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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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Massachusetts Appeals Court

Commonwealth v. Valdez, 88 Mass. App. Ct. 332 (2015)

The defendant, Frank Valdez, entered the United States as a legal permanent resident in 1985. In 1989, he pled guilty to larceny of a motor vehicle. In 2013, he filed a motion for new trial asserting that the plea judge had not provided the required warnings under M.G.L. c. 278 §29D.

Under M.G.L. c. 278 §29D, absent a record that the warnings were given, the defendant shall be presumed not to have received the warnings. *Commonwealth v. Grannum*, 457 Mass. 128 (2010). Based on an affidavit from the plea judge, there was sufficient reason to believe that Mr. Valdez was warned about possible deportation and denial of naturalization, but he may not have been warned about exclusion. Therefore, he was entitled to the presumption that he did not receive that portion of the warnings.

Once clear that a defendant did not receive the proper warning, he is granted a new trial only if he can show "that his plea and conviction may have or has had one of the enumerated consequences." M.G.L. ch. 278 §29D. This portion of the statute has been interpreted to mean that there is more than a "hypothetical risk" that the defendant faces the consequence of which he was not warned. *Commonwealth v. Berthold*, 441 Mass. 183 (2004); *Commonwealth v. Grannum*, 457 Mass. 128 (2010). Because Mr. Valdez received the warnings regarding deportation and naturalization, he had to show that he would be subject to "exclusion" – now referred to as "inadmissibility." Mr. Valdez submitted a detailed affidavit from an immigration attorney outlining the consequences of his conviction as well as his own affidavit explaining his desire to travel outside the United States and become a U.S. Citizen. The court found it "difficult to imagine what other showing [Mr. Valdez] could have made" short of leaving the country and being denied re-entry. *Valdez* at 338. Despite that, the court felt it was "constrained" under *Berthold* and *Grannum* to conclude that denial of the motion was proper because mere eligibility for exclusion/inadmissibility does not appear to satisfy the standard required under those cases.

The court questioned whether requiring the defendant to risk exclusion/inadmissibility by leaving the country is too great a burden to place upon a defendant seeking a remedy of a violation of the statute, though did not suggest what else might be sufficient to satisfy the prejudice requirement.

Practice Tip – The difficulty in showing "more than a hypothetical risk" continues to be an obstacle to defendants who bring motions to vacate conviction under c. 278, §29D. In cases where the only option would be for defendants to place themselves at risk, counsel should continue to create strong records showing the near certainty of consequences. Note that an application for further appellate review in this case is pending before the SJC, FAR-23809.

U.S. Federal District Court for the District of Massachusetts

Nanje v. Chaves, 2015 U.S. Dist. LEXIS 130332 (D. Mass. Sept. 28, 2015)

The plaintiff, Janarius Nanje, is a legal permanent resident. In 2006, he pled guilty to charges of filing a false healthcare claim and larceny. As part of his plea, he agreed to pay $12,000 in restitution to Harvard Pilgrim Health Care (HPHC). Subsequently, Mr. Nanje applied for citizenship, but his application was denied based on this prior conviction. This decision arises out of an appeal of that denial.

Under the immigration statute, an offense that involves fraud or deceit in which the loss to the victim exceeds $10,000, is an aggravated felony. 8 U.S.C. §1101(a)(43)(M)(i). An aggravated felony is a permanent statutory bar to citizenship (as well as a ground of removal). The critical issue to the parties was whether or not Mr. Nanje's conviction was in fact an aggravated felony. There was no dispute as to whether Mr. Nanje's conviction involved fraud or deceit, but the issue raised was whether Mr. Nanje could show by a preponderance of the evidence that the amount of loss was $10,000 or less.

Although the initial plea agreement simply indicated that restitution of $12,000 was due on both charges, in the years following his plea, and after restitution had been paid in full, Mr. Nanje attempted to revise the docket sheets such that the amount of loss was distributed among the charges and would fall under the $10,000 threshold. After multiple post-conviction motions, the state court revised the docket to indicate that Mr. Nanje had paid $6,000 in restitution for the larceny charge and $6,000 for the false claim charge. Arguing that he had not been convicted of a single fraud offense where the loss was greater than $10,000, Mr. Nanje re-applied for citizenship. His application was again denied and the agency explained that the allocation of the restitution was irrelevant because the conviction records showed that Mr. Nanje engaged in a single scheme of conduct where the actual loss to the victim exceeded $10,000.

Unlike in most circumstances, where a court must apply the categorical approach to determine whether the state offense meets the federal ground of removal, in order to determine whether an offense involved a loss exceeding $10,000 the court may look to the facts and circumstances underlying the offense and not just at the elements of the criminal statute. *Nijhawan v. Holder*, 557 U.S. 29 (2009). Using *Nijhawan*, the District Court found that all of the circumstances surrounding the conviction, including the statement of probable cause, the plea offer, and the plea colloquy indicated that Mr. Nanje agreed that the amount of loss was at least $12,000 and agreed to pay as much in restitution. Furthermore, the court discounted the revised docket sheets saying that when the restitution award has been manipulated for the sole purpose of influencing immigration, it cannot be considered as controlling. The court found that there was no question that the sole purpose of the post-conviction motions was to remove the conviction from within the definition of aggravated felony and therefore there was no suggestion that the

actual loss was in fact less than $10,000. Because of that, Mr. Nanje was unable to show that his conviction was not an aggravated felony.

Practice Tip - This case is a good reminder to try to limit the amount of restitution placed on fraud offenses. When it is not possible to keep the amount under $10,000 in total, the defendant is more likely to get the benefit of the doubt if the initial plea divides up the amount of loss rather than needing to revise the amount in post-conviction motions. Defense counsel should from the beginning try to minimize the amount of loss and/or structure the plea in a safer manner.