CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART APN

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THE PEOPLE OF THE STATE OF NEW YORK DECISION AND ORDER
DKT NO. 2007QN031258

-against

TAMARA LUCENA RANCY,

Defendant.

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PAULINE A. MULLINGS, J.C.C.:

On June 5, 2007 Ms. Rancy was arrested and charged with the "D" Felony, criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06) and the "A" misdemeanor criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). On June 20, 2007, Ms. Rancy retained the services of a private defense attorney and on August 16, 2007 Ms. Rancy pled guilty to criminal possession of a controlled substance in the seventh degree and was sentenced to time already served. Ms. Rancy never appealed the judgment of conviction and now moves to vacate her plea and sentence on the basis that she is actually innocent of the charges and that her prior defense attorney provided incorrect advice about the immigration consequences of the plea.

In support of her motion, Ms. Rancy submitted an affidavit in which she alleges that she told her prior attorney that she never knowingly possessed the illegal drugs because the packages found in her suitcase had been placed there by her cousin in Haiti,

and she was unaware that the packages contained illegal drugs. She also alleges that her attorney misadvised her about the immigration consequences associated with her plea, as he told her that there would be no immigration consequences if she pled to the misdemeanor possession of a controlled substance in the seventh degree. Four months after the plea, Ms. Rancy received a notice to appear in Immigration Court for removal proceedings. Ms. Rancy testified at a removal hearing and was ordered deported by the Immigration Court.

The Assistant District Attorney, in her response, submitted several letters written by Ms. Rancy's prior defense attorney, communicating the offer and the plea negotiations, summarizing what happened in Court, and explaining to Ms. Rancy that she needed to retain the services of an immigration attorney before deciding whether accepting the People's offer would have an adverse effect on her immigration status. The Assistant District Attorney also submitted a letter from the immigration attorney to Ms. Rancy's prior attorney detailing the type of disposition the prior attorney should try and negotiate on her behalf without the negative immigration consequences.

Defendants in criminal cases have both a state and federal constitutional right to effective assistance of counsel (*People v Ramchair*, 8 NY3d 313, 316 [2007]). Courts analyzing a claim of ineffective assistance of counsel under federal law apply the two-prong test found in *Strickland v Washington*, 466 US 668, 687-88 (1984). In order to prevail on a claim of ineffective assistance under federal law, a defendant must establish that: (1) counsel's professional performance fell below an objective standard of reasonableness (*People v McDonald*, 1 NY3d 109, 115 [2003] citing, *United States v Couto*, 311 F.3d

179,188 [2nd Cir. 2002]); and (2) 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" (*McDonald*, 1 N.Y.3d at 115; citing, *Hill v Lockhart*, 474 US 52, 59 [1985]).

Pursuant to C.P.L. § 440.30[3], [a] court must grant [the motion] without conducting a hearing

and vacate the judgment or set aside the sentence, as the case may be, if:

(a) [t]he moving papers allege a ground constituting a legal basis for the motion; and
(b) [s]uch ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and
(c) [t]he sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

In a letter dated July 2, 2007 (Exhibit D of the People's Opposition Papers), Ms. Rancy's immigration attorney advised Ms. Rancy's defense attorney that Ms. Rancy "would face a significant likelihood of a deportation proceeding if she were to take a plea disposition that constitutes possession of a controlled substance with intent to sell," (emphasis in original). The immigration attorney further advises Ms. Rancy's defense attorney "[t]o the extent the facts of your client's case and legal risks involved permit it, a plea to a crime (even a so-called drug crime) that does not include, as an element, any 'intent to sell' a controlled substance, is most likely to assist her in (a) avoiding the filing of a Notice to Appear for a Removal Proceeding or (b) prevailing against such an effort in the event a Notice to Appear is filed, anyway. To that end, if she could plead to simple possession (PL § 220.03, for example), it would be quite helpful to her immigration position."

