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FAMILY COURT OF NEW YORK
QUEENS COUNTY

In the Matter of Joseph G.[1]
(decided August 13, 2003)

Thirteen year old Joseph G. was charged with acts which, but for his age, would have constituted first, second, and third degree robbery, possession of stolen property, possession of a weapon, grand larceny and menacing.[2] On May 20, 2003, in the presence of counsel and his parents, Joseph announced to the court his wish to admit to robbery in the first degree.[3] The judge then proceeded to allocute him, advising Joseph that he was not required to make this admission and informing him of his rights and the consequences of such an admission.[4] Two months later, on July 28, 2003, Joseph and his parents appeared in court with both Joseph's original counsel and his present counsel.[5] Joseph's original counsel was relieved and substituted with present counsel.[6] His new counsel moved to withdraw Joseph's admission, contending that original counsel neither properly advised Joseph of the significance and ramifications of his guilty plea, nor provided Joseph with effective assistance of counsel.[7]

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[1] 765 N.Y.S.2d 455 (N.Y. Fam. Ct. Queens County 2003).
[2] *Id.* at 456-57.
[3] *Id.* at 457.
[4] *Id.*
[5] *Id.* at 459.
[6] *Joseph G.*, 765 N.Y.S.2d at 459.
[7] *Id.* at 459-60.

Upon review, the family court allowed Joseph to withdraw his admission.[8] It based its decision on the ground that the court failed to fully and accurately inform Joseph of the nature of his admission and its repercussions.[9] Specifically, the court failed to warn Joseph of the implications of admitting to an act which is statutorily designated a felony.[10] By admitting to such an act, Joseph would lose his youthful offender status[11] and would be subject to placement outside of his home for a minimum of three years,[12] not the eighteen months the court had advised him.[13]

Joseph G. claimed that both his constitutional and statutory rights to effective counsel were violated in that his guilty plea was not made knowingly and intelligently, and was, therefore, invalid because the court failed to inform him both of the full dispositional consequences of his plea and that the guilty plea would deprive him of his youthful offender status.[14] The court, in finding that Joseph G. could withdraw his admission, grounded its decision on the Family Court Act governing the proceeding, rather than on the Constitution itself. It found that Section 321.3 of the New York Family Court Act,[15] which reflects the protections afforded by

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[8] *Id.* at 461.
[9] *Id.* at 460.
[10] *Id.* at 462-63.
[11] *Joseph G.*, 765 N.Y.S.2d at 462-63.
[12] *Id.* at 461.
[13] *Id.* at 458.
[14] *Id.* at 459-60.
[15] N.Y. FAM. CT. ACT § 321.3 (Consol. 1999) provides:

> The Court shall not consent to the entry of an admission unless it has advised the respondent of his right to a fact-finding hearing. The court shall also ascertain through allocution of the respondent and his parent or other person legally

both the federal and state constitutions, mandates that before a juvenile may make an admission to a charge, the trial court must ensure that the juvenile makes a voluntary waiver of his rights and is aware of the consequences of his admission.[16] This requirement flows from the Constitution and "transcends the specific statutory provisions concerning a juvenile allocution. . . ."[17]

The court in *Joseph G.* allowed Joseph to withdraw his admission, finding that at the time he made the admission, he did so without understanding the full ramifications of his action.[18] The court declared that both the federal and New York constitutions obligate courts to ensure that a defendant's "guilty plea is made knowingly, intelligently, and voluntarily. . . ."[19] Joseph was permitted to withdraw his admission because the record showed that it was made without his complete knowledge and comprehension of its consequences.[20]

The Queens County Family Court found that the allocution of Joseph and his parents was improper and constituted reversible error.[21] Its determination that the court's failure to meet Section 321.3 in accepting Joseph's admission was sufficient grounds for

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> responsible for his care, if present, that (a) he committed the act or acts to which he is entering an admission, (b) he is voluntarily waiving his right to a fact-finding hearing, and (c) he is aware of the possible specific dispositional orders.

[16] *In re Joseph G.*, 765 N.Y.S.2d at 460.

[17] *Id.* at 463.

[18] *Id.* at 462, 463-64.

[19] *Id.* at 463 (citing Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) and People v. Ford, 657 N.E.2d 265, 267 (N.Y. 1995)).

[20] *Id.* at 462, 463-64.

