

**People v Phillip**

2007 NY Slip Op 32428(U)

July 2, 2007

Supreme Court, Kings County

Docket Number: 0007140/2001

Judge: Patricia DiMango

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 30

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

HON. PATRICIA M. DI MANGO

Date: July 2, 2007

-against-

DECISION & ORDER

CURTIS PHILLIP,

Indictment No. 7140/2001

Defendant.

-----X

The defendant was convicted of assault in the first degree and assault in the third degree, upon his plea of guilty, on July 2, 2002 (Barros, J. at plea). According to the plea agreement, upon completion of a designated program, the felony charge of assault in the first degree would be dismissed and the defendant would be re-sentenced to assault in the third degree with a conditional discharge. Defendant, however, was unable to successfully complete two successive programs and, thus, was sentenced on April 22, 2005 to concurrent terms of imprisonment of five years and one year, respectively. The defendant also waived his right to appeal.

Defendant herein moves, *pro se*, to vacate the judgment of conviction on the grounds that (1) he was deprived of his right to effective assistance of counsel because his attorney failed to inform him of the immigration consequences of his guilty plea; and (2), that as a non-citizen, he was not advised of his right to consular notification pursuant to Article 36 of the Vienna Convention on Consular Relations (“Vienna Convention”).

***Ineffective Assistance of Counsel***

A defendant has the right under both the Federal and State Constitutions to effective assistance of counsel in the plea process (U.S. Const. 6<sup>th</sup> Amend; *Hill v Lockhart*, 474 U.S. 52 [1985]; N.Y. Const., Art I §6; *People v Ford*, 86 NY2d 397, 404 [1995]). The Federal

Constitution requires a defendant, claiming to have received ineffective assistance of counsel, to prove that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant (*Hill v Lockhart* at 58; *Strickland v Washington*, 466 U.S. 668, 687 [1984]). In the context of a plea, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (*Hill v Lockhart* at 59). "[T]he 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" (*id.* at 59).

Under the New York 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* at 404). Thus, where "a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation." (*People v McClure*, 236 AD2d 633 [2d Dept 1997], *lv. denied*, 89 NY2d 1097.)

A defendant must also show that he would have insisted on a trial if not for counsel's alleged error (*People v Atkins*, 12 AD3d 376, 376-377 [2d Dept 2004]); *People v Ammarito*, 306 AD2d 99, 100 [2d Dept 2003], *lv. denied*, 100 NY2d 640, *appeal withdrawn*, 3 NY3d 635; *People v Rodriguez*, 188 AD2d 623 [2d Dept 1992], *lv. denied*, 81 NY2d 891). "The sufficiency of defendant's factual allegations as to prejudice should be evaluated with reference to the face of the pleadings, the context of the motion and defendant's access to information." (*People v McDonald*, 1 NY3d 109, 115 [2003].) An unsubstantiated claim that the defendant would have

insisted on proceeding to trial is insufficient (*see, People v McKenzie*, 4 AD3d 437, 439 [2d Dept 2004]; *People v Melio*, 304 AD2d 247, 251-252 [2d Dept 2003]).

In this instance, the measure of counsel's performance depends on whether the consequences of the potential guilty plea were collateral or direct. In *Ford*, the Court of Appeals drew a distinction between those direct consequences of a plea of which a defendant must be advised and those indirect or collateral consequences that need not be addressed by the trial court or by counsel prior to a defendant's guilty plea (*People v Ford* at 403). A direct consequence was defined as "one which has a definite, immediate and largely automatic effect on defendant's punishment" (*id.*). In contrast, a collateral consequence is "a result peculiar to the individual's personal circumstances and one not within the control of the court system" (*id.*)

The Court in *Ford* held that deportation was a collateral consequence of a conviction as a result of the defendant's peculiar status as an alien, and because deportation is the product of a separate proceeding that is not within the control of the trial court (*id.*). Thus, "[t]he mere failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel." (*People v McDonald* at 114.) Moreover, the defendant, here, has not alleged that counsel had affirmatively misinformed or misled him about the collateral consequences of his decision to plead guilty (*see, id.*, at 114-115).

Furthermore, a highly beneficial disposition was negotiated for defendant that would have eliminated his exposure to incarceration. Defendant's inability to successfully uphold his end of the plea agreement was no fault of his attorney, and, even with his failure, defendant's sentence reflected a minimal term of incarceration.

Finally, defendant has not established that he would have insisted on a jury trial if not for some error attributed to counsel. Accordingly, defendant's claim of ineffective assistance of counsel is rejected.

### *Vienna Convention*

Article 36 of the Vienna Convention (21 U.S.T. 77, 100-101; T.I.A.S. No. 6820 [1963]) "concerns consular officers' access to their nationals detained by authorities in a foreign country." (*Sanchez-Llames*, \_ U.S.\_, 126 S.Ct. 2669, 2675 [2006].) The Article requires that "when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests." (*Id.*) Article 36 (1)(b) further requires that the detainee be informed by the detaining authorities of the right to contact consular officers without delay (*id.*).

The Supreme Court has declined to directly address whether the Vienna Convention grants individuals judicially enforceable rights (*see, Sanchez-Llames* at 2677-78; *Breard v Greene*, 523 U.S. 371, 376 [1998]). The Second Circuit, however, has held that because "there is a strong presumption against inferring individual rights from international treaties," consular notification cannot be equated with fundamental rights (*United States v De La Pava*, 268 F.3d 157, 164 [2d Cir. 2001]). In any event, in *Sanchez-Llames*, the Supreme Court held that, even assuming that the Vienna Convention created such rights, suppression of evidence was not an appropriate remedy for violations of Article 36 (*Sanchez-Llames*, at 2681). The Court observed that:

"Article 36 has nothing whatsoever to do with searches or interrogation. Indeed, Article 36 does not guarantee defendants *any* assistance at all. The provision

secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention – not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention.” (*Id.* at 2681 [emphasis in original].)

Furthermore, the Court stated that a foreign national’s due process rights are effectively protected by the same constitutional and statutory protections available to citizens who are detained on suspicion of committing a crime (*Id.* at 2681-2682).

Viewing the Vienna Convention from this vantage point, judicially enforceable individual rights have not been created by Article 36. Rather, “the purpose of the privileges and immunities [created by the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts.” (*United States v De La Pava, supra*, at 164, quoting Vienna Convention preamble at 79.) Thus, the failure to apprise defendant of his right to contact consular officials did not infringe on his individual rights and does not undermine his otherwise lawful conviction.

In any event, defendant has made no effort to establish that his decision to plead guilty was in any way affected by the failure of the police to alert him to his rights under the Vienna Convention. Absent a showing of actual prejudice, no remedy is available to the defendant for any alleged violation of the treaty (*see, Breard v Greene, supra*).

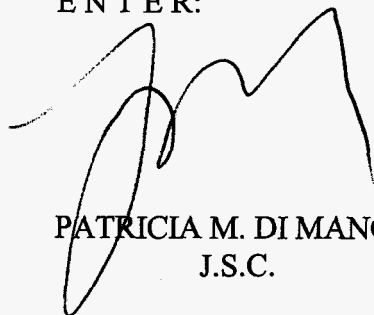
Accordingly, defendant’s motion to vacate the judgment of conviction is, respectfully, denied in its entirety without a hearing.

This decision shall constitute the order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, N.Y. 11201 for a certificate granting

leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

ENTER:



PATRICIA M. DI MANGO  
J.S.C.

