Jan 29th -

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX T-33

THE PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

-against-

Ind. # 1770/1988

ANPANG CHOU,

Defendant.

APRIL A. NEWBAUER, J.

The issue raised by defendant's §440 motion is whether prior defense counsel was ineffective in representing defendant at his sentencing. On October 17, 1994, defendant Anpang Chou was convicted after a plea of guilty to 23 felony counts including Conspiracy in the Fourth Degree, Robbery in the Second Degree (3 counts), Grand Larceny in the Second Degree (5 counts), Attempted Robbery in the Second Degree (13 counts), Assault in the Second Degree, and Coercion in the First Degree. In total, the indictment had charged the defendant and others with 128 counts relating to Robbery, Conspiracy, Assault and Kidnaping for participating in four different incidents involving teenage victims. At the time of these incidents, defendant himself was 18 years old and eligible for youthful offender treatment. At the time of the plea, the defendant had returned to the United states after absconding to China for five years and was 25 years old. On November 14, 1994, defendant was sentenced to six months' incarceration and five years of probation, a sentence consistent with a youthful offender finding. As a consequence of his plea,

defendant is deportable and has been denied the opportunity to legalize.

The plea and sentencing record is silent as to youthful offender status. Specifically, there is no evidence in the record that the People's offer was conditioned on the defendant's waiver of youthful offender status. Nor did defendant's attorney ever mention defendant's age or request youthful offender treatment for him on the record. At the sentencing hearing, the prosecutor stated that the 'Department of Immigration' had been notified and he believed the defendant was going to have problems because of his 23 felony convictions. Defendant replied, "[w]ell, the reason why I took this plea is because I want to continue schooling in the United States and stay with my family. Right now since the Immigration got involved in this case, I really don't know what to say...." Defense counsel made no statement.

Defendant served his sentence and never appealed. On March 29, 2013, almost nineteen years post conviction, the defendant filed a CPL §440 motion in which he raised for the first time his counsel's failure to request youthful offender treatment, and the court's failure to consider it. On July 24, 2013, the Court issued a decision denying defendant's CPL §440 motion in part but granting a hearing as to his Sixth Amendment rights were violated at the sentencing hearing. On November 7, 2013, the hearing was held. The defense called two witnesses and the People called one. The Court credits all of their testimony as credible.

Findings of Fact

The defense first called Lisa Pelosi, defendant's attorney in 1994. Ms. Pelosi's background included work in the Bronx District Attorney's office from 1984 to 1990. She was able to recall that during this time period she worked on cases "to some extent"

involving defendants who were eligible for youthful offender status and was generally familiar with the statute. After she left the District Attorney's office, she opened her own office on Wall Street. Sometime in 1995, she opened a second satellite office in Chinatown where she represented a number of young people in the community who were alleged to have been involved in snakehead trafficking and smuggling. When representing these young individuals, Ms. Pelosi would usually advocate for youthful offender treatment in plea negotiations with the prosecutor by referencing the defendant's age at the time of the commission of the crime, prior background, lack of youthful offender treatment in the past and no prior convictions. Ms. Pelosi stated that youthful offender treatment would have been discussed between the parties before her client would enter a plea. If the plea did not involve youthful offender treatment, she would explain this to her client and would not request a youthful offender finding at sentencing because it was not part of the plea. Ms. Pelosi acknowledged that she became "more in tune" with immigration consequences of pleas after she opened her Chinatown office. She had no independent recollection if she made any assessment of defendant Chou's eligibility for youthful offender treatment or discussed it with either the defendant or the prosecutor.

The minutes indicate that Ms. Pelosi negotiated a plea and represented the defendant during the plea proceedings.[1] However, she had no file, no memory of the defendant, the charges he faced, the plea, or any conversation she may have had with the defendant about his immigration status or youthful offender treatment. Further, Ms. Pelosi testified that it was her brother and law partner, John Pelosi, who appeared at the sentencing to represent the defendant. Ms. Pelosi stated that her brother would "help out" to cover criminal appearances from time to time but his practice was mainly intellectual

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property.

Defendant Chou also testified at the §440 hearing. Defendant is currently 44 years old, married with two children ages four and seven years old, and is a proprietor of his own digital advertising firm. The 1988 indictment dates back to 1987 when defendant was a senior in high school. He was 18 at that time, and his father ordered him to return to Taiwan soon after his father learned of what had happened. Defendant served five years in the Navy in Taiwan. After his father passed away, defendant returned to the United States in 1991 first on a tourist visa and later converted to a student visa. While in the United States, he went to college and obtained a bachelor's degree from CUNY Baruch College. In 1994, the defendant was working as a clerk in a store in Manhattan that sold knives, ninja stars and tear gas when two police officers arrested him. When he was arrested, the officers were notified of the outstanding warrant. His boss at the time introduced the defendant to defense attorney Lisa Pelosi. Ms. Pelosi was able to negotiate a deal for the defendant to get him released from jail and five years' probation.

