STATE OF VERMONT
COUNTY OF LAMOILLE

In re: AINSWORTH CLARE Petitioner	)	Lamoille Superior Court Docket No. 105-5-08 Lecv

ORDER AND OPINION RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

This post-conviction relief petition came before the court on the parties' cross-motions for summary judgment. The State of Vermont is represented by Assistant Attorney General John Treadwell. The Petitioner, Ainsworth Clare, is represented by Seth Lipschutz, Esq.

On November 2, 2008, the court held a status conference to determine the present immigration status of the Petitioner. By correspondence filed on November 7, 2008, Attorney Lipschutz confirmed that the Petitioner remains in the custody of United States Immigration and Customs Enforcement and that his immigration case is currently pending before the Board of Immigration Appeals.

I. The Undisputed Facts.

On February 12, 2007, in *State v. Clare,* Docket No. 714-11-06 Lecr, the Petitioner, a citizen of Belize, pleaded guilty to conspiracy to deliver cocaine in violation of 13 V.S.A. § 1404(c)(5). The Petitioner was represented by counsel at the time of his change of plea and received a sentence of three to five years, all suspended except for 18 months. A simple assault charge was dismissed as part of the plea agreement.

As part of the court's plea change colloquy, the following exchange occurred:

> **Court:** And now Mr. Clare, this case where it's alleged that you committed the offense of conspiring to deliver cocaine, have you been represented by Attorney Stephan MacKenzie?
>
> **Petitioner:** Yes, sir.
>
> **Court:** Did Mr. MacKenzie answer any questions you had?

Petitioner: Yes, sir.

Court: Have you had a full and fair opportunity to speak to Mr. MacKenzie about the charge against you?

Petitioner: Yes, sir.

Court: Good. Do you have any questions for me about anything he's told you or anything you do not understand?

Petitioner: No, sir.

Court: And finally do you understand that if you are not a citizen of the United States that your conviction today could have some adverse consequences to your immigration status?

Petitioner: Yes, sir.

On May 5, 2008, the Petitioner filed this post-conviction relief action. The Petitioner received credit for time served in the computation of his incarcerative sentence and was released by the Vermont Department of Corrections on May 7, 2008. On that same day, the Petitioner was detained by U.S. Immigration authorities. He remains in their custody.

II. Standard of Review.

When addressing a motion for summary judgment, the court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

> Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.

V.R.C.P. 56(c)(3).

III. Conclusions of Law.

Effective September 1, 2006, the Vermont Legislature required the State's courts to advise criminal defendants of the immigration consequences of pleading guilty or nolo contendere to a criminal charge. 13 V.S.A. § 6565(c) was amended as follows:

> (1) Prior to accepting a plea of guilty or a plea of nolo contendere from a defendant in a criminal proceeding pursuant to Rule 11 of the Vermont Rules of Criminal Procedure, the court shall address the defendant personally in open court, informing the defendant and determining that the defendant understands that, if he or she is not a citizen of the United States, admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to a crime may have the consequences of deportation or denial of United States citizenship.
>
> (2) If the court fails to advise the defendant in accordance with this subsection, and he or she later at any time shows that the plea and conviction may have or has had a negative consequence regarding his or her immigration status, the court, upon the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea or admission and enter a plea of not guilty.

As part of this change in the law, Rule 11 of the Vermont Rules of Criminal Procedure was amended as follows:

> (c) Advice to Defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following: . . . (7) if the defendant is not a citizen of the United States, admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to a crime may have the consequences of deportation or denial of United States citizenship.

V.R.Cr. P. 11(c)(7).

The sole issue before the court is whether the colloquy between the trial court and the Petitioner on February 12, 2007 satisfied the foregoing requirements.

The Petitioner bears the burden of establishing that the trial court did not "substantially comply with V.R.Cr.P. 11 in accepting [his] plea agreement[] *and* that this noncompliance prejudiced [his] plea[]." *In re Calderon*, 2003 VT 94, ¶ 9, 176 Vt. 532 (mem.) (citations omitted). Here, the Petitioner has satisfied both prongs of this burden of proof.

