DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2013

WILBER PEREZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D12-1770

[July 24, 2013]

FORST, J.

We affirm the summary denial of appellant's timely Florida Rule of Criminal Procedure 3.850 motion. We conclude that the claim of ineffective assistance of trial counsel filed in reliance on *Padilla v. Kentucky*, 559 U.S. 356 (2010), was appropriately denied, because the "new rule" set forth in *Padilla* does not apply retroactively, as the appellant's conviction had become final and he had filed neither a direct appeal nor a Rule 3.850 motion prior to the *Padilla* decision.

On October 7, 2009, Wilber Perez entered a negotiated plea to manufacturing cannabis and felony possession of cannabis. The court withheld adjudication and placed him on probation. He did not appeal. On October 5, 2011, Perez filed a timely motion for postconviction relief under Rule 3.850. Among other things,[1] citing *Padilla*, he argued that his attorney was ineffective in failing to advise him of the inevitable deportation consequences of his plea. The motion alleged that counsel led Perez to believe that "because he was Cuban, he would not have deportation issues." The trial court denied this claim based on the State's response which pointed out that Perez acknowledged during the plea colloquy that "this plea could affect your immigration status and could indeed result in your deportation."

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[1] The motion raised two other claims which have not been argued on appeal and are, therefore, abandoned. *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010).

The Florida Supreme Court, however, subsequently held that an equivocal "may" or "could" warning is not alone sufficient to refute such a claim where the deportation consequence is truly clear and automatic from the face of the statute. *Hernandez v. State*, 37 Fla. L. Weekly S730, S731-32 (Fla. Nov. 21, 2012) (disagreeing in part with *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2010)). Where the deportation consequence is clear, as it is for the felony drug manufacturing and possession offenses at issue in this case, *Padilla* requires an attorney to provide accurate advice. An admonition from the court that the plea "may" result in deportation is not alone enough to conclusively refute such a claim.

In *Hernandez*, the Florida Supreme Court also held that *Padilla*, which was decided on March 31, 2010, does not apply retroactively. *Id.* at S730. However, in a decision issued the same day as *Hernandez*, the Florida Supreme Court applied *Padilla* retroactively in a case wherein the defendant's timely Rule 3.850 motion, raising the same issue that had been introduced by Padilla in his appeal, was pending in the trial court at the time *Padilla* was decided. The petitioner in *Castano v. State*, 37 Fla. L. Weekly S740 (Fla. Nov. 21, 2012), had timely filed her postconviction motion just months after her plea and *prior to* the U.S. Supreme Court's ruling in *Padilla*.

As noted above, Perez's conviction had become final prior to *Padilla* and, as distinguished from the situation in *Castano*, Perez had not filed his postconviction motion until after the Court had announced its new *Padilla* rule. In *Castano*, the court's opinion noted that the basis for its decision to rule in favor of the postconviction movant was because "Castano's postconviction proceeding was pending when the United States Supreme Court issued *Padilla*." *Castano*, 37 Fla. L. Weekly at S740-41. The narrowness of the Florida Supreme Court's *Castano* exception with respect to retroactivity is reflected in Justice Pariente's concurring opinion in *Hernandez*, wherein she states (with reference to her concurring opinion in *Castano*) "*Padilla* applies to those cases in which, *at the time Padilla was decided*, the initial postconviction proceeding was not yet final *and the defendant had raised a claim of ineffective assistance of counsel* for failing to advise of the deportation consequences of a plea." *Hernandez*, 37 Fla. L. Weekly at S733 (Pariente, J., concurring) (emphasis added).

Justice Pariente also authored a concurring opinion in *Castano* which further provides some context for her decision to treat Ms. Castano differently than Mr. Hernandez with respect to the retroactive application of *Padilla*. The opinion notes that Castano entered her plea in March

2009 and subsequently filed her postconviction motion in November 2009, asserting (among other grounds) that her counsel had failed to advise her about the deportation consequences associated with her guilty plea. *Castano*, 37 Fla. L. Weekly at S741-42 (Pariente, J., concurring). *Padilla* was issued in March 2010, some four months *after* Castano had filed her postconviction motion. "Given the procedural posture of this case—where the defendant timely raised the same postconviction claim as the defendant in *Padilla* and the resolution of her claim was still pending at the time *Padilla* was decided—it is in effect a "pipeline" case for purposes of whether *Padilla* applies." *Castano*, 37 Fla. L. Weekly at S741 (Pariente, J., concurring).

Shortly after the Florida Supreme Court's *Hernandez* and *Castano* decisions, the United States Supreme Court concluded that a defendant may not obtain federal relief under *Padilla* where the defendant's conviction became final on direct review before *Padilla* was decided. *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013). The Court held that *Padilla* announced a "new rule" and, therefore, under *Teague v. Lane*, 489 U.S. 288 (1989), which controls federal retroactivity analysis, "defendants whose convictions became final prior to *Padilla* . . . cannot benefit from its holding." 133 S. Ct. at 1113. We note that the conviction of Perez, the appellant in the instant case, had become final prior to *Padilla* and he did not file a postconviction motion until after *Padilla* had been issued. Thus, under federal retroactivity analysis, *Padilla* could not be applied retroactively to the benefit of Perez.

