People v Valerio
2012 NY Slip Op 32250(U)
July 5, 2012
Supreme Court, Kings County
Docket Number: 1893/96
Judge: Dineen Riviezzo
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1].

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM : PART 14
---X
THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 1893/96

Jose Valerio
---X
Hon. Dineen A. Riviezzo, J.:

Defendant moves pursuant to CPL 440.10 to vacate his conviction based on ineffective assistance of counsel, raising issues under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

FACTS

On February 12, 1996, defendant, acting in concert with Jose Jimenez, sold two glassines of heroin to an undercover police officer within one thousand feet of a school. Under an acting in concert theory, defendant was indicted and charged on February 21, 1996, under Indictment Number 1893/96 with criminal sale of a controlled substance near school grounds (P.L. § 220.44[2]), criminal sale of a controlled substance in the third degree (P.L. § 220.39), criminal sale of a controlled substance in the fifth degree (P.L. § 220.31), two counts of criminal possession of a controlled substance in the third degree (P.L. § 220.16[1]), and two counts of criminal possession of a controlled substance in the seventh degree (P.L. § 220.03). Mr. Irving Friedman was assigned as defendant's counsel.

Defendant eventually pleaded guilty on January 27, 1997 to attempted criminal sale of a controlled substance in the third degree (P.L. §§ 110.00/220.39[1]) in exchange for a promised sentence of three to six years (hereinafter "the 1997 conviction"). During the plea colloquy, the court

informed defendant the conviction "can result in deportation" (plea minutes at 13 – 14).[1] Defendant stated that he understood, but that he still wanted to plead guilty. At the end of the plea proceedings, the court afforded defendant the opportunity to change or take back anything that he had stated. After he pleaded guilty, defendant was adjudicated a predicate felony offender. He was sentenced on June 13, 1997, to an indeterminate prison term of three to six years. Defendant was released on parole on July 31, 1998.

In addition to the 1997 conviction, defendant had previously pleaded guilty to criminal possession of a weapon in the third degree (P.L. former § 265.02[3]) on July 6, 1989, to attempted petit larceny on December 6, 1994, and to petit larceny on November 28, 1995.[2]

Defendant now moves pursuant to C.P.L. § 440.10(1)(h) to vacate the judgment, alleging that his attorney's failure to advise him that pleading guilty to attempted criminal sale of a controlled substance would subject him to mandatory removal constituted ineffective assistance of counsel. Defendant argues Mr. Friedman's failure to advise him of the automatic and permanent immigration consequences of his conviction fell below the objective standard of reasonableness required for effective assistance under *Strickland*. In support of this argument, defendant offers his own affidavit, in which he states, "There was absolutely no discussion about possible deportation proceedings" (*see* Exh. G at 2). Defendant also offers Mr. Friedman's affidavit in support of his claim that Mr. Friedman failed to advise defendant of the immigration consequence, as Mr. Friedman

---

[1]There is no indication in the underlying record of the plea and sentence whether or not defendant's counsel discussed the immigration consequences of the plea with defendant.

[2] Although these prior crimes are not "aggravated felonies," these offenses could arguably be considered crimes "involving moral turpitude," conviction of which would render defendant deportable but eligible for cancellation of removal (*see* 8 U.S.C. § 1227[a][2][A][i]; § 1229b; the discussion, *infra*.

acknowledged that, "at the time it was not my practice to discuss...immigration consequences with a client when I discussed plea agreements" (*see* Exh. H at 2). The People offer the plea minutes and Mr. Friedman's affirmation to challenge the credibility of defendant's claim. In light of the fact that the court informed the defendant of potential immigration consequences during the plea colloquy, the People offer Mr. Friedman's affirmation in which he states that, "If the issue had been raised I would have discussed...the immigration consequences of his plea" (*see* Friedman Affirmation at 2).

Defendant's motion turns on a number of legal issues, including whether *Padilla* applies retroactively to the case at bar and, if it does, whether defendant received effective assistance of counsel.

ARGUMENTS OF COUNSEL

With respect to the "retroactive" application of *Padilla*, defendant argues that, because *Padilla* merely applied the well-settled Sixth Amendment analysis in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) to a unique set of facts, it did not announce a new rule and thus the ruling applies retroactively to this case. Defendant maintains that the *Padilla* Court's discussion of whether the decision would potentially open the "floodgates" to challenges to final convictions, and the fact that the Supreme Court accorded Padilla himself relief, support the conclusion that the Court intended that the decision apply retroactively.

