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**CRIMINAL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY**

People v. DeJesus¹
(decided May 20, 2006)

Defendant Walter DeJesus, an alien to the United States and a nonpermanent resident of New York, pleaded guilty to possession of an illegal substance.² However, after DeJesus learned that his allocation of guilt could result in his deportation under the 1996 amendment of the Immigration and Nationality Act,³ he moved to vacate his conviction under Criminal Procedure Law section 440.10⁴ “on the grounds that neither his attorney nor the court advised him of the immigration consequences of his guilty plea”⁵ In his appeal, the defendant argued that a violation of Criminal Procedure Law section 200.50(7)⁶ deprived the defendant of his constitutional right

¹ 819 N.Y.S.2d 442 (Crim. Ct. 2006).

² *Id.* at 443.

³ See 8 U.S.C. § 1227(a)(2)(B)(i) (2000) (“Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable.”). See also *id.* § 1228 (b)(5) (“No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General’s discretion.”)

⁴ N.Y. CRIM. PROC. LAW § 440.10(h) (McKinney 2006) provides:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: . . . The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

⁵ *DeJesus*, 819 N.Y.S.2d at 443.

⁶ N.Y. CRIM. PROC. LAW § 200.50(7) (McKinney 2006) states in pertinent part:

Prior to accepting a defendant’s plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant’s plea of guilty and the court’s acceptance thereof may result in the defendant’s deportation

to due process.⁷

Mr. DeJesus argued that because his deportation was automatically the result of his conviction, it was a direct, rather than collateral consequence, and the trial court should have advised him of that fact.⁸ According to the defendant, the failure of both his attorney and the court to adequately apprise him of the potential ramifications of his conviction was a violation of his constitutionally protected right to due process, and as a result, maintained that the judgment rendered against him should have been vacated.⁹

The *DeJesus* court followed the rationale of the federal courts in determining that deportation is a collateral consequence of a plea, despite the amendment to the Immigration and Nationality Act which virtually mandated the deportation of aliens convicted of a crime that is related to a controlled substance.¹⁰ The *DeJesus* court held that a court has the responsibility to warn defendants of only the direct consequences of judgments rendered against them.¹¹ Furthermore, the court determined that failure by the trial judge to warn the defendant of any potential collateral consequences, that may arise as a result of the judgment rendered, is not a due process violation.¹²

The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization.

⁷ *DeJesus*, 819 N.Y.S.2d at 443.

⁸ *Id.*

⁹ *Id.* at 443 n.1.

¹⁰ *Id.* at 443.

¹¹ *Id.* at 444.

¹² *DeJesus*, 819 N.Y.S.2d at 445.

Hence, the court held that while a guilty plea may automatically result in a consequence, the mandatory nature of the consequence does not necessarily guarantee that the consequence is direct.¹³ As a result, DeJesus's motion to vacate his guilty plea was denied because the judgment rendered against him did not deprive him of his constitutionally protected right to due process of law.¹⁴

According to *DeJesus*, many federal circuit courts have mandated that federal district courts only need to advise the defendant of all direct consequences.¹⁵ Collateral consequences, on the other hand, need not be enunciated by the court in order for the defendant's guilty plea to be considered voluntary.¹⁶ However, it first must be determined which consequences are direct¹⁷ and which are collateral¹⁸ in order to determine whether the defendant's guilty plea can be deemed voluntary.¹⁹

The *DeJesus* court applied a two-part test to differentiate

¹³ *Id.* at 444. See also *United States v. Gonzalez*, 202 F.2d 20, 27 (1st Cir. 2000). The court also stated that, "federal courts have previously found various 'automatic' consequences of conviction to be merely 'collateral.'" *Id.* (citation omitted).

¹⁴ *DeJesus*, 819 N.Y.S.2d at 444.

¹⁵ *DeJesus*, 819 N.Y.S.2d at 444-45. See also *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977); *United States v. Amador-Leal*, 276 F.3d 511, 514 (9th Cir. 2002) ("[A]lthough a defendant is entitled to be informed of the direct consequences of the plea, the court need not advise him of all the possible collateral consequences.").

