SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 85

----------X

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
INDICTMENT NO. 2247/2010

- against -

LORANDO WATSON
(A/K/A ORLANDO WATSON),

DEFENDANT.

----------X

MONDO, SUZANNE, J.:

Defendant moves, *pro se*, to vacate the judgment of conviction pursuant to CPL §440.10(h)[1] on the ground that he was denied his Sixth Amendment right to effective assistance of counsel when his trial counsel both failed to advise him and misadvised him of the deportation consequences of his guilty plea. The United States Supreme Court held in Padilla v. Kentucky, 130 U.S. 1473 (2010), that criminal defense attorneys are constitutionally obligated to advise their non-citizen clients of the clear removal consequences of a plea of guilty.

Factual History

On March 13, 2010, defendant was arraigned on a felony complaint that charged him with Criminal Possession of Marijuana in the Second Degree (PL §221.25), a class D felony offense, and lesser-related charges. The charges stemmed from the recovery of over 16 ounces of marijuana by the police from defendant's car. The court set bail and adjourned the

[1] Defendant mistakenly labeled his motion a Motion to Withdraw his Plea pursuant to CPL §220.60.

case to March 17, 2010. On March 17, 2010, defendant made bail, and the court adjourned the case for grand jury action to April 28, 2010.

On April 28, 2010, the People offered defendant a plea of guilty to Criminal Possession of Marijuana in the Fourth Degree (P. §221.15), a class A misdemeanor, and a sentence of three years of probation. On that date, the court wrote in the court file "defendant wants plea, but will be deported." The court adjourned the case to May 21, 2010, for possible disposition. On May 21, 2010, the People again offered defendant a plea of guilty to Marijuana in the Fourth Degree, but with a sentence of 140 hours of community service and a $1,000 fine. The court file indicates that defendant refused the plea offer because of the immigration consequences, and the court adjourned the case to October 29, 2010.

In the meantime, on July 16, 2010, the People filed with the court a copy of Indictment Number 2247/2010, which charged defendant with Criminal Possession of Marijuana in the Second Degree (PL §221.25), a class D felony offense, and lesser-related charges. On September 9, 2010, defendant was arraigned on the indictment; the People offered defendant a plea of guilty to Criminal Possession of Marijuana in the Third Degree (PL §221.20), a class E felony, and a sentence of five years of probation. The court adjourned the case to September 22, 2010, for possible disposition.

On September 22, 2010, the People again offered defendant a plea of guilty to Criminal Possession of Marijuana in the Third Degree (PL §221.20), a class E felony, and

a plea to Criminal Possession of Marijuana in the Fifth Degree (PL §221.10(2)), a class B misdemeanor. According to the offered plea deal, once defendant either paid a fine of $500 or performed 10 days of community service, the People would dismiss the felony charge, and defendant would receive a sentence of a conditional discharge on the misdemeanor charge. The court adjourned the case to October 13, 2010, for possible disposition and for defendant to return with $500 for payment of the fine.

On October 13, 2010, defendant requested an adjournment, and the court adjourned the case to October 28, 2010. On October 28, 2010, defendant requested more time to pay the money, and the court adjourned the case to December 8, 2010, for disposition or trial. On December 8, 2010, the court adjourned the case for trial to January 31, 2011.

Prior to the next adjournment, defendant was arrested and incarcerated for a new felony matter that was pending in Queens County.[2] While defendant was incarcerated on the Queens matter, the Immigration and Customs Enforcement Unit of the United States Department of Homeland Security (ICE), placed a detainer on defendant on the basis that he was unlawfully in the United States.

On January 31, 2011, the instant case was adjourned to February 17, 2011, for defendant to be produced in court. On February 17, 2011, the court set $1.00 bail on defendant and adjourned the case for possible disposition to February 28, 2011. On February 28, 2011, defendant pleaded guilty to Criminal Possession of Marijuana in the

---

[2] The Queens arrest appears to have resulted in no criminal conviction.

Fourth Degree (PL §221.15), a class A misdemeanor, in exchange for a sentence of 30 days jail, most of which defendant had served. The People dismissed all felony charges against defendant.

