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***Rubio v. State*, 124 Nev. Adv. Op. No. 87 (Oct. 30, 2008)¹**

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL

Summary

Appeal from a district court order denying relief for ineffective assistance in a criminal case resulting in deportation.

Disposition/Outcome

Affirmed the district court order denying relief for ineffective assistance by an interpreter but reversed and remanded the district court order denying relief for ineffective assistance by counsel.

Factual and Procedural History

Rubio is a Mexican native that has resided in Las Vegas with her husband and four children as a lawful permanent resident of the United States since 1999. Two of her children have cerebral palsy and require special care. On September 29, 2005, she rear-ended her husband's car when she observed him driving the car in the company of another woman. Rubio was arrested and charged with one count of battery with the use of a deadly weapon.

On February 13, 2006, Rubio met with her court-appointed public defender who presented her with a plea agreement written in English. Rubio is not fluent in English so Rubio met with a Spanish-language interpreter, who read the agreement to Rubio in Spanish. Rubio then signed the agreement, pleading guilty to the offense in exchange for a lesser sentence.

The plea agreement included language explaining the possible immigration consequences. It also contained standard language indicating that she was signing the agreement voluntarily and that her attorney answered all her questions regarding the plea agreement to her satisfaction.

Rubio told the district court that she understood that plea agreement, discussed the rights she was waiving with her attorney, had no questions, and had signed the agreement freely and voluntarily. The district court sentenced her to probation for up to three years and required, as a condition of probation, that Rubio comply with Immigration and Naturalization Service (INS) directives.

After Rubio's conviction, she was taken into custody by Immigration and Customs Enforcement as an alien convicted of an aggravated felony.² While the immigration court proceedings were pending, Rubio filed a motion in district court to withdraw her guilty plea, arguing that she entered the agreement involuntarily without effective assistance of counsel. In January 2007, Rubio was removed to Mexico.

¹ By Holly Cheong

² See 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) which allows the INS to deport aliens convicted of aggravated felonies.

In her affidavit supporting the motion, Rubio claimed that she never discussed the plea agreement with counsel and thought that the court interpreter would provide proper advice. According to Rubio, counsel referred her to the court interpreter and counsel was not present during the translation of the agreement. Also, Rubio claimed that the court interpreter did not interpret the entire document and when Rubio asked the interpreter about immigration consequences, the interpreter replied that Rubio should be fine as long as she has papers. Rubio claimed that she was rushed into signing the agreement and if she had been given the opportunity to discuss the agreement with counsel, she would not have signed the agreement. Rubio also included information regarding her children's special care needs in her affidavit.

The district court denied the motion stating that the court had no control over the INS, Rubio knew that there were immigration consequences with accepting the plea agreement, and that an interpreter cannot provide ineffective assistance.

In a *per curiam* decision, the court affirmed that an interpreter cannot provide ineffective assistance through affirmative misrepresentation but reversed and remanded the district court decision, requiring an evidentiary trial to consider Rubio's ineffective assistance of counsel claims.

Discussion

Standard of review

The court discussed the standard of review, stating that a claim of ineffective assistance of counsel is a *de novo* review but deference will be given to the district court's factual findings unless they are clearly erroneous and not supported by substantial evidence.³ The court also discussed burden of proof, stating that the defendant bears the burden of proof to show, by a preponderance of the evidence, that "the plea was not entered knowingly or voluntarily."⁴ A guilty plea is entered into knowingly and voluntarily only if the defendant has "a full understanding of both the nature of the charges and the direct consequences arising from a plea of guilty."⁵ The district court must look beyond the hearing and evaluate the totality of the circumstances in order to make the determination.⁶ A motion to withdraw a guilty plea may be granted in order to correct a manifest injustice through ineffective assistance of counsel or "failure to adequately inform a defendant of the consequences of his plea."⁷

³ Lader v. Warden, 120 P.3d 1164, 1166 (Nev. 2005) (citing Kirksey v. State, 923 P.2d 1102, 1107 (Nev. 1996)).

⁴ Foster v. State, 111 P.3d 1083, 1086 (Nev. 2005); Barajas v. State, 991 P.2d 474, 475 (Nev. 1999).

⁵ Little v. Warden, 34 P.3d 540, 543 (Nev. 2001).

⁶ *Id.* at 544; Barajas, 991 P.2d at 475 (citing Bryant v. State, 721 P.2d 364, 368 (Nev. 1986)).

⁷ Barajas, 991 P.2d at 442; Paine v. State, 877 P.2d 1025, 1031 (Nev. 1994) *overruled on other grounds by* Leslie v. Warden, 59 P.3d 440, 445-46 (Nev. 2002). See NEV. REV. STAT. § 176.165 (governing a motion to withdraw a guilty plea); United States v. Signori, 844 F.2d 635, 638 (9th Cir. 1988).

