People v Campbell

2013 NY Slip Op 30821(U)

March 15, 2013

Supreme Court, Kings County

Docket Number: 7395/2009

Judge: Elizabeth A. Foley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 30

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

Indictment No: 7395/2009

FABIAN CAMPBELL,

Defendant.

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FOLEY, ELIZABETH, J:

Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10(1)(h) on the grounds that he did not knowingly and voluntarily enter his guilty plea due to his ineffective assistance of counsel. Defendant contends that his attorney failed to properly advise him about the immigration consequences of pleading guilty as required by *Padilla v Kentucky,* 599 U.S. __, 130 S.Ct. 1473 (2010). After a review of the moving papers, the People's opposition, the Court file and the relevant case and statutory law, the defendant's motion is denied for the reason's stated below.

FACTUAL BACKGROUND

On August 11, 2009, police observed the defendant driving while talking on a cell phone in the vicinity of Remsen Avenue and Church lane, in Brooklyn. The officers pulled the defendant over, and observed the defendant throw an object into the rear of the vehicle. The officers smelled Marijuana as they approached the defendants vehicles and recovered a clear Ziploc Bag of Marijuana in the backseat, which weighed in excess of eight ounces. The officers conducted a Department of Motor Vehicles computer check which revealed that the defendant's drivers license was suspended.

Defendant was charged with one count of each of the following crimes: Criminal Possession of Marihuana in the Third Degree (P.L. § 221.20); Criminal Possession of Marihuana in the Fourth Degree (P.L. § 221.15); Criminal Possession of Marihuana in the Fifth Degree (P.L. § 221.10[2]); Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (V.T.L. § 511.1[a]); and Use of Mobile Telephones (V.T.L. § 1225-C [2][A]). On September 7, 2010, defendant pleaded guilty to Criminal Possession of Marihuana in the Fourth Degree (P.L. § 221.15). On October 19, 2010 , defendant was sentenced to three years probation and his licensed was suspended for 6 months.

In an affidavit submitted in support of the instant motion, defendant states that he came to the United States from Jamaica in 1992 at the Age of 15 years old; and on January, 14, 1998 became a Lawful Permanent Resident of the United States. The defendant contends he has no ties or relations to Jamaica, that his family lives here and has a close relationship to his daughter who is nine years old. Defendant also asserts that he did not have the chance to have any in-depth conversation regarding his plea, and only met with Mr. Rubin a few times of which they did not discuss the plea implications or his potential immigration consequences. Furthermore, defense counsel contends that the defendant has a learning disability and states it was due to this learning disability that he was not able to comprehend what was being asked during his plea colloquy and would not have plead guilty had he been informed of the potential immigration consequences.

The United States Bureau of Immigration and Customs Enforcement (ICE) states in a letter submitted by the People that defendant has been a permanent resident of the United States since January 14, 1998. The defendant has had previous interactions with the criminal justice

system, and was subject to removal hearings once prior. The people presented evidence of a cancellation of a removal proceeding dated April 2, 2007. In 2012 the defendant was detained by ICE because of his instant conviction and has since commenced removal proceedings.

When the defendant entered his plea on September 7, 2010 the court engaged in the following discussion with the defendant:

COURT: If you are not a United States citizen, have you discussed this with your attorney the impact this plea may have upon immigration issues you may have?

DEFENDANT: Yes.

At the plea allocution defendant's attorney, Stuart Rubin, indicated to the court that he had reviewed defendant's rights. And stated that " He (defendant), has been fully advised as the consequences of a plea over 30 grams of marijuana". The court then asked defendant a series of questions designed to ascertain whether defendant's plea was knowing, voluntary and intelligent. In response, defendant admitted to possessing more than 30 grams of marijuana, and waived his right to appeal.

Defense also contends that due to his learning disability, which states that the Defendant has deficient expressive language skills. Yet, during his sentencing on October 19, 2010 the Court had the following colloquy with the defendant relating to the marijuana in which was found in the defendants vehicle.

COURT: Mr. Campbell do you remember speaking to the probation department for your probation report?

DEFENDANT: Yes, your Honor.

COURT: And you had a discussion with the probation officer who was interviewing you about your guilt or innocence; is that right?

DEFENDANT: Yes

COURT: And it says here that you told the probation officer that you didn't know that there was a pound of marijuana in the trunk of the car.

DEFENDANT: No, I knew it was there. I knew it was there.

The court then imposed the promised sentence three years probation. Defendant did not file a notice of appeal from his judgment of conviction.

In support of his motion to vacate the judgment, defendant claims that due to his learning disability he did not understand the ramifications to what he was pleading to, and that he was never informed about the potential immigration consequences that the plea may contain. Defendant states in his affirmation that, "Had I known that pleading guilty would have affected my ability to live in the United States or subject me to deportation, I would not have accepted the plea and instead would have gone to trial. This is true even in light of the fact that I would have risked harsher punishment if the prosecutor succeeded in proving their case... ." (Defendant's Aff. ¶ 33)

