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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, MISC. MOTIONS

PEOPLE OF THE STATE OF NEW YORK — Indictment No.: 13987/90

against — By: Hon. Thomas J. Carroll

Anthony Brown, A/K/A Dennis Brown, Defendant — Dated: October 15, 2010

Defendant moves pursuant to CPL § 440.10 (1)(h) to vacate his judgment of conviction on the grounds that he was denied effective assistance of counsel. Defendant asserts that his attorney's misleading advice about the impact of his conviction on his immigration status made his guilty plea unknowing and involuntary. Specifically, defendant contends that counsel: (1) advised him that by pleading guilty to attempted sale of a controlled substance in the third degree he could avoid the possibility of deportation; (2) failed to seek a plea to a non-deportable offense; and (3) failed to obtain a judicial recommendation against deportation (JRAD) on the defendant's behalf. Defendant also seeks to substitute a disposition of a non-deportable offense for his conviction for attempted criminal sale of a controlled substance in the third degree and, in the alternative seeks a hearing. Finally, defendant asserts that were it not for counsel's misleading advice he would have proceeded to trial. For the following reasons defendant's motion is denied.

Factual Background

Defendant is a citizen of Jamaica. On October 1, 1987, he legally entered the United States as a non-immigrant visitor with authorization to remain for a period not to exceed April 9, 1988. Defendant let the time limit for his visit expire and never left.

On December 10, 1990, at approximately 2:25 a.m., defendant was approached by an undercover officer asking if he had "nicks". Defendant answered affirmatively and asked "How many?" After the undercover officer said "two", defendant withdrew a bag from the front wheel area of a nearby car and presented the undercover officer with two vials of crack cocaine in exchange for ten dollars in the form of a ten dollar pre-corded bill. Shortly thereafter, defendant was arrested by the field team near the site of the transaction and within ten minutes was identified by the undercover officer. The police retrieved a quantity of crack cocaine from the front wheel area of the same car and recovered one hundred twenty-one dollars as well as the ten dollar pre-recorded bill from defendant's pants pocket. All of the money and the drugs recovered were vouchered as evidence against defendant.

The defendant was charged under Indictment Number 13987/1990 with criminal sale of a controlled substance in the third degree (PL § 220.39), two counts of criminal possession of a controlled substance in the third (PL § 220.16[1], and one count each of criminal possession of a controlled substance in the fifth and seventh degrees (PL §§ 220.06[5], 220.03).

On February 7, 1991, the defendant, represented by Steven A. Lee of the Legal Aid Society, pleaded guilty to one count of attempted criminal sale of a controlled substance in the third degree (PL §§ 110.00/220.39[1]) in exchange for a sentence of one day in jail and five years probation. He also admitted his guilt in his pre-sentence report where he stated that he had no other means of support and that at the time of his arrest he had only been selling drugs for a few weeks. The promised sentence was imposed on

April 16, 1991 (Marano, J., at plea and sentence). The minutes of the plea and sentence are unavailable.

The defendant never appealed his judgment of conviction.

Since his conviction, defendant was arrested twice for the criminal sale of marijuana to an undercover police officer, once in 1992 and once in 1994. In each instance, and contrary to his assertion that since the instant felony conviction his record was blemish-free, defendant pleaded guilty to disorderly conduct. On October 27, 2008, defendant's application for a Certificate of Relief from Disabilities was granted.

According to present counsel's affirmation, in 2003, defendant married a presumably United States citizen who subsequently filed a Petition for Alien Relative on defendant's behalf which was allegedly approved. On April 18, 2007, defendant submitted both an Application to Register Permanent Residence or Adjust Status and an Application fo Employment Authorization.

On September 18, 2007, removal proceedings were instituted against defendant under section 240 of the Immigration and Nationality Act. The specification noted in the Notice to Appear document was defendant's act of remaining in the United States beyond April 9, 1988 without authorization from the Immigration and Naturalization Service. On August 27, 2008, additional charges were filed against defendant in support of his deportation. They stemmed from defendant's drug conviction and included the charges (1) that he had been convicted of a crime of moral turpitude within five years of his entry in the United States for which a sentence of at least one year may be imposed and (2) that he had been convicted of a crime relating to a controlled substance other than a single

offense involving the personal possession and use of thirty grams or less of marijuana.

