2024 Annual Conference

Niagara Falls, New York

Presiding Over Cases Involving Non-Citizen Defendants

Date: Tuesday, September 24, 2024
Instructors:

Sharon Ames, Esq.
Hon. David Gideon
Daniel Jackson, Esq.
MCLE: 1.0 DIEB

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association

Sharon Ames, Esq. is the Immigration Law Director of the Regional Immigration Assistance Center for Region 2. The RIAC provides legal, technical and language access support to both criminal defense and family court practitioners concerning the immigration consequences of any plea bargain or family court disposition for noncitizen clients who qualify for assigned counsel or public defender services. The RIAC also provides free trainings to both attorneys and the judiciary. Region 2 covers sixteen counties in the 5th and 6th judicial districts.

Ms. Ames is a graduate of Syracuse University College of Law and St. Lawrence University, where she majored in Government and Spanish. She is the sole member of Ames Immigration Law, PLLC, and has had her own law practice in Syracuse, since 1984, where she practiced in the areas of criminal defense, both in private practice and as an Assistant Public Defender in Cortland County, and in family law, both as assigned counsel and as a Law Guardian.

Sharon has practiced exclusively in Immigration Law since 1999 and is a member of the American Immigration Lawyers Association (AILA). In the area of Immigration, her practice has centered on "crimmigration," family- based immigration, citizenship, and Special Immigrant Juveniles. She served as Attorney for the Child, for six years, in Family Court, on behalf of unaccompanied minor refugee (URM) children placed with the Onondaga County Division of Child and Family Services.

Sharon is a participating attorney in the Onondaga County Volunteer Lawyers Project for Immigration and serves on the Access to Justice Committee for the 5th Judicial District. She was a volunteer attorney for the Vera House Monday Night Legal Clinic for nearly 15 years, providing free consults to victims of domestic violence seeking legal assistance.

Sharon is fluent in Spanish.

Daniel E. Jackson, Esq. is the Deputy Director of RIAC, Region 2. Dan received his law degree from the University of London, England and subsequently studied for his LL.M. at Columbia Law School, New York and the University of Amsterdam, The Netherlands. Having qualified as a Barrister in the UK (roughly the equivalent of a specialist appellate attorney), he moved from London to the United States in 2012 and subsequently to Western New York in 2015.

Dan has practiced extensively before the United States Immigration Courts, the Board of Immigration Appeals, the United States District Courts and the Second Circuit Court of Appeals – dealing with all possible aspects of immigration cases which involve criminal convictions. Dan previously directed RIAC Region 1 (covering all 16 counties in Western New York) and also provides litigation support on post-conviction relief in both New York State and federally.

PRESIDING OVER CASES INVOLVING NON-CITIZEN DEFENDANTS

Immigration Consequences of Criminal Convictions
and the Role of the Magistrate

Sharon L. Ames, Esq. Regional Immigration Assistance Center, Region 2
NYS Magistrates Association Annual Meeting and Conference, Niagara Falls, NY September, 2024

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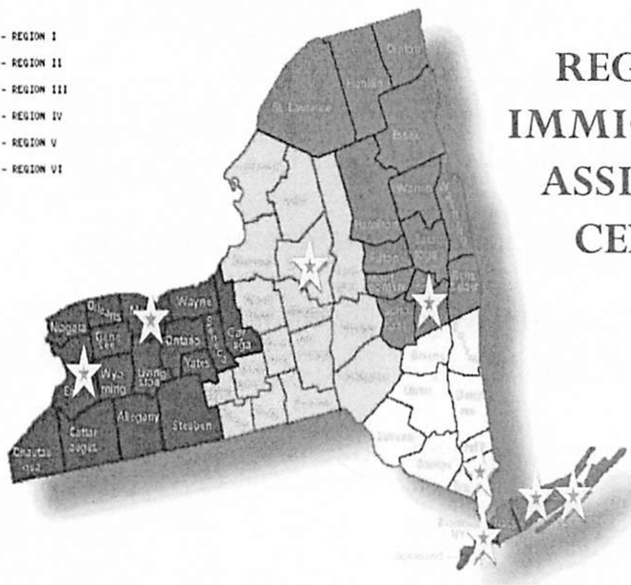

REGIONAL IMMIGRATION ASSISTANCE CENTERS

NEW YORK STATE OF OPPORTUNITY | Office of Indigent Legal Services

2

WHAT DO WE DO AT RIAC?

