

People v Richards

2011 NY Slip Op 31054(U)

March 24, 2011

Supreme Court, Kings County

Docket Number: 4048/93

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 3

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THE PEOPLE OF THE STATE OF NEW YORK :
:
:
-against- :
:
:
KIRK DOUGLAS RICHARDS, :
:
Defendant. :
-----X

DECISION AND ORDER

Kings County
Information Number
4048/93

Docket No. 96K054614

JAMES P. SULLIVAN, J.

The defendant has moved, *pro se*, for an order pursuant to CPL § 440.10 to vacate his two judgments of conviction. In a motion dated October 19, 2010, the defendant claims that he was denied his right to effective assistance of counsel because his attorneys allegedly failed to advise him about the deportation consequences of his previous guilty pleas. The People have filed an answer in opposition. By an order dated October 26, 2010, the Immigration Court of the United States Department of Justice, found the defendant to be removable, and ordered him to be removed from the United States to Jamaica. Defendant is currently in custody in a federal detention center. For the reasons stated below, the defendant's motion is denied.

Procedural History

On April 3, 1993, a patrol officer heard two gunshots in the vicinity of Westbury Court, in Kings County, New York. As the officer approached the area, he observed four men traveling on foot. He then observed one of these individuals, later determined to be the defendant, make a motion towards his waistband, and then run into 2100 Westbury Court. The officer followed the defendant into the building and observed him drop a gun to the floor as he ran through the hallway. The officer arrested the defendant and recovered a .44 caliber magnum, loaded with two spent rounds and three live rounds in the cylinder. After he was arrested, the defendant made a statement to the officer indicating that he fired the gun and dropped it when the arresting officer approached him.

Although originally charged with various felony charges, the defendant was subsequently charged, by Kings County Information Number 2048/93, with one count of criminal possession of a weapon in the fourth degree (P.L. § 265.01 [1].) On April 9, 1993, defendant pleaded guilty to criminal possession of a weapon in the fourth degree (P.L. § 265.01 [1].) in exchange for a sentence of sixty days in jail and a three year sentence of probation. The defendant was sentenced , on May

5, 1993, to the bargained term of sixty days incarceration and three years' probation. (Gershwer, J. at plea and sentence). The defendant did not file a notice of appeal. The minutes of the plea and sentence are unavailable at this time.

On July 19, 1996, the defendant encountered a United States mail carrier, and placed his hand inside the carrier's bag attempting to take his phone. When the mail carrier attempted to walk away, defendant followed him and displayed what appeared to be a weapon, and flashed it at him. After a bystander called 911, the defendant was arrested, and a knife was recovered from his pocket. The defendant admitted to the arresting officer that he put his hand inside the carrier's bag, although he denied that he tried to take the phone that was in the bag. The defendant further admitted that he was holding the knife in his hand.

With respect to this incident, the defendant was charged under Kings County Docket Number 96K054614 with possession of knives or instruments/blades in excess of four inches (N.Y.C.A.C § 10-133-B); attempted petit larceny (P.L. § 110/155.25); menacing in the second degree (P.L. § 120.14 [1]); and criminal possession of a weapon in the fourth degree (P.L. § 265.01 [2]). At arraignment on July 21, 1996, defendant pleaded guilty to attempted petit larceny (P.L. § 110/155.25) in full satisfaction of the docket. On the same date, the court sentenced defendant to ten days of community service. (Friedman, J. at plea and sentence). The defendant did not file a notice of appeal. The minutes of the plea and sentence are unavailable at this time.

On May 26, 2005, in the U.S. District Court, Northern District of West Virginia, defendant was convicted for possession with intent to distribute five or more grams of cocaine base in violation of 21 U.S.C. §§ 841 (a) (1) and 841 (b) (1) (B). On June 22, 2010, the United States Immigration and Customs Enforcement Agency (hereinafter, ICE), of the United States Department of Homeland Security, arrested defendant and initiated removal proceedings against him. ICE charged that defendant was deportable based on his federal conviction claiming it to be a deportable offense. Based on this conviction, the Immigration Court of the United States Department of Justice issued an order, dated October 26, 2010, excluding and deporting defendant from the United States because he was convicted of an aggravated felony under section 237 (a) (2) (A) (iii) of the Immigration and Nationality Act.

