SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 18

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THE PEOPLE OF THE STATE OF NEW YORK — Notice of Motion

– against –

JENNIFER KING, — Indictment No.4321/1986

Defendant.

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WILLIAM M. HARRINGTON, A.J.S.C.

Notice of Motion	Smotritsky Law Group, PLLC By: Stanley Smotritsky, Esq.
Opposition Filed By:	Charles J. Hynes, District Attorney By: Michael L. Brenner, Esq. Assistant District Attorney

Upon defendant's Notice of Motion, filed March 6, 2013, and the People's Response to Defendant's Motion, dated June 10, 2013, defendant's motion is decided in accordance with the accompanying decision.

Dated: June 28, 2013
Brooklyn, New York

WILLIAM M. HARRINGTON, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 18

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THE PEOPLE OF THE STATE OF NEW YORK — Decision

– against – — Notice of Motion

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Defendant.

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WILLIAM M. HARRINGTON, A.J.S.C.

The defendant, a citizen of Jamaica, West Indies, stands convicted of Criminal Possession of a Controlled Substance in the Fourth Degree (Penal Law § 220.09). Defendant now moves pursuant to Criminal Procedure Law 440.10(1)(h) to vacate her judgment of conviction. The defendant contends that her plea was not knowingly and voluntarily entered because her counsel did not properly advise her about the immigration consequences of her plea.

The court has considered the defendant's motion, as well as the People's response opposing the requested relief. For the reasons set forth below, the defendant's motion to vacate her judgment of conviction is denied.

Factual Background

By Indictment Number 4321/1986, the defendant was charged with one count of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]), one count of Criminal Possession of a Controlled Substance in the Fourth Degree (Penal Law 220.09[1]), and one count of Criminally Using Drug Paraphernalia in the Second Degree (Penal Law 220.50[2]). It was alleged that on June 24, 1986, while police officers executed a search warrant at 144 Woodruff Avenue, Apartment 2A, in Brooklyn, a quantity of crack-cocaine was thrown out the window of the apartment's

bathroom, from which the defendant, and the co-defendant, Margarette Johnson, were subsequently seen exiting. Police officers recovered 36 vials of crack-cocaine, drug paraphernalia, and $653 from a bedroom in the apartment. A second co-defendant, Margaret Sibblies, was also in the apartment when the police arrived.

On March 18, 1987, the defendant pleaded guilty to one count of Criminal Possession of a Controlled Substance in the Fourth Degree (Penal Law § 220.09[1]), a class C felony, with an agreed-upon sentence to a term of incarceration of six months to be followed by a probationary term of five years. Judge Rienzi sentenced the defendant as promised on April 30, 1987. The defendant was represented by appointed counsel, Mr. David Windley. According to New York State's attorney directory, Mr. Windley is deceased.

Trial defense counsel filed a notice of appeal on the defendant's behalf.[1] A search of the Westlaw New York case law database does not reveal any reported appellate criminal cases wherein Jennifer King was the defendant-appellant. The defendant served her sentence and her probationary period has concluded.

At the time of her plea the defendant had two previous convictions. On July 18, 1986, the defendant was convicted of Petit Larceny. On July 31, 1985, the defendant was convicted of possessing stolen property in New Jersey.

The defendant did not have legal status in the United States when she pleaded guilty under the instant indictment. The defendant is not currently in removal proceedings. She has resided in the United States for the last 25 years.

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[1]The notice of appeal specifically provided that trial counsel would not be representing the defendant on appeal. The defendant does not aver that she obtained counsel or that she petitioned to proceed in forma pauperis.

Conclusions of Law

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. *Strickland v. Washington*, 466 US 668 (1984); *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 show that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 687. To satisfy the second prong of the test a defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" *Hill v. Lockhart,* 474 U.S. 52, 58 (1985). A defendant must affirmatively prove prejudice to succeed under the second prong of the *Strickland* test. In New York, it is well settled that "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 N.Y.2d 137, 147 (1981).

