COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-563

COMMONWEALTH

vs.

ELTON MONIZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant entered the United States on a non-immigrant B-2 (tourism) visa in 2000 and has remained in the United States since that time. In 2016, he pleaded guilty to multiple criminal charges with the effect that he was classified as an "aggravated felon" for immigration purposes pursuant to 8 U.S.C. § 1101(a)(43)(F).[1] In January 2020, the judge who presided over the plea proceeding granted the defendant's motion to vacate his plea, and ordered a new trial on the basis that the immigration warning delivered during the plea colloquy failed to comply with

[1] The defendant's charges included two counts of armed assault with intent to murder, two counts of assault with a dangerous weapon, one count of possession of a firearm without a firearm identification (FID) card, one count of carrying a loaded firearm without an FID card, and one count of malicious damage to a motor vehicle.

G. L. c. 278, § 29D. The Commonwealth appeals from the order vacating the defendant's plea. We reverse.

1. Background. During the guilty plea colloquy, the judge delivered the following immigration warning: "If you're not a citizen of the United States, your guilty plea can result in your deportation, exclusion from the U.S., and denial of citizenship." The defendant responded affirmatively that he understood the warning. In 2017, Immigration and Customs Enforcement issued a Final Administrative Removal Order against the defendant, finding that he was deportable and ineligible for any discretionary relief from removal. The defendant claims that he and his wife, who is a United States citizen, subsequently applied to adjust his immigration status through a Petition for Alien Relative, although such petition was not included in the record on appeal. The defendant claims that the petition to adjust his status will be denied as a direct result of his guilty plea and his status as an aggravated felon, and that the plea colloquy failed to adequately warn him of this adverse immigration consequence as required by G. L. c. 278, § 29D.

2. Discussion. Section 29D "entitles every criminal defendant proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts to receive prior

verbal warning from a judge." Commonwealth v. Petit-Homme, 482 Mass. 775, 779 (2019). The warning specified by statute is:

> "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

G. L. c. 278, § 29D.[2] If the court does not properly advise the defendant under G. L. c. 278, § 29D, and the defendant later "shows that his plea and conviction may have or has had one of the enumerated consequences," the court shall vacate the judgment and permit the defendant to withdraw his plea. Id.

While the Supreme Judicial Court's interpretation of § 29D has been quite "literal and strict" in light of the statute's unique prescriptive approach, Petit-Homme, 482 Mass. at 783, a

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[2] In addition to the statutory requirement, the Massachusetts Rules of Criminal Procedure also state that during a plea colloquy the judge shall inform the defendant of "potential immigration consequences of the plea." See Mass R. Crim. P. 12 (c) (3) (A) (iii) (a)-(b), as appearing in 470 Mass. 1501 (2015). The Rule 12 warning was created in response to Padilla v. Kentucky, 559 U.S. 356 (2010). See Petit-Homme, 482 Mass. at 781 n.7 (explaining history). The warning is intended to trigger timely and competent advice from counsel about the effects of a guilty plea. See id. "[R]ule 12 provides for no specific relief in the event that a judge fails to provide the requisite immigration consequences warnings during the colloquy." Id. at 782. As a result, the defendant's second argument that the judge failed to deliver a more specific rule 12 warning does not justify vacatur of his plea. Furthermore, the defendant's reliance on Commonwealth v. DeJesus, 468 Mass. 174 (2014), is misplaced. DeJesus involved inadequate assistance of counsel, not a rule 12 claim. Id. at 182.

verbatim recitation of the statute is not required. See Commonwealth v. Hilaire, 437 Mass. 809, 819 (2002) (stating direct reading from statute "preferable"). "The exact language of the warning is not crucial; what is important is that the purpose of the statute be satisfied, that is, 'to assure that a defendant knows that a plea of guilty may have an effect on his alien status.'" Commonwealth v. Hason, 27 Mass. App. Ct. 840, 843-844 (1989), quoting Commonwealth v. Lamrini, 27 Mass. App. Ct. 662, 666 (1989).

In general, we review a motion to withdraw a guilty plea and vacate a judgment for abuse of discretion. Commonwealth v. Ciampa, 51 Mass. App. Ct. 459, 461 (2001). "However, '[a] motion to vacate the judgment pursuant to G. L. c. 278, § 29D, is different in kind' and must be allowed if the warnings were not given and 'on a showing that the criminal conviction at issue may have any of the enumerated consequences to the defendant's immigration status; the judge has no discretion in that regard.'" Id., quoting Commonwealth v. Mahadeo, 397 Mass. 314, 318 n.5 (1986). The initial question then is whether the § 29D immigration warning was adequately delivered. See Ciampa, supra.

