WITHDRAWALS OF GUILTY PLEAS

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Most criminal cases are resolved by pleas of guilty to one or more offenses (whether as charged or lesser included offenses [CPL Art. 220]), and once the defendant has admitted his/her guilt on the record in open court after waiving his/her constitutional rights (e.g to confront his/her accusers at a trial) and acknowledged the potential direct consequences (e.g. probation, fine, imprisonment, Post Release Supervision [PRS] for a violent felony [VF] or drug felony (DF],and possible deportation if a non-citizen), taking back the guilty plea is by no means a simple or easy proposition.

That is in part because a guilty plea (and the sentence imposed upon it) is, as stated in People v Hanson 95 NY2d 227, 230 (2000), supposed to signal the end of the case rather than open the flood-gates to further litigation. (See also People v Francis 38 NY2d 150 [1975]).

CPL 220.60(3) states that at any time BEFORE IMPOSITION OF SENTENCE, the court, in its discretion, MAY PERMIT a defendant who has entered a guilty plea to all or part of an indictment (or information in the local court) to withdraw such plea (thereby restoring the accusatory instrument to its pre-plea status). (See People v Selikoff 35 NY2d 227 [1974]).

While the rule is simply and succinctly stated, persuading a court to undo the plea (and return the case to a pre-trial posture), can be more complicated, not unlike asking for an annulment after saying, “I do.” Once a guilty plea has been withdrawn from the CRIMINAL case, it is as if it never happened. Therefore, it cannot be used either as affirmative evidence in the People’s case-in-chief or to impeach the defendant if he testifies. (People v Spitaleri 9 NY2d 168 [1961], People v Heffron 59 AD3d 263 [4th dep’t 1977]).

But see Cohens v Hess 92 NY2d 1202 (1998): Defendant’s withdrawn guilty plea to a Vehicle and Traffic infraction (Failure to Obey a Traffic Control Device), entered without counsel, was deemed admissible in a subsequent CIVIL lawsuit (personal injury case), to impeach the defendant when he testified that he stopped for the stop sign.

The Court noted that since the defendant had only pled guilty to a traffic infraction, he was not entitled to assigned counsel (CPL 170.10 [3]), and the vacatur of his plea was not constitutionally or statutorily compelled (i.e. no claim of involuntariness), but instead, was solely a matter of judicial discretion, exercised after the defendant was advised by his civil attorney that his guilty plea would be harmful in the negligence case. Consequently, the Spitaleri rule was deemed not to apply.

Mere pleader's remorse, a post-plea change-of-heart or unsubstantiated protestations of innocence (People v Allen 99 AD3d 1252 [4th dep't 2012], People v Barnello 56 AD3d 1214 [4th dep't 2008], People v Dixon 29 NY2d 55 [1971]), conclusory claims of coercion (People v Ramos 63 NY2d 640 [1984], People v Linares 113 AD3d 1796 [2d dep't 2014], People v Sparcino 8 AD3d 1508 [4th dep't 2010]), or an alleged misunderstanding of the nature and quality of the People's case (People v Clarke 61 AD3d 1426 [4th dep't 2008], People v John 107 AD2d 824 [2d dep't 2004], will ordinarily not carry the day.

As noted in People v Leonard 25 AD3d 925 [3rd dep't 2006]), where the defendant has been fully informed of his/her rights that he/she is waiving by his/her guilty plea and then admits the acts constituting the crime, a subsequent profession of innocence which is not substantiated by supporting facts is generally insufficient to support a motion to withdraw the plea.

Rather, the defendant must put forth evidence that he/she is innocent and/or that there was some type of fraud or mistake in the inducement to the plea of guilty. (See generally People v Lewis 13 AD3d 810 [3d dep't 2004], People v Gibson 84 AD3d 855 [3d dep't 1985]).

