

People v Paulino

2007 NY Slip Op 32453(U)

July 13, 2007

Supreme Court, New York County

Docket Number: 0002686/1992

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. 2686-92

HILBERTO PAULINO, a/k/a Luis Alfonso Then,

Defendant.

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For the People: Richard Washington
Hilberto Paulino, pro se

JUSTICE A. KIRKE BARTLEY:

Defendant was indicted on one count of Criminal Sale of a Controlled Substance in the Third Degree in an indictment filed on March 31, 1992. On June 24, 1999, defendant entered a guilty plea to one count of Attempted Criminal Sale of a Controlled Substance in the Third Degree. He was sentenced to five years probation on September 9, 1999.

Defendant has now moved pursuant to CPL §440.10 to vacate judgement and withdraw his guilty plea on the ground that he received ineffective assistance of counsel. Defendant, a citizen of the Dominican Republic, claims that he had a poor understanding of the English language and of the legal system in 1992 and 1999, and that his lack of understanding and the lack of proper guidance resulted in an involuntary and invalid plea. He contends that his attorney failed to explain to him the distinction between the “sale” and the “possession” of narcotics, and failed to inform him of the possible immigration consequences of his plea. According to the defendant, his conviction has both prevented him from becoming a naturalized United States citizen, and has resulted in his likely deportation. Defendant requests that this court vacate the

judgement against him and permit him to withdraw his guilty plea in order to allow him to plea bargain, presumably for a lesser, possession offense that would not bear the same immigration consequences.

However, in light of the charges in this case, there is nothing in the court record to indicate defendant was ever offered, would have been offered, or will ever be offered a plea to a possession offense. While he contends that his lack of proficiency of English (and lack of guidance) caused him to fail understanding that he was pleading to sale offense, the minutes from June 24, 1999 (attached) demonstrate otherwise. Specifically, the plea minutes indicate that not only was an official Spanish interpreter present during the plea, but that the defendant engaged in an off the record conference with his attorney and the Spanish interpreter for the specific purpose of discussing the plea offer, prior to taking the plea.

Defendant also failed to submit an affirmation from defense counsel corroborating his allegations. Nor did he offer any explanation for the absence of such an affirmation. The absence of any corroborating affidavit is particularly relevant here where at least some of defendant's claims are not supported by the court record. Without an attorney's affirmation, this court has only the allegations of a defendant whose claims are, at least in part, contradicted by the court record. Absent an affirmation from his attorney corroborating his claims (or a plausible explanation for its absence), his 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 him of the possible immigration consequences of his plea. such failure would not mean his 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 one count of Criminal Sale of a Controlled Substance in the Third Degree. He thereafter warranted for seven years. When he returned he was offered, and pled guilty to, a single count of the lesser charge of Attempted Criminal Sale of a Controlled Substance in the Third Degree. That plea bargain not only resulted in a probationary sentence in lieu of a mandatory term of incarceration, but also satisfied the potential bail jumping charge that could have resulted from his seven year absence. Nothing in the court record otherwise casts doubt on the effectiveness of defendant's attorney.

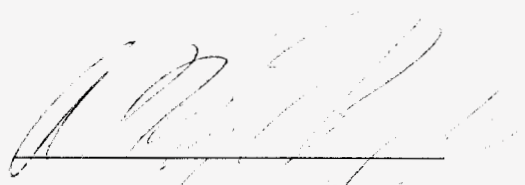
That defendant's attorney may have failed to advise him of the possible immigration consequences of the plea does not constitute ineffective assistance of counsel. The failure of an attorney to advise a defendant that a plea may result in deportation does not constitute ineffective assistance of counsel. (*See People v. McDonald*, 1 NY3d 109, 114 [2003]; *People v. Ford*, 86 NY2d 397 [1995]; *People v. Holder*, 32 AD3d 734 [1D 2006]). That defendant's attorney in this case may not have advised him that his conviction could become a bar to naturalization eight years after his 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 resentencing was with the consent of the People. In this case, this court has no authority to vacate defendant's plea and permit him 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 Richard Washington, no such consent is given here.

Accordingly, the motion is denied.

DATED: July 13, 2007

New York, NY



JUSTICE, SUPREME COURT

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