

People v Williams

2011 NY Slip Op 33490(U)

October 7, 2011

Supreme Court, Kings County

Docket Number: 14744/96

Judge: Neil Jon Firetog

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MEMORANDUM

SUPREME COURT - KINGS COUNTY - CRIMINAL TERM - MISCELLANEOUS MOTIONS PART

<hr/> <p style="text-align: center;">THE PEOPLE OF THE STATE OF NEW YORK, -vs- WADE WILLIAMS, Defendant.</p> <hr/>	<p>: By: NEIL JON FIRETOG, J.S.C.</p> <p>: Dated: October 7, 2011</p> <p>: Indictment #14744/96</p> <p>:</p>
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<p>Appearances:</p>	<p style="padding-left: 40px;">District Attorney's Office By: Terrence Heller, Esq.</p> <p style="padding-left: 40px;">Spar & Bernstein, P.C. By: Michael Biniakewitz, Esq. Attorneys for Defendant</p>
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The defendant moves pursuant to CPL §440.10(1)(h) for an order vacating his conviction for assault in the third degree on the ground that he received ineffective assistance of counsel. The People oppose the motion. For the reasons stated below, the motion is denied.

Based on acts alleged to have been committed on November 10, 12, 18 and 19, 1996, the defendant was indicted for, *inter alia*, burglary in the second and third degree, and assault in the third degree. On September 10, 1997 after a series of negotiations, the defendant pled guilty before another judge of this court to one count of assault in the third degree, an A misdemeanor offense, in full satisfaction of all the charges contained in the indictment. The agreed upon sentence was a three year term of probation, and that sentence was imposed on October 21, 1997. Although defendant violated the terms and conditions of that probation sentence, he was eventually discharged from probation.

Currently, defendant is facing deportation to Trinidad based on a 1989 conviction for assault in the second degree, a D felony offense, under Kings County indictment #7500/88 and on the 1997 conviction for assault in the third degree he presently wishes to vacate.

Defendant's motion raises various claims, primarily that his prior attorney knew he was not a United States citizen, but failed to inform him of the deportation consequences of his plea. Defendant also alleges that he was never advised of his right to a trial, that he did not understand the plea and the consequences of the plea and that he is innocent of the charges. None of these claims has any veracity.

The court has been provided with a transcript of the plea minutes, which reveal that the defendant, under oath, stated that he had discussed the plea and waiver of his right to appeal with his attorney, that he had enough time to consult with his attorney and that he was satisfied with the legal services provided by his attorney. (Tr. p.4) Most telling, the court specifically asked defendant if he was a citizen of the United States and the defendant replied yes. (Tr. p.4). Counsel interjected that the defendant actually had dual citizenship (Tr. p.5) The court then went on to advise the defendant of all his rights, advising him that he would not accept his plea of guilty unless he was actually guilty. The defendant then described the acts he committed which made him guilty of the crime to which he was pleading guilty, and the court advised the defendant of each of the rights he was waiving and ascertained that the defendant understood each and every one. The court engaged in a comprehensive allocution and the defendant admitted understanding all the questions and all that he was pleading guilty because he was guilty.

On the date of sentence, when defendant was given the opportunity to make a statement, he apologized "for everything; just my apologies to Ms. Abrams" [the complainant]. (Tr. p.2), implicitly affirming his guilt of the acts charged. The agreed upon sentence was imposed and a discussion ensued regarding the order of protection, custody and related issues. No application was made to withdraw the plea, nor was there any objection to the sentence as imposed.

The allegations contained in defendant's current affidavit are directly contradicted by the record of the plea allocution, as shown by the sections mentioned above. It is certainly clear now that the defendant was not a U.S. citizen, his affirmative answer to the court under oath to the contrary. However, counsel representing him on the motion asks the court to consider that, in response to the court's specific question of whether defendant was a U.S. citizen, "...it is arguable that he [defendant] understood this to mean whether he in fact resided in the United States at the time." The court finds this argument to be utterly disingenuous, and finds defendant's response to the court's question was a deliberate misrepresentation by the defendant in order to avoid the possibility of deportation. Moreover, defendant did not disabuse either the court or his attorney of the notion that he held dual citizenship. It is highly unlikely that prior counsel blatantly misled the court as to defendant's status; it is more than likely that he was merely advising the court of what he believed to be defendant's status, based on information provided by defendant himself.

