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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000105-DG

DILIPKUMAR PATEL — APPELLANT

ON DISCRETIONARY REVIEW FROM HARDIN CIRCUIT COURT
v. HONORABLE KEN HOWARD, JUDGE
ACTION NO. 14-XX-00012

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2015-CA-001443-MR

ELIEZAR SANCHEZ A/K/A
ELIESER SANCHEZ-SALGADO — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 00-CR-002468

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: In *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the United States Supreme Court held the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea. In *Chaidez v. United States*, 568 U.S. 342, 133 S.Ct. 1103, 1105, 185 L.Ed.2d 149 (2013), the United States Supreme Court further held *Padilla* does not have retroactive effect, so a person whose conviction became final before *Padilla* was decided cannot benefit from it. Subsequently, panels of the Kentucky Court of Appeals held, in reliance on *Chaidez*, that *Padilla* does not have retroactive effect in post-conviction proceedings in Kentucky. *See Al-Aridi v. Commonwealth*, 404 S.W.3d 210, 214 (Ky. App. 2013); *Diaz v. Commonwealth*, 479 S.W.3d 90, 92 (Ky. App. 2015); *Djoric v. Commonwealth*, 487 S.W.3d 908, 911 (Ky. App. 2016).

Dilipkumar Patel and Eliezar Sanchez a/k/a Elieser Sanchez-Salgado both pleaded guilty to criminal offenses before *Padilla* became final. Under federal law, their criminal convictions render them subject to deportation. Patel, by means of a petition for discretionary review, and Sanchez, by means of a direct appeal, seek to reverse orders denying their post-conviction motions to vacate their

guilty pleas on the grounds their attorneys failed to advise them of the deportation consequences. Citing *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and *Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), Patel and Sanchez seek to revisit the issue of *Padilla's* retroactive applicability, arguing a state court may adopt broader standards of retroactivity than those afforded in federal proceedings. Because they raise similar issues and arguments, their appeals have been designated to be heard together.

FACTS

As a preliminary matter, we address certain deficiencies in the briefs of both appellants. The Commonwealth correctly asserts the Statement of Facts in Patel's brief relies almost entirely on the statement of facts contained in his appeal to the circuit court, rather than on citations to the records of the district and circuit courts. Similarly, Sanchez's appellate brief refers without citation to a misdemeanor charge incurred in 2014 and to subsequent deportation proceedings, but the record lacks any documents relating to these events. "CR[1] 76.12(4)(c) requires a party's 'ample' citation to the record in his Statement of the Facts and Argument." *Walker v. Commonwealth*, 503 S.W.3d 165, 170 (Ky. App. 2016), *review denied* (Dec. 8, 2016). The Commonwealth further asserts a majority of Patel's arguments were never presented to the district court and are consequently inadequately preserved.

[1] Kentucky Rules of Civil Procedure.

These shortcomings could warrant the imposition of sanctions, because "CR 76.12(4)(c) grants this Court great discretion over the imposition of sanctions for failure to comply with its provisions." *Walker*, 503 S.W.3d at 171. "Any sanction must be commensurate with the harm caused and the severity of the defect, as determined on a case-by-case basis." *Id*. at 171 (internal citations and quotation marks omitted). Because these cases present primarily questions of law rather than factual disputes, and because the circuit courts did address the substance of the claims the appellants now raise on appeal, we will overlook any deficiencies and review their arguments.

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Patel has been a lawful permanent resident of the United States since 2004. His wife and two minor children are American citizens. On January 4, 2007, Patel was charged with possession with the intent to deliver drug paraphernalia after some glass pipes were found in the inventory of a convenience store he had purchased through his company, Keshav Food Mart, Inc. Patel entered a plea of guilty to misdemeanor possession of drug paraphernalia and paid a fine of $500.00.

At some unspecified point in 2014, deportation proceedings were commenced against Patel. On June 11, 2014, he filed a pleading in district court styled "Motion to vacate and set aside the guilty plea, verdict and sentencing." The motion did not identify the rule under which Patel was proceeding, but sought relief on the grounds Patel's attorney had been ineffective IN advising him to plead

guilty, because there was insufficient evidence of the possession charge. The motion did not allude to Patel's immigration status, nor to any misadvice or lack of advice from his attorney regarding his immigration status.

