State of New York v Harris
2008 NY Slip Op 33765(U)
December 17, 2008
County Court, Broome County
Docket Number: 08-244
Judge: Joseph F. Cawley
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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

STATE OF NEW YORK

-vs-

SAMUEL HARRIS,

Defendant.

DECISION AND ORDER
SCI No. 08-244

JOSEPH F. CAWLEY, J.

The defendant has moved, pursuant to Criminal Procedure Law §440.10, for an order vacating the judgment of conviction imposed by Broome County Court on July 31, 2008. Defendant was convicted after a guilty plea to Criminal Possession of Marijuana in the Third Degree. Defendant's application purports to seek such relief pursuant to CPL Section 440.10(b) and (h); however, no factual assertions or even allegations have been made which would arguably support the consideration (much less the granting) of the application under CPL 440.10(1)(b), which permits vacature of a judgment of conviction where it was "procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor".

CPL 440.10(1)(h) permits a court to vacate a judgment upon a finding that it "was obtained in violation of a right of the defendant under the constitution of this state or of the United States". In this application, the defendant contends that he was deprived of his constitutional right to the effective assistance of counsel. In this regard, two specific claims are made. First, it is contended that his former attorney failed to advise him of the potential consequence of deportation in the event of conviction and in fact told him "not to worry about it" when asked about deportation.

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Criminal Procedure Law §440.10(1) provides that after entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that the judgment was procured in violation of the defendant's rights under the Constitution of this State or of the United States. To obtain a hearing upon a CPL §440.10 motion, a defendant must establish that there is a triable issue of fact to overcome the presumption of the validity of the subject judgment (*see,* People v. Session, 34 N.Y.2d 254 (1974), and that the non-record facts sought to be established at a hearing are material and would entitle him to relief (*see,* People v. Satterfield, 66 N.Y.2d 796, 799 (1985). "A judgment of conviction is presumed valid, and the party challenging its validity... has a burden of coming forward with allegations sufficient to create an issue of fact [cite omitted]. ...[B]are allegations are insufficient to carry this evidentiary burden [cites omitted]. ...[I]t is not enough to make conclusory allegations of ultimate facts; supporting evidentiary facts must be provided." People v. Session, *supra,* at 254-256. The Court may deny the motion without a hearing where essential allegations of fact are unsupported by affidavit or evidence, or contradicted by a court record. The Court herein has reviewed defendant's motion papers, the People's response, transcript of the plea proceedings, and all Court papers, records and notations, and finds that it can determine the issues raised by the defendant relating to the deportation issue without an evidentiary hearing.

"A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences [cites omitted]. ...[T]he record must be clear that 'the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant' [cites omitted]." People v. Ford, 86 N.Y.2d 397, 402 (1995). The Ford Court went on to note, however, that "[d]eportation is a collateral consequence

of a conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system." As such, for example, a trial court's failure to advise a defendant of the possibility of deportation before accepting a guilty plea will not affect the voluntariness of the plea *(Id., at* 403*)*. Nor does such failure on the part of defense counsel rise to the level of ineffective assistance (*Id., at* 404-405).

Although it has been held that an affirmative misstatement by defense counsel with respect to deportation consequences of a plea may, under certain circumstances, constitute ineffective assistance of counsel, the defendant must establish that counsel's performance was deficient ***and*** that the deficiency in performance prejudiced defendant (*see*, People v. McDonald, 1 N.Y.3d 109 (2003)). In McDonald, the Court of Appeals applied the two-prong test set forth by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). This standard for evaluating claims of ineffective assistance of counsel requires a showing not only that counsel's representation fell below an objective standard of reasonableness, but that there existed a reasonable probability that the outcome would have been more favorable for the defendant absent the claimed errors (*see,* Hill v. Lockhart, 474 U.S. 52 (1985)). "Defendant's allegations must be sufficient to 'show that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty, and would have insisted on going to trial'." People v. McDonald, *supra,* at 115. Defendant must allege the necessary facts to support his motion to vacate the judgment of conviction (*Id.)*

