Appeal Nos. **2014AP678**
2014AP679
2014AP680

Cir. Ct. Nos. **2004CM245**
2004CM257
2005CF83

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELISA VALADEZ,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Pursuant to WIS. STAT. RULE 809.61 (2011-12),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

How definite or imminent must deportation be in order for it to be "likely," such that a defendant may withdraw a guilty or no contest plea on the basis that he or she was not informed of the immigration consequences at the plea colloquy? If, in order to withdraw the plea, the defendant must show that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

deportation proceedings are underway, how does this standard fit in with the time limits for a motion to withdraw the plea?

BACKGROUND

In three separate cases that are consolidated on this appeal, Melisa Valadez was convicted of possession of cocaine, tetrahydrocannabinol (THC), and drug paraphernalia pursuant to her guilty plea. She was convicted in 2004 and 2005. It is undisputed that, at the plea colloquy, the circuit court did not warn Valadez, as required by WIS. STAT. § 971.08(1)(c), that the plea and subsequent conviction might have adverse immigration consequences.

Under federal immigration law, Valadez is deportable because of her plea. Valadez is a legal permanent resident (LPR); she is not a citizen. She has three United States citizen children. With her drug-related convictions, she is deportable from the United States. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012).[2] Another consequence of her conviction is that federal statutes bar her re-entry if she travels outside the country. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012). Furthermore, Valadez must renew her LPR status every ten years. Although she indicates that there is no federal statute deeming her ineligible for a renewal of her LPR status, or for naturalization as a United States citizen, her status as deportable

[2] 8 U.S.C.A. § 1227(a)(2)(B)(i) (2012) states:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

and ineligible for re-entry implies that she would not be able to seek to renew her LPR status, much less become a citizen, without triggering deportation proceedings.

Arguing that she is unable to renew her residency, seek citizenship, or leave and re-enter the country, Valadez moved to withdraw her guilty plea. In her motion and supplemental materials, she indicated: (1) under federal law, she was "automatically removable"; (2) if she travels outside the country, she will not be admitted back in; (3) if she were to apply for citizenship, she would be denied and likely subject to deportation proceedings; and (4) renewing her LPR card, which had expired, would likely result in "severe immigration consequences warned about in [WIS. STAT.] § 971.08." In support of her motion, Valadez submitted e-mail communications between defense counsel and an immigration agent discussing deportation after a criminal sentence; the agent does not discuss Valadez in particular. Valadez also submitted various materials regarding enforcement of immigration law and the process for renewing LPR status. These materials were not specific to Valadez' case.

The State conceded that the court had failed to give Valadez the required warning, but contended that she failed to show that she is now subject to actual immigration proceedings. The circuit court denied Valadez' motion to withdraw her plea because she had not shown that immigration proceedings were underway as a result of her plea.[3]

[3] The circuit court relied on footnote eight in ***State v. Negrete***, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, discussed below, and further indicated its belief that "this area is ripe for some clarification from the appellate court."

DISCUSSION

Under WIS. STAT. § 971.08, the circuit court, when taking a guilty plea, must personally address the defendant to determine that he or she has made an informed decision to plead. Among other requirements, the circuit court must advise the defendant that, if he or she is not a citizen of the United States, "a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law." Sec. 971.08(1)(c). If the circuit court fails to give this warning, and the defendant "later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization," the circuit court, on the defendant's motion, "shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea." Sec. 971.08(2). If the defendant has shown these adverse immigration consequences are likely, he or she must be allowed to withdraw the plea regardless of whether he or she was aware of such consequences.[4] ***State v. Douangmala***, 2002 WI 62, ¶¶22-25, 253 Wis. 2d 173, 646 N.W.2d 1.

