SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 5

THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	**DECISION AND ORDER**
-against-	:	
	:	**IND. 397/99**
ROBERTO RODRIGUEZ,	:	
Defendant	:	

Justice Sheryl L. Parker

Defendant moves pursuant to C.P.L. §440.10(1) (f) and (h) for this Court to vacate his judgement. Based on the defendant's motion, the People's response and the court file, the following is the Court's decision.

Defendant was arraigned on January 18, 1999, on a felony complaint charging criminal sale of a controlled substance in the third degree (P.L. §220.39[1]), criminal possession of a controlled substance in the third degree (P.L. §220.16[1]) and criminal possession of a controlled substance in the seventh degree (P.L. §220.03).

On February 5, 1999, the People filed an indictment charging the defendant with criminal sale of a controlled substance in the third degree, criminal sale of a controlled substance in the fifth degree (P.L. §220.31), criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

On February 23, 1999, the defendant was arraigned on the indictment.

On September 1, 1999, a bench warrant was issued for the defendant.

On August 29, 2005 the defendant was involuntarily returned on the warrant.

On December 22, 2005, the defendant, represented by Spiro Ferris, Esq., of the assigned counsel plan, plead guilty to the misdemeanor count of criminal possession of a controlled substance in the seventh degree and received a conditional discharge in full satisfaction of the indictment..

Defendant now claims that his attorney was ineffective in that he affirmatively mis-advised the defendant of the immigration consequences of his plea of guilty. Defendant alleges that he informed his attorney that he was a lawful permanent resident and his attorney advised him that this conviction would not affect his status.

The People have provided a sworn affirmation by defendant's attorney, Sprio Ferris, Esq.. Mr. Ferris states in part,

> Although I do not have any specific recollection at the present time, whether or not I advised [the defendant] that there could be potential collateral consequences of deportation resulting from his plea, I can emphatically state that at no time did I ever advise him at the time of his plea this would have no effect upon his immigration status.

Defendant's criminal history[1]

In 1981, defendant was convicted on the class B misdemeanor of attempted criminal possession of a weapon in the fourth degree (P.L. §110/265.01).

In 1995, defendant incurred felony weapons convictions in the state of Virginia.

In 2005, defendant incurred a felony conviction for possession of weapon in Rockland County, New York.

---

[1] This history is based on the New York City Division of Criminal Justice records and the representations of the Kings County District Attorney's office upon their communication with United States Immigration and Customs enforcement.

Also in 2005, defendant was convicted of attempted criminal possession of a controlled substance in the seventh degree in Kings County Criminal Court (Docket #99K062619).[2]

In 2007, defendant incurred a felony conviction for possession of marijuana with intent to sell in the state of New Mexico.

Conclusions of Law

C.P.L. §440.10 (1) states that at any time after an entry of judgement, the Court may vacate such judgement on the ground that:

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgement which conduct, if it had appeared on the record, would have required a reversal of the judgement upon an appeal therefrom; Or,

(h) the judgement was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

The Court of Appeals has held that under the New York State constitution "as long as the evidence, the law, and the circumstances of a particular case, viewed in the totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." (*People v. Baldi*, 54 NY2d 137 [1981]). Under the state rule, a defendant need only show that under the totality of the case he was deprived meaningful representation.

Under the Federal standard set forth in *Strickland v. Washington*, 466 US 668 (1984), the defendant must first show that his attorney's actions or advice fell below an objective standard of

---

[2] Defendant has filed a motion to vacate pursuant to C.P.L. §440.10 in Kings County Criminal Court alleging ineffective assistance of counsel on a similar immigration claim.

reasonableness *and* that there is a reasonable probability that but for counsel's deficiency the result of the case would have been different.

