

Supreme Court No. 93328-6
Court of Appeals No. 328708-III
Consolidated with No. 32990-9-III
Yakima Superior No. 11-1-01110-6

**RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE**

Aug 30, 2016, 4:21 pm

RECEIVED ELECTRONICALLY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

APOLINAR PEREZ GOMEZ, Appellant

APPELLANT'S REPLY TO STATE'S ANSWER TO
PETITION FOR REVIEW

Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

 ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ARGUMENT

REPLY TO RESPONDENT’S ANSWERS RE: ISSUES1

COUNTER-ANSWERS TO ISSUES PRESENTED BY PETITION1

COUNTER-STATEMENT OF THE CASE1

Issues in Agreement.....1

Issues in Dispute1

Factual Issues in Dispute2

REPLY ARGUMENT3

II. CONCLUSION.....4

CERTIFICATE OF SERVICE5

TABLE OF AUTHORITIES

Statutes

RCW 10.40.2002

Rules

CrR 7.8.....4
RAP 16.8.l(b).....3

Federal Cases

Matter of Ruiz-Lopez, 25 I&N Dec. 551 (BIA 2011).....2
Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)2

Washington Cases

In re Personal Restraint of Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015).....3
State v. Kells, 134 Wn.2d 309, 949 P.2d 818 (1998).....4
State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011)2
State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978).....4

Federal Statutes

INA § 2122

I. ARGUMENT

REPLY TO RESPONDENT'S ANSWERS RE: ISSUES

1. Is Dismissal proper at this time?
2. Does dismissal at the time unfairly curtail Mr. Perez Gomez's right to file any necessary future collateral appeals?
3. Does the Judge's Misinterpretation of the State's motion to remand that at no time previously had asked for dismissal as a condition of remand to vacate his conviction prejudice Mr. Perez Gomez?

COUNTER-ANSWERS TO ISSUES PRESENTED BY PETITION

1. Dismissal was not the proper procedural action.
2. Dismissal of the Petitioner's PRP unnecessarily curtails the Petitioner's ability to file a future PRP.
3. The Court of Appeals should have crafted its order to allow the Petitioner the ability to first withdraw his consolidated PRP and appeal.

COUNTER-STATEMENT OF THE CASE

With a few exceptions as noted herein, the factual issues are mostly in agreement between the parties.

Issues in Agreement:

1. The Petitioner's plea should be vacated and the matter reset in the trial court for further litigation of the original charges.

Issues in Dispute:

1. Whether the Court of Appeals dismissal of the Petitioner's consolidated PRP was proper upon remand by the Court of Appeals or whether the Petitioner should have been given the opportunity to first withdraw his consolidated PRP and appeal.

Factual Issues in Dispute:

1. The State claims that there is no evidence that the Petitioner has suffered any immigration harm as a result of the conviction.

Answer: Also included in the Petitioner's PRP materials were materials from the Petitioner's immigration proceedings. (See Personal Restraint Petition - Attachment J - 2014-01-15 Immigration Documents) The immigration law involved in this matter is sufficiently clear under the *Padilla* standard. Previously, Felony Eluding was not considered a "crime involving moral turpitude." However, the 9th Circuit Court of Appeals considered the Washington statute and issued a contrary decision prior to Petitioner's conviction that, indeed, felony eluding was a crime involving moral turpitude which would foreclose the Petitioner's ability to apply for immigration relief in the form of cancellation of removal. *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011)

The State has pointed out that the immigration charging document does not refer to specific grounds of inadmissibility under INA § 212 except for unlawful presence. That is true. However, the immigration charging documents (often called the NTA or "notice to appear") are not prepared by ICE counsel attorneys. The NTA documents are prepared by ICE non-attorney employees posted at the various field offices. The declaration of the Petitioner's immigration attorney makes it clear that ICE counsel (an actual attorney assigned to the Seattle EOIR) is proceeding against Mr. Gomez as being ineligible for cancellation of removal. (See Personal Restraint Petition – Attachment I - 2014-10-24 Transcript - Interview of Tamerton Granados)

2. Audio Skip Issue

Answer: The Petitioner never argued that he didn't receive the general RCW 10.40.200 immigration warnings contained in the guilty plea. This audio skip would not have been an issue of any importance had the case moved forward to a reference hearing. The Petitioner's issue was

limited to whether or not his counsel provided him with the specific immigration consequence advice required under *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); and *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011).

