People v Ostatishvili
2012 NY Slip Op 32280(U)
August 10, 2012
Supreme Court, Kings County
Docket Number: 09800/06
Judge: Martin P. Murphy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 40
---x
THE PEOPLE OF THE STATE OF NEW YORK
-against-

SHALVA OSTATISHVILI
---x

Decision and *Order*

Indictment *09800/06*

CPL 440.00

HON. MARTIN P. MURPHY

Defendant moves, *pro se,* to vacate the judgment of conviction pursuant to *CPL 440.10* on the grounds that he was denied the effective assistance of counsel. In support, and relying on *Padilla v Kentucky,* 130 S.Ct. 1473 [2010], *defendant* claims that counsel was ineffective for failing to advise him that his "guilty plea subjected him to virtually certain removal, deportation, and excusal". Furthermore, *defendant* asserts that had he been so advised, he "would have went to trial, or likely secured a plea to a non-removable offense/adjudication".

History of Case

On *November 11, 2006*, *defendant* and *three co-defendants* were involved in a fight with four other men outside *2107 Avenue Z* in *Brooklyn*, *New York*. Each of the four victims was stabbed during the altercation. Two of them were admitted to the hospital; one required surgery to remove portions of his intestines while the other suffered a collapsed lung. *Defendant* and the *co-defendants* were all arrested at the scene and subsequently charged, as having acted in concert with two counts of attempted murder in the second degree; gang assault in the first degree ; gang assault in the second degree; four counts of assault in the first degree; assault in the third degree , and six counts of assault in the second degree.

On *February 26, 2008*, *defendant* pleaded guilty to a single count of assault in the second

degree , conditioned on a promised sentenced of *six months* in jail and *five years* probation. *Defendant* also agreed to waive his right to appeal. During his plea allocution, *defendant* expressed satisfaction with counsel's performance and in response to the court's inquiry stated that he was not a citizen of the United States. When the court pursued the issue stating, "[t]his is a felony conviction, it will have an impact on your immigration status, understand ?", *defendant* responded affirmatively by saying, "yes". On *July 11, 2008*, defendant was sentenced as promised.

According to the People, on *July 7, 2010*, *defendant* was arrested by agents of the *Department* of *Homeland Security Immigration* and *Customs Enforcement Unit* while jailed in *Abington* Township in *Pennsylvania*.

The Instant Motion

A defendant in a criminal proceeding is constitutionally entitled to the 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, sect 6*. To prevail on an ineffective assistance of counsel claim under the *federal* standard, a *defendan*t must demonstrate that counsel's representation was deficient and fell below "an objective standard of reasonableness" based on "prevailing professional norms". *Strickland v Washington, supra* at 687-88. A defendant must also "affirmatively prove prejudice" by showing that, but for counsel's errors, the outcome of the proceeding would have been different. *Id.* at 693-694. Thus, in the context of a guilty plea, a defendant must show by a reasonable probability that, but for counsel's advice, he would not have accepted the guilty plea but instead would have gone to trial. *Hill v Lockhart*, 474

US 52, 59 [1985]. Thus, "to obtain relief, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances " .*Padilla v Kentucky, supra* at 1485.

Turning now to the performance and prejudice prongs of *Strickland*,, the *Supreme Court* noted that while it had chosen to discuss the performance component of ineffectiveness prior to the prejudice component, "there is no reason for a court deciding an ineffectiveness assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one".*Strickland v Washington, supra* at 697. The *Court* went on to state that "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed". *Id.*

In *New York*, the constitutional framework guaranteeing a defendant 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]; *People v Baldi*, 54 NY2d 137 [1981]. In order to meet this standard, a defendant "must overcome the strong presumption" that he was represented competently. *People v Ivanitsky*, 81 AD3d 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, supra,* at 147. "This protection does not guarantee a perfect trial, but assures the defendant a fair trial". *People v Flores*, 84 NY2d 184, 187 [1994]. With regard to a plea of guilty, a defendant receives meaningful

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representation when he obtains "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" .*People v Ford,* 86 NY2d 397, 404 [1995]; *People v Hawkins,* 942 NYS2d 300, 301 [4th Dept., 2012]; *People v Caruso,* 88 AD3d 809, 810 [2d Dept 2011].

While the deficiency prong under *State* law is identical to that of *Strickland*, the prejudice prong in New York is "somewhat more favorable to defendants".*People v Turner, supra,* at 480. A defendant need not strictly adhere to the "but for" prejudice prong of *Strickland* to show that he was prejudiced by counsel's performance (*id.*). Instead, "the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case". *People v Benevento*, *supra,* at 714. "The sufficiency of the defendant's allegations as to prejudice should be evaluated with reference to the face of the pleadings, the context of the motion and defendant's access to information". *People v McDonald,* 1 NY3d 109, 115 [2003].

