

People v Vega

2012 NY Slip Op 32258(U)

July 3, 2012

Supreme Court, Queens County

Docket Number: 2098/06

Judge: Darrell L. Gavrin

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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-21

THE PEOPLE OF THE STATE OF NEW YORK

BY: DARRELL L. GAVRIN, J.S.C.

IND. NO. 2098/06

- against -

REGGIE VEGA

Defendant.

By decision dated October 25, 2011, the Appellate Division, Second Department, held the appeal by defendant in abeyance and remitted this case to this court for the appointment of new counsel, a hearing on defendant's motion to withdraw his guilty plea, and a new determination of the motion thereafter (*People v Vega*, 88 AD3d 1022 [2d Dept 2011]). Subsequently, Wyatt Gibbons, Esq., was appointed as 18B counsel to represent defendant. This court commenced the hearing on defendant's motion to withdraw his plea on December 6, 2011, continued to December 19, 2011, and December 22, 2012. Oral argument was held on January 26, 2012. On February 16, 2012, the parties filed written memoranda of law with the court. Thereafter, on April 4, 2012, this court received all pertinent transcripts from the various official court reporters. Upon review of all evidence, testimony and transcripts, the court hereby renders its report to the Justices of the Appellate Division.

PROCEDURAL HISTORY

On June 7, 2006, in the County of Queens, defendant approached Joseph Nichols (Nichols), displayed a loaded gun and demanded his property. Nichols gave defendant a chain and watch. As Nichols was removing his watch, defendant shot him in the stomach and arm. Upon hearing gunshots fired, police officers responded to the scene of the crime. They observed defendant in possession of a gun. He fled and police officers apprehended him and recovered the gun and Nichols' property.

On June 8, 2006, defendant was arraigned on the Criminal Court Complaint and remanded. The records of the State of New York Division of Criminal Justice Services indicate that on March 26, 1998, defendant was convicted upon a plea of guilty to Unauthorized Use of a Vehicle in the Third Degree (Penal Law § 165.04). On October 10, 2001, defendant was convicted upon a plea of guilty to Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02), a violent felony offense. Also, defendant was convicted on October 25, 2004, of Conspiracy to Possess Cocaine with the Intent to Distribute, a federal offense, in which he received the sentence of 63 months incarceration and five years post release supervision.

On September 26, 2007, defendant pleaded guilty to Attempted Murder in the Second Degree (Penal Law §§ 110.00/125.25) in Supreme Court, Queens County, in full satisfaction of Indictment No. 2098/06. While addressing this court at his October 15, 2007 sentencing, defendant contended for the first time that his counsel was ineffective, and asked this court for a lesser sentence. This court denied defendant's request and sentenced him, as promised, to 20 years incarceration and five years post release supervision. Defendant was adjudicated a violent predicate felony offender. However, it is important to note that based on defendant's prior convictions, this court had the discretion to sentence defendant as a persistent felony offender; the maximum term of imprisonment is life and the minimum term is 15 to 25 years incarceration (Penal Law §§ 70.00 and 70.10).

Defendant appealed from the judgment claiming that he was denied his right to effective assistance of counsel when his attorney, Vincent Siccardi, Esq., became an adverse witness against him.¹ At defendant's sentencing, this court permitted Mr. Siccardi to address defendant's allegations regarding his failure to convey to defendant a plea offer of 17 years incarceration.² Defendant alleges that the People made that offer to Mr. Siccardi on August 16, 2007, in Part K-12, before the Honorable Joseph Grosso. Also, defendant maintained that Mr. Siccardi mistakenly informed him that he could get consecutive time if he was convicted after trial.

On October 25, 2011, the Appellate Division, Second Department, held the appeal by defendant in abeyance and remitted his case to the Supreme Court for the appointment of new counsel, a hearing on defendant's motion to withdraw his guilty plea and a new determination of the motion thereafter (*Id.*).

On December 6, 2011, the court scheduled an appearance for defendant and his newly appointed 18B counsel, Wyatt Gibbons, Esq., and the People concerning the hearing issues. The court commenced the hearing on defendant's motion to withdraw his guilty plea on December 6, 2011, and the hearing continued over several days until concluded.