Motions to withdraw a guilty plea are directed to the SOUND DISCRETION OF THE TRIAL COURT (People v Dozier 12 AD3d 1176 [4th dep't 2004], People v Bennett 115 AD3d 973[2d dep't 2014]), and judges will routinely look to the transcript of the plea colloquy to see whether the record of the proceedings supports or belies the defendant's arguments. (People v Seeber 4 NY3d 780 [2005], People v Bullard 33 AD3d 715 [2d dep't 2006], People v Garcia 8 AD3d 79 [1st dep't 2004]).

Where the defendant's moving papers fail to raise any credible issue (e.g. of innocence, fraud, mistake, involuntariness, illegal sentence commitment), the court can deny the motion out of hand. (People v Mitchell 21 NY3d 964 [2013]). It should first, however, inquire into the basis for (and motivation behind) the motion, (People v Smith 33 AD2d 688 [2d dep't 1969]), and it is not at all uncommon (if not advisable) for the court to make at least a limited, on-the-record inquiry to see if the motion has any merit. (People v Tinsley 35 NY2d 926 [1976], People v Fiumefreddo 82 NY2d 536 [1993]).

And, in some cases, where argument of counsel alone cannot resolve disputed issues, the court may conduct an evidentiary hearing. (See, for example, People v Williams 35 AD3d 1085 [3d dep't 2006]) where the defendant alleged that his counsel misinformed him about certain exculpatory evidence in his signed statement to authorities). In such case, where counsel takes a position adverse to the client, new counsel should be assigned to the defendant, (People v Wilson 91 AD2d 1052 [2d dep't 1987]), to ensure the defendant can receive effective assistance. (People v Welsh 207 AD2d 1025 [4th dep't 1994]).

A court generally CANNOT vacate a guilty plea on its own motion or without the defendant's consent, (People v Skinner 273 AD2d 105 [1st dep't 2000]), People v Prato 89 AD2d 860 [2d dep't 1982]): Court can't vacate plea of its own accord just because the defendant, as stated in the PSR, denies involvement in the crime), but it does have the inherent power, BEFORE SENTENCE is imposed (and service thereof is commenced), to CORRECT AN ERROR in taking the plea in violation of law. (See People v Bartley 47 NY2d 856 [1976]: Trial Court's acceptance of defendant's plea to a Class D felony drug offense under an indictment charging a Class A-2 felony drug offense was erroneous as a matter of law since it was prohibited by CPL 220.10 [6] [a]). Therefore, the plea bargain was a nullity which the court had authority to correct.

While courts, as noted above, cannot vacate guilty pleas sua sponte, they always maintain authority to approve plea agreements and exercise discretion at sentencing. And, while the District Attorney holds the cards in determining whether a plea to a reduced charge will be

offered in the first place (a defendant has no constitutional right to a plea offer), and can condition the offer upon the defendant agreeing to a particular sentence (People v Farrar 52 NY2d 306 [1981]), the court still must determine whether the proposed disposition is fair and just.

In the case of a Farrar plea, if the court, at the time of sentencing, determines that it cannot honor the plea-and-sentence agreement (e.g. the sentence is deemed too harsh), the court must afford the People an opportunity to withdraw the plea offer because they are now being deprived of the benefit or their bargained-for agreement. However, the AD has the authority on appeal to modify the sentence in accordance with the lower court's inclination. (People v Thompson 60 NY2d 513 [1983]).

Conversely, if the court decides to impose a greater sentence than the parties agreed to (and the court assented to at the time of the plea), it cannot just go ahead and do so without first allowing the defendant to withdraw his/her plea. (See People v Donnelly 23 AD3d 921 [3d dep't 2005]): Error for the court to enhance the defendant's sentence for failing to complete rehab. where the court only said that completion of rehab. could result in a lesser sentence but not that failure to do so could have an adverse effect on sentence).

But see People v Ledger 21 AD3d 1180 (3d dep't 2005): Defendant demonstrated no basis to withdraw guilty plea where the court, which had made no sentence commitment, declined to follow the People's favorable sentence recommendation (pursuant to their promise to the defendant), and imposed a harsher sentence than the defendant had hoped for.