At the hearing on the motion, the district court raised the issue of *Padilla sua sponte* and allowed Patel to supplement his pleading with affidavits. Patel submitted an affidavit in which he stated after purchasing the convenience store and its inventory, he hired a general manager and paid only one brief visit to the location thereafter. According to Patel, the previous owner had been notified some glass pipes he was selling could no longer be sold, but he did not inform Patel. Patel was charged with the sale of drug paraphernalia forty-five days after purchasing the store.

His attorney's affidavit stated he had been unaware the guilty plea would subject his client to deportation, and did not advise his client in this regard because he was not an immigration attorney. He stated Patel had a good defense to the drug paraphernalia charge but he had advised him to accept the plea offer because it was not worth taking the case to trial.

The district court found Patel's motion was untimely under RCr[2] 11.42, and the only rule that could conceivably apply was CR 60.02(f) which provides relief from a judgment for a reason of "an extraordinary nature." It ultimately denied the motion, concluding *Padilla* was not to be applied retroactively.

[2] Kentucky Rules of Criminal Procedure.

Patel appealed to the Hardin Circuit Court which affirmed the district court's ruling, addressing his claims under both RCr 11.42 and CR 60.02(f). Under RCr 11.42, the circuit court ruled it was bound by this Court's opinion in *Al-Aridi,* (which held *Padilla* was not retroactive) and the motion was untimely under the three-year limitations period of RCr 11.42(10). Under CR 60.0(f), the circuit court ruled immigration problems do not constitute a reason of extraordinary nature justifying relief in reliance on *Commonwealth v. Bustamonte*, 140 S.W.3d 581 (Ky. App. 2004).

Patel filed a motion for discretionary review in this Court which posited the following questions:

> May Kentucky courts give broader retroactive effect to *Padilla* as a matter of state law than what has been enunciated under federal law?
>
> Is the Sixth Amendment right enunciated in *Padilla* a "new" rule pursuant to Kentucky law as set forth in *Leonard*?
>
> Is an affirmative representation that a guilty plea would not have immigration deportation consequences categorically different from a failure to warn of immigration deportation consequences?[3]

Patel's petition was granted and this appeal followed.

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Sanchez is a Cuban national who until recently was a permanent resident of the United States. On November 14, 2000, he was indicted on charges

[3] No argument is advanced in this appeal regarding the final question presented in Patel's motion for discretionary review. Therefore, no discussion of this matter is warranted.

of assault in the first degree and terroristic threatening. On October 29, 2001, he entered a plea of guilty to an amended charge of assault in the second degree and one charge of terroristic threatening. According to Sanchez, his attorney did not advise him of any possible immigration consequences of his guilty plea. On August 14, 2002, he was sentenced to a total of eight years probated for five years. Sanchez successfully completed his probation.

In 2014, Sanchez was charged with a misdemeanor. When he was screened for immigration purposes, the prior second degree assault conviction was discovered and deportation proceedings against him were commenced.

On May 14, 2015, Sanchez filed a motion to vacate, correct or set aside his conviction and sentence pursuant to CR 60.02.[4] He attached an affidavit stating he had not understood when he entered his guilty plea to a felony that he would be subject to automatic deportation. He argued ineffective assistance of counsel under *Padilla*. While acknowledging the retroactive application of *Padilla* was rejected by the United States Supreme Court in *Chaidez*, he argued states may broaden the class of retroactively applicable rules in the administration of their own post-conviction regimes.

The Jefferson Circuit Court denied the motion on the grounds there was no legal basis upon which Sanchez was entitled to relief, observing Sanchez was sentenced in 2002, *Padilla* was rendered in 2010, and *Padilla* is not retroactive under *Chaidez*. Sanchez timely appealed to this Court.

[4] Neither the motion nor the affidavit is in the record before us.

ANALYSIS

Patel raises four arguments on appeal: (1) the circuit court erred in relying on *Bustamonte* to deny CR 60.02 relief because it has been superseded by *Padilla*; (2) the circuit court erred in failing to apply the two-prong *Strickland* test to determine whether he had ineffective assistance of counsel in the entry of his guilty plea; (3) the circuit court failed to apply the exceptions to the three-year limitations period under RCr 11.42(10); (4) his attorney's failure to inform him of the immigration consequences of his plea constituted a reason of extraordinary nature justifying relief pursuant to CR 60.02(f); and (5) the circuit court erred in applying *Chaidez* and *Teague,* without considering *Leonard,* which he contends would permit a collateral challenge to his conviction.

