

**People v Wright**

2013 NY Slip Op 31365(U)

May 2, 2013

Supreme Court, Kings County

Docket Number: 234/88

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART 3

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THE PEOPLE OF THE STATE OF NEW YORK	: DECISION AND ORDER
	:
	:
-against-	: Ind No. 234/88
	:
	:
ROY WRIGHT,	:
	:
Defendant.	:
-----X	

JAMES P. SULLIVAN, J.

The defendant has moved for an order pursuant to CPL § 440.10 to vacate his judgment of conviction on the ground 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. 356 (2010). The People have filed an answer in opposition. In reaching its decision, the court considered all submitted papers, and the court records.

***Procedural History***

On January 6, 1988, the defendant was arrested after conducting a sale to an undercover officer. Defendant sold the undercover officer two vials of crack cocaine. The undercover officer paid defendant with ten dollars of pre-recorded buy money, which was recovered from defendant's pocket when he was arrested.

Defendant was charged under Indictment No. 234/88 with criminal sale of a controlled substance in the third degree (PL § 220.39 [1]), criminal possession of a controlled substance in the third degree (P.L. § 220.16 [1]), and criminal possession of a controlled substance in the seventh degree (P.L. § 220.03). On February 1, 1989, defendant, represented by counsel, pleaded guilty to attempted criminal sale of a controlled substance in the third degree, in exchange for a promised sentence of sixty days in jail and five years of probation (Marano, J. at plea) On January 10, 1994, the promised sentence was imposed (Rienzi, J. at sentence). The transcript of the plea proceeding shows that the court expressly warned defendant guilty plea could have immigration consequences, including deportation.

Defendant, a native of Jamaica, originally entered the United States unlawfully in 1981. He became a lawful permanent resident on June 12, 1990. There are currently no removal proceedings

pending against defendant.

Defendant now brings a motion to vacate his conviction pursuant to CPL § 440. 10, alleging that his attorney never discussed with him the immigration consequences of any plea. He claims that he did not know that his plea of guilty would result in making him inadmissible to adjust his status, thus, barring him from becoming a legal permanent resident and a citizen of this country under 8 USC §1182 (a) (2) (A) (I) (II). He further claims that he did not realize that his plea would subject him to deportation under 8 USC § 1227 (a) (2) (B) (I). Defendant claims that it was only after consulting an immigration attorney in 2011, that he was informed that he was deportable as a result of this conviction. According to defendant, had he understood this, he would not have entered a guilty plea.

The People have attached to their response an affirmation submitted by defendant's counsel at the plea proceeding. In his affirmation, counsel states that although he does not recall this case specifically, he affirms that at the time he represented defendant, his practice was to inform his non-citizen clients about the immigration consequences of entering a guilty plea. Further, counsel states that once he learned of a client's non-citizen status, it was his general practice to confer with an immigration law practitioner regarding the specific facts and circumstances of the case, as well as the possible immigration consequences of any disposition (Affirmation of counsel, 6, 7). Finally, counsel states that at the time defendant pleaded guilty in this matter, it was his understanding that a conviction of attempted criminal sale of a controlled substance in the third degree was deportable offense. Thus, counsel would have informed defendant that entering such a plea would make him subject to deportation (Affirmation of counsel, 8).

### **Conclusions of Law**

New York courts have long recognized that incorrect advice or affirmative misstatements by defendant's counsel regarding the immigration consequences of a guilty plea may constitute ineffective assistance of counsel if a defendant would not have otherwise pleaded guilty and would have insisted on going to trial (*People v. McDonald*, 1 N.Y.3d 109, 114-115 [2003]; *People v. Ford*, 86 NY2d 397, 405 [1995]). Until recently, counsel's effectiveness was not considered to be diminished by the complete absence of advice regarding possible immigration consequences, however, counsel's obligations have been enlarged with the United States Supreme Court's recent decision, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). In *Padilla*, the Supreme Court extended the reach of the Sixth Amendment right to counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), to non-citizen defendants facing criminal charges that carry immigration consequences. Applying the two-prong test under *Strickland*, the Supreme Court ruled that the failure to give any immigration advice may also constitute ineffective assistance of counsel, so long as the defendant can establish both that no immigration advice was given and that defendant would not have pled guilty had he been apprised of the immigration consequences of conviction. A defendant raising a claim under *Padilla* and *Strickland* 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 N.Y.3d 109, 115 [2003]) “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).

The Supreme Court, however, recently determined that *Padilla* does not have retroactive effect and that “defendants whose convictions became final prior to *Padilla*...cannot benefit from its holding” (*Chaidez v. United States*, 133 S.Ct. 1103 [2013]). As defendant’s conviction became final before *Padilla* was decided in 2010, the requirement that counsel provide immigration advice does not apply to his case. Thus counsel’s conduct cannot be held to be deficient under the first prong of *Strickland*.


Moreover, defendant’s motion relies on material allegations of fact made solely by defendant and is unsupported by any other affidavit or evidence (CPL § 440.30 [4] [d]). Defendant’s claim that prior to 2011, he “was totally unaware” that his guilty plea could have immigration consequences, and that he “was in total shock” when he learned of this, is contradicted by the record. A review of the transcript of the plea proceedings shows that the court expressly warned defendant at the plea proceeding that the entry of his guilty plea could have immigration consequences, including deportation. This court has further reviewed defendant’s counsel’s affirmation which expressly contradicts the defendant’s assertions. Thus, defendant’s claims are contradicted by the record, and “under these and all circumstances attending the case, there is no possibility that such allegation[s] [are] true” (CPL § 440.30 [4] [d]).

Further, defendant was not prejudiced by the alleged deficiency of counsel. The plea was significantly favorable given that defendant was given a sentence of sixty days in jail and five years probation in a controlled substance case where pre-recorded buy money was recovered from his person. The defendant’s assertion that he would not have pled guilty had he known that his plea could result in his deportation, or would affect his future ability to regularize his status in the United States is not persuasive. The fact that defendant was residing in the United States unlawfully at the time of his guilty plea, and still had close ties to his native country, Jamaica, undermines his claim that potential immigration consequences were determinative of his decision to plead guilty. Thus, defendant’s motion fails to demonstrate both that his counsel’s representative was other than professionally competent and that he was prejudiced by counsel’s performance.

Accordingly, the defendant's motion, brought pursuant to CPL § 440.10 to vacate his judgment is denied in its entirety without a hearing.

This constitutes the decision and order of the court.

Dated: May 2, 2013

  
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James P. Sullivan, J.S.C.  
**HON. JAMES P. SULLIVAN**  
**J.S.C.**

**ENTERED**  
  
MAY - 3 2013  
  
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. The 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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