People v Baker

2010 NY Slip Op 31289(U)

April 5, 2010

Sup Ct, Kings County

Docket Number: 631/2006

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM: PART PD-85

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THE PEOPLE OF THE STATE OF NEW YORK :

DECISION AND ORDER

-against-

Indictment No. 631/2006

NORVAL BAKER,

Defendant.

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HON. PATRICIA M. Di MANGO:

The defendant, pro se, is moving, pursuant to CPL § 440.10, for an order vacating his judgment of conviction and permitting him to withdraw his plea of guilty. The People have opposed the application.

Upon due consideration of all of the parties' submissions[1] upon this motion (including a transcription of the plea and sentence minutes) and a review of the official court file, the court hereby determines that the motion is denied in its entirety, without a hearing.

Factual Background and Discussion

The defendant and his co-defendant were charged under the instant indictment with acting in concert in the commission of Robbery in the First, Second, and Third Degrees, and related offenses, in connection with a car-jacking which had taken place on January 22, 2006 in Kings County. Two children (aged 12 and 8) had been briefly left alone in a parked vehicle when the defendants reportedly entered the vehicle, and drove off in the car with the children still inside, at one point threatening them with a knife. (According to the People's recitation of the facts, one of the children was actually poked with a knife, but not injured.) A short distance away the children were discharged from the vehicle. The police were notified immediately, and a few hours later the police observed the vehicle and stopped it. The arresting officer reported that the defendant was the driver, and that he recovered two knives from the co-defendant's person. Based upon this incident, both defendants were arrested and charged as indicated.

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[1] The People's responding papers were submitted very late, and there were difficulties and delays in obtaining a transcription of the plea minutes.

Initially assigned a Legal Aid attorney, at some point after his Criminal Court arraignment Mr. Baker retained counsel, Jay Schwitzman, Esq., who entered his appearance upon the defendant's arraignment in Supreme Court, which took place on March 1, 2006.

This case, which had been pending for approximately 21 months, was essentially ready for trial and pre-trial hearings[2] had already been held, when, on December 5, 2007, the defendant decided instead to forego trial and enter a plea of guilty. Thus, on that date the defendant, represented by his retained counsel, accepted an offer to plead guilty to the reduced charge of Attempted Robbery in the Second Degree, in full satisfaction of the captioned indictment, in exchange for a promised sentence of two and one-half years' incarceration (to be followed by three years' post-release supervision).

According to the transcribed minutes of the plea proceedings, Mr. Baker's attorney, Mr. Schwitzman, stated for the record that, after consultation with the defendant and his family, he was authorized to withdraw Mr. Baker's plea of not guilty and in its stead enter a plea of guilty to the charge of Attempted Robbery in the Second Degree in accordance with the plea offer. In response to counsel's announcement, the court inquired of the defendant directly if this was his intention. Mr. Baker replied, "Yes."

Mr. Baker was then duly sworn in by the court. Under oath, the defendant acknowledged that Mr. Schwitzman was his attorney and that he was satisfied with his help, and confirmed that he had authorized his attorney to enter a plea of guilty to the lesser-included offense of Attempted Robbery in the Second Degree under the second count of the indictment. With that, the court advised the defendant of the rights he was waiving by pleading guilty, including his rights to a jury trial, to confront witnesses, and his right to remain silent. The defendant indicated that he understood this.

Mr. Baker then proceeded to allocute to the plea, admitting that, while acting in concert with his co-defendant, Marcus John, with both of them being actually present, on January 22, 2006, he attempted to steal "a car" from the identified complainant. The defendant confirmed for the court that he was pleading guilty, freely and voluntarily because he was guilty. When asked by the court if anyone had threatened, forced, or coerced him into pleading guilty, the defendant responded, "No." The defendant also denied that he was under the influence of drugs or alcohol that day.

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[2] On May 11, 2007, a Dunaway-Mapp hearing was held in this matter, following which the court ruled that there was probable cause to arrest both defendants (defendant Baker and his co-defendant Marcus John) and that defendant Baker had no standing to contest the recovery of items from the person of the co-defendant, suppression as to which was denied to Mr. John.

The court next asked the defendant if he was "a citizen of the United States?" Mr. Baker answered, "Yes." Following this, the court advised the defendant of the conditions of this plea and informed him that, as a result of this conviction, he would have a predicate violent felony conviction in the event of a future conviction. The defendant acknowledged his understanding of all of the court's admonishments. Finally, the defendant affirmed that he had understood all of the court's questions and that all of his answers had been the truth. With that, the matter was adjourned to December 20, 2007 for sentencing.

