STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 2014AP678-CR
2014AP679-CR
2014AP680-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MELISA VALADEZ,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF
WALWORTH COUNTY,
THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

DAVID ZIEMER
State Bar #1001594
Attorney for Melisa Valadaz

David Ziemer
6920 N. Ardara Ave.
Glendale, WI 53209
414.306.1324

Marc E. Christopher
State Bar #1050295
Christopher Law Office LLC
4369 S. Howell Ave #301
Milwaukee, WI 53207
414.751.0051

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 2014AP678-CR
2014AP679-CR
2014AP680-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MELISA VALADEZ,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF
WALWORTH COUNTY,
THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

ISSUE PRESENTED

Whether the Wisconsin Supreme Court opinion in *State v. Negrete*, 2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749, requires a defendant seeking plea withdrawal under Wis. Stats. Sec. 971.08(2) to prove immigration proceedings are already pending against her in order to prevail?

The Circuit Court held yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondents believe that oral argument is unwarranted. The briefs fully present the issues on appeal and fully develop the theories and legal authorities on each. However, publication is requested, because no published cases address the issue.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a review of an order of the Hon. David M. Reddy, Circuit Court Judge, Walworth County, presiding, which was entered on February 28, 2014, and which denied Defendant Melisa Valadez' motions to withdraw her guilty pleas to controlled substance charges entered in three separate cases nearly ten years earlier.

It is undisputed that the circuit court which accepted defendant's guilty pleas failed to provide the required warning. It is also undisputed that, as a consequence of the convictions, she is automatically subject to deportation, cannot legally be naturalized, cannot renew her Legal Permanent Resident Card, nor can she be legally allowed to reenter the country should she leave.

However, to date, she has suffered no concrete adverse action such as deportation, exclusion from admission or denial of naturalization. The State argued, and the circuit court agreed, that, under the Wisconsin Supreme Court's opinion in *Negrete*, Valadez' claim for plea withdrawal is not ripe for adjudication, and must be denied.

On March 19, 2014, Valadez filed a notice of appeal.

B. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Statement of Facts

The facts were not disputed at the circuit court level, and are set forth in Valadez' brief in support of her motion to withdraw her pleas as follows (all citations are to the Index of Circuit Court Record for Appeal No. 2014AP680-CR):

Defendant Melissa Valadez, is a Legal Permanent Resident of the United States. She must renew her LPR status every ten years. (R.14; pps. 1, 4).

In 2004 Valadez was charged with and pleaded guilty to Possession of Cocaine and Possession of THC in Case 04CM245 and Possession of Drug Paraphernalia 04CM257. In 2005 Ms. Valadez was charged with and pleaded guilty to Possession of THC-as a Repeater in 05CF83. (R.14; p.1).

The Court, in all cases, conducted a plea colloquy with Valadez, but did not include the immigration warning required by sec. 971.08(1)(c). (R.14; pps. 1; 5-39).

Valadez is immediately deportable under Federal Immigration Law. Valadez is a Legal Permanent Resident. With these convictions, she is automatically removable from the United States. Immigration and Naturalization Act § 237(a)(2)(A)(v) states that "Any alien at any time after admission has been convicted of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance other than a single offense involving

possession for one's own use of 30 grams or less of marijuana." There are no time limitations on requirement. (R.14; p. 1).

Valadez cannot travel outside the country as she will not be admitted back into the United States with these convictions. INA §212(a)(2)(A)(i)(II) states that one cannot enter (or re-enter) the United States if he or she has been convicted of, makes a valid admission of having violated, or has conspired to violate "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." (R.14; p.1).

If Valadez were to apply for Citizenship, she would have her biometrics taken, and likely subject to Immigration Court Removal Proceedings given that her criminal background would be available to Immigration and Customs Enforcement. (R.14; p.2).

Since her convictions in these cases, Valadez has had three citizen children, and has had no further contacts with police. (R.17; p.1).

Procedural History

Unable to renew her LPR Card, seek naturalization, or leave and reenter the country, Valadez filed a motion to withdraw her guilty pleas in these cases, pursuant to *State v. Douangmala*, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1. (R-13; R-14).

The State conceded that Valadez met the first prong of *Douangmala* – that she did not receive the required warning. However, the State contended that Valdez failed to show that is now subject to actual immigration proceedings, and that, therefore, she failed to meet her burden under the *Negrete* opinion. (R.15; p.2).

The parties engaged in further briefing and oral arguments on the issue at two hearings.

Ultimately, the circuit court held that, because Valadez was not facing any imminent immigration proceedings, she failed to meet the second requirement, and denied the motions. (R.24; pps. 11-12).

