

**People v Johnson**

2013 NY Slip Op 32562(U)

October 4, 2013

Sup Ct, Kings County

Docket Number: 4886/2011

Judge: Ruth E. Shillingford

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 27

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Ruth Shillingford  
Date: October 4, 2013

DECISION AND ORDER  
INDICTMENT NO.: 4886/2011

-against-

FLOYD JOHNSON,

Defendant.

-----X  
Ruth Shillingford, J.:

By *Pro Se* motion, defendant, an inmate at the Hudson County Correctional Center, moves pursuant to CPL § 440.10(1)(h) to vacate his judgment of conviction, entered on or about September 11, 2012, convicting him, upon his plea of guilty, to Criminal Possession of Stolen Property in the Fifth Degree (PL § 165.40), and sentencing him to three hundred sixty-four days incarceration with two full orders of protection. For the reasons that follow, this Court denies defendant's motion.

STATEMENT OF FACTS

This case arises out of allegations that on or about June 8, 2011, co-defendants Paul Gaity and Mark Matthews entered two residential buildings located in Kings County and removed property without permission or authority. These co-defendants were observed entering a vehicle that defendant Johnson was driving. Defendant and co-defendants were apprehended while still in the vehicle with the purported stolen property.

On September 11, 2012, defendant pled guilty before this Court to Criminal Possession of Stolen Property in the Fifth Degree, a class A misdemeanor. Prior to its acceptance of the plea

offer, the Court inquired as to why a misdemeanor offer was being extended to this defendant on this indictment containing multiple felonies. At that time, and in the presence of defendant and his attorney, the People stated, “[t]his is defendant’s first arrest. This defendant was the getaway driver and did not go inside either location, **and we are taking into consideration his immigration status as well**” (P: 2) (emphasis added).<sup>1</sup>

The transcript further reflects the following colloquy:

Mr. Farrell: Judge, after speaking to Mr. Johnson at length he’s authorized me to enter a plea on his behalf to Count 23, criminal possession of stolen property in the fifth degree, Class A misdemeanor in full satisfaction of all the charges against him...As previously mentioned we’re asking you pursuant to CPL 390 to waive a pre-sentence report here because of Mr. Johnson’s immigration status. He has a detainer. He won’t be released today. He will be transferred to an immigration center where his immigration lawyer will advocate on his behalf. So for all those reasons we are asking you to consider waiving INS in this case. The People indicated they do not oppose that application.

The Court: Is that correct, People?

Ms. Cardinale: Yes.

(P: 3).

After being sworn in by the Clerk of the Court, the colloquy continued as pertinent:

The Court: Mr. Johnson, your attorney has said that you wish to enter a plea of guilty to the 23<sup>rd</sup> Count of the indictment, that being criminal possession of stolen property in the fifth degree pursuant to Penal Law Section 165.40 which is a Class A misdemeanor, is that what you wish to do?

The Defendant: Yes.

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<sup>1</sup>Page numbers preceded by “P” refer to the transcript of the plea and sentence proceedings dated September 11, 2012.

The Court: Have you had a chance to speak to your lawyer about the case?

The Defendant: Yes.

The Court: Are you satisfied by his representation?

The Defendant: Yes.

The Court: Counsel, have you discussed any immigration issues with him?

Mr. Farrell: Yes, Judge. At length. I know it's your duty to inquire as to Mr. Johnson. He's not a United States citizen and I certainly have discussed this case with his immigration attorney, Mr. Albert Hayes (ph), and because – and I certainly appreciate the People taking that into consideration because of the way we structured the plea, it is our belief this conviction in and of itself will not cause Mr. Johnson to be deported. That's our belief based on research I've done and conversations I've had.

The Court: To the extent if it does turn out that it's the basis for his deportation does he understand that he will not be able to withdraw the plea nonetheless?

Mr. Farrell: Yes, I believe he does but give me a quick moment and I'll make sure.

(Conferring.)

Mr. Farrell: I believe he does understand, Your Honor.

The Court: You understand what I just said?

The Defendant: Yes.

The Court: You understand even if it becomes a basis you will not be able to withdraw this plea, do you understand that?

The Defendant: Yes.

The Court: Is anyone forcing you to enter this plea?

The Defendant: No.

(P: 4-5).

### DISCUSSION

Defendant now moves to vacate the judgment of conviction on the grounds that his counsel was ineffective. Specifically, defendant argues that his “overriding concern was to remain in the United States, and hence, he would not have agreed to take his guilty plea if he had understood that deportation was a consequence that would flow from it...[and that] [i]t therefore

follows that defense counsel, not only failed to provide relevant pertinent advice to the Defendant, but the Counsel, moreover, failed to investigate the exact immigration consequences faced by defendant. In addition, Counsel failed to negotiate a plea bargain that would have eliminated any adverse immigration consequences for the defendant” (Defendant’s Motion ¶ 40).