In response, the People argue that *Padilla* stated a new rule of criminal procedure that does not fall within either *Teague* exception to non-retroactivity and thus the decision does not apply to defendant's case. The People assert that the new obligation that was imposed on defense attorneys was not dictated by precedent and in fact broke with the well-established New York and federal

precedent that an attorney's failure to advise a defendant of the deportation consequences of a guilty plea did not constitute ineffective assistance of counsel. Further, it is observed that *Padilla* removed the distinction between the distinction between direct and collateral consequences of a conviction which had previously been determinative in an ineffectiveness claim. The People maintain that this conclusion is supported by the lack of unanimity on the Court, suggesting that reasonable people could disagree about whether *Strickland* compelled the outcome in *Padilla*, and by the language in the concurring and dissenting opinions. The People also insist that neither the "floodgates" reference nor the fact that the Court accorded Padilla relief is determinative on the issue of retroactivity.[3]

DISCUSSION

Retroactive Application of *Padilla* to Cases on Collateral Review

Prior to defendant's 1997 conviction, on April 24, 1996, Congress had enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) (P.L. §§ 104–132). The AEDPA amended various provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537. Specifically, AEDPA amended § 1182c, which had allowed an alien convicted of a deportable offense to apply to the Attorney General for discretionary relief from a deportation proceeding. The AEDPA precluded deportable aliens from applying for such relief, rendering deportation mandatory upon conviction of many offenses.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (8 U.S.C. § 1229b) enacted on September 30, 1996, effective April 1, 1997, later repealed § 1182c

[3]The Court has not addressed the remaining arguments, which do not address the retroactive application of *Padilla*.

entirely. IIRIRA provides that, under certain circumstances, the Attorney General has discretion to cancel the removal of a lawful permanent resident alien who is otherwise deportable. Under the IIRIA, however, an alien convicted of an "aggravated felony" cannot apply for discretionary relief from a removal proceeding.

Defendant's 1997 conviction constitutes an "aggravated felony" under the INA, as the term includes "an attempt to commit" an "illicit trafficking in a controlled substance" (*see* § 1101[a][43][B], [43][U]). Aliens convicted of this offense are deportable under § 1227(a)(2)(A)(iii) and § 1227(a)(2)(B)(i). Although defendant committed this offense on February 12, 1996, prior to the date that AEDPA became effective, he did not plead guilty to this offense until January 27, 1997, and thus his conviction occurred after AEDPA became effective (*see* § 1101[a][48][A][i]) but before IIRIA became effective (*see* § 1229b).[4] Due to these changes in immigration law, defendant would not have been eligible for discretionary relief at the time of his 1997 conviction "under the law then in effect," and thus he could not have relied on the availability of such relief at the time that he pleaded guilty (*see People v. Picca*, 2012 NY Slip Op 04368, *6 [2d Dept., June 6, 2012], quoting *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 2293 [2001])[5].

Defendant's 1997 conviction, however, became final long before the Supreme Court decided

---

[4]The court notes that even if defendant had plead guilty to the instant offense after the date that IIRIA became effective he still would be ineligible for discretionary relief, as he pleaded guilty to an "aggravated felony" and thus could not have reasonably relied on the possibility of cancellation of removal (*see* § 1229b).

[5] This rationale does not apply to defendant's prior deportable convictions, which occurred prior to the changes in immigration law, as defendant could have relied on the possibility of discretionary relief at the time that he pleaded guilty to those offenses (*see id.* at *6, 8). The effect of defendant's 1997 conviction, thus, rendered him subject to mandatory deportation without the possibility of any discretionary relief.

Padilla. Prior to *Padilla*, an ineffective assistance claim would only be successful where an attorney provided a defendant with "affirmatively incorrect advice regarding removal consequences" (*see Picca*, NY Slip Op 04368 at *3). In *Padilla*, the Supreme Court, in part relying on the changes to immigration law that rendered deportation nearly automatic for many noncitizen offenders, found that an attorney's advice to a client regarding any risk of deportation is within the scope of the Sixth Amendment right to counsel (130 S.Ct. at 1481, 1482). The Court held that effective assistance requires that an attorney inform a client prior to a guilty plea if the conviction carries a risk of adverse immigration consequences (*id.* at 1483). Accordingly, since defendant alleges that Mr. Friedman failed to advise him of immigration consequences, he will only be able to assert a valid ineffectiveness claim if *Padilla* applies retroactively to cases on collateral review (*see id.*).

A determination of whether a constitutional rule applies retroactively on collateral review is dependant on whether the decision creates a new rule or applies an old rule (*People v. Eastman*, 85 N.Y.2d 265, 275, 624 N.Y.S.2d 83, 88 [1995]). When a "well-established constitutional principle" is applied to a new circumstance, the application is always retroactive (*id.*, citing *Yates v. Aiken*, 484 U.S. 211, 216, 108 S.Ct. 534, 537 [1988]). However, if a decision is not "dictated by precedent existing at the time the defendant's conviction became final," it is considered a new rule and it generally does not apply retroactively (*id.*, quoting *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct.1060, 1070 [1989]). A new rule will only apply retroactively if it is substantive, such as a rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or if the decision represents a "watershed" rule of criminal procedure that requires the observance of procedures that are "'implicit in the concept of ordered liberty'" (*Teague*, 489 U.S. at 311, quoting *Mackey v. United States*, 401 U.S. 667, 693, 91 S.Ct.

1160, 1180 [1971] [concurring in judgments in part and dissenting in part]; *see Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610 [1998]).

