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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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No. 259358-III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

VALENTIN SANDOVAL,

Appellant,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Assignment of Error.

No. 1: Mr. Sandoval's defense attorney affirmatively misinformed him as to the immigration consequences of his guilty plea.

No. 2: Mr. Sandoval's decision to plead guilty was neither knowing, voluntary or intelligently made

2. Issues Pertaining to Assignments of Error.

No. 1: Whether a Guilty Plea is valid when the guilty plea is made in reliance on incorrect advice provided by defense counsel.

No. 2: Whether a Guilty Plea is knowing, voluntary and intelligently made when the guilty plea is made in reliance on incorrect advice pertaining to the consequences of the guilty plea.

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On August 14, 2006, Mr. Sandoval was charged with one count of Rape in the Second Degree, Forcible Compulsion, *RCW 9A.44.050(a)(a)*.

On August 21, 2006, Attorney Robert Schiffner was appointed to represent Mr. Sandoval and filed a notice of appearance on Mr.

Sandoval's behalf. On October 3, 2006, Mr. Sandoval pleaded guilty to a one count of Rape in the Third Degree. Mr. Sandoval was sentenced on

January 23, 2007, by the Honorable Judge Evan Sperline to jail and fines within the standard range. Mr. Sandoval was then taken directly from the Grant County jail to the Northwest Immigration Detention Center in Tacoma, Washington as a direct result of his guilty plea.

Mr. Sandoval was charged in the Seattle Executive Office of Immigration Review (EOIR; hereinafter, "immigration court") with a violation of the immigration laws; specifically, rape by forcible compulsion which is classified as an "aggravated felony" under current immigration law.

Mr. Sandoval was released after three appearances in the immigration court. The immigration court administratively terminated, without prejudice, Mr. Sandoval's immigration charges, pending the results of this direct appeal.

2. STATEMENT OF FACTS

Mr. Sandoval elected to plead guilty to a plea offer made by the Grant County Prosecuting Attorney. Mr. Sandoval pleaded guilty on October 3, 2006. (RP October 3, 2006) He was sentenced to serve six months with credit for time served (RP January 23, 2007 at 15:10-19).

The record of proceeding does not reflect the specific information provided to Mr. Sandoval by his defense attorney. The record provides

that Mr. Sandoval did have specific questions regarding his guilty plea. (RP October 3, 2006 at 5:17-23) Mr. Sandoval's attorney specifically told him that he would not be taken into custody and put into deportation proceedings by the immigration authorities, as a result of his guilty plea. (See generally; Defendant's PRP)

C. ARGUMENT

A. CRIMINAL DEFENSE COUNSEL HAS AN AFFIRMATIVE DUTY TO INVESTIGATE ALL RELEVANT FACTORS IN REGARD TO A DEFENDANT'S SENTENCE, INCLUDING THE IMMIGRATION CONSEQUENCES, AND AFFIRMATIVELY MISINFORMING THE DEFENDANT AS TO THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA CONSTITUTES INEFFECTIVE ASSISTANCE.

Prevailing professional norms clearly reflect that defense counsel's duty requires him to investigate all relevant factors that may impact the defendant's sentence.¹ In its decision in *INS v. St. Cyr*, the U.S. Supreme Court specifically stated that under prevailing norms competent defense

¹ Both the American Bar Association and the National Legal Aid and Defender Association (NLADA) maintain professional standards of practice that require counsel to investigate the immigration consequences of sentencing upon a defendant and to advocate for a sentence that would avoid them. See Standard 4-8.1 Sentencing, *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, 3rd ed., 1993; NLADA Performance Guideline 8.7. The guidelines may be found in their entirety at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines. These performance guidelines were included as the performance standards for what will constitute effective attorney performance in Grant County felony cases pursuant to the recent settlement in *Best, et. al. v. Grant County*, No. 04-2-00189-0. See *Best Settlement Agreement* at II.C.2, available at <http://www.defensenet.org/issues.htm>.

counsel must address the immigration consequences for non-citizen clients. *INS v. St. Cyr*, 533 U.S. 289, 323, fn. 50, 121 S. Ct. 2271, 2291, fn. 50, 150 L. Ed. 2d 347, 376, fn. 50 (2001).

In this case, counsel already knew that defendant was not a U.S. citizen. (RP January 23, 2007 at 13:11-12) Given the plethora of resources available to counsel on the issue of immigration consequences of crimes, it would have taken less than an hour to determine that Mr. Sandoval would face certain deportation as an aggravated felon by entering a guilty plea to Rape in the Third Degree.