In *People v. Hassan*, the defendant was charged with Criminal Possession of a

Controlled Substance in the Third Degree (Penal Law § 220.16), Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]), Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03), and making an illegal U-turn (Vehicle and Traffic Law § 1160[e]). *People v. Hassan*, 36 Misc.3d 160 (A), 2012 N.Y. Slip. Op. 51823 (U) [App Term, 2d, 11th & 13th Jud Dists 2012]. Prior to his plea, the defendant "specifically asked his defense attorney whether there would be any immigration consequences [to] pleading guilty to criminal possession of a controlled substance in the seventh degree, and his attorney affirmatively told him there would not be any." *Id.* In its reasoning the Court found the defendant met the performance prong of *Strickland* because § 237 the Immigration and Nationality Act provided that "any alien who is convicted of violating a state law 'relating to a controlled substance...other than a single offense for possession for one's own use of 30 grams or less of marijuana, is deportable." (*People v. Hassan*, 36 Misc.3d 160 (A), 2012 N.Y. Slip. Op. 51823 (U) [App Term, 2d, 11th & 13th Jud Dists 2012], *quoting* 8 USC § 1227[a][2][B][i]). Further, the *Hassan* Court reasoned that the defendant met *Strickland's* prejudice prong because the defendant alleged he would not have pled guilty to the misdemeanor drug possession if he knew doing so would render him deportable. Despite this fact, the Court ordered an evidentiary hearing on the defendant's ineffective assistance of counsel claim, since the allegations in support of the motion are neither conceded by the People as true or are substantiated by unquestionable documentary proof. *People v. Hassan*, 36 Misc.3d 160 (A), 2012 N.Y. Slip. Op. 51823 (U) [App Term, 2d, 11th & 13th Jud Dists 2012].

Similarly to *Hassan*, Ms. Rancy pled guilty to Criminal Possession of a

Controlled Substance in the Seventh Degree, based on the assurance of her prior defense attorney, who relied on the incorrect advice he received from the immigration attorney that a plea "...to simple possession (PL § 220.03, for example), it would be quite helpful to her immigration position." (Exhibit D of the People's Opposition Papers) when the plea was a deportable offense. Ms. Rancy further alleges that she relied on the incorrect immigration advice when she took the plea before this Court and she would not have taken the plea and would have gone to trial if she were correctly advised of the immigration consequences. Further, as a result of her plea to the drug possession charge, Ms. Rancy was placed in removal proceedings.

As in *Hassan*, Ms. Rancy's demonstrated that she her prior attorney's performance fell below an objective standard of reasonableness (*People v McDonald*, 1 NY3d 109, 115 [2003] citing, *United States v Couto*, 311 F.3d 179,188 [2nd Cir. 2002]); and (2) that "there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial." (*McDonald*, 1 N.Y.3d at 115; citing, *Hill v Lockhart*, 474 US 52, 59 [1985]). However, unlike in *Hassan*, Ms. Rancy is able to substantiate her ineffective assistance of counsel claim and unwillingness to take a plea to a deportable offense by unquestionable documentary proof. *See* C.P.L. § 440.30[3][c]; *See People v. Hassan*, 36 Misc.3d 160 (A), 2012 N.Y. Slip. Op. 51823 (U) [App Term, 2d, 11th & 13th Jud Dists 2012]; *See* (Exhibits A,B, C & D of the People's Opposition Papers); *See* (Exhibit F to Defendant's Affirmation In Support of Motion to Vacate Defendant's Judgment of Conviction). Accordingly, Ms. Rancy's motion to vacate her judgment of conviction based on ineffective assistance of

counsel is granted and the Court need not rule on the claim of actual innocence. The plea is vacated and the felony charge is reinstated and the case is adjourned for the appearance of Ms. Rancy on a day convenient to both sides.

This constitutes the Decision and Order of this Court.

Dated: Kew Gardens, New York
September 15, 2014

PAM

Pauline A. Mullings,
Justice of the Criminal Court