

People v Hendy

2012 NY Slip Op 32255(U)

July 5, 2012

Supreme Court, Kings County

Docket Number: 11168/89

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 3

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

DECISION AND ORDER

-against-

Ind No. 11168/89 and
3936/90

MARVIN HENDY,

Defendant.

-----X
JAMES P. SULLIVAN, J.

The defendant has moved, *pro se*, for an order pursuant to CPL § 440.10 to vacate his two judgments of conviction. Defendant claims that his pleas were not knowing and voluntary because neither the court, the prosecutor, nor the attorney who represented him advised him of the immigration consequences of his previous pleas. Defendant also claims that he was denied his right to effective assistance of counsel for these reasons. The defendant further asserts that he would not have pled guilty if he had been informed that his guilty pleas would negatively effect his status. The People have filed an answer in opposition. Additionally, defendant has filed supplemental affidavits in support of his motion. In 2009, defendant was convicted in the United District Court for the District of New Jersey of unlawful entry after deportation (8 U.S.C. § 1326 [a], [b] [2]), and is currently serving a federal prison sentence.

Procedural History

On July 24, 1989, the defendant and three other individuals were involved in a robbery at J & J Electronics, an electronics and jewelry store located at 1582 Pitkin Avenue, in Kings County. All the perpetrators were armed and defendant carried a shotgun. Defendant pointed the shotgun at people in the store and threatened to shoot them. He broke the store's display cases and took various pieces of jewelry valued at over \$50, 000. On August 19, 1989, the police arrested defendant in front of his residence. Two of the other perpetrators were also arrested. Defendant was identified by two store employees in a lineup. Several pieces of jewelry were recovered from one of the other individuals.

The defendant was indicted and charged, by Kings County Indictment Number 11168/89, with robbery in the first degree, robbery in the second degree, grand larceny in the second degree, and criminal mischief in the third degree. Defendant was released after posting \$1500 cash bail.

On January 19, 1990, defendant and five others were involved in a robbery at S & R Gucci

Jewelry Store, located at 1600 Pitkin Avenue, in Brooklyn. During this incident defendant and at least one other individual carried a gun. Defendant pistol-whipped a store worker, who suffered a laceration to the head and was treated at a hospital for stitches and a concussion. The perpetrators took approximately \$150,000 worth of jewelry from the display cases. On April 20, 1990, the police arrested defendant, along with three other perpetrators. A jewelry store employee identified defendant in a line-up. No jewelry was recovered. Defendant was incarcerated at \$10,000 bail.

For this incident, defendant was charged, by Kings County Indictment Number 3936/90, with robbery in the first degree, robbery in the second degree, and grand larceny in the second degree. On February 8, 1991, the defendant pleaded guilty to two counts of robbery in the first degree in full satisfaction of Indictment Numbers 11168/89 and 3936/90. On March 11, 1991, the court sentenced defendant to two and one-half to seven and one-half years' incarceration on each charge, to be served concurrently (Cirigliano, J., at plea and sentence). Defendant did not file notices of appeal from the convictions in this case. The plea and sentence minutes are unavailable at this time.

Additionally, defendant has been convicted of four separate felonies. On December 17, 1990, in Queens County, defendant pleaded guilty to attempted robbery in the first degree and was sentenced to two to six years' incarceration. He also pleaded guilty to robbery in the first degree on that date and was sentenced to two to six years' incarceration for that charge. On October 16, 1991, in Bronx County, defendant pleaded guilty to robbery in the first degree and was sentenced to three to nine years incarceration. Additionally in Bronx County, defendant pleaded guilty to robbery in the first degree on November 7, 1991 and was sentenced to three to nine years' incarceration. These sentences were ordered to run concurrently with each other, and with the sentences defendant received for his two Kings County convictions.

Defendant entered the United States as a lawful permanent resident in 1986. In 1991, after defendant was convicted of robbery in the first degree in Kings, Queens, and Bronx Counties, the United States Immigration and Customs Enforcement Agency (hereinafter, ICE), of the United States Department of Homeland Security, initiated deportation proceedings against him.. Defendant was deported in 1993. ICE deported defendant based only in part on his two Kings County convictions. In addition, ICE cited defendant's Queens and Bronx convictions as the basis for defendant's deportation. Six months later, the defendant illegally re-entered the United States and married in 1996. Defendant was re-deported in 2004, and subsequently, defendant illegally re-entered the country for a third time.

In 2009, defendant was convicted in the United States District Court for the District of New Jersey of Unlawful Entry After Deportation in violation of 8 U.S.C. § 1326 [a], [b] [2]. He is currently serving a 63-month federal prison sentence at Federal correction Institution Ray Brook in Ray Brook, New York.

