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

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

HENRY MARAMOLEJOS

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By: Hon. Patricia M. DiMango

Date: December 19, 2012

DECISION & ORDER

Indictment No. 1176/2003

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 defense counsel failed to advise him about the immigration consequences of his guilty plea, in violation of *Padilla v Kentucky*, 559 U.S. __, 130 S.Ct. 1473 (2010). Defendant is a native of the Dominican Republic who has resided with his family in the United States as a permanent resident alien since 1994. For the following reasons, the motion is denied.

On February 6, 2003, a 1998 Ford stopped at the corner of East 98th Street and Glenwood Road in Brooklyn, where an unapprehended individual bought a tinfoil of cocaine from a person inside the car. Police officers stopped the Ford about five blocks away and observed defendant in the front passenger seat, attempting to stuff a plastic bag full of tinfoils of cocaine into the vehicle's empty radio well. Co-defendant Evelio Hernandez was in the driver's seat. The officers recovered the plastic bag containing thirty-six tinfoils of cocaine as well as two hundred and sixty dollars from the visor above the driver's seat.

Defendant and co-defendant were charged together with two counts of criminal possession of a controlled substance in the third degree (PL §§ 220.16[1], [12]) and one count of criminal

possession of a controlled substance in the seventh degree (PL § 220.03).

On June 11, 2003, defendant, represented by counsel Ayisha Amjad, Esq. of the Legal Aid Society, pleaded guilty to criminal possession of a controlled substance in the fifth degree (PL § 220.06[1]), in full satisfaction of the indictment. In return for his plea of guilty, the court promised defendant a sentence of five years probation (DiMango, J., at plea). During the plea allocution, defendant answered in response to the court's questions that he was satisfied with his attorney's representation, that he was freely and voluntarily pleading guilty, and that he was not threatened, forced or coerced into pleading guilty. When the court asked defendant if he was a citizen he affirmed that he was. On August 6, 2003, the court imposed the promised sentence (McKay, J., at sentence).

Defendant did not appeal from his judgment of conviction.

On May 12, 2009, defendant returned to the United States from a trip abroad. He applied for admission to the United States as a returning lawful permanent resident and was paroled into the United States. On May 27, 2009, defendant was arrested in New Jersey and charged with aggravated assault with a weapon, robbery, burglary, and other gun possession charges.

On June 30, 2009, defendant was served with a Notice to Appear, charging that he was subject to removal from the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act based upon his drug conviction in the instant case. Defendant was ordered deported by an immigration judge on November 6, 2009, and thereafter returned to the Dominican Republic.

Three years subsequent to his deportation from the United States, defendant now challenges his judgment of conviction, claiming that his attorney never advised him about the immigration

consequences of his guilty plea. Defendant argues that because he did not own the vehicle in which he was riding and because no drugs were found on him, he had a viable defense. He also claims that his attorney "threatened" him to plead guilty when she informed him that he was "facing five years in jail" if he "did not accept the five years probation." With respect to defendant's on-the-record affirmation to the court that he was a citizen, defense counsel now argues that defendant's answer implies "the possibility that immigration was never discussed with him and [that] the question caught him by surprise. This appears to be a natural response to an individual who has not discussed his immigration consequences with his attorney."

In an affidavit appended to the People's opposition, Ms. Amjad states that at the time she represented defendant, the "discussion of possible immigration consequences always played a prominent role in my advice to clients and in my plea negotiation tactics. It was my usual practice to ask every client I represented whether they were an American citizen, and to advise non-citizen clients of immigration consequences of pleading guilty to any crime that might make them deportable." Though she does not specifically recall conversations with defendant, Amjad is "certain, based upon [her] standard practice and knowledge of the law, that [she] did not fail to advise him of possible immigration consequences..."

As a preliminary matter, the court notes defendant's deportation from the United States does not necessarily render moot the instant motion to vacate the judgment of conviction. The New York Court of Appeals has recently held that, in cases where defendants have been deported during the pendency of an appeal, the appeal should not be dismissed on the ground that the defendant cannot obey the mandate of the court (*People v Ventura*, 17 NY3d 675 [2011]). Here, defendant's involuntary absence from this jurisdiction does not bar consideration of the instant motion.

In *Padilla v Kentucky*, the United States Supreme Court extended the reach of the Sixth Amendment right to counsel to non-citizen defendants facing criminal charges that carry immigration consequences. The Court held that the right to effective assistance of counsel requires that a defense attorney properly advise a non-citizen client about the immigration consequences of a guilty plea. While the scope of counsel's duty depends on the complexities of a particular case, the Court determined that counsel's silence would no longer be an option when deportation is at stake. Because "deportation is a particularly severe penalty" and so "intimately related to the criminal process," the distinction between direct and collateral consequences could no longer be recognized when a non-citizen pleads guilty (*Padilla* at 1481). Accordingly, "[w]hen 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).

To prevail on a claim of ineffective assistance of counsel under *Padilla*, a defendant must satisfy the two-prong test established by *Strickland v Washington*, 466 U.S. 668 (1984) (*see People v McDonald*, 1 NY3d 109, 113 [2003]). Under the first prong a defendant must show that counsel's representation was deficient and 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).

