

People v Abreu
2013 NY Slip Op 31735(U)
July 17, 2013
Supreme Court, Kings County
Docket Number: 15613/91
Judge: Desmond A. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 38

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

Respondent,

Decision

Against

BY: GREEN, J.

July 17, 2013

JOSE ABREU,

INDICT NO: 15613/91

Defendant.
-----X

Defendant moves for an order to vacate his conviction pursuant to CPL article 440.10 (1) (h) and to modify the matter under 440.10 subdivision (5) (b).

Based on a review of the motion papers, such other papers on file with the Court, the decision and order of the Court on defendant's motion to vacate his conviction and to modify the matter is **summarily denied**.

Defendant's motion filed with the clerk of the court on August 13, 2012 argues ineffective assistance of counsel pursuant to *Padilla v Kentucky*, 130 S Ct 1473 (2010) in that defendant's counsel at plea did not inform him that his plea would subject the defendant to removal by immigration.

However, *Padilla v Kentucky*, is not applicable here as *Padilla* is not retroactive. *Chaidez v United States*, 133 S Ct 1103 (2013); *People v Verdejo*, 967 NYS 2d 729 (App Div 1st Dept 2013)

It is more than twenty years since defendant pled guilty on February 14, 1992 to Penal Law section 220.06 (5) Criminal Possession of a Controlled Substance in the 5th Degree. At sentencing, on March 27, 1992 by Justice Coffinas, the defendant received five years of probation. The plea minutes could not be located by the Court's Office of the Principal Court Reporter. Sentencing minutes were also not provided to this court.

Defendant is facing removal proceedings by Immigration, in part, because the offense he pled guilty to in this matter is considered an Aggravated Felony which made him eligible to be removed from the United States. Defendant argues that the only relief available to him is post conviction relief before this court.

The defendant, a native of the Dominican Republic, born on February 25, 1951, entered the United States as a lawful permanent resident on July 6, 1990. Removal proceedings commenced on June 2, 2010.

However, defendant has two judgments of convictions, where he pled guilty, in Kings County Criminal Court under docket numbers 2004KN069169 on November 21, 2004 and 2007KN011644 on February 13, 2007 and is seeking to vacate those judgments, as well, also on ineffective assistance of counsel grounds that his attorneys in those matters failed to advise him of the immigration consequences of his conviction. Both of the dockets were for violation of Penal

Law section 220.03, Criminal Possession of a Controlled Substance in the 7th Degree, to wit, cocaine and in both instances, defendant was sentenced to time served.¹

FACTS

The underlying facts of this matter, indictment number 15613/1991, for which defendant pled guilty follow:

On December 5, 1991, at about 9:30 am, Police Officer Frank Cupertino observed defendant standing in the doorway of a building at 116 Van Siclen Avenue in Kings County. The Officer saw several people approach the defendant, touch hands with defendant and then walk away. Upon approaching the defendant, Officer Cupertino observed defendant drop a plastic bag to the ground and walk away. When Officer Cupertino recovered the plastic bag from the ground, it had twenty-two glassines of crack cocaine amounting to an aggregate of 1,667 milligrams of crack cocaine inside. After defendant told the Officer, "I was holding it for a friend", Officer Cupertino arrested the defendant.

CONCLUSION OF LAW

Notwithstanding the inapplicability of *Padilla*, in order for defendant to prevail on a claim of ineffective assistance of counsel under the state standard,

¹ A copy of defendant's 3 pg. Notice to Appear from the U.S. Department of Justice, Immigration and Naturalization Service, is attached to defendant's motion papers.

defendant must show that he was denied "meaningful representation". *People v Stultz*, 2 NY 3d 283 (2004).

Defendant does not show that he was denied meaningful representation. He merely makes conclusory statements in his notarized affidavit stating that his attorney told him to "just take a plea and do not worry about it because no jail time." Defendant does not even assert whether his attorney knew that he was not a United States citizen. Even if defendant could fulfill the first prong of this standard, defendant would be hard pressed to show the second prong, that he was prejudiced, since he took a favorable plea with no imprisonment.

Under CPL 440.30 (4) (d), upon considering the merits of the motion, the court may deny it without conducting a hearing if an allegation of fact essential to support the motion is made solely by defendant and is unsupported by any other affidavit or evidence and under the circumstances attending the case, there is no reasonable possibility that such allegation is true.

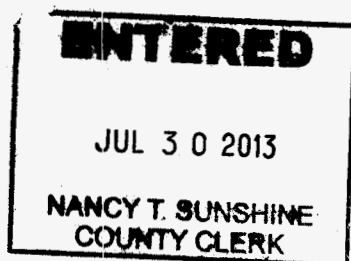
There being no showing by defendant that he was denied "meaningful representation", upon examination of the evidence, the law and the circumstances of this particular case, viewed in totality based on the record before this court, the defendant's attorney is presumed to have rendered effective assistance to his client. *People v Benevento*, 91 NY 2d 708 (1998);

People v Baldi, 54 NY 2d 137 (1981); *Strickland v Washington*, 466 US 668 (1984)

Further, the fact that defendant was convicted by plea in 2004 and 2007 for other drug offenses sharply curtails the ability of defendant to show that he has lived a stable law abiding life enough so for this court to consider whether to grant defendant a modification.

As such, defendant's allegations fail to establish a legal basis for the relief sought and the motion is denied in its entirety.

This shall constitute the Decision, Opinion and Order of the Court.



ENTERED

Hon. Desmond A. Green, J.S.C.

Notice of Right to Appeal for a Certificate Granting Leave to Appeal

Defendant is informed that his right to appeal from this order determining the within 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 your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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