

People v Saint-Fermin
2011 NY Slip Op 33584(U)
December 1, 2011
Sup Ct, Kings County
Docket Number: 9956/2007
Judge: Patricia DiMango
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. DiMango

Date: November 22, 2011

-against-

DECISION & ORDER

PATRICK SAINT-FERMIN

Indictment No. 9956/2007

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Defendant moves, pro se, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of counsel. He claims that defense counsel misadvised him about the immigration consequences of his guilty plea and failed to move to dismiss the complaint and indictment. For the following reasons, the motion is denied.

Defendant entered the United States as a refugee of Haiti and obtained lawful permanent resident status on June 6, 1996. He is not a citizen of the United States.

On October 9, 2007, defendant, acting with two other men, approached Jihad Waldron on a Brooklyn street. Defendant demanded Waldron's MP3 player and chased him to the corner. Co-defendant held a knife to Waldron's stomach and again demanded the MP3 player. Waldron turned it over, ran away, and then called the police. The police canvassed the area with Waldron, who spotted co-defendant and identified him a few hours after the robbery. Co-defendant was arrested and gave an oral statement in which he admitted to robbing Waldron and implicated defendant in the robbery. A warrant was issued for defendant's arrest.

The following day, defendant was arrested for trespass and police learned of the warrant in connection with the robbery case. He was brought to the precinct and placed in a lineup.

Waldron identified defendant in the lineup as one of the three men who had stolen his MP3 player.

For his acts, defendant was charged with robbery in the first, second, and third degrees (PL §§ 160.15[3], 160.10[1], 160.05), petit larceny (PL § 155.25) and criminal possession of a weapon in the fourth degree (PL § 265.01[2]). Represented by counsel Dana Cohen, Esq., defendant pleaded guilty on December 20, 2007 to robbery in the third degree (acting in concert) in exchange for a promised sentence of ninety days' imprisonment, subject his participation in the CASES program. The court promised that if defendant succeeded in the program he would be adjudicated a youthful offender. Defendant was told that the plea agreement was conditioned upon defendant returning to court on the sentence date, cooperating with the Department of Probation and CASES, and not getting arrested. If he violated any of these conditions he would be sentenced to one to three years in prison and would no longer be eligible for youthful offender status.

At the plea proceedings the court asked defendant if he was a citizen of the United States, to which defendant replied, "I think so, yes, sir." Counsel stated, "He has a U.S. Passport. He has been here since he was four years old, but he wasn't born here." The court made no further inquiry.

Defendant completed the ninety-day sentence and was released to participate in the CASES program on January 22, 2008. The CASES director informed the court on March 4, 2008 that defendant's status in the program was jeopardy based upon his poor attendance, punctuality and motivation. Having violated the terms of his plea agreement, defendant returned to court for sentencing on April 17, 2008. He was sentenced to one to three years' imprisonment,

to run concurrently with a one to three year sentence on an unrelated case under Indictment No. 8726/2007. The court stated, "It's my understanding they're going to deport you at the end of your sentence; is that correct? Are you a citizen?" Defendant replied, "No." The court stated, "They will be deporting you. I told you that before, and that was part of the reason why you got the plea that you just got, because they're deporting you."

On September 2, 2008, the Department of Homeland Security served defendant with a Notice to Appear for removal proceedings pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act. The Notice cited defendant's conviction in the instant case as the basis for his removal. On July 22, 2009, the Board of Immigration Appeals determined that defendant was subject to removal. According to records provided by Immigration and Customs Enforcement, defendant was deported from the United States to Haiti on June 14, 2011.

In the instant motion, defendant claims that he was denied the effective assistance of counsel when his trial attorney failed to inform him that deportation was an automatic consequence of his guilty plea to a felony charge. He also alleges that his attorney affirmatively misadvised him that he did not need to worry about deportation because he was a green card holder and had been in this country for a significant time. Finally, he argues that counsel should have moved to dismiss the complaint and indictment pursuant to CPL § 200.50 for the failure to sufficiently identify the date, time, or place of the crime, and for the lack of factual allegations in the indictment.

