SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JUNIOR DIAZ ORTIZ

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By: Hon. Patricia M. DiMango

Date: December 23, 2011

DECISION & ORDER

Indictment No. 9702/2008

Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. Specifically, defendant alleges that his attorney failed to advise him of the immigration consequences of his plea. For the following reasons, the motion is denied.

On September 25, 2008, a witness observed defendant and two co-defendants using screwdrivers to pry open the door of a second-floor apartment and push the door open. A short while later the witness saw the three men exit the apartment with a guitar. Defendant and the co-defendants were stopped on the first floor of the building by police who recovered from them various electronic items taken from the burglarized apartment including a guitar, video game players and games, plugs and cables. The police also recovered a screwdriver and a silver center punch. The door to the apartment had been damaged and items inside were strewn about.

For his acts, defendant was charged with burglary in the second and third degrees (PL §§ 140.25[2], 140.20) grand larceny in the fourth degree (PL § 155.30[1]), and other related charges. On November 6, 2008, defendant, represented by Robert Nicholson, Esq., pleaded guilty to burglary in the third degree (PL § 140.20) in full satisfaction of the indictment, in exchange for a

promised sentence of a one year prison term. The court asked defendant if he was a citizen of the United States and defendant answered "no." He was then advised, "They're going to deport you, okay."

Defendant was sentenced on November 25, 2008 to the promised prison term of one year. He did not appeal from the judgment of conviction.

Defendant is a citizen of the Dominican Republic. He entered the United States in 1995 as a lawful permanent resident. He was placed in removal proceedings through a Notice to Appear and subsequent amendments that charged him with an "aggravated felony," as defined by the Immigration and Nationality Act ("INA") section 237(a)(2)(A)(iii), for his conviction of third-degree burglary in the instant case. Defendant is also charged with removability under INA section 237(a)(2)(B)(I) for his four previous drug crime convictions. He has been incarcerated at the Buffalo Federal Detention Facility since August 15, 2011. An immigration judge ordered removal on defendant's case on October 12, 2011.

Defendant now claims that counsel never warned him that he would be deported as a consequence of his felony conviction and that the court failed to advise him of any "adverse direct or collateral consequences." Defendant further contends that his attorney convinced him to take the plea to "get rid of a simple mistaken case" and that he would never have taken the plea if he knew he was going to be deported.

The claim that counsel failed to provide advice about the immigration consequences of a guilty plea is made solely by defendant and is unsupported by any other affidavit or evidence. Aside from his own bare and self-serving allegations, defendant has not provided any supporting documentation to indicate what conversations he may have had with counsel about the decision

to plead guilty. Thus, "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]). As such, defendant has not established that counsel failed to provide immigration advise.

Defendant's claim is also without merit. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington,* 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; *see* U.S. Const., 6th Amend.; N.Y. Const., art. 1, § 6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" *(Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when "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 Flores*, 84 NY2d 184, 187 [1994]; *People v Baldi,* 54 NY2d 137, 147 [1981]). Moreover, "[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*Flores* at 187). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for counsel's conduct (*People v Baldi* at 146; *People v Rivera,* 71 NY2d 705, 709 [1988]). Defense counsel's choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento,* 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was

prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

Defendant relies upon *Padilla v Kentucky*, 130 S.Ct. 1473 (2010), in which the United States Supreme Court, adhering to the two-prong *Strickland* standard of ineffective assistance, held that the Sixth Amendment requires criminal defense attorneys to give correct advice to their non-citizen clients concerning the risk of adverse immigration consequences, particularly deportation, as a consequence of a conviction. The Court also emphasized that *Strickland*'s presumption of reasonable professional conduct still applies and that in attacking a plea the defendant would still face the heavy burden of convincing the court that a decision to reject the plea bargain would have been rational under the circumstances (*Padilla* at 1485; *Strickland* at 689).

Defendant's statements are inadequate to establish ineffectiveness under the first prong of *Strickland* and he has failed to meet his burden with respect to the prejudice element of the inquiry. A claim of prejudice must be supported by objective facts, and a bare claim that the defendant would have insisted on proceeding to trial is insufficient (*People v McKenzie*, 4 AD3d 437, 439 [2d Dept 2004]; *People v Melio,* 304 AD2d 247, 251-252 [2d Dept 2003]). Here, defendant has failed to elaborate on the factors he considered in taking the plea, such as the the availability of a defense, the likelihood of success at trial and the reason why defendant admitted committing the act (*People v McDonald*, 1 NY3d 109, 115 [2003]).

In this case defendant faced overwhelming evidence and he had no viable defense to the crime with which he was charged. Defendant was observed by a witness prying open an apartment door and was arrested at the scene of the crime with stolen items on his person.

Moreover, counsel obtained for him a very favorable plea leading to a sentence of one year imprisonment. This offer was so low that the court hesitated to accept it. Had he been convicted of the top count at trial, defendant would have faced a minimum term of three and one-half years and a maximum of fifteen years, followed by certain deportation. This beneficial plea in the face of much harsher maximum sentencing exposure reflects counsels' effective performance and renders defendant's claim of prejudice incredible *(see Ford*, 86 NY2d at 404; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley,* 221 AD2d 376 [2d Dept 1995]).

In addition, defendant has been convicted of multiple removable offenses apart from the instant conviction, including a 2009 conviction of burglary in the third degree (PL § 140.20), a 2010 conviction of attempted criminal possession of a weapon in the third degree (PL § 110.00/254.02[1]), and multiple convictions involving criminal possession of a controlled substance. Thus, vacatur of the conviction in the instant case would not change defendant's immigration status because he remains deportable on the basis of several other felony convictions.

Finally, defendant's claim that the court failed to advise him of "direct and collateral consequences" is belied by the record (CPL § 440.30[4][d]).

Accordingly, defendant's motion is denied in its entirety.

This decision constitutes the order of the court.

ENTER:

PATRICIA M. DIMANGO, 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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