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19-P-1683

Appeals Court

COMMONWEALTH vs. JONALSON DOR.

No. 19-P-1683. December 14, 2020.

Practice, Criminal, Plea. Alien.

In Commonwealth v. Villalobos, 437 Mass. 797, 802-804 (2002), the Supreme Judicial Court observed that the immigration warning then prescribed by G. L. c. 278, § 29D, did not adequately warn criminal defendants that an admission to sufficient facts, leading to a continuance without a finding, could lead to adverse immigration consequences. In response, the Legislature amended the statute, which previously warned that the described immigration consequences could follow a "conviction," to require judges to advise the defendant that such adverse immigration consequences could follow a "plea of guilty, plea of nolo contendere, or admission to sufficient facts." St. 2004, c. 225, § 1.

The defendant in the present case entered a plea of guilty to certain drug charges in 2016, including possession of a class D substance with intent to distribute. During the colloquy incident to his guilty pleas, the judge advised the defendant that "a conviction of the offenses that you've been charged with may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Now facing deportation to his native Haiti as a result of his convictions, the defendant filed a motion pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), to withdraw his guilty pleas, based on the judge's failure during the plea colloquy to provide an immigration warning that strictly conformed to the requirements of G. L. c. 278, § 29D, as it was amended by St. 2004, c. 225, § 1.

The case is controlled in material respects by the reasoning of Commonwealth v. Berthold, 441 Mass. 183, 185-186 (2004). See Commonwealth v. Agbogun, 58 Mass. App. Ct. 206, 207-208 (2003). In Berthold, supra, the Supreme Judicial Court held that the failure of an immigration warning to identify one of the enumerated consequences would entitle a defendant to withdraw his plea only if the defendant faced the consequence of which he was not warned. "A defendant who has been warned under the statute of the very consequence with which he must subsequently contend is not entitled to withdraw his plea, even if he was not warned of other enumerated consequences that have not materialized." Id. at 186.

In the present case, the defendant was warned that his conviction could result in his deportation. Though he was not warned that a plea of nolo contendere or an admission to sufficient facts could lead to that consequence, the deviation is immaterial to the adequacy of the warning because he entered pleas of guilty rather than either omitted alternative. In other words, he was warned that his pleas could produce the very consequence he now faces.

The defendant observes, correctly, that the language adopted by the Legislature was not identical to that offered by the Supreme Judicial Court to address the concern identified in Villalobos, 437 Mass. at 806 n.5. Instead of simply appending reference to pleas of nolo contendere and an admission to sufficient facts to the preexisting statutory reference to a conviction, the amendment enacted by the Legislature required a plea colloquy to warn of the consequences that could follow a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. However, the purpose of the statute is to ensure that the defendant is adequately apprised during the plea colloquy of the consequences that may follow the entry of the defendant's plea. Though the "interpretative approach [to § 29D] has been relatively literal and strict," Commonwealth v. Petit-Homme, 482 Mass. 775, 783 (2019), "relief is not automatic upon receipt of a defective warning." Id. We are not aware of any decision suggesting that an immigration warning omitting statutory language inapplicable to the defendant's circumstances nevertheless entitles the defendant to relief. When a defendant is warned that his conviction of the offenses with which he is charged could lead to adverse immigration consequences, and then enters guilty pleas to those charges, the statutory purpose is met.

Order denying motion to
withdraw guilty pleas
affirmed.

Edward Crane for the defendant.
Houston Armstrong, Assistant District Attorney, for the
Commonwealth.