18-P-434 Appeals Court

COMMONWEALTH vs. JUAN LOPEZ.

No. 18-P-434.

Essex. April 10, 2019. - September 9, 2019.

Present: Rubin, Henry, & Wendlandt, JJ.

Alien. Practice, Criminal, Plea, Assistance of counsel, New trial. Motor Vehicle, Operating under the influence. Reckless Endangerment of a Child.

Complaints received and sworn to in the Lynn Division of the District Court Department on April 6 and 16, 2015.

A motion for a new trial, filed on February 7, 2017, was heard by Ellen Flatley, J.

Emily R. Mello, Assistant District Attorney, for the Commonwealth.
C. Alex Hahn for the defendant.

WENDLANDT, J. The defendant, Juan Lopez, an undocumented individual, pleaded guilty after being advised by counsel (consistent with Padilla v. Kentucky, 559 U.S. 356 [2010]) that doing so would result in the loss of his then-pending removal proceedings in Federal immigration court and thus deportation.

In this appeal, we consider whether the standard under Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001) (rule 30), allowing a judge to order a new trial when "justice may not have been done," permits a judge to vacate a guilty plea on the basis that the defendant regrets his decision now that the warned of deportation has come to pass. We hold that it does not.

Background. In 2014, the defendant received a notice to appear (NTA) from immigration authorities, which officially commenced the process of deporting him to his native Guatemala. He had entered the United States without authorization in 1998, at age nineteen. At the time he received the NTA, he was married and had two sons, each a United States citizen. He retained immigration counsel and applied for cancellation of removal -- a procedure that, if allowed, would permit him to stay in the United States in light of the length of his residency and his family circumstances. Significant to the issue on appeal, cancellation of removal is not available to an individual who has committed a "crime involving moral turpitude." So far as the record shows and as the defendant acknowledges, cancellation of removal represented the defendant's only hope to avoid deportation.

While his immigration case was pending, in April 2015, the defendant drove his vehicle at a high rate of speed and crashed it into a truck before plowing it into a guardrail in Lynn. His

eight year old son, who was unrestrained in the back seat of the vehicle, was propelled forward into the windshield,[1] cutting his face and lip and losing a tooth. Several empty containers of alcohol were found in bags and strewn on the floor of the defendant's vehicle. The defendant was unsteady on his feet, his eyes were glassy, and a strong odor of alcohol emanated from his mouth. During field sobriety assessments, he swayed noticeably from side to side, missed heel to toe, turned incorrectly, and raised his arms for balance in contravention of the instructions he received. Following his arrest, he consented to a breathalyzer test, which showed a 0.28 percent blood alcohol level. The defendant was charged with (1) operating a vehicle under the influence of alcohol (OUI), pursuant to G. L. c. 90, § 24 (1) (a) (1); (2) operating with a suspended license, subsequent offense, pursuant to G. L. c. 90, § 23; (3) reckless endangerment of a child (reckless endangerment), pursuant to G. L. c. 265, § 13L; (4) child endangerment while operating under the influence (OUI endangerment), pursuant to G. L. c. 90, § 24V; and (5) three civil motor vehicle infractions.

[1] Plea counsel stated that he was told by the defendant's wife that the child's face hit the back of the front passenger's seat, not the windshield.

During the course of representing the defendant, plea counsel learned that he was in the United States without authorization. With the assistance of an interpreter,[2] plea counsel told the defendant that his plea would "trigger dire immigration consequences." Plea counsel also learned of the pending removal proceeding in which the defendant had applied for cancellation of removal.

After consulting with the immigration unit of Committee for Public Counsel Services (CPCS) for advice concerning the effect of the defendant's pending criminal charges on his immigration status,[3] plea counsel advised the defendant by letter[4] that, if he pleaded guilty to the OUI and OUI endangerment charges, he was not automatically deportable, although it could make his immigration case more difficult to win. Plea counsel also advised the defendant that, if he pleaded guilty to the reckless endangerment charge, "you are deportable and you cannot win your

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[2] The defendant speaks Spanish.

[3] CPCS immigration counsel spoke to the defendant's immigration counsel.

[4] The record does not show whether the letter was translated into Spanish. As set forth supra, however, plea counsel communicated the same advice to the defendant at least twice orally, at which times an interpreter conveyed the information to the defendant in Spanish. Accordingly, the defendant's contention on appeal that plea counsel was ineffective for not translating the advice in the letter into Spanish is without basis.

immigration case." Plea counsel subsequently spoke with the defendant's immigration counsel, who similarly advised that "anything involving recklessness should be avoided" in light of the pending removal proceedings.

