

People v Malcolm

2011 NY Slip Op 33460(U)

August 30, 2011

Sup Ct, Kings County

Docket Number: 10866/91

Judge: Danny K. Chun

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Danny Chun

Date: August 3^d, 2011

-against-

DECISION & ORDER

CARL MALCOLM,

Ind No. 10866/91

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Defendant moves pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of conviction, principally arguing that his attorney was ineffective in advising him about the immigration consequences of his guilty plea. Defendant requests that the court conduct a reconstruction hearing to determine what transpired at defendant's plea allocution since the plea minutes have been either lost or destroyed. In the alternative, defendant requests that the court forgo said hearing, find that defendant was not advised of the immigration consequences of his guilty plea and dismiss the indictment against defendant.

Defendant, a native and citizen of Jamaica, has been a lawful permanent resident of the United States for approximately twenty-five years. He now faces deportation after pleading guilty to attempted criminal sale of a controlled substance in the third degree (PL § 110/220.39[1]). The charges stem from allegations that on July 23, 1991 in front of 227 Linden Boulevard in Brooklyn, defendant sold cocaine to two individuals in exchange for a sum of United States currency. Upon arrest, the police recovered \$106 dollars from defendant's person and five green bags of cocaine from a bag on the ground near defendant's feet. Defendant made an inculpatory statement to the police that it was his first time and that the police should let him go.

For these acts, defendant was charged with two counts of criminal sale of a controlled substance in the third degree (PL § 220.39[1]), three counts of criminal possession of a controlled substance in the third degree (PL § 220.16[1]) and two counts of criminal possession of a controlled substance in the seventh degree (PL § 220.03).

On September 5, 1991, defendant pled guilty to attempted criminal sale of a controlled substance in the third degree. The plea minutes of the proceeding have been lost and, accordingly, there exists no record of that proceeding. On November 13, 1991, the court sentenced defendant to one day in jail and five years probation (Meyer, J., at plea and sentence).

Defendant did not appeal the judgment of conviction.

On or about April 13, 2009, defendant returned to the United States from abroad and applied for re-admission as a lawful permanent resident. On November 24, 2010, Immigration and Customs Enforcement commenced removal proceedings against defendant based on the 1991 drug conviction and a 1997 attempted assault in the third degree conviction (PL § 110/120.00[1]). Defendant is currently incarcerated in a federal detention center awaiting deportation.

Defendant now moves to vacate the judgment of his conviction, alleging that his attorney was ineffective in advising him about the immigration consequences of his guilty plea. In his moving papers, however, defendant makes two somewhat contradictory statements. First, defendant maintains that his attorney never informed him that a guilty plea to a drug offense would result in deportation and mandatory detention. Defendant also maintains that prior to pleading guilty, he inquired whether his plea would have any adverse immigration consequences and his attorney informed him that it would not. Defendant argues that had he known that the guilty plea would have resulted in deportation and mandatory detention, he would not have pled

guilty and would have insisted on going to trial. Defendant further claims that his attorney was ineffective for failing to investigate a viable defense and for failing to allow him to testify before the Grand Jury. Defendant also insists that he is innocent of the crime for which he was convicted.

Ineffective Assistance of Counsel

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 US 668 [1984]; *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 performance fell below an objective standard of reasonableness and prejudiced the defendant" (*Hill v Lockhart*, 474 US 52, 58 [1985]; *Strickland v Washington* at 687). In the context of a plea, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (*Hill v Lockhart* at 59). Defendant must be able to show that there is a reasonable possibility that, but for counsel's error, he would not have pleaded guilty and would have insisted on proceeding to trial (*id.*).

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]). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he ... 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]). Thus, "where a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he

has received adequate representation” (*People v McClure*, 236 AD2d 633, 633 [2d Dept 1997]).

A defendant must also satisfy the “prejudice” requirement by showing that absent counsel’s alleged error he would have insisted on a jury trial (*People v Rodriguez*, 188 AD2d 623 [2d Dept 1992]). In order to establish that the defendant would have insisted on going to trial, an affidavit setting forth the factors that a defendant considers in accepting a plea must be submitted to the court (*People v McDonald*, 296 AD2d 13, 19-20 [3d Dept 2002]). Some of the factors that must be set out in such an affidavit are the strength of the prosecution’s case, the availability of a defense, the likelihood of success at trial, a comparison of the sentence promised with the potential incarceration the defendant faced if convicted after trial, counsel’s advice as to the reasons to accept the plea bargain and a reason why the defendant admitted committing the act (*id.*). An unsubstantiated claim that the defendant would have insisted on proceeding to trial is insufficient (*see People v McKenzie*, 4 AD3d 437, 440 [2d Dept 2004]; *People v Melio*, 304 AD2d 247, 251-252 [2d Dept 2003]). There must be objective facts supporting such a claim (*Melio* at 251-252).

