State of Wisconsin: Milwaukee County: Circuit Court

State of Wisconsin,

Plaintiff,

Case No. 2002CM001114

v.

Viduel Plascencia

Defendant.

Motion to Withdraw Guilty Plea Pursuant to Sec. 971.08(2), Stats

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Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to Sec. 971.08(2), Stats., hereby moves to withdraw his guilty plea.

As grounds, the undersigned shows to the court as follows:

1. On April 24, 2002 the defendant entered guilty pleas to the following misdemeanor charges: (1) Theft (less than $2,500); (2) Criminal damage to property; and, (3) Entry into a locked vehicle. Plascencia was sentenced on May 22, 2002 and, following sentencing, Plascencia filed a notice of intent to pursue postconviction relief pursuant to Sec. 809.30, Stats.

2. The defendant is a Mexican national and is not a citizen of the United States.

3. During the court's guilty plea colloquy with the defendant the court failed to inform the defendant of the immigration consequences of a criminal conviction as required by Sec. 971.08(1)(c), Stats.

4. As the attached affidavit of Viduel Plascencia establishes, at the time Plascencia entered his guilty pleas he did not know that the criminal convictions would subject him to deportation proceedings.

5. That the federal government has, in fact, started deportation proceedings against Plascencia. That matter is set for final hearing in July, 2008.

This motion is further based upon the attached Memorandum of Law.

Wherefore, the defendant hereby requests the court to permit the defendant to withdraw his guilty pleas to the charges in question and to enter not guilty pleas.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007.

Law Offices of Jeffrey W. Jensen
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By:_____
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Memorandum of Law

I. The court did not warn Plascencia of the immigration consequences of his guilty pleas and, therefore, the statute mandatorily requires the court to permit Plascencia to withdraw his guilty pleas.

When Plascencia entered his guilty pleas on April 24, 2002 the court did not give Plascencia the mandatory statutory warning concerning the immigration consequences of a criminal conviction. Because Plascencia's conviction was not final on the day that the Wisconsin Supreme Court decided, *State v. Douangmala*, 2002 WI 62, P46 (Wis. 2002) the rule in *Douangmala* applies to this case. That is, the failure to give the statutory immigration warning makes the court's obligation to grant Plascencia's motion to withdraw his plea is mandatory- regardless of whether Plascencia can establish that the error was not harmless. Even if Plascencia is required to show that the error was not harmless he is able to do so. Plascencia would testify that at the time he entered his pleas he did not know that the convictions would cause him to be deported. He would not have entered the guilty pleas had he known this and, now, he is subject to deportation.

A. Plascencia did not received the statutory warning

Sec. 971.08(2), Stats., provides:

> (2) 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. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

Here, the transcript of the plea hearing establishes that the court did not warn Plascencia of the immigration consequences of his guilty pleas. Thus, the plea colloquy was defective.

Additionally, Plascencia's affidavit establishes that at the time he entered his guilty pleas he did not understand that the convictions could result in deportation. Moreover, Plascencia is now the subject of deportation proceedings and, therefore, the motion is ripe.

B. Harmless error or not?

If it is established that if the court failed to give the defendant the statutory warning the next question is whether the court should apply the harmless error analysis or not. For a time in Wisconsin the law was that after establishing that he did not receive the statutory the defendant was then required to establish that he did not have independent knowledge of the immigration consequences (the so-called "harmless error" rule) before he would be permitted to withdraw his plea. *See, e.g., State v. Garcia*, 2000 WI App 81, PP1, 11-13, 234 Wis. 2d 304, 610 N.W.2d 180; *State v. Lopez*, 196 Wis. 2d 725, 731-32, 539 N.W.2d 700 (Ct. App. 1995); *State v. Issa*, 186 Wis. 2d 199, 209-210, 519 N.W.2d 741 (Ct. App. 1994).