On December 20, 2007, all the parties were before the court for sentencing. The court noted that the defendant had admitted his guilt upon his Probation Department pre-sentence interview and that the court was prepared to render sentence in accordance with the promise. In response to the court's inquiry, no one raised any reason as to why sentence should not be imposed.

With regard to the plea terms, the Assistant District Attorney made a point of noting that the People's plea offer had been "substantially higher" and that their offer had always been for a "five year" sentence. However, it was only after extensive discussions with the victims, two young children and their father, that the People acceded to the father's request that the defendants be offered a lesser period of incarceration so that they might have a greater opportunity for rehabilitation.

When offered the opportunity to address the court, Mr. Baker stated that he "apologize[d] to the family" and that he "truly regret[ted] whatever took place that night."

The court thereupon sentenced the defendant pursuant to the plea agreement. Notably, the defendant did not deny his guilt, did not ask to withdraw his plea, and raised no objections or impediment to sentencing. This concluded Mr. Baker's sentence. (The co-defendant, Mr. Marcus, was also sentenced that day upon his plea of guilty in this matter, with the People again noting a reduced sentence offer only due to the intervention of the victims. The co-defendant also apologized for his actions.)

Against this backdrop, the defendant, having since learned that he was facing deportation proceedings, brought the instant motion to vacate the conviction and withdraw his guilty plea, primarily on the ground of ineffective assistance of counsel.

The defendant charges that he was denied effective representation in that his attorney affirmatively misrepresented to him the consequences of his plea with regard to immigration and deportation. He claims that his guilty plea "was induced after [his] having been given affirmative misrepresentations as to the collateral consequences to

such plea," and were it not for these "misrepresentations" by counsel he would have proceeded to trial. Thus, he indicates that his plea was not voluntary or intelligent. Further, denying that he had done anything wrong or that he had ever had a weapon or "been picked out of a line-up[3] as the perpetrator of the crimes alleged," Baker opines that, at best, he might have been found guilty of Unauthorized Use of a Motor Vehicle in the Third Degree, and that, therefore, he would not have entered the felony guilty plea had he also been aware of the deportation consequences of his plea.

As noted above, the People have opposed the defendant's application and urge that it is deniable both on procedural grounds as well as upon the merits.

Upon reading the defendant's factual averments in support of this motion, the court finds that the defendant has not demonstrated that he should be accorded the relief of vacatur.

In direct contradiction of his sworn assertion to the court upon his plea, now in his motion papers Mr. Baker indicates that he is <u>not</u> a United States citizen, and he alleges that he was given "affirmative misrepresentations" by his attorney as to the immigration consequences of his plea and conviction.

Specifically, in his sworn allegations of fact, the defendant claims that, in July of 2007, "the subject of whether [his] arrest . . . would have any adverse effect on [his] immigration status was brought to Mr. Schwitzman's attention" and that counsel "informed" the defendant and his family "that he was unsure and that an immigration attorney would have to be consulted."

This is the only information that the defendant provides regarding this very important topic. Mr. Baker proffers nothing else to establish the instant claims and provides nothing to evidence that this purported meeting between him and his family and his attorney was ever held. Nor does the defendant relate any factual particulars to demonstrate the nature of the alleged erroneous advice, assuming the topic of immigration had ever even come up. In fact, his affidavit is conspicuously silent regarding what actions would have ensued, had this discussion of July, 2007 taken place as

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[3] Although there is no indication of a "line-up" identification, according to the People's Voluntary Disclosure Form, the eldest child victim made a "corporeal non-lineup" identification of each defendant less than two hours after they were arrested. Additionally, while the defendant claims herein that he was picked up by the co-defendant who was already in the vehicle and that he, Baker, merely rode with him in the vehicle, when the police stopped the vehicle, it was Baker who was purportedly at the wheel.

indicated, namely, whether the defendant did consult an immigration specialist, whether his attorney looked into the matter, etc. Also, the defendant does not refer to any follow-up discussions on the issue or indicate how the matter was otherwise pursued, if at all.

Remarkably, although he claims that his attorney actually gave him erroneous information regarding his immigration consequences, the defendant never actually states exactly what incorrect information counsel is alleged to have given him. He simply makes this bare assertion, without elaboration or any substantiation. Furthermore, the defendant has not come forward with any other proof of the nature of advice rendered, or not, by his attorney, in order to establish his claim here that counsel affirmatively gave him erroneous advice.

