

No.74309-1-I

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

STATE OF WASHINGTON

Appellee,

v.

JORGE MADRIGAL,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE KING COUNTY
SUPERIOR COURT

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court erred when it denied appellants motion to withdraw his guilty plea and vacate his judgment and sentence.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court err in ruling that appellant's attorney provided him with effective assistance of counsel with regard to immigration consequences when he did not advise the appellant that if he pled guilty to the charged offense, that he would be deported?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

Mr. Madrigal was charged with Unlawful Possession of a Controlled Substance, Heroin. (CP 1) On September 16, 1985, Mr. Madrigal, plead guilty to the charge and was sentenced to 35 days. (CP 70) On July 10, 2015, Mr. Madrigal filed a Motion to Vacate Judgment and Sentence. (CP 73) On October 25, 2015, the trial court denied the request. (CP 123) Notice of Appeal was timely filed.

Mr. Madrigal has no legal status in the United States. (RP 13) Mr. Madrigal testified via his declaration to the court in support of his Motion to Vacate his Judgment and Sentence. He testified that he was uneducated. (CP 123) At the time that he entered his plea, he did not read or write English. (CP 123) He testified that he was not informed that he would be deported by anyone. (CP 123) He further testified that he would not have plead guilty had he known of the consequence that he would be deported from the United States. (CP 123) Had he been informed that he would be deported from the United States, he stated that he would have fought the criminal charge. (CP 123)

Mr. Sidney Glass was the attorney appointed in 1985 to represent Mr. Madrigal. (RP 8) Mr. Glass testified that his standard procedure was

to negotiate the least amount of jail time. (RP 8) He would inquire about his client's immigration status. (RP 9) He never research any relevant immigration law before he proceeded with a guilty plea. (RP 9) Other than reviewing the language of the plea with his clients, he would take no other actions regarding the consequences of the plea on immigration status. (RP 9) A client who plead guilty would not receive any additional information regarding immigration consequences from him. (RP 10)

After hearing testimony, the trial court denied the Motion to Vacate Judgment and Sentence. The court found that Mr. Glass had advised the defendant he would be deported. (CP 123) The court found that the defendant received effective assistance of counsel in this matter prior to the entry of the guilty plea. (CP 123) Mr. Madrigal challenges that trial court's finding that Mr. Glass provided effective assistance of counsel and that Mr. Madrigal was properly advised of the immigration consequences.

III. ARGUMENT & AUTHORITY

A. Standard of review

A trial court's denial of a CrR 7.8 motion is reviewed for an abuse of discretion and will not be reversed absent an abuse of that discretion. *State v. Martinez*, 161 Wn. App. 436, 259 P.3d 1109 (2011). "A trial court abuses its discretion when it bases its decisions on untenable or

unreasonable grounds. *State v. Pierce*, 155 Wn. App. 701, 710, 230 P. 3d 237 (2010). Under CrR 7.8(b)(5), a court may grant relief from judgment for “any other reason justifying relief from the operation of the judgment.” Ineffective assistance of counsel is a reason to justify relief. *Martinez*, *supra* at 441.

B. Did the trial court err in ruling that appellant's attorney provided him with effective assistance of counsel with regard to immigration consequences when he advised him that if he pled guilty to the charged offense there was a possibility that he would be deported?

The state and federal constitutions guarantee a criminal defendant the right to effective assistance of counsel. U. S. Amend 14; Wash const, Art. 1, section 22. In the plea bargaining context, effective assistance of counsel requires counsel to " actually and substantially" assist the client in deciding whether to plead guilty. *State v. Osborne*, 102 Wn. 2d 87, 99, 684 P. 2d 683 (1984).

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel' s deficient performance the result of the proceeding would have been different. *Strickland v. Washington*, 466 U. S. 668, 687 -88, 04 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When a challenge to a guilty plea is based on a claim of ineffective assistance of counsel, the prejudice prong is analyzed in terms of whether counsel's performance affected the outcome of the plea process. *State v. Garcia*, 57 Wn. App. 927, 932 -33, 791 P. 2d 244 (1990), citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). One of the key factors in deciding that issue is whether the defendant would have pled guilty as charged in the absence of deficient performance. *Garcia*, 57 Wn. App. at 933.

