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Right to Counsel

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RIGHT TO COUNSEL

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.

COURT OF APPEALS

People v. Ford¹
(decided October 24, 1995)

Defendant, Rudolph Ford, was indicted for second degree manslaughter.² On advice of counsel, defendant pled guilty to the charge and the conviction which resulted in the initiation of deportation proceedings against him by the Immigration and Naturalization Service.³ The defendant alleged that defense counsel's failure to inform him of the possibility of deportation as a consequence of a guilty plea constituted ineffective assistance of counsel, in violation of both the New York State⁴ and Federal⁵ Constitutions.⁶ The New York Court of Appeals rejected Ford's argument and found that counsel had no duty to inform the

1. 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995).

2. *Id.* at 402, 657 N.E.2d at 267, 633 N.Y.S.2d at 272. In addition, defendant was indicted for criminal possession of a weapon in the second and third degree. *Id.*

3. *Id.*

4. N.Y. CONST. art. I, § 6. This provision provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions" *Id.*

5. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence." *Id.*

6. *Ford*, 86 N.Y.2d at 404, 657 N.E.2d at 268, 633 N.Y.S.2d at 273.

defendant of all of the collateral consequences of a guilty plea and affirmed the judgment of the lower court.⁷

On September 28, 1990, the defendant showed a gun to his girlfriend.⁸ Believing that the weapon was not loaded, he held the gun up to her head and pulled the trigger.⁹ The gun discharged and she was killed instantly.¹⁰ The defendant was charged with manslaughter in the second degree, and criminal possession of a weapon in the second and third degree.¹¹ Upon the advice of his counsel, the defendant pled guilty to manslaughter in the second degree and was sentenced to two to six years.¹²

The defendant was subject to deportation by the Immigration and Naturalization Service [hereinafter INS] upon his release from prison because he was a documented legal alien from Jamaica.¹³ After the defendant served the minimum sentence and was paroled, the INS initiated deportation proceedings against the defendant, pursuant to 8 U.S.C. § 1251.¹⁴ On appeal, the defendant claimed that his counsel's failure to warn him of the possibility of deportation constituted a denial of effective assistance of counsel.¹⁵

In addressing the state constitutional claim, the court began its analysis by stating the standard used to judge claims of ineffective assistance of counsel. Under *People v. Baldi*,¹⁶ the

7. *Id.* at 405, 657 N.E.2d at 269, 633 N.Y.S.2d at 274.

8. *Id.* at 402, 657 N.E.2d at 267, 633 N.Y.S.2d at 272.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. 8 U.S.C. § 1251(a)(2)(A)(i) (1995). This section provides that a legal alien may be deported if "convicted of a crime involving moral turpitude committed within five years . . . after the date of entry" *Id.*

15. *Ford*, 86 N.Y.2d at 404, 657 N.E.2d at 268, 633 N.Y.S.2d at 273. *Ford* also alleged that the trial court's failure to advise him on all the possible consequences of a guilty plea resulted in a denial of due process. *Id.* at 402-03, 657 N.E.2d at 267, 633 N.Y.S.2d at 272. The court rejected this contention, finding that the trial court had a duty only to advise the defendant of "direct" consequences of the plea and not "collateral" consequences. *Id.* at 403, 657 N.E.2d at 268, 633 N.Y.S.2d at 273.

16. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981).

standard is one of meaningful representation.¹⁷ In *Baldi*, the court stated that “[s]o long as 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, the constitutional requirement will have been met.”¹⁸

In a later case, *People v. Modica*,¹⁹ the court defined a stricter standard than that elaborated in *Baldi* for ineffective assistance of counsel cases.²⁰ In *Modica*, the court held that in order for a mistake of counsel to be considered ineffective assistance “the test [is] ‘reasonable competence,’ not perfect representation.”²¹ Therefore, both *Modica* and *Baldi* suggest that only certain omissions or transgressions on the part of counsel will rise to the level where the defendant’s constitutional rights are implicated.

Citing to *People v. Boodhoo*,²² the *Ford* court held that where a defendant has pled guilty to a criminal charge, “a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing on the record casts doubt on the apparent effectiveness of counsel.”²³ The *Boodhoo* court held that, because defense counsel has no duty to warn a defendant of the collateral consequences of a guilty plea, such as initiation of deportation proceedings, claims of ineffective assistance of counsel based on the occurrence of such consequences will fail.²⁴

Applying the meaningful representation standard to the facts of the instant case, the *Ford* court found that the defendant, based on the charges against him, could have received a maximum punishment of imprisonment for up to thirty years.²⁵ Based upon

17. *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

18. *Id.* (citations omitted).

19. 64 N.Y.2d 828, 476 N.E.2d 330, 486 N.Y.S.2d 931 (1985).

20. *Id.* at 829, 476 N.E.2d at 331, 486 N.Y.S.2d at 932. *See Baldi*, 54 N.Y.2d at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

21. *Modica*, 64 N.Y.2d at 829, 476 N.E.2d at 331, 486 N.Y.S.2d at 932.

22. 191 A.D.2d 448, 593 N.Y.S.2d 882 (2d Dep’t 1993).

23. *Ford*, 86 N.Y.2d at 404, 657 N.E.2d at 268, 633 N.Y.S.2d at 273 (citing *People v. Boodhoo*, 191 A.D.2d at 449, 593 N.Y.S.2d at 883). *See also* *People v. Mayes*, 133 A.D.2d 905, 520 N.Y.S.2d 276 (3d Dep’t 1987).

