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

----------x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DARREN WILLIAMS

----------x

By: Hon. Patricia M. DiMango

Date: June 29, 2012

DECISION & ORDER

Indictment No. 1769/2004

Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. Defendant contends that his attorney failed to advise him about the immigration consequences of pleading guilty as required by *Padilla v Kentucky*, __ U.S. __, 130 S.Ct. 1473 (2010).

On February 9, 2004, defendant, acting in concert with another at their Brooklyn high school, pointed a knife at a fellow student and demanded money. For these acts, defendant was charged with one count of attempted robbery in the third degree (PL §§ 110.00, 160.05) and one count of menacing in the third degree (PL § 120.15).

On July 14, 2004, defendant pleaded guilty to both offenses charged in the indictment, in return for a promised sentence of one year of extensive supervision probation. After successful completion of the probationary term, the attempted robbery count would be dismissed and defendant would be sentenced, as a youthful offender, to a conditional discharge for the menacing count. The court asked whether counsel had spoken to defendant "about the immigration consequences here and that there's a possibility that they might deport you; do you understand that?" Defendant answered, "Yes, ma'am." Upon further inquiry defendant again

stated that he understood "the impact this might have on you immigration status and deportation."

Defendant violated the terms of his probation when he was arrested for shoplifting. Accordingly, on April 1, 2005, he was sentenced to concurrent prison terms of 90 days for his conviction of attempted robbery in the third degree and menacing in the third degree. On June 26, 2008, defendant was convicted in the United States District Court of the Eastern District of New York of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). He was sentenced to 42 months in prison and three years of supervised release.

On January 1, 2009, Immigration and Customs Enforcement ("ICE") initiated removal proceedings against defendant on the grounds that defendant's convictions in 2005 for attempted robbery and in 2008 for the federal weapons charge are deportable offenses. Defendant was charged under 8 U.S.C. § 1227(a)(2)(A)(i)(I), (II) for the commission of a crime of moral turpitude within five years after admission to the United States, for which a sentence of one year or longer may be imposed. He was also charged under 8 U.S.C. § 1227(a)(2)(C) for possession of a firearm and under 8 U.S.C. § 1227(a)(2)(A)(iii) for commission of an aggravated felony. On February 14, 2011, he was placed in deportation proceedings.

Defendant now seeks to vacate his judgment of conviction on the grounds that his attorney failed to inform him that his plea would result in deportation. According to defendant, he would not have accepted the plea offer had he known he would be deported.

The People oppose defendant's motion, contending that *Padilla* should not apply retroactively to a collateral attack on a judgment, that defendant received effective assistance of counsel, and that defendant's claim is procedurally barred because his allegations are insufficient

to entitle him to relief.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington,* 466 U.S. 668 [1984]; *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 first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on "prevailing professional norms (*Strickland* at 687-88). It is his burden to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*id.* at 687). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions (*Strickland* at 690).

Defendant must also "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different (*Strickland* at 693). A reasonable probability in this context is a "probability sufficient to undermine the outcome" (*id.* at 694). Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable" (*Harrington v Richter*, __ U.S.__, 131 S.Ct. 770, 792 [2011]). Thus, the *Strickland* standard is "highly demanding" (*Kimmelman v Morrison*, 477 U.S. 365, 382 [1986]) and "rigorous" (*Lindstadt v Keane*, 239 F3d 191, 199 [2d Cir. 2001]). Where a defendant enters his plea upon the advice of counsel, he must show that, but for counsel's errors, he would not have pleaded guilty and instead insisted on going to trial (*Hill v Lockhart*, 474 U.S. 52, 56, 69 [1985]).

The performance and prejudice prongs of *Strickland* may be addressed in either order.

The *Strickland* Court noted that while it had chosen to discuss the performance component of ineffectiveness prior to the prejudice component, "there is no reason for a court deciding an ineffectiveness assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one" (*Strickland v Washington* at 697). The Court went on to state that "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed" (*id.*).

In New York, a defendant's right to the effective assistance of counsel is violated when "defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure" (*People v Turner*, 5 NY3d 476, 479 [2005]). To meet this standard, defendant "must overcome the strong presumption" that he was represented competently (*People v Ivanitsky,* 81 AD3d 976 [2d Dept 2011]; *People v Myers*, 220 AD2d 461 [2d Dept 1995]. "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 the constitutional requirement will have been met" (*People v Baldi,* 54 NY2d 137, 147 [1981]). In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v Ford*, 86 NY2d 397, 404 [1995]; *People v Hawkins*, 94 AD3d 1439, 1440 [4th Dept 2012]; *People v Caruso*, 88 AD3d 809, 810 [2d Dept 2011]).

While the deficiency prong under State law is identical to that of *Strickland*, the prejudice prong in New York is "somewhat more favorable to defendants" (*People v Turner* at 480). Thus

a defendant need not strictly adhere to the "but for" prejudice prong of *Strickland* to show that he was prejudiced by counsel's performance (*id.*). Instead, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento* at 714). The "question is whether the attorney's conduct constituted 'egregious and prejudicial' error such that defendant did not receive a fair trial" (*id.* at 713, quoting *People v Flores* at 188). Thus, a defendant's showing of prejudice is a "significant but not indispensable element in assessing meaningful representation" (*People v Stulz*, 2 NY3d 271, 284 [2004]).

