

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Apr 24, 2012, 7:56 am  
BY RONALD R. CARPENTER  
CLERK

87297-0

RECEIVED BY E-MAIL

Form 9, Petition for Review  
[Rule 13.4(d)]

Court of Appeal Cause No. 294005

**FILED**  
APR 24 2012  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

---

Sigifredo G. Bueno, Respondent

v.

State of Washington, [Petitioner or Appellant]

---

PETITION FOR REVIEW

---

Misty Bueno,  
Wife of Mr. Bueno  
308 Valley View Ave. #11  
Selah, WA. 98942  
(509) 697-5785

ORIGINAL

## TABLE OF CONTENTS

A. Identity of Petitioner.....	5
B. Court of Appeals Decision.....	5
C. Issues Presented For Review.....	5
D. Statement of the Case.....	6-7
E. Argument why Review Should Be Accepted.....	9-19
F. Conclusion.....	20

TABLE OF AUTHORITIES

Cases	Page
Delgadillo v. Carmichael, 332 U.S. 388, 68 S. Ct. 10, 92 L.Ed. 17 (1974).....	16
Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893).....	16
Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203(1985).....	9
Immigration & Naturalization Serv. v. St. Cyr. 533 U.S. 289,121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).....	16
Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 111 S.Ct. 453,112 L.Ed.2d 435(1990).....	19
McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	9
Padilla v. Kentucky, -- U.S. --, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).....	9-10, 14-16

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....9, 16

Calderon v. U.S. Dist. Court, 163 F.3d 530, (9<sup>th</sup> Cir.), cert. denied,523 U.S. 1063, 118 S.Ct. 1395, 140 L.Ed.2d 653 (1998).....18

Sandvik v. United States, 177 F.3d 1269, (11<sup>th</sup> Cir.1999).....18

United States v. Patterson, 224 F.3d 927, (5<sup>th</sup> Cir.2000).....18

Valverde v. Stinson, 224 F.3d 129, (2<sup>d</sup> Cir.2000).....18

Finkelstein v. Sec. Props., Inc., 76 Wn. App. 733, 888 P.2d 161 (1995).....	18
In re Pers. Restraint of Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007).....	15
In re Personal Restraint Petition of Hoisington, 99 Wn. App. 423, 993 P.2d 296 (2000).....	18
In re Pers. Restraint of Riley, 122 Wn.2d 772, 863 P.2d 554 (1993).....	9, 15
State v. Duvall, 86 Wn. App. 871, 940 P.2d 671 (1997), Review denied, 134 Wn.2d 1012, 954 P.2d 276 (2003).....	18
State v. Littlefair, 112 Wn. App. 749, 51 P.3d 116 (2002), Review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003).....	19
State v. Oseguera Acevedo, 137 Wn.2d 179, 970 P.2d 299 (1999)..	15
State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015(2011)...	11, 16-17

Constitutional Provisions

U.S. Const. Amend. VI.....9

Statutes

8 U.S.C. 1227(a)(2)(B)(i).....10-11

RCW 10.40.200(2).....13-14

RCW 10.73.090.....17-19

## **A. IDENTITY OF PETITIONER**

SIGIFREDO G. BUENO. Asks this Court to Accept Petition for Review of the Court of Appeals Decision Termination Review Designated in Part B of This Petition.

## **B. COURT OF APPEALS DECISION**

The Court of Appeals Affirmed the Superior Court's Decision denying the motion to vacate the guilty plea Filed on December 9, 2011. The motion to modify the commissioner's ruling was denied.

A copy of the decision is in the Appendix at pages A 1. A copy of the Order Denying Petitioner's motion for Reconsideration is in the Appendix at pages A 2-6.