In recognition of the immigration consequences of crimes, and the complexity of immigration law, The Washington Defenders' Association (WDA) established the Immigration Project in 1999. In addition to providing regular CLE trainings throughout the state and extensive resource materials, WDA's Immigration Project provides case-by-case technical assistance to defenders representing non-citizen defendants. Had Mr. Sandoval's defense counsel contacted the WDA's Immigration Project, or other experienced immigration counsel, he would have been promptly advised that a plea to rape in the third degree – forcible compulsion would make his defendant immediately and permanently deportable. Thus, obtaining the necessary information, in order to

advocate accordingly to the trial court, was not, and is not, an onerous burden on defense counsel.²

It is well established that a defendant has a Sixth Amendment right to effective assistance of counsel at sentencing. *State v. Bandura*, 85 Wn. App. 87, 931 P.2d 174 (1997). (A defendant has a right to counsel at every critical stage of the case, and sentencing is such a stage.); *State v. Tinkham*, 74 Wn. App. 102, 871 P.2d 1127 (1994), (Defendant has no substantive right to a particular sentence, but sentencing is a critical stage at which he is entitled to the effective assistance of counsel). The Washington Supreme Court has expressly held that failure to provide effective assistance at sentencing constitutes a violation of that right. *In Re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001).

The Ninth Circuit recently addressed this issue in *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005). In granting Kwan's petition for post conviction relief, the court found that defense counsel's representation was ineffective, *inter alia*, where he had failed to inform the sentencing judge that a sentence of only two days shorter than the sentence imposed would have enabled Kwan to avoid deportation. *Kwan* at 1017-18.

In addition to affirming a defendant's entitlement to effective assistance of counsel at sentencing, the U.S. Supreme Court held in *Glover*

² There are also written and web-based resources available on these issues. See www.nationalimmigrationproject.org; www.ilrc.org.

v. United States, 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001), that *any* amount of jail time faced by the defendant has Sixth Amendment significance, irrespective of the type of case at issue. *Glover* at 203. The Court held that even a one-day increase in a sentence can constitute the requisite prejudice under the *Strickland* test for establishing an ineffective assistance claim. (*Strickland v. Washington*, 466 U.S. 668 (1984)).

Counsel did not conduct any investigation into what the immigration consequences of sentencing would be for his client, whom he knew was not a U.S. citizen. (RP January 23, 2007 at 13:11-12) The immigration consequences information provided by Mr. Sandoval's counsel was incorrect. At the very minimum, Mr. Sandoval was entitled to accurate advice concerning the immigration consequences of his guilty plea.

In light of the resources readily available to defense counsel, failure to conduct a reasonable investigation into the immigration consequences of sentencing on a non-citizen defendant, and to advocate accordingly, falls below objective standards of reasonableness.

B. IF MR. SANDOVAL'S PLEA OF GUILTY IS UPHELD, HE WILL FACE DEPORTATION AS AN AGGRAVATED FELON, BE FORECLOSED FROM ANY AVENUES OF RELIEF FROM DEPORTATION, AND BE SUBJECT TO MANDATORY DETENTION.

Immediately upon release from jail on January 23, 2007, Mr. Sandoval was taken into custody by immigration authorities and served with a Notice to Appear (NTA), the charging document that initiates deportation proceedings against a non-citizen. Mr. Sandoval was deportable on the following grounds: (1) as an aggravated felon since his conviction was a crime of violence (rape) under *8 U.S.C. 1101(a)(43)*. Mr. Sandoval's removal proceedings were terminated without prejudice since his conviction was not final. See *Pino v. Landon*, 349 U.S. 901 (1955).

Lawfully admitted non-citizens are subject to being removed, pursuant to the proceedings set forth in *8 U.S.C. 1229(a)*, if they violate any of the grounds of deportation at *8 U.S.C. 1227*. Title *8 U.S.C. 1227(a)(2)* contains the crime-related grounds of deportation. Section *1227(a)(2)(A)(iii)* states, “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.”

The definition of what constitutes an aggravated felony is at *8 U.S.C. 1101(a)(43)* and contains over 20 provisions which encompass hundreds of offenses. Specifically, *8 U.S.C. 1101(a)(43)(A)* designates as an aggravated felony, “rape.” Under current Ninth Circuit caselaw, a state's classification of an offense is irrelevant and misdemeanor offenses will constitute aggravated felonies under immigration law. See *U.S. v.*

Alvarez-Gutierrez, 394 F.3d 1241 (9th Cir. 2005); *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2001).

