

**People v William**

2010 NY Slip Op 33700(U)

June 25, 2010

Supreme Court, Kings County

Docket Number: 5221/2006

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CRIMINAL TERM: PART PD-85

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 THE PEOPLE OF THE STATE OF NEW YORK :  
 :  
 : DECISION AND ORDER  
 :  
 -against- :  
 : Indictment No. 5221/2006  
 :  
 JEAN WILLIAM a/k/a JEAN WILLMAN, :  
 :  
 :  
 Defendant. :  
 -----X

HON. PATRICIA M. Di MANGO:

The defendant, pro se, is moving, pursuant to CPL § 440.10, for an order vacating his judgment of conviction and permitting him to withdraw his plea of guilty. The People have opposed the application.

Upon due consideration of all of the parties' submissions upon this motion (including a transcription of the plea minutes) and a review of the official court file (which also contained the sentence minutes), the court hereby determines that the motion is denied in its entirety, without a hearing.

Factual Background and Discussion

The defendant was charged under the instant indictment with Attempted Robbery in the First, Second, and Third Degrees, Attempted Grand and Petit Larceny, Assault in the Second and Third Degrees, and other related offenses, all regarding events which took place on June 30, 2006 in Kings County.

According to the People's assertions and the sworn allegations contained in the felony complaint, the defendant had entered a taxicab at around 5:30 PM on June 30, 2006, demanded money from the driver and then hit the driver in the head with a hard metal object. As a result of being struck in the head, the driver lost control of his vehicle and his taxi impacted with other vehicles, veered onto the sidewalk and crashed into a house. Further, when the taxi jumped the curb it also struck an eight-year-old child. Both the child and the driver were transported to Brookdale Hospital for medical treatment. The People indicate that the driver received six stitches to his head and the child had sustained cuts and bruises. The People also allege that the "metal object" was recovered, although they do not describe or identify it any further. Papers in the court file further reveal that the complainant driver had made a "point out" identification of the defendant

to the arresting officer immediately after the incident and there may have been another witness who made a photographic identification.

Based upon this incident, the defendant was arrested and charged as indicated. He was arraigned thereon in Supreme Court on September 7, 2006, represented by his appointed Legal Aid attorney. Subsequently, on May 2, 2007, the defendant was assigned new counsel, Gregory Zenon, Esq.

While the defendant had repeatedly expressed his interest in obtaining a drug treatment program disposition, ultimately, the People declined to offer him any drug program disposition for this case. Instead, during the pendency of this case, the defendant was presented with several incarceration plea offers. The first offer was for a promised 5-year term of imprisonment in full satisfaction of the indictment upon a guilty plea. The second offer, made in April, 2007 was in exchange for 7 years' incarceration. These offers were rejected and the case proceeded along in preparation for eventual trial. In September of 2007, the matter was set down for the completion of discovery and to fix a date for hearings and trial.

On December 11, 2007, the People were ready to commence hearings and trial. Their final offer for a disposition was for a plea of guilty to Attempted Robbery in the First Degree with a sentence of seven years' incarceration. However, further negotiations took place and, ultimately, the defendant agreed to accept an offer to plead guilty to Assault in the Second Degree in exchange for a promised sentence of three and one-half years' imprisonment (as a second felony offender), followed by five years' post-release supervision, in lieu of trial. At that point, this case had been pending in Supreme Court for over 15 months.

Thus, on December 11, 2007 the defendant, represented by his attorney, Mr. Zenon, accepted this reduced plea offer, in full satisfaction of the captioned indictment.

According to the transcribed minutes of the plea proceedings, Mr. Willman's<sup>1</sup> attorney, Mr. Zenon, acknowledged that a disposition had been worked out with the People. Following a bench conference, Mr. Willman was duly sworn in by the court. Under oath, the defendant acknowledged that Mr. Zenon was his attorney and that he was satisfied with his help, and he confirmed that he had authorized his attorney to withdraw his plea of "not guilty" and to enter a plea of "guilty" to the offense of Assault in the

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<sup>1</sup> While the defendant brought the instant motion under the name, "Jean William," he was indicted here under the name, "Jean Willman," and thus the court will refer to him as Mr. Willman.

Second Degree ("a 'D' violent felony") under the second count of the indictment in exchange for a promised sentence of three and one-half years' imprisonment, followed by five years' post-release supervision.

With that, the court advised the defendant of the rights he was waiving by pleading guilty, including his rights to a jury trial, to confront witnesses and cross-examine them, and his right to remain silent. The defendant indicated that he understood this.

