SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 50

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTONIO D. DELACRUZ,

Defendant

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By: JOHN P. WALSH
J.S.C.

Dated: December 2, 2011
Indictment No.
10789/1990

DECISION and ORDER

By Notice of Motion to Vacate Judgment, dated September 30, 2011, Affirmation and Exhibits, the defendant moves, pursuant to CPL 440.10 and CPL 440.30, for an Order vacating the judgment of conviction entered before the court on February 18, 2004. The People responded by Affirmation in Opposition to Motion to Vacate Judgment and Memorandum of Law.

When the defendant entered his guilty plea on January 7, 2004, he was specifically advised by the court that "if you are not a citizen of the United States, your plea may result in your deportation, exclusion from admission to the United States, or denial of naturalization as a citizen." The defendant stated "Yes," that he understood what had been told to him by the court.

The defendant's arrest occurred on September 27, 1990. An indictment was voted on or about October 19, 1990. The defendant pled guilty to the crime of Criminal Facilitation in the Third Degree on January 7, 2004 and was promised a sentence of 100 hours of community service, a $5,000 fine and five (5) years probation. On February 18, 2004, the defendant was sentenced as promised.

In paragraph (7), counsel affirms that "for reasons unknown to counsel, the case was pending for a period of time in excess of 13 years by the time the matter was ultimately resolved." A simple review of the court file reveals that a bench warrant was issued against the defendant and his bail forfeited on June 11, 1991 when, according to "the buck sheet," the defendant "skipped!! Just before case called/during plea negotiations." The defendant's own affirmation, attached to the motion and repeatedly referred to, informs (at 6) that "When the attorney stopped showing up in Court on the case I stopped appearing as well because I thought the case was finished and had been dismissed." Another review of the court file would have revealed that on June 11, 1991, in Part 10 of the court, the attorney was present without the defendant ("AWOD").

Apparently, 12 years later, in May 2003, upon the defendant's return to the United States from the Dominican Republic he learned he had "an open case," and, without explanation, waited two (2) additional months to return to court.

Counsel's affirmation (at 12) that "Mr. Delacruz has had his green card and passport detained by Immigration agents while he was traveling and he has been advised by said agents that unless the mattter 'is cleared up' his documents will be forwarded to the Immigration and Naturalization Service for, upon information and belief, initiation of potential deportation proceedings," is insufficient inasmuch as there is nothing in the defendant's affirmation in support; moreover, since the source of counsel's information and belief regarding the "initiation of potential deportation proceedings" is not noted, that particular statement is of little, if any, value to the court.

At the time of the defendant's plea, his retained counsel, purportedly, advised him to enter a guilty plea. Although the defendant now expresses reservations about that advice, the defendant accepted counsel's assurance "that I would not have to worry about deportation." Based upon counsel's assurance the defendant "decided to resolve the case and waive my right to trial." The minutes of the plea support that counsel did state that it was his "opinion" the plea "would not implicate the automatic removability provisions" of the federal statutes. More significantly, subsequent to counsel's statement, the court advised the defendant of possible immigration consequences without regard to its opinion.

The basis for the defendant's present CPL 440 motion is ineffective assistance of counsel under the two prong *Strickland v. Washington* test (466 U.S. 668). The motion also relies on *People v. McDonald*, 1 NY3d 109 in which the Court of Appeals held that "under certain circumstances, a defense counsel's incorrect advice as to deportation consequences of a plea may constitute ineffective assistance of counsel." Furthermore, *Padilla v. Kentucky*, 130 S.Ct. 1473 imposed on defense counsel the obligation to advise the client of deportation consequences (while the question of *Padilla's* retroactivity, if any, is not addressed in the motion, that omission is of no consequence since the court's decision is exclusively grounded in the defendant's argument that he was subject to ineffective assistance of counsel). In any case, *Padilla* imposed a duty on counsel to either "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences" or, when deportation consequences are "truly clear," "the duty to give correct advice" (at 1483). Here, the defendant was advised of possible immigration consequences and an opinion was offered as to the consequences of his plea.

Once a defendant has been sentenced, the court retains no jurisdiction over a concluded criminal action except as explicitly authorized by statute (*People v. Torres*, 185 Misc. 2d 108). There are two basic non- appellate post-judgment motions: a motion to vacate judgment pursuant to CPL 440.10 and CPL 440.30 and a motion to set aside sentence pursuant to CPL 440.20 and CPL 440.40. A motion to vacate a judgment is a collateral attack on the judgment and is a remedy separate and distinct from the criminal action (*People v. Valenti*, 175 AD2d 489). A court may vacate a judgment upon motion by the defendant at any time after judgment has been entered, and upon grounds specified by the CPL (at 440.10[1]).

The function of a motion to vacate judgment is to inform the trial court of facts not reflected in the trial record which undermine the legitimacy of the judgment (*People v. Crimmins*, 38 NY2d 407). The motion is the proper remedy where there are factual issues which cannot be resolved on the evidence in a record on appeal and, accordingly, the defendant's position cannot be considered on direct appeal (*People v. Sweet*, 30 AD3d 1080, *leave to appeal denied*, 7 NY3d 795).

In the motion under consideration, the defendant moves to vacate the judgment (and the plea) on the ineffectiveness of defense counsel. However, unlike most cases in which the advice given by counsel is not discernable from the record, here counsel placed on the record his "opinion" of the collateral immigration consequences of the defendant's plea of guilty.

