

People v Crawford

2011 NY Slip Op 30879(U)

February 14, 2011

Supreme Court, Kings County

Docket Number: 2285/04

Judge: Neil Jon Firetog

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This opinion is uncorrected and not selected for official publication.

Defendant appealed from his conviction under #8278/05, which was affirmed. *People v. Crawford*, 61 A.D.3d 773 (2nd Dept 2009), leave to appeal was denied. *People v. Crawford*, 13 N.Y.3d 743 (2009). In addition, defendant appealed from the re-sentence on the instant indictment, in which the court revoked the sentence of probation and imposed a term of imprisonment, and that sentence was affirmed. *People v. Crawford*, 61 A.D.3d 774 (2nd Dept 2009), leave to appeal was denied. *People v. Crawford*, 13 N.Y.3d 743 (2009).

Defendant is currently in federal custody subject to an order of deportation and alleges that his attorney "misadvised" him that the plea in the present indictment would not have an effect on his immigration status. He further states that had he known the plea could be used in a deportation proceeding, he would not have pled guilty. He also states that he did not learn of the problem until he was placed under arrest by ICE. The motion papers present a series of repetitive paragraphs reciting counsel's purported shortcomings which defendant presents as the basis of his ineffective assistance of counsel claim. Defendant makes a cursory mention of *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) in support of his contention that counsel's purported failure to advise him of the deportation risk constitutes ineffective assistance of counsel.

Unfortunately, the answer from the Department of Probation does not provide much assistance to this court in the resolution of the motion. Counsel incorrectly argues that the motion is untimely, citing the CPL section applicable to appeals, and not to post judgment motions. In fact, a constitutional claim of ineffective assistance of counsel may properly be raised at the current time under the present circumstances. Counsel does not address the ruling in *Padilla* at all, nor *People v. Baldi*, 54 N.Y.2d 137 (1981), relying solely on *Strickland v. Washington*, 466 U.S. 668 (1984) for the standards of effective assistance of counsel.

In the present matter, the defendant alleges that he would not have pled guilty but for counsel's incorrect advice about the possibility of deportation. This allegation has absolutely no credibility. To begin with, this is an allegation made by the defendant without any supporting evidence at all. Defendant's allegation that he specifically asked his attorney if the plea agreement would have an effect on his immigration status and that "[h]e affirmily [sic] told me it will have no effect on my immigration status" is highly suspect. It should be noted that throughout his apparent boilerplate motion papers, defendant refers to his attorney as "he". A cursory examination of the court file shows that his attorney was a woman on both matters, a fact which he might be expected to remember. And a fact which undercuts any credibility the allegations might have had.

The court has reviewed the plea minutes, which show that during the plea allocution, the judge very specifically explained to the defendant that it was possible he could be deported or paroled for deportation. When the court asked if he understood that, the defendant indicated that he did. (Plea minutes p.7-8). Thus, even if counsel did not specifically advise the defendant of the potential for deportation, the trial judge

made it completely clear. As such, defendant's claim that he did not know until his arrest that he could be deported is wholly unbelievable.

Nor can defendant credibly claim that he would not have pled guilty if he knew of the deportation possibility of the plea. In fact, by pleading guilty to a lesser charge, the defendant received a highly favorable sentence, involving no additional jail time, since he had been incarcerated since the commencement of the proceedings and received credit for that time. Had there been a trial and a conviction of attempted murder in the second degree, a B violent felony offense, defendant faced a substantial prison sentence and certain deportation. Under current New York law, in a case unaffected by *Padilla*, such as this, when an attorney secures such an advantageous plea agreement, that attorney cannot be deemed to be ineffective. *People v. Ford*, 86 N.Y.2d 397 (1995). It is not likely that the negotiated plea and original sentence of probation would have been considered an aggravated felony in accordance with federal statute, such as would have required deportation.

The recent United States Supreme Court decision in *Padilla, supra*, does not compel a different result here for several reasons. There has been no appellate decision determining that *Padilla* be applied retroactively, and this court declines to rule otherwise.

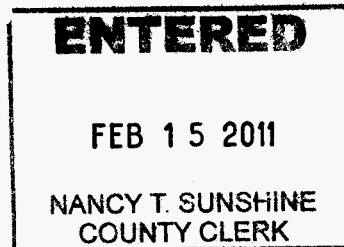
Nevertheless, a discussion of the case is important to the resolution of the motion. Although it is clear that, under certain circumstances, ineffective assistance of counsel results when a defense attorney fails to inform the defendant that the conviction for a particular offense would require his deportation, those circumstances do not exist here. First, there is no credible evidence that the attorney did not advise the defendant of the immigration consequences; second, the defendant was thoroughly advised of the immigration consequences of the plea by the judge and indicated his understanding of the situation. But even assuming that counsel did not properly advise the defendant, to succeed on this type of claim, the defendant must show that rejection of the plea bargain would have been rational under the circumstances. *Padilla, supra* at 1485.

Considering the defendant's claims under the New York standard set forth in *People v. Baldi*, 54 N.Y.2d 137 (1981), a defendant receives effective assistance of counsel when the defense attorney provides "meaningful representation" under the circumstances that existed. There is no requirement of prejudice, as under the Federal standard of *Strickland v. Washington*, 466 U.S. 668, but the court finds that the defendant could not meet that standard in any event. Defendant received meaningful representation by counsel obtaining a plea that eliminated any additional jail time and no cognizable prejudice can be shown. Counsel's conduct was well within the "wide range of professionally competent assistance" as required by *Strickland, supra* and in this

case, there is no reasonable probability that, but for counsel's errors, the defendant would have rejected the plea offer and gone to trial. See also, *Hill v. Lockhart*, 474 U.S. 52 (1985).

At the court's request, the Probation Department submitted a supplemental affirmation detailing their efforts to ascertain the actual basis of the deportation proceedings, since there was no information provided in the initial answer to the motion. Probation's liaison to the Department of Homeland Security, the umbrella agency for ICE, received information that "...Mr. Crawford was being deported on indictment #2285/04 because he violated his probation and was re-sentenced to two to four years consecutive to indictment #8278/05". Thus, it appears that the original plea is not the trigger for the deportation, but defendant's subsequent unlawful conduct and sentence is. This further bolsters the court's finding that counsel was effective in obtaining the very favorable plea agreement.

As such, there being no legal basis for granting the relief sought, the motion is denied in its entirety.



ENTER:

Neil Jon Firetog
NEIL JON FIRETOG, J.S.C.

You are advised that your right to an appeal from the order determining your 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, you 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.

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