

People v Harris

2009 NY Slip Op 33460(U)

March 4, 2009

County Court, Broome County

Docket Number: 08-244

Judge: Joseph F. Cawley

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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND ORDER
SCI No. 08-244

SAMUEL A. HARRIS,

FILED

Defendant.

MAR - 4 2009

JOSEPH F. CAWLEY, J.

SUPREME/COUNTY COURT
CLERKS OFFICE

Defendant has moved, pursuant to Criminal Procedure Law §440.10, for an order vacating the judgment of conviction imposed by Broome County Court on July 31, 2008. Defendant was convicted after a guilty plea to Criminal Possession of Marijuana in the Third Degree.

The conviction was based upon evidence that defendant was selling marijuana from his residence. The police had received information that defendant was selling marijuana from his residence, a hotel room which he shared with his cousin, [REDACTED]. They searched the room with the written consent of [REDACTED] resulting in the seizure of a small safe (searched after securing a warrant to do so) and a quantity of marijuana.

Upon review of the submissions of both parties relating to the instant motion, the Court issued a Decision and Order dated December 17, 2008, finding that the claimed failure of his attorney to advise him of the possibility of deportation as a potential consequence of his conviction constituted ineffective assistance of counsel warranting vacature of the conviction. A hearing was, however, granted for the limited purpose of considering defendant's alternate claim that he was denied effective assistance of counsel when his attorney failed to consider and/or pursue a challenge to the validity of the search of his residence and seizure of evidence therefrom.

A hearing on this limited issue was conducted on January 16, 2009. The defense called Salvatore Latona, Esq., defendant's former counsel, and defendant testified in his own behalf. The People called Assistant District Attorney Christopher D. Grace. The Court's findings of fact and conclusions of law follow.

FINDINGS OF FACT

Defendant's former attorney, Salvatore Latona, Esq., testified that he was assigned to represent the defendant in or about March of 2008. He accompanied defendant to the grand jury proceeding involving this matter, at which the defendant intended to testify (against counsel's advice). At that time, the People had made an offer, whereby defendant would plead guilty to Criminal Possession of Marijuana in the Third Degree and would receive a sentence of six months' local jail time and five years of probation supervision. The People advised Mr. Latona that the offer would no longer be available if defendant testified before the grand jury.

Defendant had met with his attorney on three or four occasions. It is uncontroverted that he repeatedly asked his attorney if the police had a warrant to search his hotel room, and asked to see the search warrant. Latona testified that he had advised defendant that this was not a "search warrant case", and that the search relied on the written consent of [REDACTED]. Latona testified that although he thought he could succeed on a suppression motion on the search issue, he did *not* discuss this with his client prior to his taking the plea. On the contrary, he attested that his only advice to defendant was to recommend that he take the plea, as it was a guarantee of local jail time versus a potential exposure of one to three years in state prison if convicted after a trial. He had, in fact, communicated to defendant in correspondence that the People had a solid case against him.

Mr. Latona testified that he had considered the fact he could lose on the suppression issue when he recommended to defendant that he plead guilty. His explanation for failing to discuss the search issue with defendant centered on concern with defendant's level of comprehension. Attorney Latona testified that at one point, he asked Assistant District Attorney Grace to come into the room where defendant was waiting to testify, and explain to defendant that the offer would be off the table if he testified before the grand jury. ADA Grace testified that Latona had told him defendant wanted to see the search warrant. Grace further told Latona that he did not consider this a search warrant case, but rather a consent case. He then made a copy of [REDACTED] consent to search form, along with the search warrant relating to the safe found in the hotel room, and gave the copies to attorney Latona. It is unclear from the evidence adduced at the hearing whether the defendant ever saw or received those documents. It is clear, however, that defense counsel Latona strongly urged defendant to accept the People's plea offer at that time, and ultimately the defendant agreed to do so.

Defendant testified that he is 23 years old and had been in the United States since he was 17. He stated that he could not read English "that good". He described meeting with his attorney briefly on three occasions, during which he was told to take the plea offer because he could not win at trial. At the plea proceeding, on May 1, 2008, the following colloquy occurred before defendant entered his plea:

"Court: Has anybody forced you, coerced you, or threatened you in any way to get you to plead guilty?"

Defendant: All I wanted to know is if they really did have a warrant to go in my house. That's all I want to know, sir."

The Court then gave defendant an opportunity to talk privately with his attorney. At that meeting, his attorney told him that he could not see the warrant if he was pleading guilty.

After speaking with his attorney and prior to defendant's entering a guilty plea, the Court again inquired if defendant had been threatened, coerced or forced in any way to plea guilty. Defendant replied "no", and acknowledged that he was pleading freely and voluntarily. Defendant then entered a guilty plea.

Defendant testified that if he had been told that he could challenge the search, it would have made a difference in his decision to plead guilty, and in fact stated that he would *not* have pled guilty.

