

**People v Ebrahim**

2010 NY Slip Op 32794(U)

September 30, 2010

Supreme Court, Wayne County

Docket Number: 08-W21

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
COUNTY COURT COUNTY OF WAYNE

08-w21

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

MURTADA EBRAHIM,  
Defendant

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New York State Attorney General  
Jerry M. Solomon, Special Assistant Attorney General, of counsel  
For the People

Wayne County Public Defender  
Gregory J. Power, Esq., Assistant Public Defender  
For the Defendant

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The Defendant Murtada Ebrahim has moved pursuant to CPL §440.10 for an order vacating his conviction on the charges of Grand Larceny in the Third Degree and Offering a False Instrument for Filing in the First Degree. The Defendant has raised several issues in his papers which were the subject of prior motions, and the Court finds no legal basis to revisit those matters. Therefore, the Court will confine its review to that portion of the Defendant's motion in which he maintains that he received ineffective assistance of counsel resulting from his attorney's alleged failure to advise him accurately as to the consequences of his plea as it affects the

question of his deportation.

The Defendant initially filed his motion papers *pro se*. Due to the nature of the arguments raised, the Court found it appropriate to grant the Defendant's subsequent request for counsel and assigned the Wayne County Public Defender. The Defendant's motion has been opposed by the New York State Attorney General. The Court has entertained oral argument on this motion. At that time, an interpreter was provided for the Defendant, due to the fact that English is his second language (although the Court has previously ruled that the Defendant's comprehension of the English language was sufficient for him to have understood the conditions of his plea).

Following a detailed investigation by the Attorney General's Medicaid Fraud Control Unit and lengthy pre-indictment negotiations, the Defendant was arraigned on a felony Complaint and waived indictment. A Superior Court Information was then filed, charging the Defendant with Grand Larceny in the Second Degree and Offering a False Instrument for Filing in the First Degree. The Defendant proceeded to enter into a plea agreement, as evidenced by the document he executed on July 8, 2008, pursuant to which he was permitted to enter a plea of guilty to Grand

Larceny in the Third Degree and Offering a False Instrument for Filing in the First Degree, with the promise of a sentence of two years to six years incarceration on each charge, to be served concurrently, as well as restitution. The agreement stated that the Defendant could face deportation consequences as a result of the plea.

At the time he was sentenced, this Court also advised the Defendant of the consequences of his plea, including the potential for deportation. The Court further advised the Defendant that no promises were being made to him regarding his immigration status. While the Assistant Attorney General at one point during the proceedings commented that deportation was “unlikely”, the Court subsequently reminded the Defendant that neither the Court, nor the People, could give him legal advice, and that he should rely only on the promises as expressly recited on the record.

At the time of the plea, the controlling case law in the State of New York regarding the issue of deportation was set forth in *People v Ford*, 86 NY2d 397 (1995). In that opinion, the Court of Appeals held that the failure to advise a defendant as to the immigration consequences of a plea did not constitute ineffective assistance of counsel because such consequences were considered collateral to the conviction itself. Therefore, it is clear that,

under the law as it existed previously, the issue of deportation was more than adequately addressed at the time of the Defendant's plea and sentence.

However, in March of 2010, the United States Supreme Court, held in Padilla v Kentucky, 130 S.Ct. 1473, that the failure to advise a defendant as to the immigration consequences of a plea can constitute ineffective assistance of counsel requiring that the conviction be set aside. In so, holding, the Supreme Court refused to apply the distinction between "direct" and "collateral" consequences of a plea in regard to deportation. The Court stated:

"When the law is not succinct and straightforward ... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear" (Padilla, supra).

Therefore, the specificity of the advice required by Padilla to be given by an attorney to a defendant appears to be directly related to the status of the crime as set forth in the Immigration Law.