[21] *In re Joseph G.*, 765 N.Y.S.2d at 461.

the withdrawal and in full accord with both federal and state precedent. Borrowing language from *People v. Ford*,[22] the court reiterated the rule that a defendant, before pleading guilty, must be forewarned of "what the plea connotes and its consequences. . . ."[23]

The family court read the first part of this phrase, "what the plea connotes," to mean the voluntary and knowing waiver of a fact-finding hearing.[24] Not only must the juvenile fully comprehend that an admission acts as a waiver of his or her rights, but so must his or her parent or legal guardian.[25] To support its position, the court drew upon similar New York decisions which consistently held, *inter alia*, that the court's failure to advise the parent or guardian of the rights the child may be waiving constituted an improper allocution.[26]

A proper allocution also informs the juvenile and his or her parent, "fully and completely . . . of all the possible dispositional alternatives available to the [c]ourt."[27] The court again relied upon other New York cases where allocution was deemed improper because of the court's failure to ensure that both the juvenile and

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[22] 657 N.E.2d at 267 (quoting *Boykin*, 395 U.S. at 244).

[23] *In re Joseph G.*, 765 N.Y.S.2d at 463.

[24] *Id.* at 460 (citing *In re* Delmar C., 617 N.Y.S.2d 611 (App. Div. 4th Dep't 1994)).

[25] *See, e.g.*, *In re* Anthony S., 755 N.Y.S.2d 294 (App. Div. 2d Dep't 2003); *In re* Christopher S., 758 N.Y.S.2d 838 (App. Div. 2d Dep't 2003); *In re* James D.H., 678 N.Y.S.2d 125 (App. Div. 2d Dep't 1998).

[26] *In re Joseph G.*, 765 N.Y.S.2d at 460-61.

[27] *Id.* at 460.

the parent understood the dispositional consequences of the admission.[28]

The court was primarily concerned with the classification of the act to which Joseph admitted as a "designated felony act,"[29] a classification which impacts the juvenile in two ways. First, a juvenile committing a designated felony act is automatically placed "with the Office of Children and Family Services (OCFS) for an initial period of three years. . . ."[30] When Joseph made his admission, however, the court informed him that he would be "placed away from . . . home for approximately 18 months."[31] No mention was ever made of a statutorily mandated three year placement with OCFS.[32] The second consequence of admitting to a designated felony act affects the juvenile even more profoundly. Any juvenile who has been found guilty of a designated felony act is not eligible at a later date for youthful offender treatment by a criminal court. Rather, "such defendants are subject to being sentenced as adults upon conviction."[33] The court asserted that the loss of youthful offender status is not a collateral consequence of Joseph's guilty plea, but one which is directly under the court's

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[28] *See, e.g., In re* Efrain R., 643 N.Y.S.2d 998 (App. Div. 1st Dep't 1996); *In re* Herbert RR, 625 N.Y.S.2d 362 (App. Div. 3d Dep't 1995); *In re* LeJuane S., 668 N.Y.S.2d 708 (App. Div. 2d Dep't 1998).

[29] *In re Joseph G.*, 765 N.Y.S.2d at 461.

[30] *Id.* (citing N.Y. FAM. CT. ACT § 353.5(5)(a)(i) (Consol. 1999)).

[31] *Id.* at 458.

[32] *Id.* at 462.

[33] *Id.* at 463.

control.[34] Therefore, the court is required to inform Joseph of this consequence of his plea.[35] The court reasoned that:

> While the Family Court Act § 321.3 does not require the Court to advise a respondent of the loss of youthful offender eligibility in any future criminal prosecution . . . the Court nevertheless must ensure that respondent and his or her parents are fully aware of this significant consequence which flows from such an admission. The obligation to ensure that a guilty plea is made knowingly, intelligently, and voluntarily is an affirmative obligation which is imposed upon the Court by the Constitution and it *transcends* the specific statutory provisions concerning a juvenile allocution which must be observed prior to the acceptance of respondent's admission under Family Court Act § 321.3.[36]

Thus, the constitutional obligation of a knowing and intelligent guilty plea required the court to advise the defendant of the potential repercussions of admitting to a designated felony act despite the absence of an express requirement within the Act itself.

The federal and New York constitutions are similar in their provisions for criminal defendants of a privilege against self-incrimination, the right of trial by jury, and the right of cross-

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[34] *Joseph G.*, 765 N.Y.S.2d at 463.
[35] *Id.*
[36] *Id.* (emphasis added).

examination.[37] In *Boykin v. Alabama*,[38] the United States Supreme Court held that an accused has a constitutional right to know that in admitting to a crime he or she is effectively waiving his or her privilege against self-incrimination,[39] right to trial by jury,[40] and the right to confront his or her accusers.[41] For the waiver to be valid, due process requires that it was made intelligently, knowingly, and voluntarily.[42] *Boykin* held that for an allocution to be proper, the record must show that the defendant fully understood the act and consequences of an admission to a charge.[43]

