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STATE OF WASHINGTON
SUPERIOR COURT
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NO. 69824-9-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

CARLOS QUINTERO CISNEROS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

ORIGINAL

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I. SUMMARY OF ARGUMENT

Carlos Quintero Cisneros appeals from a trial court decision denying a motion to withdraw a guilty plea contending he was not informed of deportation consequences of his plea. The State contends the motion more than a year after sentencing was untimely because the Supreme Court decision in Sandoval did not create a new rule meriting retroactive application. In determining a factual hearing was required, the trial court relied on a Court of Appeals case which was remanded for reconsideration.

In addition, the record before the trial court established that the defendant had been informed by his counsel that he would be deported for the charge for which he pled guilty.

Therefore, the appeal must be denied.

II. ISSUES

1. Is a motion to withdraw guilty plea timely based upon a change in the law which has been determined not to have retroactive application by the United States Supreme Court?
2. Where the defendant's former counsel testified he informed the defendant he would be deported, was the defendant informed of the immigration consequences?

3. Where counsel testified he informed the client of the immigration consequences, is the trial court determination supported by substantial evidence?
4. Where the defendant was informed of the immigration consequences, has he established ineffective assistance of counsel?

III. STATEMENT OF THE CASE

1. Statement of Procedural History.

On September 10, 2008, Carlos Quintero Cisneros was charged with Rape of a Child in the Third Degree alleged to have occurred about April 25th or 26th, 2008. CP 1. Quintero Cisneros was alleged to have had sex with a fourteen year-old girl at a Motel in Mount Vernon. CP 3. The girl had met Quintero Cisneros three or four weeks before and had been told he was twenty years old. CP 3. Law enforcement found out the hotel where the intercourse occurred and found out it had been rented by Quintero Cisneros. CP 3-4.

Officers located Quintero Cisneros and interviewed him after advising him of his rights. CP 4. He admitted to having intercourse with the girl, knowing that she was 14 or 15 years old, and that he knew it was wrong and illegal. CP 4.

On September 23, 2008, Quintero Cisneros' counsel consulted with immigration project counsel about whether certain charges would result in

deportation. CP 79-80. The Rape of a Child in the Third Degree was advised to be a sex offense resulting in automatic deportation. CP 79.

On December 31, 2008, defense counsel e-mailed the prosecutor following an inquiry about whether the offer of the plea to Assault in the Third Degree with Sexual Motivation would be accepted. CP 83. That e-mail indicated as follows:

I anticipate he'll be accepting your offer – I wanted to give a little time, though. First, he realizes that he will be going to DOC so he is trying to clean up some of his misdemeanor cases (DWLS cases mostly) before he goes. Also, this charge will undoubtedly get him deported and I am trying to get some information from his immigration attorney but I haven't had a lot of success so far. He's been good about keeping his appointments with me and he understands he's going to have to deal with this, so he is not trying to avoid it. I'd like another brief continuance, please.

CP 83. The case was continued and another e-mail exchanged occurred three weeks later. CP 84.

On January 20, 2009, Quintero Cisneros' counsel e-mailed the prosecutor indicating that Quintero Cisneros was accepting the offer, but wanted to continue sentencing to deal with other cases and the result of deportation. That e-mail reads in pertinent part:

Also, if he were to enter the plea this Friday could we set out sentencing? I know this sounds bad but I am hoping to have sentencing set out to April. He has his last pending case (I believe it is a DWLS) in Snohomish County on April 6, 2009 for dispo (according to the paperwork he showed me). I

don't know why a DWLS case got set out that far but I don't know how Snohomish County works anyway. I'm trying to avoid him having a BW when he is in DOC. He's going to get deported after this so he is trying to settle his other cases before he goes to DOC.

CP 84. The prosecutor agreed to set out the case for sentencing in mid to late February. CP 84.

On January 29, 2009, Quintero Cisneros plead guilty to Assault in the Third Degree with Sexual Motivation under an amended information. CP 8-17, 5-6, 1/29/09 RP 1-5.¹ The statement of defendant on plea of guilty contains the standard language indicating immigration consequences which reads:

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 laws of the United States.

