SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 38

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Against

CARLOS FLORES,
Defendant.

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Decision

BY: GREEN, J.

DATED: JULY 13, 2012

INDICT NO: 6993/1993

Defendant moves pro se for an order to set aside his conviction and sentence pursuant to CPL article 440.10.

Based on a review of the motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is denied in its entirety for the following reasons.

On November 18, 1993, defendant pled guilty to Kings County Indictment number 6993/93 to PL section 220.06(1), Criminal Possession of a Controlled Substance in the Fifth Degree, a D felony (defendant was originally charged with two B felonies) in return for a promised sentence as a second felony offender to two to four years in prison with forfeiture of the $137.00 recovered from him and also sentenced to concurrent terms of one and one-third to four years in prison for violating his probation on indictment number 12737/91[1] and for violating probation in Kings County Indictment number 16001/91[2]. On indictment number 16001/91 defendant had pled guilty on January 9, 1992, (eight days prior to indictment 12737/91), to PL 110/220.39, Attempted Criminal Sale of a Controlled

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[1] Defendant filed pro se 440 motion in three indictments including 12737/91.

[2] Defendant filed pro se 440 motion in three indictments including 16001/91. All three motions contain similar allegations.

Substance in the 3rd Degree. The plea and sentence were before Justice Barry Cozier.

Defendant has known since shortly after his conviction on January 9, 1992 that he was subject to deportation. Defendant was personally served on July 29, 1992 with an Order to Show Cause and a Notice of Hearing from INS.

The record of the plea minutes and the sentencing minutes are attached to the People's responsive papers.

A notice of appeal in this matter was filed by defendant as noted by papers dated June 23, 1995, however defendant's appellate attorney filed a motion dismissing the appeal as abandoned; granted by decision and order of the Appellate Division on August 2, 1995.

Defendant was represented in this matter by Michael Harrison, Esq. a 18B attorney assigned by the court to defendant's matter.

This is one of three instant pro se CPL 440 motions, in separate indictments as indicated herein, filed by defendant in March, April and May of this year and the court granted the People's request for extension of time to file its response until June 2012 in order to acquire the files, the minutes and to conduct other relevant inquiries relevant to defendant's claims in these matters.

Defendant, a 55-year-old native and citizen of Ecuador who was admitted to the United States at New York on March 23, 1972, is being held by Immigration Customs Enforcement (ICE) in a detention center in Hackensack, New Jersey. Defendant says he has been in ICE custody since September 16, 2009.

On April 3, 2009, defendant was convicted of three counts of attempted endangering the welfare of a child and three counts of harassment in the second degree in Queens County after a bench trial in docket number 2008QN028409. He was fined $200.00 and sentenced to conditional discharge. On September 8, 2009, defendant was fined $600.00 and resentenced to a conditional discharge. Defendant appealed his conviction on the 2009 matter and the Appellate Term reduced the surcharges and fees but affirmed the conviction. See, *People v Flores*, 30 Misc 3d 135A (App Term Feb. 2010), lv denied, 16 NY 3d 895 (2011)

The Queen's conviction and the January 9, 1992 conviction in indictment 16001/91 is the primary subject of defendant's removal proceedings. The conviction in this indictment 6993/93 is not listed on the deportation proceeding documents. However, all of the drug convictions sustained by defendant renders him removable.

As supported by the court record and the minutes of his plea allocution, defendant was represented by counsel and knowingly entered the plea agreement of his own free will and understood the sentence he would receive as well as the rights he was giving up as a condition of the plea agreement such as the waiver of his right to appeal the conviction and sentence.

On October 25, 1993, a confirmatory police identification hearing was held in this matter before Justice Neil Firetog. Defendant was represented by counsel, Mr. Harrison. The arresting officer testified for the People and the court found that the Officer had sufficient probable cause to arrest and denied defendant's motion to suppress the identification.

The record of the plea minutes on November 18, 1993 reveals that at the time of the plea agreement in this case defendant was thirty-seven years old. He admitted that he was addicted to heroin. He discussed the guilty plea with his attorney. He was not under the influence of drugs or alcohol at the time of taking the plea. Defendant stated he understood everything the court said and there was no threats or coercion. Defendant understood that he was waiving an appeal and that the only promise offered as a result of his plea was that he would receive two to four years in prison and that he had to forfeit the $137.00 recovered from him. Defendant admitted to the crime charged and specified that he was in possession of heroin and intended to sell it. Defendant also acknowledged that he had two prior felony convictions and that he was not challenging those convictions and not raising any constitutional objections to the convictions. And defendant was arraigned as a second non violent felony offender. Defendant also requested admission into a drug treatment program.