See also People v Kegel 55 AD3d 625 (2d dep't 2008): the trial court erred in denying defendant's motion to withdraw his guilty plea to Robbery 3d degree where it imposed RESTITUTION as part of the sentence even though it was NOT part of the negotiated plea disposition. The same conclusion was reached in People v Tehonica 46 AD3d 942 [3d dep't 2007]).

BUT, in order to PRESERVE the argument that the court erroneously imposed restitution (for purposes of appeal), the defendant had to make a motion to withdraw the plea or vacate the conviction. (People v Jerome 110 AD3 739 [2d dep't 2012], People v Niedwieski 100 AD3d 1023[2d dep't 2012]).

While a court can impose CONDITIONS upon a sentence commitment (e.g. that the defendant not pick up any new arrests, or engage in counseling, or remain drug and alcohol free), in order to impose a greater sentence than was promised, the court must INFORM the defendant, at the TIME OF THE PLEA, of the potential consequences of non-compliance (e.g. up to the maximum sentence), and make an on-the-record inquiry to verify that the defendant in fact violated the condition(s) of the plea and sentence agreement. (See People v Outley 80 NY2d 702 [1993]).

If the court does not inform the defendant of the potential direct consequences of his/her plea when the plea is taken, (or of the consequences of non-compliance with the conditions of a plea and sentence agreement), it cannot be said that the plea was knowingly, voluntarily and intelligently entered.

A guilty plea is generally considered to meet these requirements when the record of the plea proceedings demonstrates that the defendant was fully informed by the court of the rights that he/she is giving up (e.g. to a trial by jury where guilt must be proven beyond a reasonable doubt, to confront his/her accusers, to testify or call witnesses in his/her own behalf), and of the potential DIRECT CONSEQUENCES (i.e. those generally within the court's control) of the plea including the range of possible punishment for the offense in question, (including

restitution if appropriate), PRS in the case of a violent felony, (People v Catu 4 NY3d 243 [2005]), whether the defendant will be sentenced as a predicate felony offender (in which case the defendant will be looking at mandatory prison time), and potential deportation consequences if the defendant is a non-citizen.

While deportation is technically a collateral consequence, it is an automatic consequence of a guilty plea for most non-citizen defendants. Hence, it is treated as a direct consequence of a sentence of which the defendant must be advised at the time of his/her plea. (People v Peque 22 NY3d 168, 175 [2013], Padilla v Kentucky 559 US 356 [2010]).

See also People v Jumale 2020 NY Slip Op. 04697 [4th dep't 8/2/20]: Case remanded to trial court to allow defendant the opportunity to move to vacate his plea upon a showing that he would not have pleaded guilty had the court advised him of the possibility of deportation. (Citing, inter alia, People v Medina 132 AD3d 1363 [4th dep't 2015]).

But see People v Delorbe 2020 NY Slip op. 02126 (3/31/20) where the Court of Appeals held that the defendant's due process claim based on the trial court's failure to inform him of deportation consequences did NOT fall within the narrow case exception to the preservation requirement (by motion to withdraw or vacate the plea). The Court concluded that service of the "Notice of Immigration Consequences" form upon the defendant form provided him with a reasonable opportunity to object to the lower court's failure to advise him of the potential deportation consequences of his plea. Thus, since the defendant did not object when he had the chance, his argument on appeal was NOT preserved.

The Appellate Courts have not been entirely consistent on whether a motion to withdraw the plea or vacate the conviction are required to preserve an appellate challenge to the trial court's failure to advise a pleading defendant that his/her sentence will include a period of PRS.

In People v Cumberbatch 36 AD3d 157 (1st dep't 2006), the court held that the defendant's claim of involuntariness based on non-advisement of PRS was unpreserved, but in People v Boyd 57 AD3d 325 (1st dept 2008), the court held that the defendant's claim of involuntariness (based on the court's failure to advise of PRS) was not barred by his failure to move to withdraw the plea. (Se also People v Haven 38 AD3d 637 [3d dep't 2008]: Preservation by motion to withdraw not required).