The question of *Padilla*'s retroactivity is currently before the United States Supreme Court (*Chaidez v. United States*, 132 S.Ct. 2101 [April 20, 2012]). However, there has not yet been any decisive guidance from the Supreme Court or the Appellate Division on this issue of whether, and to what extent, the decision applies retroactively (*see Chaidez v. United States*, 655 F.3d 684, 693 [7th Cir. 2011] [analyzing retroactivity issue and noting that whether *Padilla* applies retroactively should not be inferred from Padilla's motion for post-conviction relief]; *Picca*, NY Slip Op 04368 at *4 n.1 ["We are not faced here with the question of whether the rule set forth in *Padilla* is retroactive..."]; *People v Marino-Affaitati*, 2011 NY Slip Op 7078, *2 [2d Dep't Oct. 4, 2011] ["We need not address here whether *Padilla* does or does not have retroactive application."]. Moreover, federal circuit courts have split on this issue (*compare United States v. Chang Hong*, 671 F.3d 1147, 1155, 1158 [10th Cir. 2011], *and Chaidez*, 655 F.3d at 688, 693 [concluding that *Padilla* announced a new rule, as it was not dictated by precedent, and that neither *Teague* exception to non-retroactivity applies], *with United States v. Orocio*, 645 F.3d 630, 641 [3d Cir. 2011] [finding that *Padilla*, which applied *Strickland* to a specific set of facts, did not establish a new rule and thus is retroactive]; *see also Medina v. United States*, 2012 WL 742076, *6 [SDNY, Feb. 21, 2012] [noting that the Third Circuit's reasoning, which relied on prevailing professional norms, would not extend relief to convictions rendered earlier than 1995]). The Second Circuit recently left the issue unresolved (*Hill v. Holder*, 454 Fed.Appx. 24, 25 n.2 [2d Cir. 2012]). In a prior decision, this court held that, even if *Padilla* were applied retroactively pursuant to the Third Circuit's reasoning in *Orocio*, the decision would not apply retroactively to convictions prior to 1996 based on prevailing professional norms

and on the significant changes to immigration law that occurred (*People v. Dixon* [2012]). In this case, defendant pleaded guilty in 1997, after the changes in immigration law, and it is thus necessary to address whether *Padilla* applies retroactively to convictions prior to 1996.

Although there is considerable disagreement at both the state and federal level regarding the issue of retroactivity, the weight of authority in the federal courts is against the retroactive application of *Padilla* (*see Chang Hong*, 671 F.3d at 1155; *Chaidez*, 655 F.3d at 688). Accordingly, this Court finds the reasoning of the Seventh and Tenth Circuits to be persuasive. Prior to *Padilla*, most state and federal courts considered a defense attorney's failure to advise a defendant of potential collateral consequences of a conviction, including the risk of deportation, to be outside the scope of the Sixth Amendment (*see Chang Hong*, 671 F.3d at 1152 n.7, 1154; *Chaidez*, 655 F.3d at 690). Although *Padilla* did not overturn any prior Supreme Court precedent, the decision departed significantly from the lower courts' adherence to this "direct versus collateral dichotomy" by applying *Strickland* to immigration consequences regardless of whether deportation was characterized as a direct or collateral consequence (*Chang Hong*, 671 F.3d at 1155; *see Padilla*, 130 S.Ct. at 1481 [noting that, based on the unique nature of deportation, it was not necessary to consider this distinction]). Applying *Strickland* to the context of immigration consequences of guilty pleas, *Padilla* imposed a new affirmative duty on defense counsel to inform a client of the risk of deportation, finding that such advice falls within the scope of the Sixth Amendment and that failure to so advise is objectively unreasonable (130 S.Ct at 1482). As defendant observes, applying the *Strickland* analysis often involves a fact-specific inquiry, especially when the standard is applied to a novel context. Despite the intensive factual inquiry involved, the ruling in *Padilla*, "while grounded in *Strickland*," nevertheless created a new rule of constitutional law, because "a reasonable

jurist...would not have considered Supreme Court precedent to compel the application of *Strickland* to the immigration consequences of a guilty plea" (*Chang Hong*, 671 F.3d at 1154, 1155).

Contrary to defendant's assertion, this Court finds that the "floodgates" reference in *Padilla* is not determinative on the issue of retroactivity. Since the *Padilla* Court did not elaborate on the significance of this reference, it is "unwise...to imply retroactivity from an isolated phrase in a Supreme Court opinion" (*Chang Hong*, 671 F.3d at 1159). This Court will not assume that the mere mention of "floodgates" constitutes conclusive evidence of a decision's retroactivity.

This Court holds that *Padilla* does not apply retroactively to cases on collateral review. Accordingly, defendant's C.P.L. § 440.10 motion to vacate must be denied. It is therefore unnecessary to reach the remaining issues raised on the motion.

Conclusion

The motion is denied.

This constitutes the order of the Court.

7/5/2012
Date

J. S. C.
HON. DINEEN ANN RIVIEZZO

ENTERED
JUL - 6 2012
NANCY T. SUNSHINE
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM : PART 14
---X
THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 1893/96

Jose Valerio
---X
Hon. Dineen A. Riviezzo, J.:

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.

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201