

People v Andrews

2011 NY Slip Op 31216(U)

April 22, 2011

Supreme Court, Kings County

Docket Number: 1903-2008

Judge: Jo Ann Ferdinand

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART BTC
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THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

-against-

SCI. No. 1903-2008

CHURCHILL ANDREWS,

Date: April 20, 2011

Defendant.

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ADA Terrence Heller, Of Counsel
Charles J. Hynes, District Attorney, Kings County, for People

Ronald Paul Hart, Esq., New York, for Defendant

JO ANN FERDINAND, J.

By Amended Notice of Motion dated October 11, 2010, the defendant moves to vacate judgment pursuant to CPL § 440.10(h) on the ground that he was denied his Sixth Amendment right to effective assistance of counsel when his trial counsel failed to advise him of the deportation consequences of his guilty plea. Since Padilla v Kentucky,¹ criminal defense attorneys are constitutionally obligated to advise their non-citizen clients of the clear and succinct immigration consequences of their pleas. The defendant asserts that Padilla did not set forth a new rule but applied an old rule to a new set of facts and, therefore, should be applied retroactively. In opposition, the People argue that the defendant's motion should be denied without a hearing on the ground that Padilla states a new rule of criminal procedure and, therefore, should not be applied retroactively on collateral review. In the alternative the People assert that, should Padilla be applied retroactively, the defendant was properly advised of the deportation consequences of his plea and has failed to demonstrate that he was prejudiced by any purported failure to do so.

¹ 130 S.Ct. 1473 (2010)

The People allege that on February 24, 2008, Detectives Johnson and Hare observed several individuals approach the defendant in front of 477 Gates Avenue in Brooklyn, New York. Detective Johnson observed the defendant hand an apprehended other a packet of crack cocaine in exchange for money. Both were immediately arrested. Twenty-two bags of crack cocaine were recovered from the ground where the defendant was observed to have thrown them, and a quantity of crack cocaine was recovered from the ground where the apprehended other was observed to have thrown it. Upon arrest, the defendant stated in sum and substance, "I didn't sale [sic] him anything. I gave it to him." For these acts, the defendant was charged with the Class B felonies of criminal sale and possession of a controlled substance with the intent to sell it. Upon his arraignment in criminal court, the defendant consented to be assessed for drug treatment in the Brooklyn Treatment Court (BTC).

A warrant was ordered for the defendant's arrest when he failed to appear in BTC as required. He was subsequently arrested on the warrant and returned to BTC, where he was assessed by a case manager and found to be in need of drug treatment. In order to participate in a treatment program as an alternative to incarceration in Drug Court, a defendant must have medical benefits that will pay for treatment. This requires that all participants either be a US citizen or a lawful permanent resident. Although information regarding a defendant's immigration status is confidential and not reported to the court, they are required to provide documented proof of their status at the time of their assessment to the case manager. In this case, once the defendant was assessed, the court was informed that an adjournment was needed to allow him an opportunity to provide such documentation. Accordingly, his counsel was aware, prior to the entry of a guilty plea, that there may be immigration issues attendant to the defendant's participation.

On March 14, 2008, the defendant was found to be appropriate to participate in BTC. The recommended treatment plan was detoxification followed by a 90-day residential rehabilitation program and then outpatient treatment for a total of 12 to 18 months of treatment. Represented by Joyce Korn, Esq. of the Legal Aid Society, the defendant entered a plea of guilty to the single reduced Class D Felony of Criminal Sale of a Controlled Substance in the Fifth Degree, in satisfaction of the complaint against him, with the understanding that his sentence would be deferred during participation in drug treatment. The plea agreement provided that upon successful completion of the mandated treatment plan, the plea would be vacated and the case dismissed. Upon failure to comply, he would remain convicted of the D felony and be sentenced to one-year in jail or, upon rearrest while under court supervision, could receive the maximum sentence of 2½ years in state prison followed by post-release supervision.

On March 30, 2008, days after entering this agreement, the defendant was rearrested and charged, inter alia, with the misdemeanor of Criminal Possession of a Controlled Substance in the Seventh Degree. When he appeared in BTC on April 9, 2008, he admitted to continued drug use and was remanded. His treatment plan was modified to require detoxification followed by long-term residential treatment. While awaiting placement, the defendant expressed concern about entering an inpatient treatment program because he was afraid of losing his job. He thereafter refused to be interviewed by Odyssey House, a residential program, via video conference from jail. He subsequently stated to his case manager that he wanted to take back his plea and, in the attorney affirmation submitted in support of this motion, claims that on several occasions he also informed his attorney that he wished to take back his plea because he did not want to lose his job.