FINDINGS OF FACT

Defendant testified on his own behalf and stated that Mr Siccardi failed to communicate plea offers to him except for the plea offer of 20 years incarceration that he accepted on the eve of trial. In particular, defendant claimed that on August 16, 2007, in Part K-12, before the Honorable Joseph Grosso, an offer was conveyed to Mr. Siccardi of a plea with a sentence of 17 years incarceration. On August 16, 2007, defendant had not been produced before the court,

¹Vincent Siccardi, Esq. was privately retained by defendant's wife and paid a \$6000.00 retainer for pre-trial services.

²Originally, defendant claimed that the People made an offer of 15 years incarceration, but defendant later conceded that the offer was 17 years incarceration not 15.

nor had his attorney discussed the case with him in the pens. When defendant returned to Rikers Island, he spoke to his wife on the jail telephone, and she informed him that the People made a plea offer of 17 years incarceration. Mrs. Vega told defendant that she was present in court and heard the offer being made at an off the record bench conference. Thereafter, defendant asked Mr. Siccardi about the offer of 17 years incarceration, but Mr. Siccardi told him that the offer was no longer on the table. Defendant claimed that prior to pleading guilty, Mr. Siccardi never conveyed any offer to him that was less than 20 years incarceration. Moreover, defendant stated that he would have would have accepted 17 or 18 years incarceration if that offer had been conveyed to him by Mr. Siccardi.

Defendant's wife, Ysenia Vega, testified on behalf of defendant. and defendant also offered an affidavit of his wife dated September 2011 into evidence. Mrs. Vega testified that she heard the plea discussion in court and Mr. Siccardi told her afterwards that the People made a plea offer of 17 years incarceration.

The People called Mr Siccardi as their sole witness at the hearing and this court found his testimony credible. The People introduced his handwritten note which indicated defendant had been offered a plea of 18 years incarceration prior to his indictment. Mr. Siccardi maintained that the People never made a plea offer of 15 or 17 years incarceration. He testified that he had hoped to convince the People "to come down from 18 years to 17 years incarceration," but he was unsuccessful. Mr. Siccardi conveyed the offer of 18 years incarceration to defendant, but he rejected it outright stating that he wanted an offer in the single digits. Mr. Siccardi testified that he and defendant both thought the initial offer of 18 years incarceration was too high.

During cross-examination by Mr. Gibbons, Mr. Siccardi revealed that during the pendency of defendant's case, he had been the subject of a disciplinary hearing. On June 10, 2008, he was suspended from the practice of law for six months for neglecting cases. At that time, the disciplinary committee recommended that Mr. Siccardi undergo psychological counseling due to the recent deaths of both his parents, the stress of the investigation, and that he had undergone triple by-pass surgery. This was the second time that Mr. Siccardi was disciplined by the committee; in October 1992, he was disciplined for his failure to respond to letters of inquiry from the Appellate Division.

An independent review of the AP-6 court minutes concerning this case failed to reveal the People's pre-indictment plea offer. Likewise, the court minutes dated August 16, 2007, were devoid of any reference to a plea offer of 17 years incarceration. Interestingly enough, after reviewing the grand jury minutes in this case, Judge Grosso stated that he would not undercut the People's recommendation of 20 years incarceration. Quite the contrary, Judge Grosso's notes indicated that he would have offered defendant a plea of 27 years incarceration.

CONCLUSIONS OF LAW

In *Strickland v Washington*, 466 U.S. 668 (1984), the United States Supreme Court

established a two-part test for evaluating a defendant's Sixth Amendment claim of ineffective assistance of trial counsel. To prevail upon such a claim, a "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense"(Id.). In *People v Baldi*, 54 NY2d 137 (1981), the New York Court of Appeals set standards for claims of ineffective assistance of counsel, holding that the constitutional requirements are met whenever the defense attorney provides "meaningful representation."

