

68542-2

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NO. 68542-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN OSORIO NICOLAS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court apply the correct legal standard when it denied Nicolas's motion to vacate?
2. Was the trial court's determination that Nicolas was not denied effective assistance of counsel supported by substantial evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On January 27, 2011, Juan Nicolas was charged with one count of violation of the uniform controlled substances act, delivery of methamphetamine, and one count of violation of the uniform controlled substances act, delivery of heroin. (CP 1-13) On June 8, 2011, he pled guilty to one count of violation of the uniform controlled substances act, delivery of methamphetamine, and the other count was dismissed pursuant to the plea. (CP 14-41) On July 1, 2011, he was sentenced to 12 months and one day in prison. (CP 42-49)

On November 11, 2011, Nicolas filed a motion to vacate his judgment and sentence claiming that his plea was involuntary due to ineffective assistance of counsel. (CP 50-65) On February 24,

2012, the trial court conducted an evidentiary hearing pursuant to CrR 7.8(c) and heard testimony from both Nicolas and his trial attorney, Anthony Grasher. (RP 1-46) On February 29, 2012, the trial court denied Nicolas's motion to vacate the judgment.

(CP 71-77)

2. SUBSTANTIVE FACTS

Nicolas's charges arose out of two controlled drug buys. Law enforcement observed Nicolas selling methamphetamine and heroin to a confidential informant. (CP 4-12) Nicolas retained attorney Anthony Grasher to represent him in defense of the charges. (RP 9) Grasher had been practicing criminal defense in both federal and state courts since 2006 and had prior experience handling cases similar to Nicolas's. (RP 23, 32, 34)

Grasher testified that at the initial consultation, Nicolas told him that he had been charged with one or two counts of violation of the uniformed controlled substances act ("VUCSA") delivery crimes and had already consulted with an immigration attorney. (RP 23) Nicolas told Grasher that he knew he would be deported unless the charges were reduced to misdemeanors. (RP 23) Grasher confirmed with Nicolas that if he was convicted of a felony drug

offense, the Immigration and Naturalization Service ("INS") would detain and deport him. (RP 24) Grasher told Nicolas that he had an immigration lawyer to whom he referred his clients. (RP 24) The immigration attorney was a former deputy prosecutor named Chris Anderson of the law firm of Lee and Lee. (RP 24) Grasher testified that Nicolas refused the referral and said that he already had an immigration lawyer and did not need to speak with another one. (RP 24) Grasher said that Nicolas told him that he was in the process of setting up another meeting with his immigration attorney to determine whether he could remain in the country if he was convicted of some other felony besides delivery. (RP 24) Grasher testified that as the case proceeded, Nicolas informed him that, according to his immigration attorney, he would be deported unless the charges were reduced to misdemeanors. (RP 24)

Grasher testified that he tried to negotiate the case to a misdemeanor but the prosecutor, Amy Meckling, said that there would be no reductions, just a "one for one" offer. (RP 25) Grasher continued the case several times in order to negotiate a possible misdemeanor. (RP 25) Grasher was unable to obtain an offer to reduce the charges to misdemeanors, because the State had evidence that Nicolas had actually committed four or five deliveries

to the same confidential informant and the deliveries involved a large amount of drugs. (RP 25) Grasher discussed with Nicolas, the concern that, if Nicolas went to trial and was convicted on all possible counts, he would face a potential prison term of 60-120 months. (RP 26) Grasher explained that Nicolas did not want to risk a five to ten year sentence only to be deported anyway. (RP 26) Grasher testified that Nicholas decided to plead guilty to one count and avoid exposure to 60-120 months since either scenario would result in his eventual deportation. (RP 26-27)

Nicolas testified that he told Grasher that he was a resident through his wife. (RP 9) Nicolas testified that when he told Grasher of his immigration status, that Grasher told him "there was no problem." (RP 10) Nicholas denied ever contacting an immigration attorney before pleading guilty. (RP 10) Nicolas also denied that Grasher ever told him anything about contacting an immigration attorney. (RP 10) However, Nicolas testified that he asked Grasher how a plea would affect his immigration status and that Grasher told him it had nothing to do with his case and that there would be no problem with his immigration status. (RP 11-12) Nicolas testified that every time he met with Grasher, Grasher told him there would be no problem with the immigration. (RP 13) He

said that Grasher confirmed this again right before the plea.