But in People v Williams 2016 NY Slip Op. 02551 (4/5/16), the Court of Appeals, citing People v Peque supra and People v Louree 8 NY3d 541 (2007) and People v Lopez 71 NY2d 662 [1988]), held that even where a defect in a plea allocution is clear on the face of the record and implicates due process, the defendant must still preserve his/her claim that the defect rendered his/her plea involuntary UNLESS the defendant HAD NO PRACTICAL ABILITY to do so. Thus, where a court fails to apprise a defendant of the consequences of a plea, he/she must object if he/she has the opportunity to do so. (People v Crowder 24 NY3d 1134 [2014]).

In People v Louree supra, the Court excused the defendant's failure to preserve his Catu (failure to advise of PRS) claim because he had no practical ability to assert that the plea was invalid prior to the imposition of sentence, (and CPL 220.60[3] requires that a motion to withdraw be made BEFORE sentence is imposed). The Court explained that it could not turn a blind eye to the "practical unavailability of either a motion to withdraw or a CPL 440.10 motion, (because) a defendant can hardly be expected to to move to withdraw his plea on a ground of which he has no knowledge". (8 NY3d at 546).

In Williams supra, the Court held that the defendant could have raised his claim prior to the imposition of sentence, and having failed to do so, his argument (that the court misstated the

range of possible sentencing for the defendant as a second felony drug offender), was not preserved.

As a general proposition, when a defendant seeks to challenge on appeal the voluntariness of his/her guilty plea or argue that his/her plea allocution was legally insufficient, he/she must PRESERVE the argument, as noted above, by affording the lower court an opportunity to address and undo the alleged error by way of a motion to withdraw the guilty plea per CPL 220.60(3) or to set it aside per CPL 440.10. (See People v Greenwood 26 AD3d 796 [4th dep't 2006], People v Perry 21 AD3d 1352 [4th dep't 2005]).

The RARE CASE EXCEPTION to the preservation rule can arise when, during the plea allocution, the defendant: NEGATES AN ESSENTIAL ELEMENT of the offense to which he/she is pleading guilty, CASTS SIGNIFICANT DOUBT on his guilt or otherwise CALLS INTO QUESTION the VOLUNTARINESS of his /her plea. (People v Lopez 71 NY2d 662 [1988]; see also People v Makas 273 AD2d 510 [3d dep't 2000], People v Scott 100 AD3d 1028 [2d dep't 2012]).

In People v Lopez supra, the defendant pled guilty to Manslaughter 1st degree (as a lesser included offense of Murder 2d degree), but hedged and fudged during the allocution such that the prosecutor jumped in a couple of times and expressed concern. Specifically, the defendant initially indicated that he didn't mean to hurt the victim and feared for his life (suggesting that he had acted in self defense). The court then inquired further and the defendant eventually admitted that he was free to leave before he stabbed the victim in the chest (near the heart), and thereafter expressed no dissatisfaction with the court's inquiry, nor did he move to withdraw his plea.

On appeal, the defendant argued that his plea was legally insufficient to establish the elements of Manslaughter (intent to cause serious injury and causation of death), and the lower court's inquiry was insufficient to clarify the ambiguity in the plea. The Appellate Division affirmed the judgment of conviction, holding that the defendant WAIVED his challenge to the sufficiency of the plea by failing to move to withdraw his plea.

The Court of Appeals agreed and held that the lower court's follow-up inquiry was sufficient to render the plea legally sound and, by not moving to withdraw or vacate, the defendant failed to preserve his challenge thereto. (Citing People v Claudio 64 NY2d 858 [1985]).

