



The Commonwealth of Massachusetts

Committee for Public Counsel Services

Immigration Impact Unit

21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591

FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Immigration Case Notes for Massachusetts Criminal Defense Attorneys **August - September 2012**

There were no significant decisions in August 2012

From the Massachusetts Court of Appeals:

Commonwealth v. Gordon, 82 Mass. App. Ct. 389 (September 6, 2012)

The defendant, Daneroy Gordon, has been a legal permanent resident since 1993. His mother and two children are all U.S. citizens. In 2008, Gordon pleaded guilty to charges that included possession of a firearm and assault and battery on a police officer (ABPO). Gordon received an 18-month House of Corrections (HOC) sentence on the firearm charge and a one-year concurrent HOC sentence on the ABPO. While possession of a firearm is a deportable offense, the defendant would be eligible to apply for relief from removal; however, a conviction for ABPO with a one year sentence of imprisonment is an aggravated felony for immigration purposes and bars any relief thus causing him to be virtually mandatorily deportable.

In 2010, Gordon filed a new trial motion asserting that his trial counsel informed him that the firearms offense could make him deportable, but that immigration authorities would not consider the ABPO. Based on this incorrect information, Gordon claimed ineffective assistance of counsel under *Padilla v. Kentucky* and requested that either the plea be vacated or the sentence on the ABPO reduced to 11 months (so that it would no longer be considered an aggravated felony). Initially, the trial court judge allowed the motion and reduced the sentence. The Commonwealth filed a motion to reconsider and, upon reconsideration, the trial judge vacated the entire conviction. The Commonwealth appealed.

On appeal, the Commonwealth argued that the trial judge could not grant a motion for new trial without an evidentiary hearing. The appeals court found that "generally, where a substantial issue is raised and is supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing... [but that] an evidentiary hearing may not be necessary...if the substantial issue raised is solely a question of law, or if the facts are undisputed in the record." *Gordon* at 395. With regard to Mr. Gordon, the court found that the affidavits he submitted left too many

factual questions and thus an evidentiary hearing was required before the motion could be granted.

Turning to the ineffective assistance claim, the Commonwealth argued that trial counsel's duties under *Padilla* were satisfied because trial counsel had given general warnings about immigration consequences. General warnings were sufficient, the Commonwealth argued, because the immigration consequences of the ABPO were not succinct and straightforward. The court disagreed finding that the issue was "not so complex or confused that a reasonably competent attorney would be uncertain of the consequences of the plea." The court concluded that effective counsel should have advised the defendant that a one-year sentence on ABPO was an aggravated felony.

In the discussion of prejudice, the court understood that in order to protect Mr. Gordon from the aggravated felony conviction, the ABPO sentence had to be reduced by one day. The court felt that since he was serving a concurrent 18-month sentence, there was a reasonable probability that he could have negotiated such a plea. Even though Mr. Gordon would still be deportable based on the firearm conviction, had he avoided an aggravated felony conviction he would have been eligible for relief from removal through cancellation of removal. The court decided that the question of prejudice raised a substantial issue, but due to unanswered factual questions, the case had to be remanded for an evidentiary hearing.

Practice Tip

This is the first Massachusetts appellate decision to discuss what constitutes "clear" immigration consequences and what level of advice is thus required under *Padilla v. Kentucky*. The court holds that the immigration consequences of ABPO are clear despite the need for defense counsel to research several provisions of the Federal Code in order to determine the consequences, and that, therefore, the defendant was entitled to advice about the specific immigration consequences he was facing based on the particular offense and his immigration status.

The court also affirmed the decision in *Commonwealth v. Martinez*, 81 Mass. App. Ct. 595 (2012), that cancellation of removal is a serious benefit, and that prejudice can be shown by asserting that with proper advice of counsel, the defendant would have rejected the plea to an aggravated felony in order to maintain eligibility for cancellation of removal.

The discussion of evidentiary hearings in this decision must be read carefully. It is important to note that this decision does NOT hold that a motion for new trial cannot be granted on the affidavits alone. The cases cited in the decision that support the need for an evidentiary hearing involve situations in which the defendant's affidavits were missing key information or conflicting affidavits were submitted by the defendant and the Commonwealth. The court stated that the affidavit submitted by Gordon's trial attorney were ambiguous and incomplete. If the affidavits are complete and there is no conflicting evidence presented by the Commonwealth, Rule 30(c) allows judges to decide motions on the affidavits. The Reporter's Notes state that "[t]he primary purpose of subdivision (c)(3) is to encourage the disposition of post conviction motions upon affidavit." However, counsel should request an evidentiary hearing if necessary to introduce additional evidence or to allow the court to better access the credibility of the witnesses.

From the Board of Immigration Appeals:

Matter of Edgar Leal, 26 I&N Dec. 20 (BIA 2012)

In 1990, Mr. Leal entered the United States without inspection, and in 2007 he was convicted of “recklessly endangering another person with a substantial risk of imminent death or physical injury” in violation of section 13-1201(A) of the Arizona Revised Statutes. After being placed in removal proceedings, Mr. Leal applied for non-LPR cancellation of removal pursuant to 8 U.S.C. 1229b(b) (a form of relief available to noncitizens without green cards). The immigration judge denied Mr. Leal’s application for cancellation, finding that his Arizona endangerment conviction was a crime involving moral turpitude (CIMT), making Mr. Leal ineligible for cancellation of removal.

On appeal, the BIA affirmed the immigration judge’s determination that the reckless endangerment conviction was a CIMT. The central issue on appeal was whether the Arizona definition of reckless, which included “[a] person who creates [substantial and unjustifiable] risk but is unaware of such risk solely by reason of voluntary intoxication,” was sufficient scienter (intent) to satisfy the CIMT test outlined in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (2008). In *Silva-Trevino*, the Attorney General held that recklessness would satisfy the intent requirement for a CIMT. The BIA concluded that “an actor who fails to perceive a manifest risk of harm solely because of voluntary intoxication is no less culpable than an actor who consciously disregards a known risk.”

Practice Tip: This decision further expands the category of CIMTs to include those criminal offenses where the required level of intent is recklessness that can be established by failing to perceive a substantial and unjustifiable risk due to voluntary intoxication.