

SECOND CIRCUIT

***U.S. v Carrasco*, 2019 WL 2866602, 7/3/19 – IAC / REMAND**

The defendant appealed from a judgment of conviction, pursuant to a plea of guilty in District Court–EDNY, on the ground that he did not knowingly and willingly plead guilty to a violation of 26 USC § 7206 (1) (fraud and false statements), in that counsel was ineffective in failing to warn him about mandatory deportation. In a Summary Order, the Second Circuit remanded for an evidentiary hearing. The immigration consequence was clear, since the U.S. Supreme Court has held that a violation of the subject provision was an aggravated felony. Both the defendant and defense counsel submitted affidavits stating that counsel did not inform the defendant that a conviction would subject him to mandatory deportation. To show prejudice, the defendant had to demonstrate a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. The manner in which counsel’s provision of inaccurate information affected a defendant’s decision could not turn solely on the likelihood of conviction after trial. The defendant had to demonstrate that, in deciding whether to plead guilty, he placed particular emphasis on immigration consequences. The court could not rely solely on post hoc assertions from a defendant and was required to look to contemporaneous evidence. This defendant relied on: (1) his own affidavit and an affidavit from counsel suggesting that the defendant was particularly concerned about the effect of his plea on immigration status, and (2) the defendant’s history in the U.S., his family circumstances, and his gainful employment—purportedly signaling a strong connection to, and desire to remain in, this country. Because the District Court had not yet evaluated the salient evidence, the reviewing court ordered a determination as to whether the conviction should be vacated on the basis of objectively unreasonable representation and resulting prejudice to the defendant.

APPELLATE DIVISION

***People v Bakayoko*, 7/17/19 – BAD WAIVER / REDUCTION TO 364 DAYS**

Following pleas of guilty, the defendant was convicted in Queens County Supreme Court of 3rd degree robbery and attempted 3rd degree robbery and sentenced to concurrent terms of 2 to 6 years and 1½ to 4 years. Upon appeal, he challenged the sentences as excessive. The Second Department found the waiver of the right to appeal invalid. The terse colloquy was insufficient to show that the defendant appreciated the consequences of the waiver, given that: he was age 20, had dropped out of high school in 11th grade, had mental health issues, and had limited experience in the criminal justice system. The written waiver could not cure the defects. Although the defendant had served the sentences, the excessiveness question was not academic, in light of the potential immigration consequences. Thus, the appellate court reduced the sentences to concurrent definite terms of 364 days. Appellate Advocates (Erica Horwitz, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_05677.htm