

Reasonable Advice Is Not Ineffective Assistance of Counsel

BY LAZAR EMANUEL

In *People v. Gatien*, NYLJ, January 9, 2004, page 18, defendant Gatien was indicted on multiple charges, including grand larceny. His wife was also indicted. The charges were based on the underreporting of nightclub receipts to avoid sales taxes; the failure to report as income personal expenses charged to his business; and misrepresentation of his residency status on tax returns. Under a plea bargaining agreement, defendant was to receive a jail sentence of 90 days and five years' probation, and to pay restitution and fines totaling \$1,500,000. His wife was to receive probation and pay restitution. The agreement allowed defendant to continue running his business.

Defendant was a citizen of Canada. Before he entered his guilty plea, he was advised by his attorney, Benjamin Brafman, that the plea would not lead to his deportation. However, a US Immigration Judge determined that defendant's crime was an "aggravated felony" under federal law, subjecting the defendant to mandatory removal under the immigration laws.

Defendant moved to vacate his judgment and withdraw his guilty plea, arguing that he had received ineffective assistance of counsel and that he would not have entered a guilty plea if he had known that the plea meant mandatory deportation. The court denied the defendant's motion and defendant was deported.

In the instant action, defendant renewed his motion to vacate, relying on a recent Court of Appeals decision, *People v. McDonald*, NY2d , decided November 24, 2003. The motion and the effect of the McDonald decision were considered by Supreme Court Justice Bruce Allen.

Judge Allen agreed that the Court of Appeals decision in *McDonald* supported one of the defendant's arguments - that he had been prejudiced in pleading guilty by the incorrect advice of counsel. In *McDonald*, the Court of Appeals had imposed a simple standard for prejudice - the defendant has only to show that he would not have pleaded guilty had he been given the proper advice, not that there was some likelihood of success at trial.

But Judge Allen found that defendant had not received ineffective assistance of counsel. Unlike the advice in *McDonald*, the advice given to defendant was not an affirmative misstatement by counsel. In most cases in which deportation has followed a plea of guilty, the advice given by counsel was clearly wrong at the time it was given.

In this case, Judge Allen found, defendant's deportation involved two complex and unsettled legal issues. One of the issues was not resolved until two years after defendant's guilty plea. The other involved differing interpretations of the statutory definition of crimes "involving fraud or deceit."

Lawyer Brafman had consulted with lawyers specializing in immigration matters before advising the defendant. "While the advice may ultimately have proved to be incorrect, there is no showing that [counsel's] performance of his duties....fell below a level of reasonable competence....the defendant...could not dispute that in all other respects, Mr. Brafman's representation was at the highest level"

Judge Allen denied defendant's motion.