CP 12 (bold emphasis in original). In the guilty plea form certain language which was added was indicated in bold including the charges and prosecutor's recommendation. CP 8, 11-12. In the plea form the standard immigration language was also placed in bold.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

1/29/09 RP	Guilty Plea Hearing (In volume with 10/1/09 and 11/7/12)
2/26/09 RP	Sentencing
10/1/09 RP	Hearing to Amend J & S (In volume with 1/29/09 and 11/7/12)
11/7/12 RP	Motion to Withdraw Plea (In volume with 1/29/09 and 10/1/09)
12/12/12 RP	Motion to Withdraw Plea – Testimony and Ruling.

On February 26, 2009, Quintero Cisneros was sentenced to 13 months of prison. CP 27, 2/26/09 RP 4-5.

On July 19, 2012, Quintero Cisneros filed a motion to withdraw the guilty plea contending that his counsel had failed to advise him of the immigration consequences of the conviction. CP 42. The motion noted that the counsel's notes indicated that he advised Quintero Cisneros that the initial charge would cause him to be deported. CP 43, 114. The motion included e-mails from counsel referenced above.

On August 24, 2012, the prosecutor filed a response opposing the motion. CP 120-132. The response argued that the motion was untimely. CP 124-31. If the trial court determined the motion was timely, then the State contended a reference hearing was required. CP 132.

On November 7, 2012, the State acknowledged that given the Court of Appeals decision in In re Pers. Restraint of Jagana, 170 Wn. App. 32, 282 P.3d 1153 (2012), although not agreed with by the State, supported the position that the motion was not time barred but that a hearing was still required to determine if Quintero Cisneros was advised of immigration consequences. 11/7/12 RP 8-9. The trial court determined a hearing was required. 11/7/12 RP 10-1.

On December 12, 2012, the trial court conducted a hearing taking testimony as to whether the defendant had been advised of immigration consequences. 12/12/12 RP 1-60. The testimony is detailed below.

At the conclusion of the hearing, the trial court entered oral findings that Quintero Cisneros had been advised that he would be deported and that his counsel was not ineffective. CP 59.

On January 11, 2013, Quintero Cisneros filed a notice of appeal from the motion to withdraw the guilty plea. CP 155-6.

On January 29, 2013, the trial court entered written findings of fact and conclusions of law. CP 18-21. The factual findings included a determination that counsel had wrote in his notes that he had “explained immigration and registration requirements with the defendant.” CP 19 (Finding 6). The trial court also found that counsel had testified that he explained to his client that deportation was going to be a consequence of the guilty plea to the charge and recalled that because he had sent an e-mail to the prosecutor afterward. CP 19 (Finding 7). The e-mail sent shortly after the meeting with the client indicated that the Quintero Cisneros “was going to get deported after this.” CP 19 (finding 8).

The trial court found that “Mr. Roth advised Mr. Quintero Cisneros of the immigration consequences, that is that he would be deported if he pled guilty to Assault of a Child in the Third Degree with Sexual Motivation.”

CP 20 (Conclusion 3). The trial court specifically did not address whether there was prejudice. CP 20 (Conclusion 2).

2. Summary of Testimony from Hearing.

Robert Roth was the public defender who represented Mr. Quintero Cisneros in 2008 and 2009. 12/12/12 RP 5. Mr. Roth had been licensed as an attorney since 2001, and had worked since that time for the Skagit County Public Defender's Office. 12/12/12 RP 10-11. He had handled felony cases in Superior Court for about five years. 12/12/12 RP 11. Mr. Roth had dealt with immigration issues in his capacity at the public defender's office. 12/12/12 RP 12.

On direct examination Mr. Roth recalled the charges and recalled working with Quintero Cisneros. 12/12/12 RP 5-6. Roth did not have a specific recollection of what was discussed, but did have a general recollection. 12/12/12 RP 7. He recalled discussing the potential sentences, the plea offer from the state as well as immigration consequences. 12/12/12 RP 7. He recalled telling Quintero Cisneros that the charged offense would cause him to be deported. 12/12/12 RP 7, 14-5. After reviewing the notes and e-mails regarding the case, Mr. Roth was able to recall that he had discussed immigration consequences of the plea with Quintero Cisneros. 12/12/12 RP 9-10.

On cross examination by the prosecutor, Mr. Roth described his standard practice in going over the plea form with his clients. 12/12/12 RP 13-4. Roth also indicated that after reviewing the e-mails in the case, his recollection was refreshed regarding contacting an immigration attorney and his advice to Quintero Cisneros. 12/12/12 RP 14. Roth had contacted attorneys at the immigration project early in the case. 12/12/12 RP 14.

