MEMORANDUM

SUPREME COURT - KINGS COUNTY - CRIMINAL TERM - PART 7

	: By: NEIL JON FIRETOG, J.S.C.
THE PEOPLE OF THE STATE OF NEW YORK,	**: Dated: August 30, 2012**
-vs-	
	: Indictment #1704/95
LEROY MARSH,	
Defendant.	**:**

Appearances: District Attorney's Office
By: Maria Park, Esq.

Spar & Bernstein
By: Laura McLean, Esq.
Attorney for Defendant

Some 16 years after his guilty plea in the above-noted indictment, defendant moves to vacate that conviction, alleging that he received ineffective assistance of counsel in that prior counsel failed to advise him of the possible immigration consequences of that plea. Defendant also moves for vacatur pursuant to CPL §440.10, alleging that he is actually innocent of the charges. The People oppose the motion. For the reasons stated below, the motion is denied in its entirety.

The instant matter presents an unusual situation, namely, that the defendant is not currently in the custody of ICE, nor does there appear to be any deportation proceeding pending against him. Rather, defendant seems to be making a pre-emptive strike, in the expectation that the vacatur of this misdemeanor drug conviction would prevent any deportation proceeding from being commenced.

The history of the case is not in dispute, but the defendant's version of the facts of the case differ substantially from those presented in the People's affirmation in opposition. The defendant alleges that he was merely a passenger in the vehicle and claims to have had no involvement in the drug transaction, hence his claim of actual innocence, yet the People allege that defendant actively participated in the sale of the cocaine to the undercover officer. Specifically, they note that the defendant is the one who handed the drugs to the undercover officer, that a quantity of drugs was recovered from under defendant's seat, that he was identified by the officer a very short time after the transaction and that he fit the description of one of the participants in the drug sale.

The stark dichotomy between the two recitations of the facts makes defendant's claim of actual innocence less likely to be true. Counsel for defendant on this motion appears to be relying solely on the defendant's assertions and not on information contained in the court file. Clearly, defendant's minimization of his participation in the drug transaction is tailored to best present his situation for the purposes of the instant motion and the court considers it to be purely self-serving and a wholly insufficient basis for a claim of actual innocence.

Further, the court will not consider defendant's actual innocence claim since it is not, defendant's allegations to the contrary, a cognizable claim under CPL §440.10(1)(h), except under very limited circumstances, and this case does not fall within those parameters. The case cited by defendant, *People v. Tankleff*, 49 A.D.3d 160, does not stand for the proposition that New York recognizes an actual innocence claim that can be considered under CPL §440.10(1)(h). *See also, People v. Wheeler-Whichard*, 25 Misc.3d 690. The facts as stated by the People in their affirmation, which if taken as true, present no reasonable view of the evidence that would suggest the actual innocence of the defendant nor does defendant's recitation of the facts rise to the level of clear and convincing evidence of his innocence, in the unlikely event that the court would have countenanced the claim.

Defendant's main contention, however, is that he received ineffective assistance of counsel based on the holding in *Padilla v. Kentucky*, 130 S.Ct. 1473 since his attorney failed to advise him of the deportation consequences of his plea. This is currently an oft-used approach by defendants to stave off deportation, however, defendant is not presently under a deportation order, nor is he being held in an ICE facility awaiting a hearing. Defendant has clearly examined the possibility of his deportation, should ICE commence proceedings, and believes that the vacatur of the present conviction is the key to him remaining in the United States. An examination of the facts and circumstances surrounding his plea lead this court to the conclusion that vacatur is unwarranted.

To resolve defendant's claims, the court must first determine if *Padilla* is applicable to this matter. Because defendant's conviction and sentence pre-date *Padilla* by some 14 years, and the matter was considered final at the time of the Supreme Court's decision, *Padilla* is not applicable. As such, the court must decide the motion based on the Federal standards of effectiveness of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 in conjunction with New York standards of *People v. Benevento*, 91 N.Y.2d 708 and *People v. Baldi*, 54 N.Y.2d 137.

Turning to defendant's contentions, the court finds the evidence presented insufficient to establish ineffectiveness of counsel. Defendant alleges that he did not understand the proceedings and pled guilty because he was encouraged to do so by his attorney. Since defendant was not a novice to the criminal justice system, having

pled guilty in 1992 to a felony drug offense, for which he received a sentence of 1 day in jail plus a 5 year term of probation, it is difficult for the court to credit that assertion.