## **C. ISSUES PRESENTED FOR REVIEW**

I. That the Motion to Withdraw was Untimely.

II. That no Basis Existed to Equitably toll the one year Time Period for such Motions.

III. That Mr. Garcia Bueno was fully aware of the Immigration Consequences of His Plea.

Petition for Review Page

#### D. STATEMENT OF THE CASE

Mr. Bueno was originally charged with delivery of methamphetamine and conspiracy to deliver methamphetamine. CP 1. Mr. Bueno has a 6<sup>th</sup> grade education, cannot speak, read or write English, can barely read and write Spanish, and speaks and understand only a poor quality form of Spanish. 8/20/10 RP 9, 27-28. At the advice of his attorney he entered into a plea bargain where he pled guilty to the conspiracy charge with a recommendation of seven days confinement, the amount of time he had already served. CP 77. The judge informed Mr. Bueno at the guilty plea hearing, "There could be immigration consequences if you are not a citizen of the United States." 2/24/05 RP 4. Sometime after 8/25/08, Mr. Bueno received a notice of deportation proceedings from the Department of Immigration. 8/20/10 RP 42. He obtained different counsel than that at his guilty plea hearing and filed a motion to withdraw his guilty plea on 8/24/09. CP 77. His original counsel testified at the motion hearing that he told Mr. Bueno it would be very difficult to win at trial and if he lost he would immediately go to prison and be deported directly from prison. 8/20/10 RP 33-34. On the other hand, if he took the bargain and pled guilty to the conspiracy charge, he could avoid deportation as long as he didn't get arrested for anything and put in jail: "If you don't go back to jail, Immigration isn't going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don't get put in jail for anything, you could go on for years and years and years without a problem." 8/20/10 RP 34.

The court found that Mr. Bueno's Motion to Vacate was time barred under RCW 10.73.090 and that the one-year time limit was not equitably tolled (Conclusions of Law Nos. 4 & 7; CP 79-

80); that Mr. Bueno had no basis to invoke equitable tolling (Conclusion of Law No. 6; CP 80); that Mr. Bueno's case was distinguishable from State v. Littlefair, and that Mr. Bueno was fully aware of the immigration consequences of his plea (Conclusion of Law No.5; CP 79).

The court also found that Mr. Bueno's motion to vacate failed on the merits (Conclusions of Law Nos. 8 & 10; CP 80); that Mr. Bueno was fully cognizant of the parameters of the plea agreement, was not misinformed, was not misled in any fashion, and was totally aware of the immigration consequences that would flow from his conviction (Conclusion of Law No. 1; CP 78); that Mr. Bueno was not telling the truth regarding his lack of understanding of the immigration consequences of his plea and that he pled guilty because his attorney told him to (Conclusions of Law Nos. 2 & 3; CP 78-79); and that Mr. Bueno had failed to demonstrate that failure to allow withdrawal would perpetrate a manifest injustice (Conclusion of Law No. 11; CP 80).

This appeal followed. CP 75.

## E. ARGUMENT

1. Mr. Bueno's Sixth Amendment right to effective assistance of counsel was violated when his attorney failed to correctly advise him that pleading guilty would lead to deportation, thus rendering his guilty plea involuntary or unintelligent.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. In *re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Counsel's faulty Advice can render the defendant's guilty plea involuntary or unintelligent. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *McMann*, 397 U.S. at 770-71. To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), test for ineffective assistance claims---first, objectively unreasonable performance, and second, prejudice to the defendant. Ordinary due process analysis does not apply. *Hill*, 474 U.S. at 56-58.

Before *Padilla v. Kentucky*, ---U.S. ---, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), many courts believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction. See *Padilla*, 130 S.Ct. at 1481 n. 9. However, in *Padilla*, the United States Supreme Court rejected this limited conception of the right to counsel. *Id.* at 1481-82. The Court recognized that deportation is "intimately

related to the criminal process” and that “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.” Id. at 1481. Because of deportation’s “close connection to the criminal process,” advice about deportation consequences falls within “the ambit of the Sixth Amendment right to counsel.” Id. at 1482.