Defendant’s claim of ineffectiveness relies upon the recent case of *Padilla v Kentucky*, ___ US ___, 130 Sct 1473 (2010). In *Padilla*, the Supreme Court clarified the obligations of counsel under *Strickland* with respect to advising noncitizen defendants about the immigration consequences resulting from a guilty plea. Before addressing defendant’s *Padilla* claim, however, it is necessary to consider several key changes to immigration law since defendant’s 1991 conviction.

Prior to 1990, sentencing judges were empowered under the 1952 Immigration and Nationality Act (“INA”) to decide whether a particular conviction should be disregarded as a basis for deportation, by means of a procedure known as the judicial recommendation against

deportation (“JRAD”) (*Janvier v US*, 793 F2d 449 [2d Cir 1986]). Because of the discretion embodied in the JRAD, there was thus no such thing as an automatically deportable defense (*Padilla* at 1479). In 1990, however, the JRAD was eliminated and Congress amended INA § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years (§ 511, 104 Stat. 5052, amending 8 USC § 1182[c]; *INS v Cyr*, 533 US 289, 297 [2001]).

Then, in 1996, Congress sharply circumscribed the Attorney General’s authority to grant discretionary relief from deportation pursuant to § 212(c) of the 1952 INA, an authority that had been exercised to grant relief to 10,000 noncitizens between 1989 and 1995 (*Padilla* at 1480). “Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses” (*id.*).

In the same year, Congress also enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub.L. No 104-132, 110 Stat. 1214 et seq. (1996), and the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”), Pub.L. No. 104-208, 110 Stat. 3009-546 et seq. (1996). These statutes both enlarged the number of aggravated felony offenses that would render immigrants deportable and barred immigrants convicted of an aggravated felony from applying for discretionary relief from deportation. IIRIRA further restricted eligibility for discretionary relief by adding length-of-status requirements and, while it restored eligibility for relief to permanent residents convicted of crimes other than aggravated felonies, it expanded the list of crimes that would render nonpermanent residents ineligible for relief (8 USC § 1229[b]).

The near-mandatory nature of deportation for post-1996 convictions led the Supreme

Court to rule that an attorney is ineffective when the attorney, counseling a defendant on whether to plead guilty to a crime for which deportation is mandatory, fails to advise the defendant that his guilty plea *will* result in the defendant's deportation (*Padilla* at 1483). As there would "undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain," the Court limited the duty of counsel: "When the law is not succinct and straightforward ... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, ... , the duty to give correct advice is equally clear" (*id.*).

Padilla also eliminated the distinction between counsel's utter failure to provide advice about the immigration consequences of a guilty plea and an affirmative misstatement by counsel about the possibility of deportation (*Padilla* at 1482 [holding that "[t]he collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation"]).

Before *Padilla*, the mere failure to advise a defendant of the possibility of deportation did not constitute ineffective assistance of counsel (*see Ford*, 86 NY2d at 404; *People v Leybinsky*, 299 AD2d 494 [2d Dept 2002]). On the other hand, affirmative misstatements about immigration consequences were in many instances held to constitute ineffective assistance of counsel, but only where the defendant established that he was prejudiced by counsel's error (*McDonald*, 1 NY3d 109, 114 [2003]).

Whether to apply *Padilla* retroactively is a question that need not be answered in the instant case because defendant's conviction predates the point in 1996 when an attorney faced the

new reality of certain deportation for a client.¹ Accordingly, this court cannot find that

¹ While the question of retroactivity is not relevant to the instant case, the People address it in some detail and conclude that *Padilla* should not apply retroactively. If this court were to make a determination on the matter, it would reach the same conclusion.

Both federal and state courts have wrestled with the question of *Padilla*'s retroactive effect, and there is much divergence of opinion (see, e.g., *United States v Obonaga*, 2010 US Dist LEXIS 64954 [EDNY June 30, 2010], citing *People v Bennett*, 28 Misc3d 575, 903 NYS2d 696 [Crim Ct New York City, Bronx County 2010]; *People v Garcia Hernandez*, 30 Misc3d 1234[A] [Suffolk Co Ct 2011]; *People v Nunez*, 30 Misc3d 55 [App. Term, 2d Dept 2010] [retroactive effect] and *People v Sanchez*, 29 Misc3d 1222A [Sup Ct Queens County 2010]; *People v Kabre*, 29 Misc3d 307 [Crim Ct New York County 2010]; *Gacko v United States*, 2010 WL 2076020 [EDNY 2010]; *United States v Hubenig*, 2010 WL 2650625 [ED Cal 2010] [no retroactive effect]).