Defendant's other complaints about his attorney, namely, that counsel only spent a few minutes with him before court appearances, that a trial was never presented as an option and that he never received copies of papers pertaining to the case are simply not credible and are clearly designed to bolster defendant's claim of ineffectiveness of counsel. However, it is defendant's statement that because he had only been in the United States for 10 years at the time of his arrest and that he has a Jamaican accent, counsel should have asked about his citizenship that truly indicates his desperation to avoid any consequences of his criminal activity. It is beyond this court's comprehension how the mere fact that a person speaks with an accent or the length of a person's residence in the United States gives rise to an obligation to an attorney to ask about a client's immigration status.

Examining counsel's conduct under the two-prong test set forth in *Strickland, supra*, to determine effectiveness of counsel, the court finds there is no basis for vacatur. Defendant has failed to establish that prior counsel's conduct fell below the objective standard of reasonableness and 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. Under the New York standards, counsel is considered effective "so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation". *Baldi, supra.* Moreover, under New York law, counsel who negotiates such a favorable disposition cannot be said to be ineffective. *People v. Ford*, 86 N.Y.2d 397.

In the present matter, defense counsel negotiated an extremely favorable plea agreement for the defendant, and there is absolutely no credible evidence to support defendant's claim that he would have rejected the plea agreement and gone to trial, risking a lengthy term of imprisonment on the present charges. He would also likely have been subjected to a consecutive period of incarceration on a violation of the term of probation imposed on his prior 1992 drug felony conviction. Defendant's status as a second felony offender would have subjected him to a lengthy term of incarceration, the maximum sentence at the time of the plea was a term of imprisonment of 8⅓-25 years and he would have risked almost certain deportation. The sentence of 15 days in jail and a the termination of his probation was substantially more favorable. Based on the facts underlying the charges, it would not have been rational for the defendant to refuse the plea offer that gave him minimal jail time, and his claim that he would have rejected the offer and gone to trial does not have the ring of truth.

Although the failure of a defense counsel to advise a defendant of the potential deportation consequences of a plea may be conduct which falls below the standard of accepted professional norms, based on the standards that existed at the time of

defendant's plea, defense counsel would not have been ineffective for failing to advise the defendant of the immigration consequences of the plea. At the time defendant pled guilty 14 years ago, deportation was considered a collateral consequence of the plea, therefore, counsel was not required to advise a defendant of the possibility of deportation.

It should also be noted that defendant omits any reference to either a 1992 felony conviction in New York for a drug offense, for which he received a sentence of 1 day in jail plus 5 years probation, or a subsequent 1997 felony conviction in Florida for a drug offense, but only challenges the present misdemeanor conviction. He asserts that, as a direct result of this conviction, he is inadmissible to adjust his immigration status, he is barred from becoming a citizen, he is subject to deportation and he cannot travel without the risk of being denied re-entry.

Those assertions are not accurate. Because defendant's present conviction, as well as the felony drug conviction preceding it, occurred prior to the effective dates of the harsh immigration statutes known as the AEDPA (Anti-Terrorism and Effective Death Penalty Act) and the IIRIRA (Illegal Immigrant Reform and Immigrant Responsibility Act), the was eligible for the relief from which he claims to be precluded and could have sought a discretionary waiver of deportation. *See, Immigration and Naturalization Serv. V. St. Cyr*, 533 U.S. 289.

Indeed, also undercutting defendant's contention of his deportability based on the present conviction, is the fact that he is not currently subject to an order of deportation. As such, this court cannot determine, with any degree of certainty, that the instant conviction would even serve as the trigger for deportation, taking into consideration that defendant has a 1997 drug felony conviction for which he could not seek a waiver of deportation, and which would more likely serve as the basis for a deportation order.

In sum, defendant has failed to establish that he received ineffective assistance of counsel and there being no legal basis for granting the relief sought, the motion is denied in its entirety.

ENTER:

NEIL JON FIRETOG, J.S.C.

ENTERED

AUG 2 9 2012

NANCY T. SUNSHINE
COUNTY CLERK

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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