

People v Suero

2007 NY Slip Op 31472(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0010251/1987

Judge: A. Kirke Bartley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

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THE PEOPLE OF THE STATE OF NEW YORK.

-against-

DECISION and ORDER
Indictment No. 10251/87

MARIA SUERO,

Defendant.

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JUSTICE A. KIRKE BARTLEY:

Defendant was indicted on two counts of Criminal Sale of a Controlled Substance in the Third Degree in an indictment filed on November 16, 1987. On December 16, 1987, defendant entered a guilty plea to one count of Attempted Criminal Sale of a Controlled Substance in the Third Degree. She was sentenced to five years probation on January 27, 1988.

Defendant has now moved pursuant to CPL §440.10 to vacate judgement and withdraw her guilty plea on the ground that she received ineffective assistance of counsel. Defendant, a citizen of the Dominican Republic, contends that her attorney failed to inform her of the possible immigration consequences of her plea. Defendant is currently a legal permanent resident and contends that her conviction has prevented her from becoming a naturalized United States citizen. Defendant requests that this court permit her to change her plea from Criminal Sale of a Controlled Substance to Criminal Possession of a Controlled Substance and thereafter seal the court file.

Defendant alleges that her counsel failed to advise her of any future immigration consequences of her plea, and that had he informed her of such consequences she would have “consented to a different plea for [] drug possession [].” However, in light of the charges in this case, there is nothing in the court record to indicate defendant was ever offered, or would have

been offered, a plea to a possession offense. Defendant failed to submit an affirmation from defense counsel corroborating her allegations. Nor did she offer any explanation for the absence of such an affirmation. In her papers she states she does not recall authorizing a plea to a sale offense, despite the record indicating that she knowingly and voluntarily pled guilty to Attempted Criminal Sale of a Controlled Substance in the Third Degree. If she failed to recall the plea into which she voluntarily entered, she may also fail to recall any advice she may have received regarding possible immigration consequences of her plea. Without an attorney's affirmation, this court has only the allegations of a defendant who admittedly fails to recall at least some of the proceedings that took place twenty years ago. Absent an affirmation from her attorney corroborating her claims (or a plausible explanation for its absence), her moving papers are deficient. (See *People v. Morales*, 58 NY2d 1008 [1983]; *People v. Stewart*, 295 AD2d 249 [1D 2002]; *People v. Chen*, 293 AD2d 362 [1D 2002]; *People v. Johnson*, 292 AD2d 284 [1D 2002]; *People v. Taylor*, 211 AD2d 603 [1D 1995]).

In any event, defendant's claim of ineffective assistance of counsel lacks merit. Assuming defendant's attorney did fail to advise her of the possible immigration consequences of her plea, such failure would not mean her counsel was ineffective. The federal and New York state constitutional right to effective assistance of counsel requires that an attorney provide "meaningful representation" to a criminal defendant. (See *People v. Ford*, 86 NY2d 397 [1995]; *People v. Baldi*, 54 NY2d 137 [1981]). "In the context of a guilty plea, 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). The record clearly indicates that defense counsel negotiated an advantageous plea for the

defendant in this case. Defendant was indicted for two counts of Criminal Sale of a Controlled Substance in the Third Degree. She was then offered, and pled guilty to, a single count of the lesser charge of Attempted Criminal Sale of a Controlled Substance in the Third Degree. As a result of that plea bargain, defendant was able to avoid a mandatory term of incarceration and was placed on probation. Nothing in the court record otherwise casts doubt on the effectiveness of defendant's attorney.

That defendant's attorney may have failed to advise her of the possible immigration consequences of the plea does not constitute ineffective assistance of counsel. The failure of an attorney to advise a defendant that a plea may result in deportation does not constitute ineffective assistance of counsel. (*See People v. McDonald*, 1 NY3d 109, 114 [2003]; *People v. Ford*, 86 NY2d 397 [1995]; *People v. Holder*, 32 AD3d 734 [1D 2006]). Nor, inferentially, does the failure of an attorney to advise a defendant that a plea may result in other, less extreme, immigration consequences. That defendant's attorney in this case may not have advised her that her conviction could become a bar to naturalization twenty years after her plea does not make his representation less than meaningful.

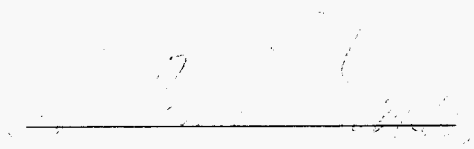
Finally, defendant's reliance on *People v. Cuaran* (261 AD2d 169 [1D 1999]) is misplaced. In that case, the court resentenced the defendant to a term that was one day less than his previous sentence to avoid unanticipated immigration consequences. Unlike the remedy that defendant is seeking here, there was no need to vacate the plea in *Cuaran*, and the resentence was with the consent of the People. In this case, this court has no authority to vacate defendant's plea and permit her to re-plead to a possession offense without the consent of the assistant district attorney. Based upon the response to defendant's motion by Assistant District Attorney David M.

Sobotkin, no such consent is given here.

Accordingly, the motion is denied.

DATED: May 9, 2007

New York, NY



JUSTICE, SUPREME COURT

ROSA A. HIRSCH BARTLEY