

People v Asantena

2011 NY Slip Op 33594(U)

December 20, 2011

Supreme Court, Kings County

Docket Number: 5162/94

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
SCI NO. 5162/94
December 20, 2011

SEKO ASANTENA,
DEFENDANT.

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

Defendant was charged under Superior Court Information No. 5162/94 with criminal possession of a controlled substance in the third degree and related charges. These charges arose from defendant's arrest on April 26, 1994, after he was observed in possession of three plastic bags containing sixty vials of crack cocaine. On May 2, 1994, defendant entered a plea of guilty to criminal possession of a controlled substance in the third degree. On June 21, 1994, defendant was sentenced as promised to one day in jail and five years probation.

In January 2011 defendant filed a motion to vacate his conviction, claiming that he was not advised of the immigration consequences of pleading guilty. Defendant submitted an affidavit stating that his attorney never advised him that the conviction would lead to certain deportation. He asserted that had he known that the guilty plea would ultimately result in certain deportation, he would have continued to assert his innocence and at a minimum would have asked his attorney to explore alternate pleas.

The People opposed defendant's motion. The People submitted with their opposition a copy of a Notice to Appear before the Immigration Court issued to defendant on December 3, 2008, advising him that he was removable on two grounds - that he had remained in the United States beyond May 4, 1992 without authorization, and that on June 21, 1994, he was convicted in Brooklyn, NY, of attempted criminal possession of a controlled substance. The People also submitted an affirmation from the attorney who represented defendant at the time of the plea. The attorney asserted that although she did

not independently recall the advice she gave to defendant, based on her standard practice and knowledge of the law she was certain that she did not fail to advise defendant of the deportation consequences of his guilty plea.

The motion was referred to this court in August 2011. The court conducted a hearing on October 14, 2011. Defendant testified on his own behalf. Dawn Ryan, attorney-in-charge of criminal practice at the Kings County Legal Aid Society, testified on behalf of the People.

Defendant testified that he spoke to his Legal Aid attorney on April 27, 1994, for three to four minutes at the window of the courtroom holding cell and that they spoke about the charges and his sentence exposure. Defendant asserted that his attorney did not ask him whether he was a citizen or speak to him about immigration. Defendant did not speak to his attorney again until May 2, 1994. On that day, his attorney told him that the prosecutor had offered defendant a sentence of one day in jail and five years probation in exchange for his guilty plea and that he faced significant jail time if he continued to plead not guilty. Defendant asserted that he spoke to his attorney for only a couple of minutes and that they did not discuss how a guilty plea would affect his immigration status. Defendant said that he would not have pleaded guilty if he had been told that the plea would lead to his being deported. In 2008, defendant received a notice to appear before the Immigration Court, and he was subsequently ordered deported. Defendant's immigration decision is currently on appeal.

Dawn Ryan testified that she has been the attorney-in-charge of criminal practice at the Legal Aid Society since December 1994. Earlier in 1994 Ryan was the director of staff development and was responsible for the implementation of training programs for Legal Aid Society attorneys in Brooklyn. At that time, the Legal Aid Society trained its attorneys to determine whether a client was a citizen and to advise a non-citizen client pleading guilty to a crime that he or she might be deported. The case file for the attorney who represented defendant was introduced into evidence at the hearing as a People's exhibit. Two entries on the file, which appear to have been made on two different dates,

read “adv. re: immig.” Ryan testified that she understood the entries to mean “advised regarding immigration.”

Defendant relies on Padilla v. Kentucky, 130 S. Ct 1473 (2010), to support his claims that he received ineffective assistance of counsel because his attorney never explained the immigration consequences of pleading guilty to sale of a controlled substance. 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. He asserts that had he known that the guilty plea would ultimately result in certain deportation, he would have continued to assert his innocence and at a minimum would have asked his attorney to explore alternate pleas.

The People argue that the rule enunciated in Padilla should not be applied retroactively. Alternatively, the People maintain, the court need not determine that issue, because the credible evidence adduced at the hearing showed that defendant’s attorney had informed him of the deportation consequences of his guilty plea and that defendant received effective assistance of counsel.

Criminal Procedure Law 440.30 (6) provides that, at a hearing, defendant has the burden of proving, by a preponderance of the evidence, every essential fact required to support his motion. The only evidence offered at the hearing in support of defendant’s claim was his own testimony that in two short meetings with his attorney prior to taking his plea, his attorney never talked about how the plea would affect his immigration status. The People’s witness, the attorney-in-charge at the Legal Aid Society in Kings County, testified that Legal Aid Society lawyers were trained to advise non-citizen clients that they were at risk for deportation. This testimony was consistent with the affirmation by defendant’s former attorney annexed to the People’s opposition papers. Defendant’s attorney’s case file was introduced into evidence as People’s Exhibit 1. Among other hand-written notations on the file were two entries indicating that defendant’s attorney did advise him of the immigration consequences of his plea. Counsel’s file notations

directly contradict defendant's testimony.

In a post-hearing submission defendant argues that regardless of the file entries, defendant was not accurately and properly advised of the immigration consequences of his guilty plea. Defendant contends that deportation as a result of pleading guilty to a crime relating to a controlled substance was a virtual certainty even in 1994 and any failure to so advise defendant constituted ineffective assistance of counsel. However, there was no certainty, even assuming defendant was ineligible for a discretionary waiver, that he would in fact be apprehended and removed. Accordingly, advice that deportation was a certainty would arguably have been inaccurate.

Moreover, neither in his affidavit nor his testimony did defendant ever assert that, had he been told that deportation was a certainty rather than a possible consequence of taking the guilty plea, he would have proceeded to trial. Defendant has consistently maintained that his attorney never mentioned his immigration status in discussing his case with him. Under the federal standard set out in Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffective assistance a defendant must 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, facing a maximum prison sentence of eight and one-third to twenty-five years, accepted a highly favorable plea offer of one day in jail and five years probation. Defendant has not convinced the court that if he had been advised that his plea would result in deportation, rather than that it could result in deportation, it would have been rational for him to reject the plea bargain. See Padilla v. Kentucky, 130

S. Ct 1473 at 1485.

In short, defendant has failed to meet his burden of proving by a preponderance of the evidence every fact essential to support his motion to vacate his judgment. CPL 440.30 (6). Since defendant's proof was insufficient to establish that counsel's performance was deficient under the Strickland test or the New York standard, it is unnecessary for the court to consider whether Padilla v. Kentucky should be applied retroactively. The credible evidence adduced at the hearing established that defendant was advised of the immigration consequences of his guilty plea. In view of counsel's affirmation detailing her practice with regard to advising non-citizen clients, and the notations on counsel's file indicating that counsel did advise defendant as to immigration consequences, defendant's claims are not credible. See People v. Gasperd, 2011 NY Slip Op. 52147 (Sup. Ct, Kings Co.). Moreover, defendant's claim that he was denied effective assistance of counsel fails, since defendant did not show that he was prejudiced.

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

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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Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
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This constitutes the decision and order of the court.

E N T E R:



MARK DWYER
Justice of the Supreme Court

DATED: December 20, 2011

ENTERED
DEC 20 2011
NANCY T. SUNSHINE
COUNTY CLERK