WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 6, 2015
9:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Walworth County Circuit Court, Judge David M. Reddy presiding.

2014AP678-80 State v. Valadez

This case examines 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.

More specifically, the District II Court of Appeals asks 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. Also, the Court of Appeals asks: If, in order to withdraw the plea, the defendant must show that deportation proceedings are underway, how does this standard fit in with the time limits for a motion to withdraw the plea?

Some background: In 2004 and 2005, Melisa Valadez was convicted of possession of cocaine, tetrahydrocannabinol (THC), and drug paraphernalia pursuant to a guilty plea. 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.

Valadez is a legal permanent resident (LPR); she is not a citizen. She has three children who are U.S. citizens. Under federal immigration law, Valadez is deportable because of her plea. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012), which states that 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.

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 10 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 U.S. citizen, her status as "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.

Valadez moved to withdraw her guilty plea on the grounds that she is unable to renew her residency, seek citizenship, or leave and re-enter the country. 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's motion to withdraw her plea because she had not shown that immigration proceedings were underway as a result of her plea.

The Court of Appeals also presents the question: 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 post-conviction relief under WIS. STAT. § 974.06. Romero-Georgana, 849 N.W.2d 668, ¶67 n.14.

The parties have been asked to file briefs in this case after decisions in two other cases to be argued before the Wisconsin Supreme Court on April 21: State v. Ortiz-Mondragon, 2014 WI App 114, 358 Wis. 2d 423, 856 N.W.2d 339, and State v. Shata, 2013AP1437.

A decision in this case is expected to help establish the appropriate standard for plea withdrawal due to the likelihood of immigration consequences.