Thereafter, plea counsel attempted to negotiate a plea. During the hearing regarding this potential plea and with the assistance of an interpreter, plea counsel conveyed orally the advice he had previously given in writing regarding the immigration consequences of a plea. Ultimately, the plea was withdrawn after a judge indicated that she would not accept any recommendation that did not include a period of incarceration.

Several months later, plea counsel again attempted to negotiate a plea. The prosecutor agreed to drop the reckless endangerment charge, but only if the defendant agreed to committed time. Again, through the use of an interpreter, plea counsel conveyed orally the same advice regarding the immigration consequences of the plea he had previously given to the defendant first in writing and then orally at the prior plea hearing. The defendant would not agree to any jail time and rejected the plea deal even though it would avoid the one charge -- reckless endangerment -- that he was told would cause him to lose his pending removal case and result in deportation.

Accordingly, the prosecutor and defense counsel negotiated a different plea deal, pursuant to which the defendant agreed to

plead to all the charges, including the reckless endangerment charge. During the colloquy with the defendant, a different judge (plea judge) warned him that, "if the offenses to which you are pleading guilty are ones that, under Federal law, presumptively mandate removal from the United States, and Federal officials decide to seek removal, it is practically inevitable that the disposition would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States if you're not a citizen." The defendant stated that he understood. Plea counsel confirmed that the defendant understood that he faced "severe immigration consequences which are unavoidable." The defendant agreed to plead guilty to all the charges, including the reckless endangerment charge that he knew would result in the loss of his pending removal proceedings. In exchange, the defendant was able to leave court that day without having to serve any committed time.[5]

The plea occurred in February 2016, and by March 2016 the defendant was taken into custody by immigration authorities. As plea counsel had predicted and advised, the defendant's request for cancellation of removal was denied because of his guilty

[5] The prosecutor and the defendant recommended different sentences. Ultimately, the plea judge stated that she would impose suspended sentences (rejecting the Commonwealth's request for split sentences), and the defendant agreed.

plea as to the reckless endangerment charge, and a final order of removal was entered in his removal proceedings.

A year after his plea, the defendant filed the present motion to withdraw his guilty plea, alleging that his plea counsel had failed to give him any warning concerning the immigration consequences of his guilty plea on the reckless endangerment charge and so had provided constitutionally ineffective assistance of counsel. The motion judge, who was also the plea judge, conducted an evidentiary hearing.[6] The judge found that "[t]here were three lawyers involved in advising the [d]efendant about the immigration consequences of the charges, two immigration specialists and one experienced trial attorney"; the defendant was properly advised that his guilty plea to reckless endangerment would result in the loss of his pending removal proceedings and thus his deportation.[7] She specifically found that he was "properly advised of his immigration exposure." Properly advised, the defendant voluntarily and knowingly opted to take a deal whereby he served no jail time but pleaded guilty to all the pending charges, including the one -- reckless endangerment -- he was

[6] At the time of the hearing on his motion, the defendant had been deported.

[7] The judge did not credit the testimony of the defendant's immigration counsel that she discussed only the OUI charges with plea counsel.

specifically and unambiguously told would result in the loss of his removal proceedings.

Nonetheless, the judge concluded that because the defendant regrets his "shortsighted decision" and had "buyer's remorse," and because he had two United States citizen children, justice had not been done. On that basis, she vacated the defendant's plea, allowing his motion for a new trial. The Commonwealth now appeals.

Discussion. "A strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012). "Judges are to apply the standard set out in Mass. R. Crim. P. 30 (b) rigorously, and should only grant a postsentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth" (quotations and citation omitted). Commonwealth v. Fanelli, 412 Mass. 497, 504 (1992). "This strict standard for postconviction motions promotes judicial efficiency and finality by discouraging a defendant from entering a guilty plea to test the weight of potential punishment . . . only to seek to withdraw the plea later when adverse consequences appear" (quotation and citation omitted). Commonwealth v. Lopez, 426 Mass. 657, 662-663 (1998).

On appeal, we review the decision of the judge to grant a new trial for an abuse of discretion. See Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 722 (2012). "[A] judge's discretionary decision constitutes an abuse of discretion where . . . the judge made a clear error of judgment in weighing the factors relevant to the decision" (quotation and citation omitted). Commonwealth v. Butler, 87 Mass. App. Ct. 183, 187 (2015).

1. Regret is not a permissible basis for allowing withdrawal of a guilty plea. We conclude that the defendant's regret -- or, as the judge referred to it, "buyer's remorse" -- is not one of the limited, exceptional grounds for relief under rule 30. Contrast Commonwealth v. Brescia, 471 Mass. 381, 382 (2015) (affirming grant of new trial where "defendant's then-undetected stroke had affected the course of his testimony in a manner that well might have damaged his credibility in the jury's eyes"); Commonwealth v. Pring-Wilson, 448 Mass. 718, 720 (2007) (affirming grant of new trial where evidence of victim's propensity for violence was excluded and new rule, announced after defendant's conviction, would permit introduction of such evidence). Although the defendant's choice may not have been the one others would have made in similar circumstances or even the one the defendant now wishes he had made, the choice was his to make and the consequences are his to bear. And, although we

are not unsympathetic to the collateral consequences flowing to the defendant's family from his choice, relief under the rule is not available on that basis either.