Florida courts "rarely [find] a change in decisional law to require retroactive application." *Hughes v. State*, 901 So. 2d 837, 846 (Fla. 2005) (quoting *Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001)). "[T]o determine whether a new rule applies retroactively to final cases in postconviction proceedings . . . courts in Florida conduct a retroactivity analysis under *Witt v. State,* 387 So. 2d 922 (Fla. 1980)." *Barrios-Cruz v. State*, 63 So. 3d 868 (Fla. 2d DCA 2011) (quoting *State v. Fleming,* 61 So. 3d 399, 403 (Fla. 2011)). The Second District Court of Appeal in *Barrios-Cruz* applied *Witt* to a case dealing with the issue of the retroactivity of *Padilla*, stating:

> Under *Witt*, a change of law will not be applied retroactively "unless the change: (a) emanates from [the Supreme Court of Florida] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So. 2d at 931. Because *Padilla* is a United States Supreme Court decision that is

> constitutional in nature, the first two elements of this analysis have been satisfied. Accordingly, the question becomes whether *Padilla* represents a development of fundamental significance. *Witt* divides such developments into two categories: "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," and "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)] and *Linkletter* [*v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965)]." *Id.* at 929, 85 S. Ct. 1731. Because the holding in *Padilla* does not fall within the first category, the analysis turns upon the three factors presented in *Stovall* and *Linkletter.* These factors include: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of the retroactive application of the new rule." *Id.* at 926, 85 S. Ct. 1731.

Barrios-Cruz, 63 So. 3d at 871. In *Hernandez*, the Florida Supreme Court determined that the first two above-referenced "factors," ("(a) the purpose to be served by the new rule" and "(b) the extent of reliance on the old rule") "weigh[] against a finding that *Padilla* is retroactively applicable." *Hernandez*, 37 Fla. L. Weekly at S732. The court also found that:

> *Witt*'s third factor weighs against retroactive application because retroactive application of *Padilla* would have an adverse impact on the administrative of justice. As the Third District in *Hernandez* observed,
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> > [t]he insufficiency of the previously-sufficient deportation warning during thousands of past plea colloquies for noncitizens would pave the way for motions to vacate those pleas and convictions. Evidentiary hearings would follow. The concern expressed in another immigration warning case, that for any such case in which a plea is set aside, "the passage of time between the guilty plea and the postconviction motion puts the State at a great disadvantage in seeking to try the case to conviction," *State v. Green*, 944

> So. 2d 208, 216 (Fla. 2006), applies with equal force here.
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> *Hernandez*, 61 So. 3d at 1151. Indeed, many of the cases could involve overturned convictions, stale records, lost evidence, and unavailable witnesses. *Chandler*, 916 So. 2d at 730-31.

Hernandez, 37 Fla. L. Weekly at S732. In *Hernandez*, the ineffective assistance of counsel motion was filed nine years after Hernandez's plea. *Id*. at S731. By contrast, after *Padilla* was decided on March 31, 2010, the petitioner in the instant case filed his motion on October 5, 2011, within the two-year time limit for raising a postconviction challenge under Rule 3.850(b).

Thus, arguably, retroactive application of *Padilla* in the instant case wherein the ineffective assistance of counsel motion was filed within the two-year limit would not have a significant "adverse impact on the administration of justice." However, we note that in *Hughes*, cited above, the issue of the retroactivity of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), arose when Hughes filed a motion under Rule 3.800(a) to correct an illegal sentence within two years of Hughes' conviction becoming final. *See Hughes v. State*, 826 So. 2d 1070, 1071-72 (Fla. 1st DCA 2002) (Hughes' conviction and sentence were affirmed on direct appeal and mandate issued on December 29, 1999; *Apprendi* was issued on June 26, 2000; Hughes filed his postconviction motion under Rule 3.800(a) on March 7, 2001). Nonetheless, the Florida Supreme Court ruled that, "[b]ased on our consideration of the *Stovall/Linkletter* factors, we conclude that the new criminal procedure rule announced in *Apprendi* does not warrant retroactive application." *Hughes*, 901 So. 2d at 846. In the instant case, at least two of the three *Witt* factors weigh against retroactive application and, in contrast to *Castano*, Perez filed his postconviction motion after the Supreme Court had issued its *Padilla* opinion. "[T]he interest in finality for criminal convictions, and the potential effects on the administration of justice, strongly weigh against applying *Padilla* retroactively." *Mortimer v. State*, 96 So. 3d 1060, 1063 (Fla. 4th DCA 2012). Absent the unique circumstances of *Castano*, we find that *Padilla* does not retroactively apply.

Affirmed.

TAYLOR, J., concurs.
STEVENSON, J., dissents with opinion.

STEVENSON, J., dissenting.