(RP 13) Nicolas admitted that he was assisted by an interpreter who read the plea form to him in his language. However, Nicolas denied having been read the specific paragraph in the plea form that discussed immigration consequences. (RP 14-15) He testified that the interpreter never read it to him and that Grasher never read it to him nor told the interpreter to read it. (RP 14-15) He also denied that he discussed the uncharged deliveries with Grasher. (RP 16)

After taking testimony, the trial court found that although there may have been a misunderstanding between Grasher and Nicolas about Nicolas's exact immigration status, Grasher had correctly informed Nicolas that a conviction for the drug charges would result in Nicolas's removal from the United States under federal immigration law.¹ (CP 73) The trial court found that Grasher had recommended that Nicolas consult with immigration counsel but that the defendant advised that he had already done so and was aware that the charges, if proven, would result in his deportation. (CP 73)

¹ Nicholas said that he told attorney Grasher that he was a "resident." (RP 9) Grasher said that Nicolas told him that he was working on obtaining legal status. (RP 28) Grasher testified that he assumed Nicolas was an undocumented alien at the time of representation. (RP 32)

The trial court found that Grasher and Nicolas discussed the immigration consequences of the pending charges on several occasions and discussed the risk of taking the case to trial. (CP 73) The trial court found that Grasher had attempted to negotiate a reduction of the charges to misdemeanors, but that the State rejected the proposed reduction because of the evidence that Nicolas had engaged in four or five other drug deliveries to the same confidential informant. (CP 73) The court found that Grasher had advised the defendant that if he was prosecuted on all the possible counts, he could face a sentence of 60-120 months in prison with the inevitable deportation afterwards. (CP 73) The trial court found that Grasher was able to convince the State to accept a guilty plea on just one of the drug charges, to dismiss the heroin delivery charge, and to agree not to press charges on any other alleged drug deliveries. (CP 73)

The trial court found that although Nicolas had testified that Grasher told him that he would not be deported and that he had nothing to worry about by pleading guilty, Nicolas's testimony was not credible. (CP 73-74) In contrast, the trial court found Grasher's testimony credible. (CP 74) The trial court noted Grasher's experience in criminal law in both state and federal courts since

2006, and his experience with defendants facing immigration consequences as a result of drug charges. (CP 74) The trial court specifically found that Grasher knew, in June of 2011, that the immigration consequences of pleading guilty to a drug delivery charge under state law would result in deportation and that Grasher communicated this to Nicolas before he pled guilty. (CP 74)

Furthermore, the trial court found that Nicolas: (1) had been assisted by a Spanish interpreter at the plea hearing; (2) had informed the court that the guilty plea form was translated entirely into Spanish for him before he signed it; and (3) had been clearly advised, before pleading guilty, that if he was not a U.S. citizen, a guilty plea would be grounds for deportation from the United States. (CP 74) The trial court found that Nicolas had stated on the record, that he understood the immigration consequences of pleading guilty. (CP 74) The trial court noted that Nicolas further confirmed that he wished to enter the plea when the prosecutor followed up with the additional question, “[w]e don’t know for sure what the immigration consequences will be. Do you still wish to proceed with entering a plea of guilty?” (CP 74)

