

**People v Hernandez**

2013 NY Slip Op 32965(U)

November 19, 2013

Sup Ct, Kings County

Docket Number: 02028/90

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of October, 2013<sup>1</sup>

HONORABLE FRANCOIS A. RIVERA

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THE PEOPLE OF THE STATE OF NEW YORK,

**DECISION & ORDER**

Plaintiff,

Indictment No. 02028/90

- against -

PATRICIO HERNANDEZ,

Defendant.

-----X

Recitation in accordance with CPLR 2219(a) of the papers considered on petitioners notice of motion, filed on July 30, 2013, pursuant to CPL 440.10(1)(h)&(5)(b), for an order vacating a judgment or in the alternative modifying his conviction:

- Notice of Motion
- Affidavit in support
- Exhibits - 1

**BACKGROUND**

On May 17, 1994, the defendant Patricio Hernandez (hereinafter Hernandez) was convicted of the attempted criminal sale of a controlled substance in the third degree in violation of Penal Law 110-220.39. Hernandez was sentenced to one day imprisonment

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<sup>1</sup> The instant decision and order was sent to the defendant on October 2, 2013.

and five years probation. The instant motion is unopposed.

## LAW AND APPLICATION

CPL 440.10 (1) (h) provides that “at any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.”

Hernandez asserts that the judgment should be vacated on the ground that he was denied his right under the Sixth Amendment to the effective assistance of counsel because he was unaware of the immigration consequences of his plea of guilty. In support of his motion, the defendant submitted an affidavit with seven averments. The only averment in which he mentions the guilty plea is the sixth. However even in the sixth there is no mention as to the assertions, or lack thereof, of his attorney or any other circumstances surrounding the plea.

The Sixth Amendment to the United States Constitution secures a criminal defendant's right to counsel, which is essential to protect the fundamental right to a fair trial (*People v Picca*, 97 AD3d 170 [2nd Dept 2012] citing *Strickland v Washington*, 466 US 668, 684 [1984]). “That a person who happens to be a lawyer is present . . . alongside the accused, however, is not enough to satisfy the constitutional command. Rather, the right to counsel is understood as the right to the effective assistance of counsel. A defendant is entitled to such effective assistance of competent counsel “[b]efore deciding

whether to plead guilty” (*People v Picca*, 97 AD3d 170 [2nd Dept 2012] citing *Padilla v Kentucky*, 559 US 356 [2010]). “Indeed, the effective assistance of counsel is imperative in the prepleading stage because the decision to plead guilty, and thereby forfeit many of the rights guaranteed by the United States and New York Constitutions, ‘is ordinarily the most important single decision in any criminal case’” (*People v Picca*, 97 AD3d 170 [2nd Dept 2012] citing *Chin and Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L Rev 697, 698 n 1, quoting Anthony G. Amsterdam, *Trial Manual of the Defense of Criminal Cases* § 201 [4th Ed 1984]; see *Missouri v Frye*, 132 S Ct 1399, 1407-1408 [2012]).

In order to prevail on a claim that, prior to deciding whether to plead guilty, a defendant that was deprived of the right to the effective assistance of counsel under the United States Constitution, must meet a two-part standard (*People v Picca*, 97 AD3d 170 [2nd Dept 2012][internal citations and quotations omitted]). Under the first prong of that standard, the “defendant must show that counsel’s representation fell below an objective standard of reasonableness.” (*Id.*) The second prong “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process” (*Id.*).

It is established that where an attorney fails to advise a criminal defendant, or misadvises the defendant, regarding clear removal consequences of a plea of guilty, his or her representation falls below an objective standard of reasonableness (*People v Picca*, 97 AD3d 170 [2nd Dept 2012] citing *Padilla v Kentucky*, 559 US 356 [2010]; *People v*

*Marino-Affaitati*, 88 AD3d 742, 743 [2nd Dept 2011]). Therefore, if the defendant establishes that the attorney failed to advise him of the immigration status then the first prong of ineffective counsel has been satisfied.

To satisfy the second prong,, also known as the “prejudice prong,” the defendant must show that “there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial ” *People v Picca*, 97 AD3d 170 [2nd Dept 2012] [internal citations omitted]. The defendant “must convince the court that a decision to reject the plea bargain would have been rational under the circumstances” (*Id. citing Padilla v Kentucky*, 559 US 356 [2010]).

In the instant matter, the defendant has offered no information as to the specific acts of the attorney, or circumstances surrounding his taking of the plea. In fact, he does not even allege that the attorney specifically failed to notify him of the adverse immigration effects of a guilty plea. Therefore, the first prong remains unsatisfied.

Even if the Court could infer, by the one sentence quoted herein, that the attorney failed to inform Hernandez, the defendant also does not satisfy the second “prejudice prong.” Hernandez has failed to include any information as to what, if any, specific effect the guilty plea had on his immigration status.

Hernandez also moves under CPL 440(5)(b), which provides:

Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable

to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either: (b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

Clearly, CPL 440.10 (5) (b) is conditioned upon granting of the motion based on grounds found in CPL 440.10 (g), specifically new evidence. As the movant has failed to offer any new evidence, that section is inapplicable to the instant matter.

Accordingly, the motion is denied without prejudice.

The foregoing constitutes the decision and order of this Court.

Enter:

*Francois A. Rivera*  
J.S.C.

**ENTERED**  
NOV 19 2013  
NANCY T. SUNSHINE  
COUNTY CLERK

**HON. FRANCOIS A. RIVERA**  
**J.S.C.**