First, the Petitioner has established that the court neither provided the specific warning required by law, nor satisfied itself that the Petitioner had been provided substantially equivalent information. The court advised the Petitioner that if he was not a citizen of the United States, his "conviction today could have some adverse consequences to [his] immigration status." Section 6565 of Title 13 and Rule 11, as amended, both expressly set forth the two consequences that must be noted by the court in accepting a guilty or no contest plea: deportation or denial of United States citizenship. In this case, neither consequence was mentioned and the warning remained a generalized suggestion that the Petitioner's immigration status could be adversely impacted by his guilty plea and conviction. In these respects, the court's warning was markedly similar to the one at issue in *Machado v. State,* 839 A.2d 509 (R.I. 2003). There, the trial court warned the defendant that his plea might have "some effect upon what happens with the immigration service." *Id.* at 510. In interpreting a statute similar to Vermont's, the Rhode Island Supreme Court found the trial court's warning insufficient and vacated the defendant's plea, explaining that "neither a generalized reference to potential immigration consequences nor an advisement of deportation alone gives adequate notice to an alien defendant of the possibility of exclusion or denial of naturalization." *Id.* at 513.

In *State v. Sorino,* 118 P.3d 645 (Haw. 2005), the Hawaii Supreme Court reached a similar conclusion, holding the following warning insufficient: "[I]f you're not a citizen, this plea may have a bearing on whatever relationship you have with the Immigration and Naturalization Service." *Id.* at 647; see also *Commonwealth v. Hilaire*, 777 N.E.2d 804, 808 (Mass. 2002) (judge's advice that defendant's admission may affect his "status," without mentioning any of the specific immigration consequences identified in statute, fell far short of statutory requirement).

The State argues that substantial compliance is sufficient and that the court should find it here. However, this is not a case in which the petitioner received adequate information regarding immigration consequences from another source and thus was not prejudiced by the court's failure to provide that same information. See *Calderon*, 2003 VT 94, ¶ 14 (in a case that predates amendments to section 6565, defendant's attorney adequately advised defendant of immigration consequences of his plea, thereby negating his claim that court's failure to do so caused him prejudice). There is no evidence that the Petitioner's

attorney advised him in greater detail of the immigration consequences of his guilty plea, and thus the court's inquiry as to whether the Petitioner had sufficient time and opportunity to consult with his attorney in no way provided an adequate substitute for the court's own warning regarding the possibility of deportation or denial of citizenship.

Based upon the undisputed facts, this court concludes that, as a matter of law, the Petitioner has established that the district court's warning failed to substantially comply with 13 V.S.A. § 6565(c) and V.R.Cr.P. 11(c)(7). See *In re Parks*, 2008 VT 65, ¶ 8 (before trial court may accept a guilty plea, it must assure itself that the defendant has a full understanding of what the plea connotes and of its consequence).

The Petitioner has also satisfied the second prong of his burden of proof by establishing prejudice as a result of the court's failure to provide the warning required by law. Petitioner need only show that he "has had a negative consequence regarding his . . . immigration status." 13 V.S.A. § 6565(c)(2). Here, that burden is clearly met because instead of being released to the community as part of a suspended sentence, the Petitioner is currently being held by federal immigration officials. The Petitioner's liberty rights have thus been substantially impaired by his decision to plead guilty and the conviction resulting therefrom. This is sufficient prejudice to require the court to vacate his plea under 13 V.S.A. § 6565(c).

For the reasons set forth above, Petitioner's Motion for Summary Judgment is hereby GRANTED, and the State of Vermont's Motion for Summary Judgment is hereby DENIED. Petitioner's conviction is hereby VACATED, and this case is remanded to the Lamoille District Court wherein *State v. Clare*, Docket No. 714-11-06 Lecr shall be reinstated.

SO ORDERED.

Dated at Hyde Park, Vermont this 3rd day of December, 2008

Hon. Christina Reiss
Lamoille Superior Court