

People v Cordero
2013 NY Slip Op 33876(U)
December 6, 2013
Supreme Court, Bronx County
Docket Number: 3443-08
Judge: John W. Carter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX H98

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Francisco Melo Cordero

Defendant.
-----X

Carter, J.

FILED

MAR 28 2014

SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

DECISION & ORDER

Ind# ~~433-2008~~

3443-08

Defendant Francisco Melo Cordero has filed a motion pursuant to Criminal Procedure Law, C.P.L. § 440.10 (1) (h), to vacate his conviction. On October 1, 2008, defendant pled guilty to Penal Law [hereinafter P.L.] § 120.05, Assault in the Second Degree and was sentenced to sixty days jail to be followed by five years probation. He waived his right to appeal and a permanent order of protection was issued for the complaining witness. Specifically, Defendant contends that his attorney was ineffective in that he misinformed him of the potential immigration consequences of his plea. Presently there are no deportation proceedings lodged against the defendant.

The People have responded to the defendant's motion and oppose it. This Court has examined the defendant's moving papers, the People's response, defendant's reply and the Court file in this case, and hereby makes the following determinations:

On September 28, 2008, the defendant was charged on a felony complaint with one count of Attempted Murder in the Second Degree [PL 110/125.25], one count of Assault in the First Degree [PL 120.10 (1)], two counts of Assault in the Second Degree [PL 120.05 (1), (2)] and other related charges for an incident involving his then intimate partner. On October 1, 2008, defendant subsequently plead guilty on SCI 3433/2088 to Assault in the Second Degree and was sentenced on October 31, 2008 to the above sentence.

Discussion

Defendant has filed the instant motion, five years after his sentence, claiming that his attorney incorrectly informed him that he could avoid deportation if he plead guilty whereas he would most certainly face deportation were he to be convicted after trial.(defendant's aff't P3) At the time of his plea, 8 USC 1227 (a) (2)(E)(i) provided for the expulsion of aliens convicted of domestic violence crimes. Defendant's actions qualified as a domestic violence crime under the relevant New York statute making him subject to possible deportation. Defendant argues that in the wake of Padilla, an attorney does not provide "effective assistance" or "meaningful representation" unless that attorney advised his client on the correct immigration consequences of his plea. (Defendant's affirmation in reply p4) Defendant contends that his attorney did not do so here and alleges that if he had known about the those consequences he would not have pled guilty to this charge and would have gone to trial.

The People in response contend Defendant's claim's are meritless, unsubstantiated, and that his motion should therefore be denied pursuant to C.P.L. §§ 440.10 (2)(c), 440.30 (4)(b) and (d).

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (Strickland v Washington, 466 US 668 (1984); US Const., 6th Amend.; NY Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant. (Hill v Lockhart, 474 US 52 (1985)) In the context of a plea, the prejudice prong asks whether "counsel's constitutionally defective performance affected the outcome of the plea process".(Id at 59-59)

In New York, in order to defeat a claim of ineffective assistance of counsel, it must be demonstrated that the attorney provided meaningful representation. (People v Stultz, 2 NY3d 277(2004) The standard of effective assistance will have been met "so long as the evidence, the law and the circumstances of a particular case viewed in totality as of the time of the representation reveal the

attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137 (1981) Thus, in the context of a plea there must first be an initial showing of prejudice, that had it not been for counsel's advice, the Defendant would have proceeded to trial and ultimately could have obtained a beneficial outcome. (McDonald at 109)

Defendant contends that his previous attorney's representation fell below both the federal and state standards and that in the wake of Padilla, it is required that his conviction be vacated¹. In *Padilla v Kentucky*, 559 US 356 (2010), the Supreme Court ruled that criminal defense attorneys have to advise defendants of "truly clear" immigration consequences of their pleas. The "new rule" in *Padilla* is not to be given retroactive effect. (*Chaidez v United States* 133 S. Ct. 1103 (2013)); *People v Verdejo*, 109 AD3d 138 (1st Dept 2013) Consequently, *Padilla* does not apply to collateral challenges to convictions, that like in the instant case, that became final prior to the *Padilla* decision. (*Chaidez v United States* 133 S. Ct. 1103 (2013); *People v Marcoll*, 40 Misc 3d 141(A) (1st Dept 2013)

Prior to *Padilla*, the immigration consequences of plea were considered collateral and absent misadvice, the failure to advise a defendant of those immigration consequences neither rendered counsel's performance deficient or rendered the plea involuntary. (*People v McDonald* at 114-115)

Defendant's most salient argument is that counsel gave him misadvice in light of the new law enacted approximately nine weeks prior to his plea. Relying on *Padilla* and *People v Picca*, 97 Ad3d 170 (2d Dept 2012)² defendant requests at minimum a hearing to determine counsel's ineffectiveness.

