SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 39

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Against

RICHARD REID,

Defendant.

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Memorandum Decision

GREEN, J.
IND. 2425/90

December 20, 2010

Upon the notice of motion dated August 31, 2010, defendant moves pro se for an order pursuant to Criminal Procedure Law (CPL) section 440.10(1)(H) to vacate the within conviction and to have his sentence therewith set aside.

Defendant claims ineffective assistance of counsel and that the judgment was obtained in violation of defendant's constitutional right because defendant's counsel did not properly advise defendant of the direct penal consequences of his plea as it related to defendant's immigration status. Defendant cites the recent United States Supreme Court decision of *Jose Padilla v Kentucky,* 130 S. Ct 1473 (2010) in support of his position.

The People oppose defendant's motion and maintain that *Padilla* is inapplicable to defendant's situation.

Based on a review of the motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is DENIED in its entirety for the following reasons.

BACKGROUND

On February 28, 1990, defendant was charged with two counts of Penal Law section 220.39[1] Criminal Sale of a Controlled Substance (CSCS) in the 3rd Degree, three counts of Penal Law section 220.16[1] Criminal Possession of a Controlled Substance (CPCS) in the 3rd Degree and three counts of Penal Law section 220.03 CPCS in the 7th Degree.

The charges stemmed from an incident occurring on February 14, 1990 at approximately 6:15 p.m. located in front of 2069 Nostrand Avenue in Kings County where defendant and another individual acting together, co-defendant Martin Mitchell (herein referred to as 'partner') was observed by Police Officer Vincent Mina selling crack cocaine to three persons. The three buyers were each seen talking to the defendant and his partner and each gave a sum of money to

defendant's partner, whereupon defendant handed, in exchange for the money, a quantity of crack cocaine to each of the buyers.

Arrests were made and officers recovered from inside defendant's mouth, four small clear plastic bags containing crack cocaine and the same drug was recovered from each of the apprehended buyers. Cash was also recovered from defendant and his partner.

A plea agreement was made and entered into by the defendant and on July 16, 1993, the defendant pled guilty to Penal Law section 220.31 CSCS in the 5th Degree. As a result of his conviction by plea, defendant was sentenced by Justice Feinberg on August 4, 1993 to two to four years of incarceration running concurrent with one and one-third to four years incarceration for violation of probation on Kings County indictment number 13530/1988. defendant was adjudicated by Justice Feinberg as a second felony offender at the time of his plea in this matter.

At the time of the plea agreement, defendant was 22 years old with a 10th grade education. He is a citizen and native of Jamaica, West Indies and was admitted to the United States at New York City on or about September 26, 1986 as a P22.

Pursuant to the plea minutes addended to the People's opposition papers, defendant, represented by Joseph Santo, Esq., stated on July 16, 1993, that he was in good physical and mental health, not under the influence of drugs and was entering the plea of his own free will after having sufficient time to discuss his case and the plea with Mr. Santo. (Plea minutes P. 8) The court continued allocution of defendant and allowed defendant to have some time with Mr. Santo to discuss the waiver of his right to appeal and defendant did in fact waive his right to appeal from the plea, conviction and sentence. (Plea minutes P. 11) In addition, the court received notice from the People that defendant was a predicate felon and defendant stated that he discussed the matter with Mr. Santo and at the time of plea also admitted the prior conviction and sentence. Defendant stated that he did not wish to challenge the constitutionality of the prior conviction. The court then adjudged defendant a second felony offender. (Plea minutes P. 17) Further, the arrest for the charges herein caused defendant's violation of probation (VOP) and defendant stated that he discussed the VOP with Mr. Santo and had sufficient time to do so. (Plea minutes P. 18) Defendant then entered a plea of guilty to the VOP for failure to lead a law-abiding life. At that time during the proceedings defendant informed the court that he wanted to discuss the VOP issue with Mr. Santo. The court allowed time to do so. (Plea minutes P. 20) Mr. Santo reported to the court that the defendant understood. Defendant responded in the affirmative that he was satisfied with the services rendered by Mr. Santo and pleaded guilty to the VOP. (Plea minutes P. 21)

The plea minutes of July 16, 1993, constituting the court record of the proceedings regarding this matter on that day, did not reflect any discussion by the court or the defense attorney, on the official record, pertaining to the defendant's immigration status or the effect and consequences of the plea agreement on any immigration status.

CONVICTIONS/IMMIGRATION REMOVAL STATUS

Defendant is currently undergoing immigration removal deportation proceedings regarding prior felonies and a subsequent charge against defendant is pending.

Defendant's removal papers cite all four of his convictions in the following reverse order:

(1) On November 5, 2009 in Rockland County Court at Brooklyn, NY for the offense of Penal Law (PL) section 220.09 [1], Criminal Possession of Narcotic Drug in the 4th Degree, a class C felony and sentenced to two years.

(2) On December 11, 2001 in Albany County for violating PL section 220.06[5], Criminal Possession of a Controlled Substance in the 5th Degree, a class D felony and PL section 220.16[12], Criminal Possession of a Controlled Substance in the 3rd Degree, a class B felony and sentenced to 5 years, 4 months to 16 years concurrent.

