

**People v Coles**

2011 NY Slip Op 31275(U)

May 4, 2011

Sup Ct, Kings County

Docket Number: 8532/1994

Judge: Miriam Cyrulnik

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 38

PEOPLE OF THE STATE OF NEW YORK

-against-

ONEIL COLES,

DECISION AND ORDER

Indictment No. 8532/1994

Miriam Cyrulnik, J:

The defendant moves pro se to vacate his judgment of conviction, pursuant to Criminal Procedure Law (“CPL”) 440.10, alleging that he was denied the effective assistance of counsel due to his attorney’s failure to advise him that he could be deported as a result of his conviction, and that his attorney failed to secure his status as a Youthful Offender (“Y.O.”). The People filed an affirmation in opposition, appended to which is an affirmation from his then-defense attorney.

PROCEDURAL HISTORY

On September 28, 1994, the defendant pled guilty to Attempted Criminal Sale of a Controlled Substance in the Third Degree. On October 6, 1994, the defendant was sentenced to six months incarceration and monetary forfeiture. This sentence was to run concurrent with six months jail and five years probation under Indictment No. 10389/1994, in which case the defendant also pled guilty to Attempted Criminal Sale of a Controlled Substance in the Third Degree. The defendant did not appeal either conviction or sentence.

The defendant has an additional criminal conviction for burglary in Florida from November 5, 2007. He was taken into custody by Immigration and Customs Enforcement (“ICE”) in 2009, and deportation proceedings were commenced against the defendant, pursuant to the Immigration Nationality Act (“INA”) for violations of the act pertaining to convictions for two or more crimes of moral turpitude, and for controlled substances. On January 24, 2011, the Immigration Court

ordered the defendant removed to Jamaica, but granted the defendant's application for deferral of removal under Article III of the Convention Against Torture. The defendant is currently in the custody of the Department of Homeland Security at the Glades County Detention Center in Florida.

The defendant now alleges that he was denied the effective assistance of counsel due to his attorney's failure to advise him that he could be deported as a result of this conviction. He claims that his guilty plea was therefore involuntary and must be vacated. The defendant also cites Padilla v. Kentucky, 130 S.Ct. 1473 (2010), recently decided by the United States Supreme Court, for the proposition that he would not have pled guilty if he knew he could be deported, and would have proceeded to trial instead. The defendant additionally contends that his attorney failed to seek Y.O. status for him, or have him adjudicated as a juvenile delinquent.

The People oppose, arguing that the defendant's claims are procedurally barred, and should have been raised on direct appeal. They also respond that the defendant received the benefit of effective assistance by defense counsel as evidenced by the advantageous plea bargain he received. The People contend that the defendant has failed to demonstrate any prejudice suffered, in that he has not shown that he would have rejected the favorable plea bargain offer and proceeded to trial, had he known of any potential immigration consequences. Additionally, the People contend that Padilla should not be applied retroactively to the defendant's application. Finally, they further claim that the defendant's attorney would not have advised him that this case would remain solely on his juvenile record, or that he would definitely receive Y.O. status.<sup>1</sup>

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<sup>1</sup> The People also discuss the court's failure to advise the defendant regarding the possibility of his deportation, arguing that such claims by the defendant should have been raised on appeal, and are, in any event, meritless, and lack a showing of prejudice to the defendant. Upon review of the defendant's motion papers, the court did not find any mention in the defendant's arguments pertaining to the court's obligations, rather only defense counsel's failure to advise the defendant of the risk of deportation. Accordingly, such contentions need not be addressed in this decision.

The court finds the People's arguments persuasive, and denies the defendant's motion in its entirety.

### IMMIGRATION CONSEQUENCES

To begin, the People contend that Padilla should not be applied retroactively to the defendant's case. However, while there has been no decisive guidance from the New York Court of Appeals, the Appellate Division, Second Department ruled to the contrary on this issue. In People v. Nunez, 2010 NY Slip Op 20522, 3 (2d Dept 2010), decided approximately three months ago, the court held that the "holding in Padilla should be applied retroactively" to CPL 440 motions. See also People v. Clarke, 2010 NY Slip Op 33243U (Sup Ct, Kings County 2010) (adhering to the analysis from People v. Bennett, 2010 NY Slip Op 20194, 4 [Crim Ct, Bronx County 2010] and People v. Hubenig, 2010 US Dist LEXIS 80179, 20 [ED Cal 2010] that the U.S. Supreme Court intended the discussion regarding opening the "floodgates" to litigation challenging guilty pleas to indicate that Padilla should be applied retroactively); People v. Garcia, 2010 NY Slip Op 20349 (Sup Ct, Kings County 2010). But see People v. Kabre, 2010 NY Slip Op 20291 (Crim Ct, NY County 2010) (finding that Padilla announced a "new rule of criminal procedure rather than applied settled law to a new set of facts" and is therefore not a retroactively applicable "watershed change"); People v. Ebrahim, 2010 NY Slip Op 32794U (Sup Ct, Wayne County 2010).

Therefore, the court will adhere to the Second Department ruling, advocating the retroactive application of Padilla v. Kentucky.

Nevertheless, the ineffective assistance of counsel claim, as it pertains to the failure to advise the defendant about possible immigration consequences upon pleading guilty to a crime, must still fail, due to substantial considerations which weigh against the defendant's arguments here.