Subsequently, a decision by the Board of Immigration Appeals, dated February 2, 2011, dismissed defendant's appeal from the denial of his request for a continuance and the finding of removability under section 237 (a) (2) (A) (iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227 (a) (A) (iii). The Board determined that, contrary to defendant's contentions, "possession of cocaine with intent to distribute under 21 U.S.C. § 841 (a) (1), a federal felony punishable up to 20 years in prison, is necessarily a 'drug trafficking crime' under 18 U.S.C. 924 (c) because it is, by its definition, a 'felony punishable under the Controlled Substances Act.'" Accordingly, the Board determined that defendant's federal conviction "automatically qualifies as an 'aggravated felony' under section 101 (a) (43) (B) of the act." (Decision of the Board of Immigration Appeals, dated February 2, 2011.)

The Current Motion

In his present motion, defendant claims that prior to these pleas, he did not seek the advice of an immigration attorney, and neither of his trial counsels explained the immigration consequences resulting from these convictions. In his affidavit attached to the instant motion, the defendant states “[p]rior to my change of plea, my attorney, did not advise me that I could face the risk of deportation, denial of naturalization or refusal of admission to the United States.” He further states that he changed his plea “after my attorney, my ex-girlfriend and family members convinced me that it would be in my best interests.” (Affidavit of 10/19/10). Although defendant does not specifically state that he would not have entered a plea of guilty if he had been informed that these convictions would bar or negatively effect his immigration status in the United States, he does indicate that he changed his pleas without knowing the immigration consequences. The prosecution’s attempt to contact the attorneys who represented defendant on his two pleas were unsuccessful.

To prevail on an ineffective assistance of counsel claim under the Federal constitution, a “defendant must show that counsel’s performance was deficient,” and “that the deficient performance prejudiced the defense” (*Strickland v. Washington*, 466 U.S. 668, 687 [1984]). “The first prong of the *Strickland* test is essentially a restatement of attorney competence, which requires a showing that counsel’s representation fell below and objective standard of reasonableness” (*People v. McDonald*, 1 N.Y.3d 109, 113 [2003]; *Hill v. Lockhart*, 474 U.S. 52, 58 [1985]). Furthermore, defendant must show “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial” (*Hill v. Lockhart*, at 59).

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 N.Y.2d 184, 187 [1994]; *People v. Baldi*, 54 N.Y.2d 137, 147 [1981]). While defendant need not establish that but for counsel’s deficient conduct he would not have pleaded guilty, as under *Strickland*, he must nevertheless show that he was denied meaningful representation by showing that the proceeding as a whole was unfair (*People v. Caban*, 5 N.Y.2d 143 [2005]; *People v. Benevento*, 91 N.Y.2d 708, 713-714 [1998]). “In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of counsel...” (*People v. Ford*, 86 N.Y.2d 397, 404, [1995]; *People v. Boodhoo*, 191 A.D.2d 448 [2d Dep’t 1993]). A showing of prejudice, while not absolutely required under New York law, is a significant factor in determining whether a defendant was provided with effective representation and whether the proceeding was fair. (*People v. Stulz*, 2 N.Y.3d 277, 284-285 [2004]).

New York courts have long recognized that incorrect advice or affirmative misstatements by defendant counsel regarding the immigration consequences of a guilty plea may constitute

ineffective assistance of counsel if a defendant would not have otherwise pleaded guilty and would have insisted on going to trial (*People v. McDonald*, 1 N.Y.3d 109, 114-115 [2003]; *People v. Ford*, at 405). Until recently, counsel's effectiveness was not considered to be diminished by the complete absence of advice regarding possible immigration consequences, however, counsel's obligations have been enlarged with the United States Supreme Court's recent decision, *Padilla v. Kentucky*, 130 S.Ct. 14 73 (2010). In *Padilla*, the Supreme Court ruled that the failure to give any immigration advice may also constitute ineffective assistance of counsel, so long as the defendant can establish both that no immigration advice was given and that defendant would not have pled guilty had he been apprised of the immigration consequences of conviction.