In May 2008, the defendant's Legal Aid attorney was relieved because the defendant's stated desire to withdraw his plea potentially made his attorney an unsworn witness against him on such a motion. New counsel, Irene Elliot, Esq., was assigned to represent him. On July 16, 2008, Ms. Elliot relayed to the Court that, although the defendant previously wished to take back his plea for fear of losing his job, he had since resigned from his position and was now requesting a residential program. On September 3, 2008, upon a finding that he failed to comply with the terms of his treatment mandate, this Court sentenced the defendant to six months incarceration. According to his affidavit, he was released from jail later that same month (Def. Aff. P.6, ¶ 30).

On September 4, 2009, the Immigration and Customs Enforcement Unit of the United States Department of Homeland Security initiated removal proceedings against the defendant. According to the Notice to Appear, his conviction for Criminal Sale of a Controlled Substance in the Fifth Degree in this case was in violation of Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, which provides that any time a non-United States Citizen is convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, as an offense relating to the illicit trafficking in a controlled substance, he will be subject to removal. There are no other grounds for removal.

The defendant, who is currently being detained by the Immigration and Customs Enforcement Unit, now moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10(h) on the ground that he was denied his Constitutional right to the effective assistance of counsel. Referring to the plea record, he contends that at the time of his guilty plea neither the Court nor defense counsel advised him, a non-citizen of Guyanese descent, of any immigration consequences.

Whether Padilla should be applied retroactively to a case on collateral review depends on whether it announced a new rule of constitutional criminal procedure. “[A] case announces a new rule when it breaks new ground or imposes a new obligation... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time defendant’s conviction became final” (Teague v. Lane, 489 U.S. 301). While New York Appellate Courts have yet to rule, several trial courts have ruled that Padilla set forth a new rule that departed from previous New York precedent and should not be applied retroactively (*see* People v. Sanchez 2010 WL 4628024; People v. Kabre, 29 Misc.3d 307). Other trial courts have found Padilla to be retroactive, declaring that “that the Supreme Court merely applied Strickland’s well-established test to determine whether Padilla’s counsel was objectively reasonable and therefore did not announce a new rule of law” (People v. Ramirez, 2010 WL 3769208; *see also* People v. Nunez, 30 Misc.3d 55; People v. Garcia Hernandez, 2011 WL 846231).

In New York, prior to Padilla, criminal defense attorneys were not required to affirmatively advise their clients of the immigration consequences of their pleas because such consequences were considered to be “personal” to the defendant and “collateral” to the control of the court, and thus the failure to so advise was not sufficient to form the basis of a cognizable ineffective assistance of counsel claim (People v. Ford, 86 NY2d 397, 403; People v. McDonald, 1 NY3d 109, 114). Under New York law in effect at the time of defendant’s plea, an attorney’s advise to a defendant, that he seek counsel from an attorney expert in immigration matters to ascertain the uncertain consequences of participating in drug court, would have been considered effective and sufficient. To the contrary, Padilla held that counsel must inform their clients of the immigration consequences of their pleas and the failure to do so, whether in the form of erroneous advice or omission, is constitutionally deficient (*supra* at 1480).

While Padilla blurs the former distinction between direct and collateral immigration consequences, it specifically differentiates between those immigration consequences that are succinct and clear as opposed to those consequences that are unclear or uncertain (*supra* at 1483, FN 10). In Padilla, the relevant immigration statute (8 U.S.C § 1227[a][2][B][i]) clearly delineates the automatic deportation consequences of Padilla's offense and therefore "is not a hard case to find a deficiency" (Padilla, *supra* at 1483). However, Padilla also recognizes that deportation consequences are often unclear, suggesting that [t]here will... undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain...", which "will affect the scope and nature of counsel's advice" (*Id.*). This Court finds that such a situation exists in the present case.

In Kabre, the Court found that "the Padilla rule was not a 'watershed' change that must be applied retroactively to cases on collateral review" (*supra* at 4). The Court found that the distinction illuminated in Padilla between *clear* and *unclear* immigration consequences of a particular plea spoke directly to a defendant pleading to a misdemeanor conviction: "Unlike the immigration consequences attendant upon conviction of a felony, the immigration consequences of a misdemeanor conviction are often unclear" (*supra* at FN1). Where immigration consequences are not succinct, the rule announced in Padilla should not apply retroactively (*supra* at 11). Similarly, in the present case, the immigration consequences of a deferred adjudication are *unclear and uncertain* for those defendants who successfully complete the court's treatment mandate and whose cases are ultimately dismissed and sealed. Like the Kabre court, this Court finds that the scope of Padilla does not extend to cases in which immigration consequences are not clear and succinct, and therefore should not be applied retroactively to the present case.