It is worth noting at this juncture that an examination of defendant's criminal record discloses at least two prior felony convictions and multiple misdemeanors. Further, at the time of his other arrests, defendant used several different names and dates of birth, and gave more than one place of birth. These apparent deceptions also serve to undercut the credibility of defendant's allegations.

The defendant's claim that he was not informed, at the time of his plea, of the deportation consequences of the plea is likewise without merit. Because the court and the prior attorney believed defendant to be a U.S. citizen, based on his own misrepresentation under oath, no advisement would have been given, as none would appear to be warranted.

Defendant's claim of ineffective assistance of counsel must fail on other grounds. Even assuming, for the purposes of deciding this motion, that the holding in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) is retroactive, although no appellate court in New York has ruled on this issue as of yet, defendant's motion would still fail. Under *Padilla, supra*, the failure of a defense counsel to advise a defendant of the potential deportation consequences of a plea is conduct which falls below the standard of accepted professional norms. However, in order to prevail on a motion alleging ineffective assistance of counsel as a basis to vacate a conviction, the defendant must also establish prejudice. Defendant must show that, but for counsel's failure to advise him of the deportation consequences of the plea, he would have rejected the plea offer and gone to trial.

In the present case, defendant has failed to establish either prong of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). As noted earlier, the assumption that defendant was a citizen would not give rise to any discussion between counsel and the defendant regarding the deportation consequences of the plea. As such, counsel's failure to engage in what appeared to be an unnecessary conversation cannot be deemed to be conduct falling below an objective standard of reasonableness.

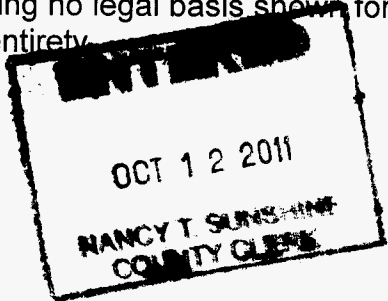
Moreover, no prejudice to defendant can be found that is based on counsel's conduct. There is no reasonable view of the circumstances presented that can lead this court to find that defendant would have rejected the plea offer and gone to trial on the indictment. At the time of the plea, defendant had a prior felony conviction for assault in the second degree and therefore had a strong incentive to accept the plea offer with a non-jail sentence and avoid the status of a second felony offender, with its concomitant increased sentence possibilities and almost certain deportation. The misdemeanor conviction with a sentence of probation and no jail time, was essentially an offer the defendant could not refuse. For the defendant to claim that, had he known of the deportation potential of the plea, he would have rejected it and gone to trial is entirely without credibility.

All of defendant's allegations are completely without any supporting evidence and lack any credibility. It is unrealistic to believe that the defendant, based on the facts and circumstances of the case, would have gone to trial on the indictment, risking certain deportation upon a conviction of the charge of criminal sale of a controlled substance in the third degree. By pleading guilty to the lesser charge, defendant

received the highly favorable sentence of a three year term of probation. The possible sentence for a conviction on the top charge of the indictment was a substantially longer term of imprisonment and more than likely deportation. Also, had defendant gone to trial and been convicted of additional counts, the court could very well have sentenced him to consecutive terms of imprisonment, since the incidents occurred on different dates. Under New York law, when an attorney secures such an advantageous plea agreement, the attorney cannot be deemed to be ineffective. *People v. Ford*, 86 N.Y.2d 397 (1995).

A review of Board of Immigration Appeals decision dated September 8, 2010 also discloses that the defendant was inadmissible by virtue of his conviction in 1989 of assault in the second degree. That alone rendered defendant capable of deportation. It is also noted in the Board's decision that the defendant neither claimed he was admissible nor that he had not been convicted of an aggravated felony. If the defendant was able to obtain vacatur of the conviction presently under review, it would not likely prevent deportation, but would allow defendant to be considered for a waiver of inadmissibility.

There being no legal basis shown for the granting of the relief sought, the motion is denied in its entirety.



ENTER:

Neil Jon Firetog
NEIL JON FIRETOG, J.S.C.

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.

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PEOPLE V. WADE WILLIAMS

INDT. #14744/96

Page 5.

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