Padilla describes the advice that a constitutionally competent defense attorney is required to give about immigration consequences during the plea process. “Immigration law can be complex,” as Padilla recognizes, and so the precise advice required depends on the clarity of the law. Id. at 1483. If the applicable immigration law “is truly clear” that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation. Id. If “the law is not succinct and straightforward,” counsel must provide only a general warning that “pending criminal charges may carry a risk of adverse immigration consequences.” Id. In other words, even if immigration law does not reveal clearly whether the offense is deportable, competent counsel informs the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other adverse immigration consequences. Padilla rejected the proposition that only affirmative misadvice about the deportation consequences of a guilty plea, but not the failure to give such advice, could constitute ineffective assistance of counsel. Id. at 1484. Padilla itself is an example of when the deportation consequence is “truly clear.” Id. Jose Padilla pleaded guilty to transporting a significant amount of marijuana in his truck, an offense that was obviously deportable under 8 U.S.C. 1227(a)(2)(B)(i):

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of ... relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

State v. Sandoval, 171 Wn.2d 163, 171, 249 P,3d 1015 (2011)

(Emphasis added). This Statute is "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." Padilla, 130 S.Ct. at 1483. By simply "reading the text of the statute," Padilla's lawyer could determine that a plea of guilty would make Padilla eligible for removal. Id.

Similarly, in the present case, the charge to which Mr. Bueno pled guilty, conspiracy to deliver methamphetamine, is similar to the charge in Padilla and involves the same immigration statute. Therefore, the applicable immigration law "is truly clear" that the offense is deportable, and Mr. Bueno's attorney should have correctly advised him that pleading guilty to that particular charge would lead to deportation. Mr. Bueno's facts are remarkably similar to those in Sandoval.

Sandoval's counsel advised him to plead guilty: "I told Mr. Sandoval that he should accept the State's plea offer because he would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea." Sandoval, 171 Wn.2d at 167. Sandoval said, "I trusted my attorney to know that what he was telling me was the truth." Id.

Sandoval followed his counsel's advice and pleaded guilty. *Id.* The statement on plea of guilty, that Sandoval signed, contained a warning about immigration consequences: "If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." *Id.*

During a colloquy with the court, Sandoval affirmed that his counsel, with an interpreter's help, had reviewed the entire plea statement with Sandoval. *Id.*

Before Sandoval was released from jail, the United States Customs and Border Protection put a "hold" on Sandoval that prevented him from being released from jail. Sandoval, 171 Wn.2d at 168. After deportation proceedings against Sandoval then began, he moved to vacate his guilty plea on grounds that the plea was involuntary due to misadvised from counsel regarding deportation consequences. Sandoval, 171 Wn.2d at 163, 168. Sandoval claimed, "I would not have pleaded guilty . . . if I had known that this would happen to me." Sandoval, 171 Wn.2d at 168. After his motion was denied, Sandoval appealed, claiming his plea was not knowing, voluntary, or intelligent due to ineffective assistance of counsel. *Id.*

The State argued that Sandoval's counsel's advice was proper because his counsel discussed the risk of deportation with Sandoval, and counsel appropriately relied on his prior experience to assess Sandoval's chances and recommend a mitigation strategy. Sandoval, 171 Wn.2d at 172. The State further argued that counsel's assurance was limited to telling Sandoval that he would not be "immediately deported, not that he would never be deported. *Id.*

The State also argued that the guilty plea statement contained a warning about the immigration consequences of pleading guilty, as required by RCW 10.40.200, and the judge confirmed in a colloquy that Sandoval reviewed the statement with his counsel. Sandoval, 171 Wn. 2d at 172-73.

The Washington Supreme Court rejected these arguments for two principal reasons. First, the Court held defense counsel's mitigation advice may not be couched with so much certainty that it negates the effect of the warnings required under Padilla.