The Current Motion

In his initial motion, defendant claims that before he pleaded guilty to the Kings County cases, the court did not inform him of the possibility that he would be deported as a consequence of his pleas. Defendant further claims that he was denied the effective assistance of counsel because his lawyer allegedly misadvised him about the immigration consequences of pleading guilty to a felony. He asserts that counsel assured him that because of his legal status in the United States, he would not be subject to deportation. The defendant claims that had it not been for counsel's advice, he would not have pleaded guilty, and would have proceeded to trial.

Defendant states in his supplemental affidavit, dated March 28, 2012, that neither his counsel, nor the prosecution, nor the judge advised him that he could be deported as a result of his guilty pleas (Supplemental affidavit). In his supplemental affidavit, defendant claims that counsel did not give any advice regarding the automatic deportation consequences of his pleas. (Supplemental affidavit of March 28, 2012). He claims that he was never advised of the immigration consequences of his plea, however, here he never alleges that he was specifically misadvised. The defendant claims here that if he had known the immigration consequences of these convictions, he would not have pleaded guilty.

In response to defendant's motion, counsel does not have any specific recollection of the substance of the advice he gave to defendant. However, he states that it is, and has been, his practice to discuss immigration consequences with his clients.

Initially, defendant's claim that the court did not inform him of the immigration consequences of his pleas is denied as sufficient facts appear on the record to permit appellate review of the issue raised, but the defendant unjustifiably failed to raise the issue on direct appeal. (*See*, C.P.L. § 440.10 [2] [c]; *People v. Cooks*, 67 N.Y.2d 100 [1986]).

With respect to defendant's claim of ineffective assistance, under the Federal constitution a "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense" (*Strickland v. Washington*, 466 U.S. 668, 687 [1984]). "The first prong of the *Strickland* test is essentially a restatement of attorney competence, which requires a showing that counsel's representation fell below an objective standard of reasonableness" (*People v. McDonald*, 1 N.Y.3d 109, 113 [2003]; *Hill v. Lockhart*, 474 U.S. 52, 58 [1985]). Furthermore, defendant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*Hill v. Lockhart*, at 59).

Under New York Law, the constitutional standard of ineffective 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 N.Y.2d 184, 187 [1994]; *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 or she receives an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of counsel...” (*People v. Ford*, 86 N.Y.2d 397, 404, [1995]; *People v. Boodhoo*, 191 A.D.2d 448 [2d Dep’t 1993]).

New York courts have long recognized that incorrect advice or affirmative misstatements by defendant counsel regarding the immigration consequences of a guilty plea may constitute ineffective assistance of counsel if a defendant would not have otherwise pleaded guilty and would have insisted on going to trial (*People v. McDonald*, 1 N.Y.3d 109, 114-115 [2003]; *People v. Ford*, at 405). Until recently, counsel’s effectiveness was not considered to be diminished by the complete absence of advice regarding possible immigration consequences, however, counsel’s obligations have been enlarged with the United States Supreme Court’s recent decision, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). In *Padilla*, the Supreme Court ruled that the failure to give any immigration advice may also constitute ineffective assistance of counsel, so long as the defendant can establish both that no immigration advice was given and that defendant would not have pled guilty had he been apprised of the immigration consequences of conviction.

To establish a claim of ineffective assistance of counsel based upon a claim that counsel incorrectly advised defendant about the risk of deportation, or failed to give any advice, the defendant has the burden of proving both that he was either not given any advice, or that the advice given was mistaken, and that this advice or lack of advice induced him to plead guilty. His claims must be weighed against the strength of the prosecution’s evidence, the availability of a viable defense, the likelihood of a conviction were he to proceed to trial, a comparison of the promised sentence after a guilty plea with the potential exposure upon a guilty verdict, and counsel’s advice on the plea offer (*People v. McDonald*, 296 A.D.2d 13, 19-21 [3rd Dep’t 2002]; *People v. Ford*, 86 N.Y.2d at 405). A defendant must also demonstrate that he was prejudiced by counsel’s mistaken advice by showing that he had a colorable claim of innocence such that he might have avoided conviction after trial and, thus avoided the conviction which rendered him deportable (*see, People v. McDonald*, 296 A.D.2d at 19-21. While a showing of prejudice is not absolutely required under New York law, whether the defendant was prejudiced by counsel’s conduct is a significant factor in determining whether a defendant received effective representation and whether the proceeding as a whole was unfair (*see, People v. Stultz*, 2 N.Y.3d 277, 283-284 [2004]).

