| **People v Powell** |
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| 2012 NY Slip Op 31000(U) |
| February 27, 2012 |
| Sup Ct, Kings County |
| Docket Number: 79/2004 |
| Judge: Patricia DiMango |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

SADIKI POWELL

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By: Hon. Patricia M. DiMango

Date: February 27, 2012

DECISION & ORDER

Indictment No. 79/2004

Defendant moves, pro se, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that he received ineffective assistance of counsel. Specifically, defendant alleges that his attorney provided incorrect advice about the immigration consequences of his plea. For the following reasons, the motion is denied.

*Background*

Defendant, a native of Jamaica, entered the United States on January 5, 2001 at the age of sixteen using another person's passport. Upon arriving in Miami, defendant was detained by immigration authorities and placed in an unsecured boys' detention facility. On January 18, 2001, Immigrations and Customs Enforcement ("ICE") served him with a Notice to Appear which specified that defendant was ineligible for admission to the United States because he was likely to become a public charge and had no visible means of support. The Notice also cited defendant's presentation of a false passport and his lack of valid documentation permitting entry into the country. Defendant appeared in Immigration Court but absconded from the detention

facility before the case was concluded. On May 14, 2001, an order of removal was ordered. That order was never executed on account of defendant's flight. Defendant has since lived with his aunt in New York.

Defendant was subsequently arrested on January 2, 2004 during a buy and bust operation in Brooklyn. Police recovered pre-recorded buy money and additional cash from defendant's person. Defendant was charged with criminal sale of a controlled substance in the third, fifth and seventh degrees (PL §§ 220.39, 220.31, 220.03).

On March 25, 2004, defendant, represented by Katherine Fitzer, Esq. of the Legal Aid Society, pleaded guilty to attempted criminal sale of a controlled substance in the third degree (PL § 110/220.39) in exchange for a promised sentence of one day in jail and five years' probation. At the plea allocution, the court advised defendant, "This plea might have impact on your immigration status. If it does the plea and sentence will stand, do you understand that?" Defendant replied, "Yes." Defendant was sentenced in accordance with the plea agreement on May 17, 2004.

Defendant is currently in ICE detention and is being held for removal pending a motion to reopen in Immigration Court. According to defendant, if that motion is granted, defendant will qualify for an adjustment of status because he is now married to a United States citizen. However, his instant conviction of an aggravated felony necessarily bars any such adjustment. Accordingly, defendant seeks to vacate his judgment of conviction in order to avoid deportation.

Defendant claims that he asked his attorney how his guilty plea would affect his immigration status, and that she told him that if he married a U.S. citizen he should be able to remain in the United States despite his conviction. He further claims that his attorney never

informed him that he was pleading guilty to an aggravated felony that carried deportation as a mandatory consequence. Defendant argues that had his attorney properly advised him about the immigration consequences of his plea, he would have never accepted the plea and would have proceeded to trial instead. According to defendant's new counsel, trial counsel Fitzer was contacted about defendant's instant claims but did not provide an affidavit. Fitzer's supervisor informed counsel that the Legal Aid Society file indicates that Fitzer gave defendant advice regarding the immigration consequences of his plea.

The People have submitted an affirmation by Fitzer, who states that at the time of defendant's representation she was familiar with the immigration consequences of guilty pleas as affecting non-citizen defendants. While Fitzer has no independent recollection of defendant's case, it was and remains her usual practice to advise all clients about the consequences of accepting a plea and to consult with the internal Immigration Unit of the Legal Aid Society concerning the immigration consequences of a given plea. Furthermore, she states in her affidavit that her file indicates that defendant was given immigration advice. Finally, Fitzer states that she would not have told defendant that his plea would have no effect on his immigration status or suggested that he marry a United States citizen in order to avoid deportation.

Defendant relies on *Padilla v Kentucky*, 130. S.Ct. 1473 (2010) to support his claim that his attorney gave him incorrect advice about the immigration consequences of his plea. The People, however, contend that *Padilla* need not be applied to this court's determination because defendant alleges that he received incorrect advice rather than no advice at all, and that *People v McDonald*, 1 NY3d 109 (2003) would furnish the relief defendant seeks, if he is so entitled.

[* 4]

*Discussion*

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington,* 466 U.S. 668 [1984]; *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 first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on "prevailing professional norms (*Strickland* at 687-88). It is his burden to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*id.* at 687). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions (*Strickland* at 690).

Defendant must also "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different (*Strickland* at 693). A reasonable probability in this context is "probability sufficient to undermine the outcome" (*id.* at 694). Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable" (*Harrington* v *Richter*, __ U.S.__, 131 S.Ct. 770, 792 [2011]). Thus, the *Strickland* standard is "highly demanding" (*Kimmelman v Morrison*, 477 U.S. 365, 382 [1986]) and "rigorous" (*Lindstadt v Keane*, 239 F3d 191, 199 [2d Cir. 2001]). Where a defendant enters his plea upon the advice of counsel, he must show that, but for counsel's errors, he would not have pleaded guilty and instead insisted on going to trial (*Hill v Lockhart*, 474 U.S. 52, 56, 69 [1985]).

In New York, a defendant's right to the effective assistance of counsel is violated when "defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure" (*People v Turner*, 5 NY3d 476, 479 [2005]). To meet this standard, defendant "must overcome the strong presumption" that he was represented competently (*People v Ivanitsky,* 81 AD 976 [2d Dept 2001]; *People v Myers*, 220 AD2d 461 [2d Dept 1995]. "So long as 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 the constitutional requirement will have been met" (*People v Baldi,* 54 NY2d 137, 147 [1981]). In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v Ford*, 86 NY2d 397, 404 [1995]). Thus, where "a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation" (*People v McClure*, 236 AD2d 633 [2d Dept 1997]).

