

People v Estrada

2007 NY Slip Op 32688(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0004348/1986

Judge: Bruce Allen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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

-against-

Ind. No. 4348/86 & 6823/86

GEORGE ESTRADA a/k/a GEORGE ORTIZ,
Defendant

-----X
For the People: David M. Sobotkin
George Estrada, *Pro Se*
JUSTICE BRUCE ALLEN:

On January 23, 1983, the defendant and a co-defendant robbed a woman on a subway platform, displaying a knife and stealing her money and property. The defendant was arrested immediately and was indicted for Robbery in the 1st Degree (Indictment No. 670/83). On March 3, 1983, the defendant pled guilty to one count of Robbery in the 1st Degree before Judge Harold Rothwax. Prior to the plea, there was some ambiguous (on and off the record) discussion about whether the defendant would be considered a youthful offender, juvenile offender, or neither. After this discussion, the defendant executed the plea colloquy and pled guilty to one count of Robbery in the 1st Degree. On March 24, 1983, defendant appeared for sentencing, and Judge Rothwax informed the defendant that the court had denied him youthful offender treatment based on the defendant's "prior criminal history and the seriousness of his present offense". The Court also recommended that the defendant be allowed to sentence his sentence at a youth facility.

In June 1986, defendant was indicted, under Indictment Nos. 6832/86 and 4384/96, for Criminal Sale of a Controlled Substance in the 3rd Degree. Each case involved an alleged sale of crack cocaine to an undercover officer. On Oct. 28, 1986, defendant pled guilty to Criminal Sale of a Controlled Substance in

the 5th Degree on both indictments before Judge Martin H. Rettinger. Prior to taking the plea, the Court informed the defendant of the promised sentence and the Court's intention to sentence the defendant as a second predicate felony offender, to a minimum of 2 years and a maximum of 4 years to run concurrently. In December 1986, defendant appeared for sentencing, and there was some discussion about whether he had received juvenile or youthful offender treatment in 1983. His attorney represented that he had examined the minutes of the 1983 plea, and did not find anything "that would make it unconstitutional" (Defendant's Exhibit 2, Plea Minutes, Dec. 2, 1986 [Rettinger, J.], at 3) to treat defendant as a predicate felon. Thus, defendant received the promised sentence, and was sentenced as a second predicate felony offender, based on his 1983 treatment as a "juvenile offender" instead of a "youthful offender".

In November 2000, pursuant to CLP 440.10(h), defendant sought to vacate his December 1983 conviction (Indictment No. 670/83) on the basis that it was obtained in violation of his constitutional rights, specifically, his right to effective assistance of counsel. Further, defendant sought to vacate his sentence under CPL 440.20(1) on the basis that the sentence was unauthorized, or otherwise invalid as a matter of law. On August 24, 2001, Judge Lewis Bart Stone denied defendant's motion to vacate the conviction, but granted his motion for re-sentencing. Judge Stone vacated the sentence and ordered that the defendant be adjudicated as a youthful offender, as the court's discussion of whether the defendant would receive youthful offender treatment was confusing and ambiguous. Additionally, Judge Stone held that the defendant was denied meaningful representation and effective assistance of counsel insofar as "the failure of defense counsel to clarify the court's promises and statements and to appropriately advise his client amount to 'less than meaningful representation'". Defendant's Exhibit 3, Decision and Order, Aug. 24, 2001 (Stone, J.), at 6.

Defendant Estrada has now moved pursuant to CPL §440.20(g) and §440.20(h) to vacate his December 1986 sentences (Indictment Nos. 4348/86 and 6823/86). CPL §440.10 sets forth the grounds upon which a defendant may seek to vacate a judgment. The defendant asserts, pursuant to CPL §440.10 (1) (h), the judgment against him "was obtained in violation of a right of the defendant under the

constitution of [New York] state”, because (1) his counsel was ineffective and (2) his plea was involuntary. Thus, Mr. Estrada appears to request that he should be allowed to vacate judgment.

