CRIMINAL COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART AP-2
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

KESTON FARRELL,
A/K/A FARRELL KESTON,
A/K/A TONY JOHNSON

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DECISION/ORDER

Hon. Curtis Farber

Docket No.: 2001KN006328

Pursuant to CPL 440.10 (1) (h), defendant moves to vacate the judgment of conviction entered against him for Attempted Theft of Services (Penal Law § 110/165.15). CPL 440.10 (1) (h) provides that 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." The People oppose defendant's motion.[1]

At the arraignment of defendant on January 23, 2001, defense counsel entered a plea of guilty to the class B misdemeanor of Attempted Theft of Services (Penal Law § 110/165.15) on defendant's behalf, in satisfaction of an accusatory instrument that charged defendant with the class A misdemeanor of Theft of Services. The plea to the lesser included offense included a promised sentence of five days of jail, and an adjournment in contemplation of dismissal for each of the accusatory instruments filed under Docket Numbers 97K088221 and 96K084798.[2] In support of his

[1]Defendant filed his motion on January 24, 2013. The People filed their opposition on March 21, 2013. Defendant filed replies on May 14, 2013, and June 21, 2013. The People filed additional opposing papers on June 10, 2013.

[2] Docket Numbers 97K088221 and 96K084798 were ordered unsealed on July 16, 2013, by Acting Justice Michael J. Yavinsky.

motion, defendant has submitted a transcript of the plea and sentence proceedings.[3] Although the People contend that defendant was convicted of a felony in 2005, they do not allege that he was convicted of a crime prior to 2001.

Defendant advances three grounds for the granting of his motion to vacate judgment. First, defendant argues that, in light of *Padilla v Kentucky* (559 US 356 [2010]), he was prejudiced as a result of his attorney's failure at the time of his plea to properly advise him of the immigration consequences of the subject conviction. Defendant further contends that counsel at that time was ineffective in that he both failed to provide meaningful representation and additionally his performance was sub par in his ability to negotiate and obtain a favorable plea disposition. Lastly, counsel submits that defendant did not knowingly, intelligently, and voluntarily waive his *Boykin* rights (*see Boykin v Alabama*, 395 US 238 [1969]).

Defendant's argument that *Padilla* should be applied to his case is misplaced. Defendant, who is not a citizen of the United States and had not been convicted of a crime prior to the instant case, asks that this Court apply *Padilla* retroactively, and grant his motion because counsel failed to advise him of the immigration consequences of his plea. In *Chaidez v United States* (- US -, 133 S Ct 1103 [2013]), the Court held that the obligation of defense counsel to discuss immigration consequences with non-citizen defendants advanced in *Padilla* does not apply retroactively to persons whose convictions became final before *Padilla* was decided. The Second Department, addressing New York law, similarly ruled that the obligations of defense counsel prescribed in *Padilla* do not apply to convictions that became final prior to the *Padilla* decision (*People v Andrews*, - AD3d - , 2013 NY Slip Op 05469 [2d Dept 2013]).

Defendant's ineffective assistance of counsel claim, relies upon the holdings of *Strickland v Washington* (466 US 668 [1984]) and *People v Baldi* (54 NY2d 137 [1984]). He argues that his attorney was ineffective because he did not provide "meaningful representation." However, the Second Department held in *People v Andrews* (- AD3d - , 2013 NY Slip Op 05469 [2013]), that since the conviction of defendant became final before *Padilla*, the law applicable to such a case is set forth in *People v McDonald*, (1 NY3d 109 [2003]). In *McDonald*, the Court of Appeals held that

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[3]Defendant's Exhibit C, attached to his motion filed on January 24, 2013.

a defendant's immigration status is a collateral issue, and accordingly a defendant could only prevail on an ineffective assistance of counsel claim if counsel rendered incorrect advice regarding the immigration consequences of the guilty plea and that defendant was prejudiced thereby (*People v McDonald, id.*; cited by *People v Andrews*, - AD3d - , 2013 NY Slip Op 05469 [2d Dept 2013]). Therefore, if defendant were able to establish prejudice in this case, incorrect advice by his attorney cannot be substantiated because defendant swears that the attorney who represented him, "never said a word about immigration or the immigration consequences of the plea" (defendant's exhibit A, attached to his January 24, 2013 motion).

Similarly, defendant's position that counsel was ineffective because he should have sought a disposition that would have mitigated possible future immigration consequences is without merit. Since the holding in *Padilla* is not retroactive, this Court is bound by the law set forth in *Andrews* and *McDonald.* Furthermore, the Court's records show that defendant, under the name Tony Johnson, was arrested on October 5, 1996, and charged with Theft of Services (Penal Law § 165.15) and Criminal Trespass in the Third Degree (Penal Law § 140.10); and a bench warrant was ordered on November 20, 1996 (Docket Number 96K084798). The Court's records also show that defendant was arrested on October 10, 1997, and charged with Theft of Services (Penal Law § 165.15); and a bench warrant was ordered on November 12, 1997 (Docket Number 97K088221). After some negotiating by defense counsel, defendant's plea of guilty to a class B misdemeanor on the instant case resulted in a 5-day jail sentence, and adjournments in contemplation of dismissal on the earlier misdemeanor charges. This Court views those facts as a favorable outcome for any defendant, and, in this case, establish that defense counsel was not ineffective.

