

**People v DelaCruz**

2010 NY Slip Op 32686(U)

September 13, 2010

Supreme Court, Kings County

Docket Number: 7201/1995

Judge: Albert Tomei

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.



approached the two men and asked to buy four bags of cocaine in exchange for \$20.<sup>1</sup> The codefendant spoke with the undercover officer and told the defendant to make the sale. The defendant brought the undercover officer inside the store, removed four ziplock bags containing cocaine from behind a plexiglass counter, and handed them to the undercover officer, who gave the defendant \$20 in pre-recorded buy money. The arrest was made shortly after the sale and the defendant and codefendant were identified by both the undercover officer who purchased the drugs and by a ghost undercover officer who witnessed the transaction on the street. An additional 7 ziplock bags of crack cocaine were recovered from behind the plexiglass counter. The buy money was recovered from the cash register, commingled with other bills, totaling \$298.00.

The defendant and his codefendant were jointly indicted and charged with criminal sale of a controlled substance in the third and fifth degrees, criminal possession of a controlled substance in the third and the seventh degrees for the cocaine sold to the undercover officer, and a second count of criminal possession of a controlled substance in the third degree, for the cocaine found behind the counter. The defendant was released on bail after his criminal court arraignment and failed to appear for his supreme court arraignment on June 29, 1995, and a bench warrant issued. He was involuntarily returned on the warrant on July 18, 1995 and was arraigned on the indictment on August 15, 1995. At arraignment, he was represented by Robert Collini, Esq., who appeared in person or by an associate at the first few court dates. The defendant was then represented by Annalise Cottone, Esq., who filed defense motions and represented the defendant at plea and sentence. On October 20, 1995, counsel Cottone filed an omnibus motion on the defendant's behalf,

---

<sup>1</sup>The police had made two prior cocaine purchases at this store, on May 8, 1995 and May 22, 1995, and, on June 2, 1995, had obtained a search warrant for this store, based on those sales. The defendant was not charged with either of the May sales.

seeking inspection and dismissal of the indictment, discovery, and *Dunaway, Wade, and Sandoval* hearings.<sup>2</sup> The defendant pled guilty before the motion was decided or any hearings held.

On November 22, 1995, the defendant pled guilty to attempted criminal sale of a controlled substance in the third degree, a class C felony, in exchange for a sentence promise of six months' incarceration and five years' probation.<sup>3</sup> The defendant was assisted at all court dates by a Spanish language interpreter. At the time of his plea, the defendant was fully advised of the rights he was waiving and stated that he understood. He also stated that he was satisfied with the services of his attorney, and that he had not been threatened or coerced into entering the guilty plea. The defendant was released on his own recognizance after the plea and was sentenced, on January 17, 1996 to the bargained-for term of a six months' incarceration and five years' probation. (M. Garson, J., at plea and sentence). The defendant signed a waiver of his right to appeal as a condition of the plea deal, and did not appeal the conviction.

In his present motion, defendant claims that before he pled guilty to attempted criminal sale of a controlled substance in the third degree, he advised his attorney that he was innocent of the charges and had been speaking with people that he knew outside a store when he was pushed inside by the police and falsely arrested. He asserts that counsel told him that he had no chance to prevail because it was his word against the officers and that he was facing a long prison term if convicted. He claims that he pled guilty because he had been in jail for nearly six months

---

<sup>2</sup>The defendant appeared in court with counsel on four dates prior to the plea, the date of the plea, once following the plea and on the date of sentence, for a total of seven court dates, not the three he recalls. (arraignment, plea, and sentence - see affidavit of defendant dated March 31, 2010).

<sup>3</sup>The codefendant was convicted, after trial, of criminal sale of a controlled substance in the third degree, for the drug sale, and criminal possession of a controlled substance in the third degree, for the additional cocaine found behind the counter.

and was told that he would be released immediately after entering his plea in exchange for a promise of six months' incarceration and five years' probation.

