



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



STATE OF ARIZONA v. HECTOR SEBASTION NUNEZ-DIAZ,
CR-18-0514-PR

PARTIES:

Petitioner: State of Arizona

Respondent: Hector Sebastian Nunez-Diaz

FACTS:

In June 2013, Nunez-Diaz was pulled over for speeding and then arrested for failing to provide identification. A search incident to his arrest uncovered small amounts of methamphetamine and cocaine. Nunez-Diaz was charged with possession or use of a dangerous drug and a narcotic drug, each a class four felony.

Nunez-Diaz's family retained a private law firm to represent him in his pending criminal matter. Because Nunez-Diaz is not in the country legally, the family first spoke with an immigration attorney who outlined the efforts the firm would take to try to reduce Nunez-Diaz's criminal exposure and then minimize the immigration consequences. Because the criminal case had to be completed first, his case was assigned to a criminal defense attorney.

The criminal defense attorney contacted the prosecutor and was told that the only plea offer the State would make would be to permit Nunez-Diaz to plead guilty to possession of drug paraphernalia. Nunez-Diaz ultimately pled guilty to possession of drug paraphernalia. His sentence was suspended, and he was placed on eighteen months' unsupervised probation.

At the time of Nunez-Diaz's plea, Immigration and Customs Enforcement (ICE) had placed an immigration "hold" on him. The day he pled guilty, he was transferred to ICE custody. Because of his conviction for possession of drug paraphernalia, ICE determined that Nunez-Diaz would not be permitted to remain in the United States. On the advice of a different attorney, Nunez-Diaz agreed to "voluntary departure" and he returned to Mexico.

While in Mexico, Nunez-Diaz filed a notice of post-conviction relief in Maricopa County Superior Court. Counsel was appointed and filed a petition arguing that Nunez-Diaz's criminal attorney had provided him with ineffective assistance during the plea negotiations. The petition argued that the criminal attorney has failed to advise Nunez-Diaz that he would be deported if he pled guilty to possession of drug paraphernalia.

After an evidentiary hearing, the trial court found that Nunez-Diaz's criminal counsel had "misrepresented the immigration consequences to defendant." Based on this, the trial court found that counsel's actions "fell below an objective standard of reasonableness," in violation of

Strickland v. Washington, 466 U.S. 668 (1984), and *Padilla v. Kentucky*, 559 U.S. 356 (2010). The trial court also held that Nunez-Diaz had established prejudice as required for a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), when Nunez-Diaz testified that he “would not have signed the plea if he was adequately advised of the immigration consequences.” The trial court granted the petition for post-conviction relief and set aside Nunez-Diaz’s plea agreement. The State appealed.

The court of appeals issued an unpublished split decision. The majority held that because the trial court had found Nunez-Diaz more credible than his former attorney, “Nunez-Diaz had established he suffered from both deficient performance and prejudice when he entered a plea not understanding the immigration consequences of pleading guilty.” *State v. Nunez-Diaz*, 1 CA-CR 16-0793 PRPC, 2018 WL 4500758, at *2 ¶ 10 (Ariz. App. Sept. 18, 2018) (mem. decision). The majority noted that Nunez-Diaz was a “deportable alien prior to his conviction,” but held that “the record below does not establish that he necessarily would have been deported had he gone to trial and been acquitted of the charges.” *Id.* ¶ 11. The majority thus denied the State’s request for relief.

The dissent stated:

The record below indicates that (i) Nunez-Diaz did not have legal immigration status in the United States, (ii) Immigration and Customs Enforcement officials had placed a detention hold for removal proceedings against him prior to his guilty plea, and (iii) Nunez-Diaz agreed to voluntary departure and did not contest removal after his conviction. Based on this record, Nunez-Diaz was a deportable alien prior to his conviction, see 8 U.S.C. § 1227(a)(1)(B), and his only potential claim of prejudice arises from the possibility of discretionary relief from removal under 8 U.S.C. § 1229b.

Id. at *3 ¶ 14 (Morse, J., dissenting). The dissent thus would have held that under “these circumstances, the superior court erred in finding that Nunez-Diaz established prejudice.” *Id.* (citations omitted).

ISSUE:

“Whether Respondent, an undocumented alien arrested for violating Arizona law by speeding, failing to have identification while operating a motor vehicle, possessing dangerous drugs (methamphetamine), possessing narcotic drugs (cocaine), and whose arrest resulted in an Immigration and Customs Enforcement hold being lodged against him, should be granted post-conviction relief on an ineffective-assistance-of-counsel claim where no counsel could have navigated around Respondent’s pre-existing deportable alien status.”

This Summary was prepared by the Arizona Supreme Court Staff Attorney’s Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.