

NEW YORK COURT OF APPEALS ROUNDUP

'UDEKE' COURT REJECTS ATTEMPT TO OVERTURN GUILTY PLEA

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In a recent criminal case, the Court of Appeals declined to extend the impact of its earlier decision in *People v. Suazo*, 32 N.Y.3d 491 (2018), that recognized a right to a jury trial for class B misdemeanors where a conviction could create a risk of deportation for the defendant. In *People v. Udeke*, the court rejected the defendant's attempt to overturn his guilty plea to attempted criminal contempt in the second degree for violating a restraining order protecting his wife. The defendant argued that he was not clearly informed at his plea allocution that he had a right to a jury trial on the class B offense and that his plea accordingly was not a voluntary and knowing waiver of his rights. In a concise memorandum opinion joined by Chief Judge DiFiore and Judges Stein, Fahey, Garcia and Feinman, the majority found that the record supported an intelligent waiver of defendant's constitutional rights. In a lengthy dissent, Judge Jenny Rivera (joined by Judge Wilson) reviewed the plea allocution in detail and concluded that the trial judge had misinformed the defendant about his right to a jury trial for the class B misdemeanor and the plea should therefore be vacated.

Background

The case involves a noncitizen who has lived in the country for several years. The defendant was arrested for jumping a turnstile with his wife, who had a protective order against him, by "doubling up and entering through the turnstile together." The defendant was charged in two criminal complaints: one for the class A misdemeanor of theft of services and the class B misdemeanor of criminal trespass in the third degree, and the second for two counts of criminal contempt in the second degree, a class A misdemeanor. The defendant agreed to plead guilty to a class B misdemeanor to attempted second-degree contempt in exchange for a conditional discharge, a two-year order of protection for his wife, and the dismissal of the theft and trespass charges.

During the plea hearing, the court asked whether the defendant understood that "you have the right to a trial by jury?" The defendant responded, "By jury?" The court said, "A jury trial, that's correct. Do you understand that you have that right?" Defense counsel then interjected, "Well, it was represented to him that this would be reduced to a B misdemeanor." The court stated, "A trial by a jury or a judge, depending on how the People proceeded. Do you understand that you have that right?" The defendant responded, "Yes, your Honor." The court then asked, "Do you understand that by pleading guilty you are giving up the right to have the trial?" The defendant said, "Yes, your Honor."

The court later asked the defendant whether he understood that the conviction could potentially impact his ability to remain in the country and might lead to his deportation, denial of citizenship, or other consequences affecting his immigration status. The defendant responded affirmatively.

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At the time of the plea allocution in 2014, defendants charged with class B misdemeanors in New York City did not have the right to a jury trial—regardless of their immigration status. In the *Suazo* decision in 2018, the Court of Appeals ruled that noncitizen defendants who face potential deportation as a result of a conviction have a Sixth Amendment right to a jury trial for that offense. This changed the state law for New York City, which previously provided that defendants were not entitled to a jury trial if the maximum penalty for a charge is six months in prison or less. The *Suazo* rule applies retroactively to all pending, non-final cases.

Udeke argued that his plea to attempted contempt in the second degree subjected him to potential deportation under 8 U.S.C. §1227(a)(2)(E)(iii), which provides that a noncitizen is deportable where he is found to have violated the portion of a court-issued protective order that involves protection against threats of violence, harassment or bodily injury. He argued that he was therefore entitled to a jury trial on the class B misdemeanor due to the retroactive application of *Suazo* and that the trial judge misinformed him of this right.

Majority and Dissent

The majority rejected the defendant’s challenge. The majority found that “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.” The majority noted that the defendant pled guilty to a class B misdemeanor “in satisfaction of two accusatory instruments charging him with class A misdemeanors” and that, unlike *Suazo*, the charging instruments were not modified to charge the lesser offense.

The dissent took issue with the colloquy between the trial judge and the defendant during the allocution. Judge Rivera concluded that “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.” She reasoned that after the defense counsel interjected that “this would be reduced to a B misdemeanor,” the court amended its statement that the defendant had a right to a jury trial and informed the defendant that he had a right to a trial by a jury or a judge “depending on how the People proceeded.” The dissent stated that “the most natural reading” of this interaction is that the trial judge informed the defendant that he did not have a jury-trial right on the class B misdemeanor. The dissent stated that even if the interaction “lends itself to another reasonable interpretation,” that would still mean that the allocution was unclear and thus the defendant could not have made an intelligent and knowing waiver of his Sixth Amendment right to a jury trial.

While the majority opinion does not elaborate on its reasoning, the majority appeared to part ways with the dissent, at least in part, on the basis that the defendant here remained charged with class A misdemeanors that clearly carried a jury-trial right and, unlike in *Suazo*, the charging instruments were never modified to charge just the lesser offense. Accordingly, in the view of the majority, the defendant made a knowing and conscious decision to give up a jury trial by pleading guilty and forgoing a trial altogether. Given the unique set of facts related to the charges, the timing of the plea allocution with respect to the *Suazo* decision, and the peculiarities of the three-way conversation among the defendant, the trial judge and the defense counsel, it seems unwise to over-read the significance of the *Udeke* decision. With the *Suazo* rule firmly established in 2018, plea allocutions since that date should not suffer from any confusion regarding the right to a jury trial in these circumstances. And while Judge Rivera’s dissent makes clear that defendants are entitled to retroactive application of *Suazo*, there is a diminishing number of cases in which an issue of past misapplication could arise.