In his first affidavit attached to the instant motion, the defendant states "I do not recall discussing Immigration consequences with any lawyer who represented me on this matter, whether it was Ms. Cottone, Mr. Collini, or someone else. As such, I cannot say that I was misled or given wrong information as to collateral consequences of the plea that I entered." (Affidavit of 12/29/2009 at 3). He concludes that if he had known that the conviction would have acted as a ban or had an affect on his later attempts to regularize his status in the United States.

The defendant also maintains that his plea was not knowing and voluntary but was coerced by counsel. He also states that he hesitated while attempting to enter his plea and told the judge that he was not involved in the drug transaction. He recalled that the judge then told him to consult with counsel and second called the case. (Affidavit of 12/29/2009 at ). The sentence minutes do not reflect any such incident. The defendant further asserts that neither counsel had hired an investigator or made any attempt to investigate the case prior to his arrest and that he would not have pled guilty except for the pressure placed on him by counsel to accept the plea deal.

In response to defendant's motions, neither attorney has any specific recollection of the defendant's case from 14 years ago. However, attorney Cottone states that it was her general practice to discuss immigration consequences with her clients at that time.

### **Conclusions of Law**

New York courts have long recognized that affirmative misstatements by defense counsel regarding the immigration consequences of a guilty plea may, in some instances, rise to the level of ineffective assistance of counsel. *See People v. Ford*, 86 N.Y.2d at 405; *People v.*

McDonald, 296 A.D.2d 13 (3d Dept 2002). This was in accord with prevailing Federal law. *See U.S. v. Couto*, N.Y.L.J., Dec. 12, 2002, p. 26, col. 1 (ruling that, in the case of a plea taken after all discretionary avenues for relief from deportation had been revoked, “an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable”). Recently, the United States Supreme Court ruled that the failure to failure to give any immigration advice may also constitute ineffective assistance of counsel, so long as the defendant can establish both that no immigration advice was given and that the defendant would not have pled guilty had he been apprised of the immigration consequences of conviction. *See Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

Under New York law, a claim of ineffective assistance of counsel requires proof that the attorney provided less than meaningful representation, measured by an evaluation of the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation. *People v. Flores*, 84 N.Y.2d 184, 186-187 (1994); *People v. Baldi*, 54 N.Y.2d 127, 147 (1981). In the context of a guilty plea, a defendant has received meaningful representation when he receives an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of counsel. *People v. Boodhoo*, 191 A.D.2d 448, 449 (2d Dept 1993).

To establish a claim of ineffective assistance predicated upon a claim that counsel incorrectly advised defendant about the risk of deportation, or failed to give any advice, a defendant must establish both that he was either not given any advice, or that the advice given was mistaken, and that this advice or lack of advice induced him to plead guilty. *See People v. Ford*, 86 N.Y.2d at 405; *People v. McDonald*, 296 A.D.2d at 19. A defendant must also demonstrate that he was prejudiced by his counsel’s mistaken advice by showing that he had a colorable claim of innocence

such that he might have avoided conviction after trial and, thus, avoided the conviction which rendered him deportable. *See People v. McDonald*, 296 A.D.2d at 19-21. While a showing of prejudice is not absolutely required under New York law, whether the defendant was prejudiced by counsel's conduct is a significant factor in determining whether a defendant received effective representation and whether the proceeding as a whole was unfair. *See People v. Stultz*, 2 N.Y.3d 277, 283-284 (2004).

Here, even accepting his factual allegations at face value, defendant has failed to establish that either of his two counsel failed to provide any immigration advice or that either provided misinformation regarding the immigration effects of his guilty plea. Defendant does not allege that he asked either counsel about the immigration consequences of his plea or that either counsel failed to give him advice. Rather, he asserts only that he cannot recall having received any immigration advice. The defendant has a burden of establishing every element necessary to support his claim in a motion to vacate judgment and the failure to recall having received immigration advice is not sufficient to establish that no advice was given.

It is entirely believable that the defendant cannot recall whether or not he discussed the immigration consequences of the plea with either of his counsel. The defendant is making his claim for the first time 14 years after his guilty plea and his memory of that plea is demonstrably poor. He cannot now recall whether his attorney was male or female, recalls only three of the seven court appearances he made with counsel, and erroneously recalls that he was reluctant to take the plea and was persuaded to do so by counsel only after telling the plea court that he was innocent and having the plea proceeding paused for him to consult with counsel.

