

<b>People v Headley-Ombler</b>
2010 NY Slip Op 33703(U)
June 29, 2010
Supreme Court, Kings County
Docket Number: 15074/96
Judge: Sheryl L. Parker
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM, PART 5**

-----X  
**THE PEOPLE OF THE STATE OF NEW YORK** :

**-against-**

**ROGELIO HEADLEY-OMBLER,** :  
: **Defendant** :

: **DECISION AND ORDER**

: **IND. 15074/96**

-----X  
**Justice Sheryl L. Parker**

Defendant moves pursuant to C.P.L. §440.10 for an order vacating his judgement after trial. Pursuant to the defendant's motion and addendum, the People's response and supplemental response, and the court records, the following is the Court's decision.

On November 27, 1996, defendant shot Earl Thomas four times. The people contended at trial that the act was intentional and depraved. The defendant asserted that he was justified and that one of the shots fired was an accident. On July 30, 1997, after trial by jury, defendant was acquitted of attempting to murder Thomas, but convicted of two counts of assault in the first degree (P.L. §120.10 [1]&[3]), one count of assault in the second degree (P.L. §120.05[2]), criminal possession of a weapon in the second degree (P.L. §265.03) and criminal possession of a weapon in the fourth degree (P.L. §265.01[1]). On November 12, 1997, he was sentenced to serve twenty-five years incarceration on the counts of assault in the first degree to run concurrently with each other and with fifteen years incarceration on criminal possession of a weapon in the second degree, seven years incarceration on the charge of assault in the second degree, and one year on the count of criminal possession of a weapon in the fourth degree. On appeal, the convictions for assault in the first degree and criminal possession of a weapon in the

fourth degree were vacated and the remainder of defendants claims were held to be without merit and the convictions on the other charges were affirmed. (*People v. Headley-Ombler*, 270 AD2d 358 [2<sup>nd</sup> Dept. 2000], *leave denied*, 95 NY2d 835).

Defendant filed a previous motion to vacate his judgement pursuant to C.P.L. §440.10 alleging ineffective assistance of counsel. That motion was denied. (Douglass, J.). Leave to appeal that decision was denied. Defendant made further applications for relief, culminating in denial of a *writ of certiori* to the United States Court of Appeals for the Second Circuit. (*Headley v. Spitzer*, 540 US 835 [2003]).

In the instant motion, defendant alleges that documents were admitted into evidence by the prosecution at trial in violation of *Crawford v. Washington*, 541 US 36 [2004] and *Melendez-Diaz v. Massachussetts*, 129 S.Ct. 2527 [2009]). Defendant again contends that his trial counsel was ineffective. He claims that his attorney did not object to the admission of the records, in fact stipulated to them, and was improper and ineffective in his summation. Thirdly, defendant avers that his attorney was ineffective for failing to advise the defendant to accept the Kings County District Attorney's office's offer of a plea-bargain to a lesser offense in light of the potential immigration consequences if convicted after trial. Defendant cites *Padilla v. Kentucky*, 130 S.Ct 1473 [2010], to support his contention.

C.P.L. §440.10 (1)(h) states that at any time after an entry of judgement, the Court may vacate such judgement on the ground that the judgement was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

*Right to Confrontation*

In *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts* the United States Supreme Court held that the Sixth Amendment right to confrontation prohibits out of court statements that are testimonial in nature from being used against a defendant if the declarant is unavailable for cross-examination. (541 US 36 [2004]; 129 S.Ct. 2527 [2009]). However, a defendant is may waive that right. (*Melendez-Diaz, Supra, People v. Reid*, 71 AD3d 699 [2<sup>nd</sup> Dept. 2010]).

Additionally, while *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts* were decided after defendant's first motion pursuant to C.P.L. §440.10 and direct appeal, their holdings are not to be applied retroactively on collateral review once the defendant's appeal was adjudicated and final. (*People v. Dobbin*, 6 Misc. 3d 892 [2004], Appeal denied 2005 N.Y. App. Div. Lexis 1789, *People v. Jackson*, 12 Misc.3d 1178[A] [2006], *US v. Mungo*, 393 F.3d 327 [2004], See, generally *Teague v. Lane*, 489 U.S. 288 [1989]).

