

People v Guerrero

2011 NY Slip Op 33582(U)

November 29, 2011

Supreme Court, Kings County

Docket Number: 1625/97

Judge: Mark R. Dwyer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 26

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
INDICTMENT NO. 1625/97
November 29, 2011

CHRISTINA GUERRERO,
DEFENDANT.

-----X
MARK DWYER, J.:

Defendant was charged under Indictment No. 1625/97 with criminal sale of a controlled substance in the third degree and related charges. These charges arose from a buy and bust operation on February 7, 1997, wherein defendant was alleged to have given an undercover officer eight vials of crack in exchange for twenty dollars of pre-recorded buy money. On October 10, 1997, defendant entered a plea of guilty to attempted criminal sale of a controlled substance in the third degree, with a promised sentence of five years probation and a drug treatment program. On December 2, 1997, defendant was sentenced in accordance with the promise. Defendant did not appeal her conviction.

Defendant, about fourteen years later, moves pursuant to CPL 440.10 (1) (h) to vacate her judgment of conviction on the grounds that her trial attorney failed to advise her adequately of the immigration consequences of her guilty plea; that her attorney pressured her into pleading guilty; and that her attorney had a conflict of interest in that he represented a co-defendant throughout the proceedings.

To support defendant's claims that she received ineffective assistance of counsel because her attorney never explained the immigration consequences of pleading guilty to sale of a controlled substance, she relies on Padilla v. Kentucky, 130 S. Ct 1473 (2010). That case imposed an affirmative duty on defense counsel to provide accurate advice to non-citizen clients concerning the potential immigration consequences of a conviction. Defendant asserts that Padilla should be applied retroactively. Defendant asserts as well

that she is now facing deportation and will have difficulty keeping her job. She further contends that she was innocent and that, had she known of the consequences, she would not have pleaded guilty and would have gone to trial.

The People argue in opposition that the rule enunciated in Padilla should not be applied retroactively. Alternatively, the People argue, the court need not determine that issue, because defendant's allegations are insufficient to entitle her to relief. The People contend that defendant's motion should be denied without a hearing pursuant to CPL 440.30 (4) (d) because there is no reasonable possibility that defendant's allegations are true. The People have submitted an affirmation from defendant's trial counsel stating that it was and is his practice to advise non-citizen clients of the possibility of deportation. The People further argue that defendant failed to show prejudice, i.e., a reasonable probability that, but for counsel's failure to advise her that she could be deported, she would have gone to trial. In addition, according to the People, pursuant to an ICE inquiry, defendant is not currently under removal proceedings.

Criminal Procedure Law 440.30 (4) (d) provides that, upon considering the merits of the motion, the court may deny it without conducting a hearing if 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.

In this case, defendant has not submitted an affidavit from her trial attorney, nor has she asserted that she made efforts to obtain one. Thus, defendant's allegation that counsel failed to advise her that her plea could result in deportation is made solely by defendant, fourteen years after the fact, and is unsupported by any other affidavit or evidence. Indeed, defendant's former attorney provided an affirmation to the district attorney's office, stating that although he had no recollection of the specific advice he gave to this defendant, discussion of deportation consequences with non-citizen clients

always played a prominent role in his advice to them. Counsel asserted that at the time he represented defendant, he had already represented many non-citizen clients on criminal charges that were deportable offenses. In addition to advising clients of the possibility of deportation, counsel stated that it was and is his practice to advise clients to consult with an immigration attorney. As such, there is no reasonable possibility that defendant's allegation is true. CPL 440.30 (4) (d) (ii).¹

Moreover, defendant has failed to demonstrate that counsel's allegedly deficient performance prejudiced her. See People v. McDonald, 1 NY3d 109 (2003). Under the federal standard set out in Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffective assistance a defendant must show that defense counsel's representation fell below an "objective standard of reasonableness." The defendant must also show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See Lockhart v. Fretwell, 506 US 364 (1993). Under New York law, a defendant need not "fully satisfy the prejudice test of Strickland" (People v. Caban, 5 NY3d 143, 152 [2005]). The inquiry focuses on whether the attorney provided "meaningful representation" (People v. Baldi, 54 NY2d 137 [1981]) in the proceedings. See Caban, 5 NY3d at 155-56. In the context of a guilty plea, a defendant receives meaningful representation when she obtains "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." See People v. Ford, 86 NY2d 397, 404 (1995).

