

People v Rosales

2011 NY Slip Op 32052(U)

July 7, 2011

Supreme Court, Kings County

Docket Number: 8797-1996

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION & ORDER
: 440 Motion

RENE ROSALES : Indictment No. 8797-1996

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MICHAEL A. GARY, J.

Defendant moves for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of counsel.

As proven at trial, on June 26, 1996, Mr. Dennis Rosales, defendant's brother and codefendant on this indictment, received a phone call from an undercover officer posing as a drug buyer, to purchase 16 glassiness of heroin. Dennis Rosales arranged to meet the undercover/ buyer in a park across the street from the home the brothers shared, at 121 Senator Street in Brooklyn, New York. Dennis Rosales approached the undercover (UC) who was sitting in a car near the house, and told her that he didn't have the drugs on him. The UC entered the park and was summoned to a car by its horn. When the UC reached the car, Dennis and Rene Rosales were inside. Defendant asked the UC how many glassiness did she want, and removed 4 bags of heroin from some plastic bags. The UC took \$140.00 pre-recorded buy money (PRBM) and defendant, Rene Rosales told her to put the money down. The UC threw the money into the passenger seat and asked that the heroin be placed inside an empty cigarette tin. Defendant directed his brother to do so, and Dennis Rosales put 16 glassiness into the box.

Defendant and codefendant were arrested a short time later. \$140 PRBM was recovered from Dennis Rosales, 3 glassiness marked "Poison" were recovered from Rene Rosales's person and one glassine was recovered from the driver's seat where Rene Rosales was sitting. Pursuant to a search warrant, a scale, empty plastic bags marked "Poison", and five plastic bags containing ten glassiness of heroin each were recovered from defendant's home.

For their participation in the drug transaction, defendant and codefendant were charged with one count each of Criminal sale of a controlled substance in the third degree (Penal Law §220.39[1]), Criminal sale of a controlled substance in the fifth degree (Penal Law §220.31), four counts each of Criminal possession of a controlled substance in the third degree (Penal Law §220.16[1]) and Criminal possession of a controlled substance in the seventh degree (Penal Law §220.03), and two counts each of Criminally using drug paraphernalia in the second degree (Penal Law §220.50[2], [3]).

On October 1, 1996, defendant waived his right to a trial by jury and a bench trial was held. Defendant was convicted of Criminal sale of a controlled substance in the fifth degree and acquitted of Criminal sale of a controlled substance in the third degree. On January 17, 1997 defendant was sentenced as a second felony offender to a term of imprisonment of a minimum of 2 years and a maximum of 4 years. Defendant also owed some parole time from a 1986 plea and sentence, for Criminal sale of a controlled substance in the fourth degree (Ind. No. 4022-85).

Defendant did not appeal from his judgment of conviction.

On January 15, 1997, codefendant Dennis Rosales plead guilty to Criminal sale of a controlled substance in the third degree and was sentenced in Febraury17, 1997 to a term of

imprisonment of a minimum of 7 ½ years and a maximum of 15 years.

Critical to this motion, the defendant received a Notice to Appear from INS dated June 1998 (attached as Exhibit B to the People's response), informing him that he was deportable based on his conviction in 1985 and for his conviction in this case. The defendant plead guilty and was sentenced in 1990 for a conviction on Criminal sale of a controlled substance in the fourth degree on Ind. No. 4646-1986. Defendant is a permanent resident, after having arrived here from Honduras in 1963. The removal proceedings are still pending.

Defendant now moves to vacate his judgment of conviction pursuant to CPL 440.10, based on the claim that he was denied effective assistance of counsel. In a lengthy affidavit, he claims that based on the opinion of his attorney that the People's case was weak against him, and in light of his brother's plea to the top count (curiously, the plea occurred 3 months after the defendant's trial) (Defense Counsel Affirmation, Par. 11) he went to trial on the matter. More importantly, he claims that because he was not informed by his attorney that a conviction after trial would result in deportation, he would have sought to plead guilty to a "non-deportable offense."

Relying on the case of *Padilla v. Kentucky*, 559 US ___ ; 130 S. Ct. 1473 (2010) which established an affirmative duty upon counsel to inform the defendant of the immigration consequences of a plea, defendant now claims that as a result of his attorney's failure in that regard, the judgment should be vacated and that *Padilla* should be retroactively applied.

The People respond that the defendant's motion should be denied for several reasons, including: that no plea offer was made to the defendant, nor was one available that included

a non-deportable offense, *Padilla* is not applicable to defendant's case because defendant was convicted after a trial and not as a result of a plea, *Padilla* is not applicable to a case that became final before that decision was rendered, defendant was deportable regardless of the outcome of this case, based on his previous conviction, and lastly, he claims now to be innocent of the charges.