- Provide assigned counsel and public defenders support and assistance to properly advise their clients of the immigration consequences of any plea in criminal court or disposition in Family Court.
- Our services assure that defense attorneys are in compliance with the holding in *Padilla v. Kentucky*.
- We work with defense counsel and do not provide any direct representation of a defendant.
- RIAC provides training with CLE and CJE credit for 18b counsel, public defenders and judges to help facilitate communication between the client, counsel and the court about these consequences.
- We provide support for language access when needed.

3

Who are "U.S. citizens?"

- Those born in the United States
- Those who have applied through naturalization
- Those who have derived citizenship through a parent or other qualifying relative
- Those who have acquired citizenship automatically by operation of law

4

Who are NOT "U.S. Citizens?"

EVERYBODY ELSE!

This includes:

- Lawful Permanent Residents (green card holders)
- Refugees and Asylees
- Temporary visa holders
    - e.g. tourists, students, those with a work visa
- Those allowed to be present in the U.S. for humanitarian reasons:
    - e.g. Temporary Protected Status, Special Immigrant Juveniles

5

WHY IS THIS IMPORTANT?

- Anyone who is NOT a U.S. citizen can be removed (deported) from the United States.

6

WHY IS THIS IMPORTANT?

- Certain **misdemeanor** convictions can result in permanent removal from the U.S.
- Certain **violations** also have deportation consequences!

➡ e.g. Endangering the Welfare of a Child

➡ e.g. Harassment 2d committed in violation of an Order of Protection.

7

7

CLASSES OF DEPORTABLE OFFENSES:

- AGGRAVATED FELONIES (AF)
- CRIMES INVOLVING MORAL TURPITUDE (**CIMT**)
- CONTROLLED SUBSTANCE OFFENSES (**CSO**)
- FIREARMS OFFENSES (**FO**)
- CRIMES OF DOMESTIC VIOLENCE (CODV), **STALKING**, VIOLATION OF PROTECTION ORDER (**VOP**), CRIMES AGAINST CHILDREN (CAC)

8

Consequences of Criminal Offenses: The "Big 3"

- Mandatory removal from the U.S. ("deportation")
- Inability to return to the U.S. after removal ("inadmissibility")
- Mandatory detention

9

Other Consequences of Criminal Offenses:

- **Inability to obtain U.S. citizenship** for failing to meet "good moral character" requirement (INA §101(f))
- **Denial of Lawful Permanent Resident (green card)** status
- **Inability to renew green card or travel outside the U.S.**

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HOW DO WE FIND OUT WHAT THE IMMIGRATION CONSEQUENCES ARE IN A SPECIFIC CASE?

- Allow the defendant to consult with defense counsel and contact the RIAC.
  Once counsel is assigned/appears, provide counsel with RIAC contact information
- **Grant necessary and appropriate adjournments** to allow time for counsel to determine immigration consequences and advise the defendant.

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ROLE OF DEFENSE COUNSEL

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COUNSEL SHOULD ALWAYS ASK **EVERY** DEFENDANT:

WHERE WERE YOU BORN?

If the answer is anywhere other than the United States, Puerto Rico or a U.S. Territory, there may be immigration consequences involved in *any* plea that is offered to this defendant.

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It is the job of **defense counsel** to ascertain status and provide immigration advice. Information about a person's status is legal/confidential information that is not to be shared absent the client's consent.

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ROLE OF THE COURT

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PEOPLE V. PEQUE
22 NY3d 168 (2013)
NYS Court of Appeals Case

- "Deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea." *Peque* at 176.
- Holding: "Due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony." *Peque* at 176.
- Also applies to misdemeanors and violations. See *People. v Martial*, 50 Misc.3d 131(A) (2015); *People v. Bello,* 55 Misc.3d 152(A) (2017).

