Admonitions in the Criminal Trial Court: Waiver of Counsel, Jury Demand, and Non-Citizen Guilty Pleas

BY PATRICK M. KINNALLY

In January 2004, the Illinois General Assembly passed legislation which provides:

> Before the acceptance of a plea of guilty, guilty but mentally ill, or *nolo contendere* to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court: 'If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States.'" [1]

For some time, members of the trial bar had pushed for this legislation[2] and this warning is posted on courtroom walls or hallways in our circuit courts. Nevertheless, it has been observed that this admonition is not being uniformly given in open court as the law requires. Perhaps the courts are relying on written agreements signed by the accused, or perhaps the act of posting of the notice is believed to be sufficient. The issue of a trial court admonishing anyone of the potential immigration ramifications surrounding a guilty plea is substantial if the accused is a non-citizen because it addresses a key issue: whether the plea is knowing and voluntary.

Quite plainly, the law requires not only that the admonition be given, but that it be given in open court when the accused is present.[3] So what happens if it is not given in accordance with this statutory requirement?

In the First District Appellate Court, a criminal defendant had an equal chance of having the admonishment being administered as not. In *People v. Bilelgene*,[4] one division held the trial court's failure to give the admonishment did not permit the defendant to vacate his guilty plea. Conversely, a panel ruled otherwise in *People v. Delvillar*,[5] vacating a plea where the admonishment had not been announced in open court. To say the least, it is aberrant that the venue of a proceeding in a criminal case could be outcome determinative of the validity of a guilty plea.

In *People v. De Leon*,[6] the Second District joined the *Bilelgene* majority opinion in concluding that the language of the statute, despite the imperative language, does not mean that the failure to admonish a defendant in open court is fatal. Thus, the imperative of giving the admonition was not mandatory but only directory. The *De Leon* court observed that whether a statute is mandatory or

1 725 ILCS 5/113-8.

2 Moran and Kinnally, *Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action*, Illinois Bar Journal (2001) Vol. 89, pp.194-198.

3 *People v. Thornton*, 363 Ill.App.3d 481 (2nd Dist. 2006).

4 *People v. Bilelgene*, 381 Ill.App.3d 292 (2008).

5 *People v. Delvillar*, 383 Ill.App.3d 80 (2008).

6 *People v. De Leon*, 387 Ill. App. 3d 1035 (2nd Dist. 2009).

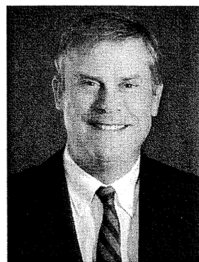
directory is a question of legislative intent and noted that there was no statement in the legislation which indicated that any consequence would ensue if the trial judge failed to obey the statute.

However, *De Leon* fails to focus on what consequences flow from the failure to give the admonition. The General Assembly was concerned that unknowing defendants, not judges, prosecutors or defense attorneys, were entering into plea arguments – contracts with the government – that were not undertaken with full knowledge of the consequences of the deal they were making.[7] The *De Leon* tribunal ignored the fact that plea agreements are contracts that require the parties enter into them with full knowledge of all the terms of such a pact.

Instead, the *De Leon* court focused on the "type of plea," which dictates whether the admonition must be given, observing that the statute would also apply to every citizen.[8] Focusing on the type of plea seems odd for two reasons: plea agreements are not generally classified by citizenship status (or lack thereof). The statute does not classify whether a person is a permanent resident alien, is undocumented, or is a citizen. It applies to all defendants. Next, the Legislature did say trial courts need to give the advisory to every defendant in plain and concise terms and in "open court." They did not say that such a warning needs be given to non-citizens in some other venue such as chambers.

Subsequent to the *De Leon* decision, the Illinois Supreme Court reviewed *Delvillar* and reversed the Appellate Court, effectively rendering the notification statute toothless.[9] Leobardo Delvillar, at a circuit court hearing on November 2, 2005, pled guilty to aggravated unlawful use of a weapon by a felon. Before doing so, the trial judge asked him whether he was entering into the plea agreement in return for a sentence recommendation, freely and voluntarily. He answered affirmatively. The trial court next asked, "Are you a citizen of the United States?" Delvillar said, "Yes." Sentencing was deferred until the end of November, when a term of four years imprisonment was imposed.

Two weeks later, Delvillar asked the trial court to vacate his plea, stating he was a legal permanent resident alien, not a United States citizen, and that the trial court had failed to admonish him consistent with 725 ILCS 5/113-8. The trial court refused the request because Delvillar had lied to the court about his citizenship status. The Appellate Court reversed, stating the trial court was required by the statute to warn Delvillar based on the statute's plain and mandatory language. The Supreme Court disagreed, reinstating Delvillar's guilty plea.[10]



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Like the waiver of a jury demand, the right to make a knowing and voluntary guilty plea is basic.[11] One cannot make an agreement to plead guilty unless the person assenting to such an obligation knew the effect of such an undertaking. Just as a defendant may waive the right to a jury trial, he or she can only do so when such a relinquishment is knowingly and understandingly made.[12]

Whether one agrees with the requirement of advising any defendant, citizen or otherwise, of the consequences relating to a plea of guilty is not the issue, but the law. 725 ILCS 5/113-8 is not a Supreme Court Rule, but a law enacted by the Illinois legislature. Where the purpose of such legislation is to ensure that a Defendant "knowingly and voluntarily" makes an agreement (*i.e.*, guilty plea), then the analysis cannot proceed based on statutory interpretation alone. Instead, the statute's purpose is to advise the defendant of the potential consequences a conviction may create with respect to "deportation, exclusion from the United States or denial of naturalization under the laws of the United States." This is not a passive role, but one that ensures a guilty plea is knowing, voluntary and informed. It cannot be collateral to a conviction when it is the judge's job to ensure the plea is knowing and voluntary and the admonition is the means to that end. □

7 *See People v. Reed*, 177 Ill.2d 389 (1997); *People v. Youngbey*, 82 Ill.2d 556, 413 N.E.2d 416 Ill. (1980).

8 *People v. De Leon*, 387 Ill. App. 3d 1035, 1042 (2nd Dist. 2009).

9 *People v. Delvillar*, 235 Ill. 2d. 507 (2009).

10 *People v. Delvillar*, 235 Ill. 2d. 507, 524 (2009).

11 *People v. Thornton*, 363 Ill. App.3d 481 (2nd Dist. 2006).

12 *People v. Bracey*, 213 Ill.2d 265 (2004).