STATE OF CONNECTICUT *v.* MAURICE S. MALCOLM (SC 16389)

McDonald, C. J., and Norcott, Katz, Sullivan and Vertefeuille, Js.*

Argued January 9—officially released August 21, 2001

Counsel

Robert M. Spector, deputy assistant state's attorney, with whom were *James R. Turcotte*, supervisory assistant state's attorney, and, on the brief, *Michael Dearington*, state's attorney, for the appellant (state).

Michael Boyle, for the appellee (defendant).

Opinion

SULLIVAN, J. The issue in this appeal is whether the trial court improperly granted the defendant's motion to withdraw his guilty plea, on the grounds that, in accepting the guilty plea, the trial court had failed to mention specifically all three immigration and naturalization consequences listed in General Statutes § 54-1j[1] that could result from a guilty plea by a defendant who is not a United States citizen. We reverse the ruling of that court.

On or about December 11, 1996, undercover Hamden

police officers made arrangements to purchase three ounces of marijuana from someone named ''Mo'' for $375. A meeting was held at an arranged location, and the defendant, Maurice S. Malcolm, arrived with the marijuana and was arrested. The defendant appeared to be under the influence of marijuana at the time.

The defendant was charged with the sale of a controlled substance in violation of General Statutes § 21a-277 (b),[2] possession of a controlled substance, less than four ounces of marijuana, in violation of General Statutes § 21a-279 (c),[3] and conspiracy to sell a controlled substance in violation of General Statutes §§ 53a-48 and 21a-277.[4] On August 20, 1998, after coming to an agreement with the state, the defendant pleaded guilty to the sale of marijuana in violation of § 21a-277 (b). Although the defendant and the state had agreed on a sentence of five years imprisonment, execution suspended, with a two year period of probation, the trial court sentenced the defendant to three years imprisonment, execution suspended, and two years of probation.[5]

On or around May 10, 1999, the Immigration and Naturalization Service took the defendant into custody and instituted deportation proceedings against him. The defendant was transferred to an Immigration and Naturalization Service detention facility in Oakdale, Louisiana. On May 20, 1999, the defendant filed an emergency motion to vacate the judgment and withdraw his guilty plea on the grounds that the trial court failed to comply with § 54-1j in accepting his guilty plea and that he was likely to be deported within two weeks. The trial court granted the motion on June 4, 1999. The state, on the granting of permission, appealed to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal, the state claims that the trial court improperly found that the defendant's guilty plea canvass did not comply with § 54-1j and, therefore, improperly vacated the defendant's conviction. We agree with the state.

I

FINAL JUDGMENT

The state argues that the trial court's vacating of the defendant's conviction is an appealable final judgment under *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). We agree.

In *Curcio*, we held that ''[a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them.'' Id. The state relies on the second prong of this test, which ''focuses not on the proceeding involved, but on the potential harm to the appellant's

rights.'' Id., 33. It points out that, in this case, the defendant pleaded guilty on August 20, 1998, in exchange for a sentence of three years imprisonment, suspended after thirty days served, and two years probation. The defendant had already served the thirty days in lieu of posting bond at the time that the sentence was imposed. In reliance on the defendant's representations at the plea canvass and on the existence of a final, partially executed judgment against the defendant, the state then destroyed the evidence against him.

We conclude that these circumstances distinguish this case from *State* v. *Ross*, 189 Conn. 42, 454 A.2d 266 (1983). In that case we held that a judgment of dismissal of the charges, with prejudice, entered on the state's own motion, was ''a sufficiently serious precondition to the right of appeal to provide adequate assurance that this procedure will not be resorted to lightly''; id., 50–51; and allowed the appeal. In the present case, although the state has not dismissed the charges against the defendant as a precondition to the appeal, in reasonable reliance on the defendant's representations that he had discussed the immigration consequences of his plea with his lawyers, it has destroyed the evidence against him, thereby significantly impairing its ability to retry him. ''A presentence order will be deemed final for purposes of appeal only if it involves a claimed right the legal and practical value of which would be destroyed if it were not vindicated before trial.'' Internal quotation marks omitted.) *State* v. *Curcio*, supra, 191 Conn. 33–34. Because the practical value of the state's right to seek a judgment against the defendant will be destroyed if it is not allowed to appeal, we conclude that the trial court's ruling vacating the conviction and allowing the defendant to withdraw the guilty plea was an appealable final judgment under the second prong of *Curcio*.

