STATE OF NEW YORK

3438

2021-2022 Regular Sessions

IN ASSEMBLY

January 26, 2021

Introduced by M. of A. KIM -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to requiring an advisement by a court regarding the possible consequences to an alien of the acceptance of a plea of guilty to a crime under state law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative finding and declaration. The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the legislature by enacting this act to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is also the intent of the legislature that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecutor in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction. It is further the intent of the legislature that at the time of the plea no defendant shall be required to disclose his or her legal status to the court.

§ 2. Subdivision 4 of section 170.10 of the criminal procedure law is amended by adding a new paragraph (f) to read as follows:

(f) Where the accusatory instrument is an information, a prosecutor's information or a misdemeanor complaint, prior to acceptance of a plea of guilty to any crime under state law, the defendant, in addition to any

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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other warning required by law, shall be entitled to substantially the following advisement to be orally administered by the court, on the record in a court of record: "If you are not a citizen of the United States, you are hereby advised that acceptance by the court of a plea of guilty or conviction of the crime for which you have been charged may result in your deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." The defendant shall not be required, at the time of entry of a plea, to disclose to the court his or her citizenship or immigration status. Absent the presence of the advisement required by this paragraph in the record of the proceeding in a court of record, it shall be presumed that the advisement was not administered; and

§ 3. Section 180.10 of the criminal procedure law is amended by adding a new subdivision 8 to read as follows:

8. Upon arraignment on a felony complaint, prior to acceptance of a plea of guilty to any crime under state law, the defendant shall, in addition to any other warning required by law, be entitled to substantially the following advisement to be orally administered by the court on the record: "If you are not a citizen of the United States, you are hereby advised that acceptance by the court of a plea of guilty or conviction of the crime for which you have been charged may result in your deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." The defendant shall not be required, at the time of entry of a plea, to disclose to the court his or her citizenship or immigration status. Absent the presence of the advisement required by this subdivision in the record of the proceeding, it shall be presumed that the advisement was not administered.

§ 4. Section 210.15 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. Upon arraignment on an indictment, prior to acceptance of a plea of guilty to any crime under state law, the defendant shall, in addition to any other warning required by law, be entitled to substantially the following advisement to be orally administered by the court on the record: "If you are not a citizen of the United States, you are hereby advised that acceptance by the court of a plea of guilty or conviction of the crime for which you have been charged may result in your deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." The defendant shall not be required, at the time of entry of a plea, to disclose to the court his or her citizenship or immigration status. Absent the presence of the advisement required by this subdivision in the record of the proceeding, it shall be presumed that the advisement was not administered.

§ 5. Subdivision 7 of section 220.50 of the criminal procedure law, as amended by chapter 738 of the laws of 2004, is amended to read as follows:

7. 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 or misdemeanor 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, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. Where the plea of guilty is to a count or counts of an indictment charging a felony or misdemeanor offense other than a violent felo-

ny offense as defined in section 70.02 of the penal law or an A-I felony offense other than an A-I felony as defined in article two hundred twenty of the penal law, the court must also, prior to accepting such plea, advise the defendant that, if the defendant is not a citizen of the United States and is or becomes the subject of a final order of deportation issued by [~~the~~] United States Immigration and [~~Naturalization Service~~] **Customs Enforcement**, the defendant may be paroled to the custody of [~~the~~] Immigration and [~~Naturalization Service~~] **Customs Enforcement** for deportation purposes at any time subsequent to the commencement of any indeterminate or determinate prison sentence imposed as a result of the defendant's plea. [~~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.~~]

§ 6. Section 220.60 of the criminal procedure law is amended by adding two new subdivisions 5 and 6 to read as follows:

5. If the court fails to advise the defendant and the defendant shows that acceptance of the plea of guilty or conviction of the crime or crimes to which the defendant pleaded guilty 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, upon request of the defendant, shall permit the defendant to withdraw the plea of guilty and enter a plea of not guilty at any time before the imposition of sentence, and in such event the entire accusatory instrument, as it existed at the time of the plea of guilty, shall be restored.

6. A court's failure to provide the advisement required by this section shall not require the vacation of judgment or withdrawal of the plea or constitute grounds for finding a prior conviction invalid if such failure occurred prior to the effective date of this subdivision. Nothing in this chapter, however, shall be deemed to inhibit a court in the sound exercise of its discretion, from vacating a judgment or permitting a defendant to withdraw a plea according to law.

§ 7. Paragraphs (j) and (k) of subdivision 1 of section 440.10 of the criminal procedure law, paragraph (j) as amended by chapter 131 and paragraph (k) as added by chapter 132 of the laws of 2019, are amended and a new paragraph (l) is added to read as follows:

(j) The judgment is a conviction for a class A or unclassified misdemeanor entered prior to the effective date of this paragraph and satisfies the ground prescribed in paragraph (h) of this subdivision. There shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences, and there shall be a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment under section five of article one of the state constitution based on such consequences; [~~or~~]

(k) The judgment occurred prior to the effective date of this paragraph and is a conviction for an offense as defined in subparagraph (i) or (ii) of paragraph (k) of subdivision three of section 160.50 of this part, in which case the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict for the aforementioned offenses constitutes

cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions[.]; or

(1) The judgment was entered upon a plea of guilty and the court prior thereto failed to advise the defendant as required by paragraph (f) of subdivision four of section 170.10 or as required by subdivision eight of section 180.10 or as required by subdivision four of section 210.15 of this part, provided that the defendant shows that the entry of and acceptance of the plea of guilty 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.

§ 8. Section 440.10 of the criminal procedure law is amended by adding a new subdivision 10 to read as follows:

10. Upon granting the motion upon the ground, as set forth in paragraph (l) of subdivision one of this section, that the entry of and acceptance of the plea of guilty 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 shall order a new trial.

§ 9. The office of court administration shall develop a bill of rights and code of ethics for attorneys on how to advise aliens of the deportation consequences of a plea of guilty to a crime under state law. Such office is authorized and directed to promulgate any rule, regulation or form necessary for the implementation of this section within 180 days after the date on which this act becomes a law.

§ 10. This act shall take effect on the first of November next succeeding the date on which it shall have become a law, provided, however, that the amendments to subdivision 7 of section 220.50 of the criminal procedure law made by section five of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith.