

People v Kong Pin Shao
2010 NY Slip Op 32113(U)
July 19, 2010
Sup Ct, Kings County
Docket Number: 9106/2008
Judge: Patricia DiMango
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART PD85

-----X
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. Di Mango

Date: July 19, 2010

-against-

DECISION & ORDER

KONG PIN SHAO

Indictment No. 9106/2008

-----X

The defendant moves to vacate his judgment of conviction on the ground that he was denied his constitutional right to the effective assistance of counsel. The People oppose the motion, urging that the defendant has not established that vacatur is warranted.

Upon this motion the defendant claims that his attorney never consulted with him regarding the handling of his case or discussed with him what rights he had. He asserts that his only communication with his attorney occurred during his court appearance when counsel determined that he should plead guilty and instructed him how to plead guilty, without explaining to him the consequences of pleading guilty. Specifically, the defendant contends that he was never informed of the immigration consequences of a guilty plea and he maintains that, had he “been informed by his counsel that a guilty plea would result in a ‘virtually automatic’ deportation, he would not have pled guilty and insisted on going to trial.”

According to the People's assertions and the sworn allegations contained in the felony complaint, on September 10, 2008, the defendant was discovered in the complainant's apartment when the police arrived in response to an early morning 911 call. Defendant fled but was quickly apprehended and was found to have in his possession the complainant's cell phone, debit card

and \$81. The defendant explained to the police that he had climbed through an apartment window to steal money because of his gambling debt. For this conduct, the defendant was indicted for the offenses of Burglary in the Second Degree (PL § 140.25[2]), Burglary in the Third Degree (PL § 140.20), Criminal Possession of Stolen Property in the Fourth Degree (PL § 165.45[2]), Criminal Possession of Stolen Property in the Fifth Degree (PL § 165.40), Grand Larceny in the Fourth Degree (PL § 155.30[4]), and Petit Larceny (PL§ 155.25).

On November 25, 2008, the defendant, with the assistance of a Mandarin interpreter, pleaded guilty before this court to the offense of Attempted Burglary in the Second Degree (PL §§ 110.00, 140.25[2]) in full satisfaction of the indictment. The record reflects that in response to the court's questions, defendant indicated that he had discussed the case with his attorney (who was retained counsel), and was satisfied with counsel's representation. He stated that he understood the rights that he was waiving by pleading guilty in exchange for a promised sentence of one year's jail. He admitted his guilt and confirmed that he was pleading guilty freely and voluntarily because he was in fact guilty. When the court asked him if anyone had pressured him into pleading guilty, the defendant responded negatively. He also denied that he was under the influence of drugs or alcohol that day.

When the defendant was asked about his immigration status the following colloquy took place:

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: I am not a US citizen.

THE COURT: They will deport you.

THE DEFENDANT: I have a green card.

THE COURT: I'm not a legal adviser to you, you can discuss all the ramifications of a plea and status here with your attorney. For my purposes, I am telling you they will deport you.

COUNSEL: I've spoken to him about immigration ramifications, Your Honor. I really did.

THE COURT: I believe you did.

The court concluded these proceedings by advising defendant of the conditions of his plea and explaining the implications of a violent felony conviction. With defendant's acknowledgment of his understanding of the court's admonishments, the matter was adjourned for sentencing on January 13, 2009. On that subsequent date, the defendant was sentenced to the promised term of one year's incarceration in New York City custody. Now, facing deportation, the defendant seeks vacatur of his conviction.

Discussion

The defendant's assertion that he was never informed of the immigration consequences of pleading guilty is refuted by the record (*see* CPL § 440.30[4][d]) and the court finds no reasonable possibility that this allegation is true. Rather, it is evident from the plea minutes that both the court and defense counsel advised defendant about the possibility of deportation. Indeed, the court stated twice, unequivocally, "They will deport you." Defense counsel also indicated that he and the defendant had discussed immigration ramifications to pleading guilty, and the defendant did not dispute counsel's statement or otherwise request clarification. Instead,

he proceeded with the plea. Further, at no point during the remainder of the plea allocution or at sentencing did the defendant ever request additional time to discuss immigration matters with his attorney or express a desire to withdraw his plea.

The defendant's claim of ineffectiveness is also meritless. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668 [1984]; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, § 6). To prevail on an ineffective assistance of counsel claim under the Federal standard, a defendant must be able to show that counsel's conduct was "outside the wide range of professionally competent assistance" (*Strickland v Washington*, at 690). The defendant also must be able to show that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694). In the context of a guilty plea, a defendant must also demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have accepted the guilty plea and instead would have insisted on going to trial (see *Hill v Lockhart*, 474 US 52, 59 [1985]; *United States v Artega*, 411 F3d 315, 320 [2d Cir. 2005]).

In New York, "[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" (*People v Baldi*, 54 NY2d 137, 147 [1981]). "This protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187 [1994], *habeas corpus conditionally granted*, 215 F.3d 293 [reversing and remanding for Rosario violations], *cert. denied*, 531 U.S. 1029 [2000]). Accordingly, the reviewing court must separate true ineffectiveness from "mere

losing tactics” (*People v Baldi* at 146) and the defendant must “demonstrate the absence of strategic or other legitimate explanations” for counsel’s conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel’s choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 712-713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004], *rearg. denied*, 3 NY3d 702 [2004]).

