People v Bennett
2015 NY Slip Op 30933(U)
May 7, 2015
Supreme Court, Kings County
Docket Number: 480/1985
Judge: Miriam Cyrulnik
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 33
---X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. No. 480/1985
12938/1990

LESTER BENNETT
a.k.a. MILTON HENDERSON,
Defendant
---X

Miriam Cyrulnik, J.S.C.:

Defendant moves, pursuant to CPL §440.10, to vacate the judgments of conviction in the above indictments, asserting that they were obtained in violation of his rights under the United States and New York State Constitutions. Specifically, defendant claims that he was denied effective assistance of counsel, in that he was not advised of the immigration consequences of the plea bargains that resulted in his convictions.[1]

In determining this motion, the court has reviewed defendant's two Motions to Vacate Judgment, and the People's Affirmation in Opposition, together with all supporting attachments.

Defendant argues that his attorney's failure to advise him of the immigration consequences of his pleas and, in particular, his incorrect advice that the pleas would not result in immigration consequences, violated his rights to effective assistance of counsel under *Padilla v. Kentucky*, 599 U.S. 356 (2010) and *Strickland v Washington*, 466 U.S. 668 (1984). The People argue that defendant's motion must be denied, in that defendant has failed to demonstrate that he received

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[1] Defendant filed two separate motions, one for each name and indictment number, both seeking the same relief. As the issues and legal arguments are the same and the People addressed both motions in a single Affirmation in Opposition, the court has resolved both motions in one decision.

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ineffective assistance of counsel.

Initially, the court notes that defendant has presented no evidence that he has ever been legally documented to reside in the United States. According to defendant, he entered the United States on a visitor's visa in 1984 and simply never left. Although he recounts his history in this country, he never claims that he, at any time before or after the convictions in question, obtained or applied for documentation that would allow him to reside here legally.[2] Nowhere in defense counsel's affirmations in support of the respective motions is it claimed that defendant has obtained legal residence status since his arrival in the United States. Finally, the People represent that they are informed by Alan N. Wolf, Esq., an official of Citizen and Immigration Services, Department of Homeland Security (CIS), that CIS has no record of defendant and that defendant has not been assigned an Alien Registration Number.[3]

Where a defendant's status as an undocumented alien alone would subject him to deportation, regardless of the outcome of his case, he cannot claim to be prejudiced by alleged ineffectiveness of counsel resulting from deficient advice regarding immigration issues (*see People v Figueroa*, 170 AD2d 529 [2d Dept. 1991], *appeal denied* 78 NY2d 529 [1991]; *People v Osario*, __ Misc.3d __, 2013 N.Y. Slip Op. 30822 [U][Sup Ct, Kings County 2013]; *People v Williams*, __ Misc.3d __, 2012 N.Y. Slip Op. 32281[U][Sup Ct, New York County 2012]; *People v Hendy*, __ Misc.3d __, 2012 N.Y. Slip Op. 32255[U][Sup Ct, Kings County 2012]; *People v Powell*, 35 Misc.3d 1214[A][Sup Ct Kings County 2012]; *People v Delacruz*, __ Misc.3d __, 2012 N.Y. Slip Op. 32686[U][Sup Ct, Kings

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[2] *See* defendant's affidavits, attached to each of his motions as Exhibit B. Although the facts of the respective indictments differ, the remainder of the affidavits, regarding defendant's arrival and history in the United States, are identical.

[3] *See* the People's Affirmation in Opposition, page 4, paragraph 12.

[* 3]

County 2010]).

In the cases at bar, defendant's immigration status was not affected by the terms of his respective pleas. He "faced deportation for reasons wholly separate from his conviction[s] in the instant case[s]" (*see People v Osario*, 2013 N.Y. Slip Op. 30822, [U][2013], *supra*). Therefore, he could not have been prejudiced by the lack of or mistaken advice regarding immigration issues and his claim of ineffective assistance of counsel must fail.

With respect to defendant's federal constitutional claim, he correctly points out that *Padilla v. Kentucky* (599 U.S. 356 [2010], *supra*) expanded a defendant's Sixth Amendment right to counsel with respect to the impact of pleas upon immigration status. In *Padilla*, applying the first prong of the two-pronged *Strickland v. Washington* (466 U.S. 668 [1984]) analysis, the U.S. Supreme Court held that an attorney's failure to advise a defendant, who is not a U.S. citizen, that a plea of guilty will subject him to automatic deportation resulted in constitutionally deficient representation.[4]

However, in *Chaidez v. United States*, __ U.S. __, 133 S.Ct. 1103 (2013), the U.S. Supreme Court held that *Padilla* does not apply retroactively to cases in which the conviction was final before that decision came down.