The question is, what must the defendant show to fulfill the "likely" standard? In ***State v. Negrete***, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, the supreme court held that Negrete did not make a sufficient showing for plea withdrawal under WIS. STAT. § 971.08(2). First, Negrete's affidavit indicated that he could not recall if the court had given him the deportation warning, while his motion indicated that the court had not. The supreme court held that this

[4] We refer herein to "immigration consequences" as shorthand for the various adverse immigration actions referred to under WIS. STAT. § 971.08(1)(c), (2).

contradictory information did not satisfy the first prong under the statute—proving that the circuit court failed to advise of the possible negative deportation consequences of the plea. ***Negrete***, 343 Wis. 2d 1, ¶35. Second, the court addressed whether Negrete had alleged sufficient facts to show that he was likely to be deported. In discussing this requirement, the court explained:

> This requires that the defendant allege facts demonstrating a causal nexus between the entry of the guilty or no contest plea at issue and the federal government's likely institution of adverse immigration actions consistent with § 971.08(1)(c). Bare allegations of possible deportation are insufficient.
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> … Accordingly, to satisfy WIS. STAT. § 971.08(2)'s "likelihood" of immigration consequences requirement, a defendant may allege that: (1) the defendant pleaded guilty or no contest to a crime for which immigration consequences are provided under federal law; and (2) because of his plea, the federal government has manifested its intent to institute one of the immigration consequences listed in § 971.08(2), as to the defendant. As alternatives, a defendant may submit some written notification that the defendant has received from a federal agent that imports adverse immigration consequences because of the plea that was entered; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered.

Negrete, 343 Wis. 2d 1, ¶¶26-27 (footnote omitted).

> More specifically, if a defendant chooses to establish that the crime to which the defendant pleaded is one for which the defendant would have been subject to potentially adverse immigration consequences under controlling federal law, the defendant should cite the federal law upon which reliance is placed. For example, under federal law, 8 U.S.C. § 1227 (2006) delineates numerous categories of aliens who are potentially deportable. Relevant to motions under WIS. STAT. § 971.08(2) is the federal statute providing that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii).

> In addition, in such a motion, a defendant should allege that the federal government has conveyed its intent to impose one of the enumerated immigration consequences set out in WIS. STAT. § 971.08(2). This required nexus between the crime to which a plea was made and adverse immigration consequences can be demonstrated by alleging facts that show that, because of his plea, the defendant has become subject to deportation proceedings, has been excluded from admission to the country, or has been denied naturalization.

Negrete, 343 Wis. 2d 1, ¶27 n.8 (citation omitted). Negrete, who had been convicted of second-degree sexual assault, failed to identify an applicable federal statute and alleged only that he was "now the subject of deportation proceedings." ***Id.***, ¶36. The court found that these "bare allegations" were insufficient to demonstrate that his plea was "likely to result in [his] deportation." ***Id.***

Under the WIS. STAT. § 971.08(2) requirement that immigration consequences be "likely," is it enough for the defendant to show that he or she is automatically subject to deportation under specifically identified federal law? If so, do any applicable exclusions or possibilities of discretionary waiver change the analysis? Or, must the federal government affirmatively act to "manifest[] its intent to institute one of the immigration consequences listed in § 971.08(2)?" ***Negrete***, 343 Wis. 2d 1, ¶27. If that is the case, what action by the federal government is enough to trigger the right to withdraw the plea? Does "written notification that … imports adverse immigration consequences" only mean advisement that deportation proceedings are actually underway, or is a letter stating that the government is determining deportation status enough? May a defendant merely state that he or she has spoken with a federal agent "advising that adverse immigration consequences were likely," as suggested by ***Negrete***, 343 Wis. 2d 1, ¶27, or does such testimony fall short of the mark?

As noted above, ***Negrete*** indicates that the "required nexus between the crime to which a plea was made and adverse immigration consequences can be demonstrated by alleging facts that show that, because of his [or her] plea, the defendant has become subject to deportation proceedings, has been excluded from admission to the country, or has been denied naturalization." ***Id.***, ¶27 n.8. Must Valadez leave the country and be denied readmission to show that she has suffered the immigration consequence? What of application for citizenship or for renewal of her LPR status? Under these two prongs, must Valadez trigger the initiation of immigration proceedings in order to receive the statutorily mandated plea withdrawal?

