

NO. 79621-6-I

No. 98026-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint
Petition of

ALEJANDRO GARCIA MENDOZA,

Petitioner.

SUPPLEMENTAL
BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves a Motion to Withdraw Guilty Plea that was transferred to this court for consideration as a personal restraint petition. In Superior Court, the State filed a Motion to Transfer, which contained legal arguments concerning the merits of the petition. The defendant filed a Response that raised new grounds. The State filed a Reply to that response.

This court did not direct the State to respond to the personal restraint petition. The State's Motion to Transfer and Reply therefore stand as the State's response to the petitioner's claims.

The court did direct the petitioner to file a supplemental brief addressing the timeliness of the petition. The State was authorized to submit a reply brief. Consequently, this Supplemental Brief of Respondent is addressed solely to the issue identified in the court's order. With regard to all other issues, the State rests on the arguments set out in the Motion to Transfer and Reply.

II. ISSUE

RCW 10.40.200 requires courts to give general advice concerning possible immigration consequences of guilty pleas. Did the Supreme Court's decision in Tsai significantly change the interpretation of that statute?

III. STATEMENT OF THE CASE

The following summary sets out the essential facts.¹ A more detailed summary is set out in the State's Motion to Transfer.

In his plea agreement, the defendant (petitioner) agreed that the Affidavit of Probable Cause could be considered in deciding whether there was a factual basis for the plea. Docket no. 31 at 7 ¶ 12. According to the Affidavit, on June 19, 2006, the defendant was driving a car that was associated with a felony warrant. After he left the car, he was contacted by a police officer. On identifying the defendant, the officer learned that he had an outstanding arrest warrant. In a search incident to arrest, the officer found a baggie of methamphetamine and another baggie of cocaine. Docket no. 2 at 1-2.

On September 19, an information was filed charging the defendant with possession of cocaine. Docket no. 1. On October 23, he was arraigned and released on his own recognizance. Docket no. 11. He twice failed to appear for scheduled hearings. Docket no. 17, 23.

¹ Because there is no formal record in this court, citation to the record is impossible. This Statement of the Case is based on documents contained in the Superior Court record. The relevant documents can be provided to this court on request.

On March 27, 2007, the defendant pleaded guilty. Docket no. 31. The defendant's criminal history included two prior convictions for "VUCSA-Possession," in 2004 and 2005. Id., Appendix A. The plea statement included the standard warning that a guilty plea could be grounds for deportation, exclusion from admission, or denial of naturalization. Docket no. 31 at 4 ¶ 6(r). In return for the plea, the prosecutor agreed not to file two bail jumping counts. Id., Plea Agreement at 2 ¶ 8. The defendant was sentenced on July 18, 2007. Docket no. 44.

On October 18, 2018, the defendant filed a motion to withdraw his guilty plea. The motion was based solely on allegations of ineffective assistance of counsel. The State responded with a motion to transfer the matter to this court. The State conceded that the defendant's motion was timely because it was based on a "significant change in the law." The State argued, however, that the defendant had failed to demonstrate either deficient performance or prejudice.

In responding to the State's motion, the defendant introduced a new claim: that he had not received the statutory advice required by RCW 10.40.200. He argued that because of this, he was entitled to relief without any showing of prejudice. In a

Reply, the State argued that this new claim fell outside of any exception to the time limit, thereby rendering the motion untimely. The court has now directed supplemental briefing on this timeliness issue.

IV. ARGUMENT

SINCE DEFENSE COUNSEL DO NOT ACT DEFICIENTLY IN FAILING TO APPLY A STATUTE IN A WAY THAT CONFLICTS WITH EXISTING PRECEDENT, TSAI CANNOT BE VIEWED AS ALTERING THAT PRECEDENT.

The issue addressed in the supplemental briefs is whether there has been a significant change in the interpretation of RCW 10.40.200. That statute was enacted in 1983. Laws of 1983, ch. 199, § 1. The purpose of the statute is explained in subsection (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.

