

**People v Diaz**

2010 NY Slip Op 33538(U)

December 17, 2010

Sup Ct, Kings County

Docket Number: 10446/96

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY, CRIMINAL TERM, PART MISC.

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PEOPLE OF THE STATE OF NEW YORK

Indictment No.: 10446/96

against

By: Hon. Thomas J. Carroll

Julio Diaz,

Dated: December 17, 2010

Defendant

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Defendant filed a motion pursuant to CPL § 440.10 (1)(h) to vacate judgment or in the alternative to have a hearing pursuant to CPL § 440.30. In deciding this motion, the court has considered the motion papers, the affirmation in opposition and the court file.

***Background***

On August 5, 1996, the defendant was observed driving a vehicle with a missing red lens cover for one of the car's brake lights. The defendant, who was driving the vehicle, could not produce a license, registration or proof of insurance. Defendant's driving abstract revealed that his license had been suspended on at least ten separate dates.

The defendant was indicted in Kings County under Ind. No. 10446/96 for the crimes of aggravated unlicensed operation of a motor vehicle ( VTL § 511.3 (a)(II) ), driving without a license ( VTL § 509 (1) ), driving an unregistered motor vehicle ( VTL § 401(1) ), and driving without financial security ( VTL § 319(3) ).

On August 8, 1996, in an unrelated incident, the defendant, who, at the time, was represented by Vincent Scala, Esq., pled guilty to one count of attempted criminal possession of a controlled substance in the third degree in exchange for a promised sentence of five years probation in New York County under in New York County Ind. No. 1391/93.

On September 20, 1996, the defendant was sentenced, as promised, in New York County to five years probation.

On December 10, 1996, in the instant case, the defendant again represented by Vincent Scala, pled guilty to first degree unlicensed operation of a motor vehicle in full satisfaction of the indictment ( Rooney, J. at plea ).

On January 23, 1997, in the instant case, the court sentenced the defendant to five years probation to run concurrently to his New York County sentence. Peo.'s Exh I - ps. 3- 4.

Defendant did not appeal from the judgment in this case.

On November 26, 2003 , the United States Immigration and Naturalization Service issued a Notice to Appear, requiring the defendant to appear before the Immigration Court on January 29, 2004, seeking to deport the defendant based upon his New York County conviction for attempted criminal possession of a controlled substance in the third degree. Peo.'s Exh. II.

On December 7, 2007, the Immigration Court ordered the defendant removed to the Dominican Republic. The Immigration Court found the defendant failed to appear at his hearing with no exceptional circumstances having been shown for his non-appearance. Removal was predicated on the defendant having previously admitted the factual allegations contained in the Notice to Appear and conceding removability. Peo.'s Exh. III.

On March 28, 2008, the defendant was deported to the Dominican Republic.

On May 26, 2009, the defendant was arrested by the border patrol as he crossed the Mexican border into Texas.

On August 31, 2009, defendant applied for asylum.

On October 8, 2009, the defendant was convicted of illegal reentry in the United States District Court for the Southern District of Texas and was sentenced to eight months of federal confinement.

On May 5, 2010, the defendant was interviewed and it was determined that he was ineligible for asylum. Defendant has requested a review of that determination.

The defendant seeks to vacate the judgment of conviction on the ground that::

1. the court failed to advise him that his guilty plea might result in his deportation; and
2. counsel was ineffective for not informing him of the immigration consequences of his guilty plea.

Defendant also submits an affidavit from his attorney in which counsel states: “During the entire time of my representation of Mr. Diaz, I did not advise him that a plea of guilty could result in denial of citizenship, refusal of reentry into the United States, deportation proceedings or deportation or removal from the United States of America.”

Defendant’s claim that the court failed to apprise him of the future immigration consequences of his guilty plea is procedurally barred from collateral review. Any omission by the court is a matter of record which would have permitted this issue to have been raised on direct appeal. The court must deny a motion to vacate judgement when sufficient facts appear on the record to permit review on appeal but no such review occurred because of defendant’s unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]; *People v Cuadrado*, 9 NY3d 362, 365 [2007]). By failing to perfect an appeal defendant missed his opportunity to raise this issue before an appellate tribunal. Accordingly, this court is foreclosed from reviewing it as a motion to vacate the judgement of conviction (*People v Cooks*, 67 NY2d 100, 103 [1986]; *People v Jossiah*, 2 AD3d 877 [2d Dept 2003]).

Defendant’s further claim that counsel was ineffective for failing to properly advise him of the immigration consequences of his guilty plea is also rejected.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel’s

conduct was outside the “wide range of professionally competent assistance” (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel’s errors, the outcome of the trial would have been different (*id.* at 694). In the context of a plea, the prejudice prong “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process” (*Hill v Lockhart*, 474 US 52, 59 [1985]). Defendant must be able to show that there is a reasonable probability that, but for counsel’s error, he would not have pleaded guilty and would have insisted on proceeding to trial (*Id.*).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when “the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation” (*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Baldi*, 54 NY2d 137, 147 [1981]). In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v Ford*, 86 NY2d 397, 404 [1995]). Defendant must also show that he was prejudiced by showing that there is a reasonable probability that he would have insisted on proceeding to trial if not for counsel’s alleged deficiency (*People v Rodriguez*, 188 AD2d 623 [2d Dept 1992]).

In this instance defendant received a beneficial plea that did not mandate his incarceration. The probation sentence was imposed to run concurrently with his sentence on his previous New York County drug conviction and the fine imposed was below the allowable maximum fine.

Moreover, nothing in the record casts doubt on the effectiveness of counsel’s performance because defendant was not prejudiced by counsel’s admitted failure to advise defendant of the immigration consequences of his plea of guilty. Here, defendant’s conviction in

this case was not the basis for his deportation. The removal proceedings against defendant were initiated and ultimately concluded based on the factual allegation arising from his previous drug conviction in a different county. That conviction alone subjected defendant to removal regardless of the disposition in this case (*see People v Figueroa*, 170 AD2d 529 [2d Dept 1991]).

**Decision**


Based on all of the foregoing, the defendant's motion is denied in its entirety.

**Right to Apply to Appeal**

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted.<sup>1</sup>

This constitutes the decision and order of the court.

ENTER,

  
HON. THOMAS J. CARROLL  
J. S. C.

**ENTERED**  
DEC 20 2010  
NANCY T. SUNSHINE  
COUNTY CLERK

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<sup>1</sup> 22 NYCRR § 671.5.