The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences. Under Padilla, counsel can provide mitigation advice. However, counsel may not, as Sandoval's counsel did, assure the defendant that he or she certainly "would not" be deported when the offense is in fact deportable. That Sandoval was subjected to deportation proceedings several months later, and not "immediately" as his counsel promised, makes no difference. Sandoval's counsel's advice impermissibly left Sandoval the impression that deportation was a remote possibility.

Sandoval, 171 Wn.2d at 173.

The Washington Supreme Court rejected these arguments for two principal reasons. First, the Court held defense counsel's mitigation advice may not be couched with so much certainty that it negates the effect of the warnings required under Padilla.

The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences. Under *Padilla*, counsel can provide mitigation advice. However, counsel may not, as Sandoval's counsel did, assure the defendant that he or she certainly "would not" be deported when the offense is in fact deportable. That Sandoval was subjected to deportation proceedings several months later, and not "immediately" as his counsel promised, makes no difference. Sandoval's counsel's advice impermissibly left Sandoval the impression that deportation was a remote possibility.

Sandoval, 171 Wn.2d at 173.

The second reason the Court found Sandoval's counsel's advice was unreasonable was that the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave. *Id.* RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings. *Id.* The Court noted that in *Padilla*, despite the warning about immigration consequences on Kentucky's plea forms, the Court concluded that the advice of *Padilla*'s lawyer was incompetent under the Sixth Amendment. The defendant was misadvised that he " 'did not have to worry about immigration status since he had been in the country so long.' " Sandoval, 171 Wn.2d at 173-74 (citing *Padilla*, 130 S.Ct. at 1478).

The result is the same here. Just as *Padilla*'s lawyer incorrectly dismissed the risks of deportation, and Sandoval's counsel's categorical assurances the constitutionally required advice about

the deportation consequence of pleading guilty, Mr. Bueno's counsel gave mitigation advice couched with so much certainty that it negated the effect of the warnings required under Padilla. Mr. Bueno's attorney assured him that if he took the plea bargain and pled guilty to the conspiracy charge, he could avoid deportation as long as he didn't get arrested for anything and put in jail: "If you don't go back to jail, Immigration isn't going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don't get put in jail for anything, you could go on for years and years and years without a problem." 8/20/10 RP 34.

As in Sandoval, Mr. Bueno's counsel assured him that he probably would not be deported when the offense is in fact deportable. The fact that Mr. Bueno was subjected to deportation proceedings sometime later, and not "immediately" as his counsel promised if he went to trial, makes no difference. See Sandoval, 171 Wn.2d at 173. Mr. Bueno's counsel's advice impermissibly left him the deportation was a remote possibility. Therefore, Mr. Bueno has proved the performance prong of Strickland.

Mr. Bueno was prejudiced by his attorney's advice.

"In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Riley, 122 Wn.2d at 780-81, 863 P.2d 554 (citing Hill, 474 U.S. at 59); accord In re Pers. Restraint of Elmore, 162 Wn.2d 236, 254 172 P.3d 335 (2007); State v. Oseguera Acevedo, 137 Wn.2d 179, 198-99, 970 P.2d 299(1999). A "reasonable probability" exists if the defendant "convince[s] the court that a decision to reject the plea bargain would have been

rational under the circumstances. “Padilla, 130 S.Ct. at 1485. This standard of proof is “somewhat lower” than the common “preponderance of the evidence” standard. Strickland, 446 U.S. at 694.

In Sandoval, the Court concluded he had met this burden for the following reasons. Not only did Sandoval swear after-the-fact that he would have rejected the plea offer had he known the deportation consequences, but also his counsel said that Sandoval was “very concerned” at the time about the risk of deportation and Sandoval relied heavily on his lawyer’s counsel. Sandoval, 171 Wn.2d at 175.

