

People v Clarke

2010 NY Slip Op 33243(U)

October 27, 2010

Sup Ct, Kings County

Docket Number: 2086/1994

Judge: Michael L. Pesce

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV76.

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Michael Pesce

Date: October 27, 2010

-against-

DECISION & ORDER

CHARLES CLARKE

Indictment No. 2086/1994

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Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he pleaded guilty based on the incorrect advice from counsel that entering a plea would not subject him to deportation. Immigration and Customs Enforcement (ICE) has commenced removal proceedings against defendant, a citizen of Guyana. Defendant is currently in custody at a federal detention center. For the following reasons, the motion is denied.

In the instant case, on February 17, 1994 police observed defendant exchange cash for small plastic items with three different individuals. Before each exchange, defendant retrieved the items from a snowbank approximately twenty feet away from him. After defendant was arrested a black pouch was recovered from the snowbank, containing eight plastic vials of crack-cocaine. One hundred and twenty-seven dollars was also recovered from defendant's person. Defendant was charged under Indictment No. 2086/1994 with criminal possession of a controlled substance in the third degree (PL § 220.16[1]) and criminal possession of a controlled substance in the seventh degree (PL § 220.03).

On December 8, 1994, defendant, represented by counsel, pleaded guilty to one count of criminal possession of a controlled substance in the seventh degree (PL § 220.03) in exchange

for a promised sentence of three years' probation. Defendant was sentenced to the agreed-upon term of probation on February 8, 1995. Defendant did not appeal from his judgment of conviction and has since completed his sentence in this case.

Defendant has a substantial criminal history apart from his conviction in the instant case. On March 6, 1991, defendant pleaded guilty to two separate counts of attempted sale of a controlled substance in the third degree under Indictment Nos. 11031/1989 and 14923/89. After he was observed placing a handgun into his pants, defendant pleaded guilty to criminal possession of a weapon in the fourth degree on September 27, 1992. At his sentencing on the weapons charge defendant also received additional prison terms for violating his probation under the previous two 1989 indictments. Defendant continued to sell illegal drugs after he completed his sentence in the instant case and pleaded guilty to criminal possession of a controlled substance in the seventh degree on September 13, 2000. He was again observed selling crack-cocaine on December 31, 2005, in relation to which he pleaded guilty to criminal possession of a controlled substance in the seventh degree on January 1, 2006. He was sentenced to a conditional discharge that included ten days of community service. After he failed to complete the community service defendant pleaded guilty to a violation of conditional discharge and was resentenced to 66 days in jail. At that time defendant was arrested by ICE officials and charged with violating 8 USC § 1227(A)(2)(A)(iii) (commission of an aggravated felony).

Defendant has also made repeated attempts at post-conviction litigation. In several sets of papers ranging from July 2006 to February 1, 2007, defendant moved in the Criminal Court pursuant to CPL §§ 440.10 and 440.30 to vacate the judgments of conviction under Docket Nos. 2000KN067225 and 2006KN000047 on the grounds of ineffective assistance of counsel.

Defendant argued that his attorneys had misadvised him that his guilty pleas would not subject him to deportation because he was sentenced only to conditional discharge. The court denied defendant's motions on February 5, 2007, finding that defendant had failed to establish that he was prejudiced by his attorneys' alleged conduct and that his "assertions regarding the effect of his attorneys's misrepresentation" were not credible (*People v Clarke*, 14 Misc.3d 1227A [Kings Co. 2007]).

In four separate motions filed under Indictment Nos. 11031/1998, 14923/1989, 14996/1992 and 2086/1994, defendant alleged both that he was misinformed as to the immigration consequences of his plea and that he was never informed that pleading guilty could result in deportation. In a decision dated December 21, 2007, this court rejected all four motions, finding that defendant's allegations were unsubstantiated and incredible and that defendant had failed to establish the essential element of prejudice.

In the instant motion, defendant again moves pursuant to CPL §§ 440.10(1)(h) and 440.30 to vacate his 1994 judgment of conviction on the grounds that counsel mistakenly advised him to plead guilty because the sentence of probation would not subject him to mandatory deportation. Defendant contends that he relied on counsel's advice and that, had he received accurate advice, he would not have pleaded guilty and would have either proceeded to trial or tried to negotiate a plea for a non-deportable offense.

The instant motion is procedurally barred for the same reasons that the court previously rejected defendant's identical claim of wrong advice from counsel. Here, as in defendant's last motion, defendant has failed to substantiate all of the essential facts underlying his claim (CPL § 440.30[3][b]). His very brief affidavit makes only the bald allegation that counsel informed him

that his guilty plea would not subject him to deportation. Defendant has neglected to elaborate on the details of this conversation or to state when it took place. Moreover, he has never submitted a supporting affidavit from counsel. Accordingly, the motion is denied for its procedural deficiency.

