

APPELLATE DIVISION

Plea Cases – Immigration Issues

***People v McDonald*, 12/4/18 – BAD IMMIGRATION ADVICE / NO PREJUDICE**

The defendant appealed from a judgment convicting him of 2nd degree criminal possession of stolen property. Counsel rendered deficient advice in stating that the defendant “could” be deported. In fact, deportation was presumptively mandatory for the subject aggravated felony. However, the plea court corrected the error, advising the defendant that he “will” be deported as the result of the plea. In light of the warning—the last word on the subject, which was not undermined by defense counsel—the **First Department** found that the defendant could not show a reasonable probability that he would have gone to trial if properly warned by counsel about deportation.

http://nycourts.gov/reporter/3dseries/2018/2018_08266.htm

***People v Pinto*, 12/5/18 – TESTIMONY ON MISADVICE NOT CREDIBLE / 440 DENIED**

The defendant appealed from an order of Queens County Supreme Court, which after a hearing, denied his CPL 440.10 motion to vacate a judgment convicting him of attempted 3rd degree criminal sale of a controlled substance. The **Second Department** affirmed. The defendant, a native of Colombia and a LPR of the U.S. defendant, was sentenced in 2003 to probation for the above crime. Following his 2012 application for citizenship, removal proceedings were initiated for the aggravated felony. In 2014, the defendant moved to vacate his conviction based on ineffective assistance; his attorney allegedly gave incorrect advice regarding the immigration consequences of his plea. Supreme Court denied the motion without a hearing. The Second Department reversed and remitted for a hearing and a new determination. In the instant decision, the appellate court held that, at the hearing, the defendant failed to demonstrate that he was deprived of the effective assistance. He did not show that his trial counsel misadvised him that he would likely prevail in a removal proceeding. The defendant admitted that he had previously lied under oath to avoid deportation, and the Supreme Court found that his vague testimony was not credible.

http://nycourts.gov/reporter/3dseries/2018/2018_08331.htm

Plea Cases - Other Issues

***People v Sarner*, 12/5/18 – COUNSEL TOOK ADVERSE POSITION / NEW COUNSEL**

The defendant appealed from a judgment of Nassau County Supreme Court convicting him of criminal contempt. The **Second Department** remanded for further proceedings. At sentencing, the defendant stated that he wished to withdraw his plea of guilty because he was innocent and was coerced into pleading guilty. His attorney stated that he did not want to be a party to the motion and added: “I fought long and hard to get this. I thought we had this.” The court advised the defendant not to say anything further; warned that he could be charged with perjury; denied the motion; and imposed sentence. The defendant’s right to counsel was denied when his attorney took a position adverse to him. Before determining the motion, the trial court should have assigned a new attorney. Moreover, in advising the

defendant not to say anything further because he could be charged with perjury, the court denied the defendant the opportunity to present his contentions. Steven Feldman represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_08335.htm

***People v Desselle*, 12/4/18 – NO CONST. SPEEDY TRIAL VIOLATION / CONCURRENCE**

The defendant appealed from a judgment of New York County Supreme Court convicting him, upon his plea of guilty, of attempted 2nd degree murder. The **First Department** concluded that the trial court had properly denied the defendant's constitutional speedy trial motion. The 28-month delay was attributable to both the prosecution and the defense; and the defendant had not shown how his defense was impaired by the delay, which was not so egregious as to warrant dismissal. A concurring justice criticized the prosecution for largely causing the substantial, unnecessary delay by insisting on motion practice and missing deadlines.

http://nycourts.gov/reporter/3dseries/2018/2018_08252.htm

***People v Rodriguez*, 12/6/18 – FLAWED PLEA NEGOTIATION ADVICE / NO PREJUDICE**

The defendant appealed from a judgment of New York County Supreme Court convicting him of persistent sexual abuse and sentencing him, as a persistent violent felony offender. The **First Department** affirmed, concluding that the defendant had not established that his attorney's allegedly deficient advice regarding plea negotiations caused prejudice. Before his arraignment on charges of forcible touching and 3rd degree sexual abuse, the prosecutor proposed a misdemeanor disposition. Even if counsel should have warned defendant that he could be indicted for persistent sexual abuse and sentenced to three years to life as a persistent violent felony offender, the defendant did not establish that the misdemeanor disposition would have actually been accepted by the court.

http://nycourts.gov/reporter/3dseries/2018/2018_08358.htm

***People v Galea*, 12/5/18 – MENTAL CAPACITY / NO IMPACT ON PLEA**

The defendant appealed from a judgment of Nassau County Supreme Court convicting him of attempted 3rd degree robbery. His contention that the plea allocution was insufficient because Supreme Court failed to inquire into his mental capacity at the time of the plea was unpreserved for appellate review. The **Second Department** held that, in any event, nothing in the record indicated a need for the plea court to have conducted a full inquiry into the defendant's mental health before accepting his plea of guilty. While the psychiatric evaluation indicated that the defendant had been diagnosed with three disorders (bipolar, substance use, and antisocial personality), there was no proof that, at the time of the plea proceeding, he could not understand the nature of the proceeding or the consequences of the plea. During the allocution, the defendant stated that he took medication, but did not feel that his condition interfered with his ability to understand what was happening; appropriately responded to questions; and gave no indication that he was mentally incapacitated.

http://nycourts.gov/reporter/3dseries/2018/2018_08325.htm