The State argued that the disparity in punishment between the plea bargain and going to trial (6-12 months versus 78-102 months) made it less likely Sandoval would have been rational in refusing the plea offer. *Id.* However, the Court observed that although Sandoval would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea was also “a particularly severe penalty.” *Id.* (citing Padilla, 130 S.Ct. at 1481. (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S.Ct. 37 L.Ed. 905 (1893). For criminal defendants, deportation no less than prison can mean “banishment or exile,” *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91, 68 S.Ct. 10, 92 L.Ed. 17 (1947), and “separation from their families,” Padilla, 130 S.Ct. at 1484. Given the severity of the deportation consequence, the Court believed Sandoval would have been rational to take his chances at trial. Sandoval, 171 Wn.2d at 176 (citing *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.”)).

The facts in the present case are indistinguishable from those in Sandoval. The evidence from the motion hearing shows that Mr. Bueno relied entirely on the advice he received from his attorney. He pled guilty to avoid immediate deportation. Although he would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea meant banishment or exile. It meant separation from his wife to whom he had been married for 13 years, as well as his children. 8/20/10 RP 24-25. It meant no means of support for his family. His wife had not worked since 2001. 8/20/10 RP 25. As in Sandoval, given the severity of the deportation consequence, Mr. Bueno would have been rational to take his chances at trial. See Sandoval, 171 Wn.2d at 176. Therefore, Mr. Bueno has proved that his counsel's unreasonable advice prejudiced him.

2. Mr. Bueno's motion to withdraw his guilty plea was not time barred. Justice required the court to invoke the doctrine of equitable tolling because Mr. Bueno lacked the correct knowledge of immigration consequences at the time of his plea due to his counsel's faulty advice.

RCW 10.73.090 is the applicable statute and provides in pertinent part:

- 1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

2) For purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes ... a motion to withdraw a guilty plea....

In re Personal Restraint Petition of Hoisington, 99 Wn. App. 423, 993 P.2d 296 (2000), the court of appeals held that "[t]he doctrine of equitable tolling applies to statutes of limitation but not to time limitations that are jurisdictional;" that RCW 10.73.090 "functions as a statute of limitation and not as a jurisdictional bar[;]" and thus that RCW 10.73.090 "is subject to the doctrine of equitable tolling." In re Hoisington, 99 Wn. App. At 431, 993 P.2d 296; see also United States v. Patterson, 211 F.3d 927, 930 (5<sup>th</sup> Cir.2000); Valverde v. Stinson, 224 F.3d 129, 133 (2d Cir.2000); Sandvik v. United States, 177 F.3d 1269, 1271 (11<sup>th</sup> Cir.1999); Calderon v. U.S. Dist. Court, 163 F.3d 530, 542 (9<sup>th</sup> Cir.), cert. denied, 523 U.S. 1063, 118 S.Ct. 1395, 140 L.Ed.2d 653 (1998).

Equitable tolling "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012, 954 P.2d 276 (1998). "Appropriate circumstances generally include bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff." Id. at 875, 940 P.2d 671 (quoting Finkelstein v. Sec. Props., Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). "Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a " garden variety claim of excusable neglect." Id.

(quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)).

In *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003), the court of appeals equitably tolled RCW 10.73.090. The court concluded that Littlefair's evidence proved that he lacked knowledge of possible immigration consequences at the time of his plea due to a "bizarre series of events" and the mistakes of others. *Littlefair*, 112 Wn. App. At 763, 51 P.3d 116. Littlefair was a resident alien who moved to withdraw his guilty plea to a drug charge more than two years after the court entered his plea and sentence. *Id.* at 755, 51 P.3d 116. Although Littlefair signed a plea form containing the required immigration consequences, he argued he did not receive the required advisement because of mistakes by his attorney, the court, and the INS. *Id.* at 762, 51 P.3d 116. The Court concluded that the one-year time period in RCW 10.73.090 should be equitably tolled from the date of his plea (October 17, 1996) to the date on which he first discovered that deportation was a consequence of his plea (November 2, 1998). *Id.* at 762-63, 51 P.3d 116. Since Littlefair filed his motion within one-year after November 2, 1998 his motion was not time-barred. *Id.* Similarly in the present case, Mr. Bueno lacked knowledge of possible immigration consequences at the time of his plea due to mistakes by his attorney in misinforming him about the immigration consequences of his guilty plea. As in *Littlefair*, the one-year time period in RCW 10.73.090 should be equitably tolled from the date of Mr. Bueno's plea (2/5/05) to the date on which he discovered that deportation was a consequence of his plea (sometime after 8/25/08). Since Mr. Bueno filed his motion within one year after 8/25/08, his motion was not time-barred.