Patel's first four arguments are all contingent on the retroactive application of *Padilla*, the issue which is central to these consolidated appeals and which will be addressed later in this opinion. His second and third arguments are further premised on the assumption relief is available under RCr 11.42. RCr 11.42(10)(b) permits a motion to be filed after expiration of the three-year limitations period if "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." Thus, invoking this provision would still require a holding that *Padilla's* establishment of the right of a criminal defendant to be informed of the deportation consequences of a guilty plea applies retroactively.

In any event, relief is unavailable to Patel under RCr 11.42 because he is not challenging a sentence he is currently serving. By the express terms of the rule itself, relief is only available to a "prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack[.]" RCr 11.42(1). "RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody." *Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009) (quoting *Sipple v. Commonwealth*, 384 S.W.2d 332 (Ky. 1964)). "RCr 11.42 is procedural remedy designed to give a convicted prisoner a direct right to attack the conviction *under which he is being held.*" *Id*. (quoting *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966) (emphasis in original)). "It is axiomatic that a person cannot be released from a sentence which has been completed." *Id*. Patel was convicted of a misdemeanor; he paid a fine and never served a sentence. Consequently, we may address only whether Patel was entitled to relief under CR 60.02.

Sanchez recognizes he is not entitled to relief under RCr 11.42, and seeks relief under 60.02 because it provides an avenue to address issues which cannot be raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for

abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). Absent a "flagrant miscarriage of justice," we will affirm the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

In holding *Padilla* is not to be applied retroactively, the United States Supreme Court relied on *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), which made "the retroactivity of our criminal procedure decisions turn on whether they are novel." *Chaidez*, 133 S.Ct. at 1107. Thus, when the United States Supreme Court announces a "new rule," "a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding." *Id*. The *Chaidez* Court determined *Padilla* did indeed announce a "new rule" and consequently did not have retroactive effect. *Id*. at 1105.

The scope of the *Teague* retroactivity rule is limited, however, to federal habeas proceedings. "[T]he *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 1042, 169 L.Ed.2d 859 (2008).

Patel and Sanchez both contend under *Danforth*, Kentucky state courts are free to broaden the class of retroactively applicable rules if they choose, and need not be bound by the holding of *Chaidez*.

Although the Supreme Court of Kentucky has not addressed the retroactivity of *Padilla* specifically, it has delineated the boundaries of retroactivity available in Kentucky. In *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the appellant proceeding under RCr 11.42 sought retroactive application of a new rule enunciated in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), that an unpreserved error which was not deemed palpable on direct appeal could nonetheless be raised in a collateral post-conviction attack based on ineffective assistance of counsel.

The *Leonard* Court reviewed the effect of *Teague*, stating "*Teague* is not binding on the states if they choose to broaden the class of retroactively applicable rules. . . . Nor is *Teague* binding as to a new rule grounded solely in state law (as opposed to the federal constitution). *American Trucking Associations, Inc. v. Smith,* 496 U.S. 167, 177, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (plurality opinion) ("When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.")." 279 S.W.3d at 159-60.

The *Leonard* Court then addressed the retroactivity of new federal constitutional rules in Kentucky. "This Court applied the *Teague* test in evaluating the retroactivity of new federal constitutional rules in *Bowling v. Commonwealth,*

163 S.W.3d 361, 370 (Ky. 2005). **Under that decision, Kentucky's constitutional retroactivity rule is no broader than that employed by the federal courts**." *Id*. at 160 (emphasis added). The Court then concluded under these standards the *Martin* rule could be applied retroactively because it "was not of a constitutional dimension; rather, it was simply one of criminal procedure springing from this Court's own rules as to whether certain issues may be raised in a collateral attack. As such, this Court is free to adopt whatever standard of retroactivity it finds reasonable." *Id*.