In contrast, in People v Goldfadden 145 AD2d 959 (4th dep't 1988), the Fourth Department reversed and vacated the defendant's conviction for Assault 2d degree (in satisfaction of a three-count indictment), when, during the plea colloquy, the defendant said that he had no memory of the incident (other than going to the bar, having some drinks and next remembering waking up in the hospital). On such facts, the lower court was deemed to have erred in accepting a guilty plea without first INQUIRING FURTHER to establish that the defendant possessed the requisite intent (to cause injury to another), and understood that by pleading guilty, he was foregoing the right to assert the defense of intoxication.

The lower court also erred in advising the defendant that he could face life in prison if convicted of all charges after trial. At sentencing, the defendant did move to take back his plea which he argued was based on misinformation from the court. The AD held that since such erroneous information could have induced the defendant's guilty plea (presumably to avoid what he had been misled to believe could be a life sentence if convicted at trial), his motion to withdraw should have been granted.

In People v Seymore 2020 NY Slip Op. 06924 (4th dep't 11/20/20) the court held that while the defendant's claim of INVOLUNTARINESS of his plea to Assault 2d degree survived his waiver of appeal (which he did not challenge), he nevertheless failed to preserve his argument for appeal by failing to withdraw or vacate his plea. The AD was satisfied that this case did not fit into the NARROW EXCEPTION to the preservation requirement because the record reflected that the plea had been entered knowingly, voluntarily and intelligently. (Citing People v Lopez supra and People v Seeger supra).

Also unpreserved for the same reason, in the AD's estimation, was the defendant's challenge to the sufficiency of his plea allocution. (People v Guerrero 28 NY3d 110 [2016]). And, to the extent that the defendant's claim that the lower court erred in denying his request for substitution of counsel in a pre-plea proceeding implicated the voluntariness of his plea, the challenge was likewise unpreserved (People v Rolfe 83 AD3d 1219 [3d dep't 2011]), and found to be lacking in merit in any event.

There was also no merit to the defendant's claim of ineffective assistance of counsel inasmuch as the defendant failed to show that the plea bargaining process was infected by the alleged ineffectiveness or that the defendant pled guilty because of counsel's allegedly poor performance. (People v Rauschenberg 126 AD3d 1535 [4th dep't 2015]).

However, in People v Lee 2020 NY Slip Op. 06666 (4th dep't 11/13/20), the Fourth Department reserved decision and remitted the case to County Court for assignment of new counsel and determination of the defendant's motion to withdraw his guilty plea to Attempted Assault 1st degree where the defendant's former attorney took a position adverse to the defendant when he sought the assignment of new counsel and made statements that the court construed as a motion to withdraw his plea. (People v King 235 AD2d 364 [1st dep't 1997]).

Though counsel did file a motion on the defendant's behalf to withdraw his plea (a fundamental decision belonging to the defendant), he dubbed it "silly" and offered the opinion that the plea was "informed" and the "correct decision."

In the AD's view, while counsel was not under any duty to support a motion that he found to be without merit, (see People v Ford 444 AD3d 1070 [2d dep't 2007]), he should not have taken an adversarial position to his client which deprived the defendant of effective assistance of counsel. (People v Hunter 35 AD3d 1228 [4th dep't 2006]). For its part, the lower court should not have entertained the defendant's motion to withdraw his plea without first relieving counsel and assigning a new attorney to represent the defendant's interests. (People v Chrysler 233 AD2d 928 [4th dep't 1996]).

See also People v Welsh 207 AD2d 1025 (4th dep't 1994): Trial court's action in compelling defense counsel to express his opinion that the defendant's guilty plea was voluntarily made and that if withdrawn and the defendant proceeded to trial, he would lose, deprived the defendant of effective assistance of counsel.

But see People v Greer 2020 NY Slip Op. 07799 (4th dep't 12/23/20), where the court was deemed to have properly rejected the defendant's claim of coercion based on counsel's explanation of the benefits of taking a plea in a case which, in counsel's analysis, could not be won at trial. Under the circumstances, in the AD'S estimation, counsel was merely fulfilling his duty to provide his client with a realistic assessment of the People's case and warn him of the risk of being knocked out at trial. (People v Spinks 227 AD2d 310 [1st dep't 1990]).