The defendant relies partly on United States Supreme Court case *Padilla v. Kentucky,* 130 S.Ct 1473 [2010], which held that failure to properly advise a defendant of his risk of deportation on a matter such as a drug conviction rises to the level of ineffective assistance of counsel on a Federal Constitutional level. The obvious rational behind the Court's decision was that a defendant should enter into a plea knowingly and voluntarily and aware of all of the likely consequences of that disposition. (*People v. Fiumefreddo*, 82 NY2d 536 [1993]). This Court has held that *Padilla* should not apply retroactively on collateral review of convictions. As discussed in *People v. Kabre*, 29 Misc.3d 307 (Crim. Ct. NY 2010), the rule enunciated by the United States Supreme Court in *Padilla* is a new rule that over-ruled decades of case law in New York and in the Federal courts which clearly found that *failure* to advise a defendant of potential immigration consequences was not ineffective assistance of counsel. (*Teague v. Lane*, 489 US 288 [1988]; *People v. Eastman*, 85 NY2d 265 [1995]). The defendant in this matter does not allege *failure* apprise of consequences, the defendant contends an error in the representation made by his attorney. The People contend that the attorney should be held to the standard of effective assistance of counsel in existence in December of 2005. In October of 2005, the Court of Appeals was faced with this exact scenario in *People v. McDonald,* 1 NY3d 109 (2003), and ruled that to prevail, a defendant must show that the defense attorney's representation was below a standard of reasonableness and that but for counsel's errors defendant would not have pleaded guilty and would have insisted on going to trial. It is, as discussed above, a two pronged analysis.

First, defendant must establish his claim that his attorney gave him incorrect advice. The defendant in this matter claims that he informed his attorney that he was a lawful permanent

resident and was informed that the plea of guilty would not effect his immigration status. The Court notes that the credibility of this allegation is questionable in that the defendant's affirmation alleges the *identical* facts for both his plea in this matter and his matter pending in the Kings County Criminal Court.[3] However, defendant was represented by an attorney from the Legal Aid Society which is unaffiliated with Mr. Ferris. Defendant further avers, "Had I been advised a guilty plea would effect my immigration status of qualification for citizenship in the U.S., I never would have plead guilty to the charge that I was not truly guilty of." Again, defendant swears *verbatim* to the same allegations in his claim in Criminal Court.

Unlike the facts in *McDonald*, the attorney in this case does not admit the allegations made by the defendant. The defendant here has failed to allege by sworn statements of fact that his attorney knew that he was not a citizen of the United States. (C.P.L. §440.30[4][b]). There is no evidence that his attorney was aware of his immigration status, nor is there evidence, besides the defendant's own self-serving statements, that his attorney never advised him of the possible immigration consequences of his plea. (Id.). It is noted that the report generated from the pre-arraignment interview with the New York City Criminal Justice Agency ("CJA") indicated that the interview with the defendant was conducted in English, the defendant indicated addresses in the United States dating back over 14 years and there was no indication of an immigration status. In fact, it appears that the defendant informed CJA that he received disability support for being a veteran. The defendant has not satisfied the first half of the test.

Were the first prong under *Strickland* and *McDonald* satisfied, defendant must still establish that he was prejudiced by the attorney's actions. In this case, the defendant was facing

---

[3] Defendant used one affirmation for both his Supreme Court and Criminal Court claims.

conviction on a class B felony where he could have been sentenced up to nine years in prison with a period of post-release supervision. Additionally, defendant was facing charges on the E felony of bail jumping. Defendant's attorney was able to secure a disposition of a class A misdemeanor and a conditional discharge. Additionally, no bail jumping charges were filed against the defendant. Defendant has failed to show any prejudice by his attorney's representation. His attorney negotiated a plea that was to a lesser included offense with no prison time.

Moreover, based on the representations of the Kings County District Attorney's office and United States Immigration and Customs, there are a myriad of bases for the defendant's removal from the United States, including felony gun possession and felony possession of marijuana with intent to distribute. The defendant has failed to show that the outcome of the instant case is the basis for his removal and therefore has not shown that he was prejudiced by the misdemeanor conviction resulting from his plea of guilty.

Accordingly, defendant's motion to vacate the judgement is denied without hearing.

Dated: Brooklyn, New York
December 7, 2011

J.S.C.