The defendant’s ineffectiveness claim rests upon the recent decision of the United States Supreme Court, *Padilla v Kentucky*, 130 S.Ct. 1473 (March 31, 2010), which addressed the first prong of the *Strickland* test. Before *Padilla*, an attorney in New York had no affirmative duty to inform a defendant about the immigration consequences of a guilty plea (*People v Ford*, 86 NY2d 397, 404-405 [1995], and an attorney could be considered ineffective only for providing incorrect advice about immigration consequences (*People v McDonald*, 1 NY3d 109, 115 [2003]). Now, *Padilla* requires attorneys to correctly advise their clients regarding the risk of deportation that attaches to a judgment of conviction (*Padilla* at 1482-3).

Consequently, under *Padilla* and *Strickland*, defendants challenging the conduct of counsel need not only demonstrate that they were not told that their conviction would make them deportable, but they must also show that the outcome of their proceedings would have been different had their attorney performed his or her duties competently. Although the Supreme Court did not expressly state whether *Padilla* should be applied retroactively, several courts have interpreted the decision as extending the existing *Strickland* rule rather than creating a new rule; as such, *Padilla* may be applied retroactively (*see, People v Bennett*, 903 NYS2d 696 [Crim. Ct.,

Bronx Cnty. 2010]; *People v Valestil*, 27 Misc3d 1234[A], **3 [Crim. Ct., Kings Cnty. 2010]; *People v Romero*, 7/6/2010 N.Y.L.J. [Dist. Ct., Suffolk County, June 16, 2010]; *see also, United States v Obonaga*, 2010 WL 2629748 [EDNY 2010]).

Here, former counsel provided meaningful representation. With respect to the first prong of *Strickland*, it is clear from the record that counsel fulfilled his duty of informing defendant of the immigration consequences of his guilty plea. Defendant has failed to substantiate his claim to the contrary, which claim is also unsupported by any affidavit from either the defendant or his former defense attorney detailing what discussions, if any, took place concerning the plea and the possibility of deportation (CPL § 440.30[4][b], [d]). The claim that trial counsel never informed the defendant of immigration consequences is made only by present counsel in the Memorandum of Law in support of the instant motion, and a sworn statement by defendant is conspicuously lacking.

Prior counsel's competence is further underscored by the very favorable plea of one year of imprisonment negotiated on behalf of the defendant (*see, People v Ford*, 86 NY2d at 404 [1995]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley*, 221 AD2d 376 [2d Dept 1995]); *People v Kearney*, 186 AD2d 270 [2d Dept 1992]). Whereas defendant faced a sentence of at least three and one-half years, and up to fifteen years in the event he were convicted of second degree burglary after trial, he received a very advantageous, short sentence in exchange for his plea to the lesser-included charge of attempted second degree burglary.

Turning to the second half of the ineffectiveness inquiry, the court finds that the defendant has also failed to establish that he was prejudiced by counsel's alleged deficient representation under either the Federal or State standard. Defendant has not demonstrated that

there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead would have insisted on going to trial (*Hill* at 59; *McDonald* at 115), or that he was deprived of "meaningful representation" overall.

In view of the very favorable plea bargain and the overwhelming evidence of defendant's guilt, it is highly unlikely that the defendant would have chosen to proceed to trial and risk a much lengthier prison sentence that would have also included deportation as an automatic consequence following conviction. The People's evidence against the defendant included proof that he was actually found in the complainant's home, was immediately pursued by police and was apprehended shortly thereafter, in possession of the complainant's cell phone, debit card and cash. The defendant himself even admitted to police that he had climbed into the apartment to steal money because of his gambling problem. Had he proceeded to trial, defendant would have had no legitimate defense or alibi. With the odds stacked squarely against him, his best option was to accept the plea offer of one year's imprisonment (*see, e.g., United States v Yong Won Park*, 222 Fed Appx 82, 83-84 [2nd Cir 2007 -- no prejudice where defendant, claiming he would not have pleaded guilty had he known the immigration consequences of his plea, faced overwhelming evidence of his guilt and the strong likelihood of conviction at trial, which too would have triggered deportation]; *see also, People v Robles-Mejia*, 27 Misc3d 1219(A) [Sup. Ct., Bronx County 2010 -- claim of prejudice rejected as incredible where defendant chose generous non-prison plea in face of lengthy sentence upon near-certain conviction after trial]). The court thus rejects the defendant's claim that he would have chosen to proceed to trial had he been fully aware of the immigration consequences of his plea.

In conclusion, upon the foregoing, the defendant's motion is, respectfully, denied without a hearing.

This decision shall constitute the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 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 his 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 certification granting leave to appeal is granted.

ENTER:



PATRICIA M. DI MANGO, J.S.C.

ENTERED
JUL 28 2010
NANCY T. SUNSHINE
COUNTY CLERK