

People v Lionel
2013 NY Slip Op 33486(U)
December 3, 2013
Supreme Court, Kings County
Docket Number: 1974/2012
Judge: Mark R. Dwyer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 26

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
INDICTMENT NO. 1974/2012

RICKLEY LIONEL,

DEFENDANT.

-----X
MARK DWYER, J.:

Defendant was charged under Indictment No. 1974/2013 with Conspiracy in the Fourth Degree (P.L. §105.11[1]), Criminal Sale of a Controlled Substance in the Third Degree (P.L. §220.39[1]), Criminal Possession of a Controlled Substance in the Third Degree (P.L. §220.16[1]), and two lesser offenses. These charges arose from an undercover buy operation on July 15, 2011, wherein defendant was alleged to have given an undercover officer three bags of crack cocaine in exchange for 100 dollars of pre-recorded buy money. On August 7, 2013, defendant entered a plea of guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (P.L. §220.03). On September 5, 2012, defendant was sentenced to a one-year term of incarceration. Defendant did not appeal his conviction.

Defendant now moves pursuant to CPL 440.10(1)(h) to vacate his judgment on the grounds that he was not properly advised of the potential immigration consequences of his plea and was denied effective assistance of counsel.

I.

Defendant relies on Padilla v. Kentucky, 130 S. Ct. 1473 (2010), to support his claim that he received ineffective assistance of counsel with respect to his conviction under Indictment Number 1974/2012. Padilla imposed an affirmative duty on defense counsel to provide accurate advice to non-citizen clients concerning the potential

immigration consequences of a conviction. Defendant claims he relied on the advice of his defense attorney, who represented to him that pleading guilty to Criminal Possession of a Controlled Substance in the Seventh Degree would not jeopardize his immigration status. Defendant alleges he did not learn that he was still subject to mandatory deportation until after his sentencing. Defendant also argues that his conviction should be vacated because he was not advised by the court of the immigration consequences of his guilty plea.

The People argue in opposition that defendant failed to establish that his attorney gave him incorrect advice regarding the immigration consequences of his plea. First, the People rely on the transcript of defendant's plea allocution, during which the court asked defendant if he was a citizen and he replied "No, your Honor." The court then asked defendant "Have you discussed with Ms. Camhi the ramifications of your plea today on your current status in this country?" to which defendant replied "Yes, your Honor." The court then asked defendant's attorney "Is that correct, Ms. Camhi?", to which she replied "Yes. And just for the record, Mr. Lionel is represented by separate counsel regarding his immigration issues. Her name is Laura Leibfried. I have had extensive conversations with her, as well as Mr. Lionel, regarding how this could potentially affect his immigration status." The People also rely on phone conversations prosecutors had with defendant's attorney, Ms. Camhi, during which she stated that she advised defendant that a guilty plea could affect his immigration status. Finally, the People rely on phone conversations prosecutors had with defendant's immigration attorney, Ms. Leibfried, who corroborated Ms. Camhi's statements. Ms. Leibfried stated that both she and Ms. Camhi met defendant at the jail on Rikers Island and discussed the immigration consequences of a plea bargain with defendant. Ms. Leibfried further opined that it was her opinion defendant understood that pleading guilty to a misdemeanor could affect his immigration status.

The People also argue that, even if defendant had not been apprised of the immigration consequences of his guilty plea, he cannot show that he was prejudiced by

defense counsel's representation and therefore is not entitled to relief. Finally, the People argue that defendant's claim that the court failed to advise defendant that his guilty plea could result in deportation is mandatorily barred from collateral review.

The court agrees with the People's arguments.

II.

Defendant argues that his attorney was ineffective because she incorrectly advised him that there would be no immigration consequences after a guilty plea. In order to establish an ineffective assistance of counsel claim, a defendant must satisfy the two-pronged test set forth in Strickland v. Washington, 466 U.S. 688, 6790 (1984). First, the defendant must show that "counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show that counsel's "deficient performance prejudiced the defendant." Id. at 688-692. Under New York law, a defendant need not "fully satisfy the prejudice test of Strickland." (People v. Caban, 5 NY3d 143, 155 [2005]). Instead, the court focuses on "the fairness of the process as a whole rather than its particular impact on the outcome of the case." (People v. Caban, 5 NY3d 143, 155 [2005]).

