CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART AP-N
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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

-against-

Dkt. No. 2005QN056552

SHAHED HASAN,

Defendant.

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

INTRODUCTION

This matter is again before this Court on remand from the Appellate Term, Second Department (*People v Hasan*, No, 2010-2643 Q CR, September 13, 2012).

The defendant stands convicted of Criminal Possession of a Controlled Substance in the Seventh Degree *(Penal Law § 220.03).* Defendant previously moved through counsel, pursuant to Criminal Procedure Law Section 440.10, to vacate the conviction and sentence on the grounds that he received ineffective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution, as well as Article I, Section 6 of the New York State Constitution. By Decision and Order dated September 15, 2010, this Court denied the defendant's motion without a hearing (*Mullings, J.*).

The defendant appealed and the Appellate Term reversed this Court's decision, remanding the matter for an evidentiary hearing prior to the Court adjudicating the defendant's motion on the merits. On December 21, 2012, this Court conducted a hearing. Based upon the hearing record and the arguments of counsel, the defendant's motion to vacate his conviction is granted. The case is restored to the AP-N calendar on January 23, 2012.

PROCEDURAL HISTORY

The defendant was arrested on November 26, 2005, as a result of a car stop occasioned by the defendant's illegal "U-turn" *(7/7/10 Affirmation of Ayelet Sela)*. During the ensuing investigation, a police officer observed a glassine envelope containing heroin in the center console of the defendant's vehicle *(Id.)*. A search of the defendant's jacket pocket revealed a gravity knife *(Id.)*. The defendant made a statement to the arresting officer in which he admitted to possessing an additional ten glassine envelopes of heroin hidden in his shoe *(Id.)*.

On the above-described facts, the defendant was charged with Criminal Possession of a Controlled Substance in the Third Degree *(Penal Law § 220.16)*, a class "B" felony; Criminal Possession of a Weapon in the Fourth Degree (*Penal Law § 265.01*) a class "A" misdemeanor; Criminal Possession of a Controlled Substance in the Seventh Degree *(Penal Law § 220.03*), a class "A" misdemeanor; and Improper U-turns *(Vehicle and Traffic Law § 1160[E])*, a traffic infraction *(Id.)*. The most serious charge, Criminal Possession of a Controlled Substance in the Third Degree, carried a sentence exposure of a minimum indeterminate sentence of from one to three years to a maximum of eight and one-third to twenty-five years.

On February 21, 2006, the People dismissed the felony count of Criminal Possession of a Controlled Substance in the Third Degree *(Court Record)*. The defendant then waived his right to be prosecuted by information and pled guilty to the crime of Criminal Possession of a Controlled Substance in the Seventh Degree *(Penal Law § 220.03)*, a class "A" misdemeanor, in exchange for a promised sentence of a conditional discharge *(Id.)*. On that date, the defendant was sentenced to a conditional discharge *(Id.)*. The defendant did not file a notice of appeal *(Id.)*.

The defendant was represented at the plea and sentence by Arthur Camponanes, Esq. *(Court File)*.

THE DEFENDANT'S CLAIM

The defendant is a Bangladesh national who is a lawful permanent resident of the United States *(1/14/10 Affidavit of Shahed Hasan)*. On or about March 19, 2008, the defendant was taken into custody by Immigration and Customs Enforcement and served with a Notice to Appear for deportation proceedings *(Appendix D, Defendant's Motion)*. The aforementioned Notice advised the defendant that he was removable from the United States based upon his conviction for the instant offense *(Id.)*.

Defendant moved to vacate his conviction based upon the claim that he was misadvised by his former attorney regarding the possible immigration consequences of his guilty plea. The defendant avers that he asked his former attorney whether taking the plea would affect his ability to travel outside the country, as well as his immigration situation *(1/14/10 Affidavit of Shahed Hasan)*. The defendant avers further that his former attorney replied that it would not *(Id.)*. The defendant avers further that he asked his former attorney if he was sure, to which the attorney answered, "yes," and advised the defendant to stay out of trouble for "six months or one year or something like that" *(Id.)*.

