

People v Alegria

2012 NY Slip Op 30562(U)

January 25, 2012

Sup Ct, Kings County

Docket Number: 6465/86

Judge: Wayne M. Ozzi

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**SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART 17**

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

**Indictment No. 6465/86
534/76**

HECTOR ALEGRIA,

DECISION & ORDER

Defendant.

-----X

Ozzi, J.

Charles Hynes, District Attorney, Kings County (Leonard Joblove, Diane Eisner, and Allison Ageyva, Of Counsel)
Labe Richman, Esq., for the Defendant

Defendant Hector Alegria, by his attorney, filed a motion dated September 20, 2011 for an Order vacating his conviction pursuant to Criminal Procedure Law Section 440.10 on the grounds that he received ineffective assistance of counsel at trial because his attorney failed to raise a statute of limitations defense to Bail Jumping in the Second Degree and because his attorney allegedly failed to advise him of the immigration consequences of his guilty plea.

The People submitted an affirmation in opposition to Defendant's motion dated November 28, 2011. The defendant filed a reply affirmation in support of his motion to vacate on or about December 13, 2011. The Court has examined Defendant's moving papers, the People's opposition, the defendant's reply papers, the court file, and the court records in this matter from which the following findings are made.

On February 18, 1976, Defendant was arrested and subsequently charged with Criminal Possession of a Controlled Substance in the Fifth Degree. On April 8, 1976, the defendant failed to show up for a scheduled court appearance. On April 13, 1976 a bench warrant was issued.

The defendant was returned to court upon execution of the warrant on August 11, 1986 and was charged with Bail Jumping in the Second Degree. Defendant pled guilty to Criminal Possession of a Controlled Substance in the Fifth Degree and Bail Jumping in the Second Degree and was sentenced to five years probation pursuant to the plea agreement.

Defendant is currently detained by the U.S. Department of Homeland Security and deportation proceedings are pending. According to a letter from U.S. Immigration and Customs Enforcement, the proceedings are based on a Notice to Appear charging that he lacks valid immigration status and is in the United States illegally.

In his papers, defendant seeks to vacate his judgment of conviction on grounds that he received ineffective assistance of counsel, claiming that counsel failed to advise the defendant of the potential consequences of his guilty plea and further claiming that his attorney failed to raise a statute of limitations defense to Bail Jumping in the Second Degree, as the defendant was indicted after the ten year statute of limitations expired. The People oppose the motion in its entirety.

Analysis

In deciding whether to plead guilty to a charged offense, a criminal defendant is constitutionally entitled to effective assistance of “competent counsel.” McMann v. Richardson, 297 U.S. 759, 771 (1970); see Strickland v. Washington, 466 U.S. 668, 686 (1984). In Strickland, the United States Supreme Court proffered a two-part test for analyzing claims of ineffective assistance of counsel. Strickland, 466 U.S. at 687.

In the first prong of the Strickland test, the defendant must show that his attorney’s representation was “deficient” and “fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 687-688. This is essentially a “restatement of attorney competence.”

People v. McDonald, 1 N.Y.3d 109, 113 (2003). In making such a determination, the court should assess the attorney's performance against "prevailing professional norms." Strickland at 688. Under the second prong of the Strickland test, commonly referred to as the "prejudice prong," the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. More specifically, the defendant must demonstrate that there is a reasonable probability that, but for the errors of his attorney, he would not have pled guilty; rather, he would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also People v. McDonald, 1 N.Y. 3d 109, 114 (2003).

The New York State Constitution requires that a defendant receive "meaningful representation." People v. Henry, 95 N.Y.2d 565 (2000); People v. Benevento, 91 N.Y.2d 708, 713 (1998). Prior to the United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. ____, 130 S.Ct. 1473 (2010), it was well-settled in New York that deportation was a collateral consequence "peculiar to the individual's personal circumstances and not one within control of the court system." People v. Ford, 86 N.Y.2d 397, 403 (1995); see also People v. Gravino, 14 N.Y. 3d 546 (2010). However, in Padilla, the United States Supreme Court held that a criminal defense attorney's failure to advise his or her client of the immigration consequences of a guilty plea constituted a violation of the client's Sixth Amendment right to effective assistance of counsel.