Mr. Roth recalled receiving an initial offer by e-mail on October 13, 2008, which was for Assault in the Third Degree with Sexual Motivation. 12/12/12 RP 16. Roth identified the second e-mail of December 30, 2008, in which the prosecutor inquired about the status of the offer. 12/12/12 RP 17. In response the next day, Mr. Roth indicated that he was trying to get some information from an immigration attorney. 12/12/12 RP 18. Because Mr. Roth was aware that Rape of a Child would result in deportation, Mr. Roth believed the information was as to the consequences of Assault of a Child in the Third Degree. 12/12/12 RP 18-9.

Mr. Roth's own notes and the email of January 20th, showed that Quintero Cisneros intended to accept the plea to Assault of a Child in the Third Degree with Sexual Motivation and that Mr. Roth had explained the immigration consequences. 12/12/12 RP 19-20. The e-mail also requests a continuance of sentencing, and noted that Quintero Cisneros was going to be deported so he was trying to settle his other cases before he goes to DOC.

12/12/12 RP 20. Based upon his review of his e-mails, Mr. Roth indicated that "I believe that I did convey to him that he would be deported for this new charge in the plea offer." 12/12/12 RP 21. Mr. Roth never represented that Quintero Cisneros would remain in the country. 12/12/12 RP 21-2.

Mr. Roth also testified that defendants often seek a plea to an assault charge to avoid the stigma of rape. 12/12/12 RP 22. He also testified that he believed Quintero Cisneros's chances at prevailing at trial were not very likely because the victim, an independent witness and an audiotaped post-Miranda confession. 12/12/12 RP 23.

Quintero Cisneros testified. 12/12/12 RP 32-43. He acknowledged that he had been represented by Mr. Roth. 12/12/12 RP 34. He indicated that he could not recall if Mr. Roth had explained the immigration consequences of the initial charges. 12/12/12 RP 34. Quintero Cisneros recalled meeting with Mr. Roth before the plea to the assault charge. 12/12/12 RP 34-5. When asked why he wanted to take the plea to the assault charge, he indicated it was to avoid consequences in applying for a job. 12/12/12 RP 35. He contended he did not know what the immigration consequence would be. 12/12/12 RP 35. He contended that he would not have plead guilty if he would have been deported. 12/12/12 RP 35. Quintero Cisneros recalls reading the plea paperwork. 12/12/12 RP 36.

Quintero Cisneros first claimed to be aware of the impact on immigration in March after he was sentenced. 12/12/12 RP 36-7.

On cross-examination, Quintero Cisneros acknowledged he did not want to be called a rapist. 12/12/12 RP 38. He also said that the plea to the Assault of a Child in the Third Degree would have been better for employment. 12/12/12 RP 38-9.

3. Trial Court's Ruling from Hearing.

All right. I don't find that there has been ineffective assistance of counsel here.

The objective standard of reasonableness requires an attorney to affirmatively provide accurate information or advice about immigration consequences following a certain choice by the defendant.

What we have here is a situation where Mr. Roth advised Mr. Quintero Cisneros that he was going to be deported. I can't come to any other conclusion, given his testimony and these records.

Number one, there are several references in Mr. Roth's notes about advising Mr. Quintero Cisneros of the deportation consequence. And first of all, I will just point to the 11/18/08 note which I just read, which appears to have followed the offer from the state, offering the two different options. And Mr. Roth says, quote, aware of immigration consequences, paren, deportation, slash, exclusion.

Then again, toward the end of the negotiations Mr. Roth indicates, January 20th, 2009, that defendant was there for an appointment, has agreed to accept the offer on the Assault Three, and Mr. Roth says, explained immigration and registration requirements.

His email to the prosecutor indicates that, quote, he's going to get deported after this, so he is trying to settle his other cases before he goes to DOC.

I do notice that that statement by Mr. Roth to Ms. Dyer, quote, he's going to get deported after this, was sent to her on Tuesday, January 20th, at 11:58 a.m., approximately 58 minutes after he had met with the defendant and, quote, explained immigration requirements. I can come to no other conclusion but that Mr. Quintero

Cisneros was advised that he was going to be deported following his plea to the Assault Third with sexual - Assault of a Child Third with Sexual Motivation.

