

CRIMINAL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: PART JP-1

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER  
Docket No. 2003QN014434

-against-

YOVANNI WORRELL,

Defendant.

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GENE R. LOPEZ, J.:

On May 12, 2003, the defendant pleaded guilty to criminal possession of a forged instrument in the third degree (Penal Law §170.20). The court sentenced the defendant to a conditional discharge and directed him to pay \$620 in court fines. At the time of his plea, the defendant was represented by Jules Eingoren, Esq. of the Legal Aid Society.

The defendant moves to vacate this conviction on the ground that his plea counsel provided misadvice as to the immigration consequences of his guilty plea. According to the minutes of defendant's guilty plea, Mr. Eingoren stated that he had informed the defendant and that the defendant understood "that there is a plea to a crime here, and it may affect any future application to the Immigration and Naturalization Service." (Plea minutes dated May 12, 2003.)

The defendant claims that he understood Mr. Eingoren's advice to mean that an application for citizenship may be unsuccessful and he believed that this to be the only immigration consequence of his guilty plea. The defendant asserts that had he known that he would be deported as a result of his guilty plea, he would not have pleaded guilty and would have attempted to negotiate a guilty plea to another charge or would have proceeded to trial.

In a decision dated October 30, 2013, this court ordered a hearing to be held. On January 13, 2014, this court held the hearing at which the defendant was the sole witness. The defense introduced the official court transcript of defendant's guilty plea on May 12, 2003 and a stipulation in that the parties agreed that Mr. Eingoren's presence was unnecessary and that Mr.

Eingoren had no recollection of his advice to the defendant regarding deportation.<sup>1</sup> This court finds the defendant credible.

### FINDINGS OF FACT<sup>2</sup>

The defendant stated that on June 26, 1977, he and his four brothers arrived in the United States from Panama to join his parents who were already in this country. The defendant was eight years old. Since that day, the defendant has not returned to Panama. The defendant now lives in Nassau County with his sister. His parents live in Queens County.

The defendant stated that he is a lawful permanent resident. In 2003, he was working at Nassau BOCES ("Board of Cooperative Educational Services") and he is still working with that agency. In 2003, the defendant paid his taxes, contributed to his retirement and paid child support. The defendant had a girl friend who is still his girl friend. At the time of his plea in 2003, his mother was ill and he was taking care of her and contributing financially to his family.

The defendant explained that he lost his green card and an acquaintance informed that he knew someone who worked in Immigration who could obtain the green card for a fee of \$80.00 which was less than the replacement cost of \$200.00. The defendant submitted the green card at the Department of Motor Vehicles ("DMV") and their representatives informed him that the green card was fraudulent. The defendant was entitled to a renewal of his green card and he believed the green card to be authentic. The information contained on the green card appeared to

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<sup>1</sup> Before the hearing, the defendant submitted to this court a copy of a letter from Mr. Eingoren to defense counsel dated December 20, 2013. Mr. Eingoren wrote that he is presently in an assisted living facility; needs a cane and walker to get around; and that he does not remember his advice to the defendant about any possible deportation proceedings.

<sup>2</sup> On February 4, 2014, this court granted the defendant's motion to vacate his conviction. This written decision explains that ruling.

be accurate.

On the date he pleaded guilty, the defendant recalled meeting with Mr. Eingoren and informed him of his criminal background which included a 1989 conviction in which he received probation which he successfully completed. In 1989, the defendant pleaded guilty to mail fraud in that he was stealing jewelry from packages that he was supposed to deliver. The defendant testified that Mr. Eingoren stated to him that in exchange for his guilty plea, he would receive a conditional discharge rather than be sentenced to jail. The defendant testified that Mr. Eingoren stated to him that if he ever attempted to apply for citizenship, his guilty plea would affect such application. The defendant testified that Mr. Eingoren did not state to him that his plea of guilty would render him deportable. The defendant testified that if he had known he would not have pleaded guilty and would have proceeded to trial. The defendant testified that he would have risked the possibility he could have been sentenced to one year incarceration if he was convicted. The defendant acknowledged that at the time of his guilty plea, he stated to the court that Mr. Eingoren discussed with him the immigration consequences of the plea.

