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

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
Indictment Number 12416/90 and
Indictment Number 12107/91

Date: August 6, 2012

DAVID WILLIAMS, a/k/a CRAIG WILLIAMS

Defendant.

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MARK DWYER, J.:

On November 11, 2011, defendant filed a motion to vacate his convictions under Indictment Number 12416/90 and Indictment Number 12107/91. Defendant claims that he has received ineffective assistance of counsel and has submitted an affidavit stating that he was not advised of the immigration consequences of pleading guilty.

I

Defendant was born in Jamaica, and entered the United States without permission on February 16, 1989. He was deported to Jamaica on September 22, 1994, on the grounds of illegal entry into the United States and for three Kings County drug related convictions under Indictment Number 12416/90, Indictment Number 12107/91, and Docket Number 9K039933.

Defendant's 1990 case resulted after criminal activity on November 4, 1990. On that date, a police officer observed defendant sell crack cocaine to a buyer who was later arrested with the crack that he had bought from defendant. When defendant was arrested, he had thirteen bags of crack in his hand. Defendant was charged under Indictment No. 12416/90 with criminal sale of a controlled substance in the third degree and related crimes. On January 30, 1991, defendant pleaded guilty to attempted criminal sale of a controlled substance in the third degree, in satisfaction of the charges contained in Indictment Number 12416/90. Defendant was sentenced to one day in jail, followed by five years of probation.

Additionally, defendant was charged under Indictment Number 12107/91 with criminal possession of a controlled substance in the third degree and related charges. The criminal activity took place on September 3, 1991, when a police officer arrested defendant with twenty plastic bags of cocaine in his pocket. On October 1, 1991, a bench warrant was ordered when defendant failed to appear in court. On April 4, 1994, defendant pleaded guilty to criminal possession of a controlled substance in the seventh degree, in satisfaction of the charges contained in Indictment Number 12107/91. The court sentenced defendant to one year in prison and resentenced defendant, under Indictment Number 12416/90, to a concurrent term of one year in prison.

In addition to the two Supreme Court convictions, defendant has two criminal court convictions. On January 14, 1991, in Kings County, under Docket Number 9K039933, defendant was convicted after trial of criminally using drug paraphrenalia, and was sentenced to six months in jail. Additionally, on September 17, 1998, under Bronx County Docket Number 98X059823, defendant pleaded guilty to criminal sale of marijuana in the fourth degree and was sentenced to time served.

Defendant was deported in 1994, but unlawfully re-entered the United States sometime in 1996. On November 16, 2010, he was arrested for illegal entry of a removed alien. On September 28, 2011, the United States Immigration and Customs Enforcement Agency ("ICE") reinstated defendant's 1994 order of removal. Defendant opposed deportation, and claimed that he would be subject to persecution or torture if he were returned to Jamaica. Defendant's motion was dated November 11, 2011.

On January 17, 2012, an immigration judge rejected defendant's claim opposing deportation and ordered defendant removed from the United States. This court received defendant's motion on February 1, 2012. Defendant was deported on March 8, 2012.

II

Defendant relies on Padilla v. Kentucky, 130 S. Ct. 1473 (2010), to support his claims that he received ineffective assistance of counsel for his convictions under Indictment Number 12416/90 and Indictment Number 12107/91. Padilla imposed an

affirmative duty on defense counsel to provide accurate advice to non-citizen clients concerning the potential immigration consequences of a conviction. Defendant claims he was never advised of these consequences.

In response, the People first argue that the court should dismiss the motion to vacate since the defendant cannot obey the mandate of the court due to his removed status. The People rely on People v. Reid, 34 Misc. 3d 1234A (Queens Co. Crim. Ct. 2012) (court dismissed CPL 440.10 motion without prejudice, where defendant was no longer available to obey mandate of court after deportation to Jamaica). There, the court found that a motion to vacate requires that the defendant be able to obey the mandate of the reviewing court. For example, if the motion to vacate were granted, "the defendant's cases would be restored to their pre-pleading status. The court would have no authority to have the defendant returned to the United States for the required arraignment, bail hearing, suppression hearings and trials." Id. In Reid, it was unlikely that defendant would be able to apply for readmission, since he was convicted of a violent crime and had a history of drug-related arrests.

Similarly, in this case, should the court grant defendant's motion to vacate his two convictions, it is unlikely that defendant would ever be in a position to appear in court for the prosecution of the two indictments. Defendant's history of drug convictions is likely to preclude his obtaining permission to reenter the country. Moreover, since defendant twice entered the United States illegally, and was twice deported, there is an even greater likelihood that defendant would be denied admission into the country. See 8 USC §1182(a)(6)(A)(I); 8 USC §1182(a)(9)(B)(i)(II). This court has no authority on its own to have defendant returned to the United States.

III

The People next argue that defendant was not prejudiced by any alleged failure by his attorneys such that he could be found to have received ineffective assistance of counsel. See People v. McDonald, 1 NY3d 109 (2003). To assert ineffective assistance of counsel successfully, a defendant must satisfy a two-part standard. See Strickland v. Washington,

466 U.S. 668 (1984). First, a defendant must show that defense counsel's representation fell below an "objective standard of reasonableness." Id. at 688. The Padilla court held that an attorney's omission, or misstatement, of the immigration consequences of a guilty plea falls below an objective standard of reasonableness. 130 S Ct at 1482-1483.