C. **ARGUMENT**

1. **THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD WHEN IT DENIED NICOLAS'S MOTION TO VACATE.**

A defendant does not have a constitutional right to withdraw a plea of guilty and to enter a plea of not guilty. State v. Olmsted, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). Such a motion is addressed to the sound discretion of the court. Id. A trial court will allow a defendant to withdraw a guilty plea when it appears that the withdrawal is necessary to correct a manifest injustice. CrR 4.2(f). State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A manifest injustice is an injustice that is obvious, directly observable and not obscure. State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). Manifest injustice includes but is not limited to situations where there was a denial of effective counsel and a plea that is not voluntary. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). CrR 4.2 (d) addresses the voluntariness of pleas and provides:

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citing Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). To establish the plea was involuntary or unintelligent due to counsel's inadequate advice, the defendant must satisfy the two-part test for ineffective assistance claims that the United States Supreme Court articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must show that: (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. State v. Sutherby, 165 Wn.2d 879, 883, 204 P.3d 916 (2009). A court presumes that counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

When applying the two-part Strickland test to a defendant's claim that his counsel's performance was deficient for failing to adequately warn him of deportation consequences, the court must first determine whether the relevant immigration law is truly clear about the deportation consequences. Sandoval, 171 Wn.2d at 171. If the applicable immigration law "is truly clear" that an offense is deportable, then the defense attorney must correctly advise the

defendant that pleading guilty to a particular charge would lead to deportation. Id. at 170. On the other hand, if “the law is not succinct and straightforward,” then the defense attorney must provide only a general warning that “pending criminal charges may carry a risk of adverse immigration consequences.” Id. (quoting Padilla v. Kentucky, — U.S. —, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010)). In State v. Martinez, 161 Wn. App. 436, 253 P.3d 445 (2011), the court recognized the clarity of immigration law surrounding drug offenses. Possessing a controlled substance with intent to deliver is an “aggravated felony” that, if committed by an alien, is a deportable offense. Id. at 442 (citing 8 U.S.C. section 1227(a)(2)(A)(iii); 8 U.S.C. section 1101(a)(43)(B)).

In this case, the trial court applied the test articulated in Strickland. As required, the court first looked at whether the immigration consequences for VUCSA delivery were truly clear, or whether the immigration consequences were not straightforward. The trial court determined that Nicolas’s VUCSA charge is clearly an aggravated felony and thus a deportable offense. (CP 75) The trial court also noted that both the State and Nicolas agreed on this point. (CP 75) Once the trial court determined that Nicolas’s offense was clearly grounds for deportation, it next examined

whether Grasher correctly advised Nicolas that he would be deported if convicted on the charge. (CP 73, 75) The trial court found that Grasher had fully advised Nicolas that he would be deported after serving his sentence. (CP 73, 75)

2. THE TRIAL COURT'S DETERMINATION THAT NICOLAS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings support the conclusions of law. State v. King, 78 Wn. App. 391, 396-97, 897 P.2d 380 (1995), aff'd, 130 Wn.2d 517 (1996). Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (quoting Olmstead v. Dep't of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991)).

Because the immigration consequences of a VUCSA delivery are clear, the trial court had to determine whether Grasher properly advised Nicolas that he would be deported upon a

conviction for the charge. In determining whether Nicolas was correctly advised about immigration consequences, the trial heard the testimony of Nicolas and his attorney Grasher. The court also received into evidence and reviewed the Statement of Defendant on Plea of Guilty, a sworn declaration of Grasher, and a DVD audio recording of the June 8, 2011 plea hearing. (CP 72)

Nicolas has challenged only the trial court's factual findings and not the law to which the court applied those findings. Nicolas challenges the trial court's Findings of Fact 4, 5, and 7 as not supported by evidence in the record. (Appellant's Brief at 7) However, the testimony and documentation upon which the trial court relied provided substantial evidence for these findings.

a. **Nicolas Was Properly Informed That The Conviction For Delivery Of Methamphetamine Would Result In His Removal From The United States (Finding Of Fact 4).**