Defendant, in arguing that he did not voluntarily, intelligently, and knowingly waive his rights, submitted a transcript of the arraignment, plea, and sentence proceedings as evidence. The 2001 plea transcript, establishes that there was absolutely no colloquy between the Court and defendant. The plea, in its entirety, proceeded as follows:

> THE COURT: It seems that your clients [sic] has a pending case for 165.15. The offer is an A.
>
> MR. STELLO: He's a vacuum cleaner salesmen [sic]. He works on commission. And, he is kind of hurting for money.

THE COURT: The offer is an A and ten days jail to cover all three.

MR. STELLO: You can't do anything better than that? He has no record at all. This is the first time since four years like.

THE COURT: It is the first time? He has 1, 2 - -

MR. STELLO: He has three in five years. We have people walking in and out of here with three in a month that don't do an A and ten days. At least he is working trying to do it.

THE COURT: I don't see anything as far as working on his CJA report?

MR. STELLO: He tells me he's a cleaner [sic] salesman, commission only. That's one of his problems. It's probably true. He could given [sic] me something a lot more exodic [sic] than that. You could always put him in a jail for 15 days, if he doesn't do his community service, obviously.

THE COURT: I am not going to give him community service. I will give him a B and five days jail to cover all three.

MR. STELLO: Judge, what could we do is ACD the two old ones and take the "attempted" on this.

THE COURT: Yes.

MR. STELLO: He pleads guilty to attempted 165.15 - - 110/165.15.

THE COURT: Plea is acceptable to the Court. Sentence of the Court is five days jail. Mandatory surcharge is imposed. Civil judgment entered. Take charge.

COURT OFFICER: Step in.

MR. STELLO: ACD the other two cases?

THE COURT: Yes.

MR. STELLO: That's dockets 97K088221 and 96K084798, ACDs. Thank you.

The transcript establishes that the Court never inquired of defendant if in fact he desired to enter a plea of guilty or understood the terms of the proposed offer being made by the Court. Further, the Court failed to advise defendant that he had the right to a trial, or to remain silent. Defendant was sentenced immediately after the plea, and was never asked whether he wished to make a statement prior tot he imposition of sentence, as required by CPL 380.50 [1].

A guilty plea will be upheld as valid "if it was entered voluntarily, knowingly and

intelligently" (*People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Even though no factual colloquy was required inasmuch as defendant pleaded guilty to a lesser included offense (*People v Cole*, 42 AD3d 963 [4th Dept 2007]), there must be an affirmative showing on the record that defendant waived his constitutional privilege against self-incrimination, his rights to a jury trial and to confront witnesses called by the People (*People v Fiumefreddo*, 82 NY2d 536, 543 [1993], citing *Boykin v Alabama*, 395 US 238, 243 and n 5 [1969]; *see People v Harris*, 61 NY2d 9 [1983]). The record is silent as to whether there was strong evidence against defendant, or whether counsel discussed any possible defenses with defendant.

Although defendant may have forfeited some of his post-conviction rights by not filing an appeal, or objecting to the lack of a formal allocution and opportunity to make a statement prior to sentence (*see People v Lopez*, 71 NY2d 662 [1988]), the deficiency of any reference to the waiver of trial-related constitutional rights, cannot be ignored. No waiver of these constitutional rights may be presumed from a silent record (*People v Vickers*, 84 AD3d 627, 628 [1st Dept 2011] citing *Boykin* at 242-243), and a conviction may be vacated in the interest of justice if "the plea allocution was so 'woefully deficient'" (*People v Vickers*, 84 AD3d at 629 citing *People v Colon*, 42 AD3d 411, 411 [1st Dept 2007]; *see People v Ebron*, 2012 NY Slip Op 51812[U] [App Term, 2d, 9th and 10th Jud Dists 2012]). Defendant did not utter a word during the arraignment, plea and sentencing proceedings, nor was he asked if he wanted to do so. Given the record available to this Court, there is no basis to conclude that defendant was actually aware of the rights he was surrendering (*see People v Kitt*, 102 AD3d 984 [2d Dept 2013]). This Court will not allow a conviction to stand merely because an attorney enters a plea of guilty on behalf of his client without an admission of guilt and a knowing and intelligent waiver of what the bench and bar refer to as "*Boykin* rights" (*see Boykin v Alabama*, 395 US 238 [1969]).

Accordingly, it is hereby:

ORDERED, that the judgment of conviction and sentence under Docket Number 2001KN006328 is vacated; and it is further,

ORDERED, that the accusatory instrument filed under Docket Number 2001KN006328 is restored to the Part AP-2 calendar; and it is further,

ORDERED, that defendant appear in Part AP-2 on October 10, 2013, or in the alternative,

a date that is requested by counsel and convenient for the Court; and it is further,

ORDERED, that since the accusatory instruments filed under Docket Numbers 97K088221 and 96K084798 are inextricably intertwined with the plea negotiations for the conviction vacated herein, those accusatory instruments are restored to the Part AP-2 calendar.

This shall constitute the decision and order of the Court.

Dated: August 8, 2013

J.C.C.