

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 24-