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JUDGES SHOULD INCLUDE THIS STATEMENT AT ARRAIGNMENT OF EVERY DEFENDANT:

" If you were not born in the United States, tell your attorney so that he or she can obtain advice about any immigration consequences that may relate to your case. Free immigration advice is available to your attorney through the Regional Immigration Assistance Center."

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18

JUDGES SHOULD INCLUDE THIS STATEMENT AT EVERY PLEA/ SENTENCING:

"If you are not a citizen of the United States, your plea of guilty may subject you to deportation from the United States. If you have not done so, you have the right to be advised of the immigration consequences of your plea."

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Judge's role:

- Provide attorney with an opportunity to consult with an immigration expert.
- Consider mitigating factors and/or requests made to minimize unintended immigration consequences.
- Determine if attorney has advised on immigration consequences, if applicable
- Provide all defendants with a brief, concise statement advising that a guilty plea may expose them to deportation.

Counsel's role:

- Determine client's immigration status, background and goals
- Analyze immigration consequences with immigration attorney (RIAC)
- Minimize risk
- Provide accurate and complete advice

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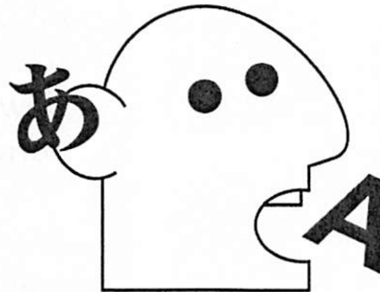
A Brief Discussion about Interpreters



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The Court SHALL provide an interpreter at no cost to anyone who is unable to "meaningfully participate" in court proceedings because of inability to understand English

- Applies in criminal, civil, family court proceedings
- In-person interpretation not required
- LEP person may waive this and bring own interpreter at own expense
- Court clerk's offices required to have interpreter available to assist LEP person when accessing clerk's services (can be remote)

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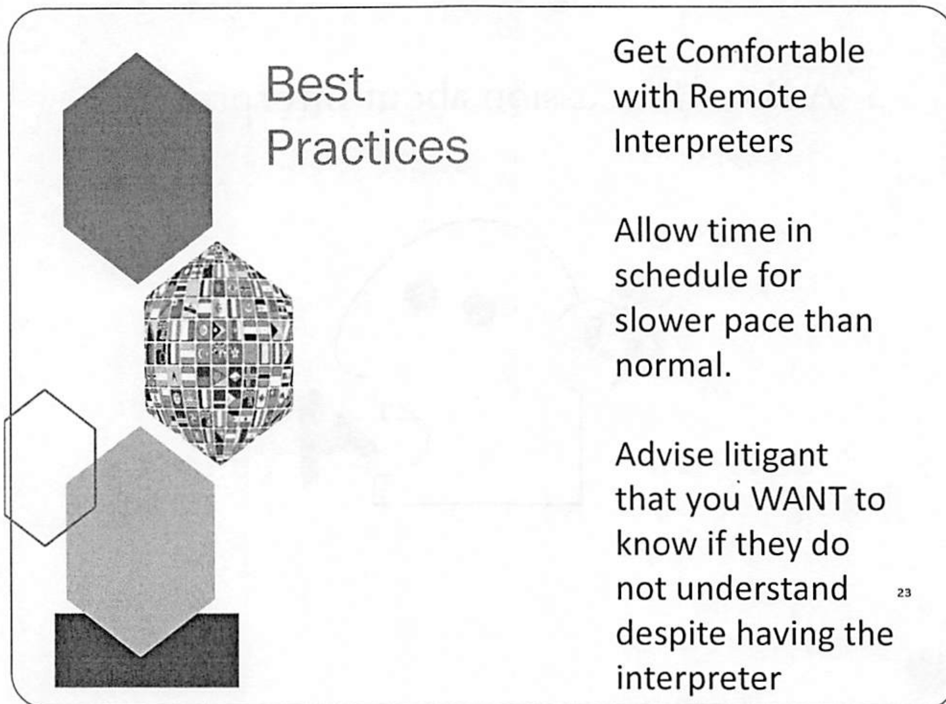