¹⁶ *DeJesus*, 819 N.Y.S.2d at 444 (citing *Meaton v. United States*, 328 F.2d 379, 381 (5th Cir. 1964) ("[T]here was no abuse of discretion in the refusal of the court to grant leave to withdraw the plea of guilty because the appellant failed to understand the collateral effects such as loss of civic rights.")). See also *Moore v. Hinton*, 513 F.2d 781, 782 (5th Cir. 1975) ("[D]efendants need not be informed of such collateral consequences in order to voluntarily and intelligently plead guilty.").

¹⁷ For a consequence to be deemed direct, it cannot simply be a possibility, but instead a foregone conclusion of punishment which was meted down from the bench. *Amador-Leal*, 276 F.3d at 514.

¹⁸ Collateral consequences are those which are established and enforced by agencies independent of the judiciary. *DeJesus*, 819 N.Y.S.2d at 443.

¹⁹ *Id.* at 445.

between the two types of unfavorable outcomes.²⁰ The first step requires the court to determine whether the consequence “ ‘ has a definite, immediate and largely automatic effect on the defendant’s punishment. ’ ”²¹ The second step mandates that the court determine who imposed the consequence—either the trial court or an independent agency.²² “If the consequence is both definite and immediate and imposed by the court, the consequence is considered a direct consequence of the sentence and requires notification to the defendant of the consequence.”²³

In rendering its decision, the *DeJesus* court discussed *United States v. Amador-Leal*,²⁴ where an illegal immigrant was charged with conspiracy to obtain illegal contraband, and “possession with intent to distribute.”²⁵ Amador-Leal pled guilty to the possession charge, but later filed a motion to vacate his plea because the magistrate judge did not explain the potential immigration consequences of the guilty plea, when the plea was taken.²⁶ The *Amador-Leal* court held that in order for a defendant’s allocution of guilt to be considered constitutional, his plea must have been both “knowingly and voluntarily.”²⁷ A plea will be considered involuntary if the defendant makes such a plea without being fully aware of the

²⁰ *Id.* at 443.

²¹ *Id.* (quoting *People v. Ford*, 657 N.E.2d 265, 267 (N.Y. 1995)).

²² *Id.* at 443 (citing *Sanchez*, 572 F.2d at 211; *Ford*, 657 N.E.2d at 268).

²³ *DeJesus*, 819 N.Y.S.2d at 444.

²⁴ 276 F.3d 511 (9th Cir. 2002).

²⁵ *Id.* at 513.

²⁶ *Id.*

²⁷ *Id.* at 514.

direct consequences.²⁸ Any failure of the court to provide the defendant with the consequences associated with his guilt could result in vacating the judgment rendered against the defendant under Criminal Procedure Law section 440.10²⁹ for violating the constitutional rights of the defendant.

Additionally, the *DeJesus* court relied on the reasoning set forth in *Michel v. United States*,³⁰ where the Second Circuit rationalized the necessity to differentiate between the two types of consequences.³¹ The *Michel* court held that, “[t]he district judge . . . has the obligation to ascertain that the consequences of the sentence *he* imposes are understood.”³² Furthermore, the Second Circuit explained that the distinction between direct and collateral consequences does not “depend[] upon the degree of certainty with which the sanction will be visited by the defendant.”³³ Additionally, the Third Circuit held that even if the collateral consequences of the plea are foreseeable, a failure of the court to make the defendant aware of the consequences would not permit a withdrawal of a guilty plea.³⁴

The *DeJesus* court had no such control over the impending

²⁸ *Id.* The court stated that the defendant must be “fully aware of the direct consequences of his plea of guilty . . .” *Amador-Leal*, 276 F.3d at 514.

²⁹ N.Y. CRIM. PROC. LAW § 440.10(h).

³⁰ 507 F.2d 461 (2d Cir. 1974).

³¹ *Id.* at 466 (stating trial courts are not and should not be expected to “anticipate the multifarious peripheral contingencies which may affect the defendant’s . . . right to remain in this country . . .”).

