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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2016AP2136-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

Irvin PEREZ BASURTO,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

On Appeal from an Order Vacating the Judgment of Conviction entered in the Milwaukee County Circuit Court, the Honorable Jeffrey Kremers, Presiding

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STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent submits that briefing may be sufficient and oral argument may not be necessary to aid the Court in determining the issues raised on appeal, however Mr. Perez welcomes oral argument if the Court believes it would be helpful.

The publication of the Court's opinion would help clarify the application of both the deficient performance of counsel and prejudice prongs articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) as applied by the US Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), as well as by the Wisconsin Supreme Court in *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93 and *State v. Ortiz Mondragon*, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the trial Court correctly conclude that an attorney cannot satisfy professional standards by simply reading a plea questionnaire stating that his guilty plea may result in his deportation when such a plea left him both ineligible for the status he had, and ineligible for an important defense against his deportation, and relevant law made both clear on their face?

Also, did the trial Court correctly conclude that Mr. Perez was prejudiced by counsel's correct but inadequate advice when the guilty plea made his deportation substantially more likely and Mr. Perez testified that had he known that fact, he would have gone to trial?

STATEMENT OF THE CASE

A few magic words by counsel cannot always satisfy *Padilla*. And here, counsel did not satisfy his professional responsibilities by merely reading a plea questionnaire. The client, Irvin Perez Basurto ("Perez"), had been granted Deferred Action for Childhood Arrivals (DACA), an important protection against deportation. But after pleading guilty to domestic battery, Mr. Perez was no longer eligible for that protection, or another important defense against deportation called cancellation of removal either.

The relevant immigration laws here were and remain succinct, clear and explicit. Specifically, this conviction was a "crime of domestic violence" defined in the list of removable offenses at 8 U.S.C. § 1227(a)(2)(E). Second, a domestic violence offense left him ineligible for DACA. The DACA program is governed not by statutes but by Agency memoranda, but the requirements are clearly articulated on a government website.

Mere minutes of research would have revealed the stark consequences of a guilty plea. And had counsel clearly stated those consequences, Mr. Perez would have taken his chances at trial. Thus the Court below was right to vacate.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

As respondent, Mr. Perez exercises his option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.1. Instead, Mr. Perez offers the following summary and will present additional facts, if necessary, in the argument portion of his brief.

On December 20, 2016, Mr. Perez was charged with Criminal Damage to Property, Criminal Trespass, each charged with the domestic abuse enhancement pursuant to Section 973,055(1), Wis. Stats. Moreover, a felony Intimidating of a Witness was also charged.

On February 10, 2017 Mr. Perez pleaded guilty and on February 29 the Court sentenced him to six months in jail on count 1 and twenty-four months probation on the remaining counts. On June 29, 2016, Mr. Perez filed a Notice of Motion and Motion to Withdraw Guilty Plea. A motion hearing was held on September 21, 2016.

The motion was based on *Padilla v. Kentucky*. Specifically, Mr. Perez alleged that his counsel did not advise him properly relative to the immigration consequences of his plea as required by the *Padilla* holding.

During the motion hearing, evidence was elicited from Mr. Perez's previous counsel that he did not know what Mr. Perez's immigration status was. Although he stated that he knew Mr. Perez was not a U.S. citizen, and he did not ask Mr. Perez to explain his status further. Indeed, the testimony further elicited previous counsel's complete ineptness in properly advising Mr. Perez as required by the holding in *Padilla*. Counsel's failure to properly advise Mr. Perez resulted in losing his DACA status and, furthermore, he was placed in removal proceedings with no relief available to him to stop his removal from the U.S. even though Mr. Perez has lived in the U.S. since a very young age.

As a result of previous counsel's testimony, the circuit court judge granted Mr. Perez's motion and vacated his pleas. The State has appealed.

STANDARD OF REVIEW

A motion to withdraw a plea based on ineffective assistance of counsel presents several mixed questions of fact and law. *See State v Shata*, 2015 WI 74, ¶31, 364 Wis. 2d 63 868 N.W.2d 93. Specifically, the Court of Appeals will generally defer to the trial court's findings about what advice was given and when. *Id*. And the same is true as to the credibility of witness testimony, such as the defendant's statement that he would have gone to trial had he known the full immigration consequences of his plea.

On the other hand, the conclusion as to whether an attorney's advice fell below professional standards is not entitled to similar deference. *See id*. (citing *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305). Similarly, the Court may review de novo whether a defendant's claimed intention to go to trial was reasonable when determining whether he was prejudiced. *See generally*, *State v Carter*, 10 WI 40, 782 N.W.2d 695, 324 Wis. 2d 640 (applying a legal analysis to the prejudice prong).