Mr. Willman then proceeded to allocute to the plea, admitting that, on or about June 30th, 2006 in Brooklyn, Kings County, "with intent to cause physical injury to [the identified complainant]," he "caused such injury . . . by means of a dangerous instrument." Additionally, the defendant acknowledged that the incident occurred in the manner described by the District Attorney, namely that in attempting to rob a taxi driver, the defendant had struck him in the back of the head with a hard object, causing him to lose control of his vehicle and to strike other vehicles and injure other persons.

The defendant confirmed for the court that he was pleading guilty "freely and voluntarily" because he was guilty. When asked by the court if anyone had threatened, forced, or coerced him into pleading guilty, the defendant responded, "No, Ma'am." The defendant also denied that he was under the influence of drugs or alcohol that day.

The court next asked the defendant if he was "a citizen of the United States?" Mr. Willman stated that he was not. Upon hearing this, the court advised the defendant as follows: "You are not a citizen. They're going to deport you as a result of this plea. Do you understand me?" Mr. Willman answered, "Yes, Ma'am." The court further informed the defendant that this plea would make him "a violent predicate felon" in the event of a future felony conviction. The defendant also acknowledged his understanding of this advisement.

Following this, the court advised the defendant of the conditions of this plea, namely, his obligations to come to court on the sentence date, to cooperate with the Department of Probation, and to not get re-arrested. Finally, the defendant affirmed that he had understood all of the court's questions and that all of his answers had been the truth. With that, the matter was adjourned to January 10, 2008 for sentencing.

On January 25, 2008<sup>2</sup>, all the parties were before the court for sentencing. The court noted that the defendant had admitted his guilt upon his Probation Department pre-

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<sup>2</sup> Although the defendant was present in court on January 10th, his attorney was not and the matter was adjourned to January 25, 2008 for sentence to be imposed.

sentence interview and that the court was prepared to render sentence in accordance with the promise. The record reflects that no one voiced any reason as to why sentence should not be imposed, and, with the exception of several applications<sup>3</sup> by defense counsel, no one else asked to be heard with regard to the sentence about to be imposed. After being adjudicated a second felony offender, the defendant was then sentenced by the court pursuant to the plea agreement terms. Notably, the defendant did not deny his guilt, did not ask to withdraw his plea, and raised no objections or impediment to sentencing. This concluded Mr. Willman's sentence.

Against this backdrop<sup>4</sup>, the defendant, has brought the instant motion to vacate the judgment of conviction. Specifically, upon this motion the pro se defendant seeks vacatur on the grounds that (1) "The Honorable Judge did not advise[ him] of his immigration consequences in regard to his plea;" and (2) "that the judgment of conviction was obtained in violation of the defendant's right to effective assistance of counsel under the Constitution" of New York State and of the United States.

In support of his motion, the defendant flatly asserts that, "throughout the pre-trial phase [of his case, he] made it clear to his counsel that he would like to go to trial, but [his] counsel advised him to take a guilty plea without advising [him] about [the] collateral consequences of his plea."

In his papers the defendant cites to case law which holds that an attorney's affirmative misrepresentation about deportation consequences for a guilty plea can constitute ineffective assistance of counsel and provide a basis for the withdrawal of a plea. However, despite this reference to the law, the defendant does not set forth any specific allegations that he was affirmatively misadvised by his attorney regarding the immigration consequences of his plea.

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<sup>3</sup> Defense counsel had requested that the court make an entry upon the defendant's sentencing papers which would allow him to perform certain [prison] work details which ordinarily violent felons would not be permitted to perform. Additionally, counsel asked the court to enter a civil judgment against the defendant [for the payment of his mandatory surcharge and other fees, in lieu of them being taken from inmate funds]. Both requests were denied by the court.

<sup>4</sup> Given the subject-matter of this motion, this court can only assume that the defendant is in Federal Immigration custody or has been informed that deportation removal proceedings are pending against him; although nowhere in his papers does Mr. Willman actually state what his present status is vis-a-vis deportation and the ICE authorities.

Rather, the defendant simply asserts that, had he "known [that] his mandatory removal was at stake, [he] would have not pled guilty and would have gone to trial." Thus, he frames the issue presented here as: "Was it constitutionally permissible to cause defendant to believe that removal was not automatic?" And, in conclusion, he requests that his conviction be vacated as it was obtained in violation of his State and Federal constitutional rights to effective assistance of counsel.

(This is the entire extent of the defendant's averments in support of his motion.)

As noted above, the People have opposed the defendant's application and urge that it is deniable both on procedural grounds as well as upon the merits.

Upon reading the defendant's factual averments in support of this motion, the court finds that the defendant has not demonstrated that he should be accorded the relief of vacatur.