In addition to his recitation being incomplete as to material information, more importantly, these current assertions by the defendant directly contradict the defendant's sworn statements, made in court, on the record, during his plea allocution. However, both cannot be true. Insofar as it now appears that the defendant was not a United States citizen, despite his contrary assurance to the court, under oath, this court can only conclude that this was a deliberate misrepresentation on the defendant's part, intended to deceive the court and other officials, in the hopes of possibly avoiding detection of his immigrant status. Further, in the court's view, this deception actually evinces a knowledge by the defendant of the potential immigration consequences to his plea.

Upon considering a motion to vacate judgment made pursuant to CPL § 440.10, the court is authorized to deny the motion without conducting a hearing if an allegation of fact essential to support the motion is, either made solely by the defendant and is unsupported by any other affidavit or evidence, or where the allegation is contradicted by a court record, if, under all the circumstances attending the case, there is no reasonable possibility that such allegation is true (see, CPL 440.30[4][d]).

The court finds that the defendant's conclusory assertions of having informed his attorney of his immigration status and having been incorrectly or deficiently counseled as to the consequences of a guilty plea upon him, are both unsupported by any other evidence as well as being contradicted by a court record, namely the plea and sentence minutes, and that there is no reasonable possibility that such allegation is true.

Indeed, in making this motion, the defendant could have and should have provided an affirmation from former counsel outlining what discussions did or did not take place between them regarding the defendant's immigration status, and he has given no explanations here for his failure to do so (see, People v Morales, 58 NY2d 1008). Moreover, it should not necessarily be assumed that former counsel would not have

provided an affirmation outlining the extent of the immigration advice rendered and that his position would necessarily be antagonistic to that of the defendant here (cf., People v Radcliffe, 298 AD2d 533). In the court's experience, defense attorneys, as officers of the court, will usually comply with a request for these sorts of affirmations under such circumstances, assuming the attorney-client prohibition may be deemed lifted. In fact, in one of the leading cases in this area, former counsel did provide an affirmation summarizing the erroneous immigration advice he had rendered (see, People v McDonald, 1 NY3d 109, 112).

In any event, since the defendant has asserted that it was in the presence of his family that he first informed Mr. Schwitzman of his alien status and that his family was present for the ensuing discussion, the defendant could also have obtained and submitted to this court affidavit(s) from such family member(s) summarizing their recollection of this consultation. However, no supporting documentation whatsoever was here submitted (see, generally, People v Taylor, 211 AD2d 603, lv. denied, 85 NY2d 981).

In sum, under these circumstances and upon this record, the court can give no credence to the defendant's assertions, only made for the first time with the threat of deportation looming over him, that he brought his immigration status to the attention of his attorney and that his attorney mis-advised him on the subject. These unsupported, self-serving claims simply cannot be credited, and, standing alone, fail to establish a basis for the relief requested. Furthermore, as the court has observed, the defendant's misrepresentation to the court that he was a U. S. citizen was an outright and deliberate deception, which the court finds evinces the defendant's knowledge of the immigration consequences of his plea and his attempt to hide and avoid same.

Had Mr. Baker candidly advised the court that he was not a citizen upon the court's inquiry, then this court would have, as it does in all such cases, alerted him to the possibility of immigration consequences to his plea, namely that he would face deportation because of this conviction (see also, § CPL 220.50 [7]). However, this colloquy and advisement did not take place solely due to the defendant's failure to admit to the court his true status, and in fact, his own affirmative misrepresentation of same.

Addressing the defendant's secondary charge that he was never informed, at the time of his plea, that he "would be subject to deportation as a result of the plea," the court reiterates that the lack of such an advisement is attributable purely to the defendant's own affirmative, sworn mis-representation in open court as to his immigration status. Thus, the fault here lies squarely with the defendant.

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Indeed, this affirmative statement by the defendant, on the record and in the presence of counsel, supports this court's conclusion that the defendant's contrary assertions, that he had previously discussed his immigration status with his attorney, simply cannot be credited.

For surely, if counsel had been aware that his client was not a United States citizen and was lying to the court about it, he would have so informed the court and corrected the record. In fact, Mr. Schwitzman was duty-bound to have done so, had that been the case. However, since the defendant apparently chose to misrepresent his situation, perhaps in an attempt to elude the attention of Immigration officials, there was no opportunity to correct the record and to properly advise the defendant of the possibility or probability of his subsequent deportation, during the plea proceedings.

