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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 30

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THE PEOPLE OF THE STATE OF NEW YORK — Present: Hon. Elizabeth Foley

-against-

DECISION & ORDER

LEMNARD SMITH, — Indictment No. 10802/2009

Defendant.

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Defendant moves, *pro se*, to vacate his judgment of conviction pursuant to CPL §440.10 on the ground that his attorney was ineffective for failing to warn him about the immigration consequences of his plea. For the following reasons, the motion is denied.

On November 19, 2009, defendant entered a home in Brooklyn with three others. The three others with whom defendant acted in concert were armed with a handgun, a shotgun, a machete, and several knives. Once they were inside, the male occupant was struck on the head with the butt of a gun and tied up. One perpetrator tried to tie up the female occupant while the other three ransacked the home and demanded money and drugs.

When police arrived following a 911 call, Officer Jovanni Jennings observed defendant flee from the home holding a shotgun. Defendant tossed the shotgun to the ground before he began to run. Defendant was apprehended and searched at the scene. Police recovered jewelry from defendant's person and defendant stated, after waiving his *Miranda* rights, that he had walked into the home carrying duct tape and a knife and that he took money and jewelry.

For his participation in the break-in, defendant was charged under Kings County

Indictment No. 10802/2009 with burglary in the first, second and third degree (PL §§140.30[4]; 140.25[2]; 140.20); two counts of robbery in the first degree and one count each of robbery in the second and third degree (PL §§160.15[4], [2]; 160.10[1], 160.05), and other related charges. On August 10, 2010, defendant, represented by counsel Patrick Jennings, Esq., pleaded guilty to robbery in the first degree (PL §160.15[4]) in full satisfaction of the indictment, and also waived his right to appeal. Defendant was sentenced on August 20, 2010 to five years in prison and five years' post-release supervision (Foley, J. at plea and sentence). Defendant did not appeal from the judgment of conviction.

In a Notice to Appear dated June 6, 2011, Immigration and Customs Enforcement (ICE) charged that defendant, a native of Jamaica, was deportable because of the instant robbery conviction. On October 12, 2011, defendant was ordered removed from the United States. Subsequent to the filing of this motion, defendant was removed to Jamaica on February 14, 2014.

In the instant motion, defendant raises a claim pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), arguing that his attorney failed to advise him of the "collateral consequence of his plea, or request a judicial recommendation against deportation . . . ." Without elaborating on the plea discussions he had with counsel, defendant further alleges that had he been advised by either "counsel or the sentencing Judge that taking a plea deal would cause deportation, he certainly would not have taken a 'plea deal' and would have insisted on going to trial." Defendant also appears to blame counsel for failing to negotiate a plea to a lesser charge that would not result in deportation. He claims that he "implored and even supplicated the Conflict Defender to plea to a lesser charge, but did not succeed to break through her unshakable resolve to safeguard the interest of the state."

As a preliminary matter, defendant's deportation rendered the instant motion moot

because he is no longer within the jurisdiction of the court. In *People v. Ventura*, 17 NY3d 675 (2011), the Court of Appeals held that the intermediate appellate courts erred when they dismissed appeals by defendants who had been deported, because CPL §450.10 gives defendants an absolute right to seek some level of appellate review of their convictions. This rationale, however, has not been applied in motions to vacate the judgment of conviction pursuant to CPL § 440.10. Rather, trial courts have dismissed such motions without prejudice, thereby permitting defendants with otherwise meritorious claims to seek redress in the event they somehow returned to the United States (*People v. Bonilla*, 41 Misc.3d 894 [S. Ct. Queens Co. 2013] [motion dismissed without prejudice because defendant no longer able to obey the mandate of the court]; *People v. Reid*, 34 Misc.3d 1234[A] [S. Ct. New York Co. 2012] [deported defendant's motion found moot, dismissed without prejudice]; *People v. Casada*, 30 Misc.3d 1202[A] [S. Ct. Kings Co. 2010] [dismissal without prejudice]).

