

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

STATE OF WASHINGTON,	)	
	)	No. 69824-9-I
Respondent,	)	
	)	
v.	)	
	)	
CARLOS QUINTERO CISNEROS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 25, 2016
	)	

VERELLEN, C.J. – Carlos Quintero Cisneros pleaded guilty to assault of a child in the third degree with sexual motivation. He later moved to withdraw the plea, claiming ineffective assistance of counsel. After conducting an evidentiary hearing, the trial court rejected Quintero Cisneros’s claims and found that counsel had advised Quintero Cisneros of the immigration consequences of his plea. Because substantial evidence supports the trial court’s decision, we affirm.

FACTS

On September 10, 2008, the State of Washington charged Quintero Cisneros with one count of rape of a child in the third degree. After being advised of his Miranda<sup>1</sup> rights, Quintero Cisneros admitted that he had sexual intercourse with a girl at a Mount Vernon motel, knowing that she was 14 or 15 years old. The Skagit County Public Defender’s Office assigned Robert Roth as Quintero Cisneros’s

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

attorney. Roth determined that the charge would result in automatic deportation and explored alternative charges that might not result in deportation.

On October 13, 2008, Erin Dyer, the deputy prosecuting attorney, e-mailed Roth the State's offer to amend the original charge to assault of a child in the third degree with sexual motivation. Roth discussed the State's offer with Quintero Cisneros on at least two occasions during the following months.

On January 29, 2009, Quintero Cisneros entered an Alford<sup>2</sup> plea to one count of assault of a child in the third degree with sexual motivation. During the plea colloquy, Quintero Cisneros acknowledged that he had no questions about the procedure and that he had thoroughly read the plea statement. The court sentenced Quintero Cisneros to 13 months confinement and 36 to 48 months of community custody.

In 2010, the federal government initiated removal proceedings against Quintero Cisneros. On July 19, 2012, Quintero Cisneros moved to withdraw his guilty plea under CrR 7.8(b)(5), alleging ineffective assistance of counsel. He claimed that although Roth may have advised him that the initial child rape charge would result in deportation, Roth failed to inform him of the immigration consequences of the amended charge of assault of a child in the third degree with sexual motivation.<sup>3</sup> Quintero Cisneros alleged he would not have accepted the plea offer had he known the assault charge would also result in deportation.

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<sup>2</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>3</sup> See Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011).

The trial court conducted an evidentiary hearing on December 12, 2012. Roth testified that he represented Quintero Cisneros from 2008 to 2009 and was familiar with immigration issues. Although Roth could not remember specific conversations, he recalled general discussions with Quintero Cisneros about the State's evidence, the potential sentence, the plea offer, and immigration consequences.

Roth contacted immigration attorneys at the Washington Defender Association about Quintero Cisneros's immigration status early in the case. During a September 21, 2008 intake appointment, Roth told Quintero Cisneros that a conviction for the charge of rape of a child in the third degree would result in deportation.

The State advised Roth of the plea offer for assault of a child in the third degree with sexual motivation on October 13, 2008. On November 18, Roth met with Quintero Cisneros to discuss the offer. In his notes of the meeting, Roth recorded that Quintero Cisneros was considering the State's offer and was "aware of immigration consequences (deportation/exclusion)."<sup>4</sup>

Roth emailed the deputy prosecutor on December 31, 2008 that

I anticipate [Quintero Cisneros will] 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 an 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.<sup>[5]</sup>

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<sup>4</sup> Clerk's Papers (CP) at 158 (Finding of Fact 3).

<sup>5</sup> CP at 83.

Roth believed the reference to consulting with an immigration attorney involved the charge of assault of a child in the third degree.

On January 20, 2009, Roth emailed the deputy prosecutor that Quintero Cisneros was planning to accept the State's offer on the assault charge. Roth asked the deputy prosecutor for a delay in sentencing so Quintero Cisneros could arrange for the disposition of his last pending case. Roth added, "He's going to get deported after this so he is trying to settle his other cases before he goes to DOC."<sup>6</sup> Roth testified that the e-mail indicated he had advised Quintero Cisneros that a guilty plea to the amended charge would result in deportation.

Roth explained that defendants often prefer to plead guilty to an assault charge "to avoid the stigma of being labeled a rapist or a child molester."<sup>7</sup> Because there was a victim witness, a possible independent witness, and a recorded confession, Roth believed there was a high likelihood Quintero Cisneros would be convicted if he went to trial. After sentencing, Quintero Cisneros did not complain about the plea process or otherwise contact Roth.

Quintero Cisneros testified that he is a resident alien and has lived in the United States since about 1988, when was three months old. He learned English in school and is able to read and write English.

Quintero Cisneros did not recall Roth telling him anything about immigration consequences during plea negotiations, either for the original child rape charge or the amended charge of assault of a child. Quintero Cisneros said that he was

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<sup>6</sup> CP at 84.

<sup>7</sup> Report of Proceedings (Dec. 12, 2012) at 22.

confused when he appeared for the plea hearing and did not know which charge “would benefit me the best.”<sup>8</sup> He acknowledged that he read the plea documents himself, but asserted that he did not have enough time to understand them. He claimed he did not understand there might be immigration problems until a month after sentencing.

Quintero Cisneros acknowledged that he knew that both the child rape and assault charges were felony sex offenses. He maintained that he decided to plead guilty to the assault charge primarily for “employment reasons”<sup>9</sup> rather than to avoid the label of “rapist.”<sup>10</sup>

At the conclusion of the hearing, the trial court rejected Quintero Cisneros’s claim that Roth’s performance was deficient. Relying on Roth’s testimony, his contemporary notes, and e-mails to the deputy prosecutor in response to plea negotiations, the court found that Roth advised Quintero Cisneros that the amended charge of assault of a child in the third degree with sexual motivation was a deportable offense. The court found Quintero Cisneros’s allegations to the contrary not credible. The court noted that Quintero Cisneros repeatedly stated that he entered a plea to the assault charge for employment reasons, not because he believed the immigration consequences were different.

