

People v Paulino

2007 NY Slip Op 34063(U)

November 29, 2007

Supreme Court, New York County

Docket Number: 0006190/2001

Judge: Patricia M. Nunez

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

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

-against-

VICTOR PAULINO,
Defendant.

-----X
PATRICIA NUÑEZ, J.:

DECISION AND ORDER

INDICTMENT # 6190/01

The defendant, Victor Paulino, moves, *pro se*, pursuant to CPL §440.10, for an order vacating his 2001 conviction by entry of a plea of guilty to a charge of Criminal Facilitation in the Second Degree (PL §115.05). The motion is predicated upon the defendant’s claim that his attorney’s failure to advise him of the immigration consequences of his plea and the language barrier between defendant and his counsel amounted to a denial of defendant’s right to the effective assistance of counsel. He further moves for a reduction in his sentence to time served. After review of the record and motion papers, the court concludes that the defendant has failed to make the requisite showing that he was denied the effective assistance of counsel as guaranteed by the Federal and State Constitutions. Accordingly, and for the reasons contained herein, defendant’s motion to vacate his judgment of conviction and reduce his sentence is denied.

Defendant was charged with both Criminal Sale of a Controlled Substance in the First Degree (PL §220.43(1) and Criminal Facilitation in the Second Degree (PL § 115.05). On December 4, 2001, after a lengthy allocution, defendant entered a plea of guilty to Criminal Facilitation in the Second Degree (PL § 115.05) before the Honorable Laura Ward in Part N in New York State Supreme Court. He was promised a sentence of 90 days of incarceration

followed by five years of probation.

Defendant, who admits he is not a United States citizen, alleges that his plea counsel and the court were aware of his undocumented immigration status and failed to discuss the immigration implications of his plea. He also alleges that the language barrier impacted his constitutional rights.

A CPL §440.10 motion is a procedural device for challenging a judgment of conviction based upon matters that may not have developed on the record. CPL §440.10 (1)(h) provides that, at any time after the entry of judgment, a defendant may move to vacate a judgment upon the ground that the judgment was obtained in violation of a right of the defendant under the Constitution of New York State or of the United States. One such right is the right to effective assistance of counsel which is guaranteed by the federal and state constitutions (United States Constitution, 6th Amendment; New York Constitution, Article 1, Section 6).

In *People v. McDonald*, 1 NY3d 109 (2003), the Court of Appeals reaffirmed that “defendants who seek to challenge the voluntary and intelligent character of their guilty pleas on the grounds of ineffective assistance of counsel must establish that defense counsel’s advice was not within the standard set forth in *Strickland v. Washington*, 466 US 668 (1984). In *Strickland*, the Supreme Court adopted a two-part test for evaluating claims of ineffective assistance of counsel, generally. A defendant must show that counsel’s performance was deficient, and that the deficient performance prejudiced the defendant.

Both the New York State and Federal courts have consistently held that 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 (1995). However, in *People v. McDonald*, *supra*, the

Court of Appeals noted that “governed by the United States Supreme Court’s *Strickland* decision, some federal courts have held that affirmative misstatements by defense counsel, may, under certain circumstances, constitute ineffective assistance of counsel (citing *United States v. Cuoto*, 311 F3d 179, 188 [2d Cir. 2002]; see also *United States v. Campbell*, 778 F2d 764, 768-769 [11th Cir. 1985]; *Downs-Morgan v. United States*, 765 F2d 1534, 1540-1541 [11th Cir. 1985].” In *Cuoto, supra*, the Court stated: “We have held that an attorney’s failure to inform a client of the deportation consequences of a guilty plea, without more, does not fall below an objective standard of reasonableness. See, e.g., *United States v. Santelises (Santelises II)*, 509 F2d 703, 704 (2d Cir. 1975). At the same time, we have implied that an attorney’s affirmative misrepresentations on the subject might well constitute ineffective assistance. *United States v. Santelises (Santelises I)*, 476 F2d 787, 789-90 (2d Cir. 1973).”