Although this Court finds that the defendant's motion must be summarily denied because Padilla does not apply retroactively to the facts of this case, reaching the merits of his claim the motion is also denied on the merits.

INEFFECTIVE COUNSEL AND PREJUDICE

In order to determine whether a defendant has been deprived of his Sixth Amendment right to the effective assistance of counsel, there must be a showing that counsel's "performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial" (Strickland v. Washington, 466 U.S. 668, 688).

Addressing the first prong of Strickland, the Padilla Court held that a defense counsel's failure to inform a client of the clear and succinct immigration consequences of his plea fell below an objective standard of reasonableness and, therefore, satisfied the first prong of the Strickland test. In the present case, although the defendant denies that defense counsel Joyce Korn, Esq. ever advised him as to the immigration consequences of his plea, based on Court records, it appears that a question as to his immigration status was raised during his assessment and prior to his guilty plea. This supports Joyce Korn's assertion that she did in fact advise the defendant of immigration consequences and suggest that he seek the advice of an immigration attorney. Nevertheless, accepting the defendant's claim that he was not informed of any adverse immigration consequences of his guilty plea, the first prong of Strickland is satisfied.

The second prong of Strickland requires that a defendant show by reasonable probability that, but for counsel's error, he would not have pleaded guilty and that the result of the proceeding would have been different (*Id.* at 688). "[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances" (Padilla, *supra* at 1485).

Here, the defendant is a noncitizen of Guyanese descent whose sole ties (including a citizen wife and children) are in the United States. He claims that, had he understood that he would be subject to deportation as a result of his guilty plea, he would not have plead guilty but rather would have elected to go to trial (particularly in light of his current attorney's assertion that he may have had a successful agency defense). He avers that he has been in the United States since he was 17 years old and would have no viable means of supporting himself or his family if he is deported to Guyana. In opposition, the People assert that the defendant was not prejudiced by the purported ineffectiveness of his counsel because acceptance of the plea, despite the possible immigration consequences, was still the rational decision because his plea agreement promised the dismissal of all charges upon his completion of the mandated drug treatment protocol.

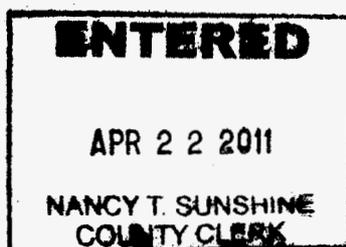
As discussed previously, it is uncertain and unclear what, if any, immigration consequences the defendant would have suffered had he successfully completed the mandated drug treatment program. However, had he rejected the treatment offer and been convicted after trial, he would have faced a minimum sentence of one year and a maximum of nine years imprisonment followed by one to two years of post-release supervision² and still would have faced deportation. Faced with this potential sentence and deportation, a decision to reject the plea bargain would not have been rational under the circumstances in light of the overwhelming evidence of his guilt: Detective Johnson observed him exchange crack cocaine for money, crack cocaine was immediately recovered from the apprehended buyer, and twenty-two vials of crack cocaine were recovered from the ground where the defendant was observed throwing them. In addition, the defendant admitted that he gave the apprehended buyer crack cocaine.

² (see P.L. §§ 70.70[2][a][i], 70.45[2][b], 220.39[1])

The defendant's claim that, had he been properly informed of the immigration consequences of his plea, he would have proceeded to trial because he had a viable agency defense is unpersuasive. In order for a defendant to raise a successful agency defense against a charge of criminal sale of a controlled substance, the "agent" must be acting on behalf of another and have no direct interest in the contraband (People v. Roche, 5 N.Y.2d 78). If he is in fact "interested in the outcome, either by ownership of property or by agency relationship with seller, he fails by definition, to be agent for the purchaser" (Id.). In the present case, the defendant was acting alone when he was observed exchanging crack cocaine for money. Furthermore, the quantity of crack cocaine (twenty-two packets) recovered from the ground where he threw them demonstrates an intent to sell, which is inconsistent with an agency defense. In addition, even if an agency defense were viable, it does not negate his possession of a significant quantity of crack cocaine. This charge alone may have resulted in a conviction of criminal possession of a controlled substance with intent to sell, which is also a deportable crime under federal law.

The defendant has failed to show that his defense was prejudiced by his counsel's purported failure to advise of the deportation consequences of his guilty plea. Had he completed the mandated drug treatment program, his case would have been dismissed and sealed with potentially no immigration consequences. In light of the overwhelming evidence against him, he would have faced certain deportation following a prison term if convicted after trial (*see* People v. Picca, 29 Misc.3d 997). Therefore, the defendant's claim is found to be without merit.

Based on the foregoing, the defendant's motion to vacate the judgment is summarily denied. This constitutes the decision and order of the Court.



JO ANN FERDINAND, A.S.C.J.