As previously noted, defendant herein contends that his then attorney failed to inform him of the potential deportation consequences of a conviction, and in fact told him "not to worry about it" when asked. As pointed out by the prosecutor and acknowledged by defense counsel, the failure of defense counsel to inform defendant of the "collateral consequence" of possible (or even

mandatory) deportation does not constitute ineffective assistance of counsel. *See,* People v. Ford, *supra;* People v. Johnson, 41 A.D.3d 1284 (4th Dept. 2007), *lv. den.* 9 N.Y.3d 877. Even if one were to assume, *arguendo*, that the advice "not to worry about [deportation]" constituted an "affirmative misrepresentation" that deportation was not a potential consequence of a guilty plea, the defendant wholly failed to make the requisite showing of prejudice, notably making no claim that he would not have entered a plea but would instead have risked exposure to a substantial prison term by insisting upon a trial. *See*, People v. McDonald, *supra;* People v. Xue, 30 A.D.3d 166 (1st Dept. 2006), *lv. den.* 7 N.Y.3d 809; *compare,* People v. McKenzie, 4 A.D.3d 437 (2nd Dept. 2004). The defendant's contentions regarding the alleged failure to advise him regarding potential deportation therefore provides no basis upon which to vacate his plea, and do not warrant a hearing on that issue.

In connection with his second claim, however, the Court finds that the defendant has made a sufficient showing to raise a factual issue meriting exploration by the conduct of a hearing. The affidavit of [redacted] describing the circumstances under which the consent to search defendant's hotel room was obtained (which description is not wholly inconsistent with the account contained in the police narrative reports contained in the defense attorney's file, supplied as Exhibit "C" to defendant's motion) arguably raises an issue with respect to the voluntariness of that consent. Although the validity of the search was clearly an issue of concern to the defendant (as evidenced by the colloquy with the court prior to the plea), he contends that his inquiries received no response. Further, nothing in his attorney's correspondence to him (also contained in Exhibit "C") addresses or advises the defendant regarding the circumstances of the search, assesses the likelihood of success or failure of a suppression motion, or evidences the attorney's own consideration and analysis of the

issue. Finally, the defendant's sworn affidavit states, presently without contradiction, that when he again tried to discuss the issue with his counsel just prior to entering a plea, his attorney simply told him that he "had to go forward now that we were in court".

There is case authority for the proposition that a court does not err in denying a hearing where the proponent of a CPL 440.10 motion fails to supply an affidavit from the attorney who represented him at the time of the conviction. *See, e.g.*, People v. Morales, 58 N.Y.2d 1008 (1983). However, this Court finds that in the instant case, the defendant's sworn statements, if accurate and absent evidence to the contrary, arguably suggest (but do not, without more, establish) the absence of a tactical or legitimate strategy basis for the attorney's recommendation to forego the possible suppression issue in favor of a plea.

This is not to say that counsel did *not* consider and analyze the strengths and weaknesses of the suppression issues, or that the recommendation to plead without testing that issue was made without careful consideration in furtherance of the defendant's best interests. On the record before the Court, however, it is impossible to accurately make that determination. For that reason, the Court will conduct a hearing pursuant to CPL 440.30(5) and (6), at which the defendant will have the burden to overcome the presumption that his counsel provided competent advice and exercised professional judgment (People v. Myers, 220 A.D.2d 461 (2nd Dept. 1995), (i.e., "demonstrating the absence of strategic or other legitimate explanations for counsel's failure"; People v. Garcia, 75 N.Y.2d 973 (1990); State v. Silent, 37 A.D.3d 625 (2nd Dept. 2007)). He will also, of course, be required to establish that any such failure was to his detriment. The hearing shall be limited to the

defendant's claim relating to the alleged failure to consider and/or pursue the unlawful search and seizure issue.

This constitutes the Decision and Order of the Court.

It is so Ordered.

DATED: December 17, 2008
Binghamton, New York

HON. JOSEPH F. CAWLEY
Broome County Court Judge

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