SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 38

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Against

GIDEON PATTERSON,

Defendant.

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Memorandum Decision

GREEN, J.
IND. 9114/1999

August 9, 2013

Defendant moves by way of counsel for an order pursuant to Criminal Procedure Law (CPL) section 440.10(1)(H) to vacate the within conviction and to have his sentence therewith set aside.

Defendant claims ineffective assistance of counsel and that the judgment was obtained in violation of defendant's constitutional right because defendant's counsel did not properly advise defendant of the direct penal consequences of his plea as it related to defendant's immigration status. Defendant cites the recent United States Supreme Court decision of *Jose Padilla v Kentucky,* 130 S. Ct 1473 (2010) in support of his position.

*Padilla v Kentucky*, is not applicable here as *Padilla* is not retroactive. *Chaidez v United States*, 133 S Ct 1103 (2013)

*Chaidez,* standing alone, does not control in this state, however, New York has declined to give *Padilla* retroactive effect. *People v Verdejo*, 967 NYS 2d 729 (App Div 1st Dept 2013); *People v Andrews,* 2013 WL 3814350 (App Div 2nd Dept)

Notwithstanding *Padilla,* regarding his claims of ineffective assistance of counsel, defendant may proceed on applicable federal and state constitutional authority set by *Strickland v Washington,*466 US 668 (1984) and *People v Baldi*, 54 NY 2d 137 (1981)

In the alternative, the People offer that a hearing be held for defendant to prove his allegations by a preponderance of the evidence.

Accordingly, where the People dispute defendant's allegations and the record does not clearly refute his claims, an issue of fact exists that requires resolution in a hearing (see CPL § 440.30[5]).

On April 19, 2000, defendant pled guilty to the indictment charged, Penal Law section 265.02 (4),Criminal Possession of A Weapon in the 3rd Degree and 265.01 (1), Criminal Possession of A Weapon in the 4th Degree.

Defendant was sentenced to five years probation on June 1, 2000.

Defendant makes this motion dated October 27, 2012, twelve years after his guilty plea and sentence in this matter because of the adverse immigration consequences subjecting him to be removed from the United States because of his conviction in this matter.

Based on a review of the motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is summarily DENIED.

Defendant received a notice of removability from the U.S. Department of Homeland Security dated April 1, 2011
Based on the People's reply papers, dated March 19, 2013, an immigration Judge, Alan L. Page granted the defendant's application for cancellation of removal in an order dated February 8, 2013. [1]

As part of its investigation of this matter, on February 26, 2013, the People spoke with defendant's former attorney in this matter, Franklyn Rouse, Esq. Mr. Rouse stated "that his practice in the year 2000 was to inform every undocumented client, including a green card holder, of the immigration consequences of a guilty plea." [2]

Specifically, Mr. Rouse told the ADA in this matter that he recalled the case and he discussed the immigration consequences of the guilty plea with the defendant before the defendant accepted the guilty plea. "Mr. Rouse also stated that the advised defendant that he was likely to have problems with immigration and that the convictions likely would be designated as crimes involving moral turpitude." Attorney Rouse also told the Prosecution "that he never advised defendant that his case would be sealed and that ICE would never know about the convictions if he plead guilty."[3]

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[1] Copy of order of Immigration Judge dated February 8, 2013 is annexed as exhibit D to the People's opposition papers noting that the defendant was released from ICE custody. The form, from the United States Department of Justice Executive Office for Immigration Review, Immigration Court is also marked at the bottom that "proceedings were terminated" and further down, on the left, opposite Judge Page's signature, appears marked "appeal waived" and handwritten in large letters, "Final Order."

[2] People's motion papers dated March 19, 2013 at P. 3 paragraph 10.

[3] People's motion papers dated March 19, 2013 at P. 3-4 contin. paragraph 10.

Defendant claims that his attorney was ineffective in that Mr. Rouse mis-advised defendant of the immigration consequences of pleading guilty.

The People oppose defendant's claims, however the record does not clearly refute defendant's claims.

**Analysis**

To prevail on a claim of ineffective assistance of counsel pursuant to constitutional law, defendant must demonstrate prejudice and that it is more likely than not, that but for his underlying counsel's alleged mis-advice or lack of advice, he would have proceeded to trial rather than plead guilty. *Hill v Lockhart*, 474 US 52, 59 (1985) However, the New York standard in showing prejudice is not as stringent. *People v Stultz*, 2 NY 3d 277, 284 (2004) The United States Supreme Court decision in *Strickland v Washington*, 466 US 668 (1984) sets out the standard for assessing "reasonably effective assistance" and infers a "strong presumption" that the attorney rendered effective assistance.