THE HEARING

The sole witness at the hearing was the defendant, Shahed Hasan[1]. On direct examination, the defendant testified, in sum and substance, that he was currently detained in an immigration facility in Georgia, that he was married and that he had a six-month old child. At the time of his arrest, he was concerned about the effect a conviction might have on his immigration status. He testified that he discussed pleading guilty with his retained attorney, Arthur Campomanes, on the steps of the courthouse shortly before appearing in court on the day he pled guilty. The defendant testified that he asked Mr. Campomanes whether a guilty plea would affect his immigration status and was told that it would not because immigration had nothing to do with the plea. As Mr. Campomanes was providing the aforementioned advice, the defendant testified that he was gesturing to a blue book, which supposedly contained relevant information about the effect of similar guilty pleas on immigration status. The defendant testified that he was aware that he could have an immigration problem because a friend of the family who had been arrested shared anecdotal information concerning how immigration agents detained him after he had disposed of a minor criminal charge.

The defendant testified that he conducted his discussion with Mr. Campomanes in English and that had he been properly advised, he would have refused to plead guilty and would have instead fought the case.

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[1] The witness testified remotely by telephone, inasmuch as the immigration facility in Georgia, where he is presently detained, does not possess video-teleconferencing capability. Prior to receiving his sworn testimony, the Court allocuted him on a written waiver of his right to be physically present and his consent to appear by telephone.

On cross-examination, the defendant testified that he that he was born in Frankfurt, Germany. From the ages of 13 to 21, he lived and worked in Bangladesh, where he has cousins, aunts and uncles. Despite making trips to Bangladesh in 2001, 2003 and 2007 to visit his father[2], the defendant testified that he did not and does not maintain contact with his family there. In 1999, the defendant entered the United States as an immigrant from Bangladesh. He testified In 2005, he was working three days per week at a Farmers Market in Jamaica, New York. The defendant was also employed as a waiter at a Hyatt Regency Hotel three days per week. He provided financial support to his mother and sister, with whom he resided.

After his arrest, he moved to Raleigh, North Carolina, where he worked 40 hours per week at a gas station. Whenever he had a court appearance in this case, he took a day off and traveled to Kew Gardens by Greyhound Bus.

At his arraignment, the defendant did not speak to an attorney, although a woman met him in the pens and provided him a business card[3]. During the initial appearance, the defendant recalled there being some discussion about bail, after which he was released on his own recognizance. Once he returned to North Carolina, he attempted to call the attorney who had provided him the business card on several occasions, but he was unable to speak with her. On the recommendation of a friend of the family, the defendant retained Mr. Campomanes. The defendant never visited him at his office, always meeting him in the courthouse. All of his conversations with Mr. Campomanes were conducted in English.

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[2] The defendant's father eventually emigrated to the United States and died in North Carolina in 2007.

[3] The Court Record contains a Notice of Appearance filed by Florence Morgan of the Legal Aid Society, dated contemporaneously with the defendant's arraignment. The Court takes judicial notice that Ms. Morgan is a woman.

The defendant never sent any information relative to his immigration status to Mr. Campomanes, who never asked about it on his own volition. The defendant testified that he did not have an understanding at that time about the seriousness of a felony conviction. He was advised by his former attorney that he would have to be on probation from 6 months to a year or pay a fine. He had no idea that if he had fought the case and lost, he could have faced serious jail time. In his discussions with Mr. Campomanes, the defendant discussed the effect of the guilty plea on his future travel and his immigration status, not his ability to continue working. The defendant was aware that the plea agreement did not call for any reporting on his part and he was satisfied with his former attorney's advice until he was arrested by immigration authorities.

The defendant testified that he had no contact with immigration officials until 2007. He traveled to Bangladesh to visit his father, who was seriously ill. The defendant continued to believe that he had no issues with his immigration status until he was detained at O'Hare Airport upon his return to the United States from Bangladesh. During the course of Mr. Campomanes' representation, there was never a discussion of pleading guilty to possession of the knife, as opposed to a plea to a controlled substance offense.

On re-direct examination, the defendant testified that when he was asked during the guilty plea allocation whether any additional promises had been made to him which had not been placed on the record, that he did not think the Court was inquiring about the potential immigration issue.

On re-cross examination, the defendant testified that he discussed the immigration issue with Mr. Campomanes in a telephone conversation held while the defendant was still in North Carolina, in between court appearances.

During the hearing, both sides stipulated that Mr. Campomanes, the defendant's former attorney, had been disbarred; that the Office of Court Administration had no contact information for him; and that he was unavailable to both sides.

DISCUSSION

"When a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the waiver be knowing, voluntary and intelligent" (*People v Hill*, 9 NY3d 189, 191 [2007]). "Prior to accepting a guilty plea, a defendant must be informed of the direct consequences of the plea. When a court fails to so advise the defendant, the plea cannot be deemed knowing, voluntary and intelligent, and defendant may withdraw the plea and be returned to his or her uncertain status before the negotiated bargain" (*People v Hill*, 9 NY3d at 191).

