SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 13
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PEOPLE OF THE STATE OF NEW YORK

-against-

HOWARD ANDERSON a/k/a MARK BROWN

Defendant.
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Decision and Order
Indictment Nos: 12914/1997
7715/2000

Pearline Guillaume, Esq.
For the Defendant

Melissa Causey, Esq.
Assistant District Attorney
For the People

Dated: August 13, 2012
Hon. Guy J. Mangano, Jr.

The defendant stands convicted after pleas of guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03), as well as one count each of Bail Jumping in the First Degree (Penal Law § 215.57) and Bail Jumping in the Third Degree (Penal Law § 215.55). On December 14, 2006, defendant was sentenced on to a term of one year of incarceration for each count to run concurrently.

By notice of motion dated April 24, 2012, defendant, by counsel, seeks to vacate the judgments of conviction pursuant to CPL 440.10 (1)(h), on the ground that trial counsel failed to provide effective representation by misadvising him of the immigration consequences of pleading guilty to the crimes for which he was convicted.

The People oppose the motion by affirmation and memorandum of law dated June 13, 2012, and defendant interposes a reply memorandum dated July 31, 2012.

Defendant is a citizen of the island nation of Jamaica, West Indies, born on December 3, 1969. Throughout the proceedings, defendant used the name Mark Brown and there is no indication within the court records that defendant asserted his name as Howard Anderson.

On December 3, 1997, at approximately 1:00 p.m., at the corner of East 95th Street and Clarkson Avenue, within one thousand feet of Public School 219, located at 1060 Clarkson Avenue, Brooklyn, an undercover police officer approached defendant and asked for two dimes of crack cocaine. Defendant briefly walked away and returned with two tinted red ziploc bags of crack cocaine. The undercover officer gave defendant a pre-recorded twenty dollar bill. After the transaction, the undercover officer signaled to another police officer who in turn informed the field team of the location and description of the defendant. Defendant was apprehended approximately five minutes later with the pre-recorded twenty dollar bill located in his right side pant's pocket, commingled with other United States currency. For his actions, defendant was charged, by Kings County Indictment 12914/1997, with one count each of Criminal Sale of a Controlled Substance in or Near School Grounds (Penal Law § 220.44), Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]), Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) and Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03).

On February 4, 1998, a bench warrant was ordered for defendant's failure to appear in court. Defendant was returned on the warrant on August 8, 2000, and on September 13, 2000, the grand jury charged defendant under Kings County Indictment 7751/2000, with one count each of Bail Jumping in the First Degree (Penal Law § 215.57), Bail Jumping in the Second Degree (Penal Law § 215.56) and Bail Jumping in the Third Degree (Penal Law § 215.55). On September 27, 2001, defendant, represented by James Pepe, Esq., pled guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03), as well as one count each of Bail Jumping in the First Degree (Penal Law § 215.57) and Bail Jumping in the Third Degree (Penal Law §

215.55) in full satisfaction of both Indictments (Barros, J., at pleas). As part of the plea agreement, defendant was required to complete a drug program through the Fortune Society. Failure to satisfactorily complete the program exposed defendant to a one year term of incarceration. The matter was adjourned to October 29, 2001, defendant failed to appear, and another bench warrant was ordered. Defendant also failed to complete the Fortune Society program.

As stated above, on December 14, 2006, defendant, represented by counsel, was sentenced to a term of one year of incarceration for each count to run concurrently with each other pursuant to the plea agreement (Mullen, J., at sentence). Defendant did not file a notice of appeal.

In support of the instant motion, defendant contends that he would not have taken the plea offer if defense counsel would have informed him of the deportation consequences. Annexed to the moving papers is defendant's affidavit stating, *inter alia*, that his "attorney of record at the time of the plea failed to properly advise me of the immigration consequences of my guilty plea." Moreover, defendant avers that had the Court or counsel properly informed him of the immigration consequences of a plea, he would have proceeded to trial. The affidavit concludes with defendant's belief that he was receiving a sentence of "probation" and that defense counsel informed him that deportation is not a consequence of a sentence of probation. The gravamen of defendant's legal argument is based upon the recent United States Supreme Court case of *Padilla v Kentucky* (559 US __, 130 S Ct 1473), wherein the Court held that Sixth Amendment requires counsel for criminal defendants to advise their non-citizen clients regarding any adverse immigration consequences of a criminal conviction when they plead guilty to any criminal charges.

Opposing the motion, the People aver that defendant cannot establish that he was prejudiced by any alleged ineffective assistance of counsel nor could he establish the he did not receive

meaningful representation.

Defendant's motion is denied in its entirety without a hearing.

Pursuant section 440.30(4) of the Criminal Procedure Law, the Court may, upon considering the merits of the motion, deny it without a hearing if "[t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30[4][b]), or "[a]n allegation of fact essential to support the motion (I) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL 440.30[4][d][I], [ii]). "A judgment of conviction is presumed valid, and the party challenging its validity (defendant here) has a burden of coming forward with allegations sufficient to create an issue of fact" (*People v Session*, 34 NY2d 254, 255). Because the moving papers in this matter contain only the bald and conclusory self-serving affidavit of defendant, as well as the affirmation of present counsel, the defendant has failed to sustain the burden of establishing ineffective assistance of counsel (*see People v Ozuna*, 7 NY3d 913; *see also People v De Jesus*, 39 AD3d 1196, *lv denied* 9 NY3d 874; *People v Stewart*, 295 AD2d 249, *cert denied* 538 US 1003). Noticeably absent from defendant's moving papers is an affirmation from prior defense counsel, James Pepe, Esq., or mention of any efforts whatsoever to obtain one (*see People v Scott*, 10 NY2d 380 [failure to supply attorney's affirmation warranted summary denial of motion collaterally attacking conviction based on attorney's alleged conduct]). Thus, defendant's plea of guilty was knowingly, intelligently, and voluntarily entered and there are no grounds present in the record before this Court upon which to vacate same (*see People v Hill*, 9 NY3d 189, *cert denied* 553 US

1048; *People v Catu*, 4 NY3d 242; *People v Fiumefreddo*, 82 NY2d 536; *People v Harris*, 61 NY2d 9). Finally, during his plea allocution, defendant admitted that there was a factual basis for the plea, and the instant moving papers fail to assert his innocence of the charges (*see People v Jones*, 44 NY2d 76, *cert denied* 439 US 846).

This Court is aware of a recent Appellate Division, Third Department case, *People v Reynoso* (88 AD3d 1162), in which a hearing was granted to a defendant with a similar claim pursuant to *Padilla v Kentucky* (559 US __, 130 S Ct 1473, *supra*). Since the decision herein is based solely upon insufficient evidence proffered in the moving papers, the holding in *People v Reynoso,* and whether *Padilla v Kentucky* is to be retroactively applied, are of no moment.

Accordingly, defendant's motion is denied in its entirety without a hearing.

This shall constitute the Decision and Order of the Court.

HON. GUY J. MANGANO, JR.
JUSTICE OF THE SUPREME COURT

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ENTERED
AUG 17 2012
NANCY T. SUNSHINE
COUNTY CLERK