In order to establish prejudice, a defendant need not show that counsel's deficient conduct "more likely than not altered the outcome in the case. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987), quoting *Strickland* at 693. Rather, a defendant only need show a reasonable probability that the outcome would have been different but for defense counsel's mistakes. Both Washington and federal courts recognize that this is a lower standard than preponderance of the evidence, a standard requiring only "a probability sufficient to undermine confidence in the reliability of the outcome." *In re Fleming*, 142 Wn.2d 853, 866, 16 P.3d 610 (2001), quoting *Strickland* at 694.

In this case, it is Mr. Madrigal's position that counsel was ineffective when he did not properly advise him of the immigration consequences of pleading guilty. The trial court found that Mr. Glass was

aware of the immigration consequences. However, there are no facts that support that Mr. Glass informed Mr. Madrigal of the facts of the consequences of the plea. A defendant must be fully informed of all the direct consequences of pleading guilty before the court accepts her plea of guilty. *Personal Restraint of Ness*, 70 Wn. App. 817, 855 P.2d 1191, (1993); *State v. Barton*, 93 Wn.2d 301, 609 P.2d 1353 (1980). In addition a defendant must understand the sentencing consequences for a guilty plea to be valid. *Wood v. Morris*, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

In *State v. Miller*, 110 Wn. 2d 528, 756 P.2d 122 (1988), the Washington Supreme Court held that the defendant, Miller, could withdraw his guilty plea where he did not understand the mandatory minimum sentence and the state could not show that prejudicial reliance on the plea. The plea must be withdrawn.

The United States Supreme Court held in *Padilla v. Kentucky*, 130 S. Ct.1473 (2010), that defense counsel's failure to inform a defendant of the immigration consequences of a criminal conviction is ineffective assistance of counsel. Before *Padilla*, many state courts, including Washington's concluded that the immigration consequences of a criminal conviction were "collateral consequences", and thus were not recognized as a basis for a claim of ineffective assistance of counsel. In *Padilla* for

the first time the Supreme Court held that trial counsel had the duty to give accurate advice about the immigration consequences of a conviction.

Washington's Supreme Court followed *Padilla* in its decision in *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011). In a proceeding strikingly similar to the present case, the defense lawyer told Sandoval he would not be immediately deported if he plead guilty to the charge of rape in the third degree, and would have time to consult with immigration counsel to "ameliorate" any potential consequences of the plea. The plea statement contained the same warning as the one in this case, i. e. that for a non—citizen, the plea of guilty might have immigration consequences. Sandoval filed an appeal from the denial of his motion to withdraw his plea and also filed a personal restraint petition, alleging that he received ineffective assistance of counsel in connection with the decision to plead guilty.

The *Sandoval* court noted that before *Padilla*, "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." 171 Wn.2d at 169. After *Padilla*, however, defense counsel has an obligation to give accurate advice about immigration consequences of a plea, so long as those consequences are clear. The court went on to

hold that the consequences of a conviction for third degree rape, which would be classified as an " aggravated felony" for immigration purposes, were sufficiently clear that the obligation to give accurate advice arose. Both *Padilla* and *Sandoval* rejected the notion that only affirmative misadvice would constitute ineffective assistance. *Padilla*, 130 S. Ct at 1484, *Sandoval* at 170. Both courts also rejected the idea that the advisement of potential consequences in the plea form satisfied the constitutional obligation to give accurate advice. *Sandoval* at 173, citing *Padilla* at 1486.

The Sandoval court concluded that his lawyer had rendered ineffective counsel because the consequences of a plea to an aggravated felony" were sufficiently clear that he should not advised his client that deportation was a remote possibility. The court went on to find that Sandoval suffered prejudice, the second prong of the Strickland test of ineffective assistance of counsel, because he would have gone to trial had he known he would be deported after a plea, despite the state' s argument that he had much to gain by accepting the plea. *Sandoval* at 175-176.

Sandoval was followed by the Court of Appeals in *State v. Martinez*, 161 Wn. App. 436, 259 P.3d 1109 (2011). As in the present case, Martinez moved to withdraw his guilty plea and appealed from the

denial of the motion. The court noted that failure to advise a client about a clearly deportable offense constituted ineffective assistance of counsel. The court again rejected the state's argument that the plea form advisement was sufficient to apprise the defendant that a conviction could have immigration consequences. Martinez met the second prong of the Strickland" test because he said he would have chosen trial had he known of the certainty of deportation that his plea would trigger. The court remanded to the trial court to allow withdrawal of the plea.