By contrast, *Padilla* indisputably announced a new federal constitutional rule that broadened the rights afforded under the Sixth Amendment. As the United States Supreme Court announced at some length in *Chaidez*,

> when we decided *Padilla*, we answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions—and our reasoning reflected that we were doing as much. In the normal *Strickland* case, a court begins by evaluating the reasonableness of an attorney's conduct in light of professional norms, and then assesses prejudice. But as earlier indicated, *Padilla* had a different starting point. Before asking whether the performance of Padilla's attorney was deficient under *Strickland,* we considered (in a separately numbered part of the opinion) whether *Strickland* applied at all. Many courts, we acknowledged, had excluded advice about collateral matters from the Sixth Amendment's ambit; and deportation, because the consequence of a distinct civil proceeding, could well be viewed as such a matter. But, we continued, no decision of our own committed us to "appl[y] a distinction between direct and collateral consequences to define the scope" of the right to counsel. And however apt that distinction might be in other contexts, it should not exempt from Sixth Amendment

> scrutiny a lawyer's advice (or non-advice) about a plea's deportation risk. Deportation, we stated, is "unique." It is a "particularly severe" penalty, and one "intimately related to the criminal process"; indeed, immigration statutes make it "nearly an automatic result" of some convictions. We thus resolved the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences: Notwithstanding the then-dominant view, "*Strickland* applies to Padilla's claim."
>
> If that does not count as "break[ing] new ground" or "impos[ing] a new obligation," we are hard pressed to know what would. Before *Padilla*, we had declined to decide whether the Sixth Amendment had any relevance to a lawyer's advice about matters not part of a criminal proceeding. Perhaps some advice of that kind would have to meet *Strickland*'s reasonableness standard -- but then again, perhaps not: No precedent of our own "*dictated*" the answer. And as the lower courts filled the vacuum, they almost uniformly insisted on what *Padilla* called the "categorica[l] remov[al]" of advice about a conviction's non-criminal consequences—including deportation—from the Sixth Amendment's scope. It was *Padilla* that first rejected that categorical approach—and so made the *Strickland* test operative—when a criminal lawyer gives (or fails to give) advice about immigration consequences. In acknowledging that fact, we do not cast doubt on, or at all denigrate, *Padilla*. Courts often need to, and do, break new ground; it is the very premise of *Teague* that a decision can be right and also be novel. All we say here is that *Padilla*'s holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been—in fact, was not—"apparent to all reasonable jurists" prior to our decision. *Padilla* thus announced a "new rule."

Chaidez, 133 S.Ct. at 1110–11 (internal citations and footnote omitted).

"As an intermediate appellate court, this Court is bound by published decisions of the Supreme Court of Kentucky. SCR 1.030(8)(a). The Court of

Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor Court." *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000). Thus, under *Leonard*, *Padilla* is not applied retroactively in Kentucky because it is a new federal constitutional rule. Consequently, the circuit courts in Patel and Sanchez's cases did not abuse their discretion in refusing to apply *Padilla* retroactively.

The circuit rulings are also in keeping with the principle that the "remediation of a legal decision that was correct under the case law in existence at the time of his [guilty plea] . . . is an improper use of a CR 60.02 motion." *Berry v. Commonwealth*, 322 S.W.3d 508, 511 (Ky. App. 2010). "A change in the law simply is not grounds for CR 60.02 relief except in 'aggravated cases where there are strong equities.'" *Id*. (quoting *Reed v. Reed,* 484 S.W.2d 844, 847 (Ky. 1972)). Allowing the retroactive application of decisions "would wholly vitiate the finality of judgments in that each change in the law would allow or require relitigation of the facts and the law of every case." *Id*.

Finally, Sanchez contends he was entitled to an evidentiary hearing on his motion. Such a hearing is required only if the movant "affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). He has not met this standard and the circuit court did not err in not holding a hearing.

For the foregoing reasons, the order of the Hardin Circuit Court affirming the district court's denial of Patel's motion to set aside his guilty plea and vacate his conviction is AFFIRMED. The order of the Jefferson Circuit Court denying Sanchez's motion for modification of sentence pursuant to CR 60.02 is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT, DILIPKUMAR PATEL:

Nader George Shunnarah
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Teresa Young
Special Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLANT, ELIEZAR SANCHEZ A/K/A ELIESER SANCHEZ-SALGADO:

Daniel M. Alvarez
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Emily Bedelle Lucas
Assistant Attorney General
Frankfort, Kentucky