(3) On December 23, 2003, resentenced for violation of PL section 220.06[5], a class D felony to time served.

(4) On August 4, 1993, in Kings County *(on the within matter which is the basis for defendant's 440 motion)*, for violation of PL 220.31 Criminal Sale of a Controlled substance in the 5th Degree, a class D felony and sentenced to 2 to 4 years imprisonment.

(5) On January 29, 1990, in Kings County, for offense of PL 110/265.02[1] Attempted Criminal Possession of a Weapon in the 3rd Degree, a class E felony and sentenced to five years probation. Defendant violated probation, thereby becoming a predicate felon and also, on August 4, 1993, was resentenced for this offense and sentenced to 16 months to 4 years.

ARGUMENT HEREIN

By way of sworn affidavit, in his factual and procedural statement contained in his motion papers, defendant states "petitioner was advised and it was his expectation that he would not face further incarceration or mandatory removal from the United States as a result of this conviction. However, as a direct result consequence of this conviction, Richard Reid has been incarcerated at the ICE Essex County Correctional Facility since February of 2010 pending immigration removal proceedings." In addition, defendant states that he was "never properly

advised of the direct penal consequences of his plea to be meted out by the state and the federal government..."

Defendant maintains that it is not sufficient for the defense attorney or the judge to tell a non-citizen defendant that he *may* get deported. And even if defendant was aware that he *may* be deported, he "was never properly advised [by his attorney] that deportation or confinement was mandatory and therefore he was not adequately informed of the true consequences of his decision to enter a guilty plea." If he had been so informed, defendant states that he would not have taken the plea agreement.

Pursuant to *Padilla*, defendant believes his guilty plea should be vacated.

In opposition to defendant's motion, the People include an affidavit from Mr. Santo dated October 1, 2010 stating that while Mr. Santo has no independent recollection of this specific case, going back almost 20 years ago, that it was and remains his customary practice to advise all of his foreign born clients of the consequences of criminal convictions including those rendered by plea.

Mr. Santo states that at the time he represented defendant on the 1993 plea agreement, he had been a practicing attorney for four years, was admitted to the 18-b indigent representation panel in Kings County and had been assigned to represent the defendant. At the time he says he had represented hundreds of foreign born clients on criminal charges that were deportable offenses and "as a result, discussion of possible deportation consequences always played a prominent role in my advice to clients and in my plea negotiation tactics. It was, and remains, my usual practice to advise non-citizen defendants of immigration consequences of pleading guilty to any crime that might make them deportable."

In his affidavit, Mr. Santo further states that, "...I am certain, based on my standard practice and knowledge of the law, that I did not fail to advise defendant of possible immigration consequences of his guilty plea nor did I ever instruct defendant that he would never suffer any adverse immigration consequences of his guilty plea in the future. I represented defendant effectively and to the best of my ability."

IMMIGRATION REMOVAL LAW

As it relates to the charges herein, a person who is not a citizen or national of the United States is subject to removal and deportation from the United States pursuant to the Immigration and Nationality Act under the following sections:

1) 237 (a) (2) (B) (i), as amended, at any time after admission [to the United States], if the person has been convicted of a violation of (or a conspiracy or

attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U. S. C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana;

2) 237 (a) (2) (A) (iii) of the Act pertains to an aggravated felony as defined in section 101 (a) (43) (B) of the Act, an offense relating to the illicit trafficking in a controlled substance as described in section 102 of the Controlled Substances Act, including a drug trafficking crime as defined in section 924 (c) of Title 18 of the United States Code; and

3) 237 (a) (2) (C) pertains to conviction for any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry in violation of any law, any weapon part, or accessory which is a firearm or destructive device, as defined in section 921 (a) of Title 18, United States Code.

According to the current law, defendant is subject to removal and deportation at any time subsequent to his convictions for possession of drugs, sale of drugs and attempted possession of a weapon (in defendant's case it was a pistol).

LEGAL ANALYSIS

In evaluating ineffective assistance of counsel claims, the court must first look at the United States Supreme Court decision in *Strickland v Washington*, 466 U.S. 668 (1984). *Strickland* provides a two prong inquiry: 1) that counsel's representation must fall "below an objective standard of reasonableness" and 2) there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different".

The United States Supreme Court decision in *Padilla* created a new rule on March 31, 2010 that imposed an obligation on counsel to render specific advice to non-citizen defendants regarding the criminal consequences of deportable offenses pertaining to the defendant's immigration status. The *Padilla* court effectively dispensed with the notion that deportation is a collateral consequence and noted its significant direct impact on a non citizen defendant faced with criminal conviction as a reason for its decision requiring specific advice by counsel. Prior to the *Padilla* decision, the courts had not imposed such a direct duty.

In his concurring opinion, Justice Alito departs somewhat from the majority, noting that the majority concedes "immigration law can be complex; "it is a legal specialty of its own". He states that in his view "an attorney must 1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration

attorney." But the majority held that a criminal defense attorney must provide such advice in cases where the law is "succinct and straightforward".

