SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 19

THE PEOPLE OF THE STATE OF NEW YORK	:	
-against-	:	DECISION AND ORDER
HUMBERTO TAVAREZ,	:	IND. NO. 3671/2002
Defendant.	:	

DANNY K. CHUN, J.

The defendant moves to vacate his judgment pursuant to Criminal Procedure Law § 440.10 arguing that (1) his attorney was ineffective in advising him about the immigration consequences of his guilty plea; (2) his guilty plea was made unknowingly, unintelligently and involuntarily; and (3) his plea was procured by misrepresentation or fraud on the part of the court. The People oppose the defendant's motion.

The defendant, a citizen of the Dominican Republic, has been a lawful permanent resident of the United States since July 1996. The defendant is currently not under removal or deportation proceedings. However, his Green Card expired in February of 2012, and it is likely that he will be placed into deportation proceedings for his conviction in this case.

The defendant was charged, under Kings County indictment number 3671/2002, with two counts each of Criminal Sexual Act in the First Degree (PL § 130.50[1]) and Criminal Sexual Act in the Third Degree (PL § 130.40[3]), three counts of Sexual Abuse in the First Degree (PL § 130.65[1]), and two counts of Sexual Misconduct (PL § 130.20[2]).

On June 16, 2003, the defendant pleaded guilty to Criminal Sexual Act in the Third Degree. During the plea proceeding, the defendant was promised a sentence of five years'

probation (Di Mango, J. at plea). On August 11, 2003, the defendant appeared for sentencing. After an off-the-record discussion, the defendant was sentenced to 10 years' probation (Collini, J. at sentence). Neither the defendant nor his defense counsel objected to the change in the sentence.

The defendant did not appeal the judgment of conviction.

The defendant now moves to vacate the judgment of his conviction, alleging that his attorney was ineffective in that he did not advise him about the immigration consequences of his guilty plea. Defendant argues that had he known that the guilty plea would result in the commencement of removal proceedings or a denial of his status as a legal permanent resident in the United States, he would not have pled guilty. In addition, he alleges that his guilty plea was obtained in violation of due process because it was an unknowing, unintelligent and involuntary guilty plea. The defendant argues that he should have been given an opportunity to withdraw the guilty plea and stand trial when the sentencing judge imposed a greater sentence than that which was promised during the plea proceeding. For the same reason, the defendant argues that the guilty plea was procured by misrepresentation or fraud on the part of the court, and therefore the judgment should be vacated.

Ineffective Assistance of Counsel

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. *Strickland v. Washington*, 466 US 668 (1984); *People v. Linares*, 2 N.Y.3d 507, 510 (2004); *see* U.S. Const., 6th Amend.; N.Y. Const., art. 1 §6. Under the two-prong test of the federal standard, a court must decide (1) whether the counsel's performance fell below an objective standard of reasonableness and (2) whether the defendant suffered actual prejudice as a result. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687

(1984). In order to satisfy the second prong, a defendant must show that there is a reasonable possibility that, but for the counsel's error, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart* at 59.

In New York, "[s]o long as 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, the constitutional requirement will have been met." *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he... receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." *People v. Ford*, 86 N.Y.2d 397, 404 (1995). Thus, "where a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation." *People v. McClure*, 236 A.D.2d 633, 633 (2d Dept 1997).

Also, in New York, a defendant must satisfy the "prejudice" requirement by showing that absent counsel's alleged error, he would have insisted on a jury trial. *People v. Rodriguez*, 188 A.D.2d 623 (2d Dept 1992). In order to establish that the defendant would have insisted on going to trial, an affidavit setting forth the factors that a defendant considers in accepting a plea must be submitted to the court. *People v. McDonald*, 296 A.D.2d 13, 19-20 (3d Dept 2002). Some of the factors that must be set out in such an affidavit are the strength of the prosecution's case, the availability of a defense, the likelihood of success at trial, a comparison of the sentence promised with the potential incarceration the defendant faced if convicted after trial, counsel's advice as to the reasons to accept the plea bargain and a reason why the defendant admitted committing the act. *Id.* An unsubstantiated claim that the defendant would have insisted on

proceeding to trial is insufficient. *See People v. McKenzie*, 4 A.D.3d 437, 440 (2d Dept 2004); *People v. Melio*, 304 A.D.2d 247, 251-52 (2d Dept 2003). There must be objective facts supporting such a claim. *Melio* at 251-52.

The defendant's claim of ineffective assistance of counsel is based upon the United States Supreme Court's holding in *Padilla v. Kentucky*, __ U.S.__, 130 S.Ct. 1473 (2010), which was decided seven years after the defendant was sentenced. As the Appellate Division—Second Department summarized, the Supreme Court held in *Padilla* that "where the deportation consequences of a plea of guilty are clear, defense counsel must provide accurate immigration advice, and where the deportation consequences are unclear or uncertain, defense counsel need do no more than advise the defendant that the plea could have adverse immigration consequences." *People v. Marino-Affaitati*, 88 A.D.3d 742, 743 (2d Dept 2011).

