

**People v Vicente**

2016 NY Slip Op 33015(U)

August 19, 2016

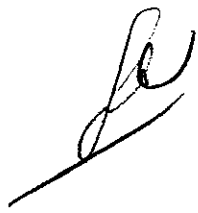
Supreme Court, Suffolk County

Docket Number: I-724-A-2014

Judge: William J. Condon

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SUPREME COURT OF SUFFOLK COUNTY  
STATE OF NEW YORK, COUNTY OF SUFFOLK

Present: HON. WILLIAM J. CONDON, J.S.C.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

Indictment No. I-724-A-2014

v.

MIGUEL VICENTE,  
  
Defendant.  
-----X

CPL§440.10: **DECISION**

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The defendant stands convicted upon his June 15, 2015 plea of guilty to the crime of Criminal Sale of a Controlled Substance in the First Degree, in violation of Penal Law §220.43, a class "A1" felony, in full satisfaction of the indictment. He was sentenced to a determinate period of incarceration of sixteen years, and five years post release supervision on July 24, 2015. He now moves to vacate that conviction and sentence pursuant to Criminal Procedure Law §440.10. The People have submitted an Affirmation in Opposition and a Memorandum of Law. The motion is determined as follows.

In the instant application the defendant claims that he received the ineffective assistance of counsel and his plea was not knowing, voluntary, and intelligent. The defendant maintains that his attorney did not adequately investigate the case, file motions, request discovery, or review wire taps with him. In addition, the defendant claims a geographical jurisdictional defect.

The defendant's burden on a motion to vacate his guilty plea and the judgment entered against him pursuant to said plea pursuant to CPL 440.10 (1) (h) reads as follows:

- 440.10. Motion to vacate judgment:
  - 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
    - (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

There is a presumption of regularity which attaches to judgments of conviction. In order to overcome that presumption and entitle a defendant to a hearing on a motion to vacate the judgment pursuant to CPL 440.10, the defendant has the burden of coming forward with allegations sufficient to create an issue of fact as to matters not appearing on the record of the underlying conviction (*People v Crippen*, 196 AD2d 548; see also *People v Mims*, 94 AD3d 909; *People v Cruz*, 14 NY3d 814; *People v Andrew*, 1 NY3d 546; *People v Velasquez*, 1 NY3d 44; *People v Bogan*, 78 AD3d 855). The Court's discretion to vacate judgments is limited to those grounds enumerated in CPL 440.10 (1). Subsequent to sentencing, a plea may not be withdrawn, and a judgment of conviction may only be vacated upon a legal ground specified in CPL 440.10 (1) (*People v Reyati*, 254 AD2d 199; *People v Michael*, 16 Misc 3d 84).

A defendant has a due process right to understand the substance of his plea and a Constitutional right to effective assistance of counsel. Due process requires that a defendant understand the nature of his plea. A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences (*People v Ford*, 86 NY2d 397; *People v Monk*, 21 NY3d 27; *People v Belliard*, 20 NY3d 381). A fundamental underpinning of a valid plea, is a defendant's knowing and voluntary waiver of his or her rights (*People v Verdi*, 127 AD2d 716 [2<sup>nd</sup> Dept]).

A defendant's right to effective assistance of counsel is guaranteed by both the Federal and New York State Constitutions (See *Strickland v Washington*, 466 U.S. 668; *People v Ennis*, 11 NY3d 403; *People v Turner*, 5 NY3d 476; *People v Berroa*, 99 NY2d 134; see also U.S. Const., 6th Amend; NY Const., art 1, § 6; CPL 440.10[1][h]). Effective assistance of counsel under New York constitutional law requires that the defendant be afforded "*meaningful representation*." (See *People v Turner*, 5 NY3d at 480; *People v Oliveras*, 21 N.Y.3d 339; *People v Henry*, 95 NY2d 563). So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided *meaningful representation*, a defendant's constitutional right to the effective assistance of counsel will have been met (*People v Henry*, 95 NY2d at 565; see also *People v Cason*, 90 AD3d 777). Further, there is a strong presumption of effective assistance of counsel that a defendant must overcome in order to prevail on his CPL 440.10 motion (See *People v Birch*, 284 AD2d 405; *People v Myers*, 220 AD2d 461).

In *Strickland v Washington* (466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]), the Supreme Court laid out a two pronged test for determining a defendant's claim that he was denied his right to effective assistance of counsel due to the actions of his attorney:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed to a defendant by the Sixth Amendment.

Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland* at 687; see also *People v Turner*, 5 NY3d at 481; See *United States v Caracappa*, 614 F3d 30, 46 [2d Cir 2010]).

