

People v Lawrence

2011 NY Slip Op 33422(U)

September 6, 2011

Sup Ct, Kings County

Docket Number: 1257/03

Judge: Ruth E. Smith

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
INDICTMENT NO.: 1257/03

JAVIAN LAWRENCE,

Defendant.

-----X
RUTH E. SMITH, J.:

By *Pro Se* Motion dated January 25, 2011, defendant, an inmate at the Buffalo Federal Detention Facility, moves pursuant to CPL § 440.10 to set aside his judgment entered on or about October 24, 2004, upon his plea of guilty to Sexual Misconduct (Penal Law§130.20), and sentencing him to six months of incarceration, with a Level Two designation as a Sex Offender. For the reasons that follow, this court grants the motion only to the extent of ordering a hearing and assigning counsel.

PROCEDURAL HISTORY

Defendant's conviction stems from an incident wherein he, then seventeen, engaged in sexual intercourse with a fifteen-year-old student from his school whom he did not know prior to the January 7, 2003 incident date. The complainant accompanied another female student, defendant and two other males to an abandoned building occupied by squatters. All the males smoked marihuana and drank alcohol but the girls refused to do so. As soon as the complainant's friend went into another room with the two males, defendant disrobed from his waist down, grabbed the complainant and pushed her onto a bed. He disrobed her in the same manner, and after first failing to insert his penis into her vagina and resisting her attempts to push

him away, defendant ultimately succeeded and ejaculated in her. She reported the incident to her mother a few days later. Defendant gave a written statement to the police following his arrest in which he acknowledged having engaged in intercourse with the complainant.

A grand jury returned no felony charges but instead indicted defendant on three counts of Sexual Abuse in the Third Degree (PL § 130.55); and one count each of Sexual Misconduct (PL § 130.20[1]) and Endangering the Welfare of a Child (PL § 260.10[1]). On October 9, 2003, defendant pleaded guilty, under oath, to one count of Sexual Misconduct and waived his right to appeal. On October 23, 2004, he was sentenced as noted above.

Defendant is now awaiting deportation based not only on his conviction in this case, which constitutes an aggravated felony, but on another aggravated felony involving a forgery conviction, as well as a conviction involving possession of a controlled substance (*see* Exhibit C to the People's Opposition). Although to date, defendant has not been deported from the United States, the Board of Immigration Appeals dismissed his appeal on June 17, 2011.

DISCUSSION

Defendant moves to vacate his judgment because he was denied the effective assistance of counsel on federal and state constitutional grounds. Specifically, he avers that neither his attorney at the time of his plea, nor the court or Assistant District Attorney, advised him regarding the potential immigration consequences of a guilty plea (Defendant's January 25, 2011 Affidavit in Support of Motion to Vacate at ¶ 5-6).¹ Defendant contends that his attorney failed to advise him regarding the "potential effect his guilty plea would have on the full nature of the

¹ "Lawrence Memorandum" refers to Defendant's Motion to Vacate Judgment dated January 25, 2011.

charge and conviction, as well as on his immigration status” and that further “he relied on trial counsel’s advise (sic) that by pleading guilty and waving any and all direct appeal, he would be helping himself and saving the court and tax payers money, and that after the appeal, he would have no further problems” (Lawrence Memorandum at ¶ 16). He further alleges that he was never advised regarding his constitutional right to a jury trial, to remain silent, to have the prosecution prove the case against him or to subpoena witnesses on his own behalf (Lawrence Affidavit at ¶ 7). Defendant also claims that had he been aware of the immigration consequences and his constitutional rights he would not have pled guilty “to the charge that [he] was not truly guilty of” (Lawrence Affidavit at ¶ 6).

The People contend that defendant’s allegations regarding the advice, if any, provided by counsel are self-serving. They also maintain that even if the court credited defendant’s assertions, his motion should be denied because (1) he fails to specifically articulate the alleged erroneous advice that he received from counsel; and (2) defendant’s counsel was not required, at that time, to provide advice regarding the potential immigration consequences of defendant’s plea, because the rule promulgated under *Padilla v. Kentucky*, 130 US 1473 [2010] does not apply retroactively.

The New York assistance of counsel standard provides that, “[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], see also *People v. Cummings*, 16 NY3d 784 [2011]). In assessing a claim under this standard, “[a]ll of the evidence must be weighed in context and as of the time of representation to assess the alleged deficient

representation” (*People v. Carncross*, 14 NY3d 319, 331 [2010], quoting *People v. Hobot*, 84 NY2d 1021, 1022 [1995]).

Although rare, a single egregious and prejudicial error can constitute ineffective assistance of counsel (*id.*). The prejudice component focuses on the fairness of the process as a whole rather than its specific impact in the outcome of a case (*People v. Feliciano*, 17 NY3d 14 [2011]). A showing of prejudice to the defendant is significant but not essential in assessing meaningful representation (*People v. Stultz*, 2 NY3d 277 [2004]). In the context of a plea, a defendant receives meaningful representation “when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel” (*People v. Ford*, 86 NY2d 397, 404 [1995]).

To prevail on a claim of ineffective assistance of counsel under the federal standard, “[a] defendant must show that counsel’s representation fell below an objective standard of reasonableness” and “any deficiencies in counsel’s performance must be prejudicial” (*Strickland v. Washington*, 466 US 668, 688, 692 [1984]). Prejudice is found where “there is a reasonable possibility that but for counsel’s unprofessional errors the result of the proceeding would have been different” (*id.* at 694).