The defendant in Padilla was a lawful permanent resident of the United States who pled guilty to a drug offense. Mr. Padilla argued that his attorney advised him that the fact that he had lived lawfully in the United States for forty years would likely prevent any immigration consequences that could otherwise result from a guilty plea. However, as in the matter currently

before the court, Mr. Padilla's drug-related conviction was in fact grounds for mandatory deportation.

In Padilla, the Supreme Court held that defense counsel's misrepresentation concerning the immigration consequences of the defendant's guilty plea fell below the objective standard of reasonableness enumerated by the first prong of Strickland. Padilla, *supra*, at 1484. The Supreme Court further elaborated that when the deportation consequences of a guilty plea are "succinct, clear, and explicit," a defendant's attorney must inform the client of those consequences. See Padilla at 1483; see also People v. Bennett, 28 Misc.3d 575 (Sixth Amendment requires a criminal defense attorney to advise non-citizen of risks of deportation stemming from a criminal conviction.)

Turning to the second prong of Strickland, a defendant must demonstrate by a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (Strickland, *supra* at 1484) (emphasis added) and must convince the court that the defendant's rejection of the plea agreement "would have been rational under the circumstances." Padilla at 1486. In order to establish that the defendant would have insisted on going to trial and that his rejection of the plea agreement would have been rational, the defendant must submit an affidavit providing sufficient factual allegations to support his contentions. People v. McDonald, 1 N.Y.3d at 115. Factual allegations that the defendant must set forth in his affidavit to support his contention that he would have rationally insisted on going to trial include the strength of the prosecution's case, the likelihood of the defendant's success at trial, and a comparison of the sentence promised pursuant to the plea agreement with the potential sentence the defendant would face if convicted after a trial.

Here, the defendant argues in his affidavit that he pled guilty based on his reasonable

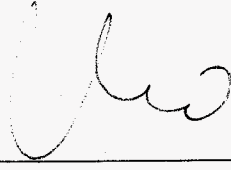
reliance on his attorney's advice and that he would not have pled guilty and would have insisted on going to trial had he known that he would have faced deportation as a result of his plea. The People assert that there is no evidence that the defendant told counsel that he was a non-citizen and, regardless, counsel in 1986 would have no reason to anticipate the 1996 amendments to the immigration law, which expanded the list of crimes that would render nonpermanent residents ineligible for relief from deportation to include controlled substances offenses such as Criminal Possession of a Controlled Substance in the Fifth Degree. The People further argue that the defendant has failed to prove that his 1996 conviction was the basis for the deportation proceedings currently pending against him.

The defendant's affidavits in support of his motion to vacate the judgement of conviction show that issues of fact exist as to whether he received ineffective assistance of counsel due to his attorney's failure to advise him of the immigration consequences of his guilty plea. See, e.g., People v. Nunez, 30 Misc.3d 55 (App. Term 2010). The affidavits also reveal issues of fact regarding whether the defendant received ineffective assistance of counsel due to counsel's failure to raise a defense to the bail-jumping charge or whether counsel's decision can be justified as strategically legitimate. See People v. Evans, 16 N.Y.3d 946, 949 (2011); People v. Rivera, 71 N.Y.2d 705 (1988); People v. Johnson, 65 A.D.3d 975 (1st Dep't 2009). Thus, a hearing is warranted (see People v. Sessions, 34 N.Y.2d 254, 256 (1974)) to determine whether Defendant received ineffective assistance of counsel because of his attorney's alleged failure to advise him of the immigration consequences of his guilty plea and because of his attorney's failure to raise a statute of limitations defense to the charge of Bail Jumping in the Second Degree. C.P.L. §440.30(5).

The parties shall contact the Court to set up a mutually agreeable hearing date. The

above constitutes the decision and order of the Court.

Dated: January 25, 2012



HON. WAYNE M. OZZI, J.S.C.

ENTERED
JAN 30 2012
NANCY T. SUNSHINE
COUNTY CLERK