

People v Salcedo

2015 NY Slip Op 30548(U)

March 24, 2015

Supreme Court, Kings County

Docket Number: 3580/2001

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

<p>THE PEOPLE OF THE STATE OF NEW YORK,</p> <p style="text-align: center;">Respondent,</p> <p style="text-align: center;">-vs-</p> <p>JORGE SALCEDO,</p> <p style="text-align: center;">Defendant.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>DECISION and ORDER</p> <p>Indictment No: # 3580/2001</p>
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Defendant, *pro se*, filed a motion for an Order pursuant to CPL §440.10 (1) (h) and §440.20 (1), vacating the judgment of conviction or setting aside the sentence. 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.

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, Jorge Salcedo, was born in Ecuador. On October 6, 1985, Defendant was admitted to the United States at Los Angeles, California, on a non-immigrant “visitor” visa. Defendant’s authorization to remain in the United States expired on April 5, 1986. On April 30, 2001, Defendant was arrested and charged under Kings County Indictment Number 3580/01, with Second Degree Burglary and other charges. On March 21, 2002, defendant pleaded to

Second Degree Trespass [P.L. §140.15] in satisfaction of the indictment and was sentenced in exchange to three years probation. A review of the transcript of the allocution, by the Court, clearly indicates that the defendant was apprised then by the Court of his rights and the immigration consequences of entering a plea of guilty and that the Court was then satisfied that the Defendant understood the consequences of his plea .

Defendant was subsequently arrested and charged with possession of a loaded pistol on August 1, 2004. Defendant was charged under Kings County Indictment 4972/04, with Criminal Possession of a Weapon in the Third Degree [P.L. 265.02 [4]] and Criminal Possession of a Weapon in the Fourth Degree [P.L. 265.01[1]].

On January 25, 2005, Defendant pleaded guilty to Criminal Possession of a Weapon in the Third Degree in exchange for a sentence of one year incarceration, to run concurrently with the one year sentence imposed by the Court for violating the conditions of the probationary sentence which Defendant received in the instant matter. A review of the transcript of the allocution, by the Court, clearly indicates that the defendant was apprised then by the Court of his rights and the immigration consequences of entering a plea of guilty and that the Court was then satisfied that the Defendant understood the consequences of his plea . On February 5, 2005, the Court imposed the negotiated sentence.

On or about March 22,2012, in Scranton, Pennsylvania, Defendant and a co-defendant were arrested and charged with numerous crimes relating to the possession of marijuana. On October 26, 2012, Defendant entered a plea of nolo contendere to the charge of Pennsylvania Crimes Code 35 § 780-113 §§ A31 (possession of marijuana) in satisfaction of the charges against him and was sentenced to 15 to 30 days in jail.

On April 11, 2012, Defendant was served , by the Department of Homeland Security, Immigration and Customs Enforcement, with a Notice to Appear, alleging that the Defendant, as a citizen of Ecuador, was removable from the United States, upon the grounds that Defendant's

visitor visa had expired on April 6, 1986 and that the Defendant had been convicted of possessing a firearm under Kings County Indictment 4972/04. Defendant's instant second-degree trespass conviction, pursuant to Kings County Indictment Number 3580/01, and which is the subject of the underlying motion, was not one of the grounds for removal cited by ICE.

On April 14, 2014, Defendant moved to vacate his judgment of conviction under Kings County Indictment Number 4972/04, pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010). By Decision and Order dated August 25, 2014, the Court denied Defendant's motion. (Brennan, J.) On January 15, 2015, The Appellate Division, Second Department granted Defendant's application for leave to appeal. The Defendant has not perfected his appeal as of date.

Defendant's current motion is to vacate his judgment of conviction under Kings County Indictment Number 3580/01 in the interest of justice, so that he may be eligible for relief from deportation on his 2005 conviction and to vacate his conviction upon the ground that he received ineffective assistance of counsel and was coerced into pleading guilty in the instant matter.

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 December 7, 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.

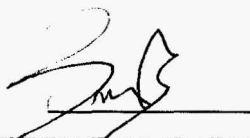
C.P.L. §440.10 (2) (c) provides that a Court may not review a claim in a motion to vacate judgment if sufficient facts appear on the record to have permitted the claim to be reviewed on direct appeal and the defendant unjustifiably failed to raise the claim on direct appeal.

The Court clearly advised defendant about the deportation consequences of his guilty plea as is evident from the record of the plea proceedings. As Defendant's allegations are belied by official court records. Accordingly, pursuant to C.P.L. 440.30 (4) (a) (d), Defendant's motion is denied.

Accordingly, defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: March 24, 2015


BRUCE M. BALTER
HON. BRUCE M. BALTER
Justice of the Supreme Court
J.S.C.

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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