Ineffective assistance of counsel

The court stated that effective assistance of counsel is guaranteed by the Sixth Amendment of the Constitution.⁸ The court also applied the two-prong *Strickland* test, which requires “that [her] counsel’s performance fell below an objective standard of reasonableness and [the plaintiff] suffered prejudice as a result” in order to determine there was ineffective assistance of counsel.⁹

Deportation is collateral consequence, generally not affecting the validity of a guilty plea

The court stated that immigration issues are collateral consequences of a guilty plea and do not affect the voluntariness of the plea.¹⁰ As a general rule, counsel’s failure to inform the defendant of collateral consequences is not objectively unreasonable and, therefore, does not meet the first prong of the *Strickland* test for ineffective assistance.¹¹ However, *Barajas* did not address the issue of affirmative misrepresentation of immigration issues.¹²

We adopt the affirmative misrepresentation exception to the collateral consequence rule

Both the Second and Ninth Circuit Courts of Appeals have adopted an affirmative misrepresentation exception for deportation, holding that affirmative misrepresentation regarding immigration consequences may constitute ineffective assistance of counsel.¹³ The court found the reasoning of the Second and Ninth Circuit Courts of Appeals to be persuasive and adopted the affirmative misrepresentation exception to the collateral consequence rule. However, the court held that an evidentiary hearing is required to invalidate a guilty plea for affirmative misrepresentation. The defendant still bears the burden to demonstrate affirmative misrepresentation, making counsel’s performance unreasonable, and prejudice in order to meet both prongs of the *Strickland* test for ineffective assistance.

Rubio did not clearly establish affirmative misrepresentation

However, the court declined to extend the affirmative misrepresentation rule to the facts in this case because the affirmative misrepresentation came from the interpreter,

⁸ *Larson v. State*, 766 P.2d 261, 262 n.6 (Nev. 1988) (citing *Turner v. State of Tenn.*, 858 F.2d 1201 (6th Cir. 1998), *vacated on other grounds*, 492 U.S. 902 (1989) (“[c]onstitution guarantees effective counsel when rejecting a plea offer”); *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (“[c]onstitution guarantees effective counsel when accepting guilty plea”)).

⁹ *Avery v. State*, 129 P.3d 664, 669 (Nev. 2006) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Kirksey v. State*, 923 P.2d 1102, 1107 (Nev. 1996); *Warden v. Lyons*, 683 P.2d 504 (Nev. 1984)).

¹⁰ *Barajas*, 991 P.2d at 475.

¹¹ *Id.* at 476 (citing *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993)).

¹² *Id.* at 476 n.1.

¹³ *United States v. Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 187 (2d Cir. 2002).

not the attorney. The court held that the exception only applies to the relationship between attorney and client.

Rubio's claims regarding counsel's assistance during the plea process warrant an evidentiary hearing

A court must consider the totality of the circumstances in determine whether “a defendant entered a guilty plea knowingly and voluntarily.”¹⁴ An evidentiary hearing may be necessary to determine any constitutional issues.¹⁵ If the defendant's claims are not supported by the record, then the district court can reject the claims without an evidentiary hearing.¹⁶ The court found that although the formal plea agreement contained a statement noting that the plea may carry immigration consequences, the district court did not ask whether counsel reviewed the entire plea agreement with Rubio or if the information regarding the possible immigration consequences was translated for Rubio. Therefore, the court could not determine if Rubio's claims were unsupported by the record. If the nonlegally trained interpreter was the only person who reviewed the plea agreement with Rubio, that act may violate due process and meet the first prong of the *Strickland* test.

The court could also not determine if Rubio suffered prejudice, the second prong of the *Strickland* test, because the district court did not consider the condition of Rubio's children and the role that their condition might have played in Rubio's decision. Because of the condition of her children, it is possible that Rubio would have opted for trial instead of a guilty plea if she was informed of the possible risks of deportation associated with pleading guilty. The court held that the district court abused its discretion by not conducting an evidentiary hearing.

Conclusion

The court adopted the affirmative misrepresentation exception for the collateral consequence rule regarding deportation and ineffective assistance, but held that the exception did not apply to Rubio because the misrepresentation regarding deportation risks did not come from counsel. However, the court held that the district court abused its discretion by not conducting an evidentiary hearing on Rubio's claims that her counsel abandoned her and that she was prejudiced by the lack of legal advice. The court therefore affirmed the district court's order regarding the interpreter's ineffective assistance but reversed and remanded the district court's order regarding Rubio's ineffective assistance of counsel claims, instructing the district court to hold an evidentiary hearing on those claims.

¹⁴ Little v. Warden, 34 P.3d 540, 544 (Nev. 2001).

¹⁵ *Id.*

¹⁶ See Hargrove v. State, 686 P.2d 222, 225 (Nev. 1984).