

People v Clarke

2007 NY Slip Op 34317(U)

December 21, 2007

Supreme Court, Kings County

Docket Number: 0011031/1998

Judge: Michael L. Pesce

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MEMORANDUM

SUPREME COURT - KINGS COUNTY - CRIMINAL TERM - PART CV76

	:	By: Hon. Michael L. Pesce
THE PEOPLE OF THE STATE OF NEW YORK,	:	Dated: December 21, 2007
-v-	:	
CHARLES CLARKE,	:	Indictments #11031/98
Defendant.	:	14923/89
	:	14996/92
	:	2086/94

Defendant moves, pro se, to vacate the judgment of conviction arising from his guilty pleas under four separate indictments. Defendant completed his sentences without appealing from the judgment of conviction. In each instance defendant claims that his guilty plea was not knowing, voluntary and intelligent because he was not made aware of the immigration consequences of his decision to plead guilty. Defendant also asserts that his attorney was ineffective for failing to advise him of the possibility of being deported as a result of his plea, and in the alternative, for falsely advising him that his guilty plea would not subject him to deportation.

Background

On March 6, 1991, in satisfaction of indictments 11031/98 and 14923/89, defendant pleaded guilty to two counts of criminal sale of a controlled substance in the third degree, a felony, and was subsequently sentenced on March 28, 1991 to concurrent split sentences of six months in jail and five years probation. Under both of these two indictments, defendant claims

(1) that he was never advised by either the court or counsel that he could be deported as a consequence of his conviction; and (2) that he was mistakenly informed by both the court and counsel that he was not subject to deportation because he was pleading to a misdemeanor.

On September 27, 1993, defendant pleaded guilty to criminal possession of a weapon in the fourth degree under indictment #14996/92. He was sentenced on October 6, 1993 to a term of imprisonment of one year, to run concurrently with another one-year term for violating his probation under indictments #11031/89 and 14923/89. Defendant now claims that his attorney misinformed him that he would not be subject to deportation because he received a one-year sentence.

On December 8, 1994, defendant pleaded guilty to criminal possession of a controlled substance in the seventh degree under indictment #2086/94 and was sentenced on February 8, 1995 to three years probation. Defendant did not appeal.

More recently, defendant was convicted by guilty plea of criminal sale of a controlled substance in the seventh degree. Under Docket #2000KN067225 he was sentenced on September 13, 2000 to a conditional discharge and to participate in a Treatment Readiness Program. Following another conviction for seventh-degree criminal possession of a controlled substance, defendant was again sentenced on January 1, 2006 to a conditional discharge with a condition that he perform 10 days of community service. When defendant failed to appear in court a bench warrant was issued.

Upon being returned on the warrant, defendant pleaded guilty to violating the condition of his discharge for not having completed the community service and was re-sentenced to 66 days in jail. At that time defendant was arrested by officials of Immigration and Customs Enforcement

of the United States Department of Homeland Security and charged with violating 8 USC § 1227 (A)(2)(A)(iii) (commission of an aggravated felony).

On February 5, 2007, defendant's pro se motion to vacate the judgments of conviction from the two Criminal Court cases was denied (*People v Clarke*, 2007 NY Misc. LEXIS 268 [Crim. Ct. Kings Cty. 2007] [Wilson, J.]). Defendant had argued that his attorneys had failed to render effective assistance of counsel by affirmatively misadvising him that pleading guilty would not result in his deportation. The court held that defendant had not been prejudiced by his attorneys' conduct.

Discussion

As defendant has raised the same issues in each of his motions, they are addressed here together. Specifically, defendant alleges in his motions under indictments #11031/98 and 14293/89, which are virtually identical, that he was never informed that pleading guilty could result in his being deported. Defendant's motion papers under all four indictments, #14293/89, 11031/98, 14996/92 and 2086/94 also all allege that defendant was misinformed as to the immigration consequences of his plea. Defendant's papers under indictments 14996/92 and 2086/94 appear nearly identical as well. The following discussion addresses each of the two claims raised under the four pertinent indictments.

Defendant's claim that he was not informed of the immigration consequences of his plea, raised in his motions under indictments #11031/89 and 14293/89, is without merit. This claim arises from defendant's inaccurate contention that deportation is a direct consequence of pleading guilty to an aggravated felony. Generally, the court is obliged to warn defendants of direct

consequences prior to taking a guilty plea (*People v Ford*, 86 NY2d 397 [1995]). However, immigration consequences are collateral matters of which defense counsel has no obligation to advise the defendant (*Id.* at 404-406). Deportation is a collateral consequence because “it is particular to the defendant’s circumstances and outside the control of the court” (*People v Argueta*, 46 AD3d 46, 844 NYS2d 63, 65 [2d Dept. 2007], *citing Ford* at 403). Although the court is obligated by statute to advise the defendant on the record that the plea may result in deportation, the failure to do so “shall not be deemed to affect the voluntariness or the validity of a conviction...” (CPL § 220.50[7]). In any event, CPL § 220.50(7) is inapplicable to defendant’s plea on March 6, 1991 because it was not effective until June 15, 1995.

