

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 23, 2024

111230

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MIGUEL PINALES-HARRIS,
Appellant.

Calendar Date: April 23, 2024

Before: Pritzker, J.P., Reynolds Fitzgerald, Ceresia, McShan and Mackey, JJ.

Timothy S. Brennan, Albany, for appellant.

Andrew J. Wylie, District Attorney, Plattsburgh (*Jeffrey C. Kehm* of counsel), for respondent.

McShan, J.

Appeal, by permission, from an order of the County Court of Clinton County (Keith M. Bruno, J.), entered May 22, 2019, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him of the crimes of criminal possession of a controlled substance in the third degree and aggravated unlicensed operation of a motor vehicle in the second degree and the traffic violation of operating a motor vehicle with improper license plates, without a hearing.

In 2017, defendant waived indictment and pleaded guilty to a superior court information charging him with criminal possession of a controlled substance in the third degree, a class B felony, aggravated unlicensed operation of a motor vehicle in the

second degree, a misdemeanor, and the violation of operating a motor vehicle with improper license plates. No agreement was made regarding his sentence, and, in 2018, County Court sentenced defendant to a prison term of three years for his conviction of criminal possession of a controlled substance in the third degree, and to lesser concurrent sentences for his remaining convictions, and directed that defendant be enrolled in a shock incarceration program.

After defendant, a non-United States citizen, was detained by immigration officials for removal, he moved pursuant to CPL article 440 to vacate the judgment of conviction. The motion was premised upon the claim that his plea was not knowing, voluntary or intelligent and he had been denied the effective assistance of counsel in that counsel never properly advised him of the immigration consequences of his guilty plea. County Court denied the motion without a hearing, and defendant now appeals by permission of this Court.

Defendant contends that counsel's failure to apprise him, prior to his plea, that his guilty plea would result in mandatory deportation constituted the ineffective assistance of counsel, thereby warranting vacatur of his plea or, at a minimum, a hearing on his motion. We agree. "On a motion to vacate a judgment of conviction under CPL 440.10, a hearing is only required if the submissions show that the nonrecord facts sought to be established are material and would entitle the defendant to relief" (*People v Baez-Arias*, 203 AD3d 1409, 1410 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 1132 [2022]; *see People v Miles*, 205 AD3d 1222, 1224 [3d Dept 2022], *lv denied* 38 NY3d 1189 [2022]). As to the merits of defendant's motion, "a defense attorney deprives a noncitizen defendant of his or her Sixth Amendment right to the effective assistance of counsel by failing to advise, or by misadvising, the defendant about the immigration consequences of a guilty plea" (*People v Peque*, 22 NY3d 168, 190 [2013], *cert denied* 574 US 840 [2014]; *see People v Baez-Arias*, 203 AD3d at 1409-1410). "Where 'the deportation consequences of a particular plea are unclear or uncertain,' and the applicable law, in turn, 'is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . , the duty to give correct advice is equally clear' " (*People v Marcellus*, 223 AD3d 1051, 1054 [3d Dept 2024] [footnote omitted], quoting *Padilla v Kentucky*, 559 US 356, 369 [2010]). Further, a defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*People v Baez-Arias*, 203 AD3d at

1410 [internal quotation marks and citations omitted]; *see People v Peque*, 22 NY3d at 198).

During the plea colloquy, County Court advised defendant that his guilty plea to criminal possession of a controlled substance in the third degree "will, *may or could* result in negative consequences for [defendant] in the future, including deportation, exclusion from admission to the United States and a denial of naturalization in the future" (emphasis added). In support of his CPL 440.10 motion, defendant alleged that defense counsel "did not provide him with the correct information concerning the immigration consequences of his guilty plea" and that counsel demonstrated a misunderstanding of the immigration laws relating to an aggravated felony by focusing on the type of sentence received rather than on the crime defendant was convicted of. That misunderstanding was reflected at sentencing where trial counsel erroneously advised defendant that he "could . . . be deported" if he were to be "incarcerated for any extensive amount of time," but, if he were sentenced to "probation," defendant would not be deported. "These advisements were erroneous, and, as in *Padilla*, defense counsel readily could have ascertained – simply from a reading of the relevant statutes – that defendant's plea to criminal possession of a controlled substance in the third degree rendered deportation presumptively mandatory and rendered defendant ineligible for cancellation of an order of removal" (*People v Marcellus*, 223 AD3d at 1054 [internal quotation marks and citations omitted]).¹

Further, defendant averred in his CPL 440.10 motion that, at the time of his plea, he had resided in the United States for over 20 years and that he "financially supported the mother of his child, as well as her two older children from a prior relationship." Given his family circumstances and their dependency upon him, defendant averred that, had he received correct advice about pleading guilty to an aggravated felony for purposes of immigration, he "would have rejected the plea offer, proceeded to trial, or sought other alternative plea options." These allegations "raise a question of fact as to whether it was reasonably probable that he would not have entered a plea of guilty if he had been correctly advised of the deportation consequences of the plea" (*id.* at 1055 [internal

¹ Defendant's conviction of criminal possession of a controlled substance in the third degree (*see* Penal Law § 220.16 [1]) constituted an aggravated felony (*see* 8 USC § 1227 [a] [2] [A] [iii]; [B] [i]), which rendered defendant's deportation mandatory, subjecting him to expedited removal proceedings (*see* 8 USC § 1228 [a] [1], [3]; [c]) and precluding him from seeking cancellation of an order directing his removal from this country (*see* 8 USC § 1229b [a] [3]; *People v Marcellus*, 223 AD3d at 1055 n 2).

quotation marks, brackets and citation omitted]). As defendant sufficiently alleged that counsel provided incorrect information concerning the deportation consequences that would result from his guilty plea and that he was prejudiced as a result thereof (*see id.* at 1053-1056; *People v Guzman-Caba*, 214 AD3d 564, 565-566 [1st Dept 2023]), we find that he was entitled to a hearing on his CPL 440.10 motion and remit the matter to County Court for that purpose.

Pritzker, J.P., Reynolds Fitzgerald, Ceresia and Mackey, JJ., concur.

ORDERED that the order is reversed, on the law, and matter remitted to the County Court of Clinton County for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court