A motion to vacate the judgment is the appropriate vehicle, rather than a motion to set aside the verdict (see *People v. Bagarozy*, 182 AD2d 565) or by direct appeal (see *People v. Santer*, 30 AD3d 1129), by which to allege ineffective assistance of counsel claims grounded in allegation not appearing on the record such as communications between the defendant and counsel (see *People v. Gonzalez*, 8 AD3d 210). As the advice does not appear on the record, further development by way of a motion to vacate judgment is appropriate.

However, a direct appeal is the appropriate vehicle by which to claim ineffective assistance of counsel where the allegations are all part of the underlying record (*People v. Hall*, 28 AD3d 678). Were it not for the defendant's "waiver of appeal," the proper avenue for the defendant would be a direct appeal. However, when, as here, a defendant expressly waives his or her right to appeal any pre-trial proceedings, that waiver precludes consideration on direct appeal of an ineffective assistance of counsel claim arising out of pre-trial proceedings. Under that circumstance, the waiver will not preclude a motion to vacate judgment of conviction on the grounds of ineffective assistance of counsel (*People v. Condon*, 184 AD2d 879; *People v. Darling*, 183 AD2d 950).

In that the right to effective assistance of counsel is guaranteed by both the State of New York (New York State Constitution, Article I, section 6) and the United States Constitution (at Amendment VI), a motion to vacate a judgment of conviction *may* be brought on the ground of inadequate representation by counsel (*People v. Angelakos*, supra). Under the federal standard for ineffective assistance of counsel, the court must engage in a two-prong analysis. First, the court must determine if counsel's representation was sufficiently deficient. Second, whether the defendant suffered actual prejudice as a result of counsel's deficient representation.

Under New York law, the analysis is different. In determining whether counsel's representation was deficient, the reviewing court should deem representation adequate "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" (*People v. Baldi*, 54 NY2d 137; *People v. Benevento*, 91 NY2d 708; *People v. Koki*, 74 AD3d 987).

It remains an open question whether the consequences of the defendant's plea to Criminal Facilitation in the Third Degree were "truly clear, which, under *Padilla*, compels correct advice by counsel or only required a general admonishment of possible consequences. Certainly, the defendant was made aware simply by virtue of counsel's advice that possible immigration consequences could result. The court confirmed that advisement. But the defendant has failed entirely to demonstrate that the consequences of a plea to Criminal Facilitation in the Third Degree were sufficiently obvious to render counsel's opinion ineffective representation. It is the defendant who bears the burden of proving by a preponderance of the evidence every fact essential to support his motion (see CPL 440.30[6]), which requires him to overcome a presumption of validity attending the judgment of conviction (*People v. Bacchi*, 186 AD2d 663).

But even assuming that the defendant's moving papers demonstrate a mistaken belief that he would not be deported if he pled guilty to Criminal Facilitation in the Third Degree, the court must consider whether the defendant would not have plead guilty but for the deficient representation by his counsel.

Among the significant factors the court has used as arriving at its decision is the following: (1) the defendant was advised to "clear up" his open case but was not detained by immigration authorities; (2) the defendant pled guilty to a non-jail sentence which did not include admission to either a direct or accessory drug sale; (3) his co-defendant on the indictment, Alexander Lopez, received a sentence of six (6) years to life; (4) his other co-defendant, Eddie Santana, received a jail sentence of one (1) to three (3) years; (5) the defendant understood the court's advisement which raised the possibility of collateral immigration consequences subsequent to counsel's re-stating his opinion on the record; These factors apparently impinged on the defendant's decision to the point where the court, considering all the circumstances of the plea, cannot conclude that the defendant has demonstrated that his sole basis for pleading guilty was his counsel's opinion that he would not face immigration consequences.

More importantly, the defendant has not faced immigration consequences. He faces only the possibility of immigration consequences, which is the same situation he found himself in when he entered his plea. In the thirteen (13) years between the defendant's arrest and his return on a warrant, he suffered no immigration consequences; during his five (5) years of probation, he suffered no immigration consequences. Contrary to counsel's affirmation (at 25), his client has not been punished for relying on erroneous legal advice. In fact, the intervening twenty (20) years only goes to demonstrate that the advice he received at the time of the plea was both adequate and sufficiently correct. All that the court is presented with is the "potential" of deportation proceedings. As the People's Response correctly points out, the motion's conclusory affirmations are insufficient when unsupported by evidentiary facts (citing *People v. Session*, 34 NY2d 254, 256; *People v. Brown*, 56 NY2d 242, 246).

The defendant's conclusory statement by the defendant (at 19), that had he "known that deportation was a risk," he would "have demanded my right to a trial," is unsupported. In point of fact, the defendant was well aware of a "risk" of deportation but was advised by counsel that the "risk" was minimal and advised by the court that it was a real "risk." To establish ineffective assistance of counsel, the defendant's allegations must be sufficient to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*Hill v. Lockhart*, 474 U.S. 52, 59).

Lastly, pursuant to *People v. McDonald*, supra, "the sufficiency of defendant's factual 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 (see *People v. Mendoza*, 82 Ny2d 415, 426 [1993]) (at115). Neither annexed affirmations by the defendant or by counsel are sufficient. When compared to the information related in the People's response, not a single factual allegation from any Immigration and Naturalization Service is provided. Not even the defendant's current immigration status is included. The motion is patently deficient, especially where, as here, "this is not an instance where defendant's lack of access to information precluded more specific factual allegations" (*McDonald* at 115). The motion fails to even make a *pima facie* showing of prejudice in any way at all.

The defendant's motion pursuant to CPL 440.10 is denied.

This constitutes the decision and order of the court.

Dated: December 5, 2011
Brooklyn, New York

John P. Walsh, J.S.C.