Defendant's ineffective assistance argument fails under CPL 440.30 (4)(d)(i). CPL 440.30(4)(d)(i) provides that, upon considering the merits of a motion, the court may deny it without conducting a hearing if an allegation of fact essential to support the motion is made solely by the defendant and is unsupported by any other affidavit or evidence. In this case, defendant's allegation that his attorney failed to advise him of the immigration consequences of a plea are supported only by the defendant's own affidavit. Furthermore, defendant's argument is directly contradicted by the minutes of the plea proceeding, during which the court asked defendant "Have you discussed with Ms. Camhi the ramifications of your plea today on your current status in this country," to which the defendant answered "Yes, your honor." The court then asked "Is that correct, Ms. Camhi?" to which she responded "Yes. And just for the record, Mr. Lionel is represented by

separate counsel regarding his immigration issues. Her name is Laura Liebfried. I have had extensive conversations with her, as well as Mr. Lionel, regarding how this could potentially affect his immigration status.” The plea minutes are further corroborated by the prosecution’s phone conversations with defendant’s lawyers, Ms. Camhi and Ms. Leibfried. During these phone conversations, both attorneys expressly stated they had warned defendant that pleading guilty to a misdemeanor could affect his immigration status. Thus, defendant’s allegation that counsel failed to advise him that his plea could result in deportation is made solely by defendant, and is unsupported by any other affidavit or evidence.

Due to the above, defendant’s motion to vacate his judgment due to counsel’s failure to inform him about immigration consequences is denied.

III.

Even had defendant supported his argument with other affidavits or evidence, his claim of ineffective assistance of counsel would be denied. Courts have held that “in the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel.” People v. Ford, 86 NY2d 397, 404 (1995). In this case, defendant pled guilty to only the misdemeanor of Criminal Possession of a Controlled Substance in the Seventh Degree, and received a sentence of one year imprisonment. Had defendant gone to trial and been convicted of the top count of the indictment (Criminal Sale of a Controlled Substance in the Third Degree), he faced up to nine years of imprisonment. Because defendant received so advantageous a plea, defendant was afforded meaningful representation.

Moreover, defendant was not prejudiced because defendant was already deportable prior to the plea. Unlike in Padilla v. Kentucky, where the defendant was a lawful permanent resident who became deportable only as a consequence of his guilty plea, defendant in this case was deportable prior to the plea based upon charges that defendant

had overstayed his temporary visa *See* People v. Figueroa, 170 A.D.2d 539 (2d Dep't 1991).

IV.

Finally, defendant claims the court failed to advise defendant that a guilty plea might result in his deportation. However, defendant's claim is barred from collateral review because defendant failed to raise this issue on direct appeal, and indeed failed to appeal at all. In People v. Cuadrado, 9 N.Y.3d 365 (2007), the court found a defendant's motion to vacate was barred under C.P.L. §440.10, where defendant "omitted an issue that he could have raised on appeal, and then raised the same issue in a C.P.L. article 440 motion." Defendant's failure to raise this issue on appeal bars review.

In any event, in the recent case People v. Peque, the New York Court of Appeals held that "due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony". People v. Peque, NY Slip Op 07561. However, the Court of Appeals required that defendants be apprised of immigration consequences only in felony cases, for only in such cases is deportation a near certainty. Because this is a misdemeanor case, defendant had no such right to have the court inquire into exactly what defendant knew regarding his immigration status as a result of the plea. Furthermore, the questions the court asked during the plea proceeding, including asking defendant and his attorney whether they had discussed the ramifications of his plea on his current status in this country, were more than enough to satisfy due process requirements for a misdemeanor plea.

For the above reasons, defendant's motion to vacate his conviction under Indictment Number 1974/2012 is denied without a hearing.

This constitutes the decision and order of the court.

ENTER:

MDwyer

MARK DWYER
Justice of the Supreme Court

DATED: December 3, 2013