The defendant testified that in 2010, he returned to the United States from Jamaica and was surprised to learn from the immigration authorities that he was deportable. The defendant testified that if he is deported to Panama, he would be lost in that he has spent over 36 years in the United States. The defendant testified that if this conviction is vacated and he is permitted to stay in the United States, he would continue to be with his family and be employed.

The defendant testified that he has been at his current job for 12 years and since he graduated high school, he has been continually employed. He was married in 1991 and later divorced. He has a daughter from that marriage who is 22 years old. He and his girlfriend have a daughter who will be 20 years old. Since his guilty plea he has been convicted of other

misdemeanors and violations including driving with a suspended license.

#### ARGUMENTS BY THE PARTIES

The People acknowledge the advice provided to the defendant but maintain that it is difficult to believe that the defendant would not ask for clarification. The defendant argues that he believed the advice to be complete so no follow up questions were necessary. The defendant also argues that the People are suggesting that a client should always assume the advice received is incomplete and unreliable.

The People claim that the defendant has consistently stated that he was not informed that his guilty plea would result in his deportation and at the hearing the defendant testified that he received misadvice. The defendant maintains that he has always stated that he was not advised that his guilty plea would result in his deportation. The People contend that the defendant admitted that he and Mr. Eingoren discussed the immigration consequences of his guilty plea and learned that his guilty plea would affect him in the future as to his immigration status.

The People also note that the defendant did not present Mr. Eingoren because he could not remember the advice he provided to the defendant and thus the defendant did satisfy his burden of demonstrating that he received misadvice. The defendant contends that in the stipulation admitted into evidence the People agreed that Mr. Eingoren's presence was unnecessary in that he could not remember the advice he had given to the defendant concerning any possible deportation.

The People contend that the defendant's claim of innocence is specious in that the defendant at the time of his guilty plea knew he was guilty and accepted the plea which included no jail time. The People conclude that there is no reasonable probability that the defendant would have rejected the plea offer and proceeded to trial. The People urge this court to review

the transcript of defendant's guilty plea in which he admitted that he purchased a forged green card which was consistent with his testimony at the hearing that he purchased the green card from someone he met on the street. The People note that although the defendant testified that he believed he had purchased the green card from someone who had obtained the green card from the INS, he did admit when confronted with his prior statement to police that he had purchased the green card from someone and not from INS, that he knew he had not purchased the green card from INS. The defendant contends that at the hearing he testified he believed that he had purchased the green card from someone who had obtained the green card from INS and thus believed the green card to be authentic. The defendant also contends that at the time of his guilty plea he admitted that he possessed a forged resident alien card and did not admit that he knew the green card was a fake or that he intended to defraud another by offering the green card.

#### CONCLUSIONS OF LAW

Guaranteed by the Federal and State Constitutions, a defendant has the right to effective representation. (People v McDonald, 1 NY3d 109 [2003].) Under Strickland v Washington, 466 US 668 (1984), the defendant must show that his counsel's performance was deficient in that his representation fell below an objective standard of reasonableness. The defendant must also show that his counsel's deficient performance prejudiced the defense and that there is a reasonable probability that, but for the counsel's errors, he would have not pleaded guilty and insisted on going to trial. (People v McDonald, 1 NY3d at 114 citing Hill v Lockhart, 474 US 52, 59 [1985].) The defendant has the burden of proving by a preponderance of the evidence every fact essential to support his motion. (CPL 440.30[6].)

The mere failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel. (People v Ford, 86 NY2d 397, 404 [1995].) Under certain

circumstances, however, an affirmative misstatement of the possibility of deportation may constitute ineffective assistance of counsel. (People v McDonald, 1 NY3d at 115.)