II

COMPLIANCE WITH GENERAL STATUTES § 54-1j

The defendant claims that the trial court did not comply with § 54-1j[6] before accepting his plea. At the plea canvass, the trial court questioned the defendant as follows: ''The law says that I have to tell you that if you're not a citizen of the United States, conviction of this offense can result in your being deported, being denied admission to the United States or being denied readmission to the United States, have you discussed that with your lawyers too?'' The defendant responded, ''Yes.'' The court then asked, ''Is there anything you want to ask your lawyer right now? Take a minute if you do,'' and the defendant responded, ''No.'' The defendant points out that § 54-1j provides that the defendant shall be warned about each of three potential consequences of a guilty plea: (1) deportation; (2) denial of admission to the United States; and (3) denial of naturalization. The defendant argues that the trial

court's instruction, which warned of only deportation and denial of admission, was improper. The state contends that the trial court's advisement substantially complied with § 54-1j and was, therefore, proper. We agree with the state.

This court previously has not considered whether a trial court must strictly comply with § 54-1j. Other jurisdictions, however, have addressed the issue. In *Daramy* v. *United States*, 733 A.2d 949, 951 (D.C. 1999), rev'd on other grounds, 750 A.2d 552 (D.C. 2000),[7] the trial court instructed the defendant, who was not a citizen, that the " 'Immigration and Naturalization Service could review your status to decide whether to allow you to remain in the United States or to return to your home country. If you were required to depart, put it plainly, if you were deported, you could be barred from re-entry at some future date.' " As in the present case, the trial court in *Daramy* did not mention the denial of naturalization. The District of Columbia Court of Appeals looked to the legislative history of the District of Columbia statute and found the statute to be a legislative response to the apparent "reluctance of the courts to grant a motion to withdraw a guilty plea when the defendant had not been advised of potential consequences with respect to the prisoner's immigration status." Id., 952. The court found that the purpose of the statute was to put noncitizens on notice that a plea of guilty could result in immigration consequences. Id., 953. It concluded that, even though the trial court did not warn the defendant that he could be denied naturalization, he could have inferred such a consequence because he could not have been deported if he were naturalized. Id. The court held that, while it would have been better for the trial court to have read the statute verbatim, the warning as given was acceptable. Id.; see also *People* v. *Superior Court*, 23 Cal. 4th 183, 194, 199, 999 P.2d 686, 96 Cal. Rptr. 2d 463 (2000)[8] (where trial court did not specifically mention one potential consequence listed in statute, namely that defendant could be excluded from admission to United States, court held that, under state constitution, to vacate plea, defendant must show he was prejudiced by trial court's noncompliance with statute); *Delatorre* v. *State*, 957 S.W.2d 145, 150–51 (Tex. App. 1997) (trial court's instruction substantially complied with statute "because it included the most severe action which could have befallen the defendant," namely deportation); *Garcia* v. *State*, 877 S.W.2d 809, 813 (Tex. App. 1994) ("trial court's admonishment, 'if you're not a citizen or if you're not legally in this country, that it could mean that you would have to be sent back to your original country,' substantially complied" with Texas statute); *State* v. *Garcia*, 234 Wis. 2d 304, 310–11, 312, 610 N.W.2d 180 (App. 2000) (warning sufficient, despite the fact that it did not follow statute[9] verbatim, because defendant confirmed that he understood risk of deportation, was instructed that his

status would be uncertain and deportation prime consideration in plea negotiation). We agree with the reasoning of these cases and conclude that it was not necessary for the trial court to read the statute verbatim. We conclude, rather, that only substantial compliance with the statute is required to validate a defendant's guilty plea.

Moreover, this court repeatedly has held that only substantial compliance is required when warning the defendant of the direct consequences of a guilty plea pursuant to Practice Book § 39-19[10] in order to ensure that the plea is voluntary pursuant to Practice Book § 39-20.[11] See *State* v. *Ocasio*, 253 Conn. 375, 380, 751 A.2d 825 (2000) (''only substantial, rather than literal, compliance with § 39-20 is required in order to validate a defendant's plea of guilty''); *State* v. *Godek*, 182 Conn. 353, 360, 438 A.2d 114 (1980), cert. denied, 450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981) (''constitutional rights of a criminal defendant in taking either a guilty or a nolo plea must be scrupulously protected . . . [however] the failure to comply with each and every requirement of [the statute] does not automatically require the vacating of the defendant's plea'' [citations omitted]). We will not require stricter compliance with regard to the collateral consequences of a guilty plea.[12]