Firstly, in direct contradiction of his claim that the court failed to advise him of the deportation consequences of his guilty plea, the plea minutes indisputably establish that the defendant was, in fact, definitively informed by the court that he would be deported as a result of his guilty plea. Indeed, the court did not even indicate that there was a possibility or probability of this, but rather, stated it as a certainty.

Thus, there is no factual basis to the first of the defendant's contentions as it is belied by the court record. In any event, such claim provides no legal basis for relief (see, § CPL 220.50 [7]), and, therefore, it may be rejected (CPL 440.30[4][a]).

The court now turns to the defendant's second charge, that his attorney should have informed him that his removal was mandatory and automatic, and that counsel's failure to do same deprived him of the effective assistance of counsel [and hence caused his plea to not be knowing, intelligent, and voluntary].

Regarding this claim, the defendant merely states that, had he known that his mandatory removal was at stake, he would not have pled guilty and would have gone to trial. However, this is all the defendant alleges regarding this most important topic; he proffers nothing else and has provided no specific factual allegations to establish his claim. Indeed, Mr. Willman does not state what conversations did or did not take place between himself and his attorney regarding the effect a guilty plea would have on his immigration status. There is no elaboration or substantiation of relevant attorney-client consultations and legal advice, or the lack thereof. Consequently, the defendant has not come forward with anything in demonstration of any contention that counsel failed to

give him accurate, definitive immigration advice, which caused him to plead guilty where he would not have otherwise.

Upon considering a motion to vacate judgment made pursuant to CPL § 440.10, the court is authorized to deny the motion without conducting a hearing if an allegation of fact essential to support the motion is either contradicted by a court record, or is made solely by the defendant and is unsupported by any other affidavit or evidence, if, under all the circumstances attending the case, there is no reasonable possibility that such allegation is true (CPL 440.30[4][d]).

The court finds that the defendant's conclusory assertions of having been inadequately or deficiently counseled as to the deportation consequences of a guilty plea upon him are both unsupported by any other evidence (see, generally, People v Taylor, 211 AD2d 603, lv. denied, 85 NY2d 981) as well as being effectively contradicted by the court record, namely the plea minutes, and thus, there is no reasonable possibility that such allegation is true (see, CPL 440.30[4][d]).

Furthermore, the motion is equally deniable on the ground that the defendant has not alleged and substantiated all the essential facts to make out his claim of ineffective assistance regarding his immigration situation (see, CPL 440.30[4][b]; see also, People v Ford, 46 NY2d 1021, 1023; People v Wells, 265 AD2d 589, error coram nobis denied, 284 AD2d 486; People v Lawson, 191 AD2d 514, 515, lv. denied, 81 NY2d 1075).

Indeed, the defendant could have and should have included among his motion papers an affirmation from former counsel indicating the nature and extent of the immigration advice rendered to Mr. Willman, and the defendant has given no explanations here for his failure to do so (see, People v Morales, 58 NY2d 1008). Moreover, it should not necessarily be assumed that former counsel would not have provided such an affirmation or that his position would necessarily be antagonistic to that of the defendant here (cf., People v Radcliffe, 298 AD2d 533). In the court's experience, defense attorneys, as officers of the court, will usually comply with a request for these sorts of affirmations under such circumstances, assuming the prohibition against revealing attorney-client discussions may be deemed lifted. In fact, in one of the leading cases in this area, former counsel did provide an affirmation summarizing the erroneous immigration advice he had rendered (see, People v McDonald, 1 NY3d 109, 112).

By contrast, here no supporting documentation whatsoever was submitted. And, the defendant, failing to do so, or to even provide his own detailed account thereof, has not even raised a triable issue regarding any allegedly erroneous advice received.

Accordingly, in light of the insufficiency of the factual allegations and proof necessary to establish his ineffective assistance of counsel claims, this court concludes that the defendant's motion should be denied on his papers alone (see, CPL 440.30[4][b]).

Even giving the defendant the benefit of the doubt and assuming arguendo, that his attorney failed to tell him that his plea would result in deportation, the defendant still would not be entitled to the relief of vacatur.

A defendant has a right under both the Federal (Hill v Lockhart, 474 US 52) and State (People v Ford, 86 NY2d 397, 404) Constitutions to effective assistance of counsel in the plea process. The Federal Constitution requires a defendant to prove that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant (see, Hill, supra, 474 US at 57, citing the Strickland v Washington test [466 U.S. 668]).

Under New York law, where the standard is "meaningful representation," in the absence of an "affirmative misrepresentation" (cf., People v McDonald, 1 NY3d 109, 115), the mere failure to advise a defendant of immigration consequences of a plea did not establish a claim of ineffective assistance of counsel, as immigration ramifications were deemed to be a "collateral" consequence of a plea (see, People v Ford, supra, 86 NY2d at 404-405; see also, People v McDonald, supra, 1 NY3d at 114).

