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PEOPLE V. YU
(decided June 24, 2005)

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In our criminal justice system, trial courts have a constitutional duty to ensure that defendants understand both the nature of the charge and the consequences of the plea before pleading guilty.[1] Although counsel may waive allocution, the court's duty to ensure a defendant voluntarily and knowingly enters a guilty plea survives.[2] Despite increasing pressure on courts to be faster and more efficient, courts should not achieve these goals by encroaching on an individual's right to due process.[3] This is particularly true when the defendant is a first-time offender and speaks little or no English.[4] When trial courts fail to fulfill their duty to ensure a plea is voluntarily and knowingly entered, convictions should be vacated and remanded for further proceedings, regardless of whether a motion was made to withdraw the plea or vacate the judgment of convic-

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1. People v. Nixon, 21 N.Y.2d 338, 345 (1967) (citing FED. R. CRIM. P. 11 (amended 1975)). *See also* People v. Ford, 86 N.Y.2d 397, 402 (1995).

2. "Allocution" is defined as a trial judge's formal address to a convicted defendant, asking him to speak in mitigation of the sentence imposed. BLACK'S LAW DICTIONARY (8th ed. 2004). A waiver of allocution involves the relinquishment by the defendant of important constitutional rights, including the right to a trial by jury. 2-11 NEW YORK CRIMINAL PRACTICE § 11.6 [5] (2005). *See generally* Unger v. Cohen, 718 F. Supp. 185, 190 (1989) (summarizing the significance of counsel's waiver of allocution and the difficulties that arise when a record is devoid of an allocution).

A plea is *voluntary* when the defendant understands the nature of the charges against him. *See* People v. Beasley, 25 N.Y.2d 483, 488 (1969). Furthermore, a plea is *knowingly* entered when the defendant is advised of the direct consequences of pleading guilty. *See* People v. Ballinger, 785 N.Y.S.2d 121, 123 (2004) (citing *Ford*, 86 N.Y.2d at 403). "[D]ue Process is not satisfied by a mere showing that a plea is voluntary. Equally indispensable to a valid plea is that it be . . . knowingly made . . . A judge is not relieved of his/her duty to ascertain that a plea was [voluntarily] and knowingly made because the defendant is represented by counsel." 2-11 NEW YORK CRIMINAL PRACTICE § 11.6 [1] (2005).

3. *See* People v. Yu, 801 N.Y.S.2d 780, 780 (2d Dep't 2005) (Belen, J., concurring).

4. *Id.*

tion.[5] This ensures that all defendants — including those who do not speak English — receive due process protection.

In *People v. Yu*, the New York State Supreme Court, Appellate Term, Second Department, addressed the issue of whether the sentencing court erroneously convicted the defendant of disorderly conduct.[6] Although the record raised sufficient doubt as to whether the defendant understood the nature of the charge and the consequences of his plea, the Appellate Term affirmed the judgment of conviction because the defendant failed to make a motion to withdraw his plea or to vacate his judgment of conviction.[7] This case comment contends that the *Yu* decision clearly contravenes both the Court of Appeals decision in *People v. Beasley*[8] and the Appellate Division, Second Department decision in *People v. Ballinger*.[9] This case comment also contends that when the record raises sufficient doubt about whether a plea was voluntarily and knowingly entered, the reviewing court should reverse and remand the case, even in the absence of a motion to withdraw the plea or vacate the judgment of conviction.

In *Yu*, Wen Zong Yu, a non-English speaking immigrant, was arrested in his home upon allegations that he had physically beaten his wife.[10] His wife filed a complaint and Yu was charged with Assault in the Third Degree, Menacing in the Second Degree, and Harassing in the Third Degree.[11] At his sentencing, the Assistant District Attorney offered Yu a plea of disorderly conduct with a sentence of a conditional discharge and full order of protection.[12] Yu accepted the plea, counsel waived allocution, and the Queens County Criminal Court issued an order of protection prohibiting Yu from returning to his home for the next year.[13] Even though Yu

5. *See Beasley*, 25 N.Y.2d at 487. *See also* People v. Lopez, 71 N.Y.2d 662, 666 (1988) (noting that "[when] the court fails in its duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of allocution on direct appeal, notwithstanding that a formal postallocution motion was not made").

