SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 71

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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No.5737/98

RAMON JORGE,

Defendant

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BERKMAN, J.

Defendant was convicted, after a jury trial, of three counts of kidnapping in the first degree, and sentenced on July 6, 2000, to concurrent terms of twenty-five years to life imprisonment. The conviction was affirmed, 1 A.D.3d 121 (2003), and leave to appeal to the Court of Appeals was denied. Defendant has also filed a petition for a writ of *habeas corpus* which is pending in the Southern District of New York. A motion to stay that proceeding so that defendant could include his present claim has been denied. *Jorge v. Phillips,* 2008 WL 34417.

Defendant claims that he was deprived of the effective assistance of counsel by virtue of his retained trial attorney's "failure to adequately convey the [plea] offer . . . in an educated manner, and to advise him as to whether to accept the prosecution's highly favorable plea offer of 9 to 18 years and his failure to advise defendant of the strength of the case against him, resulting in [defendant's] grossly underestimating the odds." He further argues that counsel "did not adequately convey the plea offer to defendant nor give him any advice as to whether to accept the prosecution's plea offer or inform defendant of the strengths and weakness of the case, neither before trial or at the time the plea offer was made." Defendant accordingly seeks *vacatur* of his

conviction or at least a modification of his sentence in accord with the plea offer he refused before his trial.

Defendant cannot claim that he was not advised of the offer or of the range of sentence he faced if convicted of the top count, as the court placed it on the record. His complaint is that counsel's advice was not 'adequate,' as demonstrated, defendant argues, by the fact that defendant was not persuaded to enter a guilty plea. Defendant concludes that "there was a reasonable probability that, had defendant been properly informed of and adequately counseled regarding the plea offer, defendant would have accepted it." Yet defendant testified at trial at great length that there was no abduction and no real kidnapping, but only a charade in which the victims cooperated.

Discussion

Other than defendant's conclusory claims that counsel's advice was inadequate, and his argument that this is proved by defendant's refusal to accept the favorable plea offer, defendant's claim that he received ineffective assistance of counsel is without any factual support.

It is plain from the record that defendant was informed of the offer and of the sentencing range should he be convicted after trial.[1] By that time, as defendant concedes in his argument,

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[1]This conclusively refutes defendant's affidavit, Exhibit D, in which he claims *inter alia* that his attorney never "educated" him as to the "comparative sentence" between standing trial and pleading guilty. It should be noted that this affidavit and the affidavit of defendant's wife, who claims no first-hand knowledge of the discussions between defendant and counsel, are the only sworn statements in support of this application. Accordingly, many of the claims discussed in this opinion are only set forth in defendant's memorandum of law and are unsworn.

defendant had heard a significant portion of the evidence from the police officers who testified at the suppression hearing. Defendant says, at page ten of his memorandum, "In light of the evidence presented at the pre-trial hearings, the [sic] was no sound strategy other than to adequately advise defendant to accept the favorable plea offer . . . ." Yet defendant apparently did not see it this way seven years ago, as he refused the plea offer after hearing this evidence. Defendant also cannot claim that he was unaware that the prosecutor would be arguing that defendant was the ringleader, as the prosecutor so stated on the record in defendant's presence at the time the offer was made.

Of course, given the relationships between defendant and the victims and the fact that the reason for the kidnapping was that the victims had burglarized defendant and stolen from his home $80,000 and 26 kilograms of cocaine, the question still remained at the time the offer was made whether the victims would testify at trial and if so how credible they would be to a jury. While defendant now claims that counsel should have informed "defendant that it was impossible for the defendant to be acquitted," that was not so perfectly clear at the time the plea offer was made and rejected.

Defendant also complains that counsel waited too long to start convincing him to take a guilty plea, as at the time the offer was made he "was not in a psychological stage" to accept the offer of significant time. Apparently, it may have taken defendant seven years to reach that stage, as that is how long he waited to file the instant application, but it would only be speculation to state that defendant only after seven years realized that had he but taken the plea he would be on the verge of parole eligibility.

Defendant does not say what counsel told him in the recess given by the court for the

purpose of discussing the plea, but complains only now that the recess was too short for an adequate discussion. He does not say whether or not he discussed the evidence or the possibility of a negotiated plea with counsel in the many months leading up to the pretrial hearings and the plea offer.

In *People v. Fernandez,* 5 N.Y.3d 813, 814 (2005), the Court of Appeals stated that a defendant's "self-serving statement that he would have accepted the plea despite his claimed innocence, without more" did not under the circumstances warrant an evidentiary hearing. *People v. Goldberg,* 33 A.D.3d 1018 (2nd Dep't 2006), following the *Fernandez* rule, required a hearing where Goldberg asserted that his lawyer had failed to inform him of the plea agreement and misinformed him of his sentence exposure. Of course neither *Fernandez* nor *Goldberg* requires relief here, as the record is clear that defendant was advised of the offer and of his exposure after trial. We have only defendant's self-serving statement that whatever it is counsel advised defendant, he was not persuaded then, but should have been.

Defendant must therefore rely on *Boria v. Kean,* 99 F.3d 492 (2nd Cir.1996), but *Boria* involved a first-time offender (defendant was a predicate who was either a businessman with a successful auto body shop or heavily involved in drug trafficking) who, unlike defendant, had no reasonable chance of acquittal but received no advice from counsel on the desirability of entering a guilty plea. Defendant annexes an affidavit in which his wife asserts that counsel subsequently said he told defendant the offered plea was not "too bad" (Exhibit B to the motion, ¶8) and defendant in no way denies that he received such advice or otherwise explains what advice counsel gave him about pleading guilty.

It is certainly plain from the trial transcript that counsel was fully familiar with the

evidence, and there is no indication (either in the transcript or in defendant's motion) that counsel had not been discussing that evidence with the defendant as the case progressed. *Boria* does not create a *per se* rule as to what constitutes effective assistance of counsel in this area. *Purdy v. United States,* 208 F.3d 41, 46 (2nd Cir.2000). Certainly defendant's conclusory allegation that counsel's advice was insufficient, without more, does not require an evidentiary hearing to explore the entire course of defendant's relationship with his experienced and able defense lawyer. If, as *Purdy* reiterates, at 45, citing *Strickland v. Washington,* 466 U.S.687, 693 (1984), "[r]epresentation is an art," the courts do not encourage proper artistry by hauling lawyers into court to explain themselves whenever a former client is dissatisfied with the result.

Defendant's motion does not contain sworn allegations as to all of the essential facts. C.P.L.§440.30(4)(b). Moreover, defendant has failed to make a showing, other than his self-serving and much belated claim, that he would have entered a guilty plea had counsel "adequately" advised him. Defendant's claim that he was not advised as to the plea offer or the advisability of accepting it is contradicted by the record. C.P.L.§440.30(4)(c and d). The motion is accordingly summarily denied.

The foregoing constitutes the opinion and order of the court.

Dated: New York, New York
April 28, 2008

CAROL BERKMAN