The absence of *Strickland's* prejudice requirement is the distinguishing characteristic of *Baldi*. The Court of Appeals indicated that a defendant need not fully satisfy the prejudice test of *Strickland*. However, they continued to regard a defendant's showing of prejudice as significant, yet not a dispositive element in assessing meaningful representation. The focus is on the fairness of the proceedings as a whole. (*People v Stultz*, 2 NY3d 277 [2004].)

"While the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento*, 91 NY2d 708 [1998]). 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. "So long as the evidence, the law, and the circumstances of a particular case, viewed in the totality and as of the time of representation, reveal that the attorney provided meaningful representation, the constitutional requirements will have been met." (*People v Ford*, 86 NY2d 397, 404 [1995].)

Viewed in totality of the circumstances and as of the time of the representation, Mr. Siccardi provided meaningful representation to defendant. Defendant received an advantageous plea; he shot a man during a robbery and the evidence against him was quite substantial. Having pleaded guilty in his three prior convictions, defendant knowingly and willingly accepted the negotiated plea of 20 years incarceration and five years post release supervision on the eve of trial. If convicted after trial, this court could have sentenced defendant as a discretionary persistent felony offender; the maximum term is life and the minimum term is 15 to 25 years incarceration (Penal Law §§ 70.00 and 70.10). The case was sent to this court for trial and being moved to trial, defendant recognized his options. In light of the above circumstances, defendant took advantage of a favorable plea and received meaningful representation. Where 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 AD2d 633 [2d Dept 1997]).

Moreover, to prevail on a claim of ineffective assistance of counsel based upon the defense counsel's failure to advise a defendant with respect to an offer of a plea agreement, a defendant must demonstrate "that a plea offer was made, that defense counsel failed to inform him [or her] of that offer, and that he [or she] would have been willing to accept the offer" (*People v Fernandez*, 5 NY3d 813 [2005], quoting *People v Rogers*, 8 AD3d 888 [3d Dept

2004]).³

In the instant case, this court has found defendant and his wife less than credible. There is no evidence to suggest that an offer of 17 years incarceration was conveyed to Mr. Siccardi on August 16, 2007, in Part K-12, before the Honorable Joseph Grosso, of 17 years. The People deny that the offer of 17 years incarceration was made to defendant on that date. Their records reflect that Mr. Siccardi asked for a plea offer of 17 years incarceration, but that was denied. Moreover, Judge Grosso's refusal to undercut the People's recommendation of 20 years incarceration along with his notes that he would offer defendant 27 years incarceration confirms to this court that there was never an offer of 17 years incarceration.

Furthermore, defendant contends that Mr. Siccardi never conveyed the pre-indictment offer of 18 years incarceration to him. According to the People's records, while the case was pending in AP-6 for three months, the plea offer was 18 years incarceration. Mr. Siccardi's notes indicate that he conveyed the plea offer of 18 years to defendant and defendant rejected the offer. Furthermore, at the hearing to withdraw his plea, defendant testified that he saw the offer was getting higher. Although the court minutes and records do not reflect the actual offers conveyed to defendant or that defendant rejected offers, the court records infer that defendant was contemplating a plea offer pre-indictment and did not accept it. Although courts have held that an entire non-communication of a plea offer can constitute a deprivation of effective assistance (136 Misc 2d 573 [S.Ct. Bronx Cty., 1987]), defendant's uncorroborated claim that Mr. Siccardi never conveyed the plea offer of 18 years incarceration pre-indictment to him is not supported by the evidence.

Accordingly, upon the evidence, the law, and the particular circumstances of this case, viewed in totality and as of the time of representation, reveal that Mr. Siccardi provided adequate and meaningful representation to defendant; defendant's plea of guilty herein was knowingly, voluntarily, and intelligently entered; defendant fully understood the implications and consequences of his plea and sentence; and despite his protestations, defendant has not established any grounds to vacate the sentence judgment of conviction entered upon his guilty plea.

Accordingly, this report recommends that defendant's motion be denied in all respects.

Respectfully submitted

Dated: July 3, 2012

³ In federal cases, defendants must show prejudice from ineffective assistance of counsel. Where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel, and defendant must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it (*Lafler v Cooper*, 132 S Ct 1376 [2012]; *Missouri v Frye*, 132 S Ct 1399 [2012]).

