

People v Alleyne

2014 NY Slip Op 33271(U)

December 8, 2014

Supreme Court, Kings County

Docket Number: 4856/2007

Judge: Bruce M. Balter

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 16**

**THE PEOPLE OF THE STATE OF
NEW YORK,**

Respondent,

-vs-

AUGUSTUS ALLEYNE,

Defendant.

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:
: DECISION and ORDER
:
: Indictment No: # 4856/2007
:
:**

Defendant’s counsel filed a motion for an Order pursuant to CPL §440.10 (1) (h) either vacating the judgment entered against the defendant on January 7, 2008 or granting a hearing at which evidence can be presented in support of the facts set forth in the motion. The prosecutor filed an affirmation in opposition to the motion.

Defendant moves on the ground that: (a) he was denied his Constitutional right to effective assistance of counsel when his attorney provided him with affirmative “misadvice” regarding the negative immigration consequences of his plea and (b) his due process rights were violated because the court failed to notify him that his plea would result in his deportation.

The People do not oppose the Court ordering an evidentiary hearing to resolve the factual issues presented by the defendant regarding his first ground for relief; however, the People oppose the granting of a hearing as to defendant’s second claim.

In reaching its decision, the court has reviewed the moving papers, exhibits, including affidavits, affirmation in opposition, the entire court file and relevant transcripts.

Facts and Procedural History

The defendant, Augustus Alleyne, was born in 1961 in Guyana. Defendant arrived in the United States in 1991 and has worked consistently between 1991 and the present time, paying income tax on his earnings. On December 27, 2006, defendant was accorded Lawful Permanent Resident status.

On February 7, 2007, the defendant was arrested and on July 11, 2007, was indicted for Grand Larceny in the Fourth Degree, [P.L. § 155.30.(1)], Identity Theft in the Second Degree [P.L. § 190.79 (1) and Petit Larceny [P.L. § 155.25]. On August 30, 2007, represented by Jeffrey Sugarman, Esq. of the Legal Aid Society, the defendant pleaded guilty to Attempted Identity Theft in the Second Degree [P.L. §§110/190.79 (1)] in exchange for a promised sentence of three year's probation and the requirement to pay \$2,248.00 in restitution at sentencing. Defendant was sentenced on January 7, 2008.

At the plea proceeding, the defendant was apprised of his rights to remain silent, to a jury trial and to confront witnesses. Defendant was presented with a written waiver of his right to appeal and it was signed by the defendant. No appeal was filed by the defendant.

On January 16, 2013, the U.S. Department of Homeland Security issued a 'Notice to Appear' for Mr. Alleyne, for commencement of removal proceedings, based upon defendant's conviction in the instant case, as being deportable under 8 U.S.C. § 1227 (a) (2) (A) (I). As the conviction is deemed a "crime against moral turpitude" under immigration law, and occurred within five years of defendant obtaining Lawful Permanent Resident status, the conviction serves as a basis for removal and defendant cannot seek cancellation of removal relief. See 8 U.S.C. § 1229 (a) (1). On March 5, 2014, a final order in absentia was issued.

Defendant's current motion alleges that he was denied his right to effective assistance of counsel, as his counsel, Mr. Sugarman did not accurately inform him of the immigration consequences of his guilty plea and failed to ascertain defendant's specific immigration status and failed to tailor his advice and legal strategy to defendant's best interests. Defendant further alleges that he was denied due process, in that the court failed to advise him of the deportation consequences of his guilty plea.

Analysis and Conclusion

Defendant relies upon CPL §440.10 (1) (h) to vacate the judgment and order, on the basis that defendant was denied his right to effective assistance of counsel, as his attorney failed to inform him that his plea of guilty would subject him to deportation. Defendant's contention relies upon the seminal rulings in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Defendant alleges, in an affidavit dated October 6, 2014, that his attorney did not properly review and discuss with him the immigration consequences resulting from the conviction in this case.

Where a defendant's claim that he was deprived of the effective assistance of counsel is based, in part, on matter appearing on the record and, in part, on matter outside the record, a C.P.L. § 440. 10 proceeding is the appropriate forum for reviewing the ineffective assistance claim in its entirety. See *People v. Freeman*, 93 A.D.3d 805, 806 (2nd Dept. 2012).

Defendant claims that he was denied due process, in that the court failed to advise him of the deportation consequences of his guilty plea. In *People v. Peque*, 22 N.Y.3d 168 (2013), the Court of Appeals held that a court's failure to advise a defendant about the deportation consequences of a guilty plea to a felony, constitutes a due process violation, upon a showing of prejudice.

C.P.L. §440.10 (2) (c) provides that a Court may not review a claim in a motion to vacate judgment if sufficient facts appear on the record to have permitted the claim to be reviewed on direct appeal and the defendant unjustifiably failed to raise the claim on direct appeal.

Whether the Court failed to advise defendant about the deportation consequences of his guilty plea is evident from the record of the plea proceeding (See Defendant Exhibit A) and defendant's present claim could have been reviewed on direct appeal from the judgment of conviction, but defendant failed to take such an appeal. Defendant's unjustifiable failure to raise this claim on direct appeal bars him from raising the claim in the instant motion. See C.P.L. § 440.10 (2) ©. See *People v. Simpson*, 120 A.D. 3d 412 (1st Dept. 2014); *People v. Lovejoy*, 2014 Misc. LEXIS 2584 (Sup. Ct. Bronx Cty 2014). See also *People v. Cuadrado*, 9 N.Y. 3d 362 (2207) and *People v. Cooks*, 67 N.Y. 2d 100 (1986).

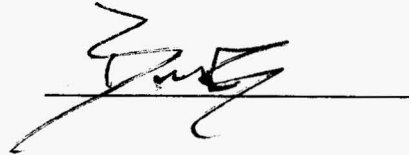
This Court finds that a hearing on the issue of whether the defendant was denied the effective assistance of counsel due to his counsel's failure to advise him of the removal consequences of his plea of guilty is necessary. See *People v. Picca*, 97 AD3d 170 (2nd Dept. 2012). See further *People v. McKenzie*, 4 AD3d 437 (2nd Dept. 2004).

Accordingly, defendant's motion is granted to the extent that a hearing is ordered pursuant to C.P.L. § 440.30 (5).

The parties are directed to appear, before this Court, on Tuesday, January 6, 2015.

This constitutes the Decision and Order of the Court.

Dated: December 8, 2014



BRUCE M. BALTER

J.S.C.

**HON. BRUCE M. BALTER
JUSTICE SUPREME COUR**

ENTERED
DEC 09 2014
NANCY T. SUNSHINE
COUNTY CLERK