2. Ineffective assistance of counsel. The defendant contends that we should affirm the judge's order on the basis that his plea counsel was ineffective. Specifically, he argues that plea counsel failed to properly advise him that pleading to the reckless endangerment charge, in addition to rendering him "deportable" pursuant to 8 U.S.C. § 1229a (2012), would also render him "inadmissible" pursuant to 8 U.S.C. § 1182 (2012). To succeed on a claim of ineffective assistance of counsel, the defendant must prove that "there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, . . . whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

Here, we need not decide whether, in connection with advising a client regarding the immigration consequences of a guilty plea, plea counsel must provide advice regarding known "inadmissibility" risks in addition to the known risks of

deportation.[8] This is because, in this case, the defendant cannot meet his burden under the second prong of the Saferian test. "In the context of a guilty plea, in order to satisfy the 'prejudice' requirement, the defendant has the burden of

[8] Some courts have held that a defendant need not be informed of an inadmissibility consequence. See United States vs. Chezan, U.S. Dist. Ct., No. 10 CR 905-1 (N.D. Ill. Oct. 14, 2014) (declining to extend Padilla further than duty of defense counsel to warn of deportation consequences); Rosario v. State, 165 So. 3d 672, 673 (Fla. Dist. Ct. App. 2015) (beyond advising defendant about risk of deportation under Padilla, "counsel had no affirmative duty to provide advice about other possible immigration ramifications of the plea, such as whether the plea might negatively impact her ability to obtain an adjustment in status, a waiver of inadmissibility, or cancellation of removal"); State v. Villegas, 380 Wis. 2d 246, 269 (Ct. App. 2018) (defense counsel "had no constitutional duty to give specific, direct advice on how pleading guilty would affect [the defendant's] possibilities for readmission beyond the accurate, generalized warnings that were given"). Nonetheless, as the Commonwealth acknowledges, in some circumstances (which it contends are not present here) it may constitute ineffective assistance not to warn about the specific inadmissibility consequences of a guilty plea. See, e.g., Commonwealth v. Marinho, 464 Mass. 115, 125-126 (2013), quoting Committee for Public Counsel Services, Assigned Counsel Manual c. 4, at 15 (rev. June 2011) ("Counsel must also advise the client . . . of the consequences of a conviction, including . . . possible immigration consequences including but not limited to . . . refusal of reentry into the United States"). See also American Bar Association, Criminal Justice Standards for the Defense Function § 4-5.5 (4th ed. 2015) (counsel should advise client of all potential immigration consequences, including not only removal, but also exclusion). See generally G. L. c. 278, § 29D (requiring judges to provide immigration warning that states, "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States" [emphasis added]).

establishing [first] that . . . 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Commonwealth v. Sylvain, 466 Mass. 422, 438 (2013), quoting Commonwealth v. Clarke, 460 Mass. 30, 47 (2011), quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985). Contrary to his position on appeal, in his affidavit, the defendant does not aver that he would not have taken this plea had he known about the inadmissibility consequences of his plea. Rather, he says only that (1) plea counsel did not advise him that his cancellation of removal petition would be denied and, (2) had he been so advised, he would not have taken the plea deal. He mentions nothing with regard to inadmissibility.[9] And, as set forth supra, the judge did not credit the defendant's affidavit regarding his allegation that plea counsel failed to inform him of the consequences of his plea deal on his cancellation of removal, and instead found that he was properly advised. Thus, even assuming he was not adequately informed of inadmissibility,[10] and assuming further that he was required

[9] Specifically, the defendant states, "No one advised me that the chance of success with the only relief I was seeking in my removal proceedings[,] cancellation of removal, was effectively eliminated because of pleading guilty to this charge or I would not have taken this plea."

[10] The judge specifically found that the defendant was properly advised of his immigration exposure. Plea counsel

under Padilla, 559 U.S. at 374, to be so informed, he cannot demonstrate the prejudice required under the second prong of Saferian.

The order granting the defendant's motion for a new trial is reversed.

So ordered.

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testified at the hearing on the defendant's motion that he "essentially" told the defendant that "there are consequences of deportation[,] exclusion from the country, or its admissibility, so they couldn't even come back" and that he reviewed "every single warning" on "the green sheets," which includes a warning regarding "exclusion from admission."