Furthermore, such a standard is consistent with the legislative intent behind § 54-1j. Although there is little legislative history regarding § 54-1j, comments made by Senator Howard T. Owens, Jr., to the Senate on April 14, 1982, shed some light on the legislative intent behind the statute. After summarizing the text of the statute, Senator Owens indicated that ''if the court fails to advise the defendant of the possible consequences of the conviction, [and] the defendant shows that his plea and conviction could result in deportation . . . [t]he court could, at a subsequent date, be required to vacate the judgment and permit the defendant to withdraw his plea and enter a plea of not guilty.'' 25 S. Proc., Pt. 4, 1982 Sess., pp. 1263. Senator Owens added, ''[a lot] of people are not aware of the consequences of these [Immigration and Naturalization Service rules] and face deportation and being able to do nothing about it.'' Id. These remarks suggest that § 54-1j, rather than demanding that trial courts instruct defendants on the intricacies of immigration law, seeks only to put defendants on notice that their resident status could be implicated by the plea. Id.; see also *Commonwealth* v. *Hason*, 27 Mass. App. 840, 844–45, 545 N.E.2d 52 (1989).

By instructing the defendant that he could be deported or excluded from readmission to the United States, the trial court in the present case substantially complied with § 54-1j. The defendant was warned adequately that his immigration status could be implicated by his guilty plea.

Although it would have been better practice for the trial court to have read the statute verbatim, strict compliance was not necessary to put the defendant on notice that a conviction could have implications beyond the state criminal justice system. To allow the defendant now, years after the charges were brought, and after the evidence has been destroyed, to withdraw a plea into which he entered knowingly and voluntarily would be to assert form over substance.[13] See *Commonwealth* v. *Lopez*, 426 Mass. 657, 662, 690 N.E.2d 809 (1998) (''strict standard for postconviction motions promotes judicial efficiency and finality by discouraging a defendant from entering a guilty plea to test the weight of potential punishment'' [internal quotation marks omitted]); see also *Commonwealth* v. *Hason*, supra, 27 Mass. App. 845 (judges ''should only grant a postsentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth'' [internal quotation marks omitted]). The legislature did not intend to create a loophole for defendants to use as grounds for vacating guilty pleas, years after they have been entered, once evidence is destroyed or witnesses become unavailable. See *State* v. *Evans*, 290 Or. 707, 714, 625 P.2d 1300 (1981) (''what the defendant now seeks is to have the benefit of his plea bargain now that the other charges against him have been dismissed and to nevertheless challenge the validity of his conviction based upon a contention which was not brought to the attention of the trial court'' [internal quotation marks omitted]); *State* v. *Chavez*, 175 Wis. 2d 366, 371, 498 N.W.2d 887 (App. 1993) (''[c]onsistent with this legislative history, we conclude that the legislature did not intend a windfall to a defendant who was aware of the deportation consequences of his plea'').

We also note that the defendant is now threatened with deportation, a subject on which he was instructed, not denial of naturalization. He argues that, had he been able to be naturalized, he could have avoided deportation. This argument, however, simply underscores the interrelated nature of the three potential immigration consequences. Although deportation, exclusion and denial of naturalization are distinct from each other, they are sufficiently related, such that a warning about the first two puts a defendant on notice that the third could be implicated. See *Daramy* v. *United States*, supra, 733 A.2d 953–54 (where trial court omitted any specific reference to naturalization, court reasoned: ''Only by denying the conferral of United States nationality upon Daramy through naturalization would the [Immigration and Naturalization Service] be in a position to return [the defendant] to [her native country]. As only aliens can be made to leave the United States, the plain import of the trial court's statement is that the [Immigration and Naturalization Service] could choose not to naturalize [the defendant]. Therefore,

while the trial court did not quote the statute verbatim, it did place [the defendant] on notice that she might be denied naturalization.'') Because we are not persuaded that a verbatim reading of § 54-1j is required, we reverse the trial court's granting of the defendant's motion to vacate his guilty plea.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion to vacate the judgment and withdraw his plea.

In this opinion, MCDONALD, C. J., and NORCOTT and VERTEFEUILLE, Js., concurred.

* Although Chief Justice McDonald reached the mandatory age of retirement before the date that this opinion was officially released, his continued participation on this panel is authorized by General Statutes § 51-198 (c). The listing of justices reflects their seniority status on this court as of the time of oral argument.

[1] General Statutes § 54-1j provides: ''(a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court advises him of the following: 'If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.'

''(b) The defendant shall not be required at the time of the plea to disclose his legal status in the United States to the court.

''(c) If the court fails to advise a defendant as required in subsection (a) of this section and the defendant not later than three years after the acceptance of the plea shows that his plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.''

[2] General Statutes § 21a-277 (b) provides: ''Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled substance, except a narcotic substance, or a hallucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisoned; and, for each subsequent offense, may be fined not more than one hundred thousand dollars or be imprisoned not more than fifteen years, or be both fined and imprisoned.''

