

People v Prescod

2011 NY Slip Op 32778(U)

September 19, 2011

Supreme Court, Kings County

Docket Number: 8399-89

Judge: Vincent M. Del Giudice

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 25

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PEOPLE OF THE STATE OF NEW YORK

IND. NO. 8399-89

vs.

DECISION
and ORDER

WILLIAM PRESCOD,

Defendant.

-----X

VINCENT M. DEL GIUDICE, J.

In a motion dated November 23, 2010, defendant files for a federal writ of coram nobis. The People filed an answer in opposition, dated May 13, 2011. The defendant has filed a reply, dated June 10, 2011.¹

On August 17, 1988, the defendant pled guilty to Criminal Possession of a Weapon in the Third Degree. On October 31, 1988, defendant was adjudicated a Youthful Offender and was sentenced to five years probation.

On November 2, 1990, the defendant pled guilty to an additional charge of Criminal Possession of a Weapon in the Third Degree. On January 7, 1991, the defendant was sentenced to a definite sentence of one year imprisonment, such sentence to run concurrent with the sentence he would receive for violating the terms of his probation.

Ten days later, the defendant was convicted, in New York County, of Attempted Robbery in the Second Degree and was imprisoned for one year.

On April 30, 1991, INS (United States Immigration and Naturalization Service) issued an order to show cause why defendant

In his reply brief, the defendant files an additional request for the assignment of counsel. That application is summarily denied. Defendant has no right to taxpayer funded counsel when collaterally attacking a twenty year old judgment of conviction.

should not be deported, based upon his second weapons prosecution. On January 7, 1994, an immigration judge entered a removal order.

On March 3, 1995, the defendant was arrested by US Marshals for making a false statement on a passport application. On November 14, 1995, defendant was sentenced to ten months in jail and three years of supervised release.

On February 12, 2002, the defendant was convicted, in federal court, of conspiracy to possess, with intent to distribute, cocaine. The defendant was subsequently sentenced to thirty years imprisonment and five years of supervised release. His conviction was affirmed on appeal.

On January 21, 2003, INS lodged an immigration detainer ordering the defendant's removal from the United States.

Defendant has filed the current motion seeking the vacating of his 8399-1989 conviction, stating that he was provided ineffective assistance of counsel because his court-appointed attorney failed to advise him of the immigration consequences of his plea of guilty.²

In opposing defendant's motion, the People argue that defendant failed to provide any evidence to substantiate the essential facts set forth in his moving papers. They note that the defendant's motion rests solely on his self-serving affidavit. The People further argue that even if this court were to apply *Padilla v Kentucky* (559 US ___, 130 S Ct 1473 [2010]), defendant's claim would still fail because he is unable to meet the burden required to show ineffective assistance of counsel.

The People argue defendant's moving papers lack sufficient allegations to substantiate all the essential facts he sets forth in his claim. Under CPL §440.30(4), upon considering the merits of the motion, the court may deny it without conducting a hearing if: (b) the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or (d) an allegation of fact essential to support the motion: (i) is contradicted by a court record or other official document or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

A judgment of conviction is presumed valid, and a defendant moving to vacate his conviction bears the "burden of coming forward with sufficient allegations to create an issue of fact" (*People v Session*, 34 NY2d

²New York no longer recognizes the federal writ of coram nobis, having created Article 440 of the Criminal Procedure Law to deal with all such issues.

254, 255-256 [1974]). Here, defendant has failed to meet this burden. Beyond his self-serving affidavit, defendant has not met his burden of establishing that counsel failed to advise him of the deportation consequences he faced. Accordingly, defendant's self-serving allegations, without any further evidence, are insufficient to meet his burden of proving that counsel's performances was ineffective (see *People v Ozuna*, 7 NY3d 913, 915 [2006]) [holding that the failure to submit an affidavit from a corroborating source, or to explain the failure to do, so warranted summary denial of a CPL §440.10 motion]).

Assuming, *arguendo*, that defendant satisfied his burden of asserting sufficient factual allegations, which he did not, his ineffective assistance of counsel claim is, nevertheless, without merit. In order to establish ineffective assistance of counsel, under the federal standard, a defendant must demonstrate both the absence of strategic or other legitimate explanations for counsel's conduct and a showing of prejudice (see *Strickland v Washington*, 466 US 668 [1984]). The relevant tests are whether counsel's representation fell "below an objective standard of reasonableness" (*Strickland*, 466 US at 688) as judged by the prevailing norms of practice and whether, "but for counsel's unprofessional errors, the result of the proceedings would have been different" (*id.* at 694).

According to New York's more flexible standard, a defendant need not show prejudice; he may prevail by establishing that his attorney failed to provide meaningful representation by demonstrating "the absence of strategic or other legitimate explanations" for counsel's allegedly deficient representation (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Rivera*, 71 NY2d 705 [1988]). Under New York's interpretation of its constitution, success of an ineffective assistance of counsel claim rests upon whether "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 Henry*, 95 NY2d 563, 565 [2000], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]).