Mr. Roth testifies that he believes he did convey to the defendant that he would be deported if he pled to the Assault Three charge. He was trying to get information from an immigration attorney on December 31st. And then when he met with the defendant on January 20th, days later, he explained immigration requirements. He believes that he had a conversation with an immigration attorney in the meantime, and he remembers having a conversation with the defendant regarding deportation as a consequence for the Assault Three.

It's not a matter of he thinks he did but maybe he didn't; it's that he remembers having the conversation. And given the records that back that up, I don't think I can come to any other conclusion.

With respect to his inability to thoroughly review his guilty plea, that isn't sufficient in and of itself by any stretch to satisfy the obligation to talk about immigration consequences, but the question that was asked by Judge Meyer in the guilty plea colloquy says -- ...

And the Court says, you read it thoroughly, and the defendant says, yes, your Honor. In the guilty plea statement itself, in highlighted paragraph, on page 5 it reads, if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime, et cetera, et cetera, etcetera, is grounds for deportation or exclusion or denial of naturalization.

So under all the circumstances, I find it very difficult to believe that Mr. Quintero Cisneros was not aware that he was going to be deported following this plea.

His testimony is that the choice he made, the Assault Three, was based on -- not on the fact that there were different immigration consequences, accepting that plea, but rather that employment situation would be different. He testified to that twice this morning, his employment situation

would be different in the assault three context as opposed to the Rape of a Child context, not that he thought he was getting a different deal with immigration.

So under these circumstances it simply doesn't make any sense to me that he was unaware, and I certainly can't find that Mr. Roth failed to meet the objective standard of reasonableness or that he failed to disclose to Mr. Quintero Cisneros the -- the definitely dire consequences of being deported. So the motion to withdraw guilty plea based on Padilla is denied.

CP 56-9.

IV. ARGUMENT

1. The motion was not transferred to the Court of Appeals for consideration as a personal restraint petition given the case law at the time.

The motion to withdraw guilty plea herein was governed by CrR 4.2

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f). Since this motion was made after judgment it is also governed by CrR 7.8. CrR 7.8 requires the motion to be within a reasonable time and that it also be subject to RCW 10.73.090, 10.73.100 and 10.73.130. Unless the trial court determines that the motion is not time barred by RCW

10.73.090 and a factual hearing is required the case must be transferred to the Court of Appeals for consideration as a personal restraint petition.

The State contended at the trial court that the motion to withdraw the guilty plea was untimely. CP 124-31. Prior to the motion being addressed before the trial court, the Court of Appeals decision in In re Pers. Restraint of Jagana, 170 Wn. App. 32, 282 P.3d 1153 (2012) was issued. The prosecutor acknowledged that the decision being issued from Division I of the Court of Appeals controlled on the issue of time bar. However, the State wished to preserve its position noting that discretionary review had been sought of the decision. 11/7/12 RP 8-9.

On August 13, 2012, the Court of Appeals issued the decision in Jagana which held that Supreme Court decision in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) was a significant change in the law that merited retroactive application. In re Pers. Restraint of Jagana, 170 Wn. App. 32, 56, 282 P.3d 1153 (2012).

The State filed a petition for review of Jagana.

Following the decision of the Court of Appeals in Jagana, the United States Supreme Court issued a decision in Chaidez v. United States, 133 U.S. 1103, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013) which held that Padilla v. Kentucky, requiring defense counsel to advise defendant about the risk of deportation arising from a guilty plea, did not apply retroactively,

abrogating U.S. v. Orocio, 645 F.3d 630 (3rd Cir. 2011), Commonwealth v. Clarke, 460 Mass. 30, 949 N.E.2d 892 (2011).

The Washington Supreme Court subsequent granted review in Jagana and remanded the decision for reconsideration. The ruling reads:

The State filed a petition for review. On August 6, 2013, the Supreme Court granted review and remanded the case to the Court of appeals for reconsideration in light of Chaidez v. United States, 133 U.S. 1103, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

In re Pers, Restraint of Jagana, 177 Wn.2d 1027, ___ P.3d___ (2013).

Supplemental Briefs were called for from the Court of Appeals and the case is waiting completion of the briefing.

2. The motion to withdraw the guilty plea was time barred.

The State maintains the position taken in the trial court and not addressed in the Appellant's Opening Brief, that the motion to withdraw the guilty plea herein was time barred because Padilla v. Kentucky, did not create a new rule meriting retroactive application. CP 124-31.