At present, neither the United States Supreme Court nor any New York appellate court has expressly announced whether *Padilla* is to be applied retroactively in post-conviction proceedings. In order to answer the question of retroactivity, this court must first decide whether *Padilla* created a new rule, which generally is not retroactive, or merely applied an old rule to a new set of facts, which would apply retroactively (see *Teague v Lane*, 489 US 288, 310 [1989] [new constitutional rules of criminal procedure are not applicable to cases which have become final before the new rules are announced]). “[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final” (*Teague* at 301). This Court concludes that the Supreme Court announced in *Padilla* a new rule of criminal procedure rather than applied settled law to a new set of facts and that the new rule is not a “watershed” change that must be applied retroactively to cases on collateral review (see *People v Eastman*, 85 NY2d 265, 275-276 [1995]).

Before its decision in *Padilla*, the Supreme Court had not addressed defense counsel’s obligation to advise clients about the potential immigration consequences of a guilty plea. Accordingly, the federal circuits held that deportation was a collateral consequence of conviction and that counsel could not be deemed ineffective for failing to advise a defendant about the immigration consequences of his plea (see *United States v Gonzalez*, 202 F3d 20 [1st Cir 2000]; *United States v Santelises*, 476 F2d 787 [2d Cir 1973]; *United States v Del Rosario*, 902 F2d 55 [D.C. Cir 1990]; *United States v Yearwood*, 863 F2d 6 [4th Cir 1988]; *United States v Banda*, 1 F3d 354 [5th Cir 1993]; *United States v George*, 869 F2d 333 [7th Cir 1989]; *United States v Fry*, 322 F3d 1198 [9th Cir 2003]; *Broomes v Ashcroft*, 358 F3d 1251 [10th Cir 2004]; *United States v Campbell*, 778 F2d 764 [11th Cir 1985]).

Additionally, it had long been settled under New York law that the failure to provide immigration advice in criminal cases did not constitute ineffective assistance of counsel (*People v McDonald*, 1 NY3d 109 [2003]; *People v Ford*, 86 NY2d 397 [1995]; *People v Boodhoo*, 191 AD2d 448 [2d Dept 1993]). While the federal standard for ineffectiveness required a showing of prejudice under *Strickland*, New York courts held to the less stringent standard of “meaningful representation” (*People v Baldi*, 54 NY2d 137, 147 [1981]). Even after the 1996 amendments to federal immigration law, New York courts held that deportation was a collateral consequence, and only the provision of wrong advice, not the failure to advise at all, was considered ineffective (*People v McDonald*, 1 NY3d 109; see *People v McKenzie*, 4 AD3d 437 [2d Dept 2004]; *People v Sanchez-Martinez*, 35 AD3d 632 [2d Dept 2006]; *People v Holder*, 32 AD3d 734 [1st Dept 2006]). “Under this analysis, the *Padilla* decision seeks to impose yet a new obligation that must be viewed in the context of more stringent immigration

counsel's failure to foresee the upcoming changes in immigration law and enforcement in 1996 constitutes ineffective assistance (*see People v Perez*, 29 Misc3d 1228[A] [NY Crim Ct 2010]). The changes to the immigration law "dramatically raised the stakes of a noncitizen's criminal conviction" (*Padilla* at 1480). Therefore, in this instance, *Padilla* does not apply to defendant's representation because defendant was convicted of an offense in 1991 that was subject only to discretionary consideration for deportation. Given that defendant was not mandatorily deportable when he was convicted, this court simply cannot conclude that counsel's alleged failure to fully advise the defendant of the immigration consequences of his criminal conviction was constitutionally deficient under *Strickland*. Moreover, in 1991 counsel could not be deemed ineffective for simply failing to tell defendant about the possibility of deportation (*Ford*, 86 NY2d at 404).

Viewing counsel's performance on the whole, the record shows that defense counsel provided meaningful representation. Having been charged with two counts of criminal sale of a controlled substance in the third degree, three counts of criminal possession of a controlled substance in the third degree and two counts of criminal possession of a controlled substance in the seventh degree, defendant was exposed to a potential sentence of up to twenty-five years. In exchange for his plea to attempted criminal sale of a controlled substance in the third degree,

enforcement efforts in this post 9/11 (2001) climate and does not constitute an application or amplification of an old one" (*People v Sanchez*, 29 Misc3d 1222[A] * 7 [Sup Ct Queens County 2010]).