As to defendant’s assertion regarding the failure to advise him of his constitutional rights, the record is to the contrary. Indeed, defendant’s claim is completely belied by the plea minutes, attached as Exhibit A to the People’s Affirmation in Opposition to Motion to Vacate Judgment. They reveal that the court engaged in an extensive colloquy regarding defendant’s educational background, physical and mental condition, satisfaction with defense counsel’s representation and acknowledgment that he was relinquishing myriad rights as a result of his plea, as well as his

separate right to appeal his conviction and sentence (P: 3-10).²

As to defendant's core argument, he claims that his attorney failed to advise him of the potential immigration consequences of his plea. Specifically, he contends that "his trial counsel had personal knowledge that he was not given the opportunity to raise a possible defense, going to trial along with his citizenship status, and that he told his attorney about his reluctance in taking a plea and his further deportation concerns" (Lawrence Memorandum at ¶ 20). According to defendant, he told his attorney that he was "a lawful resident alien, and asked him if the plea agreement would have any effect on [his] immigration status" and that although defendant "[does] not recall exactly what he said, however [he] definitely recall[s] that [defense counsel] did not advice (sic) [him] that it would affect [his] status or future in the U.S. in any way" (Lawrence Affidavit at ¶ 4). Defendant further alleges that "[h]ad [he] been advised a guilty plea would effect [his] immigration status or qualification for citizenship in the U.S., [he] would never have plead guilty to [a] charge that [he] was not truly guilty of" (Lawrence Affidavit at ¶ 6).

The People counter that they contacted defendant's previous defense counsel who stated that "he [had] no independent recollection of this case and that his review of defendant's file did not cause him to recall whether he had discussed immigration consequences with defendant" and further, that his conversations with defendant "are protected under the attorney-client privilege" (Oziemblewski Affirmation at ¶ 8). The People also indicate that they spoke with the Director of

² Page numbers preceded by "P" refer to the transcript of defendant's plea dated October 9, 2003, attached as Exhibit "A" to the People's Memorandum of Law, dated April 15, 2011.

the Immigration Unit at Brooklyn Defender Services and were informed that the “box” that signifies that an attorney had advised his client as to potential immigration consequences had not been checked on the file in this case and that there was no other indication in defendant’s file that immigration issues had been discussed.

In *Padilla v. Kentucky*, the United States Supreme Court directly addressed the obligations of attorneys to advise their clients with respect to immigration issues during plea bargaining (130 US 1473 [2010]). In *Padilla*, the petitioner, Jose Padilla, alleged that his counsel was deficient when he failed to advise him his plea of guilty would make him subject to automatic deportation. In their analysis, the Court found that under the first prong of *Strickland*, his counsel’s representation fell below an objective standard of reasonableness in that “the deportation consequence [was] truly clear” as was counsel’s obligation to give “correct advice” (*id* at 1483). The Court went on to hold that the failure by an attorney to advise their client of the immigration consequences that may arise as a result of a guilty plea constitutes ineffective assistance of counsel.

Preliminarily, this Court must decide whether *Padilla* should be applied retroactively to defendant’s case. “The threshold issue in determining whether to apply a constitutional rule retroactively is characterization of the rule as ‘new’ or ‘old’”. It is settled that when a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an ‘old’ rule, and is always retroactive” (*People v. Eastman*, 85 NY2d 265, 275 [1995]). Generally, “a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government” or, stated another way, “if the result [is] not dictated by a precedent that existed at the time that defendant’s conviction

became final” (*Teague v. Lane*, 489 US 288, 301 [1989]; *People v. Eastman*, 85 NY2d 265 [1995]).

In *Padilla*, the Supreme Court applied the *long standing rule* promulgated under *Strickland* to a *new set of facts* and concluded that an attorney’s failure to advise a defendant about the possible immigration consequences of a plea constitutes constitutionally incompetent counsel (emphasis added). The Court found that, “[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea” and that it is “quintessentially the duty of counsel to provide [their] client with available advice about an issue like deportation” (*Padilla* at 1484-1485). The Court further refused to its holding to cases involving affirmatively incorrect advice stating that, “[s]ilence under these circumstances would be fundamentally at odds with the critical obligation to advise the client of the advantages and disadvantages of a plea agreement” (*Padilla* at 1484 [internal quotation marks omitted]). This court finds that *Padilla* applies retroactively to this case (*People v. Nunez*, 30 Misc3d 55 [App Term, 9th & 10th Jud Dist 2010]).

Turning to the facts here, however, the court concludes that given the absence of any affidavit from former counsel affirmatively disputing defendant’s assertions, defendant’s motion is granted to the extent of ordering a hearing to resolve the questions of fact (*see People v. Baker*, 85 AD3d 935 [2d Dept 2011]). At the hearing, defendant will bear “the burden of proving by a preponderance of the evidence every fact essential to support the motion” (CPL §440.30[5]&[6]). The scope of the hearing is limited to determining the nature of counsel’s advice, if any, regarding the consequences of defendant’s plea on his immigration status and whether defendant was deprived of the effective assistance of counsel as a result of


counsel's actions.

CONCLUSION

In light of the foregoing, and given defendant's establishment of his entitlement to poor person relief, the matter is adjourned for a hearing to be conducted on October 19, 2011, with 18B counsel to be assigned for purposes of the hearing.

This Decision shall constitute the Order of the court.

E N T E R,



Ruth E. Smith, A.J.S.C.

ENTERED
SEP - 6 2011
NANCY T. SUNSHINE
COUNTY CLERK