6. 801 N.Y.S.2d at 780.

7. *Id.*

8. 25 N.Y.2d 483 (1969).

9. 785 N.Y.S.2d 121 (2d Dep't 2004).

10. *Yu*, 801 N.Y.S.2d at 780 (Belen, J., concurring).

11. *Id.*

12. *Id.*

13. *Id.*

had a lawyer and court-appointed interpreter, at no point were the initial charges or the plea of disorderly conduct fully described to him before he pled guilty.[14] Furthermore, although the trial court advised Yu that an order of protection would be entered against him, he was not informed of the ramifications of that order before he pled guilty.[15] Only after Yu pled guilty did the court explain that he would not be able to return to his home for the next year and, more significantly, that he would no longer be able to see his child unless he made arrangements through Family Court.[16]

On appeal, Yu sought to reverse his conviction.[17] He contended that he was never advised of the charges to which he pled guilty and did not understand the ramifications of his conviction due to a language barrier and hearing difficulties.[18] Despite Yu's arguments, the Second Department affirmed the judgment of conviction on the ground that Yu had failed to make a motion to withdraw his plea under Criminal Procedure Law (CPL) section 220.6 or to vacate the judgment of conviction under CPL section 440.10.[19]

In his concurrence, Judge Belen agreed that the judgment of conviction should be affirmed given the "distinct possibility" that Yu's lawyer had explained to his client the plea and order of protec-

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14. *Id.* Based on the record, it is uncertain why neither the initial charges nor the plea of disorderly conduct were fully described to him. Yu, however, may have a claim for ineffective assistance of counsel. *See Unger*, 718 F. Supp. at 189 ("To prove ineffectiveness of counsel, plaintiff must demonstrate first that his counsel acted unreasonably in light of prevailing professional standards, and second, that this deficient conduct actually prejudiced.").

15. *Yu*, 801 N.Y.S.2d at 780 (Belen, J., concurring). The trial court in *Yu* had a constitutional duty to ensure the defendant fully understood what the plea meant and its consequences *prior to pleading guilty*. People v. Catu, 4 N.Y.3d 242, 244-45 (2005) (emphasis added).

16. *Yu*, 801 N.Y.S.2d at 780 (Belen, J., concurring).

17. *Id.*

18. *Id.*

19. *Id.* N.Y. CRIM. PROC. L. § 220.6(3) (2005) provides "at any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment . . . to withdraw such plea . . . ." N.Y. CRIM. PROC. L. § 440.10 (2005) provides "at any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment on the ground that . . . the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

tion.[20] Judge Belen stated, however, that if Yu was not so advised, he should be permitted to make a motion to vacate given the language barrier, his inexperience with the criminal justice system and the lack of details regarding the direct consequences of his plea.[21]

The Appellate Term incorrectly affirmed the judgment of conviction solely because Yu failed to make the proper motions.[22] Although the absence of a motion to withdraw a plea or vacate a judgment of conviction generally results in the presumption that a plea is valid, the court should have reviewed the conviction when the record raised questions as to whether the plea was made voluntarily and knowingly.[23]

The Court of Appeals addressed the issue of whether a plea was voluntarily entered in *People v. Beasley*.[24] In *Beasley*, a seventeen-year-old defendant pled guilty to Manslaughter in the First Degree.[25] Although the trial court sufficiently inquired whether the defendant understood the consequences of his plea, it failed to inquire whether he understood the nature of the charges against him.[26] On appeal, the New York Appellate Division, Third Department affirmed the defendant's conviction because he did not make a motion to withdraw his plea.[27] The Court of Appeals, however, reversed and remanded the case.[28] It reasoned that the ambiguities regarding the voluntariness of the plea and the failure of the trial judge to sufficiently clarify those ambiguities mandated that the or-

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20. *Yu*, 801 N.Y.S.2d at 780 (Belen, J., concurring).

21. *Id.*

22. *See id.*

23. *See* People v. Latham, 90 N.Y.2d 795, 799 (1997) ("In the absence of such a motion, the plea . . . and the resulting conviction . . . are presumptively voluntary, valid and not otherwise subject to collateral attack. Defendant failed to make use of the available procedural vehicle to seek judicial review of whether the plea was voluntary."). The *Latham* court recognized, however, that "[in the case] where defendant's recitation of the facts . . . calls into question the voluntariness of the plea, a reviewing court on direct appeal of the plea may address the voluntariness of a plea in the absence of such a motion." *Id.* at 798.

