SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 13
----------X
PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN THOMAS,

Defendant.
----------X

Decision and Order
Indictment No: 6605/1998

Robert D. Kolken, Esq.
For the Defendant

Adam M. Koelsch, Esq.
Assistant District Attorney
For the People

Dated: October 17, 2011
Hon. Guy J. Mangano, Jr.

The defendant stands convicted after a plea of guilty to Criminal Possession of Marihuana in the Fourth Degree (Penal Law § 221.15), and was sentenced on March 23, 2001, to a term of one year of incarceration.

By notice of motion dated September 1, 2010, defendant, by counsel, seeks to vacate the judgment of conviction pursuant to CPL 440.10 (1)(h), on the ground that trial counsel failed to provide effective representation by misadvising him of the immigration consequences of pleading guilty to the Class A Misdemeanor for which he was convicted.

The People oppose the motion by affirmation and memorandum of law dated October 21, 2010, and supplemental affirmation dated July 6, 2011.[1]

Defendant John Thomas is a citizen of the island nation of Jamaica, born on March 13, 1969. He immigrated to the United States as a Lawful Permanent Resident on August 28, 1980. On June

---

[1] The delay of approximately one year to decide the instant motion was due to the fact that the parties were contemplating the logistics of procuring defendant's presence before this Court since defendant is presently in federal custody, serving a 48 month term of incarceration for a conviction of Alien Inadmissibility and Re-entry After Deportation (8 USC § 1326 [a] & [b][2]). As will be discussed below, based upon the record before this Court, defendant's production to determine the instant motion is unnecessary.

24, 1998, defendant was arrested after he accepted a UPS package addressed to him which contained over four pounds of marihuana. For his actions, defendant was charged, by Kings County Indictment # 6605/1998, with one count each of Criminal Possession of Marihuana in the Second Degree (Penal Law § 221.25), Criminal Possession of Marihuana in the Third Degree (Penal Law § 221.20) and Criminal Possession of Marihuana in the Fourth Degree (Penal Law § 221.15). On February 16, 2001, defendant, represented by Laurence Rothstein, Esq., pled guilty to one count of Criminal Possession of Marihuana in the Fourth Degree (Penal Law § 221.15), in full satisfaction of the Indictment. Defendant was sentenced on March 23, 2001, to a term of imprisonment of one year, to run concurrently to a sentence for a violation of parole on a prior 1987 indictment for robbery.[2]

In an order rendered April 17, 2003, the Immigration Court ordered defendant deported to Jamaica, and defendant voluntarily left the United States on May 18, 2003. On April 20, 2004, defendant illegally re-entered the United States through Miami, Florida, using a counterfeit passport. Defendant was arrested after a traffic stop in South Carolina on May 23, 2007, and on September 6, 2007, defendant was again deported to Jamaica. Defendant illegally attempted to re-enter the United States a second time on November 26, 2008, through Lewiston, New York, and on the following day, was charged with Alien Inadmissibility, Misuse of a Passport, General Fraud / Making a False Statement and Re-entry After Deportation. On October 8, 2009, in the United States District Court for the Western District of New York, defendant was convicted of Alien Inadmissibility and Re-entry After Deportation, and he was sentenced to a term of 48 months of

---

[2] While the Immigration and Naturalization Service (INS), now known as the United States Immigration and Customs Enforcement (ICE), notice to appear before the Immigration Court, dated December 5, 2001, originally contained a reference to the 1988 robbery conviction, the INS withdrew the charge and the factual allegations relating to the robbery conviction from the notice.

incarceration and three years of supervised release.

In support of the instant motion, defendant contends that he would not have taken the plea offer to the Class A misdemeanor if Laurence Rothstein, Esq., would have informed him of the deportation consequences. Annexed to the moving papers are defendant's affidavit, as well as an affidavit from defendant's wife, both stating that trial counsel misinformed them about defendant's status as an alien in the United States.

Opposing the motion, the People include a time line recitation of the facts, which includes the 2004 illegal re-entry and the 2008 attempt to re-enter. Moreover, the People aver that defendant cannot establish that he was prejudiced by any alleged ineffective assistance of counsel nor could he establish the he did not receive meaningful representation.

Defendant's motion is denied in its entirety without a hearing.

Pursuant section 440.30(4) of the Criminal Procedure Law, the Court may, upon considering the merits of the motion, deny it without a hearing if "[t]he 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" (CPL 440.30[4][b]), or "[a]n 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" (CPL 440.30[4][d][i], [ii]). "A judgment of conviction is presumed valid, and the party challenging its validity (defendant here) has a burden of coming forward with allegations sufficient to create an issue of fact" (People v Session, 34 NY2d 254, 255). Because the moving papers contain only the bald and conclusory self-serving affidavits of defendant and his wife, as well as the

affirmation of present counsel, the defendant has failed to sustain the burden of establishing ineffective assistance of counsel (see People v Ozuna, 7 NY3d 913; see also People v De Jesus, 39 AD3d 1196, lv denied 9 NY3d 874; People v Stewart, 295 AD2d 249, cert denied 538 US 1003). Noticeably absent from defendant's moving papers is an affirmation from Mr. Rothstein, or mention of any efforts to obtain one (see People v Scott, 10 NY2d 380 [failure to supply attorney's affirmation warranted summary denial of motion collaterally attacking conviction based on attorney's alleged conduct]). Thus, defendant's plea of guilty was knowingly, intelligently, and voluntarily entered and there are no grounds present in the record before this Court upon which to vacate same (see People v Hill, 9 NY3d 189, cert denied 553 US 1048; People v Catu, 4 NY3d 242; People v Fiumefreddo, 82 NY2d 536; People v Harris, 61 NY2d 9). Finally, during his plea allocution, defendant admitted that there was a factual basis for the plea, and the instant moving papers fail to assert his innocence of the charges (see People v Jones, 44 NY2d 76, cert denied 439 US 846).

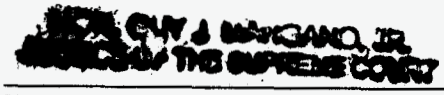
This Court is aware of a recent Appellate Division, Third Department case, *People v Reynoso* (__ AD3d __, 2011 NY Slip Op 07527 [October 27, 2011]), in which a hearing was granted to a defendant with a similar claim pursuant to *Padilla v Kentucky* (559 US __, 130 S Ct 1473).[3] Since the decision herein is based upon a finding that the moving papers contain insufficient evidence, the holding in *People v Reynoso* is inapplicable.

---

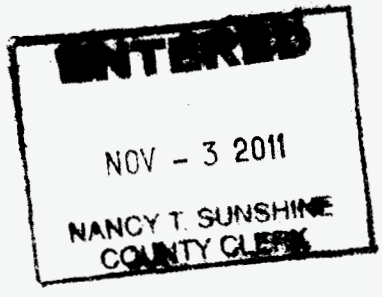
[3] In *Padilla v Kentucky*, the United States Supreme Court held that Sixth Amendment requires counsel for criminal defendants to advise their non-citizen clients regarding any adverse immigration consequences of a criminal conviction when they plead guilty to any criminal charges.

Accordingly, defendant's motion is denied in its entirety without a hearing.

This shall constitute the Decision and Order of the Court.



HON. GUY J. MANGANO, JR.
JUSTICE OF THE SUPREME COURT



You are advised that your right to an appeal from the order determining your 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, you 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 your being served by the District Attorney or the court with the court order denying your motion.

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

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201