CPL §440.10 further provides that a motion to vacate may be denied without a hearing if “an allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, *or is made solely by the defendant and is unsupported by any other affidavit or evidence*, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true. (emphasis supplied). Defendant’s *pro se* motion papers fail to include an affirmation by plea counsel attesting to the facts of defendant’s representation.

CPL §440.10 (2)(b) also mandates that a court deny a motion to vacate a judgment if all necessary facts relating to the legal issue appear on the record. *People v. Cooks*, 67 NY2d 100 (1986). The “on the record” bar applies whether or not the issue, as opposed to facts, has been preserved for appellate review (*People v. Mower*, 97 NY2d 239, 245-246 (2002); *People v.*

Cooks, 67 NY2d 100, 103 (1986). The legal sufficiency of an allocution (*People v. Cooks, supra*) and the voluntariness of a plea (*People v. Mower, supra; People v. Angelakos*, 70 NY2d 670 (1987)), are matters that appear on the record, as they do herein.

The court has reviewed the minutes of defendant's lengthy plea allocution. The official court transcript indicates that the defendant was aided by the translations of an official Spanish-speaking interpreter. During the allocution, the plea court clearly advised the defendant that by pleading guilty he was giving up certain rights, such as the right to have the case presented to a grand jury, the right to a trial, the right to remain silent, the right to confront witnesses and have the People prove him guilty and the defendant agreed to give up those rights. The defendant was asked if he was satisfied with the representation that he received and whether he had enough time to discuss his plea and sentence and he replied affirmatively to both inquiries. He further denied being forced to plead guilty and denied being made any other promises. Finally, defendant admitted to acting as a "lookout" for the purposes of a drug sale. Based on the foregoing, the record indicates that defendant's plea was entered knowingly, intelligently and voluntarily.

It is well settled that counsel renders effective assistance when "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..." *People v. Baldi*, 54 NY2d 137 (1981). In this case, assuming that plea counsel failed to advise the defendant of the immigration consequences of his plea, such conduct or omission would not rise to the level of a finding of ineffective assistance of counsel. See, *Ford, supra*. Moreover, there is no allegation that plea counsel made affirmative misstatements regarding the pleas effect on defendant's immigration status.

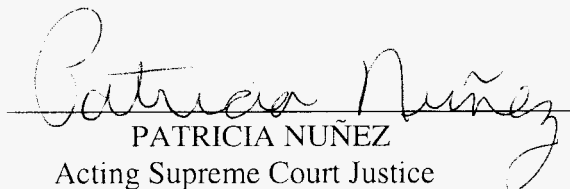
The decision not to go to trial and to accept a plea in this case is a decision that reasonably competent attorney would have made and it is not for the court to second guess whether a course chosen by defense counsel was the best trial strategy, or even a good one, so long as the defendant was afforded meaningful representation. See, *People v. Satterfield*, 66 NY 2d 796 (1985). Here, defendant received an advantageous plea, in that he plead guilty to a Class C felony, instead of potential exposure to many years of imprisonment, upon conviction of a Class A-I felony. When the defendant receives an advantageous plea and the record does not cast doubt on the apparent effectiveness of counsel, the defendant is deemed to have been given meaningful representation under the law. *People v. Baldi, supra*.

In sum, the sufficiency of defendant's plea allocution is a matter which appears on the record. Consequently, CPL §440.10 (2) mandates that the court deny a motion to vacate a judgment on the instant grounds. This court concludes that there is no suggestion that the defendant's plea was improvident or baseless. See, *People v. Harris*, 61 NY2d 9 (1983). Defendant received meaningful and effective representation, as the conduct of plea counsel was appropriate, given the circumstances of the case, and satisfied the objective standard of reasonableness outlined in *McDonald* and *Strickland*.

Accordingly, defendant's motion to vacate his judgment of conviction, entered against him on December 4, 2001, is denied.

This decision constitutes the decision and order of the court.

Dated: November 29, 2007
New York, New York


PATRICIA NUÑEZ
Acting Supreme Court Justice