DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT CRIMINAL TERM

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

Present:
Hon. Anthony W. Paradiso

- against -

Docket No.: 2001NA030271

NAHUN C. ALFARO,

Defendants.

The following papers have been considered by the Court on this motion:

Papers Numbered

Notice of Motion, Affirmation & Exhibits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Defendant moves pursuant to Criminal Procedure Law §440.10 for an order vacating the judgment convicting him of violating Penal Law §110/155.25 (Attempted Petit Larceny). Defendant argues that he was provided ineffective assistance of counsel because his then attorney failed to inform him of the immigration consequences of his guilty plea. Defendant insists that his plea was not knowing, voluntary and intelligent since he was under the mistaken belief that there were no negative immigration consequences to said plea. According to the defendant, if he had known of the immigration consequences, he would not have entered the plea but would have insisted upon a trial. The People oppose defendant's motion.

Criminal Procedure Law §440.10(1)(h) provides that a defendant may move to vacate a previously entered judgment upon the ground that "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

Criminal Procedure Law §440.30(1) provides that upon submission of all papers and evidence on the motion, the court must consider same to determine if a hearing is necessary to resolve questions of fact.

Criminal Procedure Law §440.30(3) provides that a court must grant such a motion without conducting a hearing where:

(a) the moving papers allege a ground constituting legal basis for the motion; and

(b) such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) the sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

For the reasons that follow, the defendant is entitled to the relief sought.

In order to prevail on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" measured under prevailing professional norms. In addition, a defendant must demonstrate that he was prejudiced by such ineffective assistance such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland v Washington*, 466 US 668 at 668, 694 [1984]).

In *Padilla v Kentucky*, __ US __; 130 S Ct 1473 (2010), the Supreme Court applied the two prong *Strickland* test to the situation where defense counsel's alleged ineffective assistance pertained to the collateral immigration and deportation consequences of his plea. The Court held that the application of the ineffective assistance test articulated in *Strickland* mandates that when the legal consequence of a guilty plea is readily ascertainable, defense counsel must clearly advise his client of such consequence in order to render effective assistance. The Court noted that "for at

least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea" (*id.* at 1485). The Appellate Term for this Judicial District has determined that the *Padilla* decision did not create a new rule regarding effective representation, but rather applied an established constitutional requirement to a new set of facts and, as such, is retroactive in its application (*see People v Nunez*, 30 Misc 3d 55 [App Term, 2d Dept 2010]).

Here, the affidavit of Tara Onorato, defendant's attorney at the time of his plea, states that she has "no recollection" as to whether she advised him of the immigration consequences of his plea. Indeed, the attached transcript of that proceeding is silent as to any such advisement. Likewise, the affidavit of Catherine Griffin, the attorney who represented defendant at the time of sentencing, also states that she has "no recollection" of providing the defendant any such warning. The lack of certainty on the part of the attorneys contrasts with that of the defendant, who states emphatically in his affidavit that prior to his plea "my attorney did **not** advise me that this conviction would result in deportation or a denial of legal permanent residency in the United States."

In light of this documented departure from the "professional norm" of informing a defendant of the possible deportation consequence of a guilty plea, the court concludes that counsel rendered ineffective assistance to the defendant in conjunction with his guilty plea. The question remains whether this ineffective assistance of counsel resulted in prejudice to the defendant. The court concludes that it did.

The affidavit submitted by defendant establishes that he is a citizen of El Salvador who pled guilty to attempted petit larceny, a class B misdemeanor, on May 3, 2002. As a second offense involving a crime of moral turpitude (the evidence indicates that defendant was previously convicted of attempted petit larceny in Suffolk County on October 10, 2000), this conviction

rendered the defendant subject to mandatory detention pursuant to §212(a)(2)(A)(i) of the Immigration and Nationality Act (*see* Affirmation of Ala Amoichi, Esq., the defendant's immigration attorney). According to Amoichi, this second offense also rendered the defendant ineligible for an adjustment of status pursuant to the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). The People concede as much by submitting the letter of Timothy Maguire, Senior Attorney at the New York Office of the U.S. Immigration and Customs Enforcement. In his letter dated April 15, 2011, Mr. Maguire acknowledges that "but for his conviction for petty larceny, Mr. Alfonso [*sic*] would be statutorily eligible for NACARA. With that conviction no matter how impressive a presentation he might be able to offer, he could not be granted that relief."

Although the People point out that adjustment under NACARA is discretionary, and that such relief may not have been granted in light of defendant's criminal history, it cannot be denied that the conviction under consideration absolutely precluded any NACARA relief. This is certainly evidence of prejudice. Moreover, this is not a case where the defendant ignored, misunderstood or was mislead by warnings about possible immigration consequences given by a judge or counsel (*cf. Boakye v US*, 2010 WL 1645055 [SDNY]; *People v Hendricksen*, 31 Misc 3d 1222[A] [Sup Ct, Kings County 2011]; *People v Rampersaud*, 31 Misc 3d 1229[A] [Westchester County Court 2011]). As discussed above, no such warnings were ever provided to the defendant.

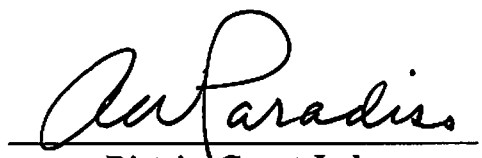
Although the People contend that the evidence of defendant's guilt in this matter (which involved a charge of petit larceny for the alleged theft of clothing valued at $75), was overwhelming, it cannot be argued that the potential sentencing consequences were so severe as to render a plea the only rational alternative to trial (*cf. Boakye*, *supra*; *People v McLartey*, 32 Misc 3d 1201[A] [Sup Ct, NY County 2011]; *People v Hendricksen*, *supra*; *People v Rampersaud*, *supra*; *People v Picca*, 29 Misc 3d 997 [Sup Ct, Kings County 2010]). Indeed, it appears that the judge who took the plea initially promised the defendant a no-jail commit (i.e., probation) pending a pre-sentence report.

Although the record is silent as to why, the defendant was later sentenced to 15 days incarceration. Based on this court's experience with similar matters, it is hard to imagine that a significantly more severe sentence would have been imposed following a conviction after trial. More to the point, it is unlikely that the remote risk of up to one year incarceration would have prevented the defendant from considering a trial had he been fully informed of the immigration consequences of a plea. Defendant's averment to that effect in his affidavit can hardly be considered conclusory and self-serving.

The court is convinced that the defendant was prejudiced by his guilty plea on May 3, 2002, and that such prejudice is attributable to counsel's failure to advise him of the immigration consequences of his plea. Accordingly, the motion is granted.

Counsel for the parties are directed to appear in Part 11 on August 25, 2011 to discuss a trial date or other disposition of this matter. This constitutes the decision and order of the court.

So Ordered:



District Court Judge

Dated: July 29, 2011

cc: The Law Offices of Christopher J. Cassar, P.C.
ADA Jacqueline M. Rosenblum, Esq.