24. *Boodhoo*, 191 A.D.2d at 449, 593 N.Y.S.2d at 883.

25. *Ford*, 86 N.Y.2d at 404, 657 N.E.2d at 268, 633 N.Y.S.2d at 273.

the possibility of a thirty year sentence, the plea which enabled the defendant to serve only two to six years was considered to be advantageous.²⁶ Thus, the court concluded that the meaningful representation standard had been met and the court disposed of the defendant's state constitutional claim.²⁷

The *Ford* court began its analysis of the Sixth Amendment claim under the United States Constitution by setting forth the standard established in *Strickland v. Washington*,²⁸ a portent of doom for most ineffective assistance claims. According to *Strickland*, in order for a defendant to demonstrate ineffective assistance of counsel, a defendant must show both deficient performance and that the defendant was prejudiced as a result.²⁹ The *Strickland* Court stated:

26. *Id.*

27. *Id.*

28. 466 U.S. 668 (1984).

29. It has been persuasively argued that *Strickland's* "prejudice" requirement undermines the Sixth Amendment right to effective assistance of counsel. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). Professor Klein states that "*Strickland's* emphasis on the 'ends' (i.e., the outcome of the trial), and not the 'means' (i.e., the process that led to conviction), may prove to be a most unfortunate precedent." *Id.* at 645. One of several examples given by Professor Klein which makes this point is that counsel may be so completely ineffective in his or her investigation of evidence favorable to the defense that this "may well be the very reason that the record will not reflect prejudice for review." *Id.* at 642. Further, Professor Klein points out that "[t]he most ominous portion of the *Strickland* decision . . . indicates the Court's apparent desire to inhibit careful judicial review and to discharge courts from granting relief based on claims of ineffective representation of counsel." *Id.* In this regard, Professor Klein extracts the following quote from *Strickland*:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes *both* showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.³⁰

Next, the *Ford* court cited to *United States v. Del Rosario*,³¹ which involved the issue of deportation as a consequence of a guilty plea. In *Del Rosario*, the circuit court rejected the petitioner's claim that counsel's failure to advise the defendant of the possible deportation constituted ineffective assistance of counsel.³² The *Del Rosario* court concluded that "trial counsel's failure to advise a defendant of the collateral consequence of a plea of guilty affecting the possibility of the deportation of the defendant, does not fall short of the 'objective standard of reasonableness' . . . under *Strickland*."³³

Consequently, the defendant's claim failed under the holding of *Del Rosario*. In addition, while federal cases have held that a failure to advise a defendant of the collateral consequences of a guilty plea does not violate defendant's Sixth Amendment

defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 642-43 (quoting *Strickland*, 466 U.S. at 691 (emphasis added)). From this quote, Professor Klein suggests that the Court is either admitting that "representation by counsel is frequently ineffective and could not withstand close scrutiny[]" or that "the Court somehow assume[s] that any proliferation of cases would present claims without merit, even though there seems to be a number of counsel so deluged with cases that they are simply unable to provide effective assistance" *Id.* at 643. In this regard, Professor Klein concludes that "for whatever reason the Court feared a proliferation of ineffectiveness challenges, that fear alone is no reason to relax the constitutional protection of the right to counsel." *Id.* at 643-44.

30. *Strickland*, 466 U.S. at 687 (emphasis added).

31. 902 F.2d 55 (D.C. Cir. 1990).

32. *Id.* at 59.

33. *Id.*

rights,³⁴ other cases have held that an affirmative misstatement may be sufficient to demonstrate a Sixth Amendment violation.³⁵ However, in the instant case, the defendant made no allegation that counsel incorrectly advised him of the risk of deportation.³⁶ Therefore, the court did not have to consider whether Ford's conviction should be reversed on that ground.³⁷

In applying the federal standard to the facts of the case, the court found that counsel's performance was neither deficient nor prejudicial since counsel was able to obtain such a favorable plea agreement.³⁸ Hence, the two-part *Strickland* test was satisfied.

In comparing the New York case law on effective assistance of counsel with that of the federal system, it is clear that there are several differences. While state law relies on the defendant showing a lack of "meaningful representation,"³⁹ a defendant alleging a violation under the Federal Constitution must satisfy the somewhat more rigorous two-part test of *Strickland*. Furthermore, there does not appear to be a comparable exception under the state caselaw for affirmative misstatements made by counsel. Notwithstanding these differences, because the defendant's appeal rested solely on the allegation that he was not informed of the possibility of deportation and was not based on an affirmative act, the result in this case was the same under both state and federal law.

34. *Id.*

35. *Ford*, 86 N.Y.2d at 405, 657 N.E.2d at 269, 633 N.Y.S.2d at 274. *See also* *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (holding that defendant was entitled to hearing for a determination of reasonable effective assistance of counsel because defendant's counsel advised him that he would not be deported as a result of a guilty plea).

36. *Ford*, 86 N.Y.2d at 405, 657 N.E.2d at 269, 633 N.Y.S.2d at 274.

37. *Id.*

38. *Id.* at 404-05, 657 N.E.2d at 268-69, 633 N.Y.S.2d at 273-74.

39. *People v. Baldi*, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981).