A defendant must also satisfy the prejudice requirement by showing that there is a reasonable probability he would have insisted on a jury trial if not for counsel's alleged deficiency (*People v Rodriguez*, 188 AD2d 623 [2d Dept 1992]). This showing may be satisfied by an affidavit setting forth the factors that a defendant considered in accepting the plea (*People v McDonald*, 1 NY3d 109, 115 [2003]). Some of the factors that may be described in an affidavit include the strength of the prosecution's case, the availability of a defense, the likelihood of success at trial, a comparison of the sentence promised with the potential incarceration the defendant faced if convicted at trial, counsel's advice as to the reasons to accept the plea bargain,

and the reason why defendant admitted committing the act (*People v McDonald*, 296 AD2d 13, 20 [3d Dept 2002]). The claim must be supported by objective facts, and a bare claim that the defendant would have insisted on proceeding to trial is insufficient (*People v McKenzie*, 4 AD3d 437, 439 [2d Dept 2004]; *People v Melio,* 304 AD2d 247, 251-252 [2d Dept 2003]).

In *Padilla*, the Supreme Court held that defense counsel has an affirmative duty under the Sixth Amendment to provide correct advice to a non-citizen client about the risk of adverse immigration consequences of a guilty plea. In reaching its decision, the Court cast aside the difference between acts of misrepresentation and omission, finding that counsel's silence on the possibility of deportation was no longer an option. "When the law is not succinct and straightforward..., a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear..., the duty to give correct advice is equally clear (*Padilla* at 1483). "Lack of clarity in the law...does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice" (*id.* at 1083 n. 10).

As *Padilla* requires that counsel provide accurate advice to a non-citizen client pleading guilty to a deportable offense, its standards are applicable to the instant case (*see Padilla* at 1476). Accordingly, the distinction that the People attempt to draw between inaccurate advice and a failure to provide any advice at all is inapposite.

Defendant's moving papers fail to establish that counsel was deficient under the first prong of *Strickland.* Pursuant to CPL § 440.30[4][b], the court may deny a motion to vacate the judgment of conviction when "an allegation of fact essential to support the motion...is made

solely by the defendant and is unsupported by any other affidavit or evidence, and...under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true." Defendant, the moving party, bears the "burden of coming forward with sufficient allegations to create an issue of fact" (*People v Session*, 34 NY2d 254, 255-256 [1974]). Here, defendant has provided only his own affidavit, which fails to include specific factual allegations regarding the date, location and substance of the conversations he claims to have had with counsel. He has provided no other affidavits from counsel or any other person to substantiate his claims of impropriety by counsel; nor were any such discussions mentioned on the record. Defendant's claim that he relied on counsel's advice in accepting the plea is further undermined by the fact that he waited nearly four years to marry. Accordingly, the court finds incredible defendant's allegation that counsel told him he could avoid deportation by marrying a United States citizen.

Defendant has also failed to demonstrate that he was prejudiced by counsel's conduct because the grounds for his removal are unrelated to the instant conviction. In his moving papers defendant ignores the fact that the order of removal is based upon his illegal entry into the United States and that the Notice to Appear does not cite the instant conviction as grounds for deportation. While he alleges that his conviction now bars him from obtaining an adjustment of status, the fact remains that defendant's deportation was ordered on entirely separate reasons long before he pleaded guilty in the drug case. Accordingly, it is apparent that even had defendant chosen to proceed to trial and been acquitted, he would have been subject to removal nonetheless (see *People v Figueroa*, 170 AD2d 529 [2d Dept 1991] [claim that counsel was ineffective for advice on immigration consequences of guilty plea denied because defendant was already

deportable]). Even in the event defendant were indeed ignorant to the possibility that his plea could run him afoul of federal immigration authorities, there can be no prejudice as a result of counsel's alleged misadvice because defendant's present immigration problems are unrelated to the challenged conviction. Defendant is therefore unable to establish that, but for counsel's advice, he would have rejected the plea and insisted on going to trial (*Hill* at 59).

Furthermore, defendant has not demonstrated a reasonable probability that he would have insisted on proceeding to trial if not for counsel's alleged deficiency (*Rodriguez* at 623). The court has considered the factors involved in defendant's decision to accept the plea and finds that defendant has not met his burden of proof in this regard (*McDonald* 1 NY3d at 115). In viewing the strength of the evidence against him, defendant, despite his claim to the contrary, had no reasonable defense available to him. Where he admitted to the undercover officer that he possessed crack cocaine, pre-recorded buy money was recovered from his person, and he was quickly identified as the seller, he had little chance of success at trial. Moreover, the facts submitted in his affidavit support his current wish to stay in the United States but do nothing to explain his decision-making process when he took the plea. Defendant, who now has family ties in the United States, was not married at the time of the plea and had no children until after he was convicted in the instant case. Finally, defendant's very favorable plea, which carried only one day in prison, undermines defendant's claim of prejudice and reflects counsel's overall effective performance *(see Ford*, 86 NY2d at 404 [1995]; *People v McClure*, 236 AD2d 633 [2d Dept 1997]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley,* 221 AD2d 376 [2d Dept 1995]).

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

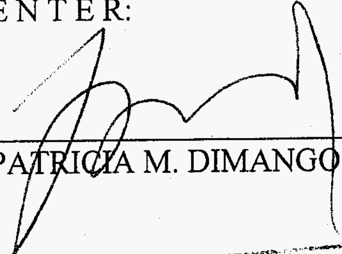
[* 9]

Pv Sadiki Powell
79/2004

This decision constitutes the order of the court.

ENTER:

PATRICIA M. DIMANGO, J.S.C.




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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