Under the first prong of the *Strickland* test, in order to establish that he was denied his right to effective assistance of counsel, the defendant must show that defense counsel's performance was not reasonable under the prevailing professional norms. (*Strickland* at 688; see also *Padilla v Kentucky*, 559 U.S. 356, 130 S Ct 1473, 1482, 176 L. Ed. 2d 284 [2010]). Under the *Strickland* test, an unsuccessful defense strategy does not by itself constitute ineffective counsel. In scrutinizing a defense attorney's performance, the Court must be highly deferential and cannot second-guess counsel's assistance after a conviction just because counsel's defense was ultimately unsuccessful (*Strickland* at 688).

The second prong of the *Strickland* test requires that a defendant "*affirmatively prove prejudice*", meaning that even if a defendant establishes that his counsel's errors were "*professionally unreasonable*", the conviction will not be set aside if said errors had no effect on the judgment (*Strickland* at 692-693). The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome (*Strickland* at 694; see also *United States v Caracappa*, 614 F3d at 46; *People v Stultz*, 2 NY3d 277, 283, 810 N.E.2d 883, 778 N.Y.S.2d 431 [2004]).

To determine whether a defendant is denied his right to effective assistance of counsel as provided under the New York State Constitution, the New York Court of Appeals has adopted the first prong of the federal *Strickland* test (See *People v Turner*, 5 NY3d 476, 840 N.E.2d 123, 806 N.Y.S.2d 154 [2005]). However, in place of the federal requirement that a defendant show *actual prejudice*, the courts under the New York State Constitution have adopted a broader "*meaningful representation*" test (*People v Turner*, 5 NY3d 476, 840 N.E.2d 123, 806 N.Y.S.2d 154 [2005]). "[T]o establish ineffective assistance, a defendant must demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143; *People v Rivera*, 71 NY2d 705, 709; *People v Clarke*, 66 AD3d 694; *People v Britton*, 49 AD3d 893; *People v Atkins*, 107 A.D.3d 1465; *People v Jones*, 101 AD3d 1241).

Here, the Court is not persuaded that the defendant received less than meaningful representation by his prior counsel. The defendant has offered no evidence establishing that he has been prejudiced. The defendant's contention that his prior counsel did not adequately demand discovery, review the People's evidence, or demand pre-trial hearings, is belied by the record. Prior counsel did receive video surveillance, photographs, warrant applications, affidavits, wiretap audio, and drug lab reports.

Furthermore, to prevail on a claim of ineffective assistance of counsel, based upon a prior attorney's failure to demand pre-trial hearings, it is incumbent on the defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request a particular hearing. Absent such a showing, it is presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing. Noticeably missing in defendant's present application, is a showing that there was no legitimate reason for prior counsel not pursuing these "colorable" claims (see: *People v Carver*, 27 N.Y.3d 418 ; *People v Garcia*, 75 NY2d 973, 974, [1990], citing *People v Rivera*, 71 NY2d 705, 709, 530 N.Y.S.2d 52 [1988]).

[\* 4]

It is not for this Court to second-guess whether a course chosen by defendant's prior counsel was the best strategy, or even a good one, so long as defendant was afforded meaningful representation (see: *People v. Benevento*, 91 NY2d 708, 712; *People v Satterfield*, 66 NY2d 796, 799-800, 488 N.E.2d 834, 497 N.Y.S.2d 903 [1985]).

Here, the defendant's prior counsel's efforts to mitigate the defendant's incarceration exposure are confirmed by an examination of the record. The Court notes, if the defendant had exercised his right to go to trial, and thereafter had been convicted of the indicted charges, he would have been facing a potential incarceration sentence of fifty years to life. It is self evident, prior counsel worked diligently to mitigate such exposure and negotiated a disposition which included a dismissal of all counts save one, with an attendant bargained for sentence of sixteen years determinate incarceration, and five years post release supervision. Prior counsel represented the defendant effectively and provided meaningful representation.

The defendant was charged with five felonies, the top count being an A-I felony, Operating as a Major Trafficker in violation of Penal Law §220.77. Standing alone, the top count exposed the defendant to a term of incarceration that could have resulted in him spending the rest of his natural life in prison. The defendant's prior attorney successfully negotiated a disposition that removed the possibility of lifetime incarceration, and instead persuaded the People to recommend a determinate sentence of sixteen years incarceration, followed by five years post release supervision. Contrary to the defendant's categorization of the sentence imposed as part of his bargained for disposition, there is a significant distinction between a sentence of sixteen years determinate incarceration, and life imprisonment.

It is well established that 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 (2<sup>nd</sup> Dept 1997); see also: *People v Mobley*, 221 AD2d 376; *People v Navedo*, 137 AD2d 726). Moreover, "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not *a reasonably competent attorney* and the advice was not *within the range of competence demanded of attorneys in criminal cases*. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness" (*Strickland*, at 687-688).