**F. CONCLUSION**

For the reasons stated, the Superior Court's denial and the Commissioner's Ruling denying Mr. Bueno's motion to withdraw his guilty plea should be reversed. If this review is granted we ask that Mr. Bueno is given the opportunity to withdraw his guilty plea.

Respectfully submitted, April 20, 2012.

Sigifredo Bueno

Sigifredo Bueno Garcia,  
PETITIONER

Misty Bueno.

Misty Bueno,  
Wife to Mr. Bueno

**FILED**

MAR 21 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,	)	No. 29400-5-III
	)	
Respondent,	)	ORDER DENYING
	)	MOTION TO MODIFY
v.	)	COMMISSIONER'S RULING
	)	
SIGIFREDO GARCIA BUENO,	)	
	)	
Appellant.	)	

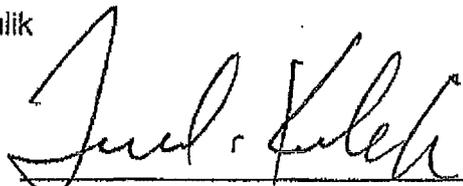
THE COURT has considered appellant's motion to modify the Commissioner's Ruling of December 9, 2011, and having considered the records and files herein is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify the Commissioner's Ruling is hereby denied.

DATED: March 21, 2012

PANEL: Jj. Brown, Sweeney, Kulik

FOR THE COURT:

  
\_\_\_\_\_  
TERESA KULIK  
CHIEF JUDGE

The Court of Appeals  
of the  
State of Washington  
Division III

FILED

DEC -9 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON, )  
)  
)  
Respondent, )  
)  
v. )  
)  
)  
SIGIFREDO GARCIA BUENO, )  
)  
Appellant. )  
\_\_\_\_\_ )

No. 29400-5-III

COMMISSIONER'S RULING

Sigifredo Garcia Bueno appeals the Yakima County Superior Court's August 24, 2010 memorandum decision that denied his motion to withdraw his February 24, 2005 guilty plea to conspiracy to deliver methamphetamine. He contends he did not knowingly enter his guilty plea because his attorney allegedly did not advise him that a guilty plea would lead to his deportation. The State moves on the merits to affirm.

At the guilty plea hearing, the superior court advised Mr. Garcia Bueno that

“[t]here could be immigration consequences if you are not a citizen of the United States. . . . You understand that?” RP at 4-5. He responded, “Yes.” RP at 5. He also signed a Statement of Defendant on Plea of Guilty that advised him that “[i]f [you] are not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law *is grounds* for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (Emphasis added.) CP at 5. The paragraph above his signature on the Statement stated that his “lawyer has explained . . . , and we have fully discussed, all of the above paragraphs.” CP at 7. At the beginning of the hearing, the court stated on the record, “Mr. Garcia Bueno, I’ve been handed . . . a statement of defendant on plea of guilty form for the charge of conspiracy. It indicates to me that the interpreter did read this document to you. Is that correct?” RP at 3. He answered, “Yes.” RP at 3. The court continued, “Did you then have an opportunity to discuss it with your attorney? RP at 3. He again answered, “Yes.” RP at 3.