Defendant was charged with selling crack to an undercover police officer who identified her shortly after the transaction. Upon her arrest, defendant was in possession

¹In at least one case this court has, under similar circumstances, afforded the defendant a hearing as to whether defense counsel followed her general practice in the particular case. But in that case, as in this one, the court could deny a hearing under CPL 440.30 (4) (d) (ii). The court has chosen not to exercise its discretion in the same way in this case because of the "prejudice" reasoning that is about to be addressed in text.

of a large quantity of crack, as well as some of the pre-recorded buy money. If defendant had rejected the plea offer of five years probation and a treatment program, she faced a mandatory state prison term and a maximum indeterminate sentence of eight and one-third to twenty-five years on the top count of criminal possession of a controlled substance in the third degree. Given the weight of the People's evidence and the probability of conviction, it is not credible that defendant would have elected to proceed to trial, particularly given the extremely favorable plea bargain she was offered.

Defendant has not convinced the court that if she had been advised that her plea could result in deportation, it would have been rational to reject the plea bargain. See Padilla v. Kentucky, 130 S. Ct 1473 at 1485.

In addition, although defendant contends that she is facing deportation, the People assert that, according to ICE (U.S. Immigration and Customs Enforcement), defendant is not currently under removal proceedings.

Defendant next claims that her attorney coerced her to plead guilty, telling her that "this is a good deal" and that she had better take it or she would go to jail. The claim of coercion is contradicted by the court record. During the guilty plea colloquy, defendant responded in the affirmative to the court's questions. The court emphasized that defendant was under oath and that should she make contradictory statements in the future she would be open to a perjury conviction. Defendant assured the court that she understood everything and was telling the truth. Defendant indicated that she had discussed the plea with her attorney, that she had had enough time to consult with her attorney and that she was satisfied with the legal advice her attorney had given her. Defendant told the court that she had no questions about her attorney's advice. Defendant indicated that no one had threatened or coerced her in any way or influenced her against her own free will in order to get her to plead guilty. She told the court, "Nobody force me. I did - plead guilty because I wanted to do it." Indeed, if defense counsel did advise defendant that she was being offered a good deal and should take it, such advice was

sound, given the strength of the People's case. Under these circumstances, there is no reasonable possibility that defendant's allegation of coercion is true. See CPL 440.30 (4) (d).

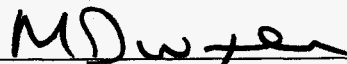
Defendant's allegation that her attorney had a conflict of interest because the attorney simultaneously represented a co-defendant throughout the case is without merit. Nothing in the court record indicates that defendant's attorney represented a co-defendant. According to the minutes of the plea and of several appearances prior to the plea, as well as the court file, each defendant in the case had a different lawyer throughout the case.

Defendant's allegations not only fail to establish that her attorney did not advise her about the deportation consequences of her plea, but her attorney's affirmation, submitted by the People, controverts this claim. Moreover, even if such allegations were true, defendant failed to establish that she suffered any prejudice as a result of counsel's alleged failure to advise her. Since defendant's allegations are insufficient to establish that counsel was ineffective, it is unnecessary for the court to consider whether Padilla v. Kentucky should be applied retroactively.

In accordance with the foregoing, defendant's motion to vacate her judgment of conviction is denied.

This constitutes the decision and order of the court.

E N T E R:



MARK DWYER

Justice of the Supreme Court

DATED: November 29, 2011