Here, the judge agreed with the defendant that there is a material difference between the warning as delivered, "exclusion from the U.S.," and the warning as dictated by § 29D, "exclusion

from admission to the United States." The cases relied upon by both parties and by the judge are all variations on the same theme. They address situations where the § 29D warning was either wholly absent, or only partially delivered, and where the defendant subsequently suffered an immigration consequence that was expressly excluded from the plea colloquy. See Petit-Homme, 482 Mass. at 785-786 (judge did not deliver § 29D warning); Commonwealth v. Valdez, 475 Mass. 178, 183-184 (2016) (Commonwealth unable to show defendant received § 29D warning in absence of transcript or other record of plea colloquy); Commonwealth v. Rodriquez, 70 Mass. App. Ct. 721, 727 (2007) (defendant warned of deportation only and not separate consequence of inadmissibility). These cases provide little instruction for the instant case, where the defendant received a warning that was nearly identical to the language of § 29D, except for a slight alteration to the second consequence.[3]

The defendant claims, and the judge agreed, that "exclusion from the U.S." suggests merely a denial of reentry, and does not encompass the defendant's current anticipated consequence of denial of an adjustment of status.[4] However, adjustment of

[3] The defendant did not challenge the judge's recitation of the third warning as "denial of citizenship," as opposed to the § 29D language of "denial of naturalization."

[4] To the extent the Commonwealth argues that the defendant would be deportable even in the absence of his conviction because of his unlawful status resulting from having overstayed his initial

status is a form of relief from exclusion or deportation, in the same manner as waiver, cancellation of removal, voluntary departure, withholding of removal, and asylum. H. Smith, CRS Report for Congress, Immigration Consequences of Criminal Activity, at 13 (as updated April 5, 2018). Although none of these forms of relief are expressly stated in the § 29D warning, they are encompassed by it. At bottom, § 29D does not require a judge to explain the "complexities of immigration law" or the "specific application of that complex law to the defendant's particular situation." See Hilaire, 437 Mass. at 819.

For this reason, we need not decide whether, as the defendant argues, "exclusion" has a narrower legal meaning than "inadmissibility."[5] However, we note that until 1996, the term "inadmissible" as used in § 1182 and elsewhere throughout the

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visitor status, it misses the thrust of the defendant's argument. The defendant did not challenge fair warning of his deportability. He argued only that the immigration warning failed to provide notice that his application for adjustment of status through his wife would be denied. While "[a]n alien is barred from adjustment of status if the alien is in an unlawful immigration status on the date of filing the adjustment application[,] [t]his bar to adjustment does not apply to: . . . immediate relatives" (footnote omitted). U.S. Citizenship and Immigration Services, Policy Manual, Vol. 7, Pt. B, Ch. 3, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-3#footnotelink-2 (as updated April 27, 2021) (addressing "Unlawful Immigration Status at Time of Filing").

[5] The defendant's brief distinguishes between "inadmissibility" and "deportation," but that distinction is immaterial where he was adequately warned of the consequences of deportation. What matters here is whether there is a distinction between exclusion and denial of change of status.

Immigration and Nationality Act (INA) was referred to as "excludable." See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 308, Pub. L. No. 104-208, 110 Stat. 3009-617 [hereafter IIRIRA].[6] "Despite the change in terminology, the terms 'exclusion' and 'inadmissibility' are functionally equivalent." 5 C. Gordon, S. Mailman, S. Yale-Loehr, & R. Wada, Immigration Law and Procedure, § 63.01[2] (rev. ed. 2020). Accord Vartelas v. Holder, 566 U.S. 257, 263 n.3 (2012) (referring to post-IIRIRA rules as relating to one who is "inadmissible" or "excludable" interchangeably).

As a result, the judge's warning that the defendant could be "excluded" from the United States was sufficient to encompass the scenario he now faces; thus, he was adequately warned of the immigration consequences of his plea as required by § 29D. See

[6] The IIRIRA consolidated the previously separate proceedings for "exclusion" and "deportation" into one "removal" proceeding and otherwise replaced INA references to excludability with inadmissibility. See 8 U.S.C. § 1229a. See also Patel v. McElroy, 143 F.3d 56, 61 (2d Cir. 1998) (explaining amendment).

Commonwealth v. Berthold, 441 Mass. 183, 186 (2004) (holding defendant not entitled to withdraw plea when adequately warned of alleged immigration consequence).

Order allowing motion to vacate guilty plea reversed.

By the Court (Meade, Wolohojian, Massing JJ.[7]),

Joseph F. Stanton

Clerk

Entered: May 7, 2021.

[7] The panelists are listed in order of seniority.