At the hearing on the motion to withdraw, the attorney testified that he told Mr. Garcia Bueno that if he took the plea bargain, he could avoid deportation so long as he was not arrested and put in jail. RP 34. Specifically, he stated that he told his client, “[i]f you don’t go back to jail, Immigration isn’t going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don’t get put in jail for anything, you could go on for years and years and years without a problem.” RP at 34.

In its findings of fact and conclusions of law, the superior court found that the motion to withdraw was untimely, that no basis existed to equitably toll the one year time period for such motions, and that, in any event, Mr. Garcia Bueno was fully aware of the immigration consequences of his plea. As to the latter, the court entered the following conclusions:

1. The court finds that the defendant was fully cognizant of the parameters of the plea agreement. He was not misinformed. He was not misled in any fashion. He was totally aware of the immigration consequences which would flow from the conviction and he was hopeful that he could delay those consequences for several years and maybe even be able to take advantage of some future change in the law which might save his resident alien status.

2. The Court specifically disbelieves Mr. Bueno-Garcia's testimony and his sworn statement in which he asserts that he did not understand the plea statement, was ignorant of the immigration consequences of the plea, wanted to go to trial, and only pleaded guilty because his attorney told him to do so.

3. The Court further finds that his assertions that he did not understand the Statement of Defendant on Plea of Guilty or the guilty plea process to be incredible. The transcript of the plea clearly contains his statement that he understood the form, and he was fully aware that if he was not a citizen, the plea could have immigration consequences, including deportation.

CP at 78-79. The superior court therefore denied the motion to vacate the guilty plea.

On appeal, Mr. Garcia Bueno argues he did not receive effective assistance of counsel. He cites *Padilla v. Kentucky*, - U.S. -, 130 S. Ct. 1473, 1482, 176 L. Ed.2d 284 (2010) for the proposition that because of deportation's "close connection to the criminal process," advice about such consequences falls within "the ambit of the Sixth Amendment right to counsel."

No. 29400-5-III

The charge to which Mr. Garcia Bueno pleaded guilty involves the same immigration statute as did the charge in *Padilla*. 8 U.S.C. §1227(a)(2)(B)(i) provides that “[a]n alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance . . . other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”

The question here is one of fact. I.e., do the facts support the superior court’s finding that Mr. Garcia Bueno was advised at the time of the plea hearing that deportation was a consequence of his conviction? The record, as set forth in this ruling, clearly supports that finding. Defense counsel’s testimony that he told Mr. Garcia Bueno that if he could avoid returning to jail he might also avoid Immigration deporting him, is not inconsistent with the advice in the plea statement that a consequence of Mr. Garcia-Bueno’s offense was deportation.

The facts here are distinguishable from those in *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1045 (2011). There, defense counsel testified the defendant was concerned that he would be held in jail after the plea and, therefore, would be the subject of deportation proceedings. He told the defendant he “would not immediately be deported and that he would then have sufficient time to retain proper immigration counsel to *ameliorate* any potential immigration consequences of his guilty plea.” (Emphasis added.) *Id.* at 167. This advice supported a reasonable inference on the defendant’s part that he could

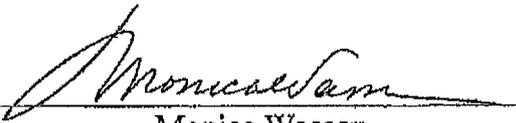
No. 29400-5-III

successfully resist deportation, when, under the law, his offense was deportable. In contrast, counsel's advice here informed Mr. Garcia Bueno that, as a practical matter, if he took the plea offer and did not return to jail, Immigration might never apprehend and deport him. Nothing he said was inconsistent with the plea statement's advice that the offense was deportable.

Since the superior court was correct on the merits, this Court does not reach the argument that the time for filing the motion to vacate was equitably tolled. Accordingly,

IT IS ORDERED, the State's motion on the merits is granted, and the superior court is affirmed.

December 9, 2011

  
Monica Wasson  
Commissioner