¹ Defendant does not explicitly argue that *Padilla* should be given retroactive application but argues throughout his motion that given the ruling in *Padilla*, counsel's erroneous advise regarding his deportation consequences was essentially per se ineffective.

² Defendant relies on *Picca* for the premise that immigration consequences were of utmost concern to him and that the reviewing court must determine whether the decision to plea guilty was a "rational" one. The Second Department found that *Picca* may have been prejudiced based on his counsel's failure to advise him regarding the immigration consequences of his plea. As this court has already noted, subsequent to *Picca*, the Supreme Court decided that *Chaidez v United States* (supra) in which the court foreclosed the *Padilla* analysis to those convictions that became final prior to it's decision in 2010. Thus the *Picca* analysis does not apply in this context.

Nevertheless, Padilla, does not diminish the Strickland, requirements. The burden remains with the defendant to establish, that, 1) his counsel's representation was inferior to an objective standard of reasonableness, and 2) the defendant must still show prejudice, i.e. that if not for counsel's unreasonably ineffective representation, he would not have pled guilty, but would have insisted on going to trial. See, *People v McDonald*, 1 NY3d 109 (2003); *Hill v Lockhart*, 474 U.S. 52, 56, 88 L. Ed. 2d 674, 106 S. Ct. 366 [1985].

Defendant has failed to meet both the Strickland and the Baldi tests for ineffective representation.

Defendant's moving papers fail to establish that counsel was deficient under the first prong of Strickland or failed to provide meaningful representation under Baldi.

Defendant was represented by competent counsel and received a favorable sentence. At the time of the plea, the defendant was facing the charges of Attempted Murder in the Second Degree, Assault in the First Degree, Assault in the Second Degree and related charges. If convicted after trial of either of the top two charges, he could have received a sentence between five and twenty-five years incarceration. If convicted of Assault in the Second Degree, defendant faced a possible sentence of up to seven years in prison. The plea negotiated by counsel, 60 days in jail with five years probation, was one that permitted him to be released after serving less than two months in jail with the remainder of his sentence under the supervision of the Department of Probation. Given the defendant's limited exposure to incarceration if he plead guilty, it is unlikely that his decision would have been different on the slim chance of being able to avoid deportation by virtue of an acquittal. Where "a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation" (*People v McClure*, 236 AD2d 633, *lv denied*, 89 N.Y.2d 1097)

His claim also contradicts the report filed by the Department of Probation at the time, wherein the defendant admitted his guilt. The defendant's claim must be supported by objective facts and a bare claim that the defendant would have insisted on proceeding to trial is insufficient. (*People v*

McKenzie, 4 AD3d 437 (2d Dept 2004) When a Defendant makes a motion to vacate, "it is not enough to make conclusory allegations of ultimate facts; supporting evidentiary facts must be provided" See People v Session, 34 N.Y. 2d 254,255 [1974]. No other evidentiary facts, including an affidavit from his then counsel was attached to the motion. Defendant has not demonstrated a reasonable probability that but for counsel's advise he would have insisted on a trial.

Defendant also fails to establish that he was prejudiced. According to defendant, as evidenced by his supporting affidavit, he pled guilty to avoid deportation based on his counsel's misadvice. Defendant claims he was misled into believing he was accepting a plea that carried no deportation consequences at all. (Defendant's reply p6) However, by defendant's own admission, his counsel informed him he *could* avoid deportation if he pled guilty, not that he certainly would avoid deportation. Although defendant argues the distinction is meaningless, his attorney's advice appears to have been accurate at the time. He has submitted no proof that he is currently subject to deportation and given the fact that he has remained a lawful permanent resident of the United States in the five years since his plea, this Court finds that defendant's unsupported conclusory affirmations insufficient to establish prejudice under the second prong of the Strickland standard. (People v Floyd, 35 Misc 3d 1215 (Kings Co. 2012);P.L. §440.30(4).

The motion is in all respects denied, without a hearing, pursuant to CP.L. §440.30 (4)(b),(d). Under 22 NYCRR § 600.18, defendant has the right to apply for a certificate granting leave to appeal from an order denying a motion to vacate a judgment made pursuant to c.P.L. §440.10 and defendant has the right to apply, if unable to pay the cost of an appeal, for leave to appeal as a poor person.

The foregoing shall constitute the Decision and Order of this Court.

Dated: December 6, 2013
Bronx, New York



John W. Carter, A.S.C.J.