To date, there is no New York appellate court decision binding on this court on the issue of whether *Padilla* is to be applied retroactively in post-conviction proceedings. The United States Supreme Court did not directly address the retroactivity issue in its *Padilla* decision and has recently denied a petition for a writ of certiorari involving this issue. *Khaburzania v. New York*, 132 S.Ct. 1005 (Jan. 09, 2012). Both federal and state courts have wrestled with the question of *Padilla*'s retroactive effect, and there have been multiple, differing opinions. There are courts that have applied *Padilla* retroactively (*See United States v. Obonaga*, 2010 WL 2710413 (EDNY June 30, 2010) citing *People v. Bennett*, 28 Misc.3d 575 (Crim Ct New York City, Bronx County 2010); *People v. Gasperd*, 2011 WL 6014460 (Sup Ct Kings County 2011); *People v. Nunez*, 30 Misc.3d 55 (App. Term, 2d Dept 2010)), and there are courts that have held that *Padilla* should not be applied retroactively (*See Hamad v. United* States, 2011 WL 1626530 (EDNY April 28, 2011); *Gacko v. United* States, 2010 WL 2076020 (EDNY May 20, 2010);

People v. Sanchez, 29 Misc.3d 1222(A) (Sup Ct Queens County 2010); *People v. Lorente*, 2012 WL 470456 (Sup Ct Queens County 2012)).

In order to decide whether *Padilla* applies retroactively, the court must determine whether *Padilla* created a new rule, which generally is not retroactive, or merely applied an old rule to a new set of facts, which would apply retroactively. *See Teague v. Lane*, 489 U.S. 288 (1989). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague* at 301. A new rule is generally not retroactive unless it is such a "watershed rule" that it "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Hamad v. United States*, 2011 WL 1626530 (EDNY April 28, 2011) *citing Beard v. Banks*, 542 U.S. 406, 417-18 (2006); *People v. Eastman*, 85 N.Y.2d 265, 275-76 (1995). This exception is so narrow that the only rule ever specially determined by the Supreme Court to be retroactive was the "right to counsel," as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Hamad* at 2. On the contrary, if the case "applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an 'old' rule, and is always retroactive." *Eastman* at 275; *see also Yates v. Aiken*, 484 U.S. 211 (1988).

Prior to *Padilla*, the Supreme Court had not addressed defense counsel's obligation to advise clients about the potential immigration consequence of a guilty plea. Accordingly, the federal circuits held that deportation was a collateral consequence of conviction and that counsel could not be deemed ineffective for failing to advise a defendant about the immigration consequences of his plea. *See United States v. Gonzalez*, 202 F.3d 20 (1st Cir 2000); *United States v. Santelises*, 476 F.2d 787 (2d Cir 1973); *United States v. Del Rosario*, 902 F.2d 55 (D.C.

Cir 1990); *United States v. Yearwood*, 863 F.2d 6 (4th Cir 1988); *United States v. Banda*, 1 F.3d 354 (5th Cir 1993); *United States v. George*, 869 F.2d 333 (7th Cir 1989); *United States v. Fry*, 322 F.3d 1198 (9th Cir 2003); *Broomes v. Ashcroft*, 358 E.3d 1251 (10th Cir 2004); *United States v. Campbell*, 778 F.2d 764 (11th Cir 1985).

It was also settled in New York that the mere failure to advise a defendant of the possibility of deportation did not constitute ineffective assistance of counsel. *See People v. McDonald*, 1 N.Y.3d 109(2003); *People v. Leybinsky*, 299 A.D.2d 494 (2d Dept 2002); *People v. Ford*, 86 N.Y.2d 397 (1995). A court could find that a defense attorney rendered ineffective assistance if that attorney affirmatively made misstatements about the immigration consequences, but even then, only where the defendant established that he was prejudiced by counsel's error. *See People v. McDonald*, 1 N.Y.3d 109 (2003).

Upon consideration of the foregoing, this court finds that *Padilla* should not be applied retroactively. In *Padilla*, the Supreme Court departed from both federal and state precedent by eliminating the distinction between the direct and collateral consequences of conviction and imposed a new obligation on defense attorneys to provide immigration advice to clients contemplating a guilty plea. In devising a new rule, *Padilla* was not "dictated by precedent" on the federal or state level (*Teague*, 489 U.S. at 301; *Eastman*, 85 N.Y.2d at 275-76), and it overruled prior authority from the circuit and state courts (*Butler v. McKellar*, 494 U.S. 407, 412(1990)). As it established a new rule that departed from past precedent, *Padilla* should not be interpreted as having retroactive effect. Therefore, *Padilla* is not applicable to the defendant in this case, since his conviction predates *Padilla* by approximately seven years.