A threshold issue, which is not expressly addressed by the Supreme Court in Padilla, is whether the high Court intended its ruling to apply retroactively. Pursuant to case law, a Defendant would not be entitled to

relief under Padilla if that decision resulted from an application of “settled law” rather than announcing a “new rule” (see, Teague v Lane, 489 U.S. 288 (1989); People v Eastman, 85 NY2d 265 (1995)). The Supreme Court has defined a “new rule” as one that breaks new ground or imposes a new obligation on the states or on the federal government. A rule is also “new” if the result was not “dictated by precedent existing at the time the defendant’s conviction became final” (Butler v McKellar, 494 US 407, 412 (1990); see also, Teague supra, at 301; People v Eastman, supra, 275-76.) A decision which merely applies settled law to a new set of facts will not be applied retroactively.

The issue of the retroactivity of Padilla has been addressed by various lower courts with conflicting results. For example, the Criminal Court of Bronx County held in People v Bennett, 28 Misc 3d 975 (2010) that Padilla did not announce a new rule and therefore concluded that Padilla is to be applied retroactively. In contrast, the Criminal Court of the City of New York held in People v Kabre, 905 N.Y.S. 2d 887 (2010) that a new rule was enunciated in Padilla, and therefore retroactivity did not apply. The analysis of both courts rests on their respective interpretations of the United States Supreme Court’s decision in Strickland v Washington, 466 US 668

(1984), which established a two-prong test to evaluate the effectiveness of counsel. In Bennett, the Court held that Padilla merely applied the settled precedent established by Strickland to a new set of facts, concluding that Padilla was a foreseeable application of Strickland rather than a new rule.

However, in Kabre, the Court stated:

“That Strickland is the standard by which counsel’s performance is judged breaks no new ground, but a ruling that courts must now judge counsel’s performance in an area previously considered completely collateral to the criminal process does and is therefore ‘new’”.

The Kabre court also reasoned that the Padilla holding was not dictated by precedent, and that the unlawfulness of the defendant’s conviction some years prior to Padilla could not have been apparent to “all reasonable jurists”. Finally, Kabre rejects as uncontrolling the Bennett court’s reliance on the Supreme Court’s equivocal language in Padilla regarding concerns that the decision would result in greatly increased litigation.

This Court finds the reasoning of Kabre to be more persuasive, and shares the opinion that Padilla need not be applied retroactively.

Accordingly, the effectiveness of the defendant’s counsel should be judged as of the time of the representation (People v Baldi, 54 NY2d 137, 147 (1984)).

However, in the event that Padilla is found to apply retroactively and that the Court must therefore apply its holding to the instant case, it then become necessary to determine whether the Defendant received ineffective assistance of counsel, in light of the aforementioned two-prong test enunciated in Strickland. Therefore, to prevail, a defendant must (1) show that his counsel's representation fell below "an objective standard of reasonableness" under "prevailing professional norms"; and (2) "affirmatively prove prejudice". (Strickland, 466 U.S. at 687-88). Only if both of these elements are satisfied can a defendant demonstrate that his counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment". (Id.)

The first prong of the Strickland test requires that there be a showing that the advice given to the defendant by his attorney constituted such "unreasonable conduct" as to be considered constitutionally deficient. As did Mr. Padilla, it appears that this Defendant entered a plea of guilty to a charge which is considered an "aggravated felony" under federal immigration law. Pursuant to Title 8, United States Code, Section 1227(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony at the time after admission (into the United States) is deportable". An

“aggravated felony” for purposes of determining immigration status includes an offense of “fraud or deceit in which the loss to the victim or victims exceeds \$10,000.00.” (See, 8 U.S.C. §110(a)(43)(M)(I)). In this case, the Defendant, by entering a plea of guilty to Offering A False Instrument for Filing in the First Degree, admitted that he had committed a fraudulent offense involving more than \$10,000.00, and was thus “deportable” under federal law.