The People urge this court to deny defendant’s motion in its entirety pursuant to CPL §§ 440.30(4)(d)(I) and (ii), “because defendant’s claims are belied by the record, and, under the circumstances, there is no reasonable possibility that the allegations that defendant makes are true” (People’s Memorandum at 1). Furthermore, they contend that defendant’s motion should be denied pursuant to CPL § 440.30(4)(a), because “both the court and defendant’s attorney did warn defendant about the immigration consequences of his guilty plea” (*id.*). Finally, the People argue that defendant is being deported, not as a result of this plea, but as a result of his entering the United States without having been properly admitted (*see* People’s Exhibit 1). This Court agrees.

Preliminarily, defendant’s motion is denied without a hearing. CPL §§ 440.30(4)(a) and (d)(i-ii) provide, respectively, that:

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

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

xxx

(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 the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

(*id.*).

As the aforementioned plea minutes demonstrate, defendant's immigration issues permeated the entire colloquy amongst the Court and the parties. Thus, his motion is denied pursuant to CPL §§ 440.30(4)(b) and (d)(i), where, as here, his claims are completely refuted by the record and his motion contains nothing more than self-serving allegations. The record likewise demonstrates that defendant was provided with the effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel under the federal standard, “[a] defendant must show that counsel’s representation fell below an objective standard of reasonableness” and “any deficiencies in counsel’s performance must be prejudicial”

(*Strickland v. Washington*, 466 US 668, 688, 692 [1984]). Prejudice is found where “there is a reasonable possibility that but for counsel’s unprofessional errors the result of the proceeding would have been different” (*id.*, quoting *Strickland v. Washington*, 466 US 668, 694 [1984]).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when “the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation” (*People v. Flores*, 84 NY2d 184, 187 [1994]; *People v. Baldi*, 54 NY2d 137, 147 [1981]). Thus, “to prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation...[and] will be sustained only when it is shown that counsel partook ‘an inexplicable prejudicial course’”

(*People v. Benevento*, 91 NY2d 708, 713 [1998]) (internal citations omitted).

In direct contradiction to defendant's contentions, the record reflects substantive dialogue regarding defendant's immigration issues. His plea was specifically structured, in a joint effort by his attorney and the People, in a direct attempt to benefit him, by considering his immigration issues. This is evidenced by the fact that he not only received a misdemeanor plea, but was sentenced to 364 days of incarceration instead of a full year. Additionally, defendant was advised by both his attorney and the court, that in the event that there was an immigration consequence that stemmed from his plea, he would not be able to withdraw it. At no time during his plea allocution did defendant indicate that he did not understand the proceedings, nor did he contradict the statements by his attorney that the latter had consulted with defendant's immigration counsel regarding this specific case. Defendant also affirmatively responded that he was satisfied with his counsel's representation.

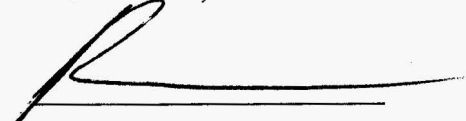
The Court further notes that defendant has neither submitted a sworn affidavit from his former attorney, nor contradicted the People's contentions that the basis for his deportation was his arrival into the United States without having been properly admitted. Accordingly, defendant's "allegations [fail] to raise an issue of fact as to whether an incentive to remain in the United States would have made it rational to reject the plea offer" when he potentially faced significantly higher years of incarceration if he proceeded to trial (*People v. Soodoo*, 2013 WL 5340765 [2<sup>nd</sup> Dept. 2013]). Accordingly, his motion is denied.

CONCLUSION

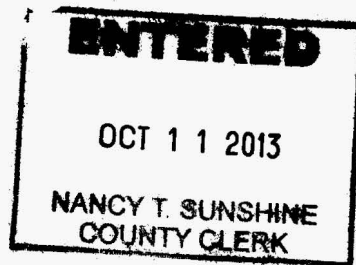
Based upon the foregoing reasons, the Court denies defendant's motion and his request for a hearing.

This Decision shall constitute the Order of the court.

E N T E R,

  
Ruth Shillingford, A.J.S.C.

The defendant is hereby advised pursuant to 22 NYCRR §671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.<sup>2</sup>



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<sup>2</sup> 22 NYCRR § 671.5 .