To establish a claim of ineffective assistance of counsel based upon a claim that counsel incorrectly advised defendant about the risk of deportation, or failed to give any advice, the defendant has the burden of proving both that he was either not given any advice, or that the advice given was mistaken, and that this advice or lack of advice induced him to plead guilty. His claims must be weighed against the strength of the prosecution's evidence, the availability of a viable defense, the likelihood of a conviction were he to proceed to trial, a comparison of the promised sentence after a guilty plea with the potential exposure upon a guilty verdict, and counsel's advice on the plea offer (*People v. McDonald*, 296 A.D.2d 13, 19-21 [3rd Dep't 2002]; *People v. Ford*, 86 N.Y.2d at 405). A defendant must also demonstrate that he was prejudiced by counsel's mistaken advice by showing that he had a colorable claim of innocence such that he might have avoided conviction after trial and, thus avoided the conviction which rendered him deportable.

In the present case, defendant has failed to meet his burden. Initially, the instant motion is procedurally barred as defendant has failed to substantiate all of the essential facts underlying his claim (C.P.L. § 440.30 [3] [b]). Defendant's allegations are unsupported by any other affidavit or evidence. (C.P.L § 440. 30 [4] [d]). His brief affidavit merely alleges that prior to his guilty plea, his attorney did not advise him that he could face "the risk of deportation, denial of naturalization or refusal of admission to the United States." The defendant has not provided an affirmation from either of his attorneys, nor does he even name them in his papers. Additionally, defendant has not stated the circumstances surrounding his conversations with his two separate attorneys, nor has he elaborated on the details of these conversations. Defendant does not specifically state that he would not have entered pleas of guilty had he known that these pleas would bar or negatively effect his immigration status in the United States. However, defendant indicates that he entered a plea of guilty because his attorney, his ex-girlfriend, and his family members convinced him that pleading guilty would be in his best interests, and he did so without knowing the immigration consequences.

Further, defendant's claim of ineffectiveness is also undermined by the favorable dispositions that were negotiated by both defense attorneys. The evidence against the defendant in both cases was overwhelming in that he was arrested immediately after both incidents. With respect to Kings County Information Number 4048/93, after hearing gunshots, and observing defendant make a motion to his waistband while proceeding to run, the arresting officer arrested the defendant upon seeing him drop a gun to the floor, and immediately recovered a .44 caliber magnum, loaded with two spent rounds and three live rounds in the cylinder. After his arrest, the defendant admitted

to firing and dropping the gun. As to Kings County Docket Number 96K054614, after defendant's arrest for displaying a weapon at a mail carrier while attempting to take his property, the arresting officer recovered a knife from defendant's pocket. The defendant further made a statement admitting holding the knife in his hand.

In both cases, defendant was facing a lengthier jail sentence, but was fortunate to receive a more lenient bargain. Originally facing felony charges and substantial jail time on the 1993 case, the defendant was fortunate to receive a misdemeanor conviction with sixty days in jail and three years' probation. Additionally, the defendant later received a lenient sentence of ten days community service on the 1996 matter. Considering the strong evidence of defendant's guilt, and the received favorable bargain, this court concludes that any claim by defendant that he would have proceeded to trial had he known that his plea would affect his immigration status is not credible.

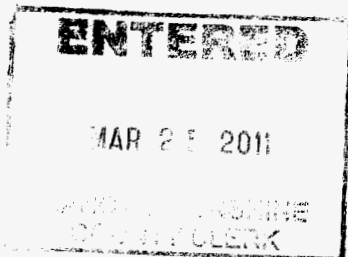
Finally, it is important to note that defendant is deportable regardless of his state convictions. A review of the documents pertaining to defendant's removal proceedings indicate that defendant's federal conviction in 2005 alone supports his removability and bars relief. As set forth in the Immigration Judge's decision and dismissal of the appeal, the defendant is being deported because his conviction for possession with intent to distribute constitutes an aggravated felony under Section 237 (a) (2) (A) (iii) of the Immigration and Nationality Act. Thus, vacatur of defendant's two state convictions would have no effect on his removability, and does not affect his lack of eligibility for relief from removal.

In sum, defendant's motion papers fail to state a claim of ineffective assistance of counsel predicated upon lack of immigration advise, or to state a claim necessitating a hearing upon his allegations. (See, C.P.L. § 440.30 (4) (c)).

Accordingly, the defendant's motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: March 24, 2011



JP S
James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.