

People v Finch

2013 NY Slip Op 32205(U)

August 6, 2013

Supreme Court, Kings County

Docket Number: 13519/1996

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

Date: August 6, 2013

-against-

DECISION & ORDER

KEITH FINCH

Indictment No. 13519/1996

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Defendant moves for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the ground that his attorney failed to advise him of the immigration consequences of his guilty plea. For the reasons stated below, the motion is denied.

On October 15, 1996, defendant was arrested for the possession of several bags of marijuana. He was charged by criminal court Information No. 13519/1996 with criminal possession of marijuana in the fourth degree (PL § 221.15). On October 30, 1996, represented by counsel Anita Turner, Esq., defendant pleaded guilty to the charged offense in exchange for a promised sentence of three years probation with no incarceration.

The court has reviewed the plea minutes of October 30, 1996, which reveal that the defendant, under oath, stated that he had discussed the plea with his attorney, that he had enough time to consult with his attorney and that he was satisfied with the legal services she had provided. The court asked defendant, "...where were you born, in this country or elsewhere?" Defendant replied, "Yonkers." The court then stated, "That's this country. Okay." Defendant stated that he was entering into the plea voluntarily and that he was pleading guilty because he was in fact guilty. Defendant admitted to the acts charged, which made him guilty of the crime

to which he was pleading guilty. The court advised him of each of the rights he was waiving and ascertained that he understood each and every one. Defendant also affirmed that he understood all the questions asked of him.

The court imposed the promised sentence of three years probation on December 16, 1996. Defendant did not appeal from the judgment of conviction.

According to defendant's affirmation in support of the instant motion, defendant was born in Jamaica and entered the United States in 1992. He now alleges that counsel failed to inquire of his immigration status and never advised him that pleading guilty would subject him to adverse immigration consequences, as required by *Padilla v Kentucky*, 130 S. Ct. 1473 (2010). He further claims that he never had an opportunity to discuss the plea offer at length with counsel and that she never told him the strengths and weaknesses of the case. As a result of his conviction, defendant is now unable to apply for a green card based upon his marriage to an American citizen. He has appended an affidavit from Ms. Turner, who states that although she does not recall the details of defendant's case, it was always her practice to inquire about the immigration status of all her clients and to inform them of the potential immigration consequences of any guilty plea.

According to the People, who have corresponded with Immigration and Customs Enforcement ("ICE") about defendant's immigration status, defendant is not currently in removal proceedings.

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 such 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 duty of counsel to provide immigration advice does not apply to his case. Thus, counsel's alleged conduct cannot be held to be deficient under *Strickland*.

Moreover, where he falsely represented to the court under oath that he was an American citizen, defendant cannot now credibly claim that his attorney was ineffective for relying upon his own false statements. Defendant does not allege in his moving papers that he ever actually informed his attorney that he was not a citizen. His accusations against counsel necessarily assume that counsel knew of his immigration status and nevertheless neglected to provide immigration advice. There is no evidence that counsel was aware that defendant was a noncitizen or that she should have been aware (*see People v Carty*, 96 AD3d 1093, 1095-6 [3d


Dept 2012] [counsel not ineffective where defendant professed to be a United States citizen]).
Indeed, counsel made no interjection during the plea to indicate that she believed defendant's
statement to be untrue. Under these circumstances, defendant has failed to allege a ground
constituting a legal basis for his motion (CPL § 440.30[4][a]).

Finally, defendant has not established prejudice because he is not facing deportation as a
result of his conviction. Rather, he alleges that he is ineligible to apply for lawful permanent
resident status. Even if *Padilla* were applicable to defendant's claim, there is no reference in
Padilla to potential bars to naturalization based upon guilty pleas nor any indication that the
Supreme Court viewed such potential bars on par with deportation. Defendant's future inability
to apply for a green card, while unfortunate, is not within the realm of consequences
contemplated by the Court in *Padilla*. Accordingly, this court finds that the potential ineligibility
for a green card does not fulfill the prejudice requirement of *Padilla* (see e.g. *People v DeLacruz*,
2011 WL 7403312 [Sup. Ct., Kings County 2011] [the possibility of immigration consequences
is insufficient to satisfy the second prong *Strickland*]; *People v Coles*, 2011 WL 1991980 [Sup.
Ct., Kings County 2011] [no prejudice where defendant was no longer facing deportation]).

Accordingly, the motion is denied.

This decision shall constitute the order of the court.

ENTERED
SEP 18 2013
NANCY T. SUNSHINE
COUNTY CLERK

ENTER:

CAROLYN E. DEMAREST, J.S.C.

You are advised that your right to an appeal from the order determining your 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, you 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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