It is clear that *Padilla* departed from both federal and state precedent by eliminating the distinction between the direct and collateral consequences of conviction and imposing a new obligation on defense attorneys to provide immigration advice to clients contemplating a guilty plea. In devising a new rule, *Padilla* was not "dictated by precedent" on the federal or state level (*Teague*, 489 US at 301; *Eastman*, 85 NY2d at 275-276), and it overruled prior authority from the circuit and state courts (*Butler v McKellar*, 494 US 407, 412 [1990]). As it established a new rule that substantially departed from past precedent, *Padilla* should not be interpreted as having retroactive effect.

defendant was promised and received a one-day jail sentence followed by five years probation. In this instance, counsel negotiated a highly beneficial disposition, and nothing has been raised before this court which casts doubt on the effectiveness of counsel (*People v Ford*, 86 NY2d at 404).

Defendant has also failed to show prejudice by establishing that, had he received accurate 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 testimony from the arresting officers who witnessed defendant engage in two separate drug transactions, where both buyers were immediately apprehended and found possessing cocaine. Moreover, when the police apprehended defendant, they recovered five bags of cocaine near defendant's feet and \$106 dollars in United States currency from defendant's person. The claim that he would have rejected the plea offer, but for counsel's conduct, is entirely without merit (*see McDonald*, 1 NY3d at 113-14), and nothing else in the record casts doubt on the adequacy counsel's representation (*Ford*, 86 NY2d at 404).

The claim that counsel failed to provide sufficient advice about the immigration consequences of a guilty plea is made solely by defendant and is unsupported by any other affidavit or evidence. Indeed, aside from his own bare and self-serving allegations, defendant has not provided any supporting documentation to indicate what conversations he may have had with counsel about the decision to plead guilty. 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]).

Moreover, defendant's credibility is undermined by the fact that he made contradictory

statements regarding his attorney's advice about the immigration consequences. He claims that his attorney failed to advise him of the potential immigration consequences of his conviction. At the same time, he asserts that he asked his attorney whether pleading guilty to a drug offense would have deportation consequences and that his attorney misinformed him that there would be no adverse consequences. In evaluating the validity of defendant's declarations, it is apparent that defendant's claims against his attorney are simply unreliable. The weakness of defendant's position is further compounded by his failure to offer an adequate explanation for the discrepancy. Therefore, given the contradictory statements and the absence of any explanation, defendant's assertions are denied as without merit.

Defendant's contention that his attorney's failed to effectuate his appearance before the Grand Jury is also denied. In this instance, the record reflects that defendant signed a waiver of indictment and acknowledged his understanding that he was giving up his right to have the matter reviewed and considered by a Grand Jury. By waiving indictment and agreeing to be prosecuted pursuant to the Superior Court Information, defendant waived his right to challenge his failure to testify before the Grand Jury. Moreover, to prevail on such a claim, a defendant must "establish that he was prejudiced by the failure of his attorney to effectuate his appearance before the Grand Jury" and must assert that "had he testified in the Grand Jury, the outcome would have been different" (*People v Simmons*, 10 NY3d 946, 949 [2008]). In the instant case, defendant has not established any prejudice whatsoever, and has made no claims that the outcome in this case would have been different had he testified. Moreover, defendant has failed to demonstrate the absence of a strategic decision for allegedly failing to have him testify in the Grand Jury (*People v Stewart*, 295 AD2d 249 [1st Dept 2002]). Accordingly, given defendant's

plea and valid appeal waiver, this court is now foreclosed from reviewing this claim.

Defendant's further contention that counsel failed to investigate a viable defense is not supported by the required sworn allegations of fact. CPL § 440.30(4)(b) provides that the court may deny a motion to vacate a judgment without a hearing, when "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." Defendant has failed to substantiate these allegations with sworn affidavits from his attorney. Accordingly, there is no basis for a finding that counsel was ineffective on these ground.

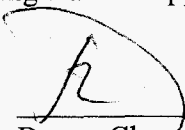
Defendant's actual innocence claim is baseless considering the strength of the evidence against him. The court, therefore, denies defendant's motion to vacate the judgment on this ground.

Finally, although the plea minutes cannot be located, defendant is not entitled to a reconstruction hearing (*People v Hofler*, 2 AD3d 176 [1st Dept 2003]). A hearing is not warranted because there is no factual issue to be determined. Moreover, defendant has not articulated any appealable issues associated with his plea.

Accordingly, defendant's motion is denied in its entirety. 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.



Danny Chun, J.S.C.

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