Defendants statements are at odds with Mr. Rubin's recollections of events. The people submit an affirmation from Mr. Rubin in which Mr. Rubin outlines that he spoke to the defendant on at least eight accessions, and that from his background as a former special education teacher in conjunction with his 25 years as a criminal defense attorney he believed that Mr. Campbell understood the consequences of his plea. (Rubin Aff. ¶ 3). Furthermore, he stated that it was because of Mr. Campbell's previous interactions with the criminal justice system and

the strength of the People's case against Mr. Campbell that both agreed that the best strategy would be one to negotiate a misdemeanor plea in which the defendant would avoid a period of incarceration. (Id. ¶2(d). Mr. Rubin stated that the defendant was aware that even taking the misdemeanor plea could render him deportable, if the immigration authorities focused on him. (Id ¶2(g)

LEGAL ANALYSIS

To effectuate a valid guilty plea the defendant must enter the plea knowingly, voluntarily, and intelligently. People v Elufe, 102 A.D.3d 982 (2013). (See also People v Fiumefreddo, 82 NY2d 536, 543, 626 N.E.2d 646, 605 N.Y.S.2d 671; People v Lopez, 71 NY2d 662, 666, 525 N.E.2d 5, 529 N.Y.S.2d 465; People v Harris, 61 NY2d 9, 17, 459 N.E.2d 170, 471 N.Y.S.2d 61). When there is a question as whether the defendant's factual recitation comports to an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge. People v. Lopez, 71 N.Y.2d 662, 666 (N.Y. 1988). After the Court was apprised of defendant's statement to the department of probation, the court conducted a further inquiry as to whether or not the defendant wanted to rescind his plea. The Court was satisfied by the defendants response and his response did not indicate he was unable to understand the nature to what he was pleading to. The colloquy in conjunction with defendant's former counsel statements aver that the defendant's plea was voluntary, knowingly, and intelligently given despite his learning disability.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. See, *Strickland v Washington,* 466 U.S. 668 (1984); *People v Linares*, 2 NY3d 507, 510 (2004) ; *see* U.S. Const., 6th Amend.; N.Y. Const., art. 1, §6. To prevail on an ineffective

assistance of counsel claim under the federal standard, 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). 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). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions (*Strickland* at 690).

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). A reasonable probability in this context is "probability sufficient to undermine the outcome" (*id.* at 694). Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable" (*Harrington* v *Richter*,131 S.Ct. 770, 792 [2011]). Thus, the *Strickland* standard is "highly demanding" (*Kimmelman v Morrison*, 477 U.S. 365, 382 [1986]) and "rigorous" (*Lindstadt v Keane*, 239 F3d 191, 199 [2d Cir. 2001]). 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, 56, 69 [1985]).

In New York, a defendant's right to the effective assistance of counsel is violated when "defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure" (*People v Turner*, 5 NY3d 476, 479 [2005]). To meet this standard, defendant "must overcome the strong presumption" that he was represented competently (*People v Ivanitsky,* 81 AD3d 976 [2d Dept 2011]; *People v Myers*, 220 AD2d 461 [2d Dept 1995]. "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 the constitutional requirement will have been met" (*People v Baldi,* 54 NY2d 137, 147 [1981]). 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]).

While the deficiency prong under State law is identical to that of *Strickland*, the prejudice prong in New York is "somewhat more favorable to defendants" (*People v Turner* at 480). 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" (*People v 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* at 188). Thus, a defendant's showing of prejudice is a "significant but not indispensable element in assessing meaningful representation" (*People v Stulz*, 2 NY3d 271, 284 [2004]).

The Supreme Court held in *Padilla v Kentucky* that defense counsel has an affirmative duty under the Sixth Amendment to provide correct advice to a non-citizen client about the risk of adverse immigration consequences of a guilty plea. "When 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). "Lack of clarity in the law...does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of

counsel's advice" (*id.* at 1083 n. 10).

The People argue that counsel's advice about the possibility of deportation was accurate because deportation was not an automatic consequence of defendant's guilty plea so long as the defendant stay out of the scope of immigration authorities.

To prove that he suffered prejudice, a defendant must present evidence establishing a reasonable probability that he would have rejected the plea had he been advised that deportation was a mandatory consequence of his guilty plea (*see Strickland* at 693). In support of his claim of prejudice defendant offers only the self-serving statement that, had he received adequate immigration advice, he would have rejected the plea offer and proceeded to trial. In viewing such a claim in hindsight, the court notes that "[i]t is all too tempting for a defendant to second-guess assistance after conviction or adverse sentence..." (*id.* at 689). Defendant's statement is insufficient in and of itself to sustain the burden of showing prejudice. A claim of prejudice must be corroborated independently by objective evidence, as a claim that defendant "would have gone to trial but for counsel's ineffectiveness, standing alone, does not establish prejudice under *Strickland*" (*Boakye v U.S.*, 2010 WL 1645055 [S.D.N.Y 2010]). Here, defendant's bare claim that he would have insisted on proceeding to trial is not sufficient.

The facts of this case diminish the probability that defendant would have gone to trial even if counsel had informed him that deportation would have resulted from his plea. First, the People presented strong evidence of defendant's guilt. Second, defendant received a very favorable sentence of three years probation. Had he been convicted of the top charge at trial, he would have faced a maximum two years of incarceration. As the goal of the plea negotiations was to avoid any period of incarceration, the generous plea bargain only weakens his claim of

prejudice and serves to reflect an overall effective performance by counsel (*see Ford*, 86 NY2d at 404; *People v McClure*, 236 AD2d 633 [2d Dept 1997]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley,* 221 AD2d 376 [2d Dept 1995]).

Accordingly, the motion is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

ELIZABETH A. FOLEY, J.S.C.

Dated: March 15, 2013