From the court record, based on the detailed allocution, statements by defendant's counsel as to his advocacy and advice as well as defendant's affirmative responses indicating that he intelligently, knowingly, willingly took the plea in this matter without any threats, force or coercion asserts; there is no legal or factual credible basis supporting defendant arguments and his statement that he was prejudiced because he would not have pled guilty had he known that his admission would have jeopardized his immigration status in the United States.

The court has the discretion to summarily dismiss defendant's motion if it is not substantiated by sworn allegations of fact pursuant to CPL section 440.30 (4) (b). The court also has the authority to grant a hearing requiring defendant to prove by a preponderance of the evidence the truth of his allegations material to the court's determination pursuant to CPL section 440.30 (3), (5).

If allegations of fact essential to support defendant's motion to vacate is in dispute, then the court must conduct a hearing. CPL 440.30 (6)

Here, the facts alleged by defendant in support of his motion is in dispute, however such facts are not "solely within the knowledge or possession of the defendant" as here the facts purported by defendant are not specifically contradicted by the court record.

The United States Supreme Court decision in *Padilla* on March 31, 2010 imposed an obligation on counsel to render specific advice to non-citizen defendants regarding the criminal consequences of deportable offenses pertaining to the defendant's immigration status. The *Padilla* court effectively dispensed with the notion that deportation is a collateral consequence and noted its significant direct

impact on a non citizen defendant faced with criminal conviction as a reason for its decision requiring specific advice by counsel.

Prior to the *Padilla* decision, the courts had not imposed such a direct duty upon defense counsel to advise defendants of the consequences of immigration penalties because it was viewed as collateral.

In his concurring opinion, Justice Alito departs somewhat from the majority, noting that the majority concedes "immigration law can be complex; "it is a legal specialty of its own". He states that in his view "an attorney must 1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney." But the majority held that a criminal defense attorney must provide such advice in cases where the law is "succinct and straightforward".

However, the burden here is on defendant and according to the majority in *Padilla*, defendant must 1) sufficiently allege that his counsel was constitutionally deficient and 2) whether defendant is entitled to relief depends on a showing of prejudice.

*Padilla* also states that in a case where the deportation consequences are unclear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may* carry adverse immigration consequences."

Here, the defendant's former attorney, Mr.Rouse states he advised defendant that defendant was "likely to have problems with immigration".

The changes to the immigration law also involved a change in the statutory language used; the term is now "removal" rather than "deportation". See, *Calcano-Martinez v INS*, 533 U.S.348 (2001)

**CONCLUSION**

Here, defendant has alleged that his counsel's advice may have been constitutionally deficient however, defendant makes no such showing that his counsel's representation fell outside the "wide range of professionally competent assistance" in the first prong of *Strickland* or that he was prejudiced, meeting the second prong of *Strickland*.

The official court record of the sentencing minutes merely shows that defendant's attorney objected to "the Serrano" [4] noting that the plea was being accepted on a limited allocution "for the purpose of what we spoke about, immigration". [5]

The court at sentencing asked defendant whether he wished to say anything before sentence was passed, however defendant declined by his attorney's answer of "no".

In pleading guilty to the indictment, the defendant did not receive any jail time, the defendant received five years of probation. In fact, defendant stated during the plea proceeding, when Judge Douglass asked defendant if he was sure he wanted to plead guilty; defendant stated that he did not want to take the chance of going forward with a jury, essentially because he knew he could face significant jail time. [6]

Defendant has provided insufficient basis for this court to consider his claims as defendant failed to show his attorney provided ineffective assistance of counsel and that he was thereby prejudiced.

Defendant's motion is summarily denied.

This constitutes the decision and order of the Court.

ENTER:

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

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

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[4] In a Serrano-type plea of guilty to a criminal charge, the defendant did not specifically admit the commission of the acts which formed the basis of the crime charged. See, *People v Serrano*, 15 NY 2d 304 (Ct of App 1965); *Almeyda v Zambito*, 171 AD 2d 633 (App Div 2nd Dept 1991)

[5] Sentencing minutes dated June 1, 2000, before Hon. Lewis L. Douglass, at Pg 2 L 25 to Pg 3 L 1-3.

[6] Plea minutes dated April 19, 2000, before Hon. Lewis L. Douglass at Pg 3 L 4-25.

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.

Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201