Before defendant pleaded guilty, the court questioned defendant and defense counsel as follows:

> THE COURT: And have you had enough time to speak to your lawyer about pleading guilty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Counsel, have you discussed with your client any possible immigration consequences?
>
> MS. TSEITLIN: Yes, your honor, I have discussed it with him. I've also written a series of letters to him explaining the immigration. [sic]
>
> THE COURT: And you still wish to plead guilty, sir?
>
> THE DEFENDANT: Yes.
>
> (Plea minutes, pp. 3-4)

On March 8, 2011, ICE arrested defendant and served him with a Notice to Appear, in which the United States Department of Homeland Security charged defendant with being subject to removal from the United States under Immigration and Nationality Act (INA) §212(a)(6)(A)(i), for being an alien present in the United States at any time or place other than as designated by the Attorney General.

On January 12, 2012, an additional charge of being subject to removal based upon his conviction in this case under Immigration and Nationality Act (INA) §212(a)(2)(A)(i)(II) was filed against defendant. On June 27, 2012, an Immigration Judge sustained both charges against defendant and ordered him removed from the United States to Jamaica. He currently is being detained by ICE at the Orange County Correctional Facility in Goshen, New York.

Defendant's Motion

In July 2012, defendant moved pursuant to CPL §440.10(h) to vacate the judgment of conviction in this case. In the motion, defendant asserts that his counsel was ineffective because she: failed to advise him of the deportation consequences of his guilty plea; misadvised him of the deportation consequences; and failed to seek a disposition with less harsh immigration consequences.

To support his claims, defendant provided his own affidavit in which he claims that he is a permanent resident of the United States who came from Jamaica when he was fifteen years old. He further states that he "had no idea" that a plea of guilty to Criminal Possession of Marijuana in the Fourth Degree (PL §221.15) could cause him to be deported, and that his attorney did not discuss with him "anything about the immigration consequences of a conviction for criminal possession in the fourth degree, PL 221.15." Despite alleging that his attorney did not discuss any immigration consequences with him, defendant, nevertheless, also maintains in his affidavit that his attorney told him that if he pleaded guilty "to a misdemeanor instead of a felony [he] could not be deported."

Defendant further alleges that if his attorney had been unable "to negotiate a plea bargain with no immigration consequences." and had he known of the immigration consequences of his guilty plea, he would have "insisted on going to trial and taking the risk of going to jail for a longer period." Defendant provided no other affidavits or documentary proof to support his motion.

In opposition to defendant's motion, the People have submitted the plea and sentence minutes in this case, which include defense counsel's statement that she had discussed the immigration consequences of defendant's plea with him and also had written to him a series of letters explaining the immigration consequences; a copy of a Notice to Appear served upon defendant, in which United States Department of Homeland Security charged defendant with being subject to removal from the United States under Immigration and Nationality Act (INA) §212(a)(6)(A)(i), for being an alien present in the United States at any time or place other than as designated by the Attorney General; a copy of Additional Charges of Inadmissiblity/Deportability served upon defendant, in which the United States Department of Homeland Security charged defendant with being subject to removal from the United States under Immigration and Nationality Act (INA) §212(a)(2)(A)(i)(II), for being an alien convicted of Criminal Possession of Marijuana in the Fourth Degree in this case; and the final removal order issued by the Immigration Judge. Relying upon the attorney-client privilege, defendant's attorney declined to provide any information concerning her advice

to defendant in this case.[3]

In addition, this court has reviewed the court file in this matter. On April 28, 2010, this court wrote in the court file that defendant wanted the plea offer of Criminal Possession of Marijuana in the Fourth Degree (PL §221.15), a class A misdemeanor, in exchange for a sentence of three years of probation, but that he would be deported. On May 21, 2010, this court wrote in the court file that defendant had refused the plea offer because of immigration consequences.

