

People v Perez
2013 NY Slip Op 30451(U)
February 25, 2013
Supreme Court, Kings County
Docket Number: 4103/2011
Judge: Miriam Cyrulnik
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 20

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PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
Indictment No. 4103/2011

DOMINGO PEREZ,

Defendant

-----X

Miriam Cyrulnik, J:

Defendant moves, *pro se*, to vacate his judgment of conviction, pursuant to CPL §440.10(1)(h), alleging that he was denied his constitutional right to effective assistance of counsel due to his attorney's failure to advise him that he could be deported as a result of his conviction. In determining this motion, the court reviewed defendant's Motion to Vacate and the People's Affirmation in Opposition.

On March 26, 2008, defendant pled guilty to Criminal Possession of a Controlled Substance in the Fourth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree, under Indictment Number 572/2008. The agreed upon sentence required defendant to successfully complete a treatment program, after which the felony conviction would be vacated and he would receive a conditional discharge. As part of the allocution of defendant, Justice Joseph McKay specifically advised defendant of the risk of deportation as a result of his plea. Defendant confirmed that he understood the risk and that he wished to proceed with the plea (*see* transcript of plea allocution, dated March 26, 2008, attached to the People's Affirmation in Opposition as Exhibit "1").

Defendant failed to appear for sentencing on Indictment Number 572/2008 and a warrant for his arrest was ordered by Justice McKay on or about March 31, 2009.

On May 14, 2011, defendant was arrested pursuant to the outstanding warrant. Upon arrest,

defendant was found to be in possession of narcotics and was charged therewith under Indictment Number 4103/2011.

On September 14, 2011, defendant pleaded guilty to one count of Attempted Criminal Possession of a Controlled Substance in the Third Degree in full satisfaction of Indictment Number 4103/2011. The agreed upon sentence was 18 months incarceration, with one year of post-release supervision. The People also agreed not to indict defendant for bail jumping and consented to have the one year jail alternative applicable to defendant's 2008 plea run concurrently with the 18 month sentence under the 2011 plea.

Defendant was represented by Michael Cibella, Esq. when he agreed to the above-referenced plea on September 14, 2011. During the plea allocution, Mr. Cibella stated that he had discussed the risk of deportation as a result of the plea with defendant (*see* transcript of plea allocution, dated September 14, 2011, attached to the People's Affirmation in Opposition as Exhibit "2"). This court followed Mr. Cibella's statement with a detailed warning regarding the risk of deportation as a result of the plea. Defendant acknowledged the warning, stating that he understood and that he wished to proceed with the plea (*id.*).¹

On November 9, 2011, defendant, represented by new counsel, Herman Walz, Esq., moved to withdraw the September 14, 2011 plea, arguing that he did not knowingly and intelligently enter into it. Defendant argued that he was under the influence of a central nervous system depressant at the time of his plea and that his previous defense counsel was ineffective in that he failed to advise defendant of the risk of deportation as a result thereof (*see* defendant's Motion to Withdraw Guilty

¹ It should be noted that, during the plea allocution, defendant also unequivocally denied taking any medication or having any medical condition that would have prevented him from understanding what he was doing.

Plea, attached to the People's Affirmation in Opposition as Exhibit "4").

On November 10, 2011, the People relied upon the transcripts of defendant's plea allocutions under Indictment Numbers 572/2008 and 4103/2011 to oppose defendant's motion to withdraw his guilty plea (*see* transcript of defendant's November 10, 2011 sentencing, attached to the People's Affirmation in Opposition as Exhibit "3"). Reading directly from the transcript of defendant's September 14, 2011 plea allocution, this court pointed out that every representation set forth in his motion to withdraw his guilty plea was directly contradicted by his statements during that plea allocution (*id.*).² This court denied defendant's motion to withdraw his plea and sentenced him on Indictment Numbers 572/2008 and 4103/2011, in accordance with the terms of the September 14, 2011 plea (*id.*).³

By the instant motion, dated July 23, 2012, defendant seeks an order vacating his conviction, pursuant to CPL §440.10(1)(h), arguing that he was denied his Constitutional right to effective assistance of counsel in that he was not advised of the immigration consequences when he plead guilty under Indictment Number 4103/2011. Specifically, defendant claims that his defense counsel not only failed to warn him of the risk of deportation as a result of his plea, but that counsel actually advised that he (defendant) should not worry about immigration issues due to the length of time he had resided in the United States. This court is not persuaded by defendant's arguments.

² This court also noted that the pre-sentence reports for both indictments indicated that defendant admitted his guilt to Probation.

³ According to the People, defendant was notified of the commencement of a Removal Proceeding by the Department of Homeland Security in June 2012 and ultimately deported, by order of an Immigration Judge in September 2012 (*see* People's Affirmation in Opposition, Exhibits "5" and "6").

