People v Rodriguez
2020 NY Slip Op 34454(U)
July 14, 2020
County Court, Columbia County
Docket Number: XXXXX
Judge: Richard M. Koweek

PRESENT: HON. RICHARD M. KOWEEK

STATE OF NEW YORK
COUNTY COURT COUNTY OF COLUMBIA

THE PEOPLEOF THE STATE OF NEW YORK,

Appellant,

-against-

DECISION AND ORDER
INDEX NO. ----------

ANTONIO FELIZ RODRIGUEZ,

Respondent.

APPEARANCES: HON. PAUL CZAJKA
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PRISONERS' LEGAL SERVICES OF NEW YORK
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KOWEEK, RICHARD M., J.:

The People/Appellant (hereinafter referred to as "the People") appeal from a Decision of the Hudson City Court (Herman, J.) which vacated the Defendant's plea of September 17, 2002 for the crime of Endangering the Welfare of a Child (Penal Law §260.10). The People filed a Notice of Appeal along with an Affidavit of Errors on November 19, 2019, and again on February 14, 2020. Thereafter, Defendant/Respondent (hereinafter referred to as "Defendant") filed Respondent's Brief on April 30, 2020.

A review of the record reveals that Defendant, a citizen of the Dominican Republic, is a Lawful Permanent Resident of the United States having entered this country when he was 6 years old. On August 6, 2002, at the age of 38, he was charged in Hudson City Court with Endangering the Welfare of a Child (Penal Law §260.10) as well as the violation of Unlawful Possession of Marijuana (Penal Law § 221.05). On September 17, 2002 the Defendant, while being represented by the Columbia County Public Defender's Office[1] pled guilty to Endangering the Welfare of a Child in full satisfaction of both charges and agreed to pay a fine of $100.00 and a mandatory surcharge.

In September of 2017, 15 years after having entered the aforementioned plea, the Defendant was placed in removal proceedings based upon his 2002 conviction for Endangering the Welfare of a Child. Subsequently, in April of 2019, Defendant made a motion, pursuant to CPL Section 440.10 (1)(h), to vacate his 2002 plea, arguing that it amounted to cruel and unusual punishment under the state and federal constitutions, that he received ineffective assistance of counsel and as a result the Defendant's plea was not entered into knowingly. The People opposed the motion.

On November 7, 2019, Hudson City Court vacated the Defendant's plea finding that the plea amounted to "de facto" cruel and unusual punishment under Article 1, Section 5 of the New York State Constitution (see, Decision J. Herman [Nov. 7, 2019]). The Court denied Defendant's motion to vacate his plea based on a claim of ineffective assistance of counsel. The People now appeal.

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[1] Despite diligent efforts by all parties, the actual Assistant Public Defender who represented Defendant at the time of his plea in Hudson City Court could not be ascertained.

Here, the People argue that the lower court finding of cruel and unusual punishment is not based on relevant case law giving rise to this appeal. They also assert that the defendant did receive effective counsel.

The Defendant contends that the lower court was correct in its finding that the possibility of deportation is, in fact, cruel and unusual punishment. However, the Defendant contends that the lower court erred in ruling that he did not meet his burden on his claim of ineffective assistance of counsel and further argues that the lower court applied the incorrect standard in reviewing such a claim.

The Eighth Amendment to the United States Constitution, which applies to the states by virtue of the Fourteenth Amendment bars the infliction of cruel and unusual punishments. The New York State Constitution echoes this ban (see, N.Y. Const., Art. I §5). The application of a defendant's Eighth Amendment protection from cruel and unusual punishment regarding deportation is well settled. Deportation is not a criminal procedure (see, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure (see, *Oliver v. U.S. Dept. of Justice, Immigration and Naturalization Serv.*, 517 F.2d 426 [2nd Cir. 1975]).

Federal Courts have long held that immigration removal is not considered a punishment for constitutional purposes (see, *Fong Yue Ting v. United States,* 149 US 698; see also, *Harisiades v. Shaughnessy,* supra). Deportation is not a punishment; "it is simply a refusal by the government to harbor persons whom it does not want" (see, *Harisiades v. Shaughnessy*, supra). The "argument that [deportation] is cruel and unusual punishment has been resoundingly rejected" (see, *Brea-Garcia v. I.N.S.*, 531 F.2d 693 [3rd Cir. 1976]).

After acknowledging the vast body of case law to the contrary, the lower court rejected it out of hand and found that "the consequence of deportation seventeen years after entering a guilty

plea to a class A misdemeanor is, de facto, cruel and unusual punishment... in violation of both the United States Constitution and the New York State Constitution" (see, Decision [J. Herman] at pg. 8). The cases cited in support of its ruling that "New York Courts can exercise their independent judgment and are not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States" are, as the People correctly assert, misplaced (see, Decision [J. Herman] at pg. 6). However well intentioned the lower court was in finding that the Defendant suffered a "de facto" cruel and unusual punishment by the imposition of deportation proceedings, this Court cannot ignore the vast body of case law to the contrary. As such, the Court reverses on this ground.

Having rejected the lower court's finding of "de facto" cruel and unusual punishment, the Court now turns to the Defendant's claim of ineffective assistance of counsel. The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (see, US Const., 6th Amend; N.Y. Const., Art. I §6). "Defendants who seek to challenge the voluntary and intelligent character of their guilty pleas on the ground of ineffective assistance of counsel must establish that defense counsel's advice was not within the standard set forth in *Strickland v. Washington* ([466 U.S. 668] see, *People v. McDonald*, 1 N.Y.3d 109 (2003)].

