

People v Makusi

2011 NY Slip Op 31215(U)

April 22, 2011

Supreme Court, Kings County

Docket Number: 175/2003

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

Date: April 19, 2011

-against-

DECISION & ORDER

PETER MAKUSI

Indictment No. 175/2003

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Defendant moves, pro se, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel when his attorney allegedly provided inaccurate advice about the immigration consequences of his guilty plea. For the following reasons, the motion is denied.

Defendant and Rosa Carty were friends who sold counterfeit DVDs and CDs on the street in Manhattan. On the night of December 31, 2002, defendant and Carty went out to dinner in Brooklyn. Defendant asked her to spend the night with him but she refused. When defendant offered her money Carty again refused. After dinner, Carty helped defendant carry some boxes into his Brooklyn apartment where he pushed her head into the wall and choked her. Defendant then banged her head on the floor, causing her to lose consciousness. She woke up in the bathroom to find that defendant had removed his shirt. When Carty refused to remove her clothes defendant choked her again. Carty bit defendant's finger, vomited on him, and tried to jump out the bathroom window, but defendant grabbed her legs and dragged her into the bedroom.

Defendant proceeded to rip off Carty's clothes and forced her to have sex with him

approximately five times. He told her that she could not leave and he threatened to kill her. Eventually Carty told defendant that she would not call the police and defendant walked with her outside to a taxi. Carty went home, called her mother and then called 911 to report the attack. She was treated at a local hospital and evidence for a sexual assault kit was collected.

Defendant was arrested on January 4, 2003, and he claimed in a written statement that the sex had been consensual.

For his acts, defendant was charged with five counts each of rape in the first degree (PL § 130.35[1]), rape in the third degree (PL § 130.25[1]), sexual abuse in the first degree (PL § 130.65[1]), sexual misconduct (PL § 130.20[1]), and sexual abuse in the third degree (PL § 130.55), and one count each of assault in the second degree (PL § 120.05[6]), assault in the third degree (PL § 120.00[1]), and unlawful imprisonment in the second degree (PL § 135.05).

On January 8, 2004, defendant, represented by retained counsel Evans D. Prieston, Esq., pleaded guilty to assault in the second degree, in full satisfaction of the indictment, in exchange for a promised sentence of six months in prison and five years of probation. During the plea allocution, the court asked, "It's also been established that you are a citizen of the United States, born in the United States, correct?" Defendant replied, "Yes, your Honor."

On February 23, 2004, defendant was sentenced to the agreed-upon sentence. He was subsequently resentenced on a violation of probation on May 5, 2008 to a prison term of nine months.

Defendant did not appeal from the judgment of conviction.

Defendant has a significant criminal history including several convictions in Georgia, Alabama, and New Jersey between 1995 and 2008. In February of 2010, defendant was also

convicted in Federal court of impersonating a citizen of the United States (18 U.S.C. § 911) and false representation (18 U.S.C. § 1001[a][2]).

Defendant is a native and citizen of Kenya. He entered the United States in Atlanta, Georgia in September of 1994 as a student on a nonimmigrant F1 visa. Defendant remained in the United States beyond the temporary period allowed under his visa without authorization from the Immigration and Naturalization Service or the Department of Homeland Security.

In February of 2010, defendant was arrested by Immigrations and Customs Enforcement (“ICE”) agents while he was incarcerated in Alabama and charged as a deportable alien. The Notice to Appear in removal proceedings charged defendant with violations of Immigration and Nationality Act section 237(a)(1)(B), for having overstayed his visa; INA § 237(a)(2)(A)(iii), for his conviction of an aggravated felony in connection with the instant case; INA § 237(a)(2)(B)(I), for his Alabama conviction of a crime involving a controlled substance, and INA § 237(a)(2)(C), for another Alabama conviction of possessing or carrying a firearm.¹

In the instant motion, defendant seeks to vacate his judgment of conviction on the ground

¹ In opposition to petitioner’s motion, following submission of their initial Affirmation in Opposition, the People supplemented their response with an Affirmation of Assistant District Attorney Jill Oziemblewski, purportedly “in response to the Court’s directive.” This Court never communicated with the Office of the District Attorney, except to confirm that a response to petitioner’s motion would be expedited so as to avoid petitioner’s deportation before his motion could be decided, and did not solicit the Supplemental Affirmation. However, the law clerk charged with drafting the initial decision on this motion, who is employed in a Law Department outside the judge’s chambers, apparently concerned about the posture of the immigration case against petitioner and the purported withdrawal of the charge relating to the instant conviction, without authorization from the Court, contacted the District Attorney to obtain more information. This ex parte communication was grossly improper and petitioner has properly taken issue with such transgression. This Court knew nothing of such request prior to receiving the Supplemental Affirmation, at which time, an investigation was initiated. The hearsay statements contained in the Supplemental Affirmation are not relevant to the Court’s decision and have been disregarded.

that he was denied the effective assistance of counsel at the plea proceeding. Defendant claims that counsel gave him wrong advice by telling him that “he did not think” a conviction of second-degree assault would subject him to deportation. To support his claim, defendant now argues that he would have rejected the plea offer and proceeded to trial had he been aware that his conviction could result in deportation.