Were he to return to the United States, defendant's claim that he was denied the effective assistance of counsel would be rejected because it lacks merit. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v. Washington,* 466 U.S. 668; *People v. Linares*, 2 NY3d 507, 510 [2004]; *see*, U.S. Const., 6th Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must first be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v. Washington, supra* at 690). The defendant must also "affirmatively prove prejudice" by showing 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" (*Strickland v. Washington, supra* at 693; *Hill v. Lockhart*, 474 U.S. 52, 59 [1985]). A claim of prejudice must be supported by objective facts setting forth the

factors that the defendant considered in accepting the plea (*see, Changar v. United States,* 2013 WL 2444180 [EDNY 2013] [self-serving and conclusory statements that defendant would not have agreed to plea if he knew it would affect his immigration status are insufficient to show prejudice]; *Park v. United States*, 222 Fed. Appx. 82, 84 [2nd Cir. 2007] [a defendant's "self-serving statements are insufficient to establish prejudice"]). Relevant factors may include the strength of the prosecution's case, the availability of a defense, the likelihood of success at trial, a comparison of the sentence promised with the potential incarceration the defendant faced if convicted at trial, counsel's advice as to the reasons to accept the plea bargain, and the reason why defendant admitted committing the act (*People v. McDonald*, 296 AD2d 13, 20 [3rd Dept. 2002] [applying solely federal constitutional law]).

In *Padilla v Kentucky*, the United States Supreme Court extended the reach of the Sixth Amendment right to counsel under *Strickland* to noncitizen defendants facing criminal charges that carry immigration consequences. The Court held that the right to effective assistance of counsel requires that a defense attorney properly advise a noncitizen client about the immigration consequences of a guilty plea. Applying the two-prong test under *Strickland,* the court determined that counsel's failure to provide immigration advice was deficient under the first prong. A defendant raising a claim under *Padilla* and *Strickland* must also show a reasonable probability that, but for counsel's advice, he would not have accepted the guilty plea and instead would have insisted on going to trial (*Hill v. Lockhart, supra* at 59; *People v. McDonald, supra* at 18). "To obtain relief a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances" (*Padilla v. Kentucky, supra* at 371). The Supreme Court subsequently determined that *Padilla* does not apply retroactively to convictions that had already become final *Chaidez v. United States*, __ U.S. __, 133 S. Ct. 1103

[2013]). Both the Appellate Division, Second Department and the Court of Appeals have likewise determined that, under New York law, *Padilla* is not retroactive to cases not on direct review (*People v. Andrews*, 108 AD3d 727 [2nd Dept. 2013]; *People v. Baret*, 23 NY3d 777 [2014]).

In New York, the constitutional requirements for the effective assistance of counsel "are met when the defense attorney provides 'meaningful representation'" (*People v. Stultz*, 2 NY3d 277, 279 [2004], quoting *People v. Baldi*, 54 NY2d 137, 147 [1981]). Counsel is generally presumed to have provided competent representation unless defendant demonstrates the absence of "... 'strategic or other legitimate explanations'" for the allegedly deficient conduct (*People v. Benevento*, 91 NY2d 708, 712 [1998] [internal citation omitted]). In the context of a guilty plea, a defendant has been afforded meaningful representation when he 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], *overruled in part on other grounds* by *People v. Peque*, 22 NY3d 168 [2013]; *People v. Hawkins*, 94 AD3d 1439, 1440 [4th Dept. 2012]; *People v. Caruso*, 88 AD3d 809, 810 [2nd Dept. 2011]). Under state law "a defendant's showing of prejudice is a significant but not indispensable element in assessing meaningful representation" (*People v. Stultz, supra* at 284). Thus, under state law the prejudice component is "ultimately concerned with the fairness of the process as a whole" rather than the "particular impact" of counsel's advice "on the outcome of the case" (*People v. Benevento, supra* at 714; *People v. Caban*, 5 NY3d 143, 156 [2005]).

In 2013, the Court of Appeals held that a trial court's failure to warn a noncitizen defendant that he or she may be deported as a result of a guilty plea to a felony may entitle the defendant to *vacatur* of the plea upon an adequate showing of prejudice (*People v. Peque, supra*). Factors relevant to prejudice include "the favorability of the plea, the potential

consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. This assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many noncitizen defendants" (*id.* , at 199).