Second, the defendant must demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See Lockhart v. Fretwell, 506 US 364 (1993). Under New York law, a defendant need not "fully satisfy the prejudice test of Strickland" (People v. Caban, 5 NY3d 143, 152 [2005]). New York recognizes that the decision to plead guilty is a calculus taking into account all of the relevant circumstances. The People's evidence against a defendant, sentence severity, and the effect of prior convictions are "factors in this calculus." People v. Picca, 2012 Slip Op 4368, 6 (2d Dep't June 6, 2012); see also People v. Vallejo, 2012 Slip Op 51131U, 3 (Kings Co. Sup. Ct. June 20, 2012). Additionally, for a defendant, the "right to remain in the United States may be more important to [him or her] than any jail sentence." Id. at 6, quoting Padilla, 130 S Ct at 1483 [some internal quotation marks omitted]. Nonetheless, such prioritization may be "irrational" if the calculus in pleading guilty strongly suggests taking the plea. See People v. Picca, 2012 Slip Op 4368, 7 (2d Dep't June 6, 2012). The question ultimately concerns whether defendant's proceeding was rendered unfair because he would have pled differently had he known of the immigration consequences of a guilty plea.

Here, there is no substantiation for defendant's claim of ineffective assistance of counsel. Defendant's proof is insufficient to establish that counsel's performance was deficient under the Strickland test or the New York standard. For example, defendant never specified which attorney told him to "just plead guilty." Defendant has not submitted an affidavit from his trial attorney, nor has he asserted that he made efforts to obtain one. Thus, defendant's allegation that counsel failed to advise him that his plea could result in deportation is made solely by defendant, and is unsupported by any affidavit or evidence. See CPL 440.30(4)(d). In contrast to the assertions made by defendant in Picca, which the Second Department found sufficient to establish that defendant could rationally have

rejected the plea offer despite the strength of the People's evidence and the severe sentence exposure, the defendant here does not even allege that had he known of the immigration consequences of pleading guilty he would have insisted on going to trial. While in Picca, defendant's wife, lawyer, and the People confirmed that defendant was never advised of the immigration consequences of his plea, here similar evidence is entirely lacking. See People v. Picca, 2012 Slip Op 4368, 2-4 (2d Dep't June 6, 2012).

Even more importantly, defendant's case is distinguishable from Padilla v. Kentucky because defendant was a deportable alien prior to his challenged guilty pleas. In Padilla, the defendant became deportable as a consequence of his guilty plea. Thus, in Padilla, defendant's guilty plea altered his immigration status - he was removable only after pleading guilty. In the present case, defendant was not prejudiced by his plea, since he was already deportable before pleading guilty.[1] Defendant's removable status did not change as a consequence of his plea. See People v. Figueroa, 170 A.D.2d 529 (2d Dep't 1991) (no ineffective assistance of counsel where defendant's status as illegal alien would subject him to deportation, regardless of case's disposition). Indeed, defendant's second removal stems from an arrest for illegal entry of a removed alien. Since defendant's status as a removable alien was unaffected by his guilty pleas, it would have been irrational for him to reject the pleas because of immigration consequences.

Finally, defendant received advantageous dispositions from his guilty pleas. Under Kings County Indictment Number 12416/90, defendant received essentially a non-jail disposition and five years' probation. Shortly after defendant's guilty plea on that case, he was indicted under Kings County Indictment Number 12107/91 for criminal possession of a controlled substance in the third degree, also a Class B felony. Defendant absconded, and was returned to court on a bench warrant. On April 4, 1994, defendant pleaded guilty to criminal possession of a controlled substance in the seventh degree, a Class A misdemeanor. He was also resentenced under Kings County Indictment Number 12416/90

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[1]Similarly, the present case is distinguishable from Picca, where defendant was a lawful permanent resident married to a United States citizen. Picca's guilty plea subjected him to mandatory removal based upon a drug-related conviction.

and received concurrent terms of one year imprisonment for both cases – a highly favorable disposition considering the nature of the offenses and his exposure to a potentially lengthy prison sentence. Defendant has not convinced the court that if he had been advised that the plea could result in deportation, it would have been rational for him to reject the plea bargain. See Padilla, 130 S. Ct at 1485; People v. Picca, 2012 Slip Op 4368, 7 (2d Dep't June 6, 2012).

The circumstances discussed make it unnecessary for this court to reach the People's argument that Padilla should not be applied retroactively. The court does note, however, that defendant's guilty pleas were entered before the years (1996-1997) when immigration laws were stiffened to result in deportation for drug crimes like defendant's.

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For the above reasons, defendant's motion to vacate his convictions and modify his sentence under Indictment Number 12416/90 and Indictment Number 12107/91 is denied without a hearing.

This constitutes the decision and order of the court.

ENTER:

MARK DWYER
Justice of the Supreme Court

DATED: August 6, 2012