In support of his motion, defendant submits an affidavit that contradicts his plea of guilty, is at odds with the documented facts, and imagines a scenario in which he is innocent. Defendant contends that he refused the undercover officer's request to buy crack cocaine from him, responding that he was not a drug dealer, and that when the undercover pressed him to "sell her some crack, I took the currency that she was offering to me, tore it up and threw it to the ground, and then I kept walking". He also asserts that upon first meeting his assigned attorney, he stated, "that I was innocent of the charges, and that I did not possess or sold [sic] crack cocaine to any one".

Defendant claims that during plea negotiations, counsel advised him that he would be able to avoid incarceration and "any possibility of being deported" if he pleaded guilty to attempted sale of a controlled substance in the third degree. He also stated that counsel informed him that if he could stay out of trouble for five years, "it would be a good way of proving that I was innocent of the charges. . . ".

The People submit the affidavit of defendant's then Legal Aid Society attorney who admits that he has no independent recollection of defendant, but states that the sources of the information and belief in his affidavit are the Court file and related papers, his Legal Aid training, his usual and customary practices and his discussions with the prosecutor assigned to this motion. He adamantly denies the allegations levied against him by defendant and his present attorney. He states, "Pursuant to my training, custom and practice, at no time would I have advised Mr. Brown that he could avoid any possibility of being deported if he agreed to plead guilty to Attempted Criminal Sale of a

Controlled substance in the Third Degree." Furthermore, "Mr. Brown and his attorney are misleading this Court as to the circumstances of Mr. Brown's arrest and what I stated to Mr. Brown as his attorney."

Lee explained that he had been able to successfully have the initial plea offer of six months in jail and five years probation reduced to one day in jail along with five years probation. He said that he "received training and was fully familiar with the consequences of guilty pleas as they impacted non-citizen clients . . . ". He also strongly denied defendant's allegation that he told defendant that a five-year period without trouble would tend to prove defendant's innocence. Finally, Lee stated that "[a]t no time did I advise Mr. Brown that the plea would not have a potential effect on his immigration status, nor did I misinform him of the effect the plea would have on his immigration".

Conclusions of Law

To prevail on an ineffective assistance of counsel claim under the Federal Constitution, the defendant must establish that counsel's conduct was outside the "wide range of professionally competent assistance" *(Strickland v Washington*, 466 U.S. 668, 690 [1984]) and "fell below an objective standard of reasonableness" (*Hill v Lockhart*, 474 U.S. 52, 58 [1985]). Furthermore, defendant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*Hill v Lockhart* at 59).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when "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" (*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Baldi,* 54 NY2d 137, 147 [1981]). While defendant need not establish that but for counsel's deficient conduct he would not have pleaded guilty, as under *Strickland*, he must nevertheless show that he was denied meaningful representation by showing that the proceeding as a whole was unfair (*People v Caban*, 5 NY3d 143 [2005]; *People v Benevento,* 91 NY2d 708, 713-714 [1998]). "In the context of a guilty 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. . . ." (*People v Ford*, 86 NY2d 397, 404 [1995]; *People v Boodhoo*, 191 AD2d 448, 449 [2d Dept 1993]). A showing of prejudice, while not absolutely required under New York law is a significant factor in determining whether a defendant was provided with effective representation and whether the proceeding was fair (*People v Stultz,* 2 NY3d 277, 284-285 [2004]).

New York courts have recognized that incorrect advice or affirmative misstatements about the immigration consequences of a guilty plea may constitute ineffective assistance of counsel if a defendant would not have otherwise pleaded guilty and would have insisted on proceeding to trial (*People v McDonald*, 1 NY3d 109, 114-115 [2003]; *People v McKenzie*, 4 AD3d 437, 438 [2d Dept 2004]; *People v Ford* at 405). Until recently counsel's effectiveness was not considered to be undermined by a complete absence of immigration advice, but with the Supreme Court's decision in *Padilla v Kentucky*, 130 S.Ct. 1473 (2010), counsel's obligation to advise a client has

been enlarged. Now the failure to give any immigration advice may also constitute ineffectiveness if defendant can establish the absence of such advice and that he would not have pleaded guilty had he been apprised of the immigration consequences of a conviction (*Id.*). However, *Padilla*, recognizing the professional norms for at least the past 15 years, also held,"[w]e should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty."(*Id.* at 1485) Based upon counsel Lee's affidavit, this Court will consider this presumption as applying in this case.