[3] General Statutes § 21a-279 (c) provides: ''Any person who possesses or has under his control any quantity of any controlled substance other than a narcotic substance, or a hallucinogenic substance other than marijuana or who possesses or has under his control less than four ounces of a cannabis-type substance, except as authorized in this chapter, for a first offense, may be fined not more than one thousand dollars or be imprisoned not more than one year, or be both fined and imprisoned; and for a subsequent offense, may be fined not more than three thousand dollars or be imprisoned not more than five years, or be both fined and imprisoned.''

[4] General Statutes § 53a-48 provides: ''(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

''(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.''

[5] The trial court stated, ''I think five is too much for this, I think it should be three suspended. This is sale of [less than four ounces of] marijuana.''

[6] Several of our sister states have statutes similar to § 54-1j. See Cal. Penal Code § 1016.5 (Deering 1998); D.C. Code Ann. § 16-713 (1997); Haw. Rev. Stat. c. 802E (1993); Mass. Gen. Laws c. 278, § 29D (Lawyers Coop. 1992); Mont. Code Ann. § 46-12-210 (1999); N.Y. Crim. Proc. Law § 220.50 (McKinney 1993); Ohio Rev. Code Ann. § 2943.031 (Baldwin 1997); Or. Rev. Stat. § 135.385 (1990); R.I. Gen. Laws § 12-12-22 (2000); Tex. Crim. Code Ann.

§ 26.13 (West 1989); Wash. Rev. Code Ann. § 10.40.200 (West 1990); Wis. Stat. Ann. § 971.08 (West 1998).

[7] D.C. Code Ann. § 16-713 (1997) provides in relevant part: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime, the court shall administer the following advisement on the record to the defendant: 'If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.'

"(b) . . . If the court fails to advise the defendant as [so] required . . . and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. . . ."

[8] Cal. Penal Code § 1016.5 (Deering 1998) provides in relevant part: "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

"If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. . . .

"(b) If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. . . ."

[9] Wis. Stat. Ann. § 971.08 (1) (West 1998) provides in relevant part: "Before the court accepts a plea of guilty or no contest, it shall . . .

"(c) Address the defendant personally and advise the defendant as follows: 'If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.' . . ." Section 971.08 (2) provides in relevant part that if the court fails so to advise a defendant "and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. . . ."

[10] Practice Book § 39-19 provides: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands:

"(1) The nature of the charge to which the plea is offered;

"(2) The mandatory minimum sentence, if any;

"(3) The fact that the statute for the particular offense does not permit the sentence to be suspended;

"(4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and

"(5) The fact that he or she has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he or she has the right to be tried by a jury or a judge and that at that trial the defendant has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself."

[11] Practice Book § 39-20 provides: "The judicial authority shall not accept a plea of guilty or nolo contendere without first determining, by addressing the defendant personally in open court, that the plea is voluntary and is not the result of force or threats or of promises apart from a plea agreement. The judicial authority shall also inquire as to whether the defendant's willing-

ness to plead guilty or nolo contendere results from prior discussions between the prosecuting authority and the defendant or his or her counsel.''

[12] Although we do not mean to minimize the potential impact of the immigration and naturalization consequences of a plea, they are not of constitutional magnitude: ''The statutory mandate . . . cannot transform this collateral consequence into a direct consequence of the plea. It can only recognize that this collateral consequence is of such importance that the defendant should be informed of its possibility.'' *State* v. *Baeza*, 174 Wis. 2d 118, 125, 496 N.W.2d 233 (App. 1993); *United States* v. *Santelises*, 476 F.2d 787, 790 (2d Cir. 1973) (''[d]eportation . . . serious sanction though it may be, is not such an absolute consequence of conviction that we are mandated to read into traditional notions of due process a requirement that a district judge must warn each defendant of the possibility of deportation before accepting his plea''); see also *State* v. *Andrews*, 253 Conn. 497, 504, 507–508 n.8, 752 A.2d 49 (2000).

[13] The defendant ultimately received a sentence even more lenient than that for which he had bargained. Although he had agreed to a five year suspended sentence, the trial court, sua sponte, reduced the sentence to a three year suspended sentence, an action the trial court later lamented when the defendant moved to withdraw his plea ''after the great deal we gave him, which I resent heartily . . . .'' Upon granting the defendant's motion to withdraw his guilty plea, the trial court noted: ''[I]t just puts the state in a terrible position. It's totally unfair to them because we did destroy the evidence based on him saying he understood everything and talked to his lawyer about it.''