Moreover, in *Padilla* , the *Supreme Court* held that defense counsel has an affirmative duty under the *Sixth Amendment* to provide accurate advice to a non-citizen client about the immigration consequences of a guilty plea. The *Court* explained that while the scope of the duty depends on the particular case, counsel's silence would no longer be an option when deportation is at stake. "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 v Kentucky, supra,* at 1483. Because "[t]he consequences of *Padilla's* plea could easily be determined from reading the removal statute, his

deportation was presumptively mandatory and his counsel's advice was incorrect". *Id.* at 1483. The *Court* held that counsel's incorrect advice satisfied performance prong of *Strickland* but failed to consider whether or not the defendant in *Padilla* had demonstrated prejudice.

In this case, while *defendant* faced the same presumption of mandatory deportation with the prospect of pleading guilty to an aggravated felony, *see 8 USC 1101[a][43][F], 18 USC 16[b])*, the court need not address whether counsel was deficient in his advice because here *defendant* has not established that he was prejudiced. Even assuming that counsel had been silent regarding the issue of deportation, the court advised *defendant* during the plea colloquy that his conviction "will have an impact on your immigration status". The court's statement was unequivocal and identical to that made to the *two co-defendants* pleading guilty to the same felony assault charge. *Defendant* acknowledged that he understood the court's admonition and proceeded to willingly enter his plea of guilty. In contrast, and again during the same proceeding, the court told the *co-defendant* who pleaded guilty to assault in the third degree that his misdemeanor conviction "may have an impact on your immigration status".

In light of the court's explicit warning, *defendant* cannot establish that he would have insisted on proceeding to trial were it not for counsel's allegedly deficient performance. "As courts applying *Padilla* principles have recognized, when a defendant learns of the deportation consequences of his plea from a source other than his attorney, he is unable to satisfy *Strickland's* second prong because he has not suffered prejudice". *Brown v United States,* 2010 WL 5313546 at 6 [E.D.N.Y. 2010]; *also see Gonzalez v United States,* 2010 WL 3465603 [S.D.N.Y. 2010][any failure by counsel to advise petitioner that he could be deported as a result of pleading guilty was not prejudicial because the court advised petitioner of this risk prior to

accepting plea]; *People v Diaz,* 92 AD3d 413, 414 [1st Dept., 2012][court's warning that "if you're not here legally or if you have any immigration issues these felony pleas could adversely affect you" was sufficient to apprise defendant that the consequences of his guilty plea extended to his immigration status]; *see also Zoa v United States,* 2011 WL 3417116 [D.Md. 2011], *appeal dismissed,* WL 313688 [4th Cir., 2012]; *Mendoza v United States,* 774 F.Supp2d 791 [E.D.Va.,. 2011]; *United States v Obonaga,* 20120 WL 2710413 [E.D.N.Y. 2010]; *People v Rosario,* 93 AD3d 605 [1st Dept., 2012]. Moreover, there is no reason under the circumstances not to accept at face value *defendant's* sworn statement that he understood the court's warning before entering a guilty plea. *see generally Blackledge v Allison,* 431 U.S. 63, 74 [1977][defendant's declarations in open court during the plea colloquy "carry a strong presumption of verity"].

Defendant's claim of ineffectiveness is also severely undermined by the beneficial disposition that counsel negotiated. If convicted of the attempted murder charge, *defendant* was facing the possibility an extremely lengthy prison term. With a conviction after trial on the assault charge to which he pleaded guilty, *defendant* was exposed to a maximum term of incarceration of *seven years* and a minimum term of *one year.* Under the circumstances, *defendant's* plea bargain was advantageous to him and reflects counsel's effective performance on his behalf.

Finally, *defendant's* assertion that had counsel informed the court of the immigration consequences that he faced, the court "may have likely found" that he deserved *Youthful Offender treatment* is pure conjecture. There is nothing in the record to indicate that a plea offer involving a *Youthful Offender adjudication* had been made or would have received the consent of

the prosecution. Furthermore, there is no reason to believe that, based on the facts of this case, any such adjudication would have been authorized by the court.

Accordingly, *defendant's* motion is *DENIED* in its entirety.

This *decision* shall constitute the *order* of the court.

Dated: Brooklyn, New York
August ~~8~~ 10, 2012

MARTIN P. MURPHY, J.S.C.

ENTERED
AUG 10 2012
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 *thirty (30)* days after you have been served by the District Attorney or the court with the court order denying you 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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