CONCLUSIONS OF LAW

CPL §440.10(1)(h) provides that after a judgment of conviction, the court may, upon motion of defendant, vacate such a judgment on the ground that it was obtained in violation of defendant's constitutional right to the effective assistance of counsel. The standard to be applied in determining whether a defendant has been denied the right to effective assistance of counsel, as guaranteed by both the Federal and State Constitutions, has been set down in People v. Baldi, 54 N.Y.2d 137 (1981). There, the court indicated that the constitutional requirement is met where the evidence, the law, and the circumstances of a particular case, viewed in their totality, reveal that the attorney provided meaningful representation. The United States Supreme Court has held that to overturn a conviction on this ground, defendant must show not only professionally unreasonable error by counsel, but also prejudice to the defense to the extent that, but for counsel's errors, the result would have been different (Strickland v. Washington, 466 U.S. 668, 694 (1984)).

A defense counsel's failure to make a pre-trial motion does not generally, in and of itself, establish ineffective assistance of counsel (*see*, People v. Rivera, 71 N.Y.2d 705, 709 (1988)). A defendant so claiming must show the absence of a strategic or legitimate reason for counsel's failure to pursue a colorable claim (*id.*; *see also*, People v. Garcia, 75 N.Y.2d 973 (1990)). Defendant herein

must demonstrate that counsel's failure to challenge the validity of the consent to search and move to suppress the evidence obtained thereby, deprived him of meaningful representation.

The validity of the written consent to search defendant's residence is a critical issue in this case, said consent having led to the seizure of the evidence to be used against him. Defense counsel failed to challenge the consent and to seek suppression of the evidence found in the apartment. It does not appear that defense counsel reviewed the relevant police reports, the written consent to search, and/or and the search warrant granted to search the contents of the safe found in defendant's apartment. The hearing testimony demonstrates that defense counsel did not have any meaningful discussions with defendant on this issue, notwithstanding the defendant's repeated inquiries, thereby depriving defendant of an opportunity to make an intelligent and knowing decision to plead guilty. In this case, although the plea bargain was advantageous in terms of reducing the duration of defendant's incarceration (counsel succeeded in obtaining a sentence of six months' local jail time and five years probation, versus a potential state prison term of one to three years upon conviction after trial), other factors merit consideration. The hearing testimony revealed that although defendant repeatedly questioned defense counsel as to whether the police had a warrant to search his apartment, and defense counsel affirmatively told defendant that he would look into it, no substantive discussion on the merits of the suppression issue ever took place. Defense counsel persistently urged defendant to take the plea offer; telling him that People had a solid case against him and he could not win, even though, as he testified at the hearing, Mr. Latona believed he could win on the suppression issue. Counsel recommended that course of action without giving defendant any information as to the merits of a possible suppression motion, or the pros and cons of pursuing a challenge to the search.

In this particular case and under these unique circumstances, the suppression motion at issue was of crucial importance. It appears that the People's evidence against the defendant is wholly reliant

upon the consent to search given by defendant's cousin, and the issue of voluntariness of that consent is a potentially viable one. A consent to search must be a free and unconstrained choice. Even subtle coercion by law enforcement may nullify an apparent consent (*see, People v. Gonzalez*, 39 N.Y.2d 122, 123 (1976)). A review of the records in this case arguably supports the position that [REDACTED] consent was not voluntary. The hearing testimony reveals that counsel expended little, if any, time and effort reviewing those facts and/or the legal merits of this critical issue, notwithstanding the defendant's repeated inquiries. Defense counsel had a professional obligation to review the facts and documents surrounding the consent to search, to determine the likelihood of success of a challenge to that search, to discuss that and any other viable issues with defendant, and to then provide the defendant with a reasoned recommendation as to whether to pursue the issue(s) or plead guilty. In this Court's opinion, the facts here warranted a challenge to the search. At the very least, defendant should have been made aware of the weaknesses in the People's case pertaining to that issue. Not only did that not occur in this case, but defendant was in fact advised by his attorney that the People had a "solid case" against him.

Defense counsel offered no reason for not challenging the search. He testified only that he strongly urged defendant to agree to plead guilty before the matter was presented to the grand jury, rather than risk losing the offer of local jail time. When an attorney advises his client to plead guilty to a charge without investigating the facts or researching the law, defendant is denied effective assistance of counsel (*see, People v. Van Wie*, 238 A.D.2d 876 (4th Dept. 1997), *lv. den.* 94 N.Y.2d 926 (2000) (CPL 440.10 motion granted where defense counsel advised his client to plead guilty to insurance fraud because he had no defense, when in fact the indictment had no merit)). Although it is difficult to precisely define ineffective representation, the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare the law and the facts

relevant to a defense (*see, People v. Droz*, 39 N.Y.2d 457, 462 (1976)). Inadequate representation is a question of degree. Cumulative errors are often determinative (*id.*). Here, the failure on the part of defense counsel to review the facts, together with the absence of meaningful communication with his client, denied defendant the opportunity to make an intelligent, knowing and voluntary decision to enter a guilty plea. The cumulative effect of these factors, when viewed in the totality of the circumstances (and notwithstanding an advantageous sentence), deprived defendant of meaningful representation. Accordingly, the defendant's motion to vacate his plea, the judgment of conviction, and sentence is granted, and the case is restored to pre-plea status.

This constitutes the Decision and Order of the Court.

It is so Ordered.

DATED: March 4, 2009
Binghamton, New York


HON. JOSEPH F. CAWLEY
Broome County Court Judge

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