

People v Gonzalez

2007 NY Slip Op 32764(U)

August 23, 2007

Supreme Court, New York County

Docket Number: 0000312/1991

Judge: Roger S. Hayes

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK

: Indictments No. 312/99

-against-

Motion: CPL §§ 440.10,
: 440.20

DIEGO GONZALEZ,

:

Defendant.

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Robert Morgenthau, District Attorney, New York County (ADA Bernice Ordonez,
of counsel) for the People.

Defendant, pro se.

Honorable Roger S. Hayes:

Findings of Fact and Procedural History

On July 5, 1989, defendant pled guilty to one count of Attempted Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 110/220.39-1). On August 8, 1989, defendant was sentenced, as promised, to time-served and a five-year period of Probation (Carey, J., at plea and sentence).

On July 22, 2005, the Immigration and Naturalization Service (hereinafter "INS") denied defendant's application for status as a permanent resident and determined he was ineligible based on his conviction for Attempted Criminal Sale of a Controlled Substance in the Third Degree. INS determined defendant was inadmissible to the United States pursuant to section 212(a)(2)(A)(II) of the Immigration and Nationality Act. Defendant is therefore no longer legally permitted to stay in the United States. INS further determined

defendant might be eligible to receive a grant for voluntary departure from the United States; however, if that request was denied, he might be then subject to involuntary removal from the United States. Whether defendant is allowed to voluntarily depart or is involuntarily removed affects when or whether he will be permitted to legally return to the United States. Therefore, on March 1, 2006, defendant, once again, filed an application to register for permanent residency with the US Citizenship and Immigration Services. On November 24, 2006, the US Citizenship and Immigration Service denied his application to adjust his status pursuant to section 212(a)(2)(A)(II) of the INA and terminated his employment authorization.

While it is unclear whether INS has instituted removal proceedings against him, defendant is concerned he is subject to removal from the United States based on his drug conviction. As a result, defendant now moves pro se for an order vacating the judgment of conviction and setting aside the sentence pursuant to Criminal Procedure Law §§ 440.10 and 440.20. The basis of defendant's request is his claims 1) he was not advised of the immigration consequences of his guilty plea to a drug offense, 2) he was not informed of his right to consular assistance under Article 36 of the Vienna Convention, and 3) he was never provided a Spanish Interpreter during the plea allocution to advise him of the possible immigration consequences of entering a guilty plea. The People oppose defendant's motion.

Conclusions of Law

A trial court has the constitutional duty to ensure a defendant, prior to pleading guilty, has a full understanding of what the plea entails and its consequences (*see People*

v Harris, 61 NY2d 9 [1983]; *Boykin v Alabama*, 395 US 238 [1969]). Although courts are not required to engage in any particular litany when allocuting a defendant, due process requires “the plea represent a voluntary and intelligent choice among the alternative courses of action open to the defendant” (*People v McDonald*, 1 NY3d 109, 113 [2003]; *People v Ford*, 86 NY2d 397, 403 [1995]). Manifestly, courts are not in a position to advise on all the ramifications of a guilty plea personal to a defendant (*People v Ford*, 86 NY2d at 403). Accordingly, “courts have drawn a distinction between consequences of which the defendant must be advised, those which are ‘direct,’ and those of which the defendant need not be advised, ‘collateral consequences’” (*id.* at 403). “A direct consequence is one which has a definite, immediate and largely automatic effect on defendant’s punishment” (*id.* at 403). Collateral consequences are “peculiar to the individual and generally result from the actions taken by agencies the court does not control” (*id.*).

In *Ford*, the Court of Appeals held that “deportation is a collateral consequence of conviction because it is a result peculiar to the individual’s personal circumstances and one not within the control of the court system” (*id.*). Accordingly, the trial court was under no constitutional obligation to inform defendant of any possible collateral consequences of his plea, including the possibility of deportation, prior to accepting his plea of guilt. To the extent that CPL § 220.50[7] instructs a trial court to advise a defendant, prior to accepting a plea of guilty to a felony offense, of the immigration consequences of accepting such a plea, the statute explicitly states that the failure to do so does not affect the voluntariness of the plea or the validity of the conviction, and it does

not afford a defendant any rights in subsequent proceedings relating to defendant's deportation, exclusion or denial of naturalization.

Likewise, a violation of the consular notification provision under the Vienna Convention provides no basis for vacating the judgment of defendant's conviction or setting aside his sentence. There is no obligation for a court to advise a defendant of his rights under the Convention; rather, Article 36 of the Vienna Convention on Consular Relations provides that law enforcement must notify a foreign national's consulate upon the arrest of that foreign national (*see Matter of Walker v Pataki*, 266 AD2d 40 [1st Dept 1999]). It is unclear, however, whether the Vienna Convention confers any individually enforceable rights. Indeed, the Treaty's Preamble clearly states the purpose of the privileges and immunities contained in the Treaty "is not to benefit individuals but to ensure the efficient performance of functions by consular posts" (*Preamble to Vienna Convention*, 21 UST 77, 79). Thus, at most, the Convention "arguably" confers on foreign nationals the right to consular assistance. It does not however create any fundamental rights or the right to counsel (*US v Li*, 206 F3d 56 [1st Cir 2000]; *Waldron v INS*, 17 F3d 511, 518 [2d Cir 1993]).

Nonetheless, even assuming the treaty confers such individual rights, which is questionable, as indicated a violation of the consular notification provision provides no basis for vacating the judgment of defendant's conviction or setting aside his sentence. Defendant has failed to allege what effect, if any, a violation of Article 36 of the Vienna Conference had on his decision to plead guilty. He has offered no affidavits from the consulate detailing how they might have assisted him, nor has he offered any evidence the

consulate regularly provides assistance to arrested citizens (*see US v Rodrigues*, 68 FSupp2d 178 [ED NY 1999]).

Inasmuch as the right to consular assistance is not viewed as a fundamental right, courts have declined to suppress evidence (*US v Lombera-Camorlinga*, 206 F3d 882 [9th Cir 2000]) or dismiss an indictment (*US v Li*, 206 F3d at 62) for alleged Vienna Convention violations. Indeed, to vacate defendant's conviction and set aside his sentence on the speculative and unlikely assertion the consulate might have offered him guidance and reviewed the indictment against him would be to confer an additional layer of protection upon foreign nationals that is not provided to United States citizens, a circumstance clearly not intended by the drafters of the Vienna Convention (*see People v Litarov*, 188 Misc2d 234 [Crim Ct, Queens County 2001, Markey, J.]). Thus, the Court finds the vacatur of defendant's conviction and sentence for the alleged violation of the Vienna Convention is not warranted, and defendant's motion on this ground is denied.

The Court finds no merit to defendant's contention that he was not provided an interpreter at the time of the plea. On the contrary, the record establishes defendant entered a plea of guilty to Attempted Criminal Sale of a Controlled Substance in the Third Degree with the assistance of an Official Court Interpreter, Cecilia Solano. Further, during the plea allocution, defendant responded appropriately to all questions posed by the court and indicated he knew what was transpiring and wished to plead guilty of his own free will. There is no reasonable possibility that defendant's allegation is true as it is directly contradicted by the court record. Therefore, defendant's motion must be denied pursuant to CPL § 440.30[4][c].

For the above stated reasons, defendant's motion pursuant to CPL §§ 440.10 and 440.20 is denied. This constitutes the Decision and Order of the Court.

New York, New York
August 23, 2007



Roger S. Hayes, J.S.C.