The defendant's claim relies upon *Padilla v. Kentucky*, 559 U.S. 356 2010, in which the United States Supreme Court held that a defense attorney's inaccurate advice about the potential immigration consequences of a guilty plea may fall below an objective standard of reasonableness under the *Strickland* test. "When the law is not succinct and straightforward ... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences .... But when the deportation consequence is truly clear, as was in this case, the duty to give correct advice is equally clear." *Id.* at 1483. In so ruling, the Court looked to the two-pronged analysis of *Strickland v. Washington* (466 U.S. 668 [1984]) in determining whether defendant received the effective assistance of competent counsel.

At the time that the defendant filed her motion, the United States Supreme Court had not determined whether its holding in *Padilla* should apply retroactively. Shortly

after the defendant filed her motion, the Supreme Court held in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), that *Padilla* does not have retroactive effect and "defendants whose convictions became final prior to Padilla...cannot benefit from its holding." *Id.* at 1113. Here, the defendant filed a notice of appeal and since it is unclear whether the defendant perfected an appeal, the court will analyze this case pursuant to the *Padilla* standard.

The defendant is not entitled to relief according to the holding in *Padilla* because she has not established that her counsel failed to provide effective assistance. Prior to 1990, deportation was not a mandatory consequence of a criminal conviction because sentencing judges were empowered with discretion to recommend against deportation pursuant to the 1952 Immigration and Nationality Act ("INA"). See *Padilla* at 1479. Discretionary relief was also available to a defendant convicted of narcotics charges. It was not until 1990, three years after the defendant pleaded guilty, that the judicial recommendation against deportation ("JRAD") was eliminated. *Id.* Moreover, it was not until the mid 1990s that advice about immigration consequences became the professional norm, particularly due to amendments which made deportation a virtual certainty following a conviction for a narcotics offense. *People v. Roberts*, 36 Misc. 3d 1239A (Sup. Ct. N.Y. Co. September 7, 2012). Considering the law at the time of the defendant's plea, and the immigration enforcement practices in 1987, it cannot be said that counsel's representation fell below an objective standard of reasonableness.

The defendant has also failed to satisfy the second prong of the *Strickland* test. The defendant has failed to allege more than a self-serving conclusory claim that, but for her defense counsel's alleged ineffectiveness, she would not have pleaded guilty and would have insisted on going to trial. The defendant does not maintain her innocence nor does she suggest that there is available to her a plausible defense to the charges.

Moreover, apart from her self-serving declaration, the defendant has not demonstrated with any reasonable probability that she would have insisted on going to trial had her attorney advised her of potential immigration consequences. The defendant was charged with Criminal Sale of a Controlled Substance in the Third Degree, a class B felony. Had she been convicted of this charge she could have been sentenced to a

term of imprisonment of as much as 8⅓ to 25 years; at a minimum, she would have received a sentence to a term of imprisonment of 1 to 3 years incarceration. Ultimately, the defendant pleaded guilty to a class C felony and, although she could have been sentenced to as much as 5 to 15 years incarceration, the Court sentenced defendant to a six month prison sentence along with five years probation.

The defendant has also failed to demonstrate ineffective assistance under the New York standard of meaningful representation. The plea agreement was plainly advantageous to the defendant and there is no reason to think that she did not accept it knowingly and willingly. In addition, as asserted by the People, the case against defendant was strong; during the execution of a search warrant, police officers witnessed her running from a bathroom, moments after 36 vials of cocaine were thrown from the bathroom window.

Viewing the totality of the circumstances, counsel provided effective assistance of counsel to the defendant and obtained a favorable disposition of the defendant's case in the face of a likely conviction of a serious felony crime after trial.

Accordingly, the defendant's motion to vacate the judgment of conviction is denied.

This is the decision of the Court.

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Dated: June 28, 2013
Brooklyn, New York

WILLIAM M. HARRINGTON, A.J.S.C.