

People v Montane

2011 NY Slip Op 33486(U)

October 12, 2011

Supreme Court, Kings County

Docket Number: 3196/09

Judge: Mark R. Dwyer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 26

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
INDICTMENT NO. 3196/09

YOTUHEL MONTANE,

October 12, 2011

DEFENDANT.

-----X
MARK DWYER, J.:

Defendant moves to vacate his judgment on the ground that he received ineffective assistance of counsel, claiming counsel gave him erroneous advice regarding the consequences of accepting a guilty plea.

In a multi-defendant narcotics conspiracy indictment filed on July 28, 2009, defendant, accused of being the Miami supplier to the Brooklyn-based enterprise, was charged with conspiracy in the first degree, conspiracy in the second degree, criminal sale of a controlled substance in the first degree and criminal sale of a controlled substance in the third degree. Following extensive plea discussions, defendant elected to go to trial. On June 14, 2011, while waiting for a jury panel, defendant decided to enter a plea of guilty to conspiracy in the second degree with a promised sentence of three to nine years incarceration. Prior to sentence, defendant filed a pro se motion seeking to withdraw his plea on the ground of ineffective assistance of counsel. The court relieved counsel and appointed a new attorney. Newly assigned counsel adopted defendant's motion.

On August 23, 2011, defendant was sentenced to three to nine years in

accordance with the plea agreement.¹

Defendant contends that “at some point during the proceedings” he was offered a misdemeanor plea but his attorney advised him that if he took the plea he would be deported to Cuba. Defendant asserts that he was fearful of the consequences of being returned to Cuba, and therefore refused the offer. He claims that he was subsequently advised by a fellow inmate that he would not have been deported to Cuba for a misdemeanor offense. According to defendant, upon further consultation with his attorney, counsel agreed that it was possible he would not be deported for a misdemeanor conviction and that if he was deported, it would likely be to a country other than Cuba. Defendant asserts that he thereupon told his attorney that he wished to accept the misdemeanor plea and that counsel subsequently advised him that the plea offer had been withdrawn.

In opposition to defendant’s motion, the People assert that defendant was never offered a misdemeanor plea. The People have submitted an affirmation from defendant’s former counsel acknowledging that while there were discussions about the possibility of a misdemeanor plea, no misdemeanor offer was ever relayed to counsel or to defendant by the People. The People also submitted an affirmation from the then-Bureau Chief of the District Attorney’s Major Narcotics Investigations Bureau confirming that no misdemeanor offer was ever authorized by the Kings County District Attorney or conveyed to defendant or his attorney.

Nothing in the court record indicates that defendant was ever offered a misdemeanor plea. On June 7, 2011, the People indicated that the current offer

¹Defendant’s pre-sentence motion is herein treated as a post-judgment motion pursuant to CPL 440.10. The result is the same as it would have been if the motion had been decided prior to sentence.

was Conspiracy in the Fourth Degree (a Class E felony) with one year imprisonment. Defendant declined that offer and the case was scheduled for a hearing. On June 14, 2011, while awaiting a jury panel, defendant expressed interest in entering a plea of guilty. The assistant district attorney said the People would be willing to offer Conspiracy in the Second Degree (a Class B felony) with a sentence of three to nine years imprisonment. Defendant agreed to accept the plea.

Defendant's claim that he was offered a plea to a misdemeanor "is made solely by the defendant and is unsupported by any other affidavit or evidence" and "there is no reasonable possibility that such allegation is true." CPL 440.30 (4) (d). Since defendant was not offered a misdemeanor plea, his claim that he declined a misdemeanor offer based on counsel's erroneous advice is groundless. Thus, to the extent that defendant's claim of ineffective assistance of counsel is based on counsel's alleged erroneous advice, his claim must fail.

Of course, the Supreme Court in Padilla v. Kentucky, 130 S.Ct 1473 (2010), imposed an affirmative duty on defense counsel to provide accurate advice to a non-citizen defendant concerning the potential immigration consequences of a conviction. At the plea colloquy, there was an extensive discussion of the potential adverse immigration consequences. Defendant indicated that he had spoken to an immigration attorney regarding the plea offer relayed the previous week, although not about the current one. Defendant told the court that he had people trying to find out for him what kind of felony would result in his being deported. Defense counsel noted that defendant had consulted defendant's cousin, an attorney in Miami, and had been told that he would be deported but not to Cuba, and that defendant could pursue legitimate grounds to remain in this country

through immigration courts and proceedings. It is not clear whether the cousin is the immigration attorney defendant stated he spoke to, and if not, whether defendant consulted his cousin prior to or subsequent to counsel's alleged erroneous advice. In any event, the evidence indicates that defendant was making extensive efforts to inform himself regarding the immigration consequences of a guilty plea up to and including the final stages of negotiating the plea. Moreover, defendant's attorney was communicating with his client regarding defendant's efforts, was involved in investigating the law and the facts with respect to defendant's status, and was advising defendant as accurately as possible. This record strongly undermines defendant's position that he was misinformed by his attorney just a few days before he entered the plea.

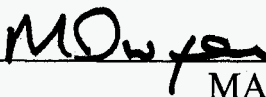
A person claiming to have been deprived of effective assistance of counsel has the burden of demonstrating that counsel failed to provide "meaningful representation," under the totality of the circumstances existing at the time of representation. People v. Caban, 5 NY2d 143, 152 (2005); People v. Benevento, 91 NY2d 708, 712 (1998); People v. Flores, 84 NY2d 184 (1994); People v. Satterfield, 66 NY2d 796, 798-99 (1985); People v. Baldi, 54 NY2d 137, 147 (1981). Under the federal constitution, a defendant is entitled to "reasonably effective assistance, which, in light of all the circumstances, does not fall "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 US 668, 687 (1984). In addition, under federal constitutional law, the party making the claim must demonstrate that the counsel's substandard performance deprived defendant of a fair proceeding. See Strickland v. Washington, 466 US 668; People v. Henry, 95 NY2d at 566; People v. Sullivan, 153 AD2d 223, 227 (2d Dept 1990). Defendant has not demonstrated that he was deprived of effective assistance of counsel or of a fair proceeding. Nothing in the record supports defendant's claim

that counsel gave him inaccurate advice or failed to properly advise defendant in accordance with the duty imposed on counsel by Padilla.

The record establishes that defendant's plea was knowingly, intelligently and voluntarily entered with effective assistance of counsel and defendant has not provided any basis for this court to hold otherwise. Defendant's motion to vacate his judgment is denied without a hearing.

This constitutes the decision and order of the Court.

ENTER:



MARK DWYER
Justice of the Supreme Court

Dated: October 12, 2011