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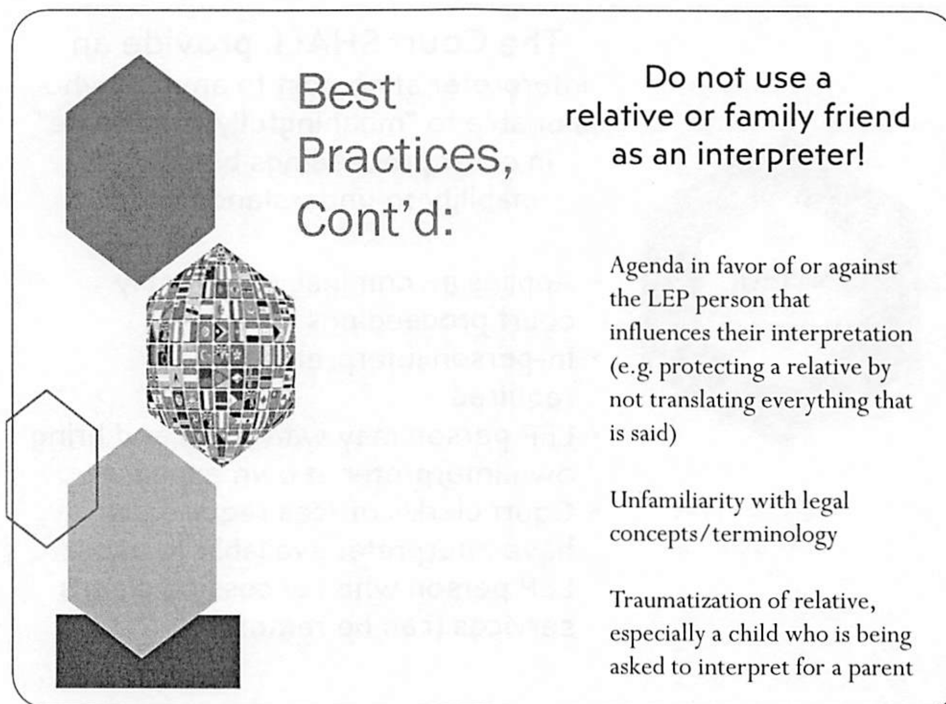

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MORE BEST PRACTICES

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BEST PRACTICES

1. If you become aware that a defendant was not born in the US, give RIAC contact info to counsel.
2. Adjourn the case as necessary for counsel to obtain advisal from RIAC.
3. Provide access to interpreter as required -one cannot assume the defendant understands enough English to comprehend the situation or make an informed decision without the aid of an interpreter.
4. Don't make any assumptions about the defendant's status or whether he or she is deportable.

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5. Keep in mind that the immigration consequences are often more important to the defendant in his/her decision to plead guilty rather than the sentence or conviction because the immigration consequences are life changing.
6. The Court is not in a position to advise on the defendant's immigration status and so should avoid questioning the defendant about this. (NOTE: Many people just don't know their status or can be mistaken.) It is the job of defense counsel to ascertain status and provide advice.

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BEST PRACTICES continued

7. About rap sheets..........

PROVIDE A COPY OF THE DEFENDANT'S RAP SHEET TO COUNSEL

(NY C.P.L. 160.40(2); 530.(20)(b)(ii))

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Finally, and most importantly,

7. The Court should not consider taking a plea from the defendant without counsel because of the possible immigration consequences.

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QUESTIONS

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55 Misc.3d 152(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, Appellate Term,
Second Dept.,
2, 11 & 13 Judicial Dist.

The PEOPLE of the State of New York, Respondent,
v.
Jose BELLO, Appellant.

No. 2015–478QCR.
|
June 2, 2017.

Attorneys and Law Firms

New York City Legal Aid Society (Margaret Teich, Esq.), for appellant.

Queens County District Attorney (John M. Castellano, Johnnette Traill, Samantha Alessi, of counsel), for respondent.

Present: MICHAEL L. PESCE, P.J., MICHELLE WESTON, THOMAS P. ALIOTTA, JJ.

Opinion

***1** Appeal from a judgment of the Criminal Court of the City of New York, Queens County (Tandra L. Dawson, J.), rendered February 17, 2014. The judgment convicted defendant, upon his plea of guilty, of theft of services.