Defendant described the circumstances under which he pled guilty in this matter on October 17, 1994. The defendant testified that no one ever imparted that he was eligible for youthful offender treatment, including his attorney, the prosecutor and the judge. Defendant also stated that no one mentioned the potential immigration consequences associated with this type of plea even after he inquired during the sentencing phase. The defendant stated that he felt pressure from his mother, sister and priest who visited him while he was incarcerated to accept the plea and get on with his life. According to defendant, Ms. Pelosi assured him that if he accepted this plea, he would be released and had only to complete probation. Defendant also stated that he was very scared in front of the court and did not know that the question of immigration consequences was going to

arise at the sentencing. Defendant testified that he attempted to ask his attorney about it during the hearing but Mr. Pelosi did not answer him. Defendant stated his mind then went blank and he did not know what to do. He remembered that at some time he received youthful offender treatment for a misdemeanor case in Queens and stated that he would have done more jail time if he had been aware that he would be eligible for youthful offender treatment in this case. Finally, the defendant testified that currently there are no deportation removal proceedings pending against him. Rather, defendant has applied for permanent residency twice and been denied as a result of this conviction.

The People called Reesa Sugarman, formerly a Bureau Chief in the Bronx District Attorney's office, who testified that she was familiar with procedures, policies and parameters of plea offers in the District Attorney's office during the applicable time period. Ms. Sugarman discussed the factors that were assessed when the People recommended or agreed to youthful offender treatment as part of a plea offer. She testified that the D.A.'s assessment of youthful offender treatment would be based on the background of the individual, his or her prior record, whether this treatment was granted in the past, the violent nature of the crimes charged, the number of charges, the number of co-defendants, the number of participants in the crime, the degree of defendant's participation, the injury to the victim(s), if a weapon was used, and if so the type of weapon. The "plea board" in the D.A.'s office--not individual assistant district attorneys--set the terms of the recommendation or offer prior to plea and sentencing. Ms. Sugarman did not have an independent recollection of this matter and did not know specifically if she participated in setting the offer for this defendant at plea board. The District Attorney's office was unable to locate their file and did not offer the plea board records or call former ADA Cherry as a witness.

Ms. Sugarman testified that she reviewed the plea and sentencing minutes, and she would not have offered youthful offender treatment in 1988 as part of the plea offer to this defendant based on the type and number of charges in the indictment; the fact that the defendant had been arrested previously; the fact that during the course of all three incidents a gun was alleged to have been used; the injury to the victim and the extortion allegations. Further, she testified that had this matter been presented to the plea board in 1994, she did not believe the People would have offered youthful offender treatment as part of the plea agreement because the defendant had "warranted" by fleeing the country for several years and was later involuntarily returned on a warrant after being arrested on weapon charges. Defendant was therefore potentially subject to added bail jumping charges. Ms. Sugarman did not say whether the prosecutor would have objected to a youthful offender application by the defense counsel or shed any light on what would have happened if the judge had been inclined to grant that application at the sentencing hearing.

On defendant's consent, the People also presented an affirmation from the sentencing judge, who reviewed his notes of the plea discussions and found he made no mention of youthful offender treatment. The former judge added that he did not think it would have been appropriate in this case, and had the defense attorney requested youthful offender treatment, he would have denied the request.

Conclusions

Defendant has the burden of demonstrating that his former counsel fell short of meaningful representation in failing to request youthful offender treatment. Under Criminal Procedure Law section 720.10(1) and (2), a defendant is eligible for youthful offender status if he or she was younger than nineteen at the time of the commission of the crime,

unless the crime is one of the serious felonies excluded by statute or he or she had been previously adjudicated a youthful offender in a prior felony case. The decision to grant youthful offender status lies within the discretion of the court. CPL § 720.10(1)(a). Youthful offender adjudication is only available upon the defendant's conviction. *People v. Shannon,* 1 AD2d 226 (2d Dept 1956), *aff'd,* 2 NY2d 192. There is no dispute that the defendant was eligible for youthful offender consideration.

As previously noted, the Court of Appeals has recently held that a sentencing court must consider a youthful offender finding for an eligible defendant, in *People v. Rudolph*, __ N.Y.3d __, 2013 N.Y. Slip.Op. 04840 (June 27, 2013). An evaluation of defendant's claim of ineffective assistance of counsel therefore begins with a view of youthful offender treatment as too valuable to the offender as well as to the community to be sacrificed to the outcome of plea bargaining. An attorney representing a young defendant arguably owes a higher degree of care. *See, People v. Shields*, 115 misc.2d 1038 (Sup. Ct., N.Y. Co. 1982), *citing, inter alia, Matter of Orlando F.,* 40 N.Y.2d 103 (1976). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also People v. Oliveras*, 2013 WL 2435065, 2013 N.Y.Slip.Op. 04040, *5 (June 6, 2013). What constitutes effective assistance in the courtroom cannot be "fixed with yardstick precision...." *People v. Baldi*, 54 N.Y.2d 137, 146 (1981). Defendant bears a high burden in establishing that he was deprived of his Sixth Amendment right to counsel by less than meaningful representation. *See People v. Hobot,* 84 NY2d 1021 (1995). Generally, a defendant must demonstrate first the lack of a tactical reason for counsel's conduct and second that but for counsel's inadequacy, the result would have been

different. *Strickland* at 689-692; *see also People v. Barnes*, 106 A.D.3d 600, 605 (1st Dept. 2013).