On June 10, 2002, though, in, *State v. Douangmala,* 2002 WI 62, P46 (Wis. 2002) the Wisconsin Supreme Court made clear that where the court does not warn the defendant about the immigration consequences in the exact words of the statute, and

where the defendant shows that he is subject to deportation proceedings, the statute is mandatory- the court must permit the defendant to withdraw his guilty pleas. That is, there is no harmless error analysis. In *Douangmala,* the Supreme Court wrote:

> [W]e conclude that Wis. Stat. § 971.08(1)(c) sets forth the language a circuit court must use to inform a defendant of the deportation consequences of entering a plea of guilty or no contest. In the present case, the circuit court did not advise the defendant in any manner regarding the deportation consequences of entering a plea of no contest. If a circuit court fails to give the statutorily mandated advice and if a defendant moves the court and demonstrates that the plea is likely to result in the defendant's deportation, then § 971.08(2) requires the circuit court to vacate the conviction and to permit the defendant to withdraw the guilty or no-contest plea.

After *Douangmala,* though, a question arose as to whether the holding applied retroactively. That issue was decided in *State v. Lagundoye*, 2004 WI 4, P31 (Wis. 2004) where the Supreme Court held that *Douangmala* applied only to convictions that had not become final as of June 10, 2002. The court explained:

> As discussed supra, Wisconsin follows the general rule in *Teague t*hat a new rule of criminal procedure does not apply retroactively to cases that were final before the date of its issuance. *Schmelzer*, 201 Wis. 2d at 257. In other words, a new rule generally cannot be applied retroactively to cases on collateral review. Thus, under the general rule of nonretroactivity, *Douangmala* would not apply to *Lagundoye's* case because Lagundoye's convictions all became final before *Douangmala* was decided.

C. Plascencia's conviction was not final on the day that *Douangmala was decided.*

"The term "final conviction" or judgment cannot be given a hard and fast definition. Whether a thing is to be considered final depends upon its purpose and use; it may be final for one purpose and not for another." *State v. Berres*, 270 Wis. 103, 105-106 (Wis. 1955) In *Berres,* the Supreme Court held that a traffic conviction was "final", for purposes of ordering revocation of the defendant's driver's license, on the day

the judge entered the conviction.

On the other hand, though, a criminal conviction is not "final" for purposes of commencing the time for filing a federal habeas corpus petition [28 U.S.C. § 2244(d)(1)(A)] until "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Lozano v. Frank*, 424 F. 3d 554, 555 (7th Cir. 2005)

The question here, then, is whether Plascencia's conviction ought to be considered "final" on June 10, 2002- the day that *Douangmala* was decided.

For purposes of retroactive application of *Douangmala* Plascencia's conviction should not be considered final until the time for appeal expired. This interpretation seems to be consistent with the court's holding in *Lagundoye.* There, the Supreme Court wrote that, a new rule generally cannot be applied retroactively to cases on *collateral review. . . ."*

At the time *Doungmala* was decided Plascencia could not even have sought collateral review because his time for direct review had not expired. *See,* 974.06(1), Stats., which provides that a conviction may be collaterally attacked only after the time for direct appeal has expired.

Plascencia entered his guilty plea on April 24, 2002. He was sentenced on May 22, 2002 and he then filed a notice of intent to pursue postconviction relief. Sec. 809.30, Stats requires the defendant to order the transcripts within thirty days of filing the notice of intent. Thus, since Plascencia did not order the transcripts under Sec. 809.30, Stats. the time limit for seeking postconviction relief or appeal ended on June 22, 2002.

Douangmala was decided on June 10, 2002. Because Plascencia's right to seek postconviction or appellate relief had not expired on that date his conviction should not be considered final and, therefore, *Douangmala* should apply. Plascencia does not have to show that the court's error was not harmless.

D. Either way, the court's error was, in fact, not harmless

Even if Plascencia is required to establish that the court's error was not harmless he is able to do so. As Plascencia's affidavit establishes, he did not know that the

convictions would result in deportation and, had he known this, he would not have pleaded guilty.

Conclusion

For these reasons it is respectfully requested that the court permit Plascencia to withdraw his guilty pleas and to enter not guilty pleas.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007.

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