STANDARD OF REVIEW

Review is de novo. Whether a defendant is entitled to withdraw her guilty plea pursuant to Wis. Stat. sec. 971.08(2) is a question of statutory interpretation that the court reviews independently of the circuit court." *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 13, 819 N.W.2d 749, 755.

ARGUMENT

VALADEZ IS ENTITLED TO WITHDRAW HER GUILTY PLEAS, EVEN THOUGH SHE IS NOT CURRENTLY FACING IMMINENT REMOVAL, HAS NOT ACTIVELY REQUESTED NATURALIZATION, OR BEEN DENIED RE-ENTRY INTO THE UNITED STATES

On its face, Wis. Stats. Sec. 971.08(2) requires that Valadez be allowed to withdraw her guilty pleas.

Subsection (1)(c) provides that, before a circuit court can accept a guilty plea, it must advise the defendant as follows:

> "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest and a finding of guilty by the Court of the offense(s) with which you

> are charged in the Criminal Complaint or Information, may result in deportation, exclusion from admission to this County or a denial of naturalization under federal law."

It is undisputed that this warning was not given. Subsection (2), in turn, provides,

> "If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea."

It is undisputed that, as a consequence of her guilty pleas, Valadez is subject to automatic deportation, cannot be naturalized, cannot reenter the country if she were to leave, and cannot renew her LPR Card.

Federal immigration law is clear and unequivocal that a person with Valadez' controlled substance convictions can never reenter the United States if she leaves. Immigration and Nationality Act sec. 212(a)(2)(A)(i)(II) holds that entry is prohibited if the person has been convicted of "any law or regulation of a State, the United States, or a foreign county relating to a controlled substance."

Thus, if Valadez were ever to visit family in Mexico, or visit any other country, not only is it "likely" that she would be denied reentry, it is an absolute certainty.

Valadez is also subject, at any time, to deportation (removal). INA sec. 237(a)(2)(B)(i) provides,

> Any alien who at any time after admission has been convicted of a violation of (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 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

This is the same statute that was at issue in the U.S. Supreme Court opinion in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). Furthermore, pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(II), in 1996, Congress eliminated discretionary relief from deportation for controlled substance convictions such as Padilla's and Valadez'. As with Padilla, Valadez' removal is not just likely, but "removal is practically inevitable." *Padilla*, 559 U.S. at 363.

To date, however, Valadez has been fortunate in that, removal proceedings have never actually been instituted against her. Nor has she left the country. Nor has she applied for naturalization or renewal of her LPR card. Nevertheless, her current position is untenable.

As Valadez argued in the circuit court, "Valadez is in a very precarious situation. She has three young children and is subject to arrest by ICE at any time. She also cannot leave the United States and she will not be allowed to be readmitted. She cannot apply for citizenship or renew her Green Card, for she will risk being subject to mandatory detention after she has

complied with the mandatory background checks. She was not warned by the Court of the immigration consequences of her plea and she can demonstrate that she is 'likely' to be removed, denied admission as well as denied citizenship. She cannot leave the country, because she will not be readmitted. She will eventually have to try to renew her LPR status, undergo a criminal background check, and be subject to removal proceedings. And she cannot apply for Citizenship, because she will again be subject to a criminal background check and be determined removable and place[d] in removal proceedings."

As observed at the beginning of this brief, on the face of the statute, Valadez is entitled to withdraw her guilty pleas.

The rub is the Wisconsin Supreme Court opinion in *State v. Negrete*, 2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749.

More specifically, the rub is the following language in *Negrete*, stating that bare allegations of possible deportation are insufficient:

> To comply with the *Bentley*-type pleading standard in the context of Wis. Stat. § 971.08(2), a defendant may set forth the crime of conviction, the applicable federal statutes establishing his potential deportability, and those facts admitted in his plea that bring his crime within the federal statutes. In so doing, a defendant may submit some written notification that the defendant has received from a federal agent that imports adverse immigration consequences because of the plea that was entered; or, a defendant may narrate verbal communications that the defendant has had with a federal

> agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered. *Negrete,* 343 Wis.2d at 25.

Valadez has noted earlier that, on the face of the statute, she is entitled to withdraw her pleas. Accordingly, she must also acknowledge that, on its face, this language appears to require denial of her motion, inasmuch as she is not facing current federal immigration proceedings to remove her.

However, that would ignore the final sentence of the paragraph:

> **A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus**. *Id.* (emphasis added).

This final sentence of the paragraph makes clear that the earlier statements in the paragraph do not apply to the case at bar, in which there is no speculation required about the nexus between Valadez' convictions and her being subject to deportation, denial of entry, or denial of naturalization.