24. 25 N.Y.2d at 487.

25. *Id.* at 485.

26. *Id.* at 484.

27. *Id.* at 487.

28. *Id.*

der be reversed and remanded for a hearing to determine whether the plea was voluntarily entered.[29]

Although counsel did not waive allocution in *Beasley*,[30] the Court of Appeals discussion regarding the importance of the voluntariness of a plea is applicable to *Yu*. In *Yu*, there was no indication that the defendant's attorney or court-appointed interpreter clarified the initial charges against him or described the plea in detail before he pled guilty.[31] Without the aid of adequate counsel or interpretation, it is unlikely that an inexperienced, non-English speaking defendant could voluntarily enter a plea. Despite the absence of a motion, the Appellate Term should not have strictly presumed the plea was valid and affirmed the judgment of conviction.[32] On the contrary, as required by *Beasley*, the Appellate Term should have reversed the conviction and remanded the case for a hearing to determine whether the plea was voluntarily entered.[33]

In addition to the ambiguity surrounding whether the plea was voluntarily entered, the Appellate Term should have reversed based on the fact that the trial court did not advise Yu of the ramifications of the plea before it was entered.[34] In order for a defendant to knowingly enter a plea, the record must show that the defendant was advised of the "direct consequences" of his plea prior to pleading guilty.[35]

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29. *Id.* at 488.

30. *See Beasley*, 25 N.Y.2d at 488.

31. *See* 801 N.Y.S.2d at 780 (Belen, J., concurring).

32. *See Beasley,* 25 N.Y.2d at 488.

33. *See id.*

34. *See Yu*, 801 N.Y.S.2d at 780 (Belen, J., concurring).

35. *See Ballinger*, 785 N.Y.S.2d at 123. Although a trial court has a duty to ensure a defendant understands the consequences of his plea before pleading guilty, a court is not obligated to explain all possible consequences that may attach to a criminal conviction. *Catu*, 4 N.Y.3d at 244. Courts, therefore, have distinguished between collateral and direct consequences of a criminal conviction. *Ford*, 86 N.Y.2d at 403. Collateral consequences generally result from the actions taken by agencies the court does not control. *Id.* Direct consequences, on the other hand, have "a definite, immediate and largely automatic effect on defendant's punishment." *Id. See Ford*, 86 N.Y.2d at 397 (holding that deportation by the Immigration and Naturalization Services was a collateral consequence of a guilty plea). *See also Catu*, 4 N.Y.3d at 244 (holding that post-release supervision was a direct consequence of a criminal conviction since it was mandatory).

This is not the first time the Second Department has addressed this issue.[36] In *Ballinger*, the defendant pled guilty to robbery in the first degree.[37] He was not advised, however, that he would be sentenced to five years of post-release supervision before he accepted the plea.[38] The Second Department held that due process requires the defendant understand the direct consequences of his plea before pleading guilty.[39] It reasoned that although the court is not expected to "engage in a particular litany," the record must show that the defendant was advised of the direct consequences of his plea prior to pleading guilty.[40] Where factual questions exist as to whether the defendant would have pled guilty if he had been advised of the consequences of the plea, the matter must be remanded to trial court for further proceedings.[41]

In *Yu*, although the court advised Yu he would be subject to an order of protection as a condition of his plea, the court did not explain the ramifications of that order until *after* he pled guilty.[42] Specifically, the court failed to inform him that as a result of the order of protection, he would not be able to return home for the next year or see his child unless he made arrangements through Family Court.[43] The ramifications of the order of protection should have been explained to the defendant *before* he accepted the guilty plea.[44] Where a defendant is unaware that, as a direct consequence of his plea, he would be locked out of his home and prohibited from seeing his child, factual questions exist as to whether he knowingly entered the plea.[45] The Appellate Term, therefore,

36. *See Ballinger*, 785 N.Y.2d at 123.

37. *Id.* at 122.

38. *Id.*

39. *Id.* at 123.

40. *Id.*

41. *Id.*

42. 801 N.Y.S.2d at 780 (Belen, J., concurring).