In keeping with this purpose, the legislature imposed the following requirements:

Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

RCW 10.40.200(2). A defendant who did not receive this advice is entitled to withdraw his guilty plea. Id.

By its terms, this statute imposes requirements on courts, not defense attorneys. Moreover, the statute requires general advisements, not ones that are tailored to the individual circumstances of each defendant. This is clear from the provision that "no defendant [should] be required to disclose his or her legal status to the court." RCW 10.40.200(1). Without knowing a defendant's immigration status, it is impossible to determine how that defendant might be affected by a particular conviction.

The defendant claims, however, that the interpretation of this clear statutory language was modified in In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015). The issue in that case was whether there would be retroactive application of Padilla v. Kentucky, 559 U.S.

356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Padilla holds that the duties of defense counsel include giving reasonable advice concerning the immigration consequences of a guilty plea. Id. at 366-69. The Washington Supreme Court held that Padilla was retroactive because it did not announce a "new rule." In reaching this conclusion, the court looked at the duties imposed by RCW 10.40.200:

RCW 10.40.200's plain language gives noncitizen defendants the unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided. While defense counsel's duty to advise regarding immigration consequences is imposed by statute, reasonable conduct for an attorney includes carrying out the duty to research the relevant law. In many cases defense counsel's failure to fulfill his or her statutory duty may be due to an unreasonable failure to research or apply RCW 10.40.200, and there is no conceivable tactical or strategic purpose for such a failure.

Tsai, 183 Wn.2d at 101–02 ¶ 18 (citations and footnote omitted).

The analysis in Tsai makes three things clear. First, the court was not applying RCW 10.40.200 as a basis for relief, but only as a means of determining the constitutionally-required duties of counsel: "The unreasonable failure to research and apply RCW 10.40.200 is as constitutionally deficient as the unreasonable failure

to research and apply any relevant statute.” Tsai, 183 Wn.2d at 102-03 ¶ 19.

Second, the court was not changing the interpretation of RCW 10.40.200. The court was looking at the duties of counsel that had existed since the statute was enacted in 1983. See Tsai, 183 Wn.2d at 101 ¶ 17. The court said that counsel would be deficient if she unreasonably failed to research and apply that statute. Id. at 102-03 ¶ 19. It Tsai had announced a *new* interpretation of the statute, lawyers could not be considered deficient for failing to anticipate that change in the law. Legal research will not uncover a statutory interpretation that is contrary to existing precedent. The court’s analysis only makes sense if the interpretation of RCW 10.40.200 had *not* changed.

Third and finally, the court did not believe that defendants who had received incorrect advice were entitled to relief without a showing of prejudice. Rather, the court specifically cited the standard for ineffective assistance set out by the United States Supreme Court. Tsai, 183 Wn.2d at 99 ¶ 13, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That standard, of course, requires a showing that any

deficient performance resulted in prejudice. Strickland, 466 U.S. at 687.

The conclusion is clear: Tsai did not set out a new interpretation of RCW 10.40.200 that dispenses with the prejudice requirement. Since there has been no “significant change in the law” with regard to that statute, the defendant’s statutory claim falls outside the exception to the time limit set out in RCW 10.73.100(6). This means that the defendant’s motion is not based *solely* on grounds that fall within one or more exceptions, as required by RCW 10.73.100. As a result, the entire petition must be dismissed. In re Hankerson, 149 Wn.2d 695, 702, 72 P.3d 703 (2003).

V. CONCLUSION

For the reasons set out in this supplemental brief, the personal restraint petition should be dismissed as untimely. Alternatively, if the petition is considered timely, it should be dismissed for the reasons set out in the State’s Motion to Transfer and Reply to Response to Motion to Transfer.

Respectfully submitted on November 12, 2019.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of

ALEJANDRO GARCIA MENDOZA,
Petitioner.

No. 79621-6-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 12th day of November, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Teymur Gasanovich Askerov; tim@blacklawseattle.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of November, 2019, at the Snohomish County Office.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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