Effective assistance of counsel, therefore, is "meaningful representation" not "perfect representation" (*People v Ford*, 86 NY2d 397, 404 [1995]). Hindsight does not transform tactical errors into ineffective assistance of counsel (*Baldi*, 54 NY2d at 151). Only errors that seriously compromise a defendant's right to a fair trial warrant a finding of ineffectiveness (*People v Hobot*, 84 NY2d 1021, 1022 [1995]). In the end, a "claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the

case” (*Caban*, 5 NY3d at 156; *People v Benevento*, 91 NY2d 708, 714 [1998]).

Defendant's motion is based on the assertion that defense counsel's failure to advise him of the potential immigration consequences associated with pleading guilty was *per se* ineffective assistance. As such, he must establish that counsel's allegedly deficient conduct prejudiced him. To do so in a plea bargain context, “the 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*, 474 US 52, 59 [1985]).

In the context of a guilty plea, a defendant receives meaningful representation when he obtains “an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel” (*Ford*, 86 NY2d at 404, *citing People v Boodhoo*, 191 AD2d 448, 449 [2nd Dept 1993]).

In addition to the foregoing, this court must consider *Padilla v Kentucky* (559 US ___, 130 S Ct 1473 [2010]) as part of defendant's ineffective assistance of counsel claim. In *Padilla*, the Supreme Court held that an attorney's advice regarding the deportation consequences of a criminal conviction may be the subject of a claim for ineffective assistance of counsel under the Sixth Amendment.

The Court concluded that, at least where the “terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s] for . . . conviction,” constitutionally competent counsel must advise a defendant that his conviction makes him subject to mandatory deportation (*Padilla*, 130 S Ct at 1477).

In short, *Padilla* states that a defense attorney is ineffective if he or she fails to inform a non-citizen criminal defendant of the immigration consequences of a plea, where the consequences are clear, and if such consequences are not clear, the attorney must inform the defendant that there might be adverse immigration consequences from a guilty plea.

Defendant claims *Padilla* applies retroactively to his twenty year old conviction. The appellate courts of this state have not decided if *Padilla* should apply retroactively. If *Padilla* does not apply retroactively, defendant's motion must be denied because prior to *Padilla* counsel had no affirmative duty to inform a client of the immigration consequences of a guilty plea (*see People v McDonald*, 1 NY3d 109 [2003]; *Ford*, 86 NY2d at 403-404).

Assuming, without deciding, that *Padilla* is applicable to defendant's claim, defendant must still satisfy two separate burdens: (1)

defendant must demonstrate that his attorney's representation fell below the "prevailing professional norms" at the time of representation (*Roe v Flores-Ortega*, 528 US 470, 477-478 [2000]; *People v McDaniel*, 13 NY3d 751 [2009]); and (2) the defendant must demonstrate how he was prejudiced by counsel's representation (*Strickland*, 466 US at 688).

Defendant must also overcome the strong presumption that his attorney provided effective assistance (*Strickland*, 466 US at 669) and has the burden of demonstrating what immigration advice, if any, his attorney was required to give in 1990.

As *Padilla* recognized, before the 1996 amendments to the Immigration and Nationality Act, deportation was not a mandatory consequence of a criminal conviction because judges had the discretion to recommend against deportation and those recommendations were binding upon the Attorney General. Assuming that counsel was even informed that the defendant was not a citizen of the United States, defendant's deportation was not triggered merely because of his 1990 plea of guilty. Thus, counsel could not be deemed ineffective for not advising the defendant about a significant change in the law that would not occur until six years later.

As recently as 2003, our Court of Appeals held that "[t]he mere failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel" (*McDonald*, 1 NY3d at 114).

Accordingly, defendant has failed to demonstrate that his attorney's representation failed to satisfy his professional requirements at the time the plea was taken.

Nor can the defendant demonstrate that he was prejudiced by pleading guilty, especially in light of his subsequent convictions. Where counsel's effectiveness for purposes of a plea proceeding is at issue, defendant must prove that but for counsel's allegedly deficient performance, he would not have pleaded guilty but would have insisted on going to trial (*Hill*, 474 US at 57-59).

In the case at issue, defendant was charged with possession of a loaded firearm, while he was on probation for possession of another loaded firearm. His attorney negotiated a deal whereby the defendant would serve a definite sentence of one year in a local jail, concurrent with his sentence for violating the terms of probation. Defendant has failed to present any evidence that at the time he took such plea his primary concern was anything other than to limit his exposure to state prison. Defendant then waited over twenty years before raising his current claim. The substantial delay in raising this issue belies the veracity of his claim.

As a direct result of this disposition, defendant avoided incarceration in a state prison. In light of such an advantageous plea offer, and the lack of evidence of ineffectiveness, defendant undoubtedly received meaningful representation (see *Ford*, 86 NY2d at 404).

Accordingly, defendant has failed to "convince th[is] court that a decision to reject the plea bargain would have been rational" had he been fully informed of the immigration consequences of his plea (*Padilla*, 130 S Ct at 1485).

For the reasons stated, this court finds that the defendant received effective assistance at all stages of the proceedings and his motion to vacate his judgment of conviction is denied.

This constitutes the decision and order of the court (CPL 440.30 [7]).

Hon. Vincent M. Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

Vincent M. Del Giudice
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Dated: September 19, 2011
Brooklyn, New York

ENTERED

SEP 20 2011

NANCY T. SUNSHINE
COUNTY CLERK