

Counsel Error Does Not Block Deportation

BY JOHN CAHER

ALBANY — A defense attorney's inaccurate advice regarding the deportation consequences of a guilty plea can constitute ineffective assistance only if there is a showing of prejudice, the Court of Appeals said yesterday.

In a "victory" for the defense, which in effect lost the battle but won the war, the Court said yesterday that erroneous advice on an immigration matter may be grounds for reversal for ineffective assistance of counsel. But the Court refused to reverse the guilty plea in the case before it, *People v. Bruce McDonald*, 110, because the defendant failed to show that had the inaccurate advice not been given, he would not have pleaded guilty.

The case involves a foreign national, Bruce McDonald, who has lived legally in the United States for more than 20 years and now faces deportation to Jamaica because he pleaded guilty to drug charges. Mr. McDonald's attorney acknowledges that he wrongly advised his client that a guilty plea would not result in deportation. However, it could not be shown to the Court's satisfaction that if Mr. McDonald knew the consequences he would not have pleaded guilty.

McDonald was one of two cases yesterday where the Court addressed the ineffective assistance issue with regard to deportable aliens. The other, *People v. Jian Jing Huang*, 115, was remitted on procedural grounds.

McDonald arises out of Tompkins County and involves a defendant with deep ties to this country who is married to a U.S. citizen and has three children born in the United States. His troubles began in 1999, when he was arrested on a variety of drug-related charges that could have landed him a 25-year prison sentence.

On advice of counsel, Thomas H. Kheel, Mr. McDonald plea bargained to selling marijuana and possessing cocaine, and was sentenced to a 1-to-3 year term. The day after sentencing, Mr. McDonald was served with notice of a deportation hearing.

Mr. Kheel promptly submitted an affidavit admitting he had misinformed his client about the deportation consequences of pleading guilty. He claimed that the prosecutor offered a similarly inaccurate opinion during plea negotiations. Regardless, the Appellate Division, Third Department, said through Justice Edward O. Spahn that inaccurate counsel does not by itself constitute ineffective counsel.

Yesterday, the unanimous Court of Appeals agreed, relying, as did the defendant, solely on the federal constitution.

Judge Carmen Beauchamp Ciparick said that under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant asserting an ineffective assistance argument must show both that the level of representation was substandard and that the defendant suffered prejudice.

Here, the Court said, the "affirmative misrepresentation" by Mr. Kheel "falls below an objective standard of reasonableness." However, contrary to the Third Department's holding, Judge Ciparick said "the prejudice inquiry ... does not necessitate a prediction analysis as to the likely outcome of the proceeding" had he gone to trial. She said more is needed — specifically, a "factual allegation that, but for counsel's error, defendant would not have pleaded guilty."

Tompkins County District Attorney George M. Dentes argued for the prosecution. Alfred O'Connor of Albany appeared for the defendant.

Huang, which came from the First Department, involved a similar issue.

Jian Jing Huang was convicted of first-degree kidnapping in connection with an abduction at a Chinatown restaurant in 1992. Six years later, the conviction was reversed and Mr. Huang plea bargained for time-served after he was assured by his attorney and the Manhattan prosecutor that he would not be deported. An hour after the plea, officials realized that the federal government had moved to detain Mr. Huang.

The plea was vacated by the trial judge, but that ruling was overturned by a 3-2 decision by the First Department. In a memorandum yesterday, the Court of Appeals reversed on a technicality, finding that the appellate court lacked jurisdiction to consider the prosecution's appeal.

Daniel A. Warshawsky of the Office of the Appellate Defender in Manhattan argued for Mr. Huang. Manhattan Assistant District Attorney Morrie I. Kleinbart appeared for the prosecution.