Ineffective Assistance

Defendant asserts that his legal assistance was ineffective because his attorney “failed to adequately review and comprehend the minutes of the plea agreement in the 1983 conviction to fully appreciate the consequences”. Defendant’s Affidavit and Memorandum of Law, April 30, 2007, pg. 6. Additionally, defendant states that on multiple occasions, he requested that his attorney look into the 1983 case, but these requests “went on ‘death ears’” (sic). Id., pg. 10. Thus, because Mr. Estrada’s attorney did not discover that he should have been sentenced as a youthful offender in 1983, and consequently that crime should not have served as a predicate felony, defendant contends he was “prejudiced in a concrete way as a direct result of counsel’s deficient acts and omissions” and deprived of his constitutional rights. Id., pg. 10.

The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (*U.S. Constitution 6th Amendment; N.Y. Constitution, Art. I, §6*). As stated in People v. Ford (86 N.Y.2d 397, 657 N.E.2d 265; 633 N.Y.S.2d 270 [1995]), “[T]he standard for measuring the performance of counsel under the New York Constitution has been stated as follows: So long as 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, the constitutional requirement will have been met”.

Notably, “‘meaningful representation’ does not mean ‘perfect representation’”. Id., at 404; People v. Modica, 64 N.Y.2d 828; 476 N.E.2d 330; 486 N.Y.S.2d 931 (1985). When a defendant pleads guilty, he has been afforded “meaningful representation” when he receives “an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel”. People v. Ford, at 404; People v. Boodhoo, 191 A.D.2d 448; 593 N.Y.S.2d 882 (1993).

Here, Mr. Estrada was indicted for two counts of Criminal Sale of a Controlled Substance in the 3rd Degree in June of 1986. Each of these charges constitutes a felony under New York State law, punishable by 3.5-7 years each. In addition, the sentences could have run consecutively and exposed the defendant to

a significantly longer sentence. Thus, because Mr. Estrada's attorney was able to limit his conviction to two counts of Criminal Sale of a Controlled Substance in the 5th degree, and to limit the sentence to a minimum of two years and maximum of four years, to run concurrently, one can conclude that he received "an advantageous plea" and therefore, has been afforded "meaningful representation" under New York State law. People v. Lioto, 174 Misc. 2d 351, 664 N.Y.S.2d 414 (1997); People v. Caldwell, 4 Misc. 3d 1020A, 791 N.Y.S.2d 871 (2004).

"Under the Federal Constitution, the 'longstanding test for determining the validity of a guilty plea is whether the plea represent a voluntary and intelligent choice among the alternative courses of action open to the defendant'". People v McDonald, 1 NY3d 109, 802 N.E.2d 131, 769 N.Y.S.2d 781 (2003), Hill v Lockhart, 474 U.S. 52, 56, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). If defendants wish to challenge the voluntary and intelligent nature of their pleas on the ground of ineffective assistance of counsel, they must establish that the attorney's advice was not within the standard set forth in Strickland v Washington (466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 [1984]) (*see Hill*, 474 U.S. at 58, McDonald, 1 N.Y.3d 109). In Strickland, the Supreme Court adopted a two-prong test to evaluate claims of ineffective assistance of counsel. First, "the defendant must show that counsel's performance was deficient", such that counsel "made errors so serious that counsel was not functioning" as guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. Second, "the defendant must show that the deficient performance prejudiced the defense". In other words, to successfully state a claim of ineffective assistance of counsel, the defendant must show not only that his attorney actually erred, but "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, 474 U.S. at 59; Armstead v. Scott, 37 F.3d 202 (5th Cir. 1994). A failure to establish either prong of the Strickland test requires a finding that counsel's performance was constitutionally effective. *See Strickland*, 466 U.S. 668, 696.