However, in the recent U.S. Supreme Court decision of Padilla v Kentucky, 130 S.Ct. 1473, \_\_\_ U.S. \_\_\_ [March 31, 2010], the Supreme Court rejected this distinction between "collateral" and "direct" consequences as a determinative factor in the assessment of the effectiveness of counsel. Rather, the Court found that an attorney must inform her client whether his plea carries a risk of deportation (id. at 1486), although the Court noted that the "[l]ack of clarity in the law . . . will affect the scope and nature of counsel's advice" (id. at 1483, n 10).

Nevertheless, even assuming that Padilla would apply<sup>5</sup> to the instant matter, the court does not find that its application to this case would require that this court reach a conclusion contrary to that mandated in the absence of this new precedent, namely, that there is no legal basis for vacating the defendant's conviction and permitting him to withdraw his guilty plea here.

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<sup>5</sup> Several recent lower court decisions have concluded that Padilla's holding should be retroactively applied to pending matters (see, e.g., People v Bennett, 2010 WL 2089266, \*4, \_\_\_ NYS2d \_\_\_, \_\_\_ Misc3d \_\_\_; see also, People v Valestil, 27 Misc3d 1234[A], \*\*3).

This is so because, in addition to the inadequacy of the defendant's factual assertions establishing the alleged deficient advice, in order to succeed upon a Federal claim of ineffective assistance of counsel, the defendant must also establish the "prejudice prong" of the Strickland test (*id.* at 694), which the defendant here has failed to do.

The plea minutes here reflect that the defendant was correctly and definitively advised, albeit by the court and not counsel, that he would be deported. Given this on-the-record advisement, the defendant's assertion that he did not know that "his mandatory removal was a stake" must be rejected, for, despite being put on notice of the certain immigration consequences to his plea, the defendant nevertheless entered into this plea agreement. Moreover, the defendant's acknowledgment to the court of his understanding that he would be deported also is quite telling. If the defendant were laboring under a different assumption, if his attorney had advised him otherwise, *e.g.*, that there was merely a possibility of deportation, the defendant would have and should have spoken up at that time, rather than acknowledging that he understood that deportation was a certainty. Accordingly, under these facts and circumstances the defendant cannot demonstrate prejudice (*see, Ellington v United States*, 2010 WL 1631497, \*3, [S.D.N.Y.; April 20, 2010] -- no prejudice under Strickland where presiding judge advised defendant of immigration consequences]).

"Prejudice" is additionally not here present as it is apparent that the People had a very strong case against the defendant and the defendant ultimately received a very advantageous plea and sentence where he does not allege, much less demonstrate that he had any defenses to the charges. Therefore, despite his conclusory assertion, the defendant has failed to establish that he would have insisted on going to trial or that there was any likelihood of a favorable outcome upon trial (*see, e.g., Boakye v. United States*, 2010 WL 1645055, \*5-\*6, [S.D.N.Y.; April 22, 2010]).

Lastly, the court will discuss the secondary issue implicated in this motion, to wit, the voluntariness of the defendant's plea.

Regarding the plea minutes overall, the court finds that there is nothing in the defendant's plea minutes which either casts significant doubt upon the defendant's guilt or calls into question the voluntariness of his plea (*cf., People v Lopez*, 71 NY2d 662, 666-668). On the contrary, during his plea allocution, the defendant admitted to the substantive elements of the crime to which he was pleading guilty and indicated that he was voluntarily pleading guilty because he was guilty. Also, there was nothing in his allocution which hinted at innocence or raised any defenses or negated any material elements as to his crime, and he never denied committing the crime.

Accordingly, the court concludes that the defendant's plea of guilty herein was knowingly, voluntarily, and intelligently entered, that the defendant fully understood the implications and consequences of his plea (see, People v Harris, 61 NY2d 9, 16-20), and that the defendant has not established any ground for vacating the judgment of conviction entered upon his guilty plea.

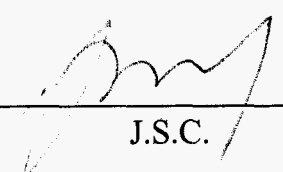
Nor is there anything in the sentencing minutes which would require a different conclusion. At sentencing, the defendant did not ask to withdraw his plea, nor did he assert any denial of his guilt, and the defendant had reaffirmed his guilt to the Department of Probation upon his pre-sentence interview.

In light of all of the above, the defendant's motion is, respectfully, denied.

The foregoing constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, N.Y. 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 (22 NYCRR 671.5).

Dated: Brooklyn, New York  
June 25, 2010

  
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J.S.C.  