ARGUMENT

The Court below was correct in both the "two parts" of its inquiry into the ineffective assistance of counsel: deficient

performance and prejudice. *See State v. Shata*, 634 Wis. 2d 63 ¶32 (describing the two part inquiry first outlined in *Strickland v Washington*, 466 U.S. 668, 686 (1984).

First, it concluded that Attorney Thomas Hackbart's brief and vague immigration admonishment to Mr. Perez did not satisfy the minimum standards of professional conduct required by the Sixth Amendment of the US Constitution, and anticipated in *Padilla v. Kentucky*. A further discussion of that element is found below in Part I. And second, the Court concluded that Mr. Perez was prejudiced by counsel's incomplete advice, in that he would have reasonably gone to trial as a chance to avoid near certain deportation. More on that in Part II.

I. The Court below was right when it concluded that Attorney Hackbart's advice was deficient because the law is "succinct, clear and explicit."

When Mr. Perez pled guilty to battery with a domestic abuse modifier in this case, the resulting conviction led to a very predictable cascade of negative immigration consequences. The offense clearly constituted a "crime of domestic violence" as defined in 8 U.S.C. § 1227(a)(2)(E). That domestic violence conviction led Federal Immigration authorities to terminate the lawful status he had and place him

in deportation proceedings. Then, once in deportation proceedings, the conviction left him ineligible for an important defense against deportation called cancellation of removal, which permits a judge to alleviate any hardship to his children by cancelling his deportation. *See* 8 U.S.C. § 1227b(b)(1)(C).

Mr. Perez's criminal defense attorney, however, did not tell him any of the above information. He could not have done so, he later admitted, because he did not know any of that. (R:33:31, 38; App. 152, 159.) Eschewing legal research, he merely "read" the plea questionnaire with Mr. Perez telling him "that if he's not a citizen he could be deported." (R:33:25; App. 146.)

The standard against which an attorney's conduct must be judged is "an objective standard of reasonableness considering all the circumstances." *Ortiz-Mondragon*, 364 Wis. 2d 1 ¶ 52 (internal citations omitted).

Perhaps the most critical "circumstance" which influences the Court's analysis of counsel's performance is the relative complexity of the particular immigration consequences at issue. When, on one hand, the law is "clear, succinct, and explicit" then "the duty to give correct advice is

equally clear." *Id*. at ¶33 (quoting *Padilla*, 559 U.S. at 369). *Padilla* itself provided the clearest example of such a case. The federal code broadly defines a controlled substance offense at 1227(a)(2)(B)(i), which defense counsel could easily have consulted. *See Padilla*, 559 U.S. at 368.

In *Ortiz-Mondragon*, on the other hand, an attorney's performance was held to a different standard when governing statutes contained no definition of the term "moral turpitude" and even case law was "notoriously baffling." 364 Wis. 2d 1 ¶ 39 (citing *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008)). There, after defense counsel did some research, *id*. at 64, he provided only a vague admonishment like the one in the present case. *Id*. at ¶44.

The immigration law at issue here is unquestionably more like the clear statute at issue in *Padilla* than the morass of case law discussed by the majority in *Ortiz-Mondragon*. Like the controlled substance offense defined in 8 U.S.C § 1227(a)(2)(B)(i), a crime of domestic violence is defined at 8 § 1227(a)(2)(E).

Indeed, one of the immigration consequences is even clearer and more explicit. Eligibility for DACA, the status Mr. Perez had at the time of his plea is widely available

online on government websites.[1] Resources abound, and are designed for the benefit of even non-attorneys. On those resources, it is clearly stated that individuals who are convicted of crimes of domestic violence are ineligible for DACA. Thus, even a casual Internet user could determine the adverse consequences of a guilty plea to someone with DACA.

The State here does not seem to dispute the clarity of the governing law. (Pet. Br. at 9.) Instead, relying on *State v. Shata*, it argues that Attorney Hackbart's reading of the plea questionnaire discharged his professional responsibilities. (Pet. Br. at 13-14.) All an attorney must do to satisfy *Shata* and *Padilla* is mention the possibility of adverse immigration consequences.

But, actually, merely reading the plea questionnaire falls far short of the one provided in *Shata*. There, an attorney told his client that there was a "strong chance" of deportation. *See Shata*, 364 Wis. 2d 63 ¶ 3. This was actually more accurate and useful than the explanation

[11] One such page can be found at: https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca

proposed in a post-conviction litigation, that deportation would be "mandatory," the Court held. *Id*. at ¶ 5.