Under the second prong, a defendant must "affirmatively prove prejudice" (*id.* at 693) 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 (*id.* at 694). A reasonable probability in this context is a "probability sufficient to undermine the outcome" (*id.*) and "[t]he likelihood of a different result must be substantial, not just conceivable" (*Harrington v Richter*, __ U.S. __, 131 S.Ct. 770, 792 [2011]). In the context of a guilty plea, a defendant must show a reasonable probability that, but for counsel's advice, he would not have accepted the guilty plea and instead would have insisted on going to trial (*Hill v Lockhart*, 474 U.S. 52, 59 [1985]; *People v McDonald*, 1 NY3d 109, 115 [2003]). Furthermore, "to obtain relief a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances" (*Padilla* at 1485).

In this instance, defendant has failed to satisfy either prong of *Strickland*. With regard to the deficiency prong, he has not established that counsel committed any error under *Padilla*. During his plea allocution defendant answered the court's question about whether he was a citizen affirmatively and without hesitation. Defendant does not allege in his moving papers that he ever actually informed his attorney that he was not a citizen; thus his accusations against counsel necessarily assume that counsel knew of his immigration status and nevertheless neglected to provide immigration advice. There is no evidence here that counsel was aware that defendant was a noncitizen, or that she should have been aware (*see People v Carty*, 96 AD3d 1093, 1095-6 [3d Dept 2012] [counsel not ineffective where defendant professed to be a United States citizen]). Indeed, counsel made no interjection during the plea to indicate that she believed defendant's statement to be untrue. *Padilla* requires an attorney to counsel a "*noncitizen* client that pending criminal charges may carry a risk of adverse immigration consequences," 130 S.Ct. at 1483 (emphasis added), and does not require an attorney to counsel a client professing to be a citizen of

immigration consequences. Therefore, counsel's performance was not ineffective, even if she did not advise defendant about immigration consequences. Under these circumstances, defendant has failed to allege a ground constituting a legal basis for his motion (CPL § 440.30[4][a]).

Defendant's bare claim that he would not have pleaded guilty had he known that he would face deportation is insufficient to sustain his burden of showing prejudice under the second prong of *Strickland*. Under all the circumstances, defendant has failed to show that it would have been rational for him to reject the plea bargain. If convicted of a B felony after trial, defendant faced a minimum prison sentence of one to three years and a maximum sentence of eight and one-third to twenty-five years, and he still would have faced deportation. Yet based on his plea to a lesser D felony, he received a non-jail sentence of probation.[1] It would not have been a rational decision for defendant to have rejected the plea bargain, particularly given the overwhelming evidence of guilt. Here, defendant was observed in the vehicle attempting to hide a bag of drugs. The fact that defendant received a very favorable plea requiring no incarceration further undermines his claim of prejudice (*see People v Ford*, 86 NY2d at 404 [2d Dept 1995]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley,* 221 AD2d 376 [2d Dept 1995]); *People v Kearney*, 186 AD2d 270 [2d Dept 1992]).

Moreover, defendant suffered no prejudice because he did not have a viable defense. Defendant mistakenly argues that he had a viable defense because the drugs were not found on his person and he did not own the car. Nevertheless, the People's evidence showed that defendant had

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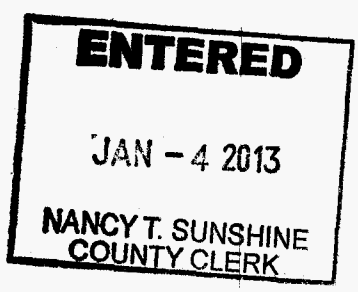
[1]The court notes, as do the People, that defendant was more likely to avoid detection by immigration authorities by taking a non-jail plea. He "flew under the radar" for six years following his conviction of a mandatorily deportable offense in the instant case, and was finally detained by immigration authorities when he was incarcerated upon robbery charges in the 1999 New Jersey case.

physical possession of the drugs and exercised a possessory interest in them when he attempted to hide them. The drugs were recovered from the dashboard, where defendant was seen trying to hide them. The People's theory of the case did not rely on the statutory presumption of possession imputed to all occupants of a vehicle. Instead, there was testimony from the police that defendant exercised direct control over the drugs. Accordingly, where defendant had no viable defense he had little chance of success at trial.

Finally, defendant's claim that counsel threatened him is not credible. There is nothing in the record or in defendant's papers to indicate that counsel's advice about his potential sentencing exposure was factually incorrect, coercive or in any way threatening. To the contrary, counsel provided accurate advice about the sentence defendant might face if he were convicted at trial. Indeed, it was only prudent for counsel to give her client such advice in order for him to make an informed decision about whether to plead guilty. Defendant's allegation of being threatened is also contradicted by his on-the-record statement at the plea allocution that he was freely and voluntarily pleading guilty, and that no one had threatened, forced or coerced him into taking the plea. Defendant's allegation is thus rejected (CPL § 440.30[4][d]).

Accordingly, the motion is denied in its entirety.

This decision shall constitute 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.

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