Two cases that the supreme court recently accepted for review, and ***Padilla v. Kentucky***, 559 U.S. 356, 363-64, 368 (2010), upon which they both rely, shed some light on what it means for immigration consequences to be likely. ***State v. Ortiz-Mondragon***, 2014 WI App 114, ___ Wis. 2d ___, 856 N.W.2d 339, *review granted*, (Dec. 18, 2014) (No. 2013AP2435-CR), and ***State v. Shata***, No. 2013AP1437, unpublished slip op. (July 15, 2014), *review granted*, (Dec. 18, 2014) (No. 2013AP1437-CR), both addressed ineffective assistance of counsel claims based on the failure to advise regarding immigration consequences. In ***Padilla***, the court held that under "succinct, clear, and explicit" federal law counsel was deficient in failing to advise Padilla that, with his drug trafficking conviction, he was automatically subject to deportation from the United States. ***Padilla***, 559 U.S. at 368-69. Noting only that Padilla was "facing" deportation, the court concluded that counsel's performance was deficient where the applicable federal law made deportation "practically inevitable." ***Id.*** at 359, 364, 366, 369.

In ***Shata***, applying ***Padilla***, the court noted that federal law requires immediate deportation upon completion of the drug trafficking sentence imposed and that the attorney general had no power to waive deportation, ultimately concluding that the deportation consequences tied to Shata's plea were more serious than counsel's advice of "a strong likelihood." ***Shata***, No. 2013AP1437, unpublished slip op. ¶¶24-25, 28. The dissent disagreed that counsel's performance was deficient where "nothing in the record actually shows that deportation for Shata is in fact a certainty." ***Id.***, ¶40 (Brennan, J., dissenting). To show the likelihood of deportation, Shata had submitted a letter from the Department of Homeland Security saying that it was initiating an investigation "to determine whether this person is subject to removal."[5] ***Id.*** In ***Ortiz-Mondragon***, the court held that whether a crime was one of moral turpitude, which would make Ortiz-Mondragon ineligible to apply for cancellation of removal, was not "succinct, clear, and explicit," and therefore his attorney's failure to inform him of the immigration consequences was not deficient performance. ***Ortiz-Mondragon***, 856 N.W.2d 339, ¶¶12-13. While not discussing the requirements for plea withdrawal *after* conviction under WIS. STAT. § 971.08(2), these cases each analyze the advice given *prior* to conviction in light of the likelihood of immigration consequences. Thus, the analysis in these cases informs what it means for immigration consequences to be likely. *See also* ***State v. Mendez***, 2014 WI App 57, ¶¶1-2, 354 Wis. 2d 88, 847 N.W.2d 895 (discussing correct analysis for prejudice prong of ineffective assistance of counsel claim where trial counsel failed to inform defendant that conviction would "subject him to automatic

[5] The federal statutes now use the term "removal" rather than "deportation." ***Padilla v. Kentucky***, 559 U.S. 356, 364 n.6 (2010).

deportation … with no applicable exception and no possibility of discretionary waiver").

This case presents us with a second, related question, not raised by the parties. If the defendant must wait until there are pending immigration proceedings against him or her, what effect does this have on the time line in which to challenge the plea? In ***State v. Romero-Georgana***, 2014 WI 83, ___ Wis. 2d ___, 849 N.W.2d 668, the supreme court cited to a now-repealed statutory 120-day time limit on motions under WIS. STAT. § 971.08(2) (1981-82) in its discussion of timeliness of motions to withdraw under § 971.08(2) vis-à-vis motions for postconviction relief under WIS. STAT. § 974.06. ***Romero-Georgana***, 849 N.W.2d 668, ¶67 n.14. The court stated:

> When a defendant has notice that he [or she] is likely to be deported and subsequently brings postconviction claims unrelated to WIS. STAT. § 971.08(2), we think it would be unwise to allow him [or her] to bring his [or her] claim as a § 971.08(2) motion at a later time, although he [or she] may be able to bring his [or her] claim as a WIS. STAT. § 974.06 motion if he [or she] has a sufficient reason for the delay. Removing all time constraints on a WIS. STAT. § 971.08(2) motion would frustrate judicial efficiency by encouraging defendants to delay bringing those motions. In the absence of a time limit, if a defendant were indifferent to deportation or wanted to be deported, the defendant would have incentive to keep a § 971.08(2) motion in his [or her] back pocket while pursuing relief on other grounds. However, that issue is not before us. In this case, we need only address Romero-Georgana's motion under WIS. STAT. § 974.06 because that is the motion he brought.

