

People v Autar

2015 NY Slip Op 30549(U)

March 24, 2015

Supreme Court, Kings County

Docket Number: 11240/1997

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,	:	DECISION and ORDER
-vs-		
	:	Indictment No: # 11240/1997
RADESH AUTAR,		# 12062/1997
Defendant.	:	

Defendant’s counsel filed a motion for an Order pursuant to CPL §440.10 (1) (h) vacating the judgments entered against the defendant under Kings County Indictment Numbers 11240/1997 and 12062/1997 on the following grounds:

- 1) That the Defendant received ineffective assistance of counsel, because counsel, during Defendant’s trial for conspiracy, failed to object to the Court’s instructions on conspiracy and failed to contest the legal sufficiency of the evidence.; and
- 2) That the Defendant received ineffective assistance of counsel, because counsel, at the plea proceedings for defendant’s conviction of Rape, failed to inform the Defendant about the immigration consequences of entering a guilty plea. That Defendant’s counsel failed to inform him about the registration requirements of the Sex Offender Registry Act.

The prosecutor filed an affirmation in opposition to the motion.

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

Facts and Procedural History

On April 7, 1998, a jury found Defendant guilty under Indictment Number 12062/1997, of Conspiracy in the Second Degree (P.L. § 105.15). On July 1, 1998, defendant was sentenced to a prison term of eight and one third to twenty-five years. Immediately after Defendant was sentenced on his Conspiracy conviction, Defendant pleaded guilty to Rape in The Second Degree (P.L. §130.30), in full satisfaction of the charges under Indictment Number 11240/1997. Pursuant to the plea allocution, Defendant was sentenced to a prison term of four to eight years,

which was ordered to run concurrently with the prison term on his conspiracy conviction and Defendant waived his right to appeal. (Gerges, J., at trial, sentence and plea).

Defendant appealed his judgment of conviction for Conspiracy. On appeal, defendant claimed inter alia, that the evidence was legally insufficient to prove his guilt beyond a reasonable doubt. On June 28, 1999, the Appellate Division, Second Department, affirmed Defendant's conviction. See *People v. Autar*, 262 A.D. 2d 652 (2nd Dept. 1999). On November 15, 1999, the Court of Appeals denied Defendant's leave to appeal. See *People v. Autar*, 94 N.Y.2d 819 (1999) (Rosenblatt, J.)

Defendant's Pre-Sentence Report prepared by the New York City Department of Corrections, indicates that the defendant, Radesh Autar, was born in Guyana and that he is a citizen of the United States.

Analysis

C.P.L. § 440.10 (2) (c) provides that a court must deny a motion to vacate the judgment of conviction when:

Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate issue or determination occurred owing to the defendant's unjustifiable failure to... raise such ground or issue upon an appeal, actually perfected by him.

As sufficient facts appear on the record to have permitted the Defendant to have raised the claims on direct appeal, Defendant's claims are currently procedurally barred from this Court's review. See *People v. Cooks*, 67 N.Y. 2d 100 (1986).

An attorney is "strongly presumed" to have rendered effective assistance to his client. See *Strickland v. Washington*, 466 U.S. 668 (1984). The Court in *Strickland* established that, in order to rebut this presumption, under the federal constitution standard, the defendant must establish that counsel's representation was outside the "wide range of professionally competent assistance", and that but for the counsel's errors, the outcome of the trial would have been different. Under New York State Constitutional standard, defendant must show that counsel failed to provide meaningful representation. See *People v. Baldi*, 54 N.Y. 2d 137 (1981).

Defend contends that his trial counsel should have moved for a trial order of dismissal, because a conspiracy requires two (or more) conspirators, and where the only other conspirator is a police officer or police agent, then the Defendant cannot be guilty of conspiracy. Defendant further contends that his counsel was ineffective for failing to request jury instructions relating that a defendant cannot be found guilty if the only other conspirator is a police agent.

The case law of New York State is clear. A defendant may be convicted of a conspiracy even when all the other members of an alleged conspiracy have feigned agreement and never intended to perform the object crime. See *People v. Schwimmer*, 66 A.D. 91 92nd Dept. (1978), aff'd, 47 N.Y.2d 1004 (1979). A trial counsel cannot be deemed ineffective for failing to move for a trial order of dismissal, of which the grounds are meritless and have no chance of success and for failing to make frivolous requests to charge the jury. See *People v. Ennis* 11 N.Y.3d 403, 415 (2008); See further *People v. Sweeney*, 84 A.D. 3d 1123 (2nd Dept. 2011).

Defendants related claim that the evidence was legally insufficient to prove that Defendant was guilty of the crime of second degree conspiracy, was determined to be without merit on direct appeal. See *People v. Autar*, 262 A.D. 2d 652,653 (2nd Dept. 1999).

Defendant challenges his conviction under Kings County Indictment Number 11240/1997, of which he pleaded guilty to Rape in the Second Degree (P.L. §130.30), claiming that defense counsel was ineffective for failing to inform him about the immigration consequences of entering a guilty plea. Defendant further claims that counsel failed to inform him about the Registration requirements of the Sex Offender Registry Act (SORA).

As previously noted, Defendant's Pre-Sentence Report prepared by the New York City Department of Corrections, indicates that the defendant, Radesh Autar, was born in Guyana and is a citizen of the United States. As such, this claim is frivolous. Furthermore, Defendant's claim is barred, as defendant's conviction became final prior to when *Padilla v. Kentucky*, 559 U.S. 356 (2010) was decided. As *Padilla* cannot be retroactively applied, on collateral review, Defendant has failed to establish his entitlement to the relief requested, as a matter of law. See *People v. Baret*, 23 N.Y.3d 777 (Ct. Of App. 2014). See *Butler v. McKellar*, 494 U.S. 407 (1990); see also *Teague v. Lane*, 489 U.S. 288 91989); see further *People v. Kabre*, 905 N.Y.S. 2d 887 (2010).

Additionally, a review of the Court's plea allocution indicates that 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 must be denied.

The failure of a Court to advise a defendant about the SORA Registration requirements does not undermine the knowing, intelligent and voluntary nature of a guilty plea. See *People v. Gravino*, 14 N.Y. 3d 546, 550 (2010).

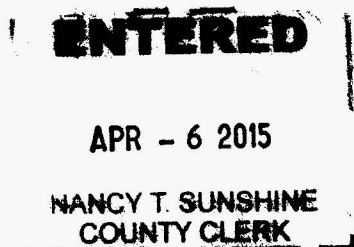
Conclusion


After a careful consideration of the motion, memoranda of law and affirmation in opposition, the Court determines that the Defendant has failed to establish his entitlement to the relief requested, as a matter of law. Here, Defendant fails to establish that defense counsel's representation was deficient and fails to meet the threshold required to substantiate an allegation of ineffective assistance of counsel. See *Butler v. McKellar*, 494 U.S. 407 (1990); see also *Teague v. Lane*, 489 U.S. 288 91989); see further *People v. Kabre*, 905 N.Y.S. 2d 887 (2010). All other claims of the Defendant are without merit.

Accordingly, defendant's motion is denied in full.

This constitutes the Decision and Order of the Court.

Dated: March 24, 2015




HON. BRUCE M. BALTER
Justice of the Supreme Court
BRUCE M. BALTER
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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