To prevail upon a claim that a defendant was deprived of the right to effective assistance of counsel under the United States Constitution, he or she must meet a two-pronged test. First, the "defendant must show that counsel's representation fell below an objective standard of reasonableness[.]" Second, the defendant must show that counsel's deficient performance prejudiced him or her. Strickland v. Washington, 466 U.S. 668, 688 (1984). In the context of a guilty plea, the prejudice prong of the Strickland standard requires that the defendant show that "'there is a reasonable possibility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" People v. McDonald 1 N.Y.3d , 115 (2003), quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Addressing the first prong of Strickland, the Padilla court held that where an attorney fails to advise, or misadvises, a criminal defendant regarding the clear removal consequences

---

[3] Given that defendant has placed the subject matter of his communications privileged in issue in this case, he has waived his attorney-client privilege with regard to the communications. See People v. Edney, 39 NY2d 620 (1976); Connell v. MaCauley, Inc., , 407 F.Supp. 420 (S.D. New York 1976).

of a plea of guilty, his or her representation falls below an objective standard of reasonableness. Padilla v. Kentucky, 130 S.Ct. At 1482-1483, 1486 (2010). Under the second prong, Padilla requires the defendant to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 130 S.Ct. at 1485.

Here, addressing the first prong of Strickland, defendant has failed to establish either that his counsel failed to provide any immigration advice or that she provided misinformation regarding the immigration consequences of his guilty plea. The court initially notes that defendant has misrepresented in his affidavit that he is a permanent resident of the United States. The People have provided contrary documentary evidence from the United States Department of Homeland Security that defendant is, in fact, unlawfully in the United States. Thus, an essential fact upon which defendant's motion is based is not only unsubstantiated, but refuted by documentary proof. See §440.30 (b)&(c); People v. Oliviery-Perez, 248 A.D.2d 645 (2nd Dept. 1998) (defendant's CPL §440.10 motion based upon his unsubstantiated allegations properly denied without hearing).

Further, during defendant's plea allocution, counsel specifically stated that she had discussed the immigration consequences of defendant's plea with him and that she also had written a series of letters to him explaining such consequences. The court then asked defendant whether he still wished to plead guilty and he replied that he did. Defendant neither refuted counsel's statements, nor requested more time to speak with her.

The court file also shows that defense counsel informed defendant that he would be deported if he pleaded guilty to Criminal Possession of Marijuana in the Fourth Degree. Thus, defendant's allegations also are contradicted by the court record. Given the circumstances in this case, no reasonable possibility exists that counsel either failed to advise or misadvised defendant about the immigration consequences of his guilty plea. See C.P.L § 440. 30 [4] [c] [d]; People v. Crenshaw, 34 A.D.3d 1315 (2nd Dept. 2006) (upholding trial court's denial of defendant's CPL 440.10 motion without a hearing).

Moreover, addressing the second, or prejudice, prong of Strickland, although defendant now asserts that he would not have pleaded guilty had he known that his plea would make him deportable, that claim is not credible. Even if defendant had not pleaded guilty in this case, he was, in fact, removable based solely upon his unlawful entry into the United States. See INA §212(a)(6)(A)(i).

Defendant's claim of prejudice also is undermined both by the protracted plea negotiations that ensued in this case and by the favorable disposition that was negotiated by defense counsel. Defendant was indicted for a class D felony offense, for which he could have received a sentence of imprisonment of up to one and one-half years incarceration, followed by one year of postrelease supervision. See PL §§70.702(a)(iii); 70.45(2)(c). Instead, he was fortunate to receive a more lenient offer to plead guilty to a class A misdemeanor and receive thirty days jail.

What clearly prompted defendant's plea was that the United States Department of

Homeland Security placed a detainer on defendant while he was incarcerated on the Queens matter. Given his unlawful immigration status in the United States, defendant was removable regardless of any conviction in this case. He, thus, understandably, chose to resolve the case with as favorable a plea – and as little jail time – as possible. Considering all relevant circumstances, including defendant's circumstances at the time he took the plea, 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. Thus, defendant has failed to convince this court that a "decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 130 S.Ct. at 1485.

In sum, defendant has failed to state a claim of ineffective assistance of counsel based upon a lack of immigration advice or mis-advice. Accordingly, defendant's motion is denied.

This constitutes the decision and order of the court.

Defendant is advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal

or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

ENTER:

SUZANNE MONDO
Justice of the Supreme Court

DATED: October 16, 2012