

People v Hinds
2012 NY Slip Op 33070(U)
December 21, 2012
Supreme Court, Kings County
Docket Number: 596/02
Judge: Deborah A. Dowling
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MEMORANDUM

SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
By: Justice Deborah A. Dowling

-against-

Dated: December 21, 2012

Indictment No:596/02

CONRAD HINDS,

Defendant(s).

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This matter is before the Court based upon the defendant's motion seeking to vacate his conviction, pursuant to Criminal Procedure Law §440.10 (1)(h). The defendant makes the instant motion after a trial by jury wherein the defendant was convicted of the instant offenses. The defendant also relies upon precedent in Supreme Court Case, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The People opposed the motion. Based upon the reason detailed herein the defendant's motion is **denied**.

PROCEDURAL HISTORY

The defendant was indicted under the instant indictment and charged with Criminal Possession of a Weapon in the Second Degree (PL §265.03(2)), Criminal Possession of a Weapon in Third Degree (PL §265.02 (4)), Criminal Possession of a Weapon in Fourth Degree (PL §265.01(1)), Criminal Possession of a Controlled Substance in the Seventh

Degree (PL §220.03) and Menacing in the Second Degree (PL §120.14(1)). The charges stemmed from an incident, on January 26, 2002, wherein the defendant pointed a firearm at another individual and fired that handgun at the individual. The incident occurred, at approximately 1:30 am, on Eastern Parkway, between its intersection with Utica Avenue and Schenectady Avenue, in Kings County.

It appears from the court file and the papers submitted, the defendant was offered a plea bargain option of pleading guilty to Criminal Possession of a Weapon in the Third Degree in satisfaction of the indictment in return the defendant would serve three (3) years incarceration¹. However, the defendant rejected the plea offer and availed himself of his constitutional right to proceed to a trial by jury. The defendant was convicted of Criminal Possession of a Weapon in the Second Degree (PL §265.03(2)) and Criminal Possession of a Controlled Substance in the Seventh Degree (PL §220.03).

The defendant was sentenced, on March 20, 2003, to a period of six (6) years incarceration. The defendant appealed his conviction, claiming trial counsel rendered ineffective assistance of counsel and the prosecuting Assistant District Attorney improperly cross-examined a defense witness. The defendant's appeal was denied and the Appellate Division, Second Department, unanimously affirmed the defendant's conviction. *See, People v. Hinds*, 16 A.D2d 436 (2nd Dept 2005). The defendant sought leave to appeal to the New York State Court of Appeals. However, on May 6, 2005, the court denied the defendant's

¹The defendant submitted a ready case status sheet and the People also confirm the defendant was offered the option to plead guilty to Criminal Possession in the Third Degree.

leave to appeal. *See, People v. Hinds*, 4 N.Y.2d 887 (2005).

The defendant also sought a federal writ of *habeas corpus*. The defendant's application was denied, on December 8, 2006, and the court found defense counsel was not ineffective and the Court's rulings did not violate the defendant's constitutional rights. *See, People v. Hinds*, 2006 *United States v* Dist. LEXIS 89098 (E.D.N.Y. Dec. 8, 2006). On February 9, 2006, the defendant became the subject of a deportation action before the Federal Immigration Court. The defendant was given notice to appear because when the defendant was convicted in this case he was a lawful permanent resident of the United States and not a citizen of the United States.

As a lawful permanent resident, the defendant was subject to deportation to his country of origin upon being convicted of Criminal Possession of a Weapon in the Second Degree (PL §265.03(2)). The defendant has since been ordered to be deported to his country of origin but remains in the United States on supervised release. The defendant submitted the instant motion seeking to vacate his conviction on the grounds his trial attorney provided ineffective assistance of counsel when failing to adequately advise of him of the immigration consequences associated with this case.