In the present case, defendant has failed to establish that his counsel failed to provide any immigration advice or that he provided misinformation regarding the immigration effects of his guilty pleas. Initially, the instant motion is procedurally barred as defendant has failed to substantiate all of the essential facts underlying his claim (C.P.L. § 440.30 [3] [b]). Further defendant’s allegations are unclear whether counsel misadvised him regarding the immigration consequences of his pleas, or whether counsel failed to give any advice whatsoever. Defendant’s allegations are

unsupported by any other affidavit or evidence. (C.P.L § 440. 30 [4] [d]). Moreover, in response to defendant's unsupported assertion, his previous attorney has responded that, although he does not recall the specifics of this case, it is, and has been, his usual practice to inform his clients of the immigration consequences of pleading guilty to a felony. The defendant has the burden of establishing every element necessary to support his claim in a motion to vacate judgment and defendant has failed to establish that either he was misadvised about the immigration consequences, or that no advice was given.

Moreover, although defendant now asserts that he would not have pleaded guilty had he known that his plea would affect, or perhaps would bar his future ability to regularize his status in the United States, that claim is not credible under the facts and circumstances here. Defendant's claim of ineffectiveness is undermined by the favorable dispositions that were negotiated by his defense attorney. The evidence against the defendant in both Kings County cases was strong. With respect to Kings County Information Number 11168/1989, two workers at the jewelry store identified defendant in line-ups. As to Kings County Indictment Number 3936/1990 defendant was identified in a line-up by a worker present in the store.

In both cases, defendant was facing a lengthier jail sentence, but was fortunate to receive a more lenient bargain. By pleading guilty, defendant was fortunate to receive concurrent sentences of 2 ½ to 7 ½ years' incarceration. If defendant had instead been convicted of robbery in the first degree after trial, he faced two jail sentences of up to 8 ½ to 25 years imprisonment under the 1989-1990 statutory sentencing requirements. Additionally, these sentences could have been imposed to run consecutively. (*See, former* P.L § 70.00 [2] [b]; 70.02 [1] [a], [2] [a] [3] [a], 4). Additionally, it is important to note that in December 1990, before defendant pleaded guilty in this case, defendant pleaded guilty in Queens to attempted robbery in the first degree and a robbery in the first degree. In return for his guilty plea, defendant received a sentence of two to six years' imprisonment. When defendant pleaded guilty to the Kings County cases he did so in exchange for the promise that those cases would be served concurrently with his sentences in Queens County.

Considering all relevant circumstances, including defendant's circumstances at the time he pleaded guilty here, the strong evidence of defendant's guilt, and the received favorable bargain which defendant benefitted from, this court concludes that any claim by defendant that he would have proceeded to trial had he known that his plea would affect his immigration status is not credible. The court also notes that defendant had not yet married or started a family at the time he entered his guilty pleas. Therefore, this court finds that the defendant has failed to demonstrate that his present asserted desire to regularize his status in the United States existed at the time of the pleas.

Moreover, it is important to note that defendant is deportable regardless of his Kings County convictions. Before defendant pleaded guilty in the Kings County cases, he was already deportable without a remedy, based upon his convictions in Queens which involved the use of firearms. Additionally defendant pleaded guilty to two robberies in the first degree in the Bronx after the pleas in this case. These pleas also rendered him deportable without a remedy. The records provided by the United States Immigration and Customs Enforcement Agency indicate that defendant was not

deported solely as a result of his Kings County convictions. Defendant's four other robbery convictions were also used as a basis for defendant's deportation. Because defendant was already subject to deportation prior to pleading guilty to the Kings County cases, it is unlikely that he was concerned about possible immigration consequences, rather than a favorable disposition (*see, People v. Figueroa*, 170 A.D.2d 529 [2d Dept. 1991]).

Finally, defendant re-entered the country twice after he was initially deported. After defendant entered the country illegally for the second time, he was convicted in the United States District Court for the District of New Jersey of Unlawful Entry after Deportation (8 U.S.C. §1326 [a], [b] [2]) and is currently serving a 63 month federal prison sentence. After completing his sentence, defendant will again be subject to removal, not only for his state felony convictions, but also for his federal conviction. Thus, vacatur of defendant's two state convictions would have no effect on his removability, and does not affect his lack of eligibility for relief from removal.

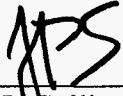
Under these circumstances, where defendant was subject to deportation prior to his guilty pleas, defendant has failed to show that any lack of advice, or mis-advice regarding the effect that these pleas would have on his future immigration status would have induced him to forgo the extremely advantageous plea bargain negotiated on his behalf by his counsel. Thus, the defendant has failed to convince this court that a "decision to reject the plea bargain[s] would have been rational under the circumstances" (*Padilla v. Kentucky*, 130 S. Ct. At 1485).

In sum, defendant's motion papers fail to state a claim of ineffective assistance of counsel predicated upon lack of immigration advise or mis-advice, or to state a claim necessitating a hearing upon his allegations. (*See, C.P.L. § 440.30 [4] [c]*).

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

This constitutes the decision and order of the court.

Dated: July 5, 2012


James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.

ENTERED
JUL 18 2012
NANCY T. SUNSHINE
COUNTY CLERK