

People v Ramos

2007 NY Slip Op 32765(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0000312/1999

Judge: Roger S. Hayes

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 NEW YORK: CRIMINAL TERM

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

: Indictments No. 312/99

-against-

: Motion: CPL §§ 440.10,
440.20 & 440.30

INOCENCIO RAMOS,

:

Defendant.

-----X

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

Defendant, pro se.

Honorable Roger S. Hayes:

Findings of Fact and Procedural History

On March 17, 2000, defendant pled guilty to one count of Attempted Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 110/220.16). On May 1, 2000, defendant was sentenced, as promised, to a five-year period of Probation which expired on April 30, 2005 (Bradley, J., at plea and sentence).

On March 15, 2007, the Immigration and Naturalization Service instituted removal proceedings against defendant, a Dominican National. 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, 440.20 and 440.30. The basis of defendant's request is his claims the court never informed him of the possible immigration consequences of entering a plea of guilty to a drug offense, his attorney was ineffective because he never advised him of the immigration consequences of entering a

guilty plea to a drug offense, and he was not provided his right to consular assistance under Article 36 of the Vienna Convention. 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 represents 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 guilty. 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. Thus, the branch of defendant's motion seeking redress based on the court's failure to advise him of the immigration consequences of his guilty plea is denied.

Moreover, the failure of counsel to warn defendant of the possibility of deportation, if it occurred, does not constitute ineffective assistance of counsel. The right to effective assistance of counsel in criminal proceedings is guaranteed by the New York and Federal Constitutions. The state standard for effective assistance of counsel has long been whether the defendant has been afforded meaningful representation (*People v Henry*, 95 NY2d 563 [2000]; *People v Baldi*, 54 NY2d 137 [1981]). When the conviction is based on a guilty plea, "a defendant 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*, 86 NY2d at 404). Moreover, defendant must also show "counsel's performance was deficient and that the deficiency in performance prejudiced the defendant" (*Strickland v Washington*, 466 US 668 [1984]).

Upon review of the parties's submissions, the Court file and the applicable law, the Court finds that meaningful representation was provided and defendant's constitutional

right to the effective assistance of counsel has been satisfied. Defendant's attorney procured an advantageous plea bargain, and nothing in the record casts doubt on the apparent effectiveness of counsel (*see People v Boodhoo*, 191 AD2d 448 [2d Dept 1993]). Defendant was charged with Criminal Possession of a Controlled Substance in the Third Degree. The case proceeded to trial and during deliberations, the jury informed the court it was deadlocked and unable to reach a verdict. The court declared a mistrial. The People intended to retry defendant, and he would have faced a minimum term of imprisonment of from one year to three years and a maximum term of imprisonment of from eight and one-third years to twenty-five years. However, new counsel successfully negotiated a plea for defendant to Attempted Criminal Possession of a Controlled Substance in the Third Degree and to a sentence of five years probation. Thus, defendant received meaningful representation when his attorney secured a favorable plea bargain for him.

Further, even if his attorney did not warn him of the immigration consequences of his guilty plea, it would not support defendant's claim he was denied the effective assistance of counsel. The mere failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel (*People v Ford*, 86 NY2d 397). This is not a case involving a claim that defense counsel made affirmative misstatements (*US v Couto*, 311 F3d 179 [2d Circ 2002]) but, is only an allegation defense counsel failed to advise defendant of the collateral consequences of his plea of guilty.

Likewise, defense counsel's failure to advise defendant of a right to consular

assistance under the Vienna Convention in no manner indicates defense counsel failed to provide meaningful representation. First, the obligations under the Convention are not defense counsel's but law enforcement's. Article 36 of the Vienna Convention on Consular Relations provides for notification of 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, a violation of the consular notification provision provides no basis for vacating the judgment of defendant's conviction. Defendant has not shown any prejudice from his failure to receive consular advice and assistance. Defendant in no way shows how the absence of the Consulate's resources impacted negatively on his plea. He has offered no affidavits from the Dominican Consulate detailing how they might have assisted him, nor has he offered any evidence the Dominican Consulate regularly provides assistance to arrested Dominican citizens (*see US v Rodrigues*, 68 FSupp2d 178 [ED NY 1999]). Also, since counsel at the plea was assigned pursuant to the county law once trial

counsel was relieved after the hung jury, there was no issue for new counsel to raise regarding this subject.

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 on the speculative and unlikely assertion the Dominican Consulate might have offered him guidance or "protection for self-incrimination" 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.

For the above stated reasons, defendant's motion pursuant to CPL §§ 440.10, 440.20 and 440.30 is denied. This constitutes the Decision and Order of the Court.

New York, New York
August 20, 2007



Roger S. Hayes, J.S.C.