This Court has been unable to locate any statutory definition of the word “deportable” as used in federal law. Some federal courts have indicated their position that the word means “presumptively mandatory” or even “automatic”. (See, e.g., *Boakye v United States*, 2010 WL 1645055 (S.D.N.Y., 2010)). However, at the time of oral argument of this matter, the Assistant Attorney General strenuously argued that the Defendant’s convictions constitute crimes involving “moral turpitude” (see, 8 USC §1227(a)(2)(A)(i)) which, even though meeting the definition of an “aggravated felony” are nonetheless subject to discretionary deportation. This Court cannot conclude as a matter of law that the characterization of an offense as “deportable”, without more, affirmatively dictates that “the deportation consequence (of the plea) is truly clear” (emphasis added), as

required by Padilla.

The Attorney General has submitted an affidavit from the Defendant's plea counsel, setting forth the substance of the advice which he allegedly gave to the Defendant on numerous occasions regarding his immigration status. This Court has reviewed that affidavit, together with the plea agreement, and the transcripts of the plea and sentencing proceedings. Absent any definitive statutory or case law defining the specific consequences of a plea to an aggravated felony of this nature, this Court believes that the Defendant was given "objectively reasonable" advice by his attorney as to the issue of deportation. Finally, the Court notes the defense attorney's silence during the Attorney General's comment that the Defendant's deportation was unlikely "does not inform the decision of whether his assistance to the (Defendant) overall was ineffective." (Boakye, supra).

Moreover, if the Court were to find that the Defendant has satisfied the first prong of Strickland, (a conclusion not reached by this Court) he has not satisfied the second prong of the Strickland, test by "affirmatively prov[ing] prejudice". Even were it found that the Defendant's counsel misled him with his advice in advance of his guilty plea, the Defendant has

not established the requisite prejudice necessary to have his conviction vacated. The Defendant has alleged that, had he known that deportation was automatic, he would have gone to trial. However, other than that conclusory allegation, the Defendant has not established any reasonable probability that he would actually have insisted on going to trial had he known of the precise immigration consequences of his conviction. (See, U.S. v Couto, 311 F. 3d 187 (2<sup>nd</sup> Cir. 2002)). Had the Defendant proceeded to trial, he would have faced the extensive evidence of his guilt gathered by the Medicaid Fraud Unit. Further, in addition to facing a strong Government case against him at trial, Defendant also would have lost the substantial benefit resulting from his plea bargain. Specifically, he would have faced prosecution on the charge of Grand Larceny in the Second Degree, which carries a maximum sentence of 5 to 15 years incarceration.

In the face of these countervailing considerations, the conclusory allegations set forth in the Defendant's papers that he would have gone to trial but for counsel's alleged ineffectiveness, standing alone, are insufficient to establish actual prejudice under Strickland. Accordingly, Defendant has not shown that there is "a reasonable probability that, but for counsel's alleged errors, [the defendant] would have not pleaded guilty and

would have insisted on going to trial," (*Couto*, supra), and thus Defendant has not satisfied the second prong of the *Strickland* test.


### CONCLUSION

In summary, the Court concludes that *Padilla* need not be applied retroactively to the Defendant's case. However, even were *Padilla* found to be controlling, the Defendant has not satisfied the two-prong test set forth in *Strickland*. Were the Court to hold that the Defendant was not adequately advised by counsel as to the effect of his guilty plea upon his immigration status (a conclusion which, as previously stated, this Court is reluctant to reach), the Court nevertheless finds that the Defendant has failed to satisfy the second prong of the test, in that he has not demonstrated that he has suffered actual prejudice as a result of his plea, in that he has failed to demonstrate a "reasonable probability" that he would have rejected the plea agreement and proceeded to trial, had he received different legal advice.

Therefore, the Defendant's motion to vacate his conviction is denied in its entirety.

This Decision constitutes the Order of the Court.

Dated: September 30, 2010  
Lyons, New York

  
Honorable Dennis M. Kehoe  
County Court Judge