

**People v Headley**

2011 NY Slip Op 31174(U)

April 11, 2011

Sup Ct, Kings County

Docket Number: 107/91

Judge: Sheryl L. Parker

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

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

**-against-**

**ROGELIO HEADLEY**

**Defendant**

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**DECISION AND ORDER**

**IND. 107/91**

**Justice Sheryl L. Parker**

Defendant moves pursuant to C.P.L. §440.10 (1)(h) for an order vacating his judgement. Based on the defendant's motion, the People's response and the court records, the following is the Court's decision.

Defendant was indicted under indictment number 107/91 for attempted murder in the second degree (P.L. §110/125.25[1]), assault in the second degree (P.L. §120.25), criminal possession of a weapon in the third degree (P.L. §265.02) and lesser included charges arising out of an incident where the defendant shot another person on the street. On September 30, 1991, the defendant pleaded guilty to assault in the first degree with a promised sentence of one and one half to four and one half years incarceration.<sup>1</sup> He was sentenced on October 28, 1991 to one and

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<sup>1</sup> Defense attorney: Your Honor, if it please the Court, after extensive discussions with my client and informing my client that he has a right to trial by jury and take the stand in his own behalf and call witnesses in his own behalf, he has advised me to inform the Court that he withdraws his previously entered plea of not guilty and enters a plea of guilty to the charge of assault in the 1<sup>st</sup> degree to cover any and all charges appearing on indictment 107/91.

The Court: Is that right Mr. Headley, you want to plead guilty?

The Defendant: Yes, sir.

one half to four and one half to run concurrently with a violation of probation on a Youthful Offender adjudication on indictment number 161/88. Upon his release, defendant was re-arrested and subsequently convicted after trial 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]). Upon sentencing on this conviction and arraignment on the predicate felony statement, defendant claimed that the prior conviction (Ind. 107/91) was unconstitutional in that he did not receive effective assistance of counsel. A hearing was held on September 10, 1997<sup>2</sup> where defendant claimed that his attorney “forced” him to enter a plea of guilty because he told him that he would face much more time if convicted after trial. The court found that the defendant’s plea was not entered unknowingly or involuntarily. (Marlow, J.). On November 12, 1997, under Indictment number 15074/96, 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

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The Court: You know you don’t have to plead guilty; you could plead not guilty and have a trial, and at that trial you could cross-examine all the witnesses. You wouldn’t have to say anything. You could only be found guilty if everybody on the jury thought your guilt has been proven beyond a reasonable doubt. Are you sure you want to plead guilty?

The Defendant: Yes.

<sup>2</sup> A second hearing was held on November 12, 1997 where defendant was given another opportunity to speak and adopted his statements on September 10, 1997 as true and swore to them under oath.

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 is serving fifteen years on the conviction for criminal possession of a weapon in the second degree.

Defendant did not appeal the 1991 conviction (Ind 107/91), however defendant filed a motion to vacate his judgement pursuant to C.P.L. §440.10 on August 17, 1999, once again alleging ineffective assistance of counsel. That motion was denied. (Douglass, J.). Leave to appeal that decision was denied.

Defendant now alleges that his attorney on the 1991 (107/91) matter was ineffective in that he failed to advise the defendant of the immigration consequences of his plea of guilty. Defendant, who was a lawful permanent resident of the United States, currently has a deportation order pending against him dated July 7, 1998, ordering his removal to Panama based on the 1991 conviction.

The United States Supreme Court in *Padilla v. Kentucky* has recently ruled that failure to properly advise a defendant of his mandatory 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 rational behind the Court's decision was that defendant should enter into a plea knowingly and voluntarily and aware of all of the serious consequences of that disposition. (*People v. Fiumefreddo*, 82 NY2d 536 [1993]).

The defendant is not entitled to reap the benefit of the ruling in *Padilla* in that it is not to be applied retroactively on collateral review of convictions. As discussed in *People v. Kabre*, 29 Misc.3d 307 (Crim. Ct. NY 2010), the rule enunciated by the United States Supreme Court in

*Padilla* is a new rule that over-ruled decades of case law in New York and in the Federal courts which clearly found that *failure* to advise a defendant of potential immigration consequences was not ineffective assistance of counsel. (Cf. *People v. McDonald*, 1 NY3d 109 [2003]).

Accordingly, this new rule is not to be applied on collateral review to a 1991 conviction. (*Kabre, Supra* ; *Teague v. Lane*, 489 US 288 [1988]; *People v. Eastman*, 85 NY2d 265 [1995]).

Moreover, the defendant is procedurally barred from bringing this claim. The defendant here has failed to allege by sworn statements of fact that his attorney knew that he was not a citizen of the United States. ( C.P.L. §440.30[4][b]). There is no evidence that his attorney was aware of his immigration status, nor is there evidence, besides the defendant's own self-serving statements, that his attorney never advised him of the possible immigration consequences of his plea. (Id.). It is noted that his interview with the Criminal Justice Agency prior to arraignment on the felony complaint was conducted in English, and he had verified community ties and listed addresses in Kings County for the previous seven and one half years. There is no record of the defendant informing anyone that he was not a citizen of the United States.

Additionally, defendant is serving a state sentence for his conviction for a *second* violent felony that would subject him to deportation even if this conviction were to be vacated. It is noted that during the hearing relating to adjudication as a second felony offender on September 10, 1997, the defendant had a lengthy colloquy with Justice Gordon Marlow regarding the conviction on 107/91 and had already received notice dated April 8, 1997, from the United States Department of Justice Immigration Court that he was removable due to the instant conviction (Defendant Exhibit A). He failed to mention his immigration status or concerns. He never raised the issue prior to this motion. Rather, defendant alleged at his predicate felony adjudication that he pleaded guilty because his attorney pressured him by telling him he would

lose at trial and would be faced with "a lot more time" (Predicate felony hearing dated 9/10/97, transcript at p. 4 ) on the class B violent felony of attempted murder in the second degree.

Defendant received a sentence of one and one half to four years after pleading guilty to assault in the first degree a class C violent felony. That sentence was the minimum he could receive on the class C violent felony. The minimum he could have received after trial if convicted of the top count was two to six years incarceration. The maximum was eight and one third to twenty five years.

Defendant has failed to show any prejudice by his attorney's representation. His attorney negotiated a plea that was to a lesser included offense with significantly less prison time than the defendant was facing. That sentence ran concurrently with a violation of probation that was pending against the defendant on a Youthful Offender adjudication, where defendant could have received consecutive time.

For the reasons stated, defendant's motion is denied without hearing.

The foregoing constitutes the decision and order of the Court.

Dated: April 11, 2011  
Brooklyn, NY

  
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J.S.C.

**ENTERED**  
APR 11 2011  
NANCY T. SUNSHINE  
COUNTY CLERK