The facts in *Negrete* were radically different from those in the case at bar. First, no transcript of the plea hearing in Negrete's case was available. *Id.*, 343 Wis.2d at 7.

Thus, the court held that Negrete failed to meet the first requirement -- proving that he was not given the necessary warning. *Id.*, 343 Wis.2d at 24.

More importantly, Negrete supplied nothing to show that he was actually subject to

deportation, but speculation about the nexus. The court wrote, "Bare allegations of possible deportation are insufficient." *Id.*, 343 Wis.2d at 18.

In contrast, Valadez has provided much more. Her convictions do not merely make deportation "possible," but mandatory. Under federal law, she is absolutely prohibited from discretionary relief from the Attorney General, just as was the case in *Padilla*. The attachments submitted with Valadez' Feb. 19, 2014 supplement eliminate any speculation regarding nexus.

In *Padilla,* the United States Supreme Court broke from long-standing precedent, which had held that collateral consequences of convictions need not be known by defendants in order for their pleas to be voluntarily and intelligently made. The automatic nexus between conviction for felony drug offenses and deportation, and the severity of deportation, the court concluded, justified an exception to the general rule.

In the case at bar, similarly, the automatic consequences of Valadez' guilty pleas separates her case from *Negrete*.

Furthermore, the statute is not limited to deportation, which was the only consequence addressed in the *Negrete* opinion. Instead, it extends to naturalization and admission to the country. Negrete would not necessarily be automatically deported if he sought naturalization; Valadez would. Negrete would not necessarily be barred from readmission to the country if he were ever to leave; Valadez would.

Negrete's conviction did not subject him to the automatic, mandatory consequences set forth in 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 212(a)(2)(A)(i)(II); Valadez' convictions do. Thus, in *Negrete*, the immigration consequences were

speculative and possible. In Valadez' case, there is no speculation about the possible consequences, or the causal nexus between her convictions and the consequences. The intersection of her convictions and federal law, in contrast to those in *Negrete*, eliminate any speculation about nexus.

This distinction makes the exhaustion doctrine, in the administrative law context, a relevant analogy. Generally, the doctrine holds that a party is required, under certain circumstances, to exhaust his remedies under any applicable administrative procedures, before seeking judicial review. *Sauk County v. Trager*, 118 Wis.2d 204, 210-211, 346 N.W.2d 756 (1984).

Exceptions exist to the exhaustion doctrine, however, for various reasons, including hardship and futility. *Nodell Inv. Corp. v. City of Glendale*, 78 Wis.2d 416, 425, 254 N.W.2d 310, fn. 12 (1977).

Suppose Valadez wanted to be naturalized, or just wanted to renew her LPR Card, as she is required to do. Under the circuit court's analysis, she must first seek naturalization or renewal. However, she will absolutely, positively, be denied, pursuant to federal law, because of her controlled substance convictions. She would also likely be arrested and removed. She would have no defenses, and no possibility for discretionary relief. However, she would now be able to withdraw her guilty pleas; pursuant to *Douangmoula*, the circuit court would have no discretion to deny the motion, and would have to grant it.

In this case, seeking naturalization or renewal of her LPR Card would be an exercise in total futility. It would also be a great hardship for her, with three small children, to subject herself to automatic arrest and removal proceedings, merely to trigger her right to withdraw her guilty pleas in

these cases. If this case involved application of the exhaustion doctrine, this court would have no difficulty concluding that the doctrine does not apply due to either the futility or the hardship exceptions. Similarly, this court should have no difficulty concluding that Valadez has sufficiently alleged, and proven, that she is likely to be denied admission, found deportable, and ineligible to apply for citizenship, and therefore, she is entitled to withdraw her guilty pleas pursuant to sec. 971.08(2).

CONCLUSION

In this case, Valadez' convictions make her subject to deportation, and ineligible for admission or naturalization. Furthermore, the nature of her convictions make those consequences automatic, rather than speculative. Thus, her case distinguishable from Negrete.

Accordingly, Smith respectfully requests that the Court of Appeals reverse the holding of the circuit court, and order that she be entitled to withdraw her guilty pleas.

Dated this 16th day of June, 2014

_____

David Ziemer
State Bar #1001594
Attorney for Appellant

David Ziemer
Attorney at Law
6920 N. Ardara Ave.
Glendale, WI 53209
(414)306-1324

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,648 words.

Dated this 16th day of June, 2014

_____
David Ziemer

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. SEC. 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. sec. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of the brief filed with the court and served on all opposing parties.

Dated this 16th day of June, 2014

_____
David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 16th day of June, 2014, I mailed 10 copies of the Brief of Defendant-Appellant Melisa Valadez to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688

_____
David Ziemer

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of June, 2014

_____

David Ziemer