Romero-Georgana, 849 N.W.2d 668, ¶67 n.14. The court went on to quote a judicial council note that explained that the § 971.08(2) time limit was repealed as unnecessary in 1983; litigants moving to withdraw guilty pleas could do so under WIS. STAT. § 809.30 (sixty days after service of transcript) and § 974.06. ***Romero-***

Georgana, 849 N.W.2d 668, ¶67 n.14 (quoting Judicial Council Note, 1983 Wis. Act 219, § 43). While not imposing a time limit on § 971.08(2) motions for plea withdrawal, the majority strongly suggests that there should be one.[6]

The ***Romero-Georgana*** dissent notes that the 120-day time limit was repealed before the immigration warning was added to the colloquy. ***Romero-Georgana***, 849 N.W.2d 668, ¶93 n.3 (Bradley, J. dissenting). The dissent also elaborates on the fact that WIS. STAT. § 971.08(2) does not contain a time limit and on the concerns attendant to imposing one.

> Nothing in WIS. STAT. § 971.08(2) requires a defendant to bring a motion to withdraw under the auspices of WIS. STAT. § 974.06. Nothing in WIS. STAT. § 971.08(2) indicates that a motion to withdraw can be brought under another statute.…
>
> The apparent reason the majority incorporates the [WIS. STAT.] § 974.06 and the [***State v.***] ***Escalona-Naranjo*** [185 Wis. 2d 168, 517 N.W.2d 157 (1994)] standard is because it considers the defendant's motion untimely under WIS. STAT. § 971.08(2). Majority op., ¶66. Yet, unlike the other statutory procedures for postconviction motions, WIS. STAT. § 971.08(2) imposes no time limitations. *See, e.g.*, WIS. STAT. §§ 809.30 and 974.02 (requiring defendant to file notice of appeal or motion seeking postconviction relief within 60 days after service of transcript or court record).
>
> It is impractical to expect a defendant to move timely to withdraw a plea on a ground for which he [or she] would have no knowledge. As explained in [***State v.***] ***Vang***, [2010 WI App 118, ¶14,] 328 Wis. 2d 251, 789 N.W.2d 115, "[t]he statute anticipates that the motion to vacate the judgment and withdraw the plea will be submitted following a qualifying event in the future and reserves the

[6] ***State v. Romero-Georgana***, 2014 WI 83, ¶67 n.14, ___ Wis. 2d ___, 849 N.W.2d 668, was about a WIS. STAT. § 974.06 motion, not a WIS. STAT. § 971.08(2) motion. However, "the court of appeals may not dismiss a statement from an opinion by [the supreme court] by concluding that it is dictum." ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

> right to defendants who demonstrate they have suffered the particular harm."
>
> Notably, the qualifying event, notice of deportation, will often be long after the timeframes for filing for postconviction relief under WIS. STAT. §§ 974.02 and 809.30 have expired. One commentator observed, "it often takes more than a decade for the INS (now ICE) to initiate deportation proceedings." Cody Harris, Comment, *A Problem of Proof: How Routine Destruction of Court Records Routinely Destroys a Statutory Remedy*, 59 Stan. L.Rev. 1791, 1805 (2007). Thus, the majority's suggestion that Romero-Georgana's motion would be untimely under WIS. STAT. § 971.08(2) is supported neither by practicality nor by the text of the statute.

Romero-Georgana, 849 N.W.2d 668, ¶¶90-93 (Bradley, J., dissenting) (citations and footnote omitted).

How would such a time limit fit in with the possible need to await actual deportation proceedings before moving to withdraw the plea? If, after a certain point, the motion must be brought as one for ineffective assistance of postconviction counsel, how could the defendant have a colorable claim when the plea withdrawal claim was not ripe postconviction? Is a WIS. STAT. § 971.08(2) motion doomed as premature when there are no deportation proceedings underway at the time of conviction, doomed as an ineffective assistance of postconviction counsel claim when there was no ripe claim to pursue, yet doomed as too late when a procedural time limit has passed prior to immigration proceedings being initiated? This may be a Catch-22 for the defendant who was not warned about immigration consequences in the first place.

CONCLUSION

The degree of certainty necessary to show, for purposes of plea withdrawal under WIS. STAT. § 971.08(2), that a defendant is likely to suffer immigration consequences as a result of a guilty plea is not clear under existing case law. The courts, the bar, and the public would benefit from resolution of this recurring question. We respectfully certify this case to the supreme court so that it can establish the appropriate standard for plea withdrawal due to the likelihood of immigration consequences.

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