43. *Id.*

44. *See id.* The order of protection was a direct consequence of the conviction given that it was issued by the sentencing court and had a "definite, immediate and largely automatic effect on defendant's punishment." *Id.* Therefore, the sentencing court was obligated to inform the defendant of both what the order of protection meant and its significance. *See supra* text accompanying note 35.

45. *Id.*

should have also reversed Yu's conviction given the trial court's failure to advise him of the direct consequences of his plea.[46]

As the immigrant population in America continues to grow, a rising concern within the legal community is the difficulty faced by non-English speaking defendants in navigating today's courts.[47] Often, non-English speaking defendants are unable to understand the criminal proceedings and choose to plead guilty in order to end the judicial proceeding as quickly as possible.[48] Many incorrectly assume that once they plead guilty, they can pay a fine and return to their homes.[49] Sadly, defendants like Mr. Yu do not realize that they will not be able to return home or see their families until it is too late. Given these circumstances, courts must take special care when dealing with non-English speaking defendants.[50] If there is any doubt regarding whether a defendant understands the charges or consequences of his plea, the trial judge must make sufficient inquiry to alleviate that doubt.[51] Courts cannot assume that such defendants voluntarily and knowingly enter guilty pleas. In the interest of safeguarding these defendants' rights, courts should presume that non-English speaking defendants cannot voluntarily and knowingly enter pleas.[52] If questions arise on appeal regarding the sufficiency of the trial court's inquiry, the reviewing court cannot affirm the conviction simply because of a technical error.[53] Rather, the reviewing court must reverse and remand for a hearing to determine whether the plea was voluntarily and knowingly entered.[54]

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46. *See Ballinger,* 785 N.Y.S.2d at 123. *See also Catu*, 4 N.Y.3d at 246.

47. *See, e.g.,* Kenneth Juan Figueroa, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 424 (2002). *See generally*, DEEPA IYER & JULIET K. CHOI, ASIAN AMERICAN JUSTICE CENTER, EQUAL JUSTICE, UNEQUAL ACCESS: IMMIGRANTS & AMERICA'S LEGAL SYSTEM 1-5 (2005), *available at* http://www.advancingequality.org/dcm.asp?id=68 (summarizing the difficulties that immigrants already face in navigating courts as a result of language barriers and the lack of linguistically appropriate services in today's legal system).

48. Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1398 (1999).

49. *Id.* at 1403.

50. *See* IYER & CHOI, *supra* note 47, at 2.

51. *Beasley*, 25 N.Y.2d at 487.

52. *See* Messier, *supra* note 48, at 1404-05.

53. *Beasley,* 25 N.Y.2d at 488.

54. *Id.*

The decision in *Yu* will have far-reaching effects on the due process rights of defendants, particularly when such defendants do not speak English. Courts would be allowed to accept guilty pleas and issue sentences even though defendants do not understand the nature of the charges or the consequences of the pleas due to their inexperience and/or inadequate language skills. In *Yu*, the trial court should have ensured that Yu understood both the charges and their direct consequences prior to entering a guilty plea.[55] Yu did not understand the language, was a first time offender, and had counsel who did not advise him of all the terms and ramifications of his guilty plea.[56] Thus, the trial court should have been immediately put on notice that the waiver of allocution was not appropriate.[57] Although a motion to withdraw the plea or vacate the judgment of conviction is generally the only option available to a defendant seeking review of a conviction, in instances where the defendant's due process rights have been encroached upon, New York law insists that exceptions be made.[58] The circumstances in *Yu* present such an exception. The judgment of conviction in *Yu*, therefore, should have been reversed and remanded and an opportunity for a hearing should have been provided to determine whether Yu's plea was voluntarily and knowingly entered.[59]

55. *See Nixon*, 21 N.Y.2d at 345 (citing FED. R. CRIM. P. 11 (amended 1975)); *Ford*, 86 N.Y.2d at 402-03.

56. *Yu,* 801 N.Y.S.2d at 780 (Belen, J., concurring).

57. *Id.*

58. *Lopez*, 71 N.Y.2d at 666. *See Latham*, 90 N.Y.2d at 798. *See supra* text accompanying note 23.

59. *See Beasley,* 25 N.Y.2d at 488.