3. Substantial evidence supports the trial court finding that the defendant was advised he would be deported.

Should this court reach the merits of the factual hearing, the State contends the factual finding of the trial court is supported by substantial evidence in the record.

Quintero Cisneros' counsel testified that he did tell him that he would be deported upon conviction for the charge in the guilty plea. 12/12/12 RP 21. The e-mails which indicated the defendant wanted time to deal with his other cases before he was deported corroborated that fact.

On appeal, Quintero Cisneros challenges the finding 7 which reads:

That in testimony on December 12, 2012, Mr. Roth indicated that he recalled having a conversation on January 20, 2009, specifically regarding deportation as an immigration consequence of Assault of a Child in the Third Degree because, in part, he had sent an e-mail to Ms. Dyer afterwards.

CP 84, Appellant's Opening Brief at pages 1, 6-8. However, appellate courts are not to disturb factual findings supported by substantial evidence. State v. Lewis, 78 Wn. App. 739, 744, 898 P.2d 874, 877 (1995).

As the State indicated, the counsel testified as follows:

Q. (BY MS. DYER) Now, again, we were talking about emails, refreshing your recollection, now that you've had the opportunity to review all of those emails, particularly those in Exhibits 1 and 2, do you have a refreshed memory or belief about what you advised Mr. Quintero Cisneros regarding his immigration consequences as to the Assault of a Child in the Third Degree?

A. Yes, I believe I do, based on my reading of this email, I believe that I did convey to him that he would be deported for this new charge in the plea offer.

Q. Okay. Is it -- is it your practice that when you come by information regarding the deportation consequences of a client, that you give them accurate information?

A. Yes.

12/12/12 RP 21.

To support the contention that the factual finding was unsupported, Quintero Cisneros asks this Court to consider his testimony and compare the weight and credibility of that testimony versus the testimony of his former counsel. Appellant's Opening Brief at pages 7-8.

However, credibility determinations are for the trial court. State v. Tyler, 177 Wn.2d 690, 715, 302 P.3d 165 (2013). The record shows a conflict between the testimony of Quintero Cisneros and his counsel.

Quintero Cisneros testified that he could not recall ever being made aware

of any immigration consequences on either the initial charges or at subsequent meetings. 12/12//12 RP 34. He also claimed that the first time he found out there would be an immigration consequence was in March after he was sentenced. 12/12/12 RP 36-7. This is directly contrary to the guilty plea form which specifically informed him there could be immigration consequences and the testimony of his counsel that he had informed Quintero Cisneros at a first meeting and prior to the plea. 12/12/12 RP 14-15, 21.

This is an example of why contested factual determinations must rest with the finder of fact who was in the position to evaluate the testimony of

the witnesses at the hearing, and why findings supported by substantial evidence are not to be disturbed.

4. The trial court did not abuse its discretion in denying the motion to withdraw the guilty plea where defense counsel properly advised deportation would occur and therefore was not ineffective.

We review a trial court's denial of a motion to withdraw a guilty plea for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)

State v. Pugh, 153 Wn. App. 569, 576, 222 P.3d 821 (2009). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Given the record before the trial court which indicates the defendant was advised that deportation would ensue following the conviction for Assault in the Third Degree with Sexual Motivation, Quintero Cisneros cannot establish his counsel was ineffective.

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.

State v. Sandoval, 171 Wn. 2d 163, 169, 249 P.3d 1015 (2011). Sandoval went on to hold where the deportation consequences were clear a constitutionally competent lawyer would “correctly advise, or seek consultation to correctly advise,” the defendant of deportation consequences. State v. Sandoval, 171 Wn. 2d 163 at 172.

Here the e-mail presented specifically represented that the defendant wanted time before sentencing to address other cases because he was going to be deported. Thus, the factual record establishes the deportation consequences were clear and Quintero Cisneros was advised by his counsel of that consequence.

V. CONCLUSION

For the forgoing reasons, the defendant’s appeal must be denied.

DATED this 16th day of October, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

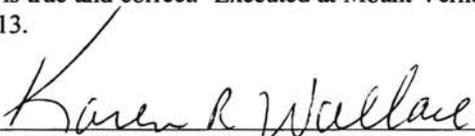
By: 

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor’s Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Lila Silverstein, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16th day of October, 2013.



KAREN R. WALLACE, DECLARANT