The People have provided an affirmation from defense counsel, who represented defendant in the instant case and in his other 2007 case, cited above. Counsel refers to her representation of defendant under Indictment No. 8726/2007. It appears that counsel was

mislead by defendant's papers, which refer solely to matters in the instant case but incorrectly lists Indictment No. 8726/2007 in the heading. Counsel states that she specifically recalls defendant's case, that she told him he would face deportation as a consequence of his conviction, and that it was her general practice to advise non-citizen clients about immigration consequences.

Defendant's claims are without merit. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *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 conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when "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 Flores*, 84 NY2d 184, 187 [1994]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, "[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*Flores* at 187). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for counsel's conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel's choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v*

Benevento, 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

Defendant relies upon *Padilla v Kentucky*, 130 S.Ct. 1473 (2010), in which the United States Supreme Court, adhering to the two-prong *Strickland* standard of ineffective assistance, held that the Sixth Amendment requires criminal defense attorneys to give correct advice to their non-citizen clients concerning the risk of adverse immigration consequences, particularly deportation, as a consequence of a conviction. The Court also emphasized that *Strickland's* presumption of reasonable professional conduct still applies and that in attacking a plea the defendant would still face the heavy burden of convincing the court that a decision to reject the plea bargain would have been rational under the circumstances (*Padilla* at 1485; *Strickland* at 689). Defendant has failed to meet his burden in this instance.

In viewing the plea minutes along with defendant's allegations and counsel's affidavit, it is unclear whether counsel knew at the plea proceedings whether defendant had an immigration status that would automatically subject him to deportation. Defense counsel's affidavit refers only to her representation of defendant in the case under Indictment No. 8726/2007, however she states that it was her general practice to inform non-citizen defendants of the immigration consequences of a guilty plea.

Regardless of the accuracy of counsel's advice, defendant is unable to establish that he was prejudiced by counsel's conduct. Here, defendant had a chance to avoid conviction by fulfilling the terms of his conditional plea. He lacked the motivation to complete the CASES program, despite his promise to the court, and returned a short time later to be sentenced as a

felon. Moreover, even after his initial failure counsel obtained for him a very favorable plea of one to three years' imprisonment, with concurrent sentencing, whereas he faced a much longer prison term upon conviction after trial, with consecutive sentencing. This beneficial plea in the face of much harsher maximum sentencing exposure reflects an effective performance by counsel (*see Ford*, 86 NY2d at 404; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley*, 221 AD2d 376 [2d Dept 1995]).

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 (*People v McDonald*, 1 NY3d 109, 113-14 [2003]). At trial defendant would have faced significant evidence of guilt, including identifications by both his co-defendant and the victim. As at the time of the plea, defendant has no defense to the crime for which he was convicted. The claim that he would have rejected the plea offer, but for counsel's conduct, is simply not credible in light of his poor performance in CASES, his acceptance of a favorable plea, and the strength of the evidence against him. Nothing else in the record casts doubt on the adequacy counsel's representation (*Ford*, 86 NY2d at 404).

The claim that counsel provided incorrect immigration advice is made solely by defendant and is unsupported by any other affidavit or evidence. 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]). Apart from his own self-serving allegations, defendant has not provided any supporting documentation to elaborate upon his conversations with counsel about the consequences of his guilty plea. Defendant's claim is therefore procedurally barred from review.

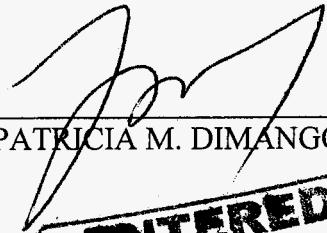
Finally, the claim that counsel should have moved to dismiss the complaint and indictment is meritless. Contrary to defendant's allegations, the accusatory instruments were facially sufficient and properly adhered to the requirements of CPL § 200.50. Thus, counsel had no grounds to make such a motion as defendant now claims. Counsel cannot be held ineffective for "fail[ing] to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005]).

In any event, the instant motion is moot because defendant has been deported during the pendency of this motion.

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

This decision constitutes the order of the court.

ENTER:



PATRICIA M. DIMANGO, J.S.C.

ENTERED
DEC 1 2011
NANCY T. SUNSHINE
COUNTY CLERK

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.

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