The court entered findings of fact, conclusions of law, and an order denying Quintero Cisneros’s motion to withdraw his guilty plea.

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<sup>8</sup> Id. at 36.

<sup>9</sup> Id. at 38-39

<sup>10</sup> Id. at 38.

Quintero Cisneros appealed, arguing that the evidence was insufficient to support the finding that Roth advised him of the immigration consequences of the plea. The State asserted that Quintero Cisneros's motion to withdraw his guilty plea was an untimely collateral attack.<sup>11</sup> In the alternative, the State argued that the evidence was sufficient to support the trial court's finding.

On May 12, 2014, this court affirmed the trial court's denial of the motion to withdraw, agreeing that Quintero Cisneros's collateral attack was untimely.<sup>12</sup> The court's opinion did not address the State's alternative argument.

On November 4, 2015, our Supreme Court granted Quintero Cisneros's petition for review and remanded for reconsideration in light of In re Personal Restraint of Tsai.<sup>13</sup> In Tsai, the court held that Padilla v. Kentucky constituted a significant, material, retroactive change in the law that exempts collateral attacks from the one-year time bar.<sup>14</sup> Accordingly, we now address the merits of Quintero Cisneros's appeal.

### ANALYSIS

Quintero Cisneros contends that he is entitled to withdraw his guilty plea because he was denied effective assistance of counsel during the plea process. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and that the defendant was prejudiced by

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<sup>11</sup> See RCW 10.73.090, .100.

<sup>12</sup> State v. Quintero Cisneros, noted at 181 Wn. App. 1006 (2014).

<sup>13</sup> 183 Wn.2d 91, 351 P.3d 138 (2015).

<sup>14</sup> Id. at 105 (citing Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)); see also RCW 10.73.100(6).

counsel's deficient performance.<sup>15</sup> We review the trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion.<sup>16</sup>

Quintero Cisneros contends that counsel's performance was constitutionally deficient because he failed to advise him that the amended charge of assault of a child in the third degree with sexual motivation would result in deportation. He argues that the record at the evidentiary hearing was insufficient to support Finding of Fact 7, which provided 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 email to Mr. Dyer afterwards."<sup>17</sup> Quintero Cisneros maintains that Roth's testimony was too equivocal to support the finding. He also relies on the absence of any document in the record informing him of the immigration consequences of the amended charge and on his own testimony denying Roth told him he would be deported.

Roth testified that he was able to refresh his recollection by reviewing his notes and the e-mails he sent to the deputy prosecutor. In an e-mail dated December 31, 2008, Roth informed the deputy prosecutor that the amended charge would likely result in deportation and that he was attempting to get some information

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<sup>15</sup> In re Pers. Restraint of Grace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

<sup>16</sup> State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

<sup>17</sup> CP at 158.

from immigration attorneys. Roth recalled contacting immigration attorneys after sending the e-mail.

On January 20, 2009, Roth met with Quintero Cisneros to discuss the State's plea offer. Roth's notes of the meeting recorded that he "explained immigration and registration requirements."<sup>18</sup> Based on his review of the materials, Roth believed that he told Quintero Cisneros that he would be deported if he accepted the State's plea offer. Shortly after meeting with Quintero Cisneros, Roth e-mailed the deputy prosecutor that Quintero Cisneros planned to accept the State's offer but wanted to delay sentencing so he could resolve one last driving while license suspended matter. Roth explained that "[h]e's going to get deported after this so he is trying to settle his other cases before he goes to DOC."<sup>19</sup>

The trial court had before it evidence that Roth contacted immigration attorneys about the amended charge, discussed the immigration consequences of the amended charge with Quintero Cisneros, and told Quintero Cisneros that deportation was a consequence of pleading guilty to assault of a child in the third degree with sexual motivation. Shortly after discussing the plea with Quintero Cisneros, Roth informed the deputy prosecutor that Quintero Cisneros was attempting to settle his other cases before sentencing because "[h]e's going to get

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<sup>18</sup> CP at 158 (Finding of Fact 6).

<sup>19</sup> CP at 84.

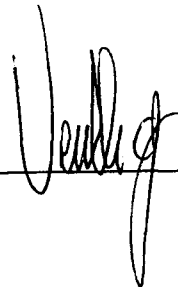


deported after this.”<sup>20</sup> The trial court found Quintero Cisneros’s testimony to the contrary was not credible, a determination this court cannot review.<sup>21</sup>

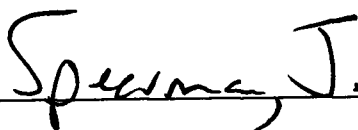
Roth’s testimony at the evidentiary hearing, along with his corroborating notes and e-mails, amply supported the trial court’s finding that defense counsel informed Quintero Cisneros of the immigration consequences of the amended charge and that Quintero Cisneros was aware of those consequences. Because defense counsel’s performance was not deficient, we need not address Quintero Cisneros’s claims of prejudice.<sup>22</sup>

The trial court did not abuse its discretion in denying Quintero Cisneros’s motion to withdraw his guilty plea.

Affirmed.

  
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WE CONCUR:

  
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<sup>20</sup> CP at 84.

<sup>21</sup> See State v. Hayes, 81 Wn. App. 425, 430, 914 P.2d 788 (1996) (appellate court defers to trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence).

<sup>22</sup> See State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).