Moreover, although defendant now asserts that he would not have pled guilty had he

known that his plea would affect or perhaps bar his future ability to regularize his status in the United States, that claim is not credible. At the time the defendant pled guilty he was an unmarried and childless twenty five year old who was illegally in the United States and whose concern was, as he admits, with gaining his immediate release from prison. At that time he was neither the father of a citizen child nor the spouse of a legal resident and it is unlikely that regularizing his status was chief on his mind. Indeed, if it had been, he would have made an inquiry of his counsel regarding the immigration consequences of his plea and would recall having done so.

Further, the evidence against the defendant was overwhelming in that he was arrested moments after completing the sale to the undercover officer and an additional stash of drugs and the buy money were both recovered from inside the store where the sale was made. Although the defendant asserts that he was innocent, and was framed by the police the defendant has not provided any information supporting that claim. The defendant has not named the friends with whom he was speaking at the time he was allegedly pushed inside the store, nor provided an affidavit from one of them. Nor has he provided an affirmation from one of his attorneys reflecting that he had, in fact, informed them of his claim of innocence and provided the names and contact information of those friends so that an investigation could be conducted. In addition, because the defendant was not legally within the United States at the time of this plea and was already subject to deportation for illegal entry, it is even more unlikely that he was concerned about possible immigration consequences, rather than his immediate freedom. *See People v. Figueroa*, 170 A.D.2d 529 (2d Dept., 1991) (claim that counsel was ineffective for advice on deportation consequences of guilty plea denied because defendant already deportable regardless of guilty plea). Therefore, this court finds that he defendant has failed to demonstrate that his present desire to regularize his status in the

United States, which he now possesses because of his marriage to a legal resident and his young teenaged citizen child, existed at the time of the plea.

Under these circumstances, where the defendant was subject to deportation prior to his guilty plea for reasons unrelated to the plea, defendant has failed to show that advice regarding the possibility that a drug conviction might have on future efforts to regularizing his status would have induced him to forego the extremely advantageous plea bargain negotiated on his behalf by counsel which gained his immediate release from custody, and instead go to trial where conviction was nearly certain and which would have resulted in a mandatory prison sentence.

The claims of ineffective assistance of counsel for 1) failing to investigate the case; and 2) advising the defendant that he should take the extremely advantageous plea offer because the evidence against him was overwhelming, his defense was based solely upon his own word, and the jail time consequences of a guilt plea after trial were quite severe, are all denied. The defendant pled guilty very early in the case, before the court had even ruled upon the omnibus motion filed by his counsel. Therefore, counsel was not ineffective for failing to hire an investigator or conduct a thorough investigation of the case at this stage. Nor was counsel ineffective for advising the defendant about the consequences of rejecting the extremely advantageous plea offer and going to trial. The advice given by counsel in this case, far from constituting coercion or duress, is exactly the type of advice expected of competent counsel - - an evaluation of the strength of the evidence and an explanation of the risks and benefits of taking the plea or of going to trial and the possible sentence which could result from a trial conviction. This claim is further undermined by the defendant's own statements at the plea proceeding where he demonstrated no hesitation in pleading guilty and admitting his role in the sale and where he stated that he was satisfied with counsel's

representation and had not been coerced or threatened into taking the guilty plea.

In sum, defendant's motion papers fail to state a claim of ineffective assistance of counsel predicated upon the lack of immigration advise or ineffective assistance of counsel for advising the defendant to take the plea or for failing to investigate the defendant's claim of innocence, or to state a claim necessitating a hearing upon his allegations. *See* C.P.L. § 440.30(4)(c).

Therefore, and for the foregoing reasons, the motion is denied.

This constitutes the decision and order of the court.

  
HON. ALBERT TOMEI, J.S.C.  
HON. ALBERT TOMEI  
JSC

**ENTERED**  
SEP 17 2010  
NANCY T SUNSHINE  
COUNTY CLERK