

**People v Meyers**

2010 NY Slip Op 31194(U)

March 29, 2010

Supreme Court, Kings County

Docket Number: 1465-2002

Judge: Vincent M. Del Giudice

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM: PART 25  
-----X  
PEOPLE OF THE STATE OF NEW YORK

Decision and Order  
  
Indict.#: 1465-2002

-against-

Hon. Vincent Del Giudice  
Dated: March 29, 2010

MICHAEL MEYERS

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On June 5, 2002, the defendant pled guilty to Criminal Possession of a Controlled Substance in the Fourth and Seventh Degree. In exchange for his plea of guilty, the defendant was placed in the Fortune Society treatment program, with the promise that if he successfully completed the program, his felony plea will be withdrawn and he would be sentenced to a conditional discharge on the remaining misdemeanor count (Greenberg, J.). On December 9, 2002, the defendant appeared before this court, having successfully completed his treatment program. In accordance with his plea agreement, the People dismissed the felony charge and the defendant was sentenced to a conditional discharge.

The defendant did not appeal from his judgment of conviction.

To overcome the presumption of regularity which attaches to judgments of conviction, a defendant is required to come forward with allegations sufficient to demonstrate that the nonrecord facts sought to be established would entitle him to relief (*People v Satterfield*, 66 NY2d 796, 799; *People v Crippen*, 196 AD2d 548, 549, *lv denied* 82 NY2d 848).

By motion, dated November 23, 2009, the defendant, via new counsel, moves, pursuant to CPL 440.10 (1)(h), to vacate the judgment of conviction rendered against him. The defendant claims his conviction must be vacated because his previous attorney misinformed him as to the immigration consequences of the plea agreement. Defendant has submitted an affidavit of facts in support of his motion and an affidavit from his current immigration attorney.

The People have filed an answer in opposition, to which they have included an affidavit from the attorney who represented the defendant during his plea and sentencing.

The defendant filed a reply affirmation.

Pursuant to CPL 440.10 (1), the court in which judgment was entered may vacate such judgment upon certain specific enumerated grounds.<sup>1</sup>

Defendant claims his previous attorney provided ineffective assistance by providing misleading advice as to the possibility of deportation as a consequence of his plea to a misdemeanor narcotics charge.<sup>2</sup>

Notwithstanding the claims raised by the defendant, pursuant to CPL 440.30 (4)(c), the court may deny such a motion whenever “an allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof” (*People v Lindsey*, 179 AD2d 915 [3<sup>rd</sup> Dept 1992])

The plea minutes show “unquestionable documentary proof” rebutting

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<sup>1</sup>Defendant bases his current claim on CPL 440.10 (1)(h) which requires the judgment be vacated if it was obtained in violation of a right of the defendant under either the federal or state constitution.

<sup>2</sup>Defendant also claims counsel inadequately investigated the circumstances surrounding his arrest prior to engaging in plea negotiations. Since this claim does not concern the voluntariness of the plea, it is waived upon defendant’s plea of guilty (*People v Perazzo*, 65 AD3d 1058, 1059, *lv denied* 13 NY3d 909; *People v Russell*, 58 AD3d 759, 760, *lv denied* 12 NY3d 821; *People v DeLuca*, 45 AD3d 777, 777, *lv denied* 10 NY3d 933; *People v Turner*, 40 AD3d 1018, 1019, *lv denied* 9 NY3d 873).

defendant's factual allegations that he never would have pled guilty had he known that his permanent resident status might thereafter be jeopardized. The plea minutes demonstrate that the defendant made an informed decision to proceed with the plea, despite the uncertainty of his immigration status:

The Court: Now I believe that you have solved an immigration problem you may have had.

Mr. Rubin<sup>3</sup>: We have had a consult on it. It's up in the air, but we know the reality of this case is that there is no perfect answer for Mr. Myers in this case that we see at this point.

The Court: As Mr. Rubin is suggesting, nothing we are doing here is going to necessarily help you in your immigration problems and if it does act against you, that is nothing I can account for. You are just taking your chances. Do you understand?

The defendant: Yes, sir.

(Plea minutes of Michael Meyers, at 8-9)(Greenberg, J.).

Even if the court were to look at the merits of the defendant's claims, the factual allegations in support thereof were made solely by the defendant and are unsupported by any other affidavit or evidence (CPL 440.30 [4][d][i]; *People v Smiley*, 67 AD3d 713, *lv denied* 13 NY3d 942).<sup>4</sup> The defendant's factual allegations, in which he claims he was led to believe that if he successfully completed the drug treatment program his immigration status would not be

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<sup>3</sup>Stuart D. Rubin was defendant's attorney at the time of the plea and sentence.

<sup>4</sup>By contrast, the plea minutes show that the defendant made an educated decision to accept the prosecution's plea offer, notwithstanding the possibility that such a plea could result in immigration complications at a later date.

adversely affected, are unsupported by any other affidavit or evidence.