ORDERED that the matter is remitted to the Criminal Court to afford defendant an opportunity to move, within 90 days of the date of this decision and order, to vacate his plea in accordance herewith, and for a report thereafter on any such motion by defendant, and the appeal is held in abeyance pending the receipt of the Criminal Court's report, which shall be filed with all convenient speed.

Defendant pleaded guilty to theft of services (Penal Law § 165.15[3]), the only offense charged. On appeal, defendant contends that the accusatory instrument was facially insufficient and, relying upon *People v. Peque* (22 NY3d 168 [2013]), that his plea of guilty was not knowing and voluntary because the Criminal Court had failed to inform him, during the course of the plea colloquy, of the possible immigration consequences of his guilty plea.

At the outset, we note that defendant's contention concerning the accusatory instrument's facial sufficiency is jurisdictional (*see People v. Alejandro,* 70 N.Y.2d 133 [1987]). Thus, defendant's claim was not forfeited upon his plea of guilty (*see People v. Dreyden,* 15 NY3d 100, 103 [2010]; *People v. Konieczny,* 2 NY3d 569, 573 [2004]) and must be reviewed in spite of his failure to raise it in the Criminal Court (*see Alejandro,* 70 N.Y.2d 133). Furthermore, since defendant did not waive prosecution by information, the facial sufficiency of the accusatory instrument must be evaluated under the standards which govern the sufficiency of an information as set forth in CPL 100.40(1) (*see People v. Hatton,* 26 NY3d 364, 368 [2015]; *People v. Kalin,* 12 NY3d 225, 228 [2009]). Courts reviewing accusatory instruments for facial sufficiency should give the instrument "a fair and not overly restrictive or technical reading," and they are facially sufficient "[s]o long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense" (*People v. Casey,* 95 N.Y.2d 354, 360 [2000]).

Here, the accusatory instrument and the supporting deposition of the arresting police officer, who was assigned to the transit task force and is a legal custodian of the New York City Transit Authority, alleged that defendant was observed entering a subway station beyond the turnstiles, which is an area enclosed by the turnstiles and gates in a manner designed to exclude those who do not pay the required fare, by walking through an exit gate without paying the lawful fare, and that defendant did not have permission or authority to enter or remain in the subway station without paying that fare. Giving these allegations "a fair and not overly restrictive or technical reading" (*Casey,* 95 N.Y.2d at 360), and "drawing reasonable inferences from all the facts set forth in the accusatory instrument" and supporting deposition (*People v. Jackson,* 18 NY3d 738, 747 [2012]), we find that they were sufficient, for pleading purposes, to meet the prima facie requirement of an information charging the offense of theft of services (*see* Penal Law § 165.15[3]; *People v. Pin,* 41 Misc.3d 128[A], 2013 N.Y. Slip Op 51681[U] [App Term, 1st Dept 2013]; *People v. Adam O.,* 45 Misc.3d 48 [App Term, 1st Dept 2014]). Contrary to defendant's contention, as a matter of common sense and reasonable pleading, the allegations were sufficient to establish that defendant had entered the subway station

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unlawfully without remitting the requisite payment or otherwise having a right to enter (*see People v. Barlow,* 46 Misc.3d 148 [A], 2015 N.Y. Slip Op 50237[U] [App Term, 1st Dept 2015]; *People v. Thompson,* 43 Misc.3d 137[A], 2014 N.Y. Slip Op 50708[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]). An accusatory instrument need not negate all possible defenses or make assertions responsive to every interpretation of facts potentially favorable to the defendant (*see Hatton,* 26 NY3d at 371 n 2; *People v. Guaman,* 22 NY3d 678, 681–682 [2014]; *Casey,* 95 N.Y.2d at 360).