3. The State contends that a dismissal of the Petitioner's consolidated PRP and appeal was implicit in its request for a remand.

Answer: Clearly, if the Petitioner were allowed to voluntarily withdraw his consolidated PRP and appeal prior to the trial court's withdrawal of the conviction, this would also fully accomplish the State's claimed purpose of avoiding "the time and money involved in the requested hearing." The Petitioner is equally "shocked" and "amazed" that the State, for whatever reason, will not simply stipulate that the Petitioner should be allowed to withdraw his consolidated PRP and appeal. This would undoubtedly save time and money and make further litigation on this issue completely moot. To date, the State has not responded to the Petitioner's request to so stipulate.

REPLY ARGUMENT

The dismissal of the Petitioner's PRP inserts an unnecessary Gordian knot into this litigation. In order to achieve the agreed goal of the parties, the Petitioner should be allowed the opportunity to withdraw his consolidated PRP and appeal.

The rules regarding successive PRPs are well-established. An appellate court may dismiss a petition without requesting a response if it brings an issue previously considered. (*See* RAP 16.8.1(b))

If Mr. Gomez should have any need to file another PRP in this matter in the future, he could easily find himself precluded from doing so since he may have argued the same issue

previously. The State's protestations of its own best-of-intentions regarding its own litigation strategies simply cannot substitute for the rights of the Petitioner to file an appeal, a PRP, or both. *State v. Kells*, 134 Wn.2d 309, 949 P.2d 818 (1998); *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978).

Recent case law in this area has placed the burden squarely on the Petitioners/Defendants to appeal any error made by the courts. *In re Personal Restraint of Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015) (Trial court erred by not transferring Tsai's motion to vacate to the court of appeals as required by CrR 7.8. However, Tsai lost the right to any further review by his failure to appeal the error of the trial court.)

Allowing Mr. Gomez to withdraw his consolidated PRP and appeal would be consistent with the current case law and with the court rules.

II. CONCLUSION

Absent a stipulation from the State requesting remand, this Court should issue an order remanding this matter to the Court of Appeals to allow Mr. Gomez to withdraw his PRP and appeal prior to the trial court's vacation of his conviction. Such an order would preserve the status quo of the parties and would promote justice.

Respectfully submitted this 30th day of August, 2016.

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	
v.)	APPELLANT'S REPLY TO
)	STATE'S ANSWER TO
)	PETITION FOR REVIEW
APOLINAR PEREZ GOMEZ,)	
Appellant.)	CERTIFICATE OF SERVICE
)	

I certify that on this 30th day of August, 2016, I caused a copy of APPELLANT'S REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW to be sent to the following by electronic mail:

David Trefry
Yakima Prosecuting Attorney
David.Trefry@co.yakima.wa.us

and to the following by U.S. Mail, first-class postage prepaid:

Apolinar Perez Gomez
4803 Ahtanum Rd., Trlr 13
Yakima, WA 98903-1075

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, August 30, 2016 4:23 PM
To: 'Brent De Young'; David Trefry
Subject: RE: No. 93328-6 Apolinar Perez Gomez

Received 8/30/16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Brent De Young [mailto:deyounglaw1@gmail.com]
Sent: Tuesday, August 30, 2016 4:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; David Trefry <David.Trefry@co.yakima.wa.us>
Subject: No. 93328-6 Apolinar Perez Gomez

Please find attached for filing the Appellant's Reply to State's Answer to Petition for Review,

--

De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
TEL (509) 764-4333
FAX (1-888) 867-1784

This e-mail, and any attachments hereto, is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail (or the person responsible for delivering this document to the intended recipient), you are hereby notified that any dissemination, distribution, printing or copying of this e-mail, and any attachment thereto, is strictly prohibited. If you have received this e-mail in error, please respond to the individual sending the message, and permanently delete the original and all copies.