³² *Id.* at 465.

³³ *Id.* at 466.

³⁴ *United States v. Crowley*, 529 F.2d 1066, 1072 (3d Cir. 1976).

deportation of DeJesus.³⁵ Instead, the Immigration and Naturalization Service is responsible for deporting aliens who plead guilty to violating the Immigration and Nationality Act.³⁶ Federal case law has consistently concluded that deportation is a collateral consequence of a conviction because an independent agency, and not the trial court, is responsible for punishing the defendant.³⁷ Under the second prong of the two-prong test, deportation must be classified as a collateral consequence.³⁸

In *People v. Ford*,³⁹ the defendant was a legal alien from Jamaica, who pled guilty to manslaughter charges after accidentally shooting and killing his girlfriend while he was showing her his gun.⁴⁰ After the defendant served his sentence, the Immigration and Naturalization Service commenced proceedings for his deportation based upon his conviction.⁴¹ Subsequently, Ford moved to reduce his manslaughter judgment to criminally negligent homicide.⁴² However, the court decided that a consequence which relates only to a defendant's particular set of circumstances is collateral.⁴³ The court denied the defendant's motion, finding, like federal court decisions,

³⁵ *DeJesus*, 819 N.Y.S.2d at 443 (explaining that deportation of an alien was "virtually mandate[d]" with the 1996 amendment, implying that the court had no control over the defendant's situation).

³⁶ See *Amador-Leal*, 276 F.3d at 516.

³⁷ See *id.* at 514; see also *Moore*, 513 F.2d at 782.

³⁸ See *Gonzalez*, 202 F.3d at 28; see also *United States v. Fugundes*, 194 F.3d 1321 (10th Cir. 1999).

³⁹ 657 N.E.2d 265.

⁴⁰ *Id.* at 267.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 268 ("The failure to warn of such collateral consequences will not warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control."). *Id.*

that that the failure of the trial court to advise the defendant of the possibility of deportation is not an unconstitutional deprivation of due process, and therefore, not a reason to vacate the judgment against the defendant.⁴⁴

In determining whether any federal or state statute violates a defendant's right to due process, the protected due process rights are examined in the constitution of the respective jurisdiction. In this case, the United States and New York State Constitutions are identical in their assurance of individual rights of due process. The Fourteenth Amendment of the United States Constitution guarantees due process of law to all United States citizens,⁴⁵ while the New York State Constitution offers similar protection to its citizens.⁴⁶ Despite the fact that both constitutions guarantee that no person shall be deprived of life, liberty or property without due process, little else is mentioned as to what rights are guaranteed. As a result, judicial interpretation is necessary to identify which rights are fundamental.

A judgment entered against a defendant must be vacated if the defendant was not made aware of the direct consequences by the court.⁴⁷ Every defendant must have the opportunity to be able to plead guilty "voluntarily and knowingly,"⁴⁸ and a plea is only

⁴⁴ *Ford*, 657 N.E.2d at 268. The court considered deportation to be a collateral consequence of conviction "because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system." *Id.*

⁴⁵ U.S. CONST. amend. XIV, § 1 states in pertinent part: "No state shall pass a law depriving its citizens of any protected rights or privileges, nor shall any state deprive its citizens of life, liberty or property, without due process of law"

⁴⁶ N.Y. CONST. art. I, § 6 states: "No person shall be deprived of life, liberty or property without due process of law."

⁴⁷ See *supra* note 5 and accompanying text.

⁴⁸ *Amador-Leal*, 276 F.3d at 514.

voluntary if the defendant is fully aware of the direct consequences.⁴⁹ However, both federal and New York courts have interpreted the due process clause in such a manner that makes it unnecessary for trial courts to warn defendants of consequences that are neither created, nor imposed, by the court. Such collateral consequences, like deportation, are created by acts of Congress and enforced by an independent agency. A trial court can, and should, only be responsible for punishments that it has the authority to render. Thus, the constitutionally protected right to due process of law is not violated when the court fails to warn defendants of punishments over which they have no control.

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⁴⁹ *Id.*