

People v Black

2009 NY Slip Op 33015(U)

October 30, 2009

Supreme Court, Kings County

Docket Number: 2657/2005

Judge: William E. Garnett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 11

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MARCUS BLACK,

Defendant.

DECISION AND ORDER

SCI #2657/2005

Date: October 30, 2009

By: Hon. William E. Garnett

The defendant was charged in a felony complaint with Criminal Sale of a Controlled Substance in the Third Degree, PL §220.39(1), et al. On May 10, 2005, the defendant pled guilty on SCI #2657/2005 to Criminal Sale of a Controlled Substance in the Fifth Degree, PL §220.31. On July 11, 2005, the defendant was sentenced to five-years probation. Thereafter, on December 11, 2007, the defendant pled guilty to violating his probation and was re-sentenced to one year in jail. The defendant did not appeal his judgment of conviction.

The defendant, moves, pro se, to vacate the judgment of conviction, pursuant to CPL §440.10(1)(h), on the grounds that the plea was not knowingly and voluntarily entered because his attorney was ineffective by failing (1) to properly advise him of the immigration consequences of his plea, i.e., deportation, and (2) to inform the defendant that he was entitled to a lab report or field test concerning the substance that he was accused of selling before he pleaded guilty. The defendant also asserts that the court did not inform him that deportation was a possible consequence of his plea.

The People were granted extensions to file their answer so that

they could obtain the plea minutes. After the Court confirmed that the court reporter's computer disc did not work and that the reporter's notes could not be located in the courthouse or at the Rochester, New York storage facility, the People were directed to submit their answer.

After attempting to serve their answer on the defendant at the South Texas Detention Complex by mail, the People informed the Court that their opposition papers had been returned undelivered. The District Attorney was subsequently informed by federal immigration authorities that, on August 10, 2009, the defendant had been deported.

Law

The right to effective assistance of counsel is guaranteed by both the United States Constitution, (US Const. 6th Amendment) and the New York State Constitution, (NY Const., Art 1, §6).

Under the federal law, the defendant must demonstrate that his or her attorney's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show that counsel's deficient performance prejudiced him. Strickland v. Washington, 466 US 668, 687 (1984); People v. McDonald, 1 NY3d 109, 113 (2003).

It is well settled that a defense attorney's mere failure to advise his client of the possible immigration consequences of his plea, including deportation, does not constitute ineffective

assistance of counsel under federal law. People v. McDonald, supra at 114; People v. Ford, 86 NY2d 397, 404 (1995). The defendant has not alleged that counsel affirmatively misstated the possibility of deportation which, under certain circumstances, may constitute ineffective assistance of counsel. People v. McDonald, supra at 114.

Under New York law, the right to effective assistance of counsel entitles a defendant to a reasonably competent attorney who provides "meaningful representation". It does not entitle him to "perfect representation". People v. Benevento, 91 NY2d 708 (1998); People v. Modica, 64 NY2d 828 (1985); People v. Baldi, 54 NY2d 137 (1981). "Meaningful representation" is measured by an evaluation of "the evidence, the law, and the circumstances of a particular case, viewed in the totality and as of the time of the representation." People v. Baldi, supra at 147. "A defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." People v. Ford, supra.

Defense counsel's alleged failure to warn the defendant of the immigration consequences of his plea did not constitute ineffective assistance of counsel. People v. Ford, supra at 404. The defendant, in his affidavit in support of the motion, did not even aver that his attorney was aware of his immigration status or that he had made his attorney aware of his immigration status. Moreover, the defense counsel negotiated an entirely favorable plea. If the People had

secured an indictment on the top count charged in the felony complaint, i.e., Criminal Sale of a Controlled Substance in the Third Degree, a class "B" felony, the defendant, if convicted, could have received a sentence of up to 9 years. PL §70.70(2)(a)(i). On the charge of Criminal Sale of a Controlled Substance in the Fifth Degree, alone, the defendant faced a sentence of up to 2 1/2 years. PL §70.70(2)(a)(iii). However, the defendant pled guilty to Criminal Sale of a Controlled Substance in the Fifth Degree and was sentenced to five-years probation. He thus avoided a jail sentence by the efforts of his attorney.

Contrary to the defendant's contention, the Court's alleged failure to inform him that his plea could be the basis for deportation is not a ground for vacating the judgment of conviction. While CPL §220.50(7) requires the court to advise a defendant entering a felony plea of the possibility of deportation, the statute clearly instructs that: "[t]he failure to advise the defendant... shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction."

Moreover, a court need only advise the defendant of the direct consequences of a plea, i.e., those that have a direct, immediate and automatic effect on the defendant's punishment. "Deportation is a collateral consequence of conviction as it is peculiar to the individual's personal circumstances and not within the control of the court system". People v. Ford, supra at 403. Consequently, a

court need not, before accepting a plea, advise a defendant of the possibility of deportation.

Thus, even assuming, in the absence of the plea minutes, that the court failed, as the defendant contends, to warn him of the possibility of deportation, such failure would not warrant the vacatur of the judgment of conviction. People v. Ford, supra.

Contrary to the defendant's contention, a defendant is not entitled to a lab report or field test report prior to pleading guilty. Therefore, defense counsel's representation was not rendered ineffective by failing to request these reports. People v. Walley, 63 AD3d 1284, 1285 (3rd Dept. 2009) (The Appellate Division rejected the defendant's claim that defense counsel provided ineffective assistance of counsel when counsel advised the defendant to plea guilty before ever having reviewed a lab report of the substance found on the defendant's person at the time of his arrest. The Court noted however that the record established that the defense counsel had been provided a copy of the field test which indicated that the substance had tested positive for crack cocaine).

In this case, the defense counsel was provided a copy of the field test prior to the plea. Thus, as in People v. Walley, supra, the defense counsel at the time of the plea was aware that the substance sold to the undercover police officer had tested positive for crack cocaine.

In any event, the defendant has not demonstrated that he was

prejudiced as a result of not having received a lab report prior to pleading guilty.

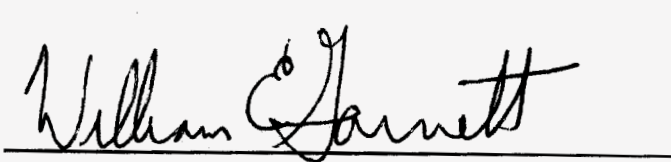
Therefore, in summary, the defendant was afforded effective assistance of counsel under both the federal and state standards and his plea of guilty was entered knowingly and voluntarily.

Finally, it appears that the defendant's application may be moot. The District Attorney has been informed by federal immigration authorities that on August 10, 2009, the defendant was deported and is no longer amenable to the court's jurisdiction. Cf. People v. Diaz, 7 NY3d 831 (2006). Upon receipt, written confirmation should be placed in the court file.

Thus, based on the Court's analysis and discussion, the defendant's motion is denied in its entirety.

This opinion shall constitute the decision and order of the court.

Dated: October 30, 2009
Brooklyn, New York



William E. Garnett
A.J.S.C.

ENTERED
NOV - 6 2009
NANCY T. SUNSHINE
COUNTY CLERK

The defendant, Marcus Black, is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted [22 NYCRR 671.5].