People v Philogene
2014 NY Slip Op 33042(U)
November 21, 2014
Supreme Court, Kings County
Docket Number: 11089-1997
Judge: Matthew J. D'Emic
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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM, PART 4

PRESENT: HONORABLE MATTHEW J. D'EMIC

THE PEOPLE OF THE STATE OF NEW YORK

- against -

MARIO PHILOGENE,
Defendant.

DECISION AND ORDER

Date: November 21, 2014

IND #11089-1997

Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL §440.10 on the grounds that he was denied the effective assistance of counsel when his attorney failed to inform him of the immigration consequences of his plea. For the following reasons, the motion is denied.

In connection with an incident that took place on September 20, 1997, defendant was charged under Kings County Indictment #11089-1997 with two counts of rape in the first degree (PL §130.35[1]), three counts of sexual abuse in the first degree (PL §130.65[1]), two counts of sexual misconduct (PL §130.20[1]) and unlawful imprisonment in the second degree (PL §130.05). On January 14, 1998, represented by counsel, defendant pleaded guilty to unlawful imprisonment in the second degree in full satisfaction of the indictment. He was sentenced, as promised, to time served and three years' probation on February 26, 1998 (Barros, J. at plea and sentence).

Defendant was previously convicted of crimes including criminal possession of stolen property in the fifth degree (PL §165.40) and robbery in the second degree (PL §160.10[2][b]) under Queens County Indictment #5558-1992. In that case he was sentenced to a term of imprisonment of one and one-half to four and one-half years in 1993.

Born in Haiti, defendant immigrated to the United States in 1984 and became a lawful permanent resident. A Notice to Appear was issued on August 27, 2012 charging defendant as deportable pursuant to 8 USC §237(a)(2)(A)(iii) on the basis of his 1993 Queens County convictions. He was taken into custody by the Department of Homeland Security on October 14, 2012 and was deported to Haiti on November 19, 2013.

In the instant motion defendant alleges that his attorney failed to advise or misadvised him of the immigration consequences of his guilty plea in the 1998 case. He argues that had his attorney informed him that he would be deported as a result of his conviction, he would have proceeded to trial or sought an alternative disposition.

As a preliminary matter, defendant's deportation rendered the instant motion moot because he is no longer within the jurisdiction of the court. In *People v Ventura*, 17 NY3d 675 (2011), the Court of Appeals held that the intermediary appellate courts erred when they dismissed appeals by defendants who had been deported, based on the reasoning that CPL §450.10 gives defendants an absolute right to seek

some level of appellate review of their convictions. However, this rationale has not been applied in motions to vacate the judgment pursuant to CPL §440.10 and trial courts have dismissed such motions without prejudice, thus permitting defendants with otherwise meritorious claims to seek redress in the event they somehow returned to the United States (*People v Bonilla*, 41 Misc.3d 894 [Queens County 2013] [motion dismissed without prejudice because defendant no longer able to obey the mandate of the court]; *People v Reid*, 34 Misc.3d 1234[A] [NY County 2012] [deported defendant's motion found moot, dismissed without prejudice]; *People v Casada*, 30 Misc.3d 1202[A] [Kings County 2010] [dismissal without prejudice]).

In the event defendant were to return to the United States, the claim that he received ineffective assistance of counsel is not cognizable under *Padilla v Kentucky*, 559 US 356 (2010), in which the United States Supreme Court extended the reach of the Sixth Amendment right to counsel under *Strickland v Washington*, 466 US 668 (1984) to non-citizen defendants facing criminal charges that carry immigration consequences. The Supreme 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. Applying the two-prong test under *Strickland*, the court determined that counsel's failure to provide immigration advice was

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deficient under the first prong. A defendant raising a claim under *Padilla* and *Strickland* must also 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 US 52, 59 [1985]; *People v McDonald*, 1 NY3d 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).

In *Chaidez v United States*, __ U.S. __, 133 S.Ct. 1103 (2013), the Supreme Court established that *Padilla* does not have retroactive application to convictions that have already become final. The Court of Appeals has likewise determined that, under New York law, *Padilla* is not retroactive to cases not on direct review (*People v Baret*, __ NY3d __, 2014 WL 2921420 [June 30, 2014]). A conviction becomes final when the availability of appeal has been exhausted (*Griffith v Kentucky*, 479 US 314 [1987]). In the instant case, defendant's conviction became final on March 28, 1999 (when his time for filing a notice of appeal expired), long before *Padilla* took effect on March 31, 2010. Accordingly, the requirement that counsel provide immigration advice does not apply to his case and counsel's conduct cannot be held to be deficient under the first prong of *Strickland*. More importantly, however, pursuant to the Immigration Law, unlawful

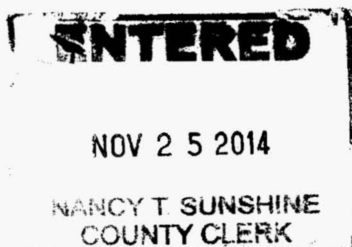
imprisonment in the second degree (PL §135.05), the crime to which defendant pleaded guilty in 1998, was never a deportable offense (*see* 8 USC §1227[a][2][A]). Even were counsel subject to the duty imposed by *Padilla*, there were no immigration consequences attached to the crime to which defendant pleaded guilty.

Moreover, defendant was not prejudiced by the alleged deficiency of counsel because he is not being deported on the basis of the instant conviction. According to the Notice to Appear, the only grounds listed for deportation are the Queens County convictions from 1993. Thus, defendant's claim that he would have chosen to proceed with trial had counsel advised him of the potential immigration consequences of pleading guilty is immaterial. Indeed, even had he gone to trial and been acquitted, he would nevertheless have been subject to removal on the independent basis of his 1992 conviction. Any alleged misadvice on the part of counsel had no effect on his subsequent immigration problems.

Accordingly, the motion is denied in its entirety.

This decision constitutes the order of the court.

E N T E R:



Matthew J. D'Emic
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.

APPELLATE DIVISION, 2nd Department
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Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

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MARIO PHILOGENE, Defendant.	IND #11089-1997

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