State of New York
Court of Appeals

MEMORANDUM

No. 104
The People &c.,
Respondent,
v.
Sixtus Udeke,
Appellant.

Benjamin Wiener, for appellant.
Jonathon Krois, for respondent.

MEMORANDUM:

The order of the Appellate Term should be affirmed.

We reject defendant's threshold challenge to the facial sufficiency of the accusatory instrument charging him with second-degree criminal contempt. A fair reading of the

allegations and reasonable inferences drawn therefrom provide reasonable cause to believe that he intended to violate the stay-away provision of the order of protection by purposely being physically present in the close confines of a subway turnstile with the protected person in order to avoid paying a subway fare (see People v Kalin, 12 NY3d 225, 228 [2009]; CPL 170.65 [3]).

Further, on this record, the court's plea allocution was sufficient to establish the voluntariness of defendant's guilty plea. Defendant pleaded guilty to a class B misdemeanor in satisfaction of two accusatory instruments charging him with class A misdemeanors. The class A misdemeanor counts in the instruments were not amended to lesser offenses as was done in People v Suazo (32 NY3d 491, 494 [2018]; cf. People v Kinchen, 60 NY2d 772 [1982]). Here, the record as a whole demonstrates defendant's knowing, voluntary and intelligent waiver of his constitutional rights and there is no basis to disturb his guilty plea (see People v Sougou, 26 NY3d 1052, 1055 [2015]; People v Conceicao, 26 NY3d 375, 383-384 [2015]).

People v Sixtus Udeke

No. 104

RIVERA, J. (dissenting):

In accordance with the law at the time of defendant Sixtus Udeke's plea allocution, the trial court told defendant, a noncitizen, that he had no right to a trial by jury for a deportation-eligible Class B misdemeanor. While defendant's leave application to this

Court was pending, we issued a new rule in People v Suazo (32 NY3d 491 [2018]), recognizing precisely the right defendant was told he did not have during the plea colloquy: that noncitizens like defendant have the right to a trial by jury for crimes carrying the potential penalty of deportation. That rule applies retroactively to defendant's appeal, and it leads to the conclusion that his guilty plea is invalid because he could not have knowingly and intelligently waived a right the court said he did not have. Therefore, I dissent from the majority decision that the guilty plea should stand.

I.

Defendant is a lawful permanent resident who had been residing in the United States for several years when he was arrested for jumping a turnstile with his wife, who had an order of protection against him. He was charged in two separate criminal complaints: one containing the Class A misdemeanor of theft of services (Penal Law § 165.15[3]) and the Class B misdemeanor of criminal trespass in the third degree (Penal Law § 140.10[a]); and another containing two counts of criminal contempt in the second degree (Penal Law § 215.50[3]), a Class A misdemeanor.

At a joint plea and sentencing hearing, defendant waived prosecution by information and pleaded guilty to attempted second-degree contempt, a B misdemeanor, in exchange for a conditional discharge, a two-year order of protection in favor of his wife, and dismissal of the theft of services and third-degree criminal trespass charges, which the

People had previously moved to consolidate with the criminal contempt charges. The following exchange occurred during the plea colloquy:

> "THE COURT: Do you understand that you have the right to a trial by jury?
>
> [DEFENDANT]: By jury?
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> "THE COURT: A jury trial, that's correct. Do you understand that you have that right?
>
> "[DEFENSE COUNSEL]: Well, it was represented to him that this would be reduced to a B misdemeanor.
>
> "THE COURT: A trial by a jury or a judge, depending on how the People proceeded. Do you understand that you have that right?
>
> "[DEFENDANT]: Yes, your Honor.
>
> "THE COURT: Do you understand that by pleading guilty you are giving up the right to have the trial?
>
> "[DEFENDANT]: Yes, your Honor."

Later in the colloquy, the court asked defendant whether he understood that the conviction could potentially impact his ability to remain in the United States, and might lead to his deportation, denial of citizenship or other consequences affecting his immigration status. Defendant replied he understood. He then admitted to attempting to intentionally disobey the order of protection commanding him to cease all communication

and contact with his wife. The court sentenced defendant in accordance with the plea agreement.