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]). Under state law, a defendant's claim that he received ineffective assistance of counsel is evaluated under the "meaningful representation" standard (*People v Ramchair,* 8 NY3d at 316; *citing*, *People v Baldi*, 54 NY2d 137, 147 [1981]). 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 (1984).

The U.S. Supreme Court has held that "counsel must advise her client regarding the risk of deportation" (*Padilla v Kentucky*, 130 S.Ct. 1473 [2010]). That Court reiterated its long-standing position that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel" (*Padilla*, 130 S.Ct. at

1486 *citing Hill v Lockhart*, 474 US at 57). "The severity of deportation – 'the equivalent of banishment or exile' – only underscores how critical it is for counsel to inform her non-citizen client that he faces a risk of deportation" *(Padilla*, 130 S.Ct. at 1486).

"[W]here an attorney fails to advise a criminal defendant, or misadvises the defendant, regarding clear removal consequences of a plea of guilty, his or her representation falls below an objective standard of reasonableness" (*People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, June 6, 2012, *3; *citing Padilla v Kentucky*, 130 SCt 1473, 1482-1483 [2010]). The Appellate Division, First Department, has recently held that *Padilla* applies retroactively *(People v Baret*, 2012 N.Y. App.Div. LEXIS 6512 *2 [October 2, 2012]); *but see, Hamad v U.S.*, 2011 U.S. Dist. LEXIS 45851 ["new constitutional rules of criminal procedure, such as that as that laid out by *Padilla*, are not deemed retroactive to cases on collateral review," *citing Schirro v Summerlin*, 542 U.S. 348]; *see also People v Marino-Affaitati*, 88 AD3d 742 [2d Dept. 2011]).

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant'" (*Hill v Lockhart*, 474 US at 56). While the decision in *Hill* affirmed the standard announced in *Strickland* for evaluating claims of ineffective assistance of counsel, it clarified *Strickland's* application to claims of ineffective assistance arising from guilty pleas. "In addition, we believe that requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas we identified in *United States v. Timmreck*, 441 U.S. 780 (1979):

> 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs

> the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'" (*citation omitted*).

(*Hill v Lockhart*, 474 US at 58).

In order to establish prejudice in a post-conviction motion, the 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 (*People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, *5). "In the context of a *Padilla* claim, the defendant 'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances'" *People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, *5; *citing Padilla v Kentucky*, US at, 130 S Ct at 1485).

The determination of whether to plead guilty is a calculus, which takes into account all of the relevant circumstances (*People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, *6). "In light of the primary importance that aliens may place upon avoiding exile from this country, an evaluation of whether an individual in the defendant's position could rationally reject a plea offer and proceed to trial must take into account the particular circumstances informing the defendant's desire to remain in the United States. Those particular circumstances must then be weighed along with other relevant factors, such as the strength of the People's evidence, the potential sentence, and the effect of prior convictions" (*Id.*).

The uncontradicted testimony of the defendant was that he asked his former attorney whether the proposed guilty plea would have an effect on his immigration status and that the attorney's answer was "no." This advice was rendered in 2005, subsequent to the sea-change in immigration law caused by Congress' 1996 repeal of the Attorney General's discretionary power

to cancel removal, which "dramatically raised the stakes of a non-citizen's criminal conviction. The importance of accurate legal advice for non-citizens accused of crimes has never been more important" (*Medina v United States*, 2012 U.S. Dist LEXIS 34467, *8-9, SDNY, February 21, 2012 [*quoting Padilla v Kentucky*, 130 S.Ct. at 180]). This advice was also rendered subsequent to the terrorist attacks of September 11, 2001. The Court takes judicial notice that there was a dramatic increase in immigration enforcement activity in the United States after the events of that day (Tamar Lewin, *"A Nation Challenged: The Domestic Roundup; As Authorities Keep Up Immigration Arrests, Detainees Ask Why They Are Targets,"* NY Times, February 3, 2002; Rachel L. Swarns, *"Immigrants Feel the Pinch of Post-9/11 Laws,"* NY Times, June 25, 2003; Edwin Meese III, *"An Amnesty By Any Other Name . . .,"* NY Times, May 24, 2006).

The Court credits the defendant's testimony that: (1) he told Mr. Campomanes that he was concerned about the possible immigration consequences of the contemplated guilty plea; (2) that Mr. Campomanes assured him that there would be no immigration consequences so long as he was not rearrested; and (3) that Mr. Campomanes never explored with him the possibility of seeking a plea to a different charge in an attempt to minimize the defendant's exposure to possible immigration consequences.