Although Mr. Eingoren may not have been inaccurate, Mr. Eingoren's advice may have been incomplete or misleading to the defendant. The People maintain that Mr. Eingoren's advice was not incomplete in that he informed the defendant that he could be deported as a result of his guilty plea. This court disagrees. Mr. Eingoren stated to the court that he had informed the defendant that he was pleading guilty to a crime and that as such "it may affect future application to the Immigration and Naturalization Service." This court finds that a reasonable interpretation of Mr. Eingoren's advice means that if the defendant attempts to apply for citizenship, he may be unsuccessful. Thus the defendant's assertions that Mr. Eingoren did not inform him that his guilty plea rendered him deportable is inconsistent with his claim of misadvice.<sup>3</sup> This court also finds that since Mr. Eingoren did not advise the defendant that this plea of guilty coupled with his 1989 conviction would render him deportable, Mr. Eingoren's advice misled the defendant in believing that any application for citizenship would be affected and not his immigration status. As such, the defendant has satisfied the first prong in that his plea counsel's conduct fell below the objective standard of reasonableness. (see People v McKenzie, 4 AD3d 437 [2d Dept 2004]; cf. People v Argueta, 46 AD3d 46 [2d Dept 2007], *appeal dismissed* 10 NY3d 761 [2008].)

As to the second prong of Strickland, the defendant must show a reasonable probability

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This court notes that initially the defendant asserted that Mr. Eingoren did not inform him of *any* immigration consequences of his guilty plea. Soon after, the defendant asserted that Mr. Eingoren's advice was misadvice. This new claim was asserted after the receipt of the plea transcript in which Mr. Eingoren stated that he had informed the defendant his guilty plea may affect future application to the INS. This court notes that at the hearing the prosecutor did not cross examine the defendant as to this circumstance.

that, if counsel had informed him that he would be deported as a result of his guilty plea, he would not have pleaded guilty and would have gone to trial. (People v Hernandez, 22 NY3d 972 [2013].) The Second Department stated in People v Picca, 97 AD3d 170, 183-84 (2012) that “[i]n light of the primary importance that aliens may place upon avoiding exile from this country, an evaluation of whether an individual could rationally reject a plea offer and proceed to trial must take into account the particular circumstances informing the defendant’s desire to remain in the United States.” The Second Department also stated that “[t]hose particular circumstances must then be weighed along other relevant factors, such as the strength of the People’s evidence, the potential sentence, and the effect of prior convictions.” (*Id.*)

In this case, the defendant arrived in the United States from Panama at the age of eight years old. The defendant testified that he has never returned to Panama. The defendant is now 45 years old, a lawful permanent resident and has been in the United States for nearly 37 years. The defendant’s parents, siblings and children are all in the United States. Since high school, the defendant has been continually employed here in this country. As to the People’s evidence, the parties do not dispute that the defendant is entitled to a green card and that apparently the information contained on the green card in which the defendant submitted to DMV was accurate.

In order to prove the charge against the defendant, the People will need to prove that the defendant knew the green card was forged and that he turned over the green card to DMV with an intent to defraud, deceive or injure another. (Penal Law §170.20) According to the transcript, at the time of his guilty plea, the defendant admitted to possessing a forged green card. At the hearing, the defendant testified that he believed the green card to be authentic and that he submitted such green card to DMV. On cross examination the defendant admitted that he purchased the green card from someone rather than from INS and he knew he had not purchased

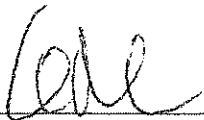
the green card from INS. Such admission is consistent with defendant's testimony at the hearing that he presented the green card to DMV and learned that the green card was fraudulent. The defendant's account raises doubts as to whether he knew the green card was a fake or that he intended to defraud DMV.

Based upon the defendant's circumstances weighed against the other relevant factors, this court finds that had the defendant known that he would be deported as a result of his guilty plea, the defendant's decision to reject the plea offer and proceed to trial would have been a rational one. Therefore, this court also finds that the defendant has demonstrated that he suffered prejudice as a result of his plea counsel's misleading or incomplete advice.

Accordingly, the defendant's conviction is vacated and the criminal action is restored to its pre-pleading status and the accusatory instrument is deemed to contain the count of criminal possession of a forged instrument in the third degree. (CPL 440.10[8].)

The foregoing is the decision and order of the court.

Dated: March 24, 2014  
Queens County, New York

  
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GENE R. LOPEZ, J.C.C.