IN THE COURT OF APPEALS OF IOWA

No. 3-649 / 12-2237
Filed October 2, 2013

JOSEFINA TENA-CORRAL,
Applicant-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

The State of Iowa appeals the district court ruling granting Josefina Tena-Corral's application for postconviction relief. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick Jennings, County Attorney, and Mark Campbell, Assistant County Attorney, for appellant.

Priscilla E. Forsyth, Sioux City, for appellee.

Heard by Mullins, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

BOWER, J.

The State of Iowa appeals the district court ruling granting Josefina Tena-Corral's application for postconviction relief. The State argues the district court should not have found Tena-Corral's trial counsel performed ineffectively when she was not fully advised of the immigration consequences of her guilty plea. The district court's ruling was based upon a prediction as to the retroactivity of *Padilla v. Kentucky* that turned out to be incorrect. Because *Padilla* is not retroactive, trial counsel was not ineffective for failing to fully explain the immigration consequences of a guilty plea to Tena-Corral. We also reject Tena-Corral's contention she was affirmatively misinformed about the immigration consequences of her plea. We reverse and remand.

I. Background Facts and Proceedings

This case presents the unusual circumstance where the district court predicted it would render a different ruling if it had the benefit of recent developments in the law. In the district court ruling, alternative outcomes were provided contingent upon a then-pending Supreme Court decision. The United States Supreme Court in *Chaidez v. U.S.*, 133 S. Ct. 1103 (2013), entered a ruling that did not match the district court's prediction, leaving us with a district court ruling that essentially disavows itself.

Tena-Corral is an immigrant who admits she has been in this country illegally for a number of years. She has five children living with her in Iowa and an additional three children who reside in Mexico. Enrique Estrada is the father

of four of these children. Estrada has lived with Tena-Corral intermittently and has failed to provide financial support for the children in spite of being employed.

In 2002 Tena-Corral applied for state assistance for her children. She falsely reported in the applications Estrada was not working and forged his signature on several of the forms. She was charged with two counts of fraudulent practices in the first degree. On September 9, 2008, Tena-Corral entered into an agreement with the State to plead guilty to one count of fraudulent practices in the first degree and receive a ten-year suspended prison sentence and five years of formal probation.

Tena-Corral filed her application for postconviction relief on July 13, 2011, claiming she received ineffective assistance of counsel. She contends her trial counsel advised her that a guilty plea resulting in a sentence of probation would carry no immigration consequences because immigration authorities would not be notified of the plea. Her trial counsel, Peter Van Etten, testified during the postconviction relief trial that he informed her any conviction would result in deportation.

This advice is important as it impacts upon Tena-Corral's understanding of a specific provision of federal immigration law. The United States Code allows for the cancellation of a deportation action when certain circumstances exist. *See* 8 U.S.C. § 1229b(b)(1) (2002).[1] Under the statute a conviction for fraudulent practices in the first degree would preclude Tena-Corral from utilizing the cancellation procedure. Tena-Corral argues Van Etten provided her with

[1] In their brief, the State incorrectly focuses on 8 U.S.C. § 1229b(a). Because Tena-Corral has always focused on section 1229b(b)(1), we decide the case on that basis.

incomplete and incorrect advice when he failed to explain the only way to preserve the possibility of cancellation would be to proceed to trial and be acquitted.

II. Standard of Review

We normally review postconviction relief rulings for errors of law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, where applications allege ineffective assistance of counsel, our review is de novo. *Id.*

III. Discussion

A. Retroactivity of Padilla

The district court thoroughly considered the facts of the case and issued a ruling that recognized the then-existing uncertainty of the law directly impacting this case. First, the district court resolved the conflicting testimony and found Van Etten, as an experienced attorney, did not misadvise Tena-Corral as to the immigration consequences of her plea. Instead, the district court found Van Etten advised Tena-Corral that any conviction would result in deportation regardless of the sentence imposed but failed to advise her specifically that a not guilty verdict was her only way to possibly remain in the United States, albeit illegally.

Settling upon an incomplete-advice theory, the district court then recognized Van Etten would only be ineffective for failing to give complete advice on the immigration consequences if the United States Supreme Court's decision

in *Padilla v. Kentucky*, 559 U.S. 356 (2010), applied retroactively to Tena-Corral.[2] Predicting *Padilla* would apply retroactively, the court found Van Etten ineffective for failing to give Tena-Corral complete advice on the immigration consequences of her plea.

When the district court ruling was issued, two cases were working their way through two separate court systems each addressing the retroactivity of *Padilla*. In *Perez v. State*, 816 N.W.2d 354 (Iowa 2012), our supreme court declined to directly determine the outcome of the retroactivity question. 816 N.W.2d at 360–61. The United States Supreme Court, however, resolved the question in *Chaidez v. United States*, 133 S. Ct. 1103 (2013). In *Chaidez,* the Supreme Court decided *Padilla* announced a new rule which, under *Teague v. Lane*, 489 U.S. 288 (1989), does not apply retroactively. *Chaidez*, 133 S. Ct. at 1111–12. Even if Van Etten failed to fully advise Tena-Corral of the immigration consequences of her plea, Van Etten was not ineffective under *Padilla* because *Padilla* does not apply to this case.

Because it was clear *Padilla* would not apply to these facts at the time the parties filed their briefs in this appeal, Tena-Corral is in the unusual position of being forced to argue the district court was incorrect in a ruling that came out in her favor. She does so by arguing Van Etten was ineffective by affirmatively misadvising her as to the immigration consequences of her plea.

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[2] In *Padilla*, the United State Supreme Court ruled trial counsel is ineffective by failing to properly advise a defendant on the immigration consequences of a guilty plea. 559 U.S. at 139. The court did not address at the time whether *Padilla* would apply retroactively.

B. Misinformation

Our supreme court has long recognized trial counsel can be ineffective by misinforming a defendant about the collateral consequences of a plea. *See Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). "The rule is well established that defense counsel . . . commits reversible error if counsel misinforms the defendant as to these consequences." *Stevens v. State*, 513 N.W.2d 727, 728 (Iowa 1994). Van Etten would have performed ineffectively if he had advised Tena-Corral incorrectly about the immigration consequences of her plea. We do not, however, find this to be the case. Van Etten testified it was his practice to advise all of his clients who faced possible immigration consequences that any conviction would result in deportation. He did so in the belief that each defendant was better off understanding the worst case scenario even if there was a possibility deportation would not occur. Because we find Van Etten did the same in this case, we conclude he did not misadvise Tena-Corral and did not perform ineffectively. Van Etten's advice was correct: any conviction in this case would prevent Tena-Corral from using the cancellation procedure and would consequently result in deportation. The ruling of the district court is reversed and the case remanded for entry of a ruling dismissing the application.

REVERSED AND REMANDED.