Boykin was an adult criminal defendant charged with five counts of common-law robbery, an offense which was then punishable by death in Alabama.[44] He pled guilty to all five charges. According to the record, the judge asked no questions of Boykin or in any way sought to inform him of the significance and consequences of his pleas.[45] Boykin was subsequently sentenced

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[37] U.S. CONST. amend. V states in pertinent part: "[No person] shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." N.Y. CONST. Art. I, § 6 states in pertinent part: "In any trial in any court whatever the party accused shall be . . . confronted with the witnesses against him. No person shall be . . . compelled in any criminal case to be a witness against himself." N.Y. CONST. art. I, § 1 provides in pertinent part: "No member of this state shall be disenfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

[38] 395 U.S. at 238.

[39] *Id.* at 243.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 244.

[43] *Boykin*, 395 U.S. at 242.

[44] *Id.* at 239.

[45] *Id.*

to death on all five counts.[46] He based his appeal on the unconstitutionality of the death sentence for common-law robbery in violation of the Eighth Amendment's prohibition of cruel and unusual punishment.[47] The Alabama Supreme Court rejected this basis altogether and affirmed the decision.[48] However, three dissenting justices questioned the constitutionality of Boykin's plea as the record failed to show it was knowing and intelligent.[49]

Boykin then appealed to the United States Supreme Court. The Supreme Court took it upon itself to review "the voluntary character of petitioner's guilty plea" under the plain error doctrine.[50] The Court determined that the trial court committed reversible error in not ensuring that defendant Boykin "voluntarily and understandingly entered his pleas of guilty."[51] The Court reasoned that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."[52] The Court held that a proper allocution should inform the defendant first of the fact that he or she possesses constitutional rights which are waived upon admission of a crime,

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[46] *Id.* at 240.
[47] *Id.*
[48] 207 So. 2d 412, 414 (Ala. 1968).
[49] *Id.* at 415 (Goodwyn, J., dissenting).
[50] *Boykin*, 395 U.S. at 241. Under the plain error doctrine, an appellate court may review errors of the court below which affect the defendant's substantial rights, despite the fact that such errors have not been previously raised in the lower courts. Review at the appellate level is appropriate to prevent manifest injustice.
[51] *Id.* at 244.
[52] *Id.* at 242 (citing Kercheval v. United States, 274 U.S. 220, 223 (1927)).

and second, of the consequences which will result from that admission.[53] A waiver, the Court stated, cannot be adduced from a silent record.[54] Therefore, the Court placed an affirmative duty on courts to not only inform a defendant of the consequences of an admission, but to ensure that the record shows that the plea was voluntary.[55]

While the *Boykin* Court did not distinguish between direct and collateral consequences of a guilty plea, the Second[56] and Ninth Circuit[57] courts did. Direct consequences are those which result directly from the plea and which are within the court's control, while collateral consequences are those which indirectly result from the plea, are beyond the control of the court, and which may be peculiar to the individual defendant.[58] Examples of collateral consequences include the "loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms or an undesirable discharge from the Armed Services."[59] In *Michel v. United States*,[60] the Second Circuit determined that judges are not required to inform defendants of the collateral consequences of their pleas,[61] and in *Polanco v. United States*[62] held that "failure to be told of

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[53] *Id.* at 243-44.
[54] *Id.* at 242.
[55] *Boykin*, 395 U.S. at 242, 244.
[56] Michel v. United States, 507 F.2d 461 (2d Cir. 1974).
[57] Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976).
[58] *See Ford*, 657 N.E.2d at 265.
[59] *Id.* at 267-68 (internal citations omitted).
[60] 507 F.2d at 461.
[61] *Id.* at 465.
[62] 803 F. Supp. 928 (2d Cir. 1992).

such collateral consequences amounts to neither ineffective assistance of counsel nor an involuntarily rendered plea."[63] The Second Circuit stated in *United States v. Parrino* that:

> We think it plainly unsound to hold . . . that such defendants are subjected to manifest injustice, if held to their plea, merely because they did not understand or foresee such collateral consequences. We find no case which even looks in that direction, and the absence of cases expressly rejecting such a doctrine we attribute to the absence of a rule so palpably unsound.[64]

The Ninth Circuit likewise asserted in *Fruchtman v. Kenton*[65] that "the accused need not be advised of those consequences that can appropriately be denominated 'collateral.'"[66] The *Fruchtman* court relied in part on the prior rulings of the Second Circuit.[67] The circuit court decisions, then, have limited the affirmative duty imposed by *Boykin* on courts to advise defendants of the consequences of guilty pleas to those which are only the direct result of such pleas.

