

People v Worklis

2011 NY Slip Op 33587(U)

December 6, 2011

Supreme Court, Kings County

Docket Number: 5834/2000

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

-----X
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. DiMango

Date: December 6, 2011

-against-

DECISION & ORDER

LUNA WORKLIS

Indictment No. 5834/2000
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Defendant moves, pro se, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of counsel. He claims that defense counsel failed to advise him about the immigration consequences of his guilty plea. For the following reasons, the motion is denied.

On July 2, 2000, defendant, three co-defendants and several unapprehended others approached three men as they entered a Brooklyn subway station. Defendant and his accomplices followed the men onto a train where they attacked them with a baseball bat. One of the co-defendants grabbed \$700 from one victim's shirt pocket.

Defendant and his three co-defendants were charged with two counts of robbery in the first degree (PL § 160.15[3]), four counts of attempted robbery in the first degree (PL §§ 110.00, 160.15[3]), and other lesser counts. On April 4, 2001, defendant pleaded guilty to robbery in the third degree (PL § 160.05). He was sentenced on May 16, 2001 to 90 days house arrest and five years probation.

On August 30, 2006, defendant pleaded guilty to criminal sale of a controlled substance in the fifth degree (PL § 220.31), and on September 20, 2006, he was sentenced to a term of 18

months in prison and two years postrelease supervision.

On May 3, 2007, an immigration judge ordered defendant removed from the United States based upon defendant's 2006 drug conviction. Defendant's appeal and motion to reopen the appeal were both denied, and he was deported from the United States on June 16, 2001.

In the instant motion, filed May 16, 2011, defendant moves to vacate the 2001 robbery conviction on the grounds that he was denied the effective assistance of counsel when his attorney failed to inform him of the immigration consequences of his guilty plea.

Defendant's claims are without merit. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, § 6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, "[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*Flores* at 187). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other

legitimate explanation” for counsel’s conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel’s choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

In *Padilla v Kentucky*, 130 S.Ct. 1473 (2010), the United States Supreme Court, adhering to the two-prong *Strickland* standard of ineffective assistance, held that the Sixth Amendment requires that criminal defense attorneys provide correct advice to their non-citizen clients concerning the risk of adverse immigration consequences, particularly deportation, as a consequence of a conviction. The Court also emphasized that *Strickland*’s presumption of reasonable professional conduct still applies and that in attacking a plea the defendant still faces the heavy burden of convincing the court that a decision to reject the plea bargain would have been rational under the circumstances (*Padilla* at 1485; *Strickland* at 689).

Defendant has not established ineffectiveness on the part of his attorney because his robbery conviction did not carry immigration consequences pursuant to 8 U.S.C. § 1227(a)(2). Deportable offenses must qualify as either an aggravated felony or a crime of moral turpitude, as defined in 8 U.S.C § 1101(a)(43) and 8 U.S.C § 1227(a)(2)(A)(i)(I). Defendant’s conviction for third-degree robbery did not qualify as an aggravated felony because his sentence was less than the one-year minimum required by statute (8 U.S.C § 1101[a][43][F], [G]). Nor was defendant convicted of a crime of moral turpitude because the 2001 judgment was entered more than five years after defendant’s 1993 entry into the United States (8 U.S.C. § 1227[a][2][A][i][I]). In this

instance, defendant has failed to establish a claim of ineffectiveness where defendant was not convicted of a deportable offense and thus counsel was under no obligation to provide immigration advice.

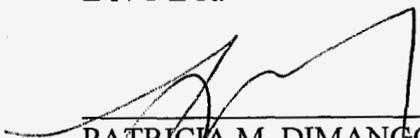
Moreover, defendant's claim with respect to the immigration consequences of his plea is misguided. He was ordered removed from the United States pursuant to Immigration and Nationality Act § 237(a)(2)(B)(i) based solely upon his 2006 judgment of conviction for criminal sale of a controlled substance in the third degree. Therefore, defendant's conviction for robbery in the instant case had nothing to do with his deportation. For this reason he has not demonstrated that he was prejudiced by counsel's performance.

In any event, the instant motion is moot because defendant has been deported during the pendency of this motion.

Accordingly, defendant's motion is denied in its entirety.

This decision constitutes the order of the court.

ENTER:


PATRICIA M. DIMANGO, J.S.C.

ENTERED
DEC - 7 2011
NANCY T. SUNSHINE
COUNTY CLERK

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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