



The Commonwealth of Massachusetts

Committee for Public Counsel Services

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys **January 2014**

Massachusetts Appeals Court

Commonwealth v. Almonte, 84 Mass. App. Ct. 735 (January 27, 2014)

In 2005, Mr. Almonte pleaded guilty to one count of ABDW and one count of A&B against a child. He received a one year suspended sentence on each count, turning these offenses into aggravated felonies. For non-citizens, aggravated felony convictions lead to nearly automatic deportation, permanent exile from the U.S., and are a bar to almost every form of relief from deportation.

In 2012, Mr. Almonte filed a motion for new trial based on his attorney's failure to provide proper immigration advice. As part of the motion, Mr. Almonte included an affidavit from plea counsel admitting that while he reviewed the green sheet with Mr. Almonte, he did not provide specific advice based on the charges.

The trial judge granted the motion for new trial without an evidentiary hearing. The Commonwealth appealed arguing that the failure to hold an evidentiary hearing and provide findings of fact was an abuse of discretion and error of law that deprived the Commonwealth of an opportunity to contest the motion. The Court of Appeals agreed finding that an evidentiary hearing was required because of what it considered conflicting evidence presented by the defendant's and plea counsel's affidavits and the green sheet signed by the defendant . Because the Appeals Court found that a "substantial issue" had been raised, they remanded the case back to the trial court for an evidentiary hearing and findings of fact.

Practice Tips

Under Rule 30(c)(3) and as described in *Commonwealth v. Gordon*, 82 Mass. App. Ct. 389 (2012), it is best practice for a trial judge to hold an evidentiary hearing when there is insufficient or conflicting evidence presented in a motion for new trial. If counsel does not think an evidentiary hearing is necessary, she should be prepared to argue why the affidavits and other evidence presented with the motion are sufficient to rule without an evidentiary hearing, and/or that the Commonwealth has not presented conflicting evidence that raises a "substantial issue" requiring an evidentiary hearing.

Note also that the SJC stated in *Commonwealth v. Clarke*, 460 Mass. 30, 39 n.20 (2011), that counsel simply reviewing the green sheet with the defendant is not sufficient to meet counsel's duty to advise a defendant of immigration consequences pursuant to *Padilla v. Kentucky*. Particularly in a situation where the client is pleading to an aggravated felony, more specific advice is necessary. Therefore, the fact that in this case trial counsel reviewed the green sheet should not be considered to be in conflict with the allegation that he failed to give adequate advice. If faced with this question, attorneys should cite to *Clarke* and argue that only reviewing the green sheet is deficient performance under the first prong of a claim for ineffective assistance of counsel, thus trial counsel's assertion that this is all he did is not evidence that proper immigration advice was given.

Finally, in a footnote in *Almonte*, the Appeals Court "assumes without deciding" that the defendant can show "more than a hypothetical risk" of deportation. Note that this is not the proper standard for prejudice in a *Padilla* motion. It is the standard for prejudice in new trial motions based on the lack of judicial immigration warnings pursuant to G.L. ch. 278, §29D. See *Commonwealth v. Grannum*, 457 Mass. 128 (2010). When filing new trial motions based on ineffective assistance of counsel under *Padilla*, be sure to clarify the prejudice standard applicable to such motions as described in *Commonwealth v. Clarke, supra*, and *Commonwealth v. Marinho*, 464 Mass. 115 (2013).