The Supreme Court held in *Padilla v Kentucky* that defense counsel has an affirmative duty under the Sixth Amendment to provide correct advice to a non-citizen client about the risk of adverse immigration consequences of a guilty plea. In reaching its decision, the Court cast aside the difference between acts of misrepresentation and omission, finding that counsel's silence on the possibility of deportation was no longer an option. "When the law is not succinct and straightforward..., a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear..., the duty to give correct advice is equally clear (*Padilla* at 1483). "Lack of clarity in the law...does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice" (*id.* at 1083 n. 10).

The Supreme Court did not offer specific guidance in *Padilla* as to whether its decision should be applied retroactively in instances of collateral review and as of this writing there is no binding New York appellate authority on the issue. This court recognizes that there has been a

divergence of judicial opinions as to whether *Padilla* should be retroactively applied. These disagreements exist on the federal and state levels and among New York trial courts. While some courts view *Padilla* as establishing a new rule, many others view it as an extension of *Strickland* to a new set of facts (*see People v Gasperd*, 33 Misc.3d 1228[A] [Sup.Ct. Kings Cty. 2011]; *People v Bevans*, 30 Misc.3d 1238[A] [Sup.Ct. Kings Cty. 2011]; *U.S. v Orocio*, 645 F3d 630 [3d Cir 2011]; *Chaidez v U.S.*, 655 F.3d 684 (7th Cir.2011), cert granted __ U.S.__,2012 WL 1468539 [2012]; *U.S. v Obonaga*, 2010 WL 2710413 [E.D.N.Y. 2010]; *U.S. v Hubenig*, 2010 WL 2650625 [E.D. Cal 2010]; *Commonwealth v Clarke*, 460 Mass. 30 [Mass. Jun 17, 2011]). This court agrees that *Padilla* should apply retroactively by extending the scope of an attorney's representation under *Strickland* to the context of immigration.

Here, counsel negotiated a plea agreement that did not have clear deportation consequences. Defendant pleaded guilty to attempted robbery in the third degree, a deportable class E felony, and menacing in the third degree, a non-deportable class B misdemeanor. The court deferred defendant's sentence so that he could participate in a program, after which the court would have dismissed the attempted robbery charge and adjudicated defendant as a youthful offender on the menacing charge. Pursuant to the Immigration Law, defendant was only deportable upon conviction of the attempted robbery charge, which is a crime of moral turpitude (8 U.S.C. § 1227[a][2][i][I], [II]). Had defendant fulfilled the terms of his probation, the only deportable offense with which defendant was charged would have been dismissed. At the time defendant pleaded guilty, the consequences of his plea were less than clear; consequently, under *Padilla* counsel was obligated only to tell defendant that deportation was possible. According to the defendant's own responses to the court's questioning during the plea allocution, counsel

satisfied this obligation.

In any event, where defendant faces the same presumption of mandatory deportation with the prospect of a conviction of an aggravated felony after trial, the court need not dwell further on whether counsel was deficient in his advice to defendant because defendant has failed to demonstrate prejudice. To prove that he suffered prejudice, a defendant must present evidence establishing a reasonable probability that he would have rejected the plea had he been advised that deportation was a mandatory consequence of his guilty plea (*see Strickland* at 693). In support of his claim of prejudice defendant offers only the self-serving statement that, had he received adequate immigration advice, he would have rejected the plea offer and proceeded to trial. In viewing such a claim in hindsight, the court notes that "[i]t is all too tempting for a defendant to second-guess assistance after conviction or adverse sentence..." (*id.* at 689). Defendant's statement is insufficient in and of itself to sustain the burden of showing prejudice. A claim of prejudice must be corroborated independently by objective evidence, as a claim that defendant "would have gone to trial but for counsel's ineffectiveness, standing alone, does not establish prejudice under *Strickland*" (*Boakye v U.S.*, 2010 WL 1645055 [S.D.N.Y 2010]). Here, defendant's bare claim that he would have insisted on proceeding to trial is not sufficient.

There is no reasonable probability that defendant's decision to plead guilty would have been different had counsel advised him that he would be deported. Here, defendant received an extremely favorable plea that carried no clear risk of deportation. Had he been convicted of the top count at trial, he faced a maximum of four years' imprisonment. Where defendant faced a strong likelihood of conviction and a more lengthy prison sentence, the generous plea bargain only weakens his claim of prejudice and serves to reflect an overall effective performance by

counsel (*see Ford*, 86 NY2d at 404; *People v McClure*, 236 AD2d 633 [2d Dept 1997]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley*, 221 AD2d 376 [2d Dept 1995]). Indeed, defendant now faces deportation only because he failed to meet the conditions of the plea. Had he successfully completed his probationary term, the only deportable offense would have been dismissed. Defendant instead proceeded to violate the law again and thereby squandered his opportunity to avoid both incarceration and deportation.

Moreover, the Notice to Appear charges defendant with the commission of another removable offense in addition to the instant crime. Regardless of whether his conviction in the instant case were vacated, defendant would still face deportation for his 2008 federal weapons charge. Defendant has thus failed to establish a sufficient showing of prejudice.

Accordingly, the 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.

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201