While the *Peque* Court did not explicitly hold that its decision should apply only prospectively, the defendant's due process rights are at issue whether counsel or the court fails to provide a warning about the possibility of deportation. The rationale of *Chaidez* and the post-*Padilla* decisional law in New York applies to the prospective application of *Peque*. Indeed, several trial courts interpreting *Peque* in postjudgment motions have held that it established a new rule and should not apply retroactively to convictions that have already become final (*see, People v. Moran,* 44 Misc3d 1205(A) [S. Ct. Bronx Co. 2014]; *People v. Lovejoy*, 44 Misc3d 457 [S. Ct. Bronx Co. 2014]; *People v. Mothersil*, 2014 WL 4210046 [Crim. Ct. New York Co. 2014]; *cf. People v. Manon*, 123 AD3d 467 [1st Dept. 2014] and *People v. Fermin,* 123 AD3d 465 [1st Dept. 2014] [*Peque* applies retroactively to cases pending on direct appeal]). This court agrees.

Even though *Padilla* applies to the instant case, defendant's claim that he was never informed about the possibility of deportation is belied by his statement on the record. The court specifically asked whether he had discussed the immigration consequences of his plea with counsel and he answered "yes" unequivocally. He did not ask the court for clarification, thus giving the clear impression that he had in fact discussed the immigration consequences with his attorney prior to taking the plea. Where defendant's current claim that he received no advice at all is contradicted by his statement to the court and is unsupported by any other affidavit or

evidence, there is no reasonable possibility that his allegation is true (CPL §440.30[4][d]). Thus, there is no indication that counsel's performance fell below an objective standard of reasonableness with respect to the first prong of *Strickland*. Nor has defendant established that his rights were violated by the court's failure to provide specific advice about immigration consequences, as *Peque* was decided after his conviction became final.

With respect to the prejudice prong, defendant has not shown any reasonable possibility that he would have risked conviction after trial in the face of significant evidence against him. A police officer made a firsthand observation of defendant fleeing the scene of the crime with a weapon and stolen property. That weapon was immediately recovered and would have been admissible as evidence. At trial, defendant would not have had any valid defense available to him and the jury would have heard direct testimony from the arresting officer, among other witnesses. Moreover, defendant's own inculpatory statement would have been admissible as trial evidence (*see, Matos v. United States*, 907 FSupp2d 378, 382 [SDNY 2012] [overwhelming evidence of guilt forecloses any reasonable probability that defendant would have proceeded to trial]; *Cuevas v. United States*, 2012 WL 3525425 at *9 [SDNY 2012] [defendant must provide some basis for concluding that chance of acquittal or conviction of lesser charges was sufficiently high]).

Defendant also received meaningful representation under New York law. 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 [2nd Dept. 1997]; *see, People v. Ford, supra* at 404). In this instance, defendant's plea afforded him a prison term of only five years. Had he been convicted of first degree robbery after trial, he could have been sentenced to up to twenty-five years in prison, after which he still would have faced deportation. Defendant

has also failed to describe any overriding factors that would have led him to reject the plea bargain for immigration purposes, such as the presence of family members in this country. His bare statement that, had he received adequate warnings, he would have proceeded to trial is insufficient in itself to establish that he was denied the effective assistance of counsel (*People v. Hernandez*, 22 NY3d 972, 976 [2013]; *People v. Galan* 116 AD3d 787, 790 [2nd Dept. 2014]).

Finally, there is no merit to defendant's claim that counsel was ineffective for failing to negotiate a plea to a non-deportable offense. The duty imposed by *Padilla* ends when accurate immigration advice has been provided. Attorneys are not legally obligated to negotiate a sentence that avoids immigration consequences altogether. Here, counsel successfully negotiated a plea that was highly favorable considering the seriousness of the felony charges defendant faced. Defendant received a relatively brief sentence in a case where he acted in concert with others to carry out a violent home invasion. There was little or no possibility that the People would have agreed to defendant's plea to a non-violent, non-deportable offense. Under the circumstances, defendant received competent and meaningful representation from counsel who helped defendant avoid a more severe sentence.

Accordingly, the motion is denied in its entirety. As a hearing is unwarranted, defendant's request for appointed counsel is also denied.

This decision constitutes the order of the Court.

ENTER:

Dated: February 17, 2015

ELIZABETH A. FOLEY, J.S.C.