Applying the two-prong test of federal effectiveness of counsel (*Strickland v. Washington*, 466 U.S. 669) and the New York state standard of "meaningful representation

(*People v. Benevento*, 91 N.Y.2d 708; *People v. Baldi*, 54 N.Y.2d 137), the court finds the defendant's contention that his attorney was ineffective in assisting him without merit. Under the first prong of the *Strickland* test, the defendant failed to show that the counsel's representation fell below an objective standard of reasonableness. In 2003, when the defendant was sentenced, a defense counsel would not have been ineffective for failing to advise his client of the immigration consequences of his guilty plea. It should be noted that the defendant alleges that his attorney failed to give him advice regarding the immigration consequences all together and not that he misadvised him. Under the same analysis, the defendant failed to show that his attorney did not meet the New York standard of "meaningful representation."

Nevertheless, the court will also address the defendant's failure to demonstrate actual prejudice under the second prong of the *Strickland* test. The defendant contends that had he received accurate immigration advice, he would have rejected the plea bargain and proceeded to trial. At trial, the defendant would have faced evidence of guilt, including testimony from the complainant and the medical examiner, which would have corroborated the complainant's testimony by revealing anal lacerations consistent with the allegations. Identification was not an issue in this case because the complainant knew the defendant.

In addition, having been charged with two counts each of Criminal Sexual Act in the First Degree and Criminal Sexual Act in the Third Degree, three counts of Sexual Abuse in the First Degree, and two counts of Sexual Misconduct, the defendant was exposed to a potential sentence of up to 25 years followed by a period of post-release supervision of up to 10 years, after which he would have potentially been deported. *See* P.L. §§70.80(4), (9); 70.45(2)(b), (j). In exchange for his plea to Criminal Sexual Act in the Third Degree, the defendant was sentenced to 10 years' probation. In this instance, his counsel negotiated a highly beneficial disposition. Therefore, the

court finds that the defendant was provided with meaningful representation and effective assistance of counsel under both the federal and state standards.

Modification of the Sentence

It is fundamental that a sentencing court may not impose a sentence greater than the one bargained for without first affording an opportunity to withdraw the plea and stand trial. *See People v. Farrar*, 52 N.Y.2d 302; *People v. McConnell*, 49 N.Y.2d 340. It is also well settled that the court has an inherent power to correct an unlawful sentence. *People v. Hollis*, 309 A.D.2d 764, 765 (2d Dept 2003); *see People v. DeValle*, 94 N.Y.2d 870, 871-72. However, when the unlawful sentence is the product of a negotiated plea agreement, and the sentencing court is unable to fulfill the promise due to the illegality of that sentence, the appropriate remedy is to give the defendant the opportunity to either accept an amended lawful sentence or withdraw his plea of guilty and be restored to pre-plea status. *People v. Hollis*, at 765; *see People v. Selikoff*, 35 N.Y.2d 227, cert denied 419 U.S. 1122; *see also People v. Annunziata*, 105 A.D.2d 709 (2d Dept 1984). Notwithstanding these principles, if the defendant's claim has not been preserved and where the sentence imposed in lieu of that which had been promised was not abusive or illegal, the defendant's request to withdraw his plea will not be granted. *People v. Ifill*, 108 A.D.2d 202, 203 (2d Dept 1985); *People v. Marinaro*, 45 A.D.3d 867, 869 (2d Dept 2007).

In this case, the defendant failed at the time of sentencing to argue that the changed sentence violated a promise made at the plea proceeding or otherwise object to the amendment of the sentence. Furthermore, the sentence that was ultimately imposed was not abusive or illegal. To the contrary, the original sentence of five years' probation was illegal as the probation period for a felony sexual assault "shall be" 10 years. PL §65.00(3)(a)(iii). It is well settled that "any

sentence promised at the time of the plea is, as a matter of law and strong public policy, conditioned upon, inter alia, it being lawful." *People v. Branch*, 2 A.D.3d 872, 872 (2d Dept 2003); *People v. Selikoff*, 35 N.Y.2d 227, 238, cert denied 419 U.S. 1122. Therefore, the defendant's request to have his judgment vacated is denied.

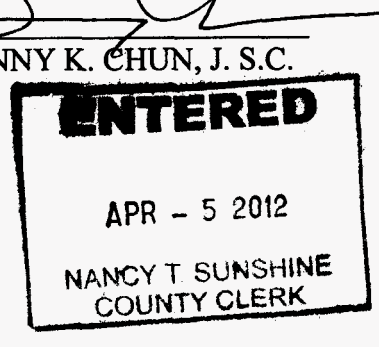
However, even if, *arguendo*, the claim was preserved, the court does not find that the defendant is entitled to have his judgment vacated. It has been 10 years since the defendant was indicted in this case, and it would be prejudicial to the People if the defendant was allowed to withdraw his plea at this late point in time and go to trial. *See People v. Annunziata*, 105 A.D.2d 709 (2d Dept 1984) (holding that withdrawing the plea and going to trial three years after the indictment would prejudice the People). To be clear, the defendant is not requesting to reduce his sentence to conform with the original plea bargain, but to vacate his judgment all together. Therefore, even if the argument was preserved, the defendant's claim on this ground would be rejected.

Wherefore, the defendant's motion to vacate his judgment is denied in its entirety.

The foregoing constitutes the decision, opinion and order of the court.

Dated: Brooklyn, New York
April 4, 2012

DANNY K. CHUN, J. S.C.



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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