The defendant's assertion that his bargained for disposition and plea were not entered knowingly, voluntarily, and intelligently due to ineffective assistance of counsel, is belied by the record. Here, the defendant, with the aid of counsel, pleaded guilty after the Court had methodically reviewed the defendant's rights, including: his right to a trial by either a jury or the Court; his right to have the People produce evidence and prove their case beyond a reasonable doubt; his right to have his lawyer cross-examine the People's witnesses; his right to testify at trial or to remain silent and not have his silence held against him; as well as his right to call witnesses and submit evidence on his own behalf should he and his attorney had chosen to do so. Under oath, the defendant assured the Court that he understood each of the rights he was waiving, he had sufficient time to speak with his attorney about his case and bargained for disposition, and in particular, he was satisfied with the manner in which his attorney represented him. Furthermore, under oath, the defendant acknowledged that he was voluntarily waiving his right to appeal his plea, sentence, and any prior rulings made in his case.

Under oath, the defendant knowingly, voluntarily, and intelligently, waived his right against self incrimination and when questioned by the People, the defendant admitted the specific details of his crime. Those details included the defendant's acknowledgment that he was "acting in concert" with other individuals when he sold heroin, and directed such other individuals to sell such heroin on his behalf and to return the proceeds of that sale to him at his home, knowing such heroin would be immediately sold in Suffolk County. The defendant further acknowledged that he had the opportunity to discuss potential defenses with his attorney, including "agency and entrapment", and acknowledged that such potential defenses were inapplicable to his case.

The record shows that the defendant, at the plea allocution, unequivocally admitted his guilt and expressed satisfaction with the representation provided by his attorney. The record also confirms the defendant admitted his criminal conduct was intended to affect, and be continued in, Suffolk County (see, *Silvestro v. Kavanagh*, 98 A.D.2d 833, see also CPL § 20.40(2)). Thus, the defendant's contention that his plea was not knowingly, voluntarily and intelligently entered, claiming ineffective assistance of counsel, is belied by the record (see, *People v Bangert*, 107 AD2d 752; see also, *People v Charles*, 256 AD2d 472; *People v Brown*, 251 AD2d 677; *People v Hernandez*, 236 AD2d 557).

The Court has considered the defendant's assertion of a jurisdictional defect in this matter and finds it to be without merit. The defendant claims the drug sale he engaged in began and terminated in Kings County, not Suffolk County, and as such Suffolk County lacked jurisdiction to prosecute the defendant. The Court notes, CPL § 20.40 provides in pertinent part:

A person may be convicted in an appropriate criminal court of a particular county, of an offense of which the criminal courts of this state have jurisdiction pursuant to section 20.20, committed either by his or her own conduct or by the conduct of another for which he or she is legally accountable pursuant to section 20.00 of the penal law, when:

1. Conduct occurred within such county sufficient to establish:
  - (a) An element of such offense;
  - (b) An attempt or a conspiracy to commit such offense;
2. Even though none of the conduct constituting such offense may have occurred within such county: \*\*\* Such conduct had, or was likely to have, a particular effect upon such county or a political subdivision or part thereof, **and was performed with intent that it would, or with knowledge that it was likely to, have such particular effect therein ...**

The defendant's allocution and admission confirms, the defendant directed and had knowledge that the drug sale he engaged in would reach into Suffolk County. Such admission and allocution further confirms, the proceeds of the defendant's criminal transaction were garnered in Suffolk County and returned to the defendant at his home. As such, the defendant's assertion that Suffolk County lacked jurisdiction in this matter is without merit (see: *People v. Pilgrim*, 67 AD2nd 554 [2<sup>nd</sup> Dept], *affirmed* 52 NY 730 [1980]).

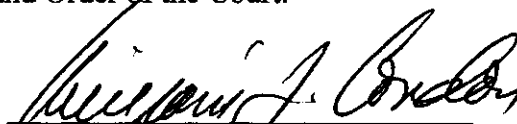
[\* 6]

Where, as here, the evidence and the circumstances of a particular case reveal that “meaningful representation” was provided, a defendant’s constitutional right to the effective assistance of counsel has been satisfied (*see People v. Brown*, 300 AD2d 314 [2002]; *citing People v. Satterfield*, 66 NY2d 796 [1985]). The Court finds, the defendant has failed to show that he was denied meaningful representation under both the Federal and New York State standards for effective assistance of counsel.

The Court has considered the defendant’s remaining arguments and finds them to be without merit.

Accordingly, the defendant's motion pursuant to CPL 440.10 to vacate his conviction entered July 24, 2015 against him based upon his corresponding June 15, 2015 guilty plea is hereby denied in its entirety.

The foregoing shall constitute the Decision and Order of the Court.

  
WILLIAM J. CONDON, J.S.C.

Dated: August 19, 2016