Both the court file and the People's notations indicate that no plea offer was extended to Mr. Rosales. The People maintain that this was the People's position in light of his history and in light of the fact that this case was designated as one of high community interest. The People have supplied the court with a copy of notes by the ADA indicating that INS had been in touch with the office and was interested in the defendant. Defendant speculates that the lack of a plea offer was due to the defense attorney's lack of advocacy, and that had defense counsel been more aggressive, perhaps a disposition including a non-deportable offense would have been possible. The People assert that not only was no offer conveyed by the People, the plea and sentence restrictions for a predicate felon facing a drug indictment were applicable: because the defendant was charged with Article 220 offenses, he was precluded from pleading to any offense lower than a D felony. CPL 220.10 similarly restricts any plea that includes a lesser offense to one in which the People must give their consent. There is no notation in the court file of an offer that if only one of the defendants pleads guilty, the other would have his case dismissed. It is pure speculation on the part of the defendant here that the People, who perceived they had a strong case, especially after the execution of the search warrant, would have made a non-jail offer to a predicate felon.

There are two options open to a defendant facing charges in a criminal case, regardless of the nature of the crimes with which he is charged: plead guilty or go to trial. In

this case, with the People asserting and the court concurring that there was no plea offer, the choice to go to trial and perhaps win an acquittal or a conviction on a lesser included count was a most logical manner in which to proceed. Thus, contrary to the discussion of defense counsel in his reply papers, the fact is that a defendant exercising his right to trial, when no offer to plead guilty to a lesser offense is available, cannot be considered prejudiced by having to do so. There is no right to a plea offer; there is however, a constitutional right to have a case proven by the prosecution at trial.

The defense argues that the affirmative duty imposed by *Padilla* should apply to cases where defendant would either plead guilty to the offenses as charged or if not, proceed to trial. If a defendant decides to have the People prove their case, the consequences relating to immigration issues are not within his control, for a resulting conviction will passively trigger the immigration consequences. The reason *Padilla* is so emotionally strong is clearly recognized by the court in its decision, where it stated (at p. 1483), “[w]e too have previously recognized that ‘preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence’” (internal citation omitted). The decision to affirmatively choose the consequences versus whether they naturally result from a conviction after trial is measured by whether it result from an informed choice. The immigration consequences resulting from a conviction after trial occur inevitably, regardless of counsel’s advice, in a situation where a plea is not forthcoming. Ideally, counsel will discuss all consequences of a conviction, e.g. predicate felony status, loss of license, etc., including impact on immigration status. But once a case is in trial posture, there is no “choice” in the matter, and thus, a defendant cannot seek advice regarding whether or not to choose one option over the other. As such, the advice of whether to plead guilty or not with

its concomitant immigration consequences is rendered moot. Therefore, in this case, where no plea offer was made, the issue of whether or not *Padilla* is applicable is likewise moot. Thus, whether *Padilla* should apply retroactively will not be addressed.

Next, the People point out that the original letter from the INS contained information regarding the deportability of the defendant based on previous cases; this one and one from 1985 (Ind. No. 4002-85), and one from 1986 (Ind. No. 4646-86). Thus, the defendant claims that the defense attorney should have advised the defendant that he might have been eligible for relief in the short window available to defendants under AEDPA and INA 212 (c) relief with an appropriate plea. However, even if there were a plea offer available to the defendant and even if the defense attorney failed to advise him of the potential consequences of that plea, this defendant was already deportable based on the previous felony conviction, regardless of whether he has any immigration relief for those convictions.

Last, the People point out that the defendant claims that had he known about the consequences of a possible plea, again theoretically speaking, the defendant must allege that he would have taken the plea instead of going to trial. In his affidavit in support of this motion, defendant states that he was in fact innocent of the charges, but would have sought to plead guilty to a non-deportable offense. (Rosales Affidavit, Par 11). This contradicts the very statement made by the defendant on the day of the bench trial, when the defendant unsolicited, stated to the court: "Your honor, I know a made a foolish mistake. I want to thank you for giving me a break." (Trial transcript, 10/1/96 page 13 line 24-27). It is incongruous to argue now both that he was innocent of the charges and that he still would have plead guilty.

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). An attorney is “strongly presumed” to have rendered effective assistance to his client (*Strickland* at 690). To rebut this presumption, the defendant must be able to show that counsel’s conduct was outside the “wide range of professionally competent assistance” (*Id.*). 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).

In New York, “[s]o long as 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 the constitutional requirement will have been met” (*People v Baldi*, 54 NY2d 137, 147 [1981]). “This protection does not guarantee a perfect trial, but assures the defendant a fair trial” (*People v Flores*, 84 NY2d 184, 187 [1994]). 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]).

In this instance, defendant’s claims fall far short of the high threshold required to substantiate an allegation of ineffective assistance of counsel. Because he has failed to

establish that counsel lacked a legitimate strategy or that he was prejudiced by the execution of his defense it remains "clear that the attorney provided meaningful representation" (*see People v Maldonado*, 278 AD2d 513 [2d Dept., 2000]). In fact, as is obvious, the defense attorney managed to avoid a conviction for the top count of Criminal sale of a controlled substance in the third degree, which would have mandated a sentence of a minimum of 4½ and a maximum of 9 years, rather than the sentence of a minimum of 2 and a maximum of 4 years this defendant actually served.

Accordingly, defendant's motion is denied.

This decision constitutes 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.

Dated: Brooklyn, New York
July 7, 2011



MICHAEL A. GARY, J.S.C.

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HON. MICHAELA. GARY
J.S.C.

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NANCY T. SUNSHINE
COUNTY CLERK