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Law not all that it seems

Many lawyers don't understand effects of deferred adjudication
By Lomi Kriel

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When Nick Rabe returned from celebrating his grandfather's 80th birthday in South Africa, he waited in line to pass customs at the Atlanta Hartsfield International Airport. He had a connecting flight to catch to Houston in two hours.

So when officials checked him in and said "something's come up on the computer," he wasn't quite sure what was going on. He was impatient and tired after a long, international flight. He certainly didn't think he was facing deportation.

Officials took him to a locked, windowless room with about four other people.

"I thought, 'What the hell is going on here?'" he said.

Originally from South Africa, Rabe, 22, has been in the United States since 1994, and a legal resident since 1996. He went to high school in Houston. He's studying to be an airport technician. He's also been arrested twice for possession of marijuana - for both he received deferred adjudication.

And that's where the problem comes in. According to Texas criminal law, deferred adjudication is not a conviction of guilt unless the defendant violates probation. It is a plea-bargain in which the defendant does not plead guilty to the charge and completes a probationary period rather than serving time in jail.

On the face of it, deferred adjudication seems like a good deal. But the detail that continues to escape many Texans and their lawyers is that deferred adjudication remains on a person's record. And for purposes of federal law, it is a conviction and can result in deportation of a non-citizen.

Betty Blackwell, an Austin-based criminal attorney, has traveled around the state in an effort to clear up misconceptions about deferred adjudication.

"Lawyers are very confused about it," Blackwell said, adding that "lawyer after lawyer" has confessed to her they thought they could get their clients' deferred adjudication expunged.

But, Blackwell said, the expunction statute clearly states only cases that have been dismissed or in which clients plead not guilty can be expunged.

"A lot of innocent people plead guilty to deferred, thinking it won't show up [on their records] and think it will be cheaper than getting a lawyer," Blackwell said. "But it does show up on your record, and you can never get it off," she said, adding that "a

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huge number of people took very bad advice."

Immigrants face harsher consequences

For non-citizens, deferred adjudication looks even more grim.

Before 1997, deferred adjudication was not considered a conviction for immigration purposes, said Barbara Hines, an award-winning immigration law expert and professor at the University's law school.

A 1997 law, authored by U.S. Rep. Lamar Smith, R-San Antonio, changed the law, making it a deportable conviction that applies retroactively.

"So persons that pleaded guilty [to deferred adjudication] on reliance on the old law, now face deportation," Hines said.

Before the Sept. 11 terrorist attacks, immigration officials would typically comb jails for persons eligible for deportation under the new law, Hines said.

"Since then, there has been a more sophisticated database between all law enforcement agencies," Hines said.

People who have been going back and forth over the border for years now face deportation proceedings for previous convictions that never showed up before, she said.

Hines said many immigrants don't understand how vulnerable they are as non-citizens.

"Especially people who come here as immigrants and live here all their lives don't understand that they can be deported," Hines said.

Between 1996 and 2001, Hines said the press picked up on what was happening with immigrants and exerted a lot of pressure on lawmakers to restore waivers - allowing people to apply for exceptions to deportation rules based on the seriousness of the crime, when it occurred, the person's participation in the community and the type of situation the person would return to.

"But after 9/11, things got a lot worse," Hines said. "[Immigration lawyers] are very pessimistic. Each rendition got so much worse. You just never know how much worse it could get."

Hines advised immigrants to naturalize as soon as possible so "they can have the same rights as the rest of us. They are held to a much higher standard."

And most importantly, she said, criminal lawyers should coordinate with immigration lawyers before accepting pleas for their clients.

Most immigration cases get to immigration lawyers when it's too late, she said.

Officials eventually issued Rabe a temporary travel permit, and he was allowed to return to Houston.

Now Rabe is appealing the deportation, but it will be a long 18 months before his fate is determined. If his appeal is refused, he said he will probably go to the Netherlands, where he has some family friends.

"There's absolutely nothing I can do," he said. "It's not in my hands."

Rabe's future depends on the Board of Immigration Appeals and his attorney, Terry Weir.

"Nick's case is a prime example of how deferred adjudication, as defined by immigration, is different than in the criminal system," Weir said. "The result is really detrimental to folks who have invested their entire lives here. What he ends up



suffering is so much greater than someone who is a citizen."

Weir said it can happen to anyone who is "simply at the wrong place at the wrong time."

For U.S. citizens, the

problem doesn't go away

Austin resident Amber Fazzino, 19, was in the wrong place at the wrong time.

Unlike Rabe, she is a U.S. citizen. But like Rabe, taking deferred adjudication on advice of her lawyer has made life more difficult than she could have imagined.

Fazzino was 17 when she was arrested at a rave for passing out fake Ecstasy tablets, filled with Robitussin. Fazzino said she had no idea the tablets were fake. Her friend told her to hand the tablet to the person sitting next to her.

That person turned out to be an undercover police officer, and both Fazzino and her friend were arrested.

Fazzino said she "picked a lawyer out the hat," after being inundated by fliers from defense lawyers.

Fazzino believes she was mistreated by her attorney. She said he told her it would "wipe it off your record" if she completed her probation term.

Almost two years later, Fazzino applied for a job at Target and "was pretty much hired" until the store did a criminal background check and sent her a letter citing her drug conviction. Her application for an apartment in Austin was also rejected.

Fazzino believes she could have received the same sentence without an attorney. She also believes she should have been given more options since she was only 17, and it was her first conviction.

"I feel like I was being manipulated, like I was betrayed by the whole process," she said.

Fazzino contacted Texans for Reform of Deferred Adjudication, a group of citizens who feel they were misled about their sentence and are now suffering the consequences. She now heads the organization's Austin chapter.

Their efforts led to state legislation enabling citizens who have completed their probation period under deferred adjudication to apply to have their records sealed from the public.

The legislation makes the information available to police officers and federal officials, including immigration services.

This law was heavily protested by media groups, like the Texas Association of Broadcasters.

"Someone might run for office in 20 years time. They might have done something, and we'll never find out about it," said Michael Schneider, who led the association's open government task force during the legislative session.

While she could not comment on either Rabe or Fazzino's specific cases, Blackwell said there are very few cases in which she would recommend deferred adjudication.

"Not unless your only other option is going to jail," she said.

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