In this case, a request for youthful offender treatment was an obvious response to this defendant's distress signals at the sentencing hearing even if not contemplated earlier. Without necessarily having to vacate and renegotiate a plea that was seemingly in defendant's interest, counsel could have attempted to clear defendant's path to legal status and avoid any risk of deportation. Unlike the plea negotiations the court characterizes in *People v. Shields,* 115 Misc. 2d 1038 (N.Y.Co.Sup. Ct. 1982*),* there is very little basis for a court here to assume the defense attorney's restraint at the sentencing hearing was knowing and strategic.

The Court credits defendant's testimony that he tried to ask the substitute attorney about the immigration consequences of his plea and was met with silence. Defendant's statement on the record tends to corroborate this testimony. What is so troublesome about counsel's performance here is that both the prosecutor and the defendant prompted a response from him and were ignored. The ADA candidly advised that immigration authorities were on notice and could act at any time, and the defendant then voiced his concerns about staying in school and with family, what the Court of Appeals has characterized as ..."the emotional and financial hardships of separation from work, home and family" inherent in deportation. *See, People v. Peque,* -NY3d -, 2013 WL 606172 (2013). Confronted with these facts, sentencing counsel did not act as a zealous advocate to safeguard defendant's interests.

While the defendant's plea to twenty-three counts was less than the indictment, the conviction and agreed upon sentence did not take full account of the defendant's point of view. *See People v. Reyes,* 213 A.D.2d 253 (1st Dept. 1995). The defendant's possible

deportation was "of primary concern" to him at the sentencing. *See People v. Vega,* 158 A.D.2d 258 (1990). [2] Given the defendant's testimony and the record itself, it appears likely the defense attorney at sentencing was either unaware of defendant's youthful offender eligibility and or unaware that he could request it at the hearing. *See, e.g., People v. Torres,* 238 AD2d 933 (4th Dept 1997).

Any determination that the parties arrived at the plea agreement by ruling out YO consideration would be pure speculation. The Pre-sentencing Report prepared by the Department of Probation did not check either 'Y' or 'N' as to YO eligibility and no one addressed it at the sentencing hearing. The People offered no witness or internal records to suggest that waiver of the defendant's right to request YO at sentencing was part of a negotiated plea. The Court credits the People's witness that an offer of YO would not have been made at the plea board stage given the charges against the defendant. But while the People may not have favored a youthful offender finding, there was no evidence that the plea board or the ADA outright rejected it or conditioned their offer on its waiver. Significantly, the People's witness did not testify that had the sentencing Court been willing to consider youthful offender treatment the People would have sought as a matter of policy to withdraw their offer and have the plea vacated. A youthful offender adjudication is a post conviction process and only available upon conviction of a crime. *People v. Shannon,* 1 AD 2d 226 (2d Dept 1956), *aff'd,* 2 NY2d 792. Here, the incarceration time and other aspects of the plea were within youthful offender parameters. The People might well have been satisfied with a youthful offender finding rather than having the plea withdrawn and

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[2] The defendant stated at the sentencing hearing, "Well, the reason I took the plea is because I want to continue schooling in the United States and stay with my family. Right now since the Immigration got involved in this case, I really don't know what to say." Transcript of sentencing, Nov. 14, 1994, p. 4.

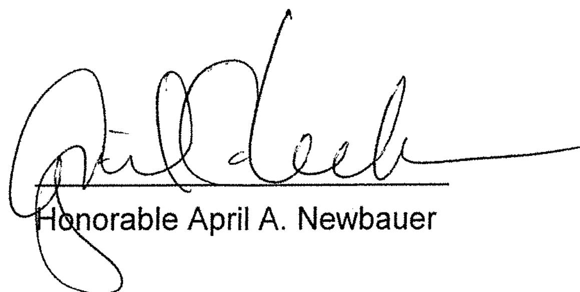
having to present their seven year old case to a jury.

Finally, although the parties consented to have the sentencing judge's affirmation admitted at the hearing, it has little relevance except to confirm what the record already suggests: that no one considered youthful offender treatment. The sentencing court in 1994 was acting without the benefit of probation's assessment of YO, any request by the defense for a youthful offender finding, and the People's input. In the absence of these considerations, the judge's present sense of what he might have done nineteen years ago carries minimal weight.

Defendant has met his burden of establishing ineffective assistance of counsel at the sentencing hearing. The Court will vacate the sentence imposed on October 17, 1994 and make a determination with respect to defendant's eligibility for youthful offender treatment. A new sentencing hearing will be scheduled to determine, among other things, whether the defendant will be afforded youthful offender treatment.

ENTER,

Dated: Bronx, New York
December 11, 2013



Honorable April A. Newbauer