The opinion offered by Mr. Shata's counsel comes far closer to what Attorney Hackbart *should have told Mr. Perez here*. Ideally, the attorney and client could have had a more nuanced conversation about losing DACA, and the probability being placed in deportation proceedings, and then the effect of losing eligibility for cancellation of removal. Most of that information was easily available in the statutes and online. But at a minimum, counsel could have told him that the chances of deportation were strong.

When, as here, the law is relatively clear, professional standards require an attorney to make a reasonable attempt at quantifying the probability of deportation. Such information is actually useful to a defendant, whereas the "may be deported" language contained in the plea questionnaire, and the statutory immigration warning delivered by the Court is not. *See* Wis. Stat. § 971.08 (for the language of that advisal). Such language, while true, provides no actionable information. The word "may" just as accurately describes one's risk of death by lightning strike or mountain lion mauling as it does the risk of death by heart disease. Even a

minimal understanding of those relative risks, though, would lead a reasonable person to *continue* outdoor activities and yet *avoid* overeating.

When the law is as clear as it is here, the norms of professional responsibility require an attorney to determine and explain whether the likelihood of deportation is more like that of a lion mauling or heart disease.

II. The Court below was right that Mr. Perez was prejudiced by Attorney Hackbart's deficient performance.

As discussed above, the decision to either plead guilty or go to trial involves a complex weighing of costs and benefits. *See DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015) (J. Posner) (discussing that analysis). And accurate measurement of both requires experienced legal advice. For non-citizens the costs of a conviction are often much higher than for citizens because their livelihood and family unity can be lost by subsequent immigration actions.

Here, Mr. Perez ultimately pleaded guilty, waiving his right to a jury trial. That decision rested, at least in part, upon the advice of counsel. To that end, counsel attempted to quantify the benefits going to trial with Mr. Perez, which given the presence of the victim were likely minimal.

(R:33:25.) Counsel similarly discussed the benefits of accepting a plea, especially avoiding a felony conviction. (*Id*.) But as addressed above, counsel did not adequately address the cost of pleading guilty from an immigration standpoint. When he later learned the true extent of those costs, Mr. Perez testified that he would not have accepted a plea. (R:33:10; App. 131.)

In the context of a guilty plea, the US Supreme Court has held that a defendant was prejudiced by counsel's deficient performance when "reasonable evidence" suggests he would have gone to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366 (1985).

More to the point, the US Court of Appeals for the Seventh Circuit has held that a defendant's later expressed preference to have gone to trial is enough to satisfy the prejudice prong—no matter how slight his chance at prevailing at that trial. *DeBartolo*, 790 F.3d at 778 (stating that defendant's "personal choice to roll the dice is enough"). *See also United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

The State, without distinguishing or even addressing *DeBartolo*, has encouraged this Court to adopt a contrary position. It argues that a Court must weigh the evidence against the defendant against his expressed desire to go forward to determine whether risking trial would have been a rational decision. This position is supported by a fair number of Federal Circuit Courts of Appeals. *Kovacs v. United States*, 744 F.3d 44 (2d Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014); *Pilla v. United States*, 668 F.3d 368 (6th Cir. 2012);

The Wisconsin Supreme Court has not addressed this issue, but the US Supreme Court seems poised to do so soon. *Lee v. United States*, 825 Fed.3d 311 (6th Cir. 2016) (Cert. granted Dec. 14, 2016). The Court heard arguments in that case on March 28, 2017.

In any event, more specific guidance is likely unnecessary. The Court below accepted Mr. Perez's testimony that he would have gone to trial, a factual conclusion that this Court must defer to. Once that fact is settled, a Court may only find a lack of prejudice if there is no "overwhelming" evidence of Mr. Perez's guilt. None exists.

The mere fact that the victim was present in Court on the day of the hearing does not establish that Mr. Perez could not have rationally opted to take his chances with a jury.

Thus, the Court was correct in concluding that Mr. Perez was prejudiced because he would have gone to trial had he gotten a more complete explanation of the probability of his own deportation.

III. Conclusion

For the aforementioned reasons, the Court should affirm the Circuit Court's grant of the motion to withdraw his plea.

Respectfully submitted this 20th day of April, 2017.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and a maximum of sixty characters per line of body text. The length of this brief is 3,577 words.

Dated this 20th day of April 2017, 2015

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