Any failure by his then attorney to advise the defendant regarding his possible deportation has not been shown to constitute ineffective assistance of counsel.<sup>2</sup> The applicable determination includes the federal standard established in Strickland v. Washington, 466 US 668 (1984), which requires a showing of prejudice suffered by the defendant, namely that “defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty.” People v. Ramirez, 2010 NY Slip Op 51661U, 4 (Crim Ct, NY County 2010).

Similarly, the defendant has failed to demonstrate ineffective assistance under the New York standard of “meaningful representation,” which affords the defendant even greater protection than the federal standard in Strickland v. Washington, that there was anything other than diligent representation by his attorney. See People v. Caban, 5 NY3d 143, 155-156 (2005); see also People v. Baldi, 54 NY 2d 137 (1981); People v. Stultz, 2 NY3d 277, 287 (2004) (holding “a defendant’s showing of prejudice [to be] a significant but not indispensable element in assessing meaningful representation,” focusing instead on “the fairness of the proceedings as a whole”).

Even if counsel had the obligation to advise the defendant of the risk at stake, “whether Padilla is applied retroactively” or not, the “result remains the same” and the defendant’s claims are without merit. See People v. George, 2010 NY Slip Op 51575U, 3 (Crim Ct, Kings County 2010). The defendant has failed to satisfactorily allege prejudice as a result of his lack of information at the time of allocution.

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<sup>2</sup> The court notes that the transcripts are unavailable for both the defendant’s plea and his sentencing, as evidenced by affidavits from the court reporters for both of those court appearances. Therefore, the court has relied on the affirmation submitted by prior defense counsel, David Lubitz, who indicates that while it was his general practice to discuss immigration consequences with applicable clients, he cannot recall with specificity whether he did so in this case.

Specifically, the defendant has not shown that if he had been told about a possible deportation risk, he would not have pled guilty. Indeed, as the People point out in their reply motion, the particular plea offer was a rather advantageous one: six months incarceration, to run concurrently with the defendant's similar felony drug conviction from several weeks prior to the instant case. Given that the defendant was facing a combined maximum sentence of 50 years incarceration for the two cases, or 25 years for just this case alone, it cannot be said that the defendant begrudgingly accepted it. See People v. Robles-Mejia, 2010 NY Slip Op 50808U (Sup Ct, Bronx County 2010).

Moreover, the defendant was not at risk for deportation here solely because of this criminal conviction. Rather, he also sustained another drug conviction, as well as a crime of moral turpitude in another jurisdiction, in violation of § 237 of the Immigration Nationality Act. See 8 USC §§ 1227(a)(2)(A)(ii). Furthermore, as the People correctly point out, the defendant is no longer facing deportation as a result of the Immigration Court's ruling granting him a deferral of removal. Therefore, the defendant has not suffered the resulting prejudice which he alleges throughout his motion papers: deportation from the country.

Having weighed all of the considerations in this case, the court finds that even if the defendant's original counsel should have discussed with the defendant the possibility that pleading guilty to this offense could potentially lead to deportation (and actually failed to do so), the resulting conviction in this case was not the dispositive factor that ultimately led to the (deferred) order of the defendant's removal from the country. Moreover, the defendant has failed to demonstrate precisely how the outcome would have been different, other than mere speculation that he would not have pled guilty. Given the fact of the concurrent drug conviction and the favorable plea bargain, the court is not convinced that the defendant would have unequivocally opted to plead not guilty and proceed

to trial.

#### JUVENILE AND YOUTHFUL OFFENDER STATUS

First, as the People correctly point out, the claims raised by the defendant regarding whether defense counsel attempted to seek Y.O. status for the defendant would have been apparent from the court record, and thus readily reviewable on direct appeal.<sup>3</sup> However, the defendant did not seek to appeal his conviction, nor has he offered any justifiable reason for failing to do so. CPL 440.10(2)(c). The defendant's only claim regarding his failure to appeal his conviction pertains to his late discovery of the immigration consequences of his guilty plea, and is not relevant to this specific portion of his motion.

Furthermore, as discussed above, the court has reviewed the affirmation submitted by then-defense counsel, David Lubitz, attached to the People's response motion, and finds it to be credible. There is no reason for the court to conclude that counsel would misadvise the defendant regarding his possible eligibility for Y.O. status, particularly given that the defendant already had a felony drug conviction for which he had been sentenced. See CPL 720.10(2)(b).

Moreover, as this case was conducted in Supreme Court, not Family Court, it is likewise unreasonable for the court to believe that defense counsel would have promised the defendant that this conviction would remain solely on his juvenile record, and later be expunged. See Family Court Act § 302.1(1) ("The family court has exclusive original jurisdiction over any proceeding to determine whether a person is a juvenile delinquent."); Family Court Act § 301.2(1) ("Juvenile delinquent" means a person over seven and less than sixteen years of age . . ."). Thus, there is no "reasonable possibility" that the claims alleged by the defendant, which are unsupported by any other

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<sup>3</sup> As discussed above, without the benefit of the plea transcript, that information is not directly ascertainable by the court.

evidence, and have failed to adequately demonstrate a sufficient factual basis, are true. CPL 440.30(4)(d).

Accordingly, the defendant's motion to vacate his judgment, and for the appointment of counsel, is denied in its entirety.

The defendant's right to an appeal from the order determining this 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, the 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 the defendant has been served by the District Attorney or the court with the court order denying this motion.

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

This constitutes the decision and order of the Court.

Dated: May 4, 2011  
Brooklyn, New York



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Miriam Cyrulnik  
A.J.S.C.