It is defendant's burden to establish that he was poorly advised and that in reliance on such advice or the lack thereof, he was induced to plead guilty when he would otherwise have insisted on going to trial. His claims must be weighed against the strength of the prosecution's evidence, the availability of a viable defense, the likelihood of a conviction were he to proceed to trial, a comparison of the promised sentence after a guilty plea with the potential exposure upon a guilty verdict, and counsel's advice on the plea offer (*People v McDonald*, 296 AD2d 13, 19-21 [3d Dept 2002] *affd* 1 NY3d 109). Defendant must also establish that he was prejudiced by counsel's advice and demonstrate that he had a colorable claim of innocence by which he might have avoided a conviction after trial (*Id.)*

In this instance defendant has failed to meet his burden. His unsubstantiated allegations are self-serving and his credibility is controvertible on a number of fronts. In the face of overwhelming and well-documented evidence of guilt, defendant's present

attorney insists that the case against defendant was weak. The lynchpin of his argument is that no drugs were found on defendant and that no money changed hands. The first argument was never at issue while the second has no basis in fact. Moreover, defendant's present version of past events where he indignantly ripped up the money that was forced upon him by the unscrupulous undercover officer appears to be a complete fiction. There is nothing in the police reports suggesting that the recovered pre-recorded bill was ripped. Nor is there any indication or reason to believe that defendant was pressured into perjuring himself before the court in his allocution or that he lied to the probation department. Finally, this court finds it difficult to believe that an attorney would advise a client that completing a period of probation without incident would tend to prove his innocence of the underlying crime.

Defendant's claim of ineffectiveness is also severely undermined by the favorable disposition that was negotiated by defense counsel Lee. Defendant was facing the possibility of a lengthy prison term but was fortunate to receive a one day split with five years of probation. Weighing defendant's tailored allegations and dissipating credibility against strong evidence of his guilt, counsel Lee's convincing denials and the presumption that counsel Lee satisfied his obligation, leads this court to the conclude defendant's claim that he would have proceeded to trial is not to be believed.

Finally, it is important to note that defendant was deportable in spite of his attorney's performance. The specification that involved defendant's overstaying his welcome in the United States preceded by almost a year the filing of the specifications

arising from defendant's instant conviction (*see People v Figueroa*, 170 AD2d 529 [2d Dept 1991] [claim that counsel was ineffective for advice regarding deportation consequences of guilty plea denied because defendant was already deportable regardless of guilty plea]).

Defendant's allegation that counsel was ineffective for not negotiating a plea to a non-deportable offense is without merit in light of defendant's extremely favorable plea. Moreover, as the People noted, no such option was available to counsel because all of the charges against defendant involved the sale or possession of a controlled substance, crack cocaine. A conviction for any of the charges would have subjected defendant to deportation. Under such circumstances "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success'"(citation omitted). (*People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant's final claim that counsel was ineffective for not seeking a judicial recommendation against deportation ("JRAD") is rejected. In a decision issued four days after defendant plead guilty the Second Department held that counsel's performance was not deficient for "not seeking a judicial recommendation against deportation at the time of sentencing inasmuch as such a recommendation is inapplicable where, as here, the alien is convicted of a narcotics offense" (*People v Figueroa* at 529). Moreover, on November 29, 1990, the Immigration Act of 1990 became effective and included a provision that abolished JRADs. With that avenue foreclosed, any failure by counsel to make such an

application is academic (*People v Gobot*, 176 AD2d 894 [2d Dept 1991]).

Accordingly, defendant's motion is denied in its entirety.

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 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.

ENTER:

HON. THOMAS J. CARROLL
THOMAS J. CARROLL,

J.S.C.

ENTERED

OCT 18 2010

NANCY T. SUNSHINE
COUNTY CLERK