Accordingly, in light of the insufficiency of the factual allegations and proof necessary to establish his ineffective assistance of counsel claims, this court concludes that the defendant's motion should be denied.

Furthermore, in the court's view, the motion is equally deniable on the ground that the defendant has not alleged and substantiated all the essential facts to make out his claim of ineffective assistance regarding his immigration situation (see, CPL 440.30[4][b]; see also, People v Wells, 265 AD2d 589, error coram nobis denied, 284 AD2d 486; People v Lawson, 191 AD2d 514, 515, lv. denied, 81 NY2d 1075), regarding his bare-boned assertion of erroneous advice, upon which he would have relied, to his detriment. Rather, his account is terse, incomplete, and his claim, conclusory and unsupported.

In sum, the defendant's papers are insufficient to raise an issue of fact to undermine the presumptive validity of the instant judgement of conviction (see, People v Session, 34 NY2d 254).

Thus, the court determines that the motion may and should be denied upon these grounds, without a hearing. Nevertheless, the court finds it appropriate to address additional matters implicated in this motion.

The court will next briefly address the merits of the ineffective assistance claim here raised.

A defendant has a right under both the Federal (Hill v Lockhart, 474 US 52) and State (People v Ford, 86 NY2d 397, 404) Constitutions to effective assistance of counsel in the plea process. The Federal Constitution requires a defendant to prove that counsel's

performance fell below an objective standard of reasonableness and prejudiced the defendant (see, Hill, supra, 474 US at 57, citing the Strickland v Washington test [466 U.S. 668]).

Under the State Constitution, counsel's effectiveness is measured as follows: "'[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' [citation omitted]"(Ford, supra, at 404). Moreover, "'meaningful representation' does not mean 'perfect representation'[citation omitted]" (id.).

Given all of the foregoing, the court does not find that the defendant has established a legal basis for the relief requested, under either Federal or New York law, upon his allegations, which are both unsupported as well as insufficient to make out a claim for ineffective assistance of counsel.

This court would note that it is aware of the very recent U.S. Supreme Court decision just handed down in Padilla v Kentucky, 2010 WL 1222274, ___ S.Ct. ___, ___ U.S. ___ [March 31, 2010]. Prior to Padilla, there was no difference in the analysis of the instant claim under either Federal or New York constitutional standards for effective assistance of counsel, given that our State standard offered greater protection than the Federal test (see, People v Argueta, 46 AD3d 46, 50-51, appeal dismissed, 10 NY3d 761).

Under New York law, the mere failure to advise a defendant of immigration consequences of a plea did not constitute ineffective assistance of counsel, as this was deemed to be a "collateral" consequence of a plea. However, in Padilla, the U.S. Supreme Court has rejected this distinction between "collateral" and "direct" consequences as a determinative factor in the assessment of the effectiveness of counsel. Rather, the Court found that an attorney must inform her client whether his plea carries a risk of deportation.

Even assuming that Padilla would apply to the instant matter, the court does not find that its application to this case would require that this court reach a conclusion contrary to that mandated in the absence of this new precedent, namely, that there is no legal basis for vacating the defendant's conviction and permitting him to withdraw his guilty plea here.

In Padilla v Kentucky, the defendant was affirmatively mis-advised that he would not be deported, where his deportation was certain under the law. This, the Supreme Court found to constitute ineffective assistance of counsel, but the High Court did not

reach the question of whether the defendant had established prejudice as a result of counsel's incorrect advice and would be thereby entitled to relief.

By contrast, in the matter at bar, the defendant essentially admits that he, himself, was aware of the possibility of deportation; and, he has not demonstrated to this court's satisfaction that his attorney actually knew of his immigration status. Further, the defendant does not allege or show that counsel should somehow be charged with this knowledge or that he had a duty to definitively ascertain same. Thus, despite personally being on notice of the possibility of immigration consequences (and there being no proof that counsel was also aware of this potential), the defendant nevertheless entered into this plea agreement, while asserting he was an American citizen.

Further, this court does not find that the defendant has met the second prong of the ineffectiveness inquiry, namely, a demonstration of "prejudice," given the facts and circumstances of this case.

Lastly, the court will discuss the secondary issue implicated in this motion, to wit, the voluntariness of the defendant's plea.