Non-citizens such as Mr. Sandoval who are lawful permanent residents (LPRs) are entitled to a hearing before an immigration judge in removal proceedings pursuant to 8 *U.S.C. 1229(a)*. If the immigration judge determines that a non-citizen is deportable as an aggravated felon, he will be precluded from virtually all forms of “relief” from removal. This bar to relief also precludes LPRs from seeking “cancellation of removal” under 8 *U.S.C. 1129(b)(A)*, which allows longtime LPRs with significant equities to petition the immigration court to exercise discretion and permit them to remain lawfully in the U.S. despite their criminal conviction(s).³

Certain non-citizens in removal proceedings are entitled to limited judicial review by filing a petition for review in the federal circuit court. *See 8 U.S.C. 1252*. However, non-citizens facing removal for criminal convictions are precluded from judicial review of their removal

³ For non-citizens who have no lawful status, or some status other than that of an LPR, whom ICE decides are aggravated felons, ICE has the discretion to simply issue an administrative order of removal pursuant to 8 *U.S.C. 1228(b)*. Non-citizens subject to this provision are “conclusively presumed” to be aggravated felons, barred from all forms of relief, and stripped of all meaningful judicial review. 8 *U.S.C. 1228(b)&(c)*.

proceedings. 8 U.S.C. 1252(a)(2)(C). The Ninth Circuit recently reaffirmed that it lacks jurisdiction to review removal orders against non-citizens deemed to be aggravated felons, but that it retains jurisdiction to determine whether the bar to review applies. *Martinez-Perez v. Ashcroft*, 393 F.3d 1018 (9th Cir. 2005).

Non-citizens facing removal as aggravated felons are subject to mandatory detention, without possibility of release, for the duration of any removal proceedings against them. 8 U.S.C. 1226(c). Additionally, non-citizens convicted of illegal reentry after deportation under 8 U.S.C. 1326 face significant sentence enhancements where they have convictions deemed to be aggravated felonies under 8 U.S.C. 1101(a)(43).

While, theoretically, federal attorneys have prosecutorial discretion to forego initiating removal proceedings against a non-citizen, such discretion is exercised extremely rarely, and virtually never in connection with a non-citizen facing removal for a criminal conviction.

Thus, non-citizens such as Mr. Sandoval who face removal for convictions deemed to be aggravated felonies – and who are lucky enough to end up in removal proceedings – will have the right to contest legally whether their conviction constitutes a specific aggravated felony. Note that to make such arguments requires complicated legal analysis and, while entitled to be represented by counsel, indigent non-citizens are not

entitled to appointed counsel. See 8 U.S.C. 1229(a)(B). The vast majority of such non-citizens face certain deportation. If they choose to contest removal, they will face prolonged mandatory detention for the duration of their proceedings. Beyond contesting removal, they are barred from almost all forms of relief and face virtually certain removal.

C. MR. SANDOVAL'S GUILTY PLEA WAS MADE AS A RESULT OF AFFIRMATIVE MISINFORMATION AS TO THE IMMIGRATION CONSEQUENCE OF HIS GUILTY PLEA. HIS DECISION TO PLEAD GUILTY WAS NEITHER KNOWING, VOLUNTARY OR INTELLIGENTLY MADE.

Mr. Sandoval elected to plead guilty upon specific immigration advice provided by his attorney. Mr. Sandoval's attorney told him, specifically, that he would not be taken into custody and put into deportation proceedings by the immigration authorities, as a result of entering a guilty plea to a plea offer. (See PRP – Exhibit 1)

Mr. Sandoval's attorney was, unfortunately, mistaken as to this information.

State v. Littlefair, 112 Wash. App 749, 51 P.3d 116 (2002) provides that a guilty plea may be vacated when an attorney affirmatively misinforms a client as to the immigration consequences of his guilty plea. (See PRP Generally)

Conversely, as compared to *Littlefair*, Mr. Sandoval's counsel knew that he was not a U.S. citizen. *Littlefair* at 748. Instead of neglecting to inform Mr. Sandoval of the immigration consequences by "crossing them out", Mr. Sandoval's lawyer advised him that he would not be deported so long as he was not taken into custody (Defendant's PRP; Exhibit 1: 6). Mr. Sandoval's lawyer further advised him that in spite of his guilty plea that he would still be able to avoid deportation. (Defendant's PRP; Exhibit 1: 7). Mr. Sandoval's counsel knew that his client did not wish to plead guilty if the result would cause him to be deported. (Defendant's PRP; Exhibit 1: 5).

Finally, RCW 10.40.200 makes clear, the requirement that Defendants in the State of Washington be accurately informed of the possible immigration consequences of a guilty plea.

RCW 10.40.200 provides:

(1) The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that

acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court.

It is clear from the facts of this case that Mr. Sandoval was misinformed by his attorney as to the immigration consequences of his guilty plea. The proper remedy is that Mr. Sandoval's guilty plea be vacated and the matter be again set for trial.

D. CONCLUSION

Prevailing professional norms require defense counsel to conduct a reasonable investigation into the immigration consequences of sentencing and not to affirmatively misinform their non-citizen client. Failure to do so constitutes a Sixth Amendment violation of the right to effective assistance of counsel.

Respectfully submitted this 3rd day of August, 2007.



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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
 v.)
 VALENTIN SANDOVAL,)
)
 Appellant.)
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CERTIFICATE OF
SERVICE

I certify that on this 3rd day of August, 2007, I caused a true and correct copy of Appellant's Brief to be served on the following in the manner indicated below:

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