Under these circumstances, the Court finds that Mr. Campomanes advice to the defendant that he would not face immigration consequences was wrong and should have been known to him to be wrong at the time he rendered it. Any competent attorney at that time should have been more cautious about rendering such a sweeping assurance, unsupported by any meaningful research, to a client. Accordingly, the Court finds that the defendant has established the first

prong of *Strickland*, in that his former attorney's advice fell below an objective standard of reasonableness.

The Court finds further that the defendant has established that he was prejudiced by Mr. Campomanes' unprofessional performance, in that a decision to reject the guilty plea and proceed to trial would have been a rational one.

The defendant, after emigrating to the United States in 1999, appears to have experienced an unremarkable life, typical of the experience of recent immigrants to the United States. Prior to his arrest in 2005, he toiled at two part-time jobs, lived with his mother and sister and contributed to the maintenance of the household from his earnings. He continued to work after his arrest, moving to North Carolina to obtain employment at a gas station.

At the time of his arrest, the Court finds it reasonable to infer that he had invested a significant amount of time and energy in building a life in the United States and that a separation from that life, viewed objectively, would have been significant. Although the defendant conceded that he visited Bangladesh three times since his emigration to the United States, his ties to his country of origin appeared to be attenuated, at best, and were linked to the continued residence of his father, from whom he was separated since 1999. The Court finds it significant that after his father suffered a serious illness, he too emigrated to the United States and died in North Carolina, near the defendant's home at the time.

While it is true that the top count of the felony complaint was a class "B" felony carrying a possible sanction of a minimum indeterminate sentence of from one to three years to a

maximum of eight and one-third to twenty-five years, the plea offer made by the People, which the defendant eventually accepted, suggests that there was flexibility in their negotiation position based upon the state of the evidence. Even though the defendant stipulated at the hearing that he was not arguing actual innocence, the facts of the case, as pled in the felony complaint, are a strong indication that the People would not have prosecuted the case as a felony.

First, the evidence supporting the charge of Criminal Possession of a Controlled Substance in the Third Degree was seized as a result of the arresting officer, after supposedly observing a single glassine envelope containing heroin on the center console of the defendant's vehicle, asked the defendant whether he had more drugs in his possession and the defendant responded that he had an additional ten glassines in his shoe. Moreover, this entire series of observations was made after supposedly observing the defendant make an illegal U-turn. The Court finds that this set of facts falls presents litigable suppression issues which a competent defense counsel could exploit, either through litigating them at a suppression hearing or by using them as a bargaining chip.

Even if the defendant had litigated the suppression issues pre-trial and lost, an objective view of the facts would not lead a competent prosecutor to be assured of a conviction on the top count after a trial. The possession of ten glassines of heroin is not an amount so significant that a finder of fact would readily conclude that they were possessed with the intent to sell them, as the proof of the charge of Criminal Possession of a Controlled Substance in the Third Degree requires. In the Court's view, it is equally plausible that a finder of fact could acquit on the felony possession count and find the defendant guilty of the misdemeanor of Criminal Possession of a

Controlled Substance in the Seventh degree, a class "A" misdemeanor, the charge to which the defendant pled guilty.

Based upon the foregoing, a competent prosecutor may have concluded that a conviction on a simple possession charge was the best outcome that was reasonably attainable from a prosecution perspective. This judgement is consistent with the People's offer of a plea to a misdemeanor and a sentence of a conditional discharge in satisfaction of an accusatory instrument containing a top count of a class "B" felony.

Under these circumstances, had Mr. Campomanes pursued a plea to the Criminal Possession of a Weapon in the Fourth Degree count, another class "A" misdemeanor, it would be difficult for a competent prosecutor to resist accepting a certain guilty plea to a class "A" misdemeanor in favor of a plea to another class "A" misdemeanor. Accordingly, while the defendant was unable to testify to various defense strategies he would have urged his former attorney to pursue, a common sense analysis of the facts suggests that there were enough options other than pleading guilty to the offer made by the People to have rationally rejected the offer and proceeded to trial, even if the path to trial was later redirected to an different guilty plea.

Accordingly, the Court finds that the defendant has satisfied the second prong of *Strickland* in that he was prejudiced by Mr. Campomanes unprofessional performance.

CONCLUSION

Accordingly, the defendant's motion to vacate his conviction and sentence is granted.

This constitutes the Decision and Order of this Court.

Dated: Kew Gardens, New York
December 26, 2012

Pauline A. Mullings,
Judge of the Criminal Court