Here, we need not even address the first prong of the Strickland test. Defendant's motion merely states that counsel was ineffective because he did not adequately review the plea minutes in the previous

case, such that the attorney would have discovered the 1983 conviction should not have served as a predicate felony. Thus, defendant asserts that sentencing him as a predicate was illegal. However, Mr. Estrada does not allege, and there is nothing in the record to suggest, that had counsel notified him that he was not a predicate, he would not have pled guilty. McDonald, at 115; People v. Rice, 240 A.D.2d 322, 659 N.Y.S.2d 749 (1997); People v. Pierce, 2007 NY Slip Op 1952; 38 A.D.3d 262; 831 N.Y.S.2d 173 (2007). On the contrary, the record suggests that the evidence against defendant was strong (he made two sales of crack cocaine to an undercover officer), and his exposure would have been significantly longer than 2-4 years if convicted at trial. Further, defendant does not contend that he was innocent or suggest that he had any realistic defense to the crimes charged.

Therefore, because Mr. Estrada does not allege that his attorney's failure to ascertain the information surrounding his 1983 conviction affected his decision to plead guilty, and his attorney's omission caused no prejudice to the defendant (McDonald, 1 NY3d 109, 115; People v. Molloy, 28 A.D.3d 681; 816 N.Y.S.2d 99 [2006]), the defendant does not provide sufficient facts to reach a conclusion that counsel's errors were so serious as to deprive the defendant of a trial. Consequently, we conclude that defendant was not denied effective assistance of counsel under either the State or Federal Constitution. *See* People v. Benevento, 91 N.Y.2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998); Strickland, 466 U.S. 668, 700.

Not Knowing/Voluntary

Thus, we must turn to defendant's contention that his guilty plea was not "knowingly, voluntarily and intelligently" entered into, such that the bargain was unfair and should be vacated. In Boykin v. Alabama (395 U.S. 238, 89 S. Ct. 1709 [1969]), the court established that there are certain fundamental rights that every person accused of a crime has, which may only be waived "knowingly, voluntarily and intelligently" (codified in Fed. R. Crim. P. 11(c); People v. Woodard, 188 Misc. 2d 7 [2001], citing Boykin).

In determining whether a plea is voluntary and intelligent, "the critical issue is whether the defendant understood the nature and substance of the charges against him, and not necessarily whether he understood their technical legal effect." Taylor v. Whitney, 933 F.2d 325, 329 (5th Cir. 1991). Here, the record confirms that the court engaged Mr. Estrada in a colloquy where defendant was fully apprised of his rights, the charges and consequences of his guilty plea. Further, defendant admitted that he pleading guilty on his own free will and was not at all coerced into taking the plea. Therefore, we conclude that the plea was a "voluntary and intelligent choice", and the facts on record do not warrant the withdrawal of his plea. Ford, 86 N.Y.2d at 402.

Consequently, defendant's motion to vacate his plea is denied.

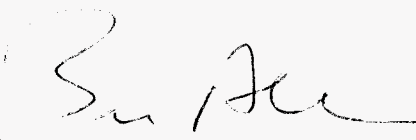
Re-Sentencing

At the time of his 1986 sentencing for two counts of Criminal Sale of a Controlled Substance in the 5th Degree, the defendant was adjudicated as a predicate felon and sentenced accordingly. In 2001, however, Judge Stone's decision and order converted the previous felony conviction to adjudication as a youthful offender. Defendant now asserts, and the People concur, that the 1986 adjudication was based on error, and the 1983 conviction could not serve as a predicate felony due to his youthful offender status at the time of commission. Per CPL §720.20(3), "Upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding...". Thus, defendant has moved to set aside the sentence, pursuant to CPL §440.20(a), on the ground that his adjudication and sentencing as a predicate felon was erroneous and, therefore, illegal. Thus, because defendant was improperly adjudicated as a predicate felon at the time of his sentencing, the sentence imposed was unauthorized.

Accordingly, the defendant's request for re-sentencing is granted. The defendant is to be produced for re-sentence.

August 2, 2007

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MON. BRUCE ALLEN