

GLEN D. BAISINGER
Judge
CAROL R. BISPHAM
Judge
JOHN A. MCCORMICK
Judge
RICK J. MCCORMICK
Judge
DANIEL R. MURPHY
Judge



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CIRCUIT COURT OF OREGON
TWENTY-THIRD JUDICIAL DISTRICT

April 15, 2010

Brian Conry, Esq
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Portland, OR 97204

Marty Wilde, Esq
PO Box 100
Albany, OR 97321

Re: *State of Oregon (post conviction relief)*
Linn County Circuit Court Number: ~~20090001~~

Dear Counsel:

This matter came before the court for argument on the petition for post conviction relief. That petition was filed on October 26, 2009. Petitioner, who became a permanent resident in the United States on January 14, 2005, was convicted by guilty plea of Delivery and Possession of a Controlled Substance on June 24, 2009.

Prejudice

The prejudice to the petitioner is that the federal laws and regulations he cites in his memoranda require his deportation from the United States without the right to return. Petitioner was told by his attorney and by the Court that if he entered the pleas to PCS and DCS as felonies that he would be eligible for optional probation under Oregon's Sentencing Guidelines and would serve no more than 30 days in jail. As far as the Guidelines are concerned this was correct. The problem is that under federal law the conviction itself justifies and requires deportation and defendant was not so advised. He was, in fact, led to reasonably believe that unless sentenced to prison he would not be deported and this was false.

Petitioner then entered his pleas based on this false assurance. Accordingly his entry of plea was not knowingly made as he did not know the legal consequence of entering the plea would include deportation from the United States. A criminal defendant must be advised of the actual legal consequences of his plea for it to be made knowingly and voluntarily. *See Dixon v Gladden*, 250 Or 580 (1968).

This court finds that petitioner did suffer actual legal prejudice as a result of the incorrect advice he was provided.

The State relies on *Gonzalez v. Oregon*, 340 Or 452 (2006) which holds that a defense attorney need only advise a criminal defendant of the possibility of deportation and not the likelihood of it. While this is the law it does not entirely describe the situation in this case. Defense counsel

here did not merely fail to advise petitioner of the likelihood of deportation, he effectively misled the petitioner into believing that deportation would not occur because he would be placed on optional probation.

This is closer to the fact pattern in *Pedilla v. United States*, ___ US ___ (2010), where defense counsel incorrectly advised his client that he need not worry about his immigration status because he had been in the United States for so long.

Pedilla is also instructive on the issue of how likely petitioner's deportation is in this case. He argues that it is inevitable. The state, without citing authority for it, argues that there are ways around deportation. In *Pedilla* the Court observes that commission of a "removable offense" (which includes the DCS conviction in this case) renders removal "practically inevitable" while allowing for some limited exceptions. Citing §1101(a)(43)(B); §1228.

Likewise, as petitioner asserts, and as *Pedia* says, defense counsel could have determined that petitioner would be subject to deportation or removal by simply reading the statute. *Pedia* at 11 of Slip Opinion. See U. S. C. §1227(a)(2)(B)(i).

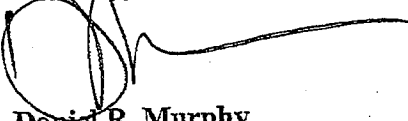
In this case, the petitioner was effectively, though not deliberately, misled into believing that if he entered his plea to the DCS charge he would serve no more than 30 days in jail and then serve 18 months probation. He was misled to believe that he would not be deported or else how could he serve his 18 months probation? In fact he will be deported under applicable federal law because of this conviction and will not be limited to 30 days in jail and will not be afforded 18 months probation. In fact petitioner now sits in federal detention pending removal.

Pursuant to ORS 138.530 this court finds that petitioner was denied his 6th Amendment right to effective counsel when his attorney misadvised him concerning the probable consequences of his plea and conviction to his immigration status. Therefore post conviction relief is granted and the petitioner may withdraw his pleas and proceed to trial on the charges.

Petitioner previously withdrew his motion to suppress so that will not be set for hearing. Petitioner further asserted that the sentencing court in this case lacked jurisdiction under ORS 138.530(1)(b) to impose sentence. This court need not decide that question to provide relief in this case and therefore does not render a decision on that question.

Mr. Conry may prepare a judgment in accordance with this decision. Petitioner should be scheduled to appear in the Linn County Circuit Court for a resolution conference to set the matter for trial at the earliest possible time.

Sincerely,


Daniel R. Murphy
Circuit Judge

DRM/msw