***2** With regard to defendant's second contention on appeal, in *Peque,* the Court of Appeals determined that, in regard to felonies, "deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea" (22 NY3d at 176) and, consequently, that "it must be mentioned by the trial court to a defendant as a matter of fundamental fairness" (*id.* at 193). A defendant seeking to vacate a plea based on this defect must establish that there is a "reasonable probability" that he or she would not have pleaded guilty and would instead have gone to trial had the court warned of the possibility of deportation (*id.* at 176; *see People v. Odle,* 134 AD3d 1132 [2015]). Here, notwithstanding that the Court of Appeals has not determined whether *Peque* applies to misdemeanor pleas, as conceded by the People, the record does not demonstrate either that the Criminal Court mentioned, or that defendant was otherwise aware of, the possibility of deportation as a consequence of his guilty plea to the misdemeanor crime of theft of services. Thus, we find that the court did not fulfill its obligation during the plea colloquy to apprise defendant of the immigration consequences of his plea and, as a result, it cannot be said with certainty that the plea was entered into knowingly, intelligently and voluntarily (*see People v. Gonzalez,* 54 Misc.3d 139[A], 2017 N.Y. Slip Op 50152[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2017]; *People v. Martial,* 50 Misc.3d 131[A], 2015 N.Y. Slip Op 51932[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2015]). Moreover, defendant's present claim falls within the narrow exception to the preservation doctrine since he had no opportunity to withdraw or move to vacate his plea (*see Peque,* 22 NY3d at 183; *People v. Louree,* 8 NY3d 541 [2007]; *People v. Lopez,* 71 N.Y.2d 662 [1988]).

Thus, under the circumstances of this case, we deem it appropriate to hold the appeal in abeyance and to remit the matter to the Criminal Court to afford defendant an opportunity to move to vacate his plea, and for a report by the Criminal Court thereafter (*see Odle,* 134 AD3d at 1133; *Gonzalez,* 54 Misc.3d 139[A], 2017 N.Y. Slip Op 50152[U]; *Martial,* 50 Misc.3d 131[A], 2015 N.Y. Slip Op 51932[U]). Any such motion shall be made by defendant within 90 days after the date of this decision and order, and, upon such motion, defendant will have the burden of establishing at a hearing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*Peque,* 22 NY3d at 176). In its report to this court, the Criminal Court should state whether defendant made a motion to withdraw his plea, and, if so, set forth its finding as to whether defendant made the requisite showing of prejudice (*see Odle,* 134 AD3d at 1133).

PESCE, P.J., WESTON and ALIOTTA, JJ., concur.

All Citations

55 Misc.3d 152(A), 61 N.Y.S.3d 192 (Table), 2017 WL 2506197, 2017 N.Y. Slip Op. 50769(U)

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50 Misc.3d 131(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, Appellate Term,
Second Dept.,
9 and 10 Judicial Dist.

The PEOPLE of the State of New York, Respondent,
v.
Georges MARTIAL, Appellant.

No. 2012–1665 RO CR.
|
Dec. 31, 2015.

PRESENT: MARANO, P.J., GARGUILO and CONNOLLY, JJ.

Opinion

***1** Appeal from a judgment of the Justice Court of the Village of Spring Valley, Rockland County (David Fried, J.), rendered March 2, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the seventh degree.

ORDERED that the matter is remitted to the Justice Court to afford defendant an opportunity to move, within 90 days of this decision and order, to vacate his plea in accordance herewith, and for a report thereafter on any such motion by defendant, and the appeal is held in abeyance pending receipt of the Justice Court's report. The Justice Court shall file its report with all convenient speed.

On November 3, 2010, defendant accepted an offer to plead guilty to a single misdemeanor charge of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), in satisfaction of all of the charges defendant faced as a result of arrests in February and March 2010, in exchange for a sentence of a conditional discharge and 50 hours of community service. At the plea proceeding, defendant, among other things, admitted that, on March 1, 2010, in the Village of Spring Valley, he had possessed a controlled substance, that being cocaine. However, the Justice Court made no mention of any immigration or deportation consequences as a result of defendant entering a guilty plea. It is undisputed that on or about May 27, 2011, the United States Department of Homeland Security commenced a removal proceeding against defendant, pursuant to sections 237(a)(2) and 240 of the Federal Immigration and Nationality Act, based on this conviction.

On appeal, defendant contends that the Justice Court's failure to inform him of the immigration consequences of his plea requires reversal and remittal to the Justice Court pursuant to *Padilla v. Kentucky* (559 U.S. 356 [2010]) and *People v. Peque* (22 NY3d 168 [2013]), and that his counsel at the plea was ineffective because he failed to inform defendant that entering into the plea could subject him to deportation.