In *Strickland,* the Supreme Court adopted a two-part test for evaluating claims of ineffective assistance of counsel. A "defendant must show that counsel's performance was deficient", and "that the deficient performance prejudiced the defendant" (see, *McDonald* supra citing *Strickland at 113*). The first prong is essentially a restatement of attorney competence, which requires a showing that counsel's representation fell below an objective standard of reasonableness (see, *McDonald*, supra at 114). The second prong, also known as the prejudice prong, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (see, *McDonald*, supra at 114). The prejudice prong is satisfied "if a defendant shows

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" (see, *McDonald,* supra).

Under a State Constitution analysis the first prong of *Strickland* is the same, however, the prejudice component considered by New York courts "focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case" *(see, People v. Benevento, 91 NY2d 708 [1998];*see also, *People v. Guerrero, 62 Misc. 3d 1203(A), [NY Co. 2018]).* The Defendant, in the underlying motion to vacate his plea, argued both a federal and state constitutional law violation however the lower Court only applied the federal *Strickland* standard in analyzing the claim of ineffective assistance of counsel.

This Court finds that the Defendant has sufficiently alleged both that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance regardless of whether being analyzed under a federal or state Constitutional claim. (see, *McDonald* supra, see also, *Strickland* supra, see also *People v. Mebuin*, NY Slip Op 09276 [1st Dept. 2017]).

Defendant asserts that, prior to his plea, he informed his counsel that he was not a citizen of the United States and that he inquired of counsel if his plea to the charge of Endangering the Welfare of a Child would affect his ability to remain in the United States (see, Defendant's Affidavit, para. 3). He further avers that his attorney advised him that the conviction would not adversely affect his immigration status (see, Defendant's Affidavit, para. 3). Having been assured that his immigration status would not be adversely affected, he accepted the plea offer. As such, Defendant has shown that counsel "affirmatively misrepresented the deportation consequences of the plea by alleging that counsel advised him that there would be no deportation consequences to the plea" (see, *Mebuin*, supra).

The People challenge the sufficiency of the Defendant's allegations on the ground that he did not supply an affidavit from counsel. As noted herein, while attempts to identify the Assistant Public Defender who represented the Defendant at the time of his plea have been futile, the Defendant has provided an affidavit from a former Public Defender of Columbia County who states that in 2002 it would not have been inconceivable that the Public Defender's Office would have provided inaccurate advice since there was no reason to believe that Immigration and Customs Enforcement were inquiring about the Defendant's case (see, "Affidavit' of Robert Linville). In addition, the Public Defender's Office did not have a policy or protocol to advise non-citizen clients of potential immigration consequences as there was no training to accurately advise a non-citizen client of potential immigration consequences (see, "Affidavit" of Robert Linville). He goes on to aver that had his office been aware that a plea of guilty [to Endangering the Welfare of a Child] would have draconian collateral immigration consequences for the Defendant, it is likely that the office would have advised a rejection of that plea or would have attempted to negotiate a resolution of the case that would not [trigger immigration consequences] (see, "Affidavit" of Robert Linville). In any event, an affidavit from an attorney is not always required and the Defendant has explained the absence of an affidavit by his counsel (see, *Mebuin*, supra).

Turning to the second prong and proof of prejudice, Defendant further alleges that he would not have pled guilty to the charge of Endangering the Welfare of a Child and would have proceeded to trial had he been given thorough and correct legal advice regarding the potential of deportation for this conviction.[2] He has now been in the United States for almost 50 years. The People argue that the Defendant received effective representation and was not prejudiced since

[2] In 2002 the crime of Endangering the Welfare of a Child was deemed an offense against a child and thus a crime of "moral turpitude" and a deportable offense under federal immigration law.

he only received a fine and a surcharge while facing the potential of one year of incarceration. This Court rejects this contention. A non-citizen defendant may be willing to forgo an otherwise very beneficial deal if it carries the consequence of deportation especially since deportation is a serious consequence, "the equivalent of banishment or exile" (see, *Mebuin,* supra citing *Delgadillo v. Carmichael*, 332 U.S. 388 [1947]). Even where the maximum penalty at trial is significantly greater than the penalty offered on a plea, a non-citizen defendant may be able to establish prejudice (see, *People v. Pica*, 97 AD3d 170 [2nd Dept. 2012]). For the Defendant, the calculus of either pleading guilty or going to trial was not the same as it would have been for a citizen defendant, who would not have had to weigh the possibility of deportation (see, *Mebuin,* supra). Here, based on Defendant's affidavit, he has sufficiently established that deportation was indeed the determinative issue and that he was willing to take his chances at trial in order to avoid that consequence. (see, *Mebuin,* supra). As such, the Court finds that the Defendant has clearly established that he was prejudiced by the deficient representation afforded to him, thereby affecting the voluntariness of his plea, regardless of whether the claim of prejudice is reviewed under a federal or state claim. Accordingly, the Defendant has established that counsel's performance fell below an objective standard of reasonableness and was prejudiced by the deficient performance of counsel as the deficiencies not only affected the outcome of the plea process (see, *Strickland* supra) but also affected the fairness of the process as a whole (see, *Benevento*, supra; see also, *Guerrero*, supra).

The Court has considered the People's remaining arguments and finds them to lack merit.

The Defendant's plea is hereby vacated and the matter is remanded to Hudson City Court for further proceedings.

SO ORDERED AND ADJUDGED
ENTER.

Dated: July 14, 2020
Hudson, New York

RICHARD M. KOWEEK
County Court Judge

Papers Considered:

1. "Notice of Appeal" of People filed November 19, 2019; "Affidavit of Errors" of People filed November 19, 2019, and February 14, 2020; and annexed Exhibits 1-7; and

2. "Brief" of Defendant filed April 30, 2020.