

People v Brown

2014 NY Slip Op 30448(U)

February 25, 2014

Supreme Court, Kings County

Docket Number: 5615/1987

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Thomas J. Carroll

Date: February 25, 2014

-against-

DECISION & ORDER

MICHAEL BROWN,

Indictment No.: 5615/1987

Defendant.

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Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10(1)(h) on the ground that he was denied the effective assistance of counsel. The People do not oppose the motion. For the following reasons, the motion is granted and the judgment is vacated.

On June 15, 1987, defendant was arrested and subsequently charged by Indictment No. 5615/1987 with criminal sale of a controlled substance in the third degree (PL § 220.39[1]) and related charges. On October 14, 1987, he pleaded guilty to criminal sale of a controlled substance in the fourth degree (PL § 220.34[1]) in full satisfaction of the indictment and was subsequently sentenced to one day in jail and five years of probation. As of February 25, 2014, this is defendant's only criminal conviction.

Defendant came to the United States from Jamaica in 1987 at about the age of 19. Now married to a citizen and the father of four children in this country from previous relationships, defendant resides in or near Dallas where he works as a road trucker and trainer. Several years ago defendant's wife filed a petition on defendant's behalf to adjust his immigration status. That petition was denied and defendant was subsequently informed that criminal sale of a controlled

substance in the fourth degree was a removable offense. It was at this time that defendant learned his 1987 conviction would subject him to removal.

Defendant now asserts that he asked his retained attorney (plea attorney in 1987), Alfred DiGrazia, whether the plea would affect his status in the United States. Counsel informed him that it would not and told him that he would not be deported if he pleaded guilty to criminal sale of a controlled substance in the fourth degree. Trusting his attorney and based on his advice, defendant pleaded guilty. Defendant now asserts, "Had I known that pleading guilty would have affected my ability to live in the United States or subject me to deportation, I would not have accepted the plea and instead would have gone to trial. This is true even in light of the fact that I would have risked harsher punishment if the prosecutors succeeded in proving their case."

Although *Padilla v Kentucky*, 559 U.S. 356 (2010), upon which defendant relies in support of his claim, is not retroactive to the instant case (*Chaidez v United States*, ___ U.S. ___, 133 S. Ct. 1103, 2013 WL 610201 [2013]), defendant has nevertheless established that he was denied the effective assistance of counsel at the time he pleaded guilty (*Strickland v Washington*, 466 U.S. 668 [1984]; *People v Baldi*, 54 NY2d 137 [1981]). Under the federal standard, in order to establish that counsel's performance was ineffective, the defendant must first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on "prevailing professional norms" (*Strickland* at 687-688). Second, the defendant must "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, he would not have pleaded guilty but would have insisted on going to trial (*Strickland* at 693; *Hill v Lockhart*, 474 U.S. 52, 59 [1985]). In the context of immigration, the prejudice requirement must also be viewed with consideration of the severity of deportation as a

consequence of a plea. “Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence” (*Padilla* at 368, quoting *INS v St. Cyr*, 533 U.S. 289, 322 [2001]). Indeed, depending on the defendant’s circumstances deportation may be the “equivalent of banishment or exile” (*Delgado v Carmichael*, 332 U.S. 388, 391 [1947]).

Under New York law, counsel’s performance is deficient when, viewing the totality of the circumstances of a particular case, the defendant is denied “meaningful representation” (*Baldi* at 147; *People v Benevento*, 91 NY2d 708 [1998]). With respect to prejudice under state law, “the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case” (*Benevento* at 714). In the context of a guilty plea, an affirmative misrepresentation of the type here by counsel falls below an objective standard of reasonableness as described in *Strickland* and can, if it results in prejudice to the defendant, deny the defendant meaningful representation (*People v McKenzie*, 4 AD3d 437 [2d Dept 2004]; *People v McDonald*, 1 NY3d 109, 115 [2003]).

Defendant has met the first prong of the *Strickland* inquiry by establishing that he received incorrect advice about the immigration consequences of his guilty plea. Defendant pleaded guilty to criminal sale of a controlled substance in the fourth degree, a class C felony. At the time of his plea in 1987, a felony conviction was a deportable offense under the Immigration and Nationality Act (8 USC § 1251[a][4] [1987]). Though subsequent amendments led to his current predicament some twenty-seven years after his conviction, even under 1987 law defendant’s plea subjected him to possible deportation. Thus, counsel’s advice that defendant would not be deported was plainly incorrect.

Defendant has also satisfied the second prong of *Strickland* by establishing that he was

prejudiced by counsel's provision of misadvice. Defendant's allegations are sufficient to "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" (*Hill* at 59). Given the grave effect of deportation on his future life, it would have been rational for defendant, had he known about immigration consequences at the time of his plea, to reject the plea offer and risk conviction at trial (*People v Picca*, 97 AD3d 170, 184-85). He has therefore made a prima facie showing of prejudice (*see McDonald* at 115).

Accordingly, defendant's motion, which the People do not oppose is granted and the judgment of conviction is hereby ordered vacated.

This decision constitutes the decision and order of the court.

ENTER:

ENTERED
FEB 26 2013
NANCY T. SUNSHINE
COUNTY CLERK

Thomas J. Carroll

 HON. THOMAS J. CARROLL
 J.S.C.