In *People v. Ford*, the New York Court of Appeals determined that "a trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences."[68] Ford, who was

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[63] *Id.* at 931.
[64] 212 F.2d 919, 922 (1954).
[65] 531 F.2d at 946.
[66] *Id.* at 948-49.
[67] *Id.* at 949 (citing *Santelises*, 509 F.2d at 704; *Michel*, 507 F.2d at 464-65).
[68] 65 N.E.2d at 267 (quoting *Boykin*, 395 U.S. at 244).

also an adult criminal defendant, was indicted for manslaughter. He was showing a gun to his girlfriend when he put it to her head and pulled the trigger, thinking it was unloaded. Instead, the gun went off and killed her instantly.[69] Ford pleaded guilty to the charge. However, after his admission, he learned he would be deported as a result of his conviction, and then sought to change his admission from that of manslaughter to that of criminally negligent homicide.[70] The supreme court granted Ford's motion, holding that at the time of his admission, the court was obligated to inform him of the possible fact of deportation.[71] The Court of Appeals disagreed.[72] It classified consequences as either direct or collateral, defining a direct consequence as one "which has a definite, immediate and largely automatic effect on defendant's punishment," while a collateral consequence was one which was outside of the court's control.[73] According to *Ford*, then, a New York court must inform a defendant of any direct consequences of admitting to a crime to satisfy the *Boykin* requirement, but it is under no obligation to likewise advise the defendant as to those potential ramifications which are outside of the court's direct control.[74] The court reasoned that because the prospect of deportation was a collateral consequence that was unique to Ford's

[69] *Id.*
[70] *Id.*
[71] 157 Misc. 2d 668, 671 (N.Y. Sup. Ct. Kings County 1993).
[72] *Ford*, 657 N.E.2d at 269.
[73] *Id.* at 267.
[74] *Id.* at 268.

circumstances and beyond the court's control, it had no duty to warn him of it.[75]

Since 1967, the New York courts have required that the guilty plea be made knowingly and intelligently.[76] In *People v. Seaton,* the Court of Appeals insisted that the court has a duty to ensure that the defendant fully understands the consequences of his or her plea before accepting it.[77] The court stated that despite the time such questioning might take, it was time well worth the effort, as correct allocutions resulted in judicial economy.[78]

People v. Smith[79] cited *Ford* when it determined that "neither the [court] nor the defendant's attorney were required to advise defendant of [the collateral consequences] . . . prior to accepting his guilty plea."[80] Thus, the responsibility of New York courts has been limited; now courts need only inform defendants of the direct consequences of a guilty plea.[81]

Joseph G. faithfully ascribes to both federal and New York standards. A proper juvenile allocution is one where the court, before accepting a juvenile's admission to a criminal charge, especially one which is termed a designated felony act, makes certain that the juvenile voluntarily and knowingly waives his or her right to a fact-finding hearing and comprehends that admission

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[75] *Id.*
[76] People v. Seaton, 227 N.E.2d 294 (N.Y. 1967).
[77] *Id.* at 295.
[78] *Id.*
[79] 641 N.Y.S.2d 905 (App. Div. 3d Dep't 1996).
[80] *Id.* at 907-08.
[81] *Ford*, 657 N.E.2d at 268.

to a designated felony act subjects him or her to a minimum three year placement outside of the home and costs him or her youthful offender status.[82] The juvenile's parent or guardian must also fully understand the ramifications of the admission.[83] Only when the court has thus satisfied this duty may it accept the juvenile's admission.[84]

In conclusion, under both the federal and state constitutions, the courts require that for a guilty plea to be constitutionally valid it must be knowing, intelligent, and voluntary.[85] A court is not mandated to inform the defendant making a guilty plea of all consequences, but only those which are direct and within the court's control.[86] It is not error if a court does not advise defendants of those consequences which are collateral, outside the control of the judiciary system, and peculiar to the individual defendant.[87]

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[82] *In re Joseph G.*, 765 N.Y.S.2d at 462, 463-64.
[83] *Id.* at 460-61.
[84] *Id.*
[85] *Boykin*, 395 U.S. at 244; *Ford*, 657 N.E.2d at 267.
[86] *Michel*, 507 F.2d at 465; *Ford*, 657 N.E.2d at 267.
[87] *Michel*, 507 F.2d at 465; *Ford*, 657 N.E.2d at 268.

DUE PROCESS

United States Constitution Amendment XIV, Section 1:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

New York Constitution Article I, Section 6:

No person shall be deprived of life, liberty, or property without due process of law.