SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 70
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THE PEOPLE OF THE STATE OF NEW YORK

-against- IND # 3155/02

DECISION AND ORDER

FERMIN VELEZ,
Defendant.
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AMBRECHT, J. :

Defendant was charged with Criminal Possession of a Controlled Substance in the First Degree (PL § 220.21[1]), Criminal Possession of a Weapon in the Fourth Degree (PL § 265.01[1]), and Criminally Using Drug Paraphernalia in the Second Degree (PL § 220.50[3]) on May 21, 2002. On June 3, 2003, he was convicted upon a plea of guilty to Criminal Possession of a Controlled Substance in the Second Degree (PL §220.18) with a promised sentence of 3 years to life. Defendant was sentenced to the promised term on August 5, 2003.

Defendant now moves to vacate this conviction and set aside the sentence pursuant to the common law doctrine of *coram nobis* and CPL §440.10(1)(h) asserting that his counsel provided ineffective assistance by: (1) improperly pressuring him to enter into the plea of guilty; (2) that there was an improper allocution on the charges and; (3) that counsel failed to investigate the facts of the case.

Factual Background

On May 21, 2002, the defendant was at the location of 609 West 135th Street, Apt. 2, with two other individuals, when police searched the apartment. The police confiscated multiple bags of cocaine, $2,718 in United States currency, a loaded .25 caliber weapon, an imitation pistol, and drug paraphernalia. Defendant was arrested and charged with Criminal Possession of a Controlled

Substance in the First Degree, Criminal Possession of a Weapon in the Fourth Degree, and Criminally Using Drug Paraphernalia in the Second Degree. Subsequently, the defendant was indicted on all counts and on June 3, 2003, he pled guilty to one count of Criminal Possession of a Controlled Substance in the Second Degree (PL §220.18). Defendant alleges the police officers, Assistant District Attorney and his own attorney wrongfully pressured him to plead guilty

Arguments

Defendant argues he received ineffective assistance of counsel because his lawyer improperly pressured him to enter into a plea of guilty to Criminal Possession of a Controlled Substance in the Second Degree. Specifically, defendant claims counsel dissuaded him from trial by instilling fear of a long-term prison sentence. The defendant also claims ineffective assistance of counsel because his attorney allegedly failed to sufficiently investigate the facts of the case. Instead, counsel simply accepted the facts as provided by the police, thus affecting defendant's opportunity for a fair trial. Finally, defendant avers he was not allocuted properly as to Criminal Possession of a Controlled Substance in the Second Degree.

The People counter that defendant received meaningful representation. His counsel successfully negotiated the lowest possible offer that could legally be offered to him and, had defendant been able to provide the People with pertinent information, he could have become an informant as well. Furthermore, defendant's plea colloquy supports his conviction, as he pled guilty of his own free will and willingly answered the court's questions.

Discussion

Both federal and state law guarantee a defendant the right to effective assistance of counsel (*Strickland v Washington*, 466 US 668 [1988]; *People v Ford*, 86 NY2d 397, 404 [1995]). In

Strickland v Washington, *supra*, the Supreme Court of the United States set forth a two pronged test for evaluating claims of ineffective assistance of counsel. The first prong requires a showing that counsel's performance was deficient and the second prong requires a showing that the deficiency caused actual prejudice to the defendant.

In the context of a guilty plea a defendant must prove that counsel's performance fell below an objective standard of reasonableness and actually prejudiced defendant (*Hill v Lockhart*, 474 US 52, 57 [1985]). "The defendant must show 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*, *supra* at 59). Applying the federal standard here, the defendant's claim fails the first prong of the test. The defendant has not substantiated the claim that his counsel wrongfully pressured him to plead guilty. In fact, defendant's counsel successfully negotiated the lowest possible plea offer. Without corroboration of ineffectiveness of counsel, it cannot be shown that trial counsel's performance fell below the objective standard of reasonableness.

In his moving papers, defendant makes the assertion that his counsel should not have allowed him to plead guilty to a deportable offense. However, even if counsel failed to discuss the deportation consequences with the defendant, it is well established that deportation is a collateral consequence of conviction. As such, counsel was not obligated to inform the defendant that it was a possible consequence of his plea (*People v Ford*, 86 NY2d 397, 403 [1995]; *People v Boodhoo*, 191 AD2d 448 [1993]).

While affirmative misrepresentations have been held to constitute ineffective assistance, *People v McDonald*, (1 NY3d 109, 114 [2003]), the mere failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel (*People v*

McDonald, supra, NY3d 109, 114 [2003]; *People v Ford, supra* at 404; *see also United States v Del Rosario*, 902 F2d 55, 59 [DC Cir 1990], *cert denied* 498 US 942 [1990]). Here, there is no support for defendant's bare bones assertion that counsel affirmatively misrepresented that he would not be deported as a result of the conviction.

Nor has defendant satisfied the prejudice prong of the federal standard. To satisfy the prejudice prong a defendant's allegations must be sufficient to show 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. (*People v McDonald, supra* at 114; *Hill v Lockhart, supra* at 59). Here, defendant relies only upon his own sworn statement that he was pressured to plead guilty. He has not shown any counsel error that could have possibly prejudiced him. Also, the record demonstrates defendant was informed by the Court at the time of the plea that the conviction could result in deportation (plea minutes p. 5, 6). Accordingly, even if counsel did fail to advise the defendant about the possibility of deportation, it cannot be said that defendant was prejudiced by the omission.

The state standard for evaluating effective assistance of counsel is less stringent than that of the federal courts (*see e.g., People v Stultz*, 2 NY3d 277, 282 [2004]; *People v Henry*, 95 NY2d 563, 566 [2000]; *People v Benevento*, 91 NY2d 708 [1998]). Under state law, counsel renders effective assistance when "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" (*People v Baldi*, 54 NY2d at 147; *People v Ford, supra*). Under the state constitution "a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness

of counsel" (*People v Ford*, 86 NY2d at 404). Counsel successfully negotiated a much lesser sentence for the defendant and advised him to take the plea bargain. Defendant claims he was pressured by trial counsel, but nothing in the record casts doubt on counsel's effectiveness. Also, defendant avers he felt "pressure" from the District Attorney's office, but no specific claims of coercion or threats have been made (see, e.g. *People v Heffernan*, 35 Misc 2d 213 [NY County Ct 1962]). Therefore, the defendant was provided with meaningful representation as defined by New York case law.

Pursuant to CPL §440.30(4)[d] (i) and (ii) the Court may deny defendant's motion without a hearing if an allegation of fact essential to support the motion is contradicted by the court record or is made solely by the defendant and is unsupported by any other affidavit or evidence and under all the other circumstances attending the case, there is no reasonable possibility that the allegation is true. Defendant's claims that the plea was coerced by his attorney is completely unsubstantiated and belied by the record. During the allocution, defendant indicated that he fully understood the plea and that he would be waiving several rights. Furthermore, the defendant responded "no" when the court asked if anyone was forcing or compelling him to plead guilty. At no time during his allocution did defendant indicate he had been coerced into a plea.

The Court has considered defendant's remaining arguments that trial counsel failed to investigate the facts and that his allocution was insufficient and finds them to be without merit. Accordingly, the motion is denied.

This constitutes the Decision and Order of the Court.

Dated: March 26, 2007

Hon. Michael R. Ambrecht
J.S.C