Defendant's claim that he was denied the effective assistance of counsel on the ground that his counsel failed to advise him of the immigration/deportation consequences of his plea does not appear on the face of the record, and thus cannot be reviewed on direct appeal (*see People v. Peque,* 22 NY3d at 202–203; *People v. Balbuena,* 123 AD3d 1384, 1386 [2014]).

In *People v. Peque* (22 NY3d at 176), the Court of Appeals determined, in accordance with the decision of the United States Supreme Court in *Padilla v. Kentucky* (559 U.S. 356), "that deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea." Thus, "to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation" (*People v. Peque,* 22 NY3d at 197). However, "the trial court's failure to provide such advice does not entitle the defendant to automatic withdrawal or vacatur of the plea" (*id.* at 176). Instead, "[t]he failure to apprise a defendant of deportation as a consequence of a guilty plea only affects the voluntariness of the plea where that consequence was of such great importance to him that he would have made a different decision had that consequence been disclosed. Therefore, in order to withdraw or obtain vacatur of a plea, a defendant must show that there is a reasonable probability that he or she would not have pleaded guilty and would have gone to trial had the trial court informed the defendant of potential deportation. In determining whether the defendant has shown such prejudice, the court should consider, among other things, the favorability of the

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plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. This assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many noncitizen defendants. To aid in this undertaking, where possible, the defendant should make every effort to develop an adequate record of the circumstances surrounding the plea at sentencing, which will permit the trial court to efficiently determine the plea's validity and enable appellate review of the defendant's claim of prejudice" (*People v. Peque,* 22 NY3d at 198–199 [internal quotation marks, citations and footnotes omitted]).

***2** The Court indicated that the remedy for such an alleged violation of due process would be for the appellate court to remit the matter to the lower court to afford the defendant the opportunity to move to vacate the plea "and develop a record relevant to the issue of prejudice ... where the deficiency in the plea allocution appears on the face of the record.... Upon a facially sufficient plea vacatur motion, the court should hold a hearing to provide the defendant with an opportunity to demonstrate prejudice." If the defendant can demonstrate prejudice by the defect in the plea allocution upon remittal to the lower court, that court must vacate his plea. "In the absence of a showing of prejudice, the court should amend the judgment of conviction to reflect its ruling on defendant's plea vacatur motion and otherwise leave the judgment undisturbed" (*People v. Peque,* 22 NY3d at 200–201 [footnote omitted]; *see People v. Llibre,* 125 AD3d 422, 423 [2015] ["the remedy for a *Peque* error may involve a remand for fact-finding proceedings"]).

As the plea and sentence minutes in this case do not contain any mention of the possible immigration or deportation consequences of the plea, we remit the matter to the Justice Court to afford defendant an opportunity to move, in that court, to withdraw his plea, notwithstanding that the Court of Appeals has not determined whether *Peque* applies to misdemeanor pleas (*see People v. Peque,* 22 NY3d at 197, n. 9; *People v. Dealmeida,* 124 AD3d 1405, 1406 [2015]; *People v. Bassou,* 44 Misc.3d 131[A], 2014 N.Y. Slip Op 51078[U] [App Term, 1st Dept 2014]; *People v. Mothersil,* 45 Misc.3d 927, 931 [Crim Ct, Kings County 2014]; *see also People v. Talbi,* 45 Misc.3d 18, 20 [App Term, 2d, 11th & 13th Jud Dists 2014]; *cf. People v. Lionel,* 2013 N.Y. Slip Op 33486[U] [Sup Ct, Kings County 2013]).

Accordingly, the matter is remitted to the Justice Court to afford defendant an opportunity to move, within 90 days of this decision and order, to vacate his plea in accordance herewith and for a report thereafter on any such motion by defendant, and the appeal is held in abeyance pending receipt of the Justice Court's report. The Justice Court shall file its report with all convenient speed.

MARANO, P.J., GARGUILO and CONNOLLY, JJ., concur.

All Citations

50 Misc.3d 131(A), 28 N.Y.S.3d 650 (Table), 2015 WL 9694111, 2015 N.Y. Slip Op. 51932(U)

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