The court rejected the defendant's claim that he was left with no choice by counsel's comments about him facing a much longer sentence if convicted at trial (as compared to a plea), because a defendant is not entitled to the bargain of his choosing, and fear of a stiffer sentence after trial does not rise to the level of coercion. (People v Zimmerman 100 AD3d 1360 [4th dep't 2012]).

The AD noted that permission to withdraw a plea rests entirely with the court's sound discretion, and the refusal to grant such motion does not amount to an abuse of discretion unless there is some evidence of innocence, fraud or mistake in the inducement to the plea. (People v Dale 142 AD3d 1284 [4th dep't 2016], People v Davis 129 AD3d 1613 [4th dep't 2015]).

Inasmuch as the defendant offered no evidence to back up his conclusory claim of innocence (People v Allen 99 AD3d 1252 [4th dep't 2012]), and the defendant's claim of coercion fell within the court's authority to assess credibility which is entitled to much deference on appeal (People v Sparcino 78 AD3d 1508 [4th dep't 2010), there was no basis to disturb the defendant's conviction.

The decision whether to plead guilty (and to seek withdrawal thereafter), belongs to the defendant, but only after counsel has provided his/her best assessment of the benefits of the plea (e.g. better sentence) as compared to the risks of trial (including the likelihood of conviction for a more serious offense), a clear explanation of the full range of potential sentence exposure in each case, and, while not required of the court, a discussion of any collateral consequences that may have an adverse impact on the client (e.g. loss of license, forfeiting of firearms, loss of employment).

While counsel may strongly suggest that a guilty plea in a given case is the more advisable route to take, he/she should never try and force the client to take a plea (worst of all, for fear of taking a loss at trial). And, if the client decides to take counsel's considered advice, it should be because he/she has done everything possible to secure the best possible plea offer from the prosecutor (pre-indictment is usually the best time), and the most attractive sentence commitment that the court can make.

If the court attaches strings to any sentence commitment, it must make clear what the conditions are and what consequences may follow if the defendant does not meet them. If the client falters (e.g. gets arrested on a new charge after the plea and before sentencing), counsel must closely evaluate the new charge as well as the legality of the circumstances resulting in the new arrest before throwing in the towel and preparing for the worst. (For example, if the client was an unwitting passenger in a stolen car that he had no reason to believe was hot, or of the stop was clearly illegal), counsel may be able to get the new case dismissed. In any event, counsel must urge the client to walk a straight and narrow path from plea to sentence, [not always an easy task], lest he/she find that all bets are off).

Should the client decide before sentence that he wishes to withdraw his/her guilty plea, counsel should request an adjournment of sentencing, order and review the record of the plea proceedings (were there any indications of innocence, the absence of facts articulated to support an essential element of the crime, any hesitation or ambiguity in the defendant's responses to the court's inquires, did the court advise him/her of the essential rights waived and the full breadth of sentence possibilities, including restitution if part of the case and deportation consequences if there is reason to believe the defendant may not be a US citizen. Don't assume that the client really knows or understands his correct status).

Counsel should also carefully read the pre-sentence report (and accompany the client to the pre-sentence interview), to see if the client protested his innocence (or at least provided facts that cast doubt on the plea). While the record of the plea will surely take precedence over any unsworn statements made by the defendant, counsel should consider and assemble all relevant evidence in support of the client's motion. Of course, if counsel decides the motion is frivolous, counsel cannot advance any arguments that don't have any basis in law or fact. (See NY Rule of Professional Conduct 3.1)

If nothing else, by making he motion to withdraw the plea, counsel will have preserved the client's ability to make his/her argument to the appellate court in the event the motion is denied. That way, appellate counsel can at least get through the door rather than find it locked altogether for lack of preservation.