

**People v Rodriguez**

2012 NY Slip Op 32584(U)

September 27, 2012

Supreme Court, Kings County

Docket Number: 4462/2009

Judge: Patricia DiMango

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

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. DiMango

Date: September 27, 2012

-against-

DECISION & ORDER

HUGO RODRIGUEZ

Indictment No. 4462/2009

-----X  
Defendant moves for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. For the following reasons, the motion is denied.

On May 15, 2009, defendant, an ice cream vendor, became engaged in a dispute with a fellow ice cream vendor, Juan Ceruva, about the location at which both wanted to park their ice cream carts. During the altercation, defendant picked up Ceruva's chair and struck him with it in the head and hands. Ceruva received two wounds that were treated with staples and stitches. For his conduct, defendant was charged with assault in the second and third degrees (PL §§ 120.05[2], 120.00[1]) and criminal possession of a weapon in the fourth degree (PL § 265.01[2]).

On September 25, 2009, defendant appeared in court with counsel and accepted the People's offer to plead guilty to assault in the third degree, in exchange for a promised sentence of probation and restitution to the victim of up to one thousand dollars. During the plea allocution the court explained the rights defendant was giving up by virtue of his plea and defendant stated that he understood. Defendant informed the court that he was not an American citizen. The court stated that he would be deported and that the court was aware that defendant

had discussed the immigration consequences of his plea with his lawyer. Defendant was sentenced to three years' probation and restitution of one thousand dollars.

In the instant motion and subsequent reply papers, defendant alleges that his attorney provided ineffective assistance of counsel by failing to advise him of the immigration consequences of his plea, to adequately investigate the facts of the case, and to zealously prepare a defense. Defendant, who also asserts his innocence, claims that he pleaded guilty to avoid a protracted criminal trial and because he believed he could explain the true facts of the case to an immigration judge. He also states that he did not understand that he was "pleading guilty to such a serious crime with such long term consequences". Accordingly, defendant asks that his conviction be vacated in the interest of justice. Defendant further relies on *Padilla v Kentucky*, 130 S. Ct. 1473 (2010), claiming that he suffered prejudice as a result of counsel's deficiencies because his conviction now renders him ineligible to apply for a green card and has required him to cease his ongoing "immigration naturalization process."

Defendant is an immigrant who came to this country from Ecuador in 1992. According to defendant, at the time of the crime he was working with an immigration attorney to legalize his status in the United States. His present attorney states that he "qualifies for a waiver for a green card, but for the guilty plea in this case" and that the "ten year waiver is barred by any crime of moral turpitude." Defendant then alleges that "had I known that a plea of guilty would have stopped cold my legalization process, I never would have plead guilty to a crime I did not commit." There is no allegation that the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") has commenced deportation proceedings against defendant in connection with the instant conviction; nor has he submitted any proof of having applied for or

been denied a green card. Finally, counsel contends in a third submission that defendant has been deprived of the “relief of a green card” and that “[a] conviction that makes someone ineligible for a green card is equivalent to subjecting someone to deportation.”

Defendant’s conviction may not be vacated in the interest of justice. This court is limited to the specific grounds enumerated in CPL § 440.10 in its jurisdiction to vacate a judgment of conviction. Only the Appellate Division has the authority to overturn a conviction in the interest of justice (CPL § 470.15[3][c]).

Under the federal standard for ineffective assistance of counsel, the court must engage in a two-prong analysis of the defendant’s claim (*Strickland v Washington*, 466 U.S. 668 [1984]). 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). Second, the 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). 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]). 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, 59 [1985]).

Under New York law, counsel’s representation is 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, 147 [1981]; *People v Benevento*, 91 NY2d 708 [1998]). 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]). With respect to prejudice under state law, “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” (*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*, 84 NY2d 184, 188 [1994]).

Defendant’s allegations rest 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 mandates that criminal defense attorneys give correct advice to their noncitizen clients concerning the risk of 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). The Court specifically indicated that “deportation is a particularly severe penalty” and that “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders” (*Padilla* at 1481–1482). The Court further distinguished deportation as a unique consequence that does not fall within the distinction between collateral and direct consequences of a criminal conviction (*id.* at 1481).

The court need not dwell on whether counsel was deficient in his advice to defendant and

will follow the practical suggestion offered by the Supreme Court to consider, when appropriate, the prejudice prong without examining the alleged deficiencies in counsel's performance. 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 ineffective 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* at 697). The Court directed, "[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.*).

Defendant's contention that *Padilla* applies to counsel's advice about his green card application is misplaced. The majority opinion in *Padilla* makes no reference to any other "immigration consequences" other than deportation, while distinguishing deportation as unique from other "consequences" of conviction because of its severity. Significantly, there is no reference in *Padilla* to potential bars to naturalization based upon guilty pleas nor any indication that the Supreme Court viewed such potential bars as a direct consequence of guilty pleas on par with deportation. Defendant's future inability to apply for a green card, while unfortunate, is not within the realm of consequences contemplated by the Court in *Padilla*. Accordingly, this court rejects defendant's claim that his potential ineligibility for a green card is equivalent to being subject to deportation (*see e.g. People v DeLacruz*, 2011 WL 7403312 [Sup. Ct., Kings County 2011] [the possibility of immigration consequences is insufficient to satisfy the second prong *Strickland*]; *People v Coles*, 2011 WL 1991980 [Sup. Ct., Kings County 2011] [no prejudice where defendant was no longer facing deportation]).