On appeal, defendant argued, amongst other things and as relevant here, that his plea was involuntary because the court incorrectly advised him as to his right to a jury trial. The Appellate Term affirmed the judgment of conviction, and in reliance on the First Department's decision in People v Suazo (146 AD3d 423, 423 [1st Dept 2017], lv granted, 29 NY3d 1087 [2017], revd, 32 NY3d 491 [2018]), rejected defendant's challenge to the plea, both because it concluded that he was not entitled to a jury trial on the Class B misdemeanor to which he pleaded guilty, and because in any event, the omission of the word "jury" in the colloquy did not render the plea invalid (59 Misc 3d 136[A] [App Term 2018], citing Suazo, 146 AD3d 423). After we reversed the Appellate Division's order in Suazo, a Judge of this Court granted defendant leave to appeal (32 NY3d 1129 [2018]).

II.

Defendant argues that he did not enter his plea knowingly because during the plea colloquy, the court misinformed him that he did not have a right to a jury trial if the People proceeded on the second-degree contempt B misdemeanor, though as a noncitizen subject to possible deportation if he pleaded guilty to that crime, he had a right to a trial by jury

under Suazo. Defendant is correct that Suazo applies to his appeal and the colloquy is constitutionally defective.[1]

In Suazo, we held that a noncitizen defendant charged with a crime that carries the potential penalty of deportation has a Sixth Amendment right to a trial by jury (32 NY3d 491, 508 [2018]). That new constitutional rule of criminal law applies retroactively to all cases pending on direct review or not yet final, as in defendant's case, in accordance with the Supreme Court's holding in Griffith v Kentucky that a new rule for the conduct of criminal prosecutions applies retroactively to all nonfinal cases, even where the rule is a clear break from the past (479 US 314, 328 [1987]). The People do not argue to the contrary. Accordingly, if defendant establishes he is a noncitizen and the court misinformed him of the right to a trial by jury during the plea colloquy, he may challenge his plea based on our voluntary plea jurisprudence and the holding in Suazo.

At the time defendant pleaded guilty to the B misdemeanor of attempted contempt in the second degree, he was a noncitizen.[2] Conviction on that charge subjects him to

[1] I agree with the majority that contrary to defendant's other claim on appeal, the complaint is facially sufficient (majority mem at 1-2).

[2] This Court does not know defendant's current immigration status and in any event, it is immaterial to this appeal. Further, the People's argument that defendant cannot seek relief under Suazo because he failed to affirmatively assert and present evidence at the plea colloquy that he was a noncitizen subject to potential deportation if convicted of the B misdemeanor is a claim looking for an issue. The People fail to establish a credible factual dispute as to defendant's immigration status. Defendant represents that he was a lawful permanent resident at the time he pleaded guilty and remains one now, and the People do not contradict this statement. In fact, the People's brief to the Appellate Term acknowledged defendant's noncitizen status, asserting specifically that "on information and belief, the sources of which are the People's [] inquiries with federal immigration authorities, defendant appears to be a lawful permanent resident who has lived in this

deportation under 8 USC § 1227 (a) (2) (E) (ii), which provides that any noncitizen "who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable."

Turning to the voluntariness of the plea, "[t]he established rule is that a guilty plea will be upheld as valid if it was entered voluntarily, knowingly and intelligently" (People v Fiumefreddo, 82 NY2d 536, 543 [1993], citing People v Moissett, 76 NY2d 909, 910-911 [1990]; People v Lopez, 71 NY2d 662, 666 [1988]). "When a defendant opts to plead guilty, [they] must waive certain constitutional rights—the privilege against self-incrimination and the rights to a jury trial and to be confronted by witnesses" (People v Tyrell, 22 NY3d 359, 365 [2013]).

> "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and

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country for seven years and has not been convicted of an aggravated felony." Notably, the Appellate Term rejected defendant's claim that as a noncitizen, he was entitled to a jury trial on the Class B misdemeanor, citing the First Department's decision in Suazo, later overturned by this Court on appeal, that "deportation consequences are [] collateral and do not render an otherwise petty offense 'serious' for jury trial purposes" (Suazo, 146 AD3d at 424; see also 59 Misc 3d 136[A]). In other words, the Appellate Term rejected defendant's claim that he should have been informed that he had a right to a trial by jury on the B misdemeanor in reliance on the representations of defendant and the People that defendant is a noncitizen. The People may not be heard to complain on this appeal that defendant failed to establish his status at the plea colloquy given that defendant was, in fact, a noncitizen at the time of the plea and they never disputed his noncitizen status, and actually conceded it.

> liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence" (Duncan v Louisiana, 391 US 145, 155 [1968]).

"[T]o constitute a knowing, voluntary and intelligent plea, there must be 'an affirmative showing on the record' that the defendant waived [their] constitutional rights" (Tyrell, 22 NY3d at 365, citing Fiumefreddo, 82 NY2d at 543; see Boykin v Alabama, 395 US 238, 242 [1969]). While "we have repeatedly rejected a formalistic approach to guilty pleas" (Tyrell, 22 NY3d at 365), "the Trial Judge has a vital responsibility 'to make sure [that the accused] has full understanding of what the plea connotes and of its consequence'" (People v Harris, 61 NY2d 9, 19 [1983], quoting Boykin, 395 US at 242). "[A] record that is silent will not overcome the presumption against waiver by a defendant of constitutionally guaranteed protections. To be sure, the record must show 'an intentional relinquishment or abandonment of a known right or privilege'" (Harris, 61 NY2d at 17, quoting Johnson v Zerbst, 304 US 458, 464 [1938]). To ensure an intentional relinquishment of a right, the trial court must "assure[] itself that defendant adequately understood the right that [defendant] was forgoing" (People v Bradshaw, 18 NY3d 257, 265 [2011]). "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void" (McCarthy v United States, 394 US 459, 466 [1969]).

Defendant's claim that the court erroneously informed him that he did not have a right to a jury on the B misdemeanor, thereby rendering his plea invalid, is supported by

the record. The first constitutional right addressed by the court at the plea colloquy was defendant's right to a trial by jury. When the court directly asked defendant if he understood that he had such a right, defendant asked back, "by jury?" and the court confirmed, "A jury trial, that's correct." And the court again asked, "Do you understand that you have this right?" At this point, defense counsel interjected and said that the representation to defendant was "that this would be reduced to a B misdemeanor." With that representation, the court then stated to defendant that he had a right to "a trial by a jury or a judge, depending on how the People proceeded." Given this context, where the court stated that defendant had a right to a jury trial—in direct response to defendant's inquiry—and then, upon counsel's representation that the People were reducing the charge to a B misdemeanor, the court changed course and said the jury trial was contingent on the People's choice, defendant was misled about his rights. The most natural reading of this colloquy is that the court informed defendant he did not have a right to a jury trial on the B misdemeanor, the category of offense to which, moments earlier, defendant had agreed to plead guilty. That is undoubtedly what occurred here because at the time defendant pleaded and then appealed, the court, defense counsel and the prosecutor all were working under the law existing at the time: that defendant was not entitled to a jury trial on the reduced B misdemeanor (see CPL 340.40 [2]).

Even if the colloquy lends itself to another reasonable interpretation, that would only confirm that the court's statements were unclear, meaning that the record fails to establish defendant understood that by pleading guilty he was waiving his right to a trial

by jury for a prosecution on the B misdemeanor. Here, a literal reading of the transcribed colloquy, that the defendant was waiving "[a] trial by a jury or a judge, depending on how the People proceeded," is too vague to serve the fundamental purpose of informing defendant of his constitutional rights, which requires the court "make sure [a defendant] has a full understanding of what the plea connotes and of its consequence" (Boykin, 395 US at 244). Defendant was unable to assess if and under what circumstances he would be waiving a jury trial and to make a fully informed choice about whether a guilty plea was worth foreclosing his constitutional rights and options. The colloquy either misinformed defendant about his jury trial right or was so vague that the record cannot establish defendant's knowing guilty plea and waiver of that right. In either case, defendant's plea cannot stand.

In sum, since defendant would be entitled to a jury trial under our holding in Suazo, the court's statement at the colloquy that he would not be entitled to a jury trial should the People prosecute him on the reduced B misdemeanor was incorrect. Therefore, defendant's plea was not intelligent and voluntary because it was based on this misinformation. The Appellate Term order should be reversed, and the guilty plea vacated. Moreover, because defendant was sentenced to a conditional discharge and the two-year order of protection has expired, the complaint should be dismissed (Tyrell, 22 NY3d at 366; Conceicao, 26 NY3d at 389 [Rivera, J., dissenting]).

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Order affirmed, in a memorandum. Chief Judge DiFiore and Judges Stein, Fahey, Garcia and Feinman concur. Judge Rivera dissents in an opinion in which Judge Wilson concurs.

Decided December 19, 2019