The defendant relies, upon *Padilla*, in asserting trial counsel's failure, to advise him of the varying immigration consequences of pleading guilty to Criminal Possession of Weapon in the Third Degree versus going to trial and potentially being convicted of the top charge on the indictment, constituted ineffective assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The defendant contends Criminal Possession of a Weapon in the

Second Degree (PL §265.03(2)), which includes a component “of intent to use the weapon unlawfully against another,” is a violent crime, classified as an aggravated felony, for which deportation is mandatory under the federal immigration laws. On the other hand, Criminal Possession of Weapon in the Third Degree is not an aggravated felony and although deportation would remain a possibility, there is also a provision in the federal immigration law where the immigration judge could forego finding deportation was necessary based upon certain circumstances proscribed by law. There is no such possibility with regard to the crime of Criminal Possession of a Weapon in the Second Degree and the defendant.

The defendant contends had trial counsel advised him of the differing immigration consequences he would have accepted the plea offer of pleading guilty to Criminal Possession of a Weapon in the Third Degree. The defendant argues he would have done so to avert being deported. The defendant contends he would have done everything possible to avoid deportation because at the time of his conviction he had a daughter and most if not all of his family resided in the United States. The defendant also alleges his present medical condition warrants this conclusion in so far as due to inferior medical care while incarcerated he has been rendered blind out of one eye and suffers significant impairment in the other eye.

The defendant urges the court to vacate the guilty verdict of the jury and allow him to now plead guilty to Criminal Possession of a Weapon in the Third Degree. The defendant argues the court is empowered to grant the relief requested because the failure of his trial counsel to competently advise him on differing immigration scenarios rendered counsel's representation ineffective. Having reviewed all the papers and evidence submitted in support

of the defendant's motion and the People's opposition papers, the motion is denied for the reasons stated herein.

CONCLUSIONS OF LAW

The core inquiry on a claim of ineffective assistance of counsel is whether the defendant received meaningful representation by legal counsel. The defendant asserts he did not receive legal counsel which even seemingly resembled meaningful representation. The defendant contends the ineffective assistance rendered by trial counsel was a glaring violation of his due process rights which warrants an order vacating his conviction pursuant to CPL §440.10.

In determining a defendant's motion on the asserted grounds of ineffective assistance of counsel, the defendant must establish the two prong test set forth in *Strickland v. Washington*, 466 US 668 (1984). Namely, the defendant must establish defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability, but for counsel's errors, the proceeding(s) would have resulted in a different outcome. *Strickland v. Washington*, 466 US 668 (1984). The *Strickland* standard requires any judicial scrutiny brought to bear upon defense counsel's performance be highly deferential in an effort to avoid the distorting effects of hindsight. *Id.*

Further, the court is required to evaluate claims of ineffectiveness without confusing real ineffectiveness with circumstances amounting to nothing more than losing tactics employed by trial counsel. The defense need only reflect a reasonable and legitimate strategy under the particular circumstances of a case. A defense theory which is ultimately a losing

theory does not amount to ineffective assistance of counsel. It is only when the evidence presented on a motion of ineffective assistance of counsel clearly establishes counsel partook in an inexplicable prejudicial course of conduct will courts deem the representation ineffective. *People v. Benevento*, 91 NY2d 708 (1998).

In applying *Strickland* to cases involving alleged ineffective assistance of counsel based upon counsel's failure to advise the defendant of the immigration consequences of pleading guilty to a crime, the Court is required to look at whether counsel failed to advise the defendant that a plea of guilty would subject the defendant to deportation. The Court must also determine whether defense counsel's failure to so advise the defendant prejudiced the defendant.

In the instant case, it is clear the defendant has failed to meet the two-prong test of *Strickland*. The claims raised by the defendant do not rise to the level of an inexplicable prejudicial course of conduct on the part of trial counsel. The defendant's contentions and reliance upon *Padilla* are also misplaced. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The court, in *Padilla*, held that constitutionally competent counsel would have advised the defendant that pleading guilty to the crime in question would make him subject to automatic deportation. *Id* at 1478.