The People have appended an affidavit from defense counsel Evans D. Prieston, who avers that at the time he represented defendant he was trained in immigration issues and was fully familiar with the consequences of guilty pleas as pertaining to non-citizen clients. While Prieston does not have an independent recollection of his pre-plea conversations with defendant, it was nevertheless his general practice to advise clients that a felony conviction could result in deportation. At no time did he tell defendant that a plea to a felony crime would not have an effect on his immigration status, or otherwise provide wrong advice about the effect of his plea.

The claim that counsel provided wrong immigration advice is made solely by defendant and is unsupported by any other affidavit or evidence. Thus, “under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true” (CPL § 440.30[4][d]). Aside from his own self-serving allegations, defendant has not provided any supporting documentation to indicate what counsel actually told him about the consequences of his guilty plea. As such, defendant is not entitled to have his judgment of conviction vacated on the ground of ineffective assistance of counsel.

Moreover, defendant’s claims are without merit. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, § 6). To prevail on an ineffective assistance of counsel claim under the federal standard, the

defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

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 NY2d 184, 187 [1994]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, "[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*Flores* at 187). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for counsel's conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel's choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

Defendant relies upon *Padilla v Kentucky*, 130 S.Ct. 1473 (2010), in which the United States Supreme Court, adhering to the two-prong *Strickland* standard of ineffective assistance, held that the Sixth Amendment mandates that criminal defense attorneys give correct advice to their non-citizen clients concerning the risk of adverse immigration consequences, particularly deportation, as a consequence of a conviction. The Court also emphasized that *Strickland's* presumption of reasonable professional conduct still applies and that in attacking a plea the

defendant would still face the heavy burden of convincing the court that a decision to reject the plea bargain would have been rational under the circumstances (*Padilla* at 1485; *Strickland* at 689). Defendant has failed to meet his burden in this instance.

Even if counsel did in fact inform defendant that his conviction would not lead to deportation, that advice was not incorrect because defendant's six-month sentence made the instant conviction ineligible as a deportable offense. While the Department of Homeland Security listed the instant aggravated felony conviction as a deportable offense pursuant to the Immigration and Nationality Act (8 U.S.C.A § 1227[a][2][A][iii]), defendant is not subject to deportation on the basis of that conviction because his sentence did not exceed one year (8 U.S.C.A. § 1101[a][43][F]). Regardless of the conviction at issue here, defendant remains deportable on the basis of the three remaining charges listed in the Notice to Appear (see *People v Figueroa*, 170 AD2d 529 [2d Dept 1991] [claim that counsel was ineffective for advice on immigration consequences of guilty plea denied because defendant was already deportable]).

Moreover, as defendant falsely represented to the court under oath that he was an American citizen, defendant cannot now claim that his attorney was ineffective for relying upon that misrepresentation. Where defendant presented himself to the court as a citizen, counsel had no basis for advising defendant that his plea would subject him to deportation. The court credits counsel's affidavit and finds that, even if defendant's allegations are true, counsel did not provide deficient advice when he had no reason to believe that defendant, who swore to being a citizen born in the United States, could be deported.

In viewing counsel's performance on the whole, counsel provided meaningful representation. Counsel negotiated a very favorable plea bargain wherein defendant pleaded guilty to a lesser charge of second-degree assault and was not convicted of any of the rape counts

in the indictment (*see People v Ford*, 86 NY2d at 404 [2d Dept 1995]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley*, 221 AD2d 376 [2d Dept 1995]). With this plea bargain defendant received a six-month prison term with five years of probation, whereas he faced a maximum term of twenty-five years were he convicted of the top charge after a trial and the onerous consequences of designation as a sex offender under the Sex Offenders Registration Act. Defendant has failed to demonstrate that, had he received correct immigration advice, he would have rejected the generous plea bargain and proceeded to trial. At trial defendant would have faced significant evidence of guilt including McCarty's prompt calls to her mother and to 911, along with the sexual assault kit. Nothing else in the record casts doubt on the adequacy of counsel's representation.

Accordingly, the motion is denied.

This decision shall constitute the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.

ENTER:



CAROLYN E. DEMAREST, J.S.C.

ENTERED
 APR 22 2011
 NANCY T. SUNSHINE
 COUNTY CLERK