

People v Osario

2013 NY Slip Op 30822(U)

March 21, 2013

Supreme Court, Kings County

Docket Number: 8007/2008

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. DiMango

Date: March 21, 2013

-against-

DECISION & ORDER

JUAN OSARIO

Indictment No. 8007/2008

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Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. Defendant contends that defense counsel failed to advise him about the immigration consequences of his guilty plea, in violation of *Padilla v Kentucky*, 559 U.S. 356, (2010). Defendant is a native of El Salvador who has resided with his family in the United States since 1993 and now faces deportation. For the following reasons, the motion is denied.

On August 9, 2008, defendant and Venacio Crespo were arrested after being found in possession of twenty-eight bags of crack-cocaine and \$1,836 in cash. Defendant admitted to the police that he was a drug dealer and that he had taken over selling drugs for his uncle, who had recently been killed.

Defendant and co-defendant were charged under Indictment No. 8007/2008 with one count of criminal possession of a controlled substance in the third degree (PL § 220.16[1]), one count of criminal possession of a controlled substance in the fourth degree (PL § 220.09[1]), and two counts of criminal possession of a controlled substance in the seventh degree (PL § 220.03).

The Plea

On February 20, 2009, defendant, represented by Robert Nicholson, Esq., pleaded guilty to one count of criminal possession of a controlled substance in the seventh degree, in exchange for a promised sentence of a conditional discharge with no imprisonment. The court stated, "the record should reflect that the defendant is already in INS custody. He has been informed by his attorney in the presence of the court and by this court as well that this sentence will result in his deportation. Do you understand that? They will deport you." Defendant answered, "yes."

Immigration History

Defendant originally entered the United States without inspection on February 28, 1993. Defendant claims to have applied for asylum shortly thereafter, based upon his fear of persecution by paramilitary groups in El Salvador. Defendant further claims that, while his asylum application was still pending, he applied for Temporary Protective Status in 2007 on the same grounds. An Order to Show Cause and Notice of Hearing was issued on February 4, 2007, alleging that defendant had entered the United States without inspection. It is not clear from the submissions of either party whether defendant ever appeared pursuant to this Notice.

On October 22, 2008, defendant was arrested and taken into custody by Immigration and Customs Enforcement ("ICE"). He was in custody pursuant to an ICE detainer on the date he pleaded guilty in this case. Defendant was released and later arrested by ICE again on May 7, 2010, when he was charged as inadmissible and deportable under sections 212 and 237 of the Immigration and Nationality Act ("INA").

On February 7, 2012, ICE lodged an additional charge of deportability against defendant

based upon his conviction of seventh-degree criminal possession of a controlled substance. On July 31, 2012, an Immigration Judge returned deportation proceedings to the Board of Immigration Appeals for defendant's appeal from the denial of his request for relief. That appeal is currently pending.

The Instant Motion

Defendant now alleges that his attorney never discussed with him the immigration consequences of any plea or plea offer, and failed to discuss with him the strengths and weaknesses of the People's case. He claims that he did not know that his plea of guilty would result in denial of his TPS application and subsequent mandatory deportation. According to defendant, had he understood this he would not have pleaded guilty.

Defendant disputes the court's statement that he had been informed about immigration consequences by his attorney, as no such colloquy appears on the record. Defendant states that such a warning could not possibly have been given off the record due to the language barrier, as defendant spoke no English and relied on an interpreter who was only available when defendant was in front of the judge. Defendant now asks this court to presume that the judge was mistaken in making this statement.

Legal Analysis

In *Padilla v Kentucky*, the United States Supreme Court extended the reach of the Sixth Amendment right to counsel under *Strickland v Washington*, 466 U.S. 668 (1984), to non-citizen defendants facing criminal charges that carry immigration consequences. The Court held that the

right to effective assistance of counsel requires that a defense attorney properly advise a non-citizen client about the immigration consequences of a guilty plea. Applying the two-prong test under *Strickland*, the court determined that counsel's failure to provide immigration advice was deficient under the first prong. A defendant raising a claim under *Padilla* and *Strickland* must also must show a reasonable probability that, but for counsel's advice, he would not have accepted the guilty plea and instead would have insisted on going to trial (*Hill v Lockhart*, 474 U.S. 52, 59 [1985]; *People v McDonald*, 1 NY3d 109, 115 [2003]). "To obtain relief a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances" (*Padilla* at 1485).

The Supreme Court, however, recently determined that *Padilla* does not have retroactive effect and that "defendants whose convictions became final prior to *Padilla* ...cannot benefit from its holding" (*Chaidez v United States*, __ S.Ct. __, 2013 WL 610201 [2013]). As defendant's conviction became final before *Padilla* was decided in 2010, the requirement that counsel provide immigration advice does not apply to his case. Thus, counsel's conduct cannot be held to be deficient under the first prong of *Strickland*.

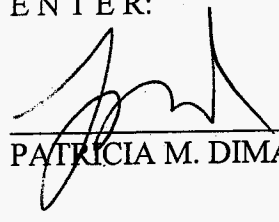
Moreover, defendant was not prejudiced by the alleged deficiency of counsel. The claim that defendant's guilty plea led to the current removal proceedings is unfounded because defendant had previously been found removable on the independent grounds that he had entered the United States without inspection. At the time he entered his guilty plea, ICE had already determined that defendant was deportable and was holding him in immigration custody. Considering these facts, defendant cannot now argue that potential immigration consequences were determinative of his decision to plead guilty (*People v Figueroa*, 170 AD2d 529 [2d Dept

1991] [claim that counsel was ineffective for advice on deportation consequence of guilty plea denied because defendant was already deportable]). Defendant faced deportation for reasons wholly separate from his conviction in the instant case.

Accordingly, the motion is denied.

This decision shall constitute the order of the court.

ENTER:



PATRICIA M. DIMANGO, J.S.C.