At sentencing, a month later, on December 14, 1993, when the court questioned whether defendant (who had been incarcerated for six months and two days) was ready to be sentenced, defense attorney Harrison attempted to hand the judge a document relating to the defense of entrapment. The court explained that the document could not be accepted as it did not relate to the sentencing issue and that defendant had already pleaded guilty on the charge. However, the court stated that if defendant wanted to withdraw his guilty plea that defendant would be back in the position of facing two open cases. Defendant stated that he understood. The court told defendant to speak to his attorney and

then let the court know what he wanted to do. Defendant consulted with his attorney as there was a pause in the proceedings. Defendant's attorney asserted to the court that defendant was ready to be sentenced. The clerk of the court informed defendant that he had a right to make a statement before being sentenced. Defendant declined to make a statement.

As the record shows, defendant had every opportunity during the plea and sentencing proceedings to withdraw his plea, make objections, make a statement and/or alert the court that he had a pending immigration issue. The defendant knowingly and intelligently plead guilty to a charge that was highly favorable and was aware of all of the rights he was giving up when he pled guilty. For defendant to assert almost 20 years later in rote fashion, that his counsel failed to seek dismissal pursuant to a CPL 3030 speedy trial motion, that there was a failure to investigate illegally obtained evidence, that his counsel did not inform him of the strengths and weaknesses of the People's case and that he would have insisted on going to trial because he had a good chance to prevail is unsubstantiated by any documentation or evidence in the record and such claims strains credulity in this matter.

Further, *Padilla v Kentucky,* 130 S Ct 1473 (2010), which defendant relies upon in his instant motion, is not applicable here. As this court has held in prior decisions, *Padilla* covers a bright line period of retroactivity 15 years hence its decision. That means cases going back to 1996, relative to amendments to the immigration law, would fall under the umbrella of *Padilla*. Defendant's case goes back more than 17 years and there is scant authority to believe that counsel at

that time had a specific obligation to provide information on immigration matters even though he stated that it was his usual practice to do so. The US Supreme Court noted in *Padilla* that the issue of whether non-citizens convicted of crimes would be deported was discretionary and not as foreseeable prior to the immigration law amendments.

Defendant was convicted by his plea of guilty prior to the 1996 immigration law amendments.

Defendant indicated in his motion papers that his attorney mistakenly believed he was a United States citizen but does not substantiate the basis for that belief.

While an affidavit is not provided from Mr. Harrison, Assistant District Attorney Terry-Ann Corniffe spoke to Mr. Harrison by telephone and states the following: "Mr. Harrison stated that he has an independent recollection of defendant's case. Mr. Harrison recalls that defendant never informed him that he was not a U.S. citizen and defendant never informed that he had a pending immigration case. Mr. Harrison stated that if he had been informed of defendant's immigration status, he would have warned defendant about the immigration consequences of a guilty plea. Mr. Harrison also stated that it was his usual practice, when he was informed of an immigration issue, to consult immigration law and inform his clients about the risks of pleading guilty."

Records in this matter show that defendant is being deported based on his criminal conviction in a number of matters. An immigration judge found defendant

removable in a decision dated December 7, 2011. Defendant's appeal on that decision is pending.[3]

Here, defendant's main allegation is not disputed by his former counsel. CPL section 440.30(4)(d) His counsel stated he did not know that defendant was not an US citizen. However, defendant knew he was subject to deportation as he had been informed by INS with an order to show cause. Defendant's other claims are incredible and unsubstantiated. Defendant is not entitled to a hearing in this matter.

Notwithstanding *Padilla*, defendant's claims are meritless as defendant has failed to establish that his counsel's representation fell outside the "wide range of professionally competent assistance." *US v Strickland*, 466 US 668 (1984) And, under the New York State standard, defendant has also failed to show that he was denied meaningful representation as he provides no showing that he was prejudiced and that the proceeding as a whole was not fair. *People v Stultz*, 2 NY 3d 277 (2004)

The fact that defendant waited more than two decades to raise the instant claims serves to undermine his argument that he would not have pleaded guilty had he been aware of the immigration consequences of his plea. *People v Melio* 304 AD 2d 247 (2nd Dept 2003)

The People point out in their response to defendant's motion that deportation proceedings had initially begun around July 1992, prior to this matter,

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[3] People's exhibit number 2 - US Dept. of Homeland Security ICE letter from Senior Attorney Timothy Maguire to Deputy Bureau Chief Rhea Grob.

and defendant was aware for almost 20 years that he would be removed, at some point, by INS.

For the aforementioned reasons and for the reasons enunciated in the People's opposition papers as substantiated by record of the official court minutes and other information in the record relevant to the issues herein, defendant's motion is summarily denied on its merits.

This shall constitute the Decision, Opinion and Order of the Court.

Notice of Right to Appeal for a Certificate Granting Leave to Appeal

Defendant is informed that his right to appeal from this order determining the within 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, defendant 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.

Hon. Desmond A. Green,
Acting J.S.C.