Similarly, a defense attorney’s failure to advise a defendant about exposure to deportation does not constitute ineffective assistance of counsel (*Ford* at 405). Absent additional factors indicating deficient performance by counsel, failing to warn about immigration consequences prior to the plea allocution does not alone render counsel ineffective (*see People v Leybinsky*, 299 AD2d 494 [2d Dept. 2002]; *People v Boodhoo*, 191 AD2d 448 [2d Dept. 1993]).

Thus, a failure by the court or counsel to advise defendant about the possibility of deportation does not render defendant’s plea involuntary. Accordingly, because defendant has not alleged that any other aspect of counsel’s performance was deficient, there is no legal basis for his first claim.

Defendant also alleges in each of his four motions that counsel falsely advised him that he would not face deportation as a result of his guilty pleas. Defendant’s claim is partially belied by the record and his contradictory allegation that he received no warning about the possibility of deportation renders it incredible (CPL § 440.30[4][d]). For instance, here defendant alleges that

he was told he would not be deported because he was pleading to a misdemeanor under indictments #11031/89 and 14923/89. Yet, defendant acknowledged on the record that he was pleading guilty to a felony under the first two indictments.

The allegation that counsel was ineffective for giving inaccurate advice is also without merit. Incorrect advice or affirmative misstatements about the immigration consequences of a guilty plea may constitute ineffective assistance of counsel if a defendant would not have otherwise pleaded guilty and would have insisted on proceeding to trial (*People v McDonald*, 1 NY3d 109, 114 [2003]; *People v McKenzie*, 4 AD3d 437, 438 [2d Dept 2004]). However, defendant has not shown that he was prejudiced by the alleged misinformation.

To prevail on an ineffective assistance of counsel claim under the Federal Constitution, the defendant must establish that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington*, 466 U.S. 668, 690 [1984]) and "fell below an objective standard of reasonableness" (*Hill v Lockhart*, 474 US 52, 58 [1985]). Furthermore, defendant must show "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 v Lockhart* at 59).

In New York, "[s]o 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" (*People v Baldi*, 54 NY2d 137, 147 [1981]). While defendant need not establish that but for counsel's deficient conduct he would not have pleaded guilty, as under *Strickland*, he must nevertheless show that he was denied meaningful representation by showing that the proceeding as a whole was unfair (*People v Caban*, 5 NY3d 143 [2005]; *People v Benevento*, 91 NY2d 708, 713 [1998]). "In the

context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea agreement and nothing else in the record casts doubt on the apparent effectiveness of counsel.” (*People v Ford* 404). Moreover, prejudice is a significant component of meaningful representation as expressed by the Court of Appeals’ skepticism of an ineffectiveness claim absent any showing of prejudice (*People v Stultz*, 2 NY3d 277, 284-285 [2004]).

In this instance, defendant’s unsupported allegations did not establish that counsel had in fact misled or misinformed him. Furthermore, defendant failed to demonstrate any prejudice. In both *McDonald* and *McKenzie* the respective Courts relied heavily on the defendant’s affirmation and the extent that it contained specific factual allegations. In *McDonald* the Court of Appeals found the affirmation to be lacking and the basis of a failure to make a prima facie showing of prejudice (*People v McDonald* at 115). In contrast, the Court in *McKenzie* rested its decision largely on the “evidentiary detail” of the defendant’s explanation (*People v McKenzie* at 439). Here, defendant’s account of prejudice was completely inadequate.

In all other respects counsel provided meaningful and competent representation, as reflected by the very favorable plea agreements and little or no jail time in each of the four cases (*see People v Mobley*, 221 AD2d 376[1995]). The evidence against defendant was overwhelming and nothing in the record casts a shadow over the performance of counsel.

No grounds exist to vacate the four judgments of conviction where defendant received meaningful representation. The proceedings were fair as a whole and defendant received the benefit of advantageous plea agreements in the face of significant jail time as a repeat offender. It is thus unlikely that defendant would have proceeded to trial in each of these four cases under

any circumstances.

Accordingly, defendant's four claims are denied both procedurally and on the merits.

This decision shall constitute the order of the court.

ENTER:



MICHAEL L. PESCE, J.S.C.

ENTERED
JAN 8 2008
NANCY T. SUNSHINE
COUNTY CLERK