I respectfully dissent. Although *Padilla v. Kentucky*, 559 U.S. 356 (2010), is not retroactive, *see Hernandez v. State*, 37 Fla. L. Weekly S730, S731–32 (Fla. Nov. 21, 2012), and *Chaidez v. United States*, 133 S. Ct 1103, 1113 (2013), I would nevertheless find it applicable here because, like the postconviction claim in *Castano v. State*, 37 Fla. L. Weekly S740 (Fla. Nov. 21, 2012), Perez's case was effectively "in the pipeline" when *Padilla* was decided.

In Florida, the longstanding "pipeline" rule requires that "disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered." *Hendeles v. Sanford Auto Auction, Inc.*, 364 So. 2d 467, 468 (Fla. 1978). The pipeline rule applies even where a new decision is deemed to have only prospective application. *See Nolte v. State*, 726 So. 2d 307, 308–09 (Fla. 2d DCA 1998) (citing *Hendeles*). Justice Pariente's concurring opinion in *Castano* made it clear that the Florida Supreme Court's decision to apply *Padilla* there was not based on principles controlling the retroactive application of new law but rather on a "pipeline" analysis. The retroactivity test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), was not implicated. Justice Pariente explained:

> Moreover, this case is distinguishable from those cases in which we have restricted the benefit of new law to "pipeline" cases—that is, cases in which an appellate court mandate has not yet issued on direct appeal. Those cases typically involved new law on issues that would be raised during direct appeal—not postconviction. *See Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005) (sentencing issue—application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt"); *Johnson v. State*, 904 So. 2d 400, 405, 407 (Fla. 2005) (sentencing issue—application of "*Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury, not a judge, must find every fact upon which eligibility for the death penalty depends"); *Smith v. State*, 598 So. 2d 1063, 1064 (Fla. 1992) (sentencing issue—"when an appellate court reverses a departure sentence because there

> were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines").
>
> In contrast to the above "pipeline" cases, *Padilla* created new law that would apply to a claim raised in postconviction, not on direct appeal. Given the procedural posture of this case—where the defendant timely raised the same postconviction claim as the defendant in *Padilla* and the resolution of her claim was still pending at the time *Padilla* was decided—it is in effect a "pipeline" case for purposes of whether *Padilla* applies. *Cf. Barthel v. State*, 882 So. 2d 1054, 1055 (Fla. 2d DCA 2004) (applying this Court's decision in *Nelson v. State*, 875 So. 2d 579 (Fla. 2004)—which established new law regarding the requirements for an ineffective assistance of counsel claim for failing to call a witness—to the appeal from the denial of a postconviction motion, because the "appeal was in the 'pipeline' at the time *Nelson* became final," and therefore the defendant "is entitled to the benefit of the controlling law in *Nelson* in effect at the time of appeal").

37 Fla. L. Weekly at S741–42 (Pariente, J., concurring).

Like *Castano*, this case stands in stark contrast to *Hernandez v. State*, 37 Fla. L. Weekly S730, S731–32 (Fla. Nov. 21, 2012), in which the Florida Supreme Court refused to apply *Padilla* where the defendant waited nine years after his 2001 plea to move for postconviction relief. Hernandez's initial postconviction proceedings were final before *Padilla* was decided. Here, Perez timely filed his motion for postconviction relief within the two-year time limit for raising a challenge under rule 3.850(b). I recognize that Castano had already *filed* her postconviction motion and raised the issue when *Padilla* was decided while Perez had not. However, the right materialized (essentially creating a new postconviction claim for ineffective assistance of counsel—and a new basis to challenge a plea) before Perez's time for bringing a postconviction challenge to the plea in his case had expired. At the time Perez filed his initial and timely motion for postconviction relief, *Padilla* was the controlling law in effect for the claims raised. Indeed, the most compelling similarity in the procedural posture of Castano's and Perez's cases is that *Padilla* was the controlling law in effect *before* the appellate court resolved either of their initial postconviction claims. A further similarity is that both Castano's and

Perez's convictions were "final" for the purposes of direct appeal at the time *Padilla* was decided.

Justice Pariente's observation in *Castano* that "it would be inequitable and illogical to hold that only one of two similarly situated defendants . . . should receive the benefit of the United States Supreme Court's decision" applies with equal force to the case at hand. 37 Fla. L. Weekly at S742. Accordingly, I would reverse the summary denial of Perez's timely rule 3.850 motion and remand the case for further proceedings. Because I do not believe that the recent case of *Chaidez v. United States* resolves the Florida appellate "pipeline" issue presented here, I would certify the following question as one of great public importance:

May a defendant raise a claim of ineffective assistance of trial counsel under *Padilla v. Kentucky*, 559 U.S. 356 (2010), where the claim is raised within the two-year time limitation of rule 3.850 but where the conviction at issue became final on direct appeal before *Padilla* was decided?

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Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Raag Singhal, Judge; L.T. Case No. 09-003654 CF10A.

Ricardo Corona and Sahar Razzaghi-Awal of The Corona Law Firm, Miami, for appellant.

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Not final until disposition of timely filed motion for rehearing.