Here, the factual scenario is outside the purview of *Padilla*. The defendant did not plead guilty to a crime for which trial counsel failed to advise him that deportation would be mandatory. The defendant rejected the plea offer to a crime, for which deportation was a consequence to pleading guilty, and elected to exercise his right to a trial by jury. While the

defendant contends his attorney's failure to advise of him the immigration consequences of being convicted of the top charge was ineffective assistance of counsel, the law does not require a defense attorney engage in the type of conduct posited by the defendant. To do so would place defense attorneys in the position of stepping into a mine field where effective representation requires intricate knowledge of the federal immigration statutes.

Further, the differences asserted by the defendant between the immigration consequences of the crime the defendant could have plead guilty to and those of the crime he was convicted are academic. Both crimes are offenses for which the defendant is subject to deportation. There is no evidence presented supporting defendant's assertion he would now be entitled to a waiver of deportation by an immigration judge presiding over this matter if he had elected to plead guilty to Criminal Possession of a Weapon in the Third Degree.

Moreover, accepting the defendant's argument would be tantamount to finding attorneys must advise defendants to accept a plea in order to limit exposure to deportation. It would require attorneys to advise presumably innocent defendants to accept a plea bargain out of fear of being convicted of a crime for which deportation is mandatory. To do so offends the notions of fair play and justice. No attorney should be placed in a position of advocating that a defendant enter a plea of guilty to a crime simply because doing so would limit the immigration consequences. The only reason for any defendant to ever enter a plea of guilty to a crime is because he or she is in fact guilty.

The defendant's motion lacks merit in so far as the defendant asserts this court should contravene a duly rendered jury verdict. There is no basis to upset the jury's verdict in this

case. Even assuming arguendo, trial counsel was required to advise the defendant of the differing immigration consequences of both crimes, there is no evidence that the failure to do so prejudiced the defendant. The defendant offers only self serving anecdotal evidence of his claim. To accept the defendant's claim of but for the failure of his lawyer to advise him the immigration consequences of being convicted of the top charge in this case would be to open the door to every defendant who is unhappy with the outcome of taking the chance to proceed to trial. There is no evidence the defendant would have abandoned his position of innocence in favor of pleading guilty to a crime for which he would be subject to deportation in any event.

The defendant was offered a significant amount of jail time, namely three (3) years, as part of the plea offer. At that time, the defendant had the option of taking the offer or proceeding to trial and putting the People to the test of proving his guilt, of the crimes charged, beyond a reasonable doubt. The defendant elected the option of going forward with a trial. The defendant is not now entitled to a second bite of the apple with regard to accepting the plea offer simply because the trial did not result in the defendant's favor.

Nothing the defendant has set forth rises to the level of prejudicial errors committed, on the part of defense counsel, which would warrant vacating a duly rendered conviction by a jury. The defendant had the benefit of experienced trial counsel as his advocate and there is nothing in the record to establish the defendant received representation which fell below an objective standard. The defendant's motion papers fail to provide any evidence establishing his claim of ineffective assistance. The defendant's claims are not claims for

which vacatur of the duly rendered verdict of conviction is a remedy. There is no basis to grant the requested relief. Accordingly, the defendant's motion is denied in its entirety. It is hereby,

ORDERED, the defendant's motion is denied in its entirety. It is further,

ORDERED, the defendant's right to appeal from this order 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. It is further,

ORDERED, 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 following parties;

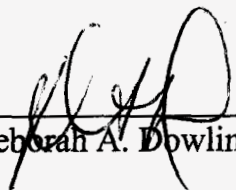
APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

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

Kings County District Attorney
Appeals Bureau

350 Jay Street
Brooklyn, NY 11201

This shall constitute the decision and order of the Court.



Deborah A. Dowling, J.S.C
HON. DEBORAH A. DOWLING
JUSTICE SUPREME COURT

