

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART TAP-A

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THE PEOPLE OF THE STATE OF NEW YORK : BY: FERNANDO M. CAMACHO, J.
:
-against- : DATE: MAY 17, 2012
:
SANDRA GOMEZ, : INDICT. NO. N10911/96
Defendant. :
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MOTION TO VACATE JUDGMENT

FOR MOTION: SHEILAH FERNANDEZ, ESQ.
AGAINST MOTION: RONI PIPLANI, ESQ., ADA

The defendant is charged with Criminal Sale of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance in the Third, Fifth, and Seventh Degrees stemming from a May 3, 1996 observation sale of cocaine. She was arraigned in Supreme Court on July 11, 1996 and released on bail. On October 29, 1996, bail was forfeited and a warrant ordered upon her failure to appear in Court for her scheduled appearance. She was returned on the warrant on January 24, 2011 and on February 9, 2011, entered a plea of guilty to Attempted Criminal Possession of a Controlled Substance in the Fifth Degree in satisfaction of all charges. She was sentenced that same day to "time served" pursuant to the negotiated plea. She now moves, pursuant to CPL § 440.10(1)(h), for an order vacating judgment on the ground

that she was "deprived of her constitutional right to the effective assistance of counsel" (Def. motion, p.1). She claims that her attorney failed to advise her that her guilty plea "mandated her deportation" and "made her ineligible for non-legal permanent resident cancellation of removal under 8 USC § 1229b(b)" (id.), and that although she was aware of the possibility that there would be immigration consequences to her plea, she was not made aware of the mandatory nature of those consequences. She cites Padilla v. Kentucky (130 Sct 1473 [2010]) and Strickland v. Washington (466 US 668 [1984]) in support of this position. She further contends that her attorney was deficient in that he: 1) failed to negotiate a plea that would "mitigate the immigration consequences" (id., p12); 2) did not inform the Court that she "was the victim of human trafficking"; 3) did not inform the Court that she had been "smuggled into the country by her drug-trafficking mother when she was fifteen"; 4) did not inform the Court that she was "forced to sell drugs" by her mother, who threatened and beat her to do so; and 5) did not inform the Court that she no longer sold drugs after her mother was incarcerated for selling drugs and deported (id., pp. 13-14). The People have

opposed the motion, contending that Padilla provides no basis to vacate judgment in this case.

The defendant's motion to vacate judgment on Padilla grounds should be denied. In People v McDonald, 1 NY3d 109 [2003], the Court of Appeals held that in order to prevail on a motion to vacate judgment on the ground of ineffective assistance of counsel, a defendant must show "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." In this case, the defendant was facing 25 years in prison on drug charges. She accepted the plea offer with the understanding that she was to be sentenced to "time served". On these facts, it would be difficult to demonstrate that she would have gone to trial had she been aware of the immigration consequences of her plea, even if they were mandatory.

The holding in Padilla v Kentucky, supra, does not warrant a different result. In Padilla, the United States Supreme Court held that the failure to advise a defendant of the deportation consequences of his guilty plea constituted ineffective assistance of counsel. However, it is not at all clear that the defendant was not made aware, at least to a

certain extent, that she was in danger of deportation. Furthermore, even if counsel is deemed to be ineffective pursuant to the standards set forth in Padilla, the defendant is in any event required to demonstrate prejudice in order to obtain relief. In other words, the holding in Padilla does not undermine the requirement set forth in McDonald, supra, that to prevail on her motion to vacate, the defendant must demonstrate that had she been correctly advised of the potential immigration consequences, she would not have accepted the plea. In this case, the Court has already held that the defendant did not meet that burden. Accordingly, there is no basis to vacate judgment on Padilla grounds.

Nevertheless, despite the Court's finding that the defendant failed to meet her burden of demonstrating ineffective assistance of counsel with respect to the immigration consequences of her plea, it finds that she has demonstrated that counsel was ineffective in connection with plea negotiations generally. As the United States Supreme Court held in Lafler v Cooper, 132 S Ct 1376 [2012], the Sixth Amendment "requires effective assistance of counsel at critical stages of a criminal proceeding" (id. at 1385). The

Court held that this constitutional guarantee "applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice" (id). One of these critical stages is the plea negotiation stage (see, Missouri v Frye, 132 S Ct 1399 [2012])).

In the case at bar, the circumstances of which are unusual and compelling, the Court finds that counsel was not effective during the plea negotiation stage. He did not bring to the attention of the Court or the District Attorney the fact that the defendant had been smuggled into the country at fifteen by her mother, a drug seller who was ultimately imprisoned for selling drugs and deported. He did not bring to anyone's attention the fact that the defendant was being forced to sell drugs by her mother, who repeatedly beat her and threatened her to assure compliance. This failure is particularly egregious in view of the fact that there are Family Court records, also not provided by defense counsel, which corroborate the defendant's claims of physical and mental abuse at the hands of her mother. The Family Court issued an Order of Protection against the defendant's mother, who they claimed utilized "excessive corporal punishment" on her daughter, at one point beating her so severely that she needed to be taken to Elmhurst Hospital for treatment.

Finally, counsel did not bring to the attention of the Court or District Attorney the fact that once the defendant's mother was incarcerated and deported, and therefore no longer able to coerce the defendant to sell drugs, the defendant no longer sold drugs. Instead, she went on to lead a law-abiding life for over fifteen years, raising four children who were all born in this country. By failing to advise the District Attorney of all of these extenuating circumstances, which could easily be viewed as establishing the affirmative defense of duress, defense counsel denied his client the opportunity to avail herself of the equitable relief which the District Attorney has provided on many occasions when dealing with defendants who are also victims, such as the defendant herein. This Court is aware of numerous instances in which the District Attorney has fashioned alternative dispositions and sentences, conditional pleas, and other equitable relief to bring about a just end and may very well have provided such relief to the defendant, had they been apprised of all the facts in this case by defense counsel.

The failure to so apprise them constituted ineffective assistance of counsel which affected the outcome of the case (see, People v Guretzky, 274 AD2d 524 [2d Dept 2000]). Under the circumstances, the Court finds that the defendant was deprived of her Sixth Amendment right to the effective assistance of counsel.

Her motion to vacate judgment on this ground should therefore be granted.

This constitutes the decision and order of the court.

The clerk of the court is directed to mail copies of this decision and order to the attorney for the defendant and to the District Attorney.

DATE: May 17, 2012

Kew Gardens, NY



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FERNANDO M. CAMACHO, J.S.C.