The United States Constitution requires a defendant seeking to vacate a judgment of conviction, based on the ineffective assistance of counsel, prove that his counsel's performance fell below an objective standard of reasonableness and that he was thereby prejudiced (*Hill v Lockhart*, 474 US 52, 57). In New York, "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*, 86 NY2d 397, 404, citing *People v Boodhoo*, 191 AD2d 448, 449 [2<sup>nd</sup> Dept 1993]; *People v Mayes*, 133 AD2d 905, 906 [3<sup>rd</sup> Dept 1987]). Where "a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation" (*People v McClure*, 236 AD2d 633, 633, *lv denied* 89 NY2d 1097, citing *People v Mobley*, 221 AD2d 376; *People v Navedo*, 137 AD2d 726, *lv denied* 71 NY2d 1030). New York requires a defendant seeking to set aside a plea establish that he would have insisted on going to trial but for defense counsel's error (*People v Rodriguez*, 188 AD2d 623, 623, *lv denied* 81 NY2d 891; *People v Ahmetovic*, 157 AD2d 489, 489-490, *lv denied* 75 NY2d 963).

As a general rule, deportation is a collateral consequence of a criminal conviction and the court need not advise a defendant of the possibility of deportation (*Ford*, 86 NY2d at 403). Moreover, a failure to warn a defendant of the possibility of deportation does not constitute ineffective assistance of counsel (*ibid.*).<sup>5</sup> However, an attorney's misleading advice as to the deportation consequences of a plea may, in certain circumstances, constitute ineffective assistance of counsel (*People v McDonald*, 1 NY3d 109, 114 - 115).

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<sup>5</sup> See also, *People v Rivadeneira*, 25 Misc 3d 1243(A), 2009 NY Slip Op 52556(U)(2009); *People v Barclay*, 12 Misc 3d 1158(A), 2006 NY Slip Op 50947(U)(2006).

In *People v McDonald* (1 NY3d 109, 115), the Court of Appeals held that a defendant may be entitled to post-judgment relief from a plea of guilty that had been entered in actual reliance on an affirmative misstatement by counsel to the effect that the defendant would not be subject to deportation because he was a long-term resident of the United States and his children were American citizens. The court concluded that this erroneous advice by counsel fell below an objective standard of reasonableness and may constitute ineffective assistance of counsel provided there was a reasonable probability that, but for the error, the defendant would not have pleaded guilty. Thus, the immigration consequences of a plea of guilty are collateral, and defense counsel's failure to inform a defendant of the deportation consequences of a plea does not constitute ineffective assistance of counsel, but an attorney's affirmative misrepresentation on that subject may fall below an objective standard of reasonableness.

*(People v Argueta, 46 AD3d 46, 50, lv dismissed 10 NY3d 761)(citations omitted).*

[T]he New York cases provide that a defendant who is rendered deportable as a result of a plea of guilty entered in ignorance of the potential immigration consequences of the plea is not entitled to post-judgment relief on the ground that the plea was involuntary or on the theory that counsel was ineffective ... We therefore consider it highly anomalous to hold, as the defendant would have us do, that such relief is available to a defendant who was admittedly warned that his plea had possible deportation consequences, but was not advised concerning the likelihood of deportation.

*(Id. at 51).*

In the current matter, the defendant submitted an affidavit, wherein he contends he was misinformed by his attorney as to the collateral consequences of his plea of guilty. He stated that although he had declined the prosecution's original offer of felony probation, he accepted their subsequent offer, whereby he would enter the Fortune Society for six months and, if successful, have the felony charges dismissed and be sentenced on the remaining misdemeanor charge to a conditional discharge. Defendant contends he relied on the advice of his attorney that if he completed the drug treatment program he would serve no time in jail and that his plea would not render him subject to deportation.

Defendant's former attorney filed an affidavit asserting that after conferring with immigration law specialists, he advised the defendant of the possibility of deportation if he pled guilty and was sentenced to the reduced charge.<sup>6</sup>


Counsel's affirmation comports with the record made at the time the defendant pled guilty. "Contrary to the defendant's contention, he received an advantageous plea, and the record does not cast doubt on the apparent effectiveness of counsel" (*People v Garrett*, 68 AD3d 781, 782 [2<sup>nd</sup> Dept 2009]).

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<sup>6</sup>"I advised Mr. Meyers, as I do all clients in this situation, that although a non-custodial sentence would render him deportable from the U.S., that if he remained out of jail he might be discovered a year down the road, five years down the road, fifteen years down the road, or never. Mr. Meyers, as all similarly situated clients, was advised that although he would be deportable based upon a plea bargain, that whether and when the law would ultimately be enforced against him was up to whether he is discovered to have been convicted by the INS. If he were in jail, I advise all similarly situated clients including defendant, that it is virtually certain that an enforcement action (deportation proceeding) would take place. If he was out of jail I advised him, my experience has been that some people get picked up, and some people even many years later, have not been picked-up" (Affidavit of Stuart D. Rubin, at 5).

Accordingly, for the reasons stated herein, defendant's motion to vacate judgment is summarily denied (CPL 440.30 [2] and [4]).

This constitutes the decision and order of the court (CPL 440.30 [7]).



Vincent M. Del Giudice  
Judge of the Court of Claims  
Acting Supreme Court Justice

Dated: March 29, 2010  
Brooklyn, New York

**ENTERED**  
MAR 31 2010  
NANCY T. SUNSHINE  
COUNTY CLERK