Furthermore, under the immigration law defendant is not subject to deportation as a consequence of his conviction. Assault in the third degree is a deportable crime of moral turpitude under the immigration law, but deportation is not required in defendant's case because defendant was convicted more than five years after his admission to the United States (8 USC § 1227[A][I], [ii]). Nor does the conviction require deportation when viewed as an aggravated felony, as defendant was sentenced only to probation rather than the one year minimum prison term defined by the law (8 USC § 1101[a][43][f]). Defendant is therefore mistaken with respect to his claim that being rejected for a green card will result in deportation. He has suffered no prejudice as a consequence of his plea where immigration authorities have not commenced any proceedings against him and removal is not mandated by law (*see Strickland Washington* at 693 [1984] [defendant must "affirmatively prove prejudice"]).

Defendant's claim of prejudice is further undermined by the court's unequivocal warning on the record that he would be deported as a result of his plea. Defendant did not dispute the court's statement or otherwise request clarification from either the court or his attorney. Instead, he proceeded with the plea. At no point during the remainder of the plea allocution or at sentencing did defendant ever request additional time to discuss immigration matters with his attorney or express a desire to withdraw his plea. This clear warning by the court erodes the credibility of defendant, who now claims he did not know that his plea would hinder his green card application. In the face of this warning, defendant cannot establish that, but for counsel's advice, he would not have pleaded guilty and instead insisted on going to trial (*Hill v Lockhart*, 474 U.S. 52, 56, 69 [1985]). Additionally, the suggestion that defendant would risk deportation but not the denial of a green card in order to obtain a favorable plea agreement is simply not

logical.

The court also notes that defendant's claim about his ineligibility for a green card is purely speculative and is based solely upon his motion counsel's interpretation of the immigration law. He has submitted no documents or letters from ICE indicating that he is barred from ever being granted a green card, or that he would otherwise be eligible but for the instant conviction. Even if defendant did not have a felony conviction, there is no guarantee that his application would be granted as ICE has the discretion to deny applications on other grounds. Accordingly, the claim that plea counsel's conduct resulted in prejudice is rejected because it is unsupported by sworn allegations substantiating all the essential facts (CPL § 440.30[4][b]). Likewise, the allegation that defendant did not knowingly and intelligently plead guilty fails to attribute any of his misapprehensions to the conduct of his attorney and lacks specific factual support. As a result, this claim is also procedurally barred for lack of substantiation (*id.*).

Finally, defendant's claims of ineffectiveness relating to counsel's investigation were necessarily forfeited by his guilty plea. It is well established that a valid guilty plea generally "marks the end of a criminal case, not a gateway to further litigation (*People v Hansen*, 95 NY2d 227, 229 [2000]; *People v Taylor*, 65 NY2d 1, 5 [1985]). Alleged errors that are normally forfeited by a guilty plea, whether constitutional, statutory or factual, include an assertion of ineffective assistance that is not directly related to the plea bargaining process or the voluntariness of the plea (*see People v Parilla*, 8 NY3d 654, 660 [2007]). Thus, "where a defendant has by his plea admitted commission of the crime with which he was charged, his plea renders irrelevant his contention that the criminal proceedings preliminary to trial were infected with impropriety and error; his conviction rests directly on the sufficiency of the plea, not on the



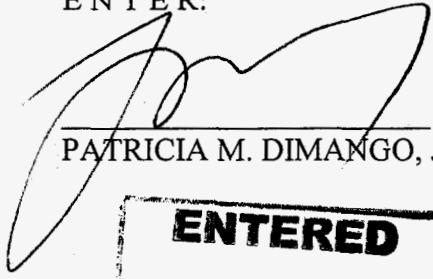
legal or constitutional sufficiency of any proceedings which might have led to conviction after trial (*People v DiRaffaele*, 55 NY2d 234, 240 [1982]). In this instance, defendant was in the best position to view the facts surrounding his conviction, yet he decided to take the plea and admit his guilt. By his plea he gave up the chance to present a defense at trial, which would have included investigation by counsel.

Overall, defendant has failed to allege any specific wrongdoing by counsel that undermined that "fairness of the process as a whole" (*People v Benevento*, 91 NY2d 708, 714 [1998]). Counsel committed no cognizable error under *Padilla* and by all appearances gave defendant "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant received an advantageous, non-incarceratory plea and nothing in the record casts doubt on the apparent effectiveness of counsel, counsel is presumed to have given an effective performance (*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]).

Accordingly, the motion is denied in its entirety.

This decision constitutes the order of the court.

ENTER:



PATRICIA M. DIMANGO, J.S.C.

**ENTERED**  
OCT - 2 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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