CPL §440.10(3)(b) states, in pertinent part:

(3) Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue.

The issues raised in defendant's instant motion were previously determined by this court on November 10, 2011 (*see* transcript of defendant's November 10, 2011 sentencing, attached to the People's Affirmation in Opposition as Exhibit "3"). By motion, dated November 9, 2011, defendant moved to withdraw his plea, based, among other factors, upon the failure of his counsel to advise him as to the immigration consequences of pleading guilty under Indictment Number 4103/2011 (*see* defendant's Motion to Withdraw Guilty Plea, attached to the People's Affirmation in Opposition as Exhibit "4"). In response to defendant's motion, the People submitted the transcripts of defendant's relevant plea allocutions, which clearly demonstrate that defendant was specifically warned about the immigration issues related to his plea (*see* transcript of defendant's November 10, 2011 sentencing, attached to the People's Affirmation in Opposition as Exhibit "3").

The record clearly indicates that, in a proceeding in a court of this state, this court considered the merits of defendant's motion and denied it. Therefore, pursuant to CPL §440.10(3)(b), defendant's motion to vacate his conviction is denied.

CPL §440.30(4)(c) states, in pertinent part:

(4) Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(c) an allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof.

In the case at bar, defendant's claim that he was not advised of the immigration consequences of pleading guilty are conclusively refuted by the transcripts of his plea allocutions under Indictment Numbers 527/2008 and 4103/2011 (*see* the People's Affirmation in Opposition, Exhibits "1" and "2"). In each case, the record is clear that defendant was made aware of the risk of deportation as a result of his plea and in each case, defendant stated that he understood the risk and wished to proceed with the plea. With respect to Indictment Number 4103/2011, the record indicates that defense counsel, Mr. Cibella, specifically stated that he discussed the immigration issue with defendant (*see* the People's Affirmation in Opposition, Exhibit "2").

In addition to the transcripts of the plea allocutions, which conclusively refute defendant's allegations of fact, the People submit an affirmation from defendant's former counsel, Mr. Cibella, in which he states that he had numerous discussions with defendant concerning his immigration status and the effect of a plea thereupon. Mr. Cibella's affirmation also establishes that, contrary to defendant's unsupported assertions, he engaged the People in plea discussions that were intended to mitigate defendant's deportation risk (*see* Affirmation of Michael Cibella, Esq., attached to the People's Affirmation in Opposition as Exhibit "7").

Defendant's motion is devoid of documentation in support of his allegations of fact. Conversely, the People's Affirmation in Opposition includes unquestionable documentary proof that refutes those allegations. Therefore, pursuant to CPL §440.30(4)(c), no hearing is necessary and defendant's motion to vacate his conviction is denied.

CPL §440.30(4)(d) states, in pertinent part:

(4) Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(d) an allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all other circumstances attending the case, there is no reasonable possibility that such allegation is true.

As pointed out above, the allegations of fact essential to defendant's motion are not only contradicted, but conclusively refuted by the transcripts of defendant's plea allocutions. Additionally, the allegations of fact in question are made solely by defendant and are unsupported by affidavit or evidence. These factors and all other circumstances attending the case lead this court to conclude that there is no reasonable possibility that defendant's allegations are true. Therefore, pursuant to CPL §440.30(4)(d), no hearing is necessary and defendant's motion to vacate his conviction is denied.

As there exist procedural and substantive bars to defendant's motion, pursuant to the above-referenced sections of CPL Article 440, the court need not address the People's arguments regarding defendant's inability to comply with the mandates of the court, due to the fact that he has already been deported.

Accordingly, defendant's motion to vacate his conviction is denied.

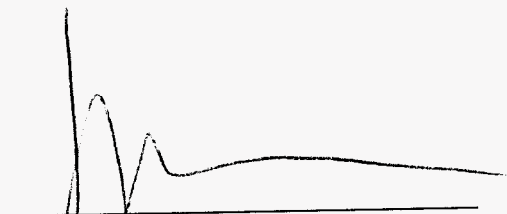
Defendant's right to an appeal from the order determining this motion is not automatic except in the single instance where the motion was made under CPL 440.30 (1)(a) for forensic DNA testing of evidence. For all other motions under article 440, defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after defendant has been served by the District Attorney or the court with the court order denying this motion.

The application must contain defendant's name and address, indictment number, the questions of law or fact which defendant believes ought to be reviewed and a statement that no prior application

for such certificate has been made. Defendant must include a copy of the court order and a copy of any opinion of the court. In addition, defendant must serve a copy of his application on the District Attorney.

This constitutes the decision and order of the Court.

Dated: February 25, 2013



Miriam Cyrulnik, J.S.C.