In *In re Jagana*, 180 W2d 104, 327 P.3d 55 (2014) The Court held that *Padilla*, should be applied retroactively, the change in the law from *Padilla*, requiring defense counsel to inform a defendant of the immigration consequences of a plea bargain, must impact the outcome of the plea at issue. Where pleading guilty to a crime could put the defendant's immigration status at risk, *Padilla* is clearly material. Here as in *Jagana*, guilty plea did result in deportation proceedings being initiated against him. Therefore, it was material to his conviction

Under immigration law, the consequences of a drug conviction are quite clear. Section 212(a)(2)(A)(i)(II) of the INA (8 U.S.C. § 1182) renders a person removable for committing "a violation or a conspiracy or attempt to violate any law or regulation of a State, the United States, or a

foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802).”

In *Sandoval*, the defendant claimed that his defense counsel was ineffective for failing to advise him of the deportation consequences of his guilty plea. *Sandoval*, 171 Wn.2d at 174, 176 Applying *Padilla*, the supreme court held that the immigration law at issue was “straightforward enough for a constitutionally competent lawyer to conclude that a guilty plea would have subjected Sandoval to deportation.” *Id.* at 172. Here, Madrigal pled guilty to one count of Violation of the Uniform Controlled Substances Act: possession of a controlled substance. Under 8 U.S.C. § 1227(a)(2)(B)(i), this crime is clearly deportable. Mr. Madrigal’s attorney did not research the law nor did he inform Mr. Madrigal of the facts of the law and how it would affect him. Therefore, under *Padilla* and *Sandoval*, Mr. Madrigal’s counsel was required to advise him of the deportation consequence of his guilty plea. Counsel’s failure to do so was unreasonable and satisfies the first Strickland prong.

Given the clarity in immigration law with respect to the consequences of any drug conviction, *Padilla* and *Sandoval* and *Jagana* imposed upon Mr. Madrigal’s counsel a duty to inform him of these potential consequences. The State cannot rely on mere boilerplate

language to protect such vulnerable individuals. The trial court was incorrect in relying on such language in the plea to support the claim that Mr. Madrigal had been informed of the consequences. The case law is clear that boilerplate language of a plea is not sufficient for a finding that a defendant is advised of the immigration consequences.

The record is clear that Mr. Madrigal was not given any information of the affects of the conviction on his immigration status. It is clear that Mr. Madrigal was denied effective assistance of counsel. Counsel now has a duty to to investigate, which may involve consulting with an immigration attorney, and providing his client with information to make an informed decision. That did not happen in this case.

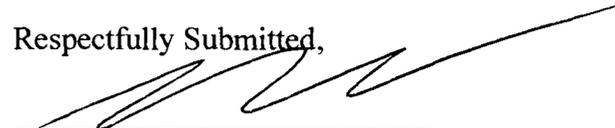
Mr. Madrigal was provided ineffective counsel because he was not properly advised of the immigration consequences of his plea. Furthermore, Mr. Madrigal testified that had he been informed of the immigration consequences, he would not have plead guilty but instead would have proceeded to trial. Therefore, the trial court erred when it denied the Motion to Vacate should have been granted.

IV. CONCLUSION

For the reasons stated herein it is respectfully requested that the Judgment and Sentence in this matter be vacated and that the matter be remanded and dismissed.

DATED this 29th day of August 2016.

Respectfully Submitted,



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CERTIFICATE OF SERVICE BY MAIL

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have mailed, on 8/29/2016, via postage prepaid, a true copy of the Brief of the Appellant attached hereto to the following individuals:

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DATED this 29 day of August 2016.


S/ Nicholas Marchi
Nicholas Marchi
Attorney for Appellant

CERTIFICATE OF FILING

I hereby certify that on the 29 day of August 2016, I filed the original Appellant's Opening Brief via ECF to:

Clerk of the Court
Court of Appeals of the State of Washington, Division I
600 University Street
Seattle, WA 98101

Dated this 29th day of August 2016.


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