The trial court took testimony from both Nicolas and Grasher. After listening to the testimony and considering all the evidence, the trial court made a determination of credibility. The trial court found that, although there may have been a misunderstanding about Nicolas's exact immigration status, the

court still found that Grasher correctly informed Nicolas that a conviction for the VUCSA delivery would result in Nicolas's removal from the United States. (CP 73) The testimony established that Grasher recommended that Nicolas consult with an immigration attorney but instead, Nicolas said he had already consulted with one and was aware that the charge would result in deportation. (CP 73; RP 23-24) Grasher confirmed this with Nicolas. (RP 24) The trial court found this testimony credible. (CP 73-74) The finding is supported by substantial evidence.

b. Nicolas And Grasher Discussed The Immigration Consequences Of The Pending Charges On Several Occasions And Grasher Tried To Get Nicolas's Charges Reduced To Non-deportable Misdemeanors (Finding Of Fact 5).

The trial court found that Nicolas and Grasher discussed immigration consequences several times. (CP 73) They also discussed the risk of proceeding to trial on additional counts and serving a longer sentence with inevitable deportation afterwards. (CP 73) Grasher tried to negotiate the charges down to misdemeanors, but that was not possible because of the numbers of deliveries that Nicolas had made resulting in additional counts

the State would have added at trial. (CP 73; RP 24-25) The court's finding that Grasher's testimony was credible is supported by substantial evidence.

c. Nicolas's Claim That He Was Never Informed Of The Immigration Consequences Of His Plea Was Not Credible (Finding Of Fact 7).

Nicolas claimed that his attorney never told him anything about immigration consequences. (RP 10, 13) He claimed that Grasher just told him to plea. (RP 10, 12) The trial court found that Nicolas's testimony was not credible. (CP 73-74) The trial court's finding was clearly supported by the facts and is reasonable in light of the evidence. Grasher is an experienced criminal defense attorney. (CP 74; RP 23, 32-34) He has experience in both federal and state courts with defendants charged with drug crimes. (RP 32-34) He even had a specific immigration attorney to whom he referred his clients. (RP 24) Grasher clearly knew the consequences of pleading guilty to a drug crime and there was no reason he would not have communicated those to Nicolas. (RP 34)

Nicolas failed to show deficient performance. His claim that he was told nothing about the immigration consequences was

simply an incredible self-serving statement without corroboration and is insufficient to show deficient performance. See In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992) (bald assertions and conclusory allegations are insufficient to justify reference hearing).

Nicolas's case is distinguishable from the defendants in State v. Martinez, 161 Wn. App. 436, 253 P.3d 445 (2011), and State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), where corroborative evidence in addition to the defendant's own testimony established ineffective assistance. (See also State v. Cervantes, 169 Wn. App. 428, 434-35, 282 P.3d 98, 101 (2012) (finding defendant's case distinguishable from Martinez and Sandoval, where corroborative evidence in those cases established ineffective assistance). In Martinez, in addition to the defendant's testimony, trial counsel claimed that he couldn't remember how he had advised the defendant about immigration consequences and knew very little about it. Id. at 442. In Sandoval, in addition to the defendant's testimony, trial counsel had testified that he had mistakenly assured the defendant that he would not be deported. Id. at 173-74.

This case is different. Grasher clearly represented that he always knew that Nicolas's charges would result in certain deportation, that he communicated this to Nicolas and that he was certain that Nicolas was always aware he was facing deportation. Unlike the defendants in Sandoval and Martinez, nothing corroborates Nicolas's claim that he was never informed about immigration.

Instead of being an uninformed defendant, Mr. Nicolas appears to be a defendant with buyer's remorse for the plea he accepted after the consequences were clearly explained to him.

D. CONCLUSION

For the reasons stated above, the State respectfully requests that the court affirm the trial court's denial of Nicolas's motion to vacate the judgment and sentence.

DATED this 11 day of January, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nicholas Marchi, the attorney for the appellant, at Carney & Marchi, P.S., 108 S. Washington Street, Suite 406, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. JUAN OSORIO NICOLAS, Cause No. 68542-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston
Name
Done in Seattle, Washington

1/14/13
Date