Defendant's claim is also without merit. While ordinarily the court may deny a motion when the ground raised was previously determined on the merits upon a prior motion, since the determination of his prior motion there has been a retroactively effective change in the law controlling counsel's duties with respect to immigration advice (CPL § 440.10[3][b]). In the intervening time, the United States Supreme Court has extended and clarified the duties of counsel, requiring that they provide accurate advice about immigration consequences to defendants contemplating a guilty plea (*see Padilla v Kentucky*, 130 S.Ct. 1473 [2010]). The People have addressed the application of *Padilla* but defendant has not. In any event, while *Padilla* is relevant to the instant case it does not change the result.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *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, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

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]). Moreover, “[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial” (*Flores* at 187). Accordingly, the reviewing court must separate ineffectiveness from “mere losing tactics” and the defendant must “demonstrate the absence of strategic or other legitimate explanation” for counsel’s conduct (*People v Baldi* at 146; *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, 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]).

In *Padilla*, the Supreme Court provided guidance as to the contours of defense counsel's obligation to advise a client on the possible immigration consequences of a guilty plea: “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..., the duty to give correct advice is equally clear” (*Padilla v Kentucky* at 1483). *Padilla* also eliminated the distinction between affirmative misrepresentations and omissions, finding that “there is no relevant difference between an act of commission and an act of omission in this context” (*id.* at 1484). Whereas New York courts have distinguished between direct and collateral consequences in delineating counsel’s Sixth Amendment obligations (*see, eg, People v Ford*, 86 NY2d 391 [1995]; *People v Argueta*, 46 AD3d 46 [2d Dept 2007]; *People v Johnson*, 41 AD3d 1284 [4th

Dept 2007]), in *Padilla* the Court found that distinction “ill-suited” to claims about the specific risk of deportation and held counsel responsible for providing correct advice about deportation regardless of whether those consequences were characterized as direct or collateral (*Padilla* at 1481-82).

The Supreme Court did not offer specific guidance in *Padilla* as to whether its decision should be applied retroactively in instances of collateral review. The New York Court of Appeals has yet to decide the question and both state and federal trial courts have made varied efforts to apply a retroactivity analysis to the new decision. Several state and federal courts have held *Padilla* to be retroactive based on a reading of the decision as an application of *Strickland* to a new set of facts rather than as establishing a new constitutional rule (*People v Williams*, 72 AD3d 1347 [3d Dept 2010]; *People v Garcia*, 907 NYS2d 398 [Kings Co. 2010]; *People v Bennett*, 28 Misc.3d 575 [NYC Crim. Ct. 2010]; *People v Valestil*, 27 Misc.3d 1234(A) [NYC Crim. Ct. 2010]; *People v Romero*, NYLJ [Dist. Ct., Suffolk County, June 16, 2010]; *US v Obonaga*, 2010 WL 2710413 [EDNY 2010]; *W.S. v Guzman-Garcia*, 2010 WL 1791247 [ED Cal 2010]; *US v Hubenig*, 2010 WL 2650625 [ED Cal 2010]; cf *People v Kabre*, 2002NY029321 [NYLJ Jul. 22, 2010] [*Padilla* not applied retroactively to misdemeanor conviction where counsel entirely failed to inform defendant that plea could lead to deportation]).

Both the *Bennett* and *Hubenig* courts (*supra*) focused on *Padilla*'s discussion of whether the new ruling would open the “floodgates” to litigation challenging prior guilty pleas. They concluded that the Supreme Court would have never raised the issue if it intended for *Padilla* to be applied only prospectively as a new rule (*Bennett* at 4; *Hubenig* at 7). The *Padilla* court, clearly unconcerned that the system would be overwhelmed with litigation, found that “[t]here is

no reason to doubt that lower courts - now quite experienced with applying *Strickland* - can effectively and efficiently use its framework to separate specious claims from those with substantial merit” (*Padilla* at 1485). Moreover, courts have analyzed *Padilla* according to *Teague v Lane* (489 US 288 [1989]), finding that *Padilla* merely extended *Strickland* to a new set of facts and that the decision articulated the widespread recommendation for attorneys to provide advice to criminal defendants about immigration consequences (*see People v Bennett, supra*, and *People v Hubenig, supra; US v. Chaidez*, 2010 WL 2740282 [N.D. Ill. 2010]). The *Padilla* court noted, “[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea” (*Padilla* at 1485). Accordingly, this court will apply *Padilla* retroactively to the facts of the instant motion.

Even if his poorly substantiated claim that counsel gave him wrong advice were true, defendant has yet again failed to establish that he was prejudiced by counsel’s conduct. As this court previously determined, “defendant’s account of prejudice [is] completely inadequate.” Counsel’s meaningful representation is reflected by the very favorable plea agreements negotiated in spite of the overwhelming evidence against defendant (*see People v Mobley*, 221 AD2d 376 [1995]). Furthermore, when defendant entered his guilty plea he was already deportable on account of his prior convictions of multiple deportable offenses. The Notice to Appear in Removal Proceedings also cites defendant’s 1989 conviction and a 2006 conviction as grounds for removal. Whether or not he entered a guilty plea in relation to the 1994 case, defendant was subject to deportation based upon his criminal history. As a consequence, defendant cannot now realistically claim that he would have rejected a highly advantageous plea

offer had counsel provided accurate immigration advice (*see People v Figueroa*, 170 AD2d 529 [2d Dept 1991] [counsel not ineffective where defendant's status as an illegal alien would subject him to deportation, regardless of the disposition of the case]).

Accordingly, the motion is denied.

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:


MICHAEL PESCE, J.S.C.

ENTERED
NOV 17 2010
NANCY T. SUNSHINE
COUNTY CLERK