Moreover, defendant has failed to establish ineffective assistance of counsel. The Court of Appeals has held that under the New York State constitution "as long as the evidence, the law, and the circumstances of a particular case, viewed in the totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." (*People v. Baldi*, 54 NY2d 137 [1981]). Under the state rule, a defendant need only show that under the *totality* of the case he was deprived meaningful representation.

Under federal law, defendant must first show that his attorney's actions or advice fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsels deficiency the result of the case would have been different. (*Strickland v. Washington*, 466 US 608 [1984]). Therefore, under the federal standard the defendant must additionally show that *but for* counsel's alleged errors defendant would have received a more

favorable outcome at trial. Defendant's moving papers fail to contain sworn allegations of fact supporting or tending to support his position on either the state or federal tests. (C.P.L. §440.30[1]). Defendant has failed to demonstrate the absence of a strategic explanation for counsel's actions. (*People v. Rivera*, 71 NY2d 705 [1988]; *People v. Satterfield*, 66 NY2d 796 [1985]). Losing trial tactics should not be confused with ineffective assistance of counsel (*People v. Baldi*, 54 NY2d 137 [1981]) or second guessed with the clarity of hindsight (*People v. Benevento*, 91 NY2d 708 [1998]; *People v. Turner*, 5 NY3d 476 [2005]).

### *Summation*

Defendant was in a position to raise the ground that he raises now when he perfected his previous appeal. Since this claim was not *de hors* the record, defendant's motion is mandatorily procedurally barred. (C.P.L. §440.10[2][c]).

### *Immigration*

Defendant's claim that his attorney failed to advise him to accept a plea bargain and thereby violated his constitutional right is without merit. The United States Supreme Court in *Padilla v. Kentucky* has very recently ruled that failure to properly advise a defendant of his risk of deportation on a matter such as a drug conviction rises to the level of ineffective assistance of counsel on a Federal Constitutional level. (130 S.Ct 1473 [2010]; *Strickland v. Washington*, 466 US 608 [1984]). The obvious rational behind the Court's decision was that a defendant should enter into a plea knowingly and voluntarily and aware of all of the consequences of that disposition. (*People v. Fiumefreddo*, 82 NY2d 536 [1993]). Defendants who are not United States citizens are all but guaranteed deportation as a result of a conviction on a drug charge. In

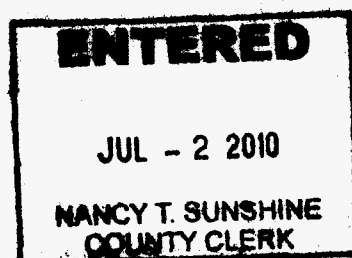
this matter, defendant going to trial did not have a guaranteed direct consequence. He might have been acquitted. He might have been convicted of a lesser-included charge. He might have been convicted of a non-deportable offense. The instant case does not fall within the ambit of *Padilla v. Kentucky*. Moreover, defendant has not provided this Court with any documentation supporting any prejudice or harm done to him as a result of this conviction, nor has he provided any proof of deportation or whether this conviction is the sole basis for any deportation proceedings. (*See, Padilla*).

Additionally, Defendant has not shown by a preponderance of the evidence (C.P.L. §440.30[6]) that his attorney failed to discuss immigration consequences with him and has failed to provide an affirmation from his attorney supporting such allegation. (*See, People v. Dejsus*, 39 AD3d 1196 [4<sup>th</sup> Dept. 2007]; *Cf. People v. Reynolds*, 309 AD2d 976 [3<sup>rd</sup> Dept. 2003]). Prior to the onset of hearing and trial, the presiding justice, Honorable George Marlow, engaged the defendant in a lengthy colloquy with respect to the benefits of pleading guilty versus proceeding to trial. The minutes of the plea discussions with the court and the defendant are long and detailed. It is evident that the defendant made an informed decision and had every opportunity to inquire of his attorney or the court.

Accordingly, for the aforementioned reasons, defendant's motion is denied without hearing.

The foregoing constitutes the decision and order of the Court.

Dated: Brooklyn, New York  
June 29, 2010



  
\_\_\_\_\_