Regarding the plea minutes overall, the court finds that there is nothing in the defendant's plea minutes which either casts significant doubt upon the defendant's guilt or calls into question the voluntariness of his plea (cf., People v Lopez, 71 NY2d 662, 666-668). On the contrary, during his plea allocution, the defendant admitted to the substantive elements of the crime to which he was pleading guilty and indicated that he was voluntarily pleading guilty because he was guilty. There was nothing in his allocution which hinted at innocence or raised any defenses or negated any material elements as to his crime, and he never denied committing the crime. Further, at the conclusion of his plea, the defendant confirmed that all of his answers had been truthful and that he had understood all of the court's questions.

While the defendant now asserts upon this motion that he was advised, in September of 2007, of the reduced plea offer, and at that time was "adamant" that he wanted to go to trial because he had done nothing wrong, these assertions are belied by his statements and representations upon both his plea and at sentencing. If that had been the case, and had remained so still months later, upon his plea (which did not take place until December 5, 2007) he should have stated that he did not want to take the plea, rather than contrarily informing the court that he was pleading voluntarily and that he had not been threatened, forced, or coerced to do so, and that he was satisfied with his attorney's help.

Accordingly, the court concludes that the defendant's plea of guilty herein was knowingly, voluntarily, and intelligently entered, that the defendant fully understood the implications and consequences of his plea (see, People v Harris, 61 NY2d 9, 16-20), and that the defendant has not established any ground for vacating the judgment of conviction entered upon his guilty plea.

Nor is there anything in the sentencing minutes which would require a different conclusion. At sentencing, the defendant did not ask to withdraw his plea, nor did he assert any denial of his guilt (and the court also noted that the defendant had admitted his guilt to the Department of Probation upon his pre-sentence interview). To the contrary, when asked if he wished to speak prior to sentence, the defendant, rather than protesting his innocence, apologized to the family and stated that he "truly regret[ted]" what had taken place that night, thereby affirming his criminal act. The defendant was then sentenced in accordance with the negotiated plea, which, as noted by the People, was far less than the offer they had maintained throughout, namely five years' incarceration.

In the context of a conviction upon a plea, "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" (Ford, supra, at 404, citing, People v Boodhoo, 191 AD2d 448, 449 and, People v Mayes, 133 AD2d 905, 906). "[W]here 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, lv. denied, 89 NY2d 1097, citing, People v Mobley, 221 AD2d 376 and, People v Navedo, 137 AD2d 726 [lv. denied, 71 NY2d 1030]).

Here, it may be concluded that the defendant did receive an advantageous plea, specifically, a plea to a lesser felony and a shorter sentence[4], thereby significantly minimizing his potential sentencing exposure. The court notes that the top count charged, Robbery in the First Degree, carried a minimum sentence of five years' incarceration and a maximum of 25 years.

Meanwhile, even upon this motion, the defendant does not demonstrate that his plea was involuntary; his only real argument is that, but for the purported

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[4] At sentencing, the Assistant District Attorney noted for the record that the case had been pending for a long time because counsel had been seeking a plea but the People's sentence offer upon any disposition had remained at five years' incarceration. However, because the victims wished to see the defendants rehabilitated and serve less time in jail, ultimately the People acceded to the defense's request for such a reduced plea.

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misrepresentations of counsel regarding the immigration consequences of his plea, he would have proceeded to trial. Nevertheless, short of denying wrongdoing, the defendant does not set forth what defenses he had to these charges, in the face of a very strong prosecution case. Furthermore, again, what the defendant characterizes as "misrepresentations," this court does not deem to constitute affirmative misrepresentations of the immigration consequences of the defendant's plea.

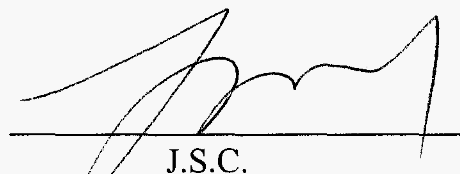
In conclusion, the court finds that the defendant's assertions regarding his immigration/deportation advisement do not provide him with a basis for the relief requested, and that, having failed to demonstrate a legal basis for this motion, it may, therefore, be denied, without a hearing (see, CPL 440.30[4][a]; People v Nash, 273 AD2d 696, 697, habeas corpus dismissed, 2005 WL 1719871).

In light of all of the above, the defendant's motion is, respectfully, denied.

The foregoing constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, N.Y. 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 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).

Dated: Brooklyn, New York
April 5, 2010



J.S.C.