However, the burden here is on defendant and according to the majority in *Padilla*, defendant must 1) sufficiently allege that his counsel was constitutionally deficient and 2) whether defendant is entitled to relief depends on a showing of prejudice.

Here, defendant's claims in his moving papers are merely conclusory without any direct statement or evidence of what his attorney actually told him or failed to tell him with respect to the result of his plea on his immigration status. Further, defendant provides no supporting evidence or documents to gird his claims and does not claim any prejudice. Rather, defendant states that even if he was made aware that he *may* be deported, he was "never properly advised that deportation or confinement was mandatory and therefore he was not adequately informed of the true consequences of his decision to enter a guilty plea." Defendant concludes that "vacating his guilty plea is warranted because the conviction results in a manifest denial of justice".

Padilla also states that in a case where the deportation consequences are unclear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may* carry adverse immigration consequences."

In 1993, seventeen years before *Padilla*, courts had wider discretion. The *Padilla* decision discusses such history and notes that narcotics offenses provided a distinct basis for deportation since 1922, however the JRAD (Judicial Recommendation Against Deportation) procedure was "generally available to avoid deportation in narcotics convictions." There has been a steadily increasing expansion of deportable offenses and the JRAD is no longer part of the law as Congress entirely eliminated it in 1990 and in 1996, Congress "eliminated the Attorney General's authority to grant discretionary relief from deportation."

The changes to the immigration law also involved a change in the statutory language used; the term is now "removal" rather than "deportation". See, *Calcano-Martinez v INS*, 533 U.S.348 (2001)

Deportation of defendant was a possibility of his 1993 conviction by plea (as defendant infers he knew of, in his motion papers, and his counsel asserts he informed defendant of such) however, removal proceedings against him were only triggered in 2009.

CONCLUSION

Here, defendant has not met either prong of *Strickland*. Defendant has not sufficiently alleged that his counsel was constitutionally deficient and defendant has not sufficiently alleged any prejudice.

Even if defendant's claims were to withstand scrutiny under the *Strickland* test, no where in defendant's motion papers does he state that his counsel failed to advise him of the immigration consequences of his plea. Defendant's arguments fall on the possibility that his counsel may have misadvised him because he "was not adequately informed of the true consequences of his decision to enter a guilty plea." Defendant also does not show that if he had been informed by counsel of what he calls the "true consequences" that he would have refused the plea and demanded to go to trial.

Again, unlike in *Padilla*, (where Mr. Padilla claimed that his counsel failed to advise him of the deportation consequences of his plea, Mr. Padilla also stated that his counsel "told him that he did not have to worry about immigration status since he had been in the country so long") here, the court does not know what counsel's advice was to this defendant because the defendant does not state such in his moving papers.

However, the People have provided the court with an affidavit of defendant's attorney, Mr. Santo, stating what his standard practice is and was at the time he represented the defendant in this matter. In light of the fact that the defendant has made no sufficient allegation, the court is constrained to accept the sworn affidavit of defendant's former counsel and finds that counsel's representation meets the objective standard of reasonableness as he details the pattern and practice of his representation over the past seventeen years.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland,* at 688

Although there is no record of conversations in the plea minutes regarding the immigration consequences of the plea between defendant and counsel or that of the court, it must be noted that that factor is not dispositive as a number of breaks occurred where defendant was allowed the in court opportunity to speak to his attorney, albeit off the record, in accordance with attorney client privilege.

The court finds there is no basis to hold a hearing in this matter pursuant to CPL section 440.30 (4) that upon considering the merits of the motion, the court may deny it without conducting a hearing if (b) the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one and (d) an allegation of fact essential to support the motion is

made solely by the defendant and is unsupported by any other affidavit or evidence and under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Defendant has failed to meet his burden.

The court agrees with the People that the *Padilla* decision is inapplicable to the instant matter. Further, even if *Padilla* were applicable, there is no basis for its application retroactively. See, *People v Kabre*, 905 NYS 2d 887 (NY Crim Ct 2010); *People v George,* 28 Misc 3d 1232(A) NY Slip Op. 51575(U) (NY Crim Ct 2010)

Consequently, defendant's motion herein must be denied in its entirety.

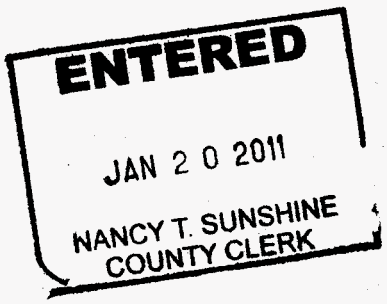
Accordingly, based on the foregoing, the defendant's CPL 440.10 (1) (h) motion to set aside his conviction is DENIED.

This constitutes the decision and order of the Court.

Notice of Right to Appeal for a Certificate Granting Leave to Appeal

Defendant is informed that his right to appeal from this order determining the within motion is not automatic except in the single instance where the motion was made under CPL 440.30 (1-a) for forensic DNA testing of evidence. For all other motions under article 440, defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.



Hon. Desmond A. Green, J.S.C.