In the case at bar, defendant's convictions became final on February 3, 1992 (Indictment Number 480/1985) and May 3,1992 (Indictment Number 12938/1990), the respective deadlines for filing appeals (*see* CPL 460.10[1][a]). Therefore, even if defendant's claim of ineffective assistance of counsel had substance under the first prong of the *Strickland* analysis, defendant "cannot benefit" from the holding in *Padilla* (*see Chaidez v. United States*, 133 S.Ct. 1103 [2013] *supra; People v McDonald*, 296 AD2d 13 [3d Dept 2003], *affirmed* 1 NY3d 109 [2003]; *People v Figueroa*, 170

[4] The court did not address the second prong of the *Strickland* analysis in *Padilla*.

AD2d 529 [2d Dept. 1991], *appeal denied* 78 NY2d 529 [1991], *supra*; *People v Osario*, __ Misc.3d __, 2013 N.Y. Slip Op. 30822 [U][2013], *supra*; *People v Williams*, __ Misc.3d __, 2012 N.Y. Slip Op. 32281[U][2012], *supra*; *People v Hendy*, __ Misc.3d __, 2012 N.Y. Slip Op. 32255[U][2012], *supra*; *People v Powell*, 35 Misc.3d 1214[A][2012], *supra*; *People v Delacruz*, __ Misc.3d __, 2012 N.Y. Slip Op. 32686[U][2010], *supra*).

The New York standard regarding effective assistance of counsel, offering greater protection, requires an attorney to provide "meaningful representation." Unlike the federal standard under *Strickland*, defendants in New York need not demonstrate prejudice, although it is considered in assessing whether representation was meaningful (*see People v. Caban*, 5 NY3d 143 [2005]).

"In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of counsel" (*see People v. Ford*, 86 NY2d 397, 404 [1995]; *People v. Boodhoo*, 191 AD2d 448 [2d Dept. 1993]).

In order to determine if there has been ineffective assistance of counsel resulting from deficient advice regarding immigration issues, defendant's claim in each case must be weighed against factors such as: the strength of the People's proof; the availability of defenses; the likelihood of conviction at trial; counsel's advice on the plea offer; and the terms of the plea, particularly whether they are favorable to defendant in comparison to the potential sentence faced (*see People v. McDonald*, 296 AD2d 13, 20 [2002], *affirmed* 1 NY3d 109 [2003], *supra*).

Defendant's support for the motions under these indictments consists of his affidavit, by which he claims that his attorney recommended a plea in each case, advising him that there would

be no adverse immigration consequences.[5] Defendant claims that he would not have agreed to the pleas if he had known that the convictions would subject him to removal from the United States.

The court finds that defendant has not met his burden of establishing the elements required to prevail on a motion to vacate. Specifically, defendant fails to demonstrate that he did not receive meaningful representation in these matters. Defendant's motions rely solely upon his self-serving affidavits and are not unsupported by any other affidavit or evidence (*see* CPL 440.30[4][d][ii]). Significantly, this court notes the absence of any supporting affirmation from his original defense counsel.

The People's recitation of the facts of Indictment Number 480/1985 indicates that on or about January 15, 1985, defendant, acting in concert with an apprehended other, sold a quantity of cocaine to an undercover police officer and was arrested in possession of a quantity of marijuana. Defendant was indicted and charged with Criminal Sale of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Seventh Degree and Criminal Possession of Marijuana in the Fifth Degree. Defendant failed to appear in court on April 2, 1985 and a warrant was issued.

The People's recitation of the facts of Indictment 12938/1990 indicates that on or about November 15, 1990, defendant was arrested in possession of more than 10 pounds of Marijuana. Defendant was indicted and charged with 2 counts of Criminal Possession of Marijuana in the First Degree.[6]

On January 4, 1991, defendant, represented by David Britton, Esq., pled guilty to the violation

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[5] See Defendant's Affidavits, attached to defendant's Motions to Vacate Judgment as Exhibit B.

[6] Defendant's new arrest in 1990 resulted in his return on the warrant issued in 1985.

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of Unlawful Possession of Marijuana, with a $100.00 fine, in full satisfaction of Indictment Number 480/1985.

On April 4, 1991, defendant, again represented by Mr. Britton, pled guilty to Criminal Possession of Marijuana in the First Degree, with a $750.00 fine, in full satisfaction of Indictment Number 12938/1990.

Unlike defendant's motions, the People's opposition is supported by the affidavit of David Britton, who represented defendant in both cases and negotiated the pleas in question. Mr. Britton states that, in 1991, it was not his practice to discuss immigration issues with defendants who were contemplating pleas. He further states that, although he has no independent recollection of representing defendant, based upon his custom and practice of not discussing immigration issues with defendants, he did not advise defendant that there would be no adverse immigration consequences to his pleas in 1991.

Under these circumstances, defendant has failed to cast doubt upon the effective assistance of his counsel (*see People v. Ford*, 86 NY2d 397[1995], *supra*; *People v. Boodhoo*, 191 AD2d 448 [1993], *supra*; *People v. Hendy*, 2012 N.Y. Slip Op. 32255[U] [2012], *supra*; CPL §440.30[4][d][ii]).

The court finds defendant's assertion - that he would not have pleaded guilty if he was advised of the immigration consequences - to lack credibility. On each indictment, defendant was charged with felonies that exposed him to substantial terms of incarceration if found guilty after trial. Under the terms of the deals negotiated by defense counsel, defendant paid modest fines, avoiding incarceration altogether. The court also notes that defendant would almost certainly have faced deportation following a term of incarceration had he been convicted after trial on either indictment. As there is no evidence of any immigration action against defendant more than 24 years after the pleas in question, defendant clearly benefitted from the sentences he received. Additionally, Mr.

Britton's affidavit contradicts defendant's claim that he received deficient advice on the immigration issue at the time of his pleas.

Defendant may not retroactively benefit from the holding in *Padilla* and he has failed to demonstrate ineffective assistance of counsel under the New York standard in this case. Additionally, his status as an undocumented alien renders his ineffective assistance of counsel claim moot.

In addition to the foregoing, defendant offers no reasonable excuse or explanation for his delay in bringing the instant motions pursuant to CPL 440.10. Defendant waited approximately 24 years from his convictions to do so. The court may appropriately, and does, take these delays into consideration in making its determination. In *People v Torres*, __Misc.3d__, 2010 NY Slip Op 33167(U) (Sup Ct, Kings County 2010), the court held that "defendant's credibility [was] undermined by the substantial period of time that passed before submitting" a CPL 440.10 and 440.20 motion fifteen years after appealing the decision, noting that in *People v Nixon*, 21 NY2d 338 [1967], the court "held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claims" *(see also People v Degondea*, 3 AD3d 148 [1st Dept 2003], *lv denied* 2 NY3d 798 [2004]; *People v Melio*, 304 AD2d 247 [2d Dept 2003], *lv denied* 3 NY3d 644 [2004]; *People v Hanley*, 255 AD2d 837 [2d Dept 1998], *lv denied* 92 NY2d 1050 [1999]; *People v Sheppard*, __Misc.3d__, 2010 NY Slip Op 32887[U] [Sup Ct, Kings County 2010]; *People v Perez*, 11 Misc.3d 1093(A) [Sup Ct, Kings County 2006]; *People v Kirkland*, 1 Misc.3d 904(A) [Sup Ct, Kings County 2003]). Delays as lengthy as those in the present cases "can be considered in evaluating the validity and legitimacy of a post-judgment motion" (*see People v Torres*, __Misc.3d__, 2010 NY Slip Op 33167[U] [Sup Ct, Kings County 2010], *supra*).

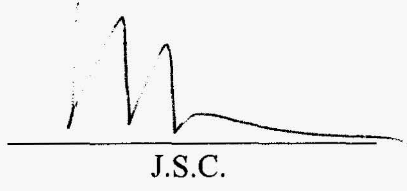
Accordingly, defendant's motions to vacate his judgments of conviction are denied without a hearing.

The defendant's right to an appeal from the order determining this 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 CPL article 440, the defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within thirty (30) days after the defendant has been served by the District Attorney or the court with the court order denying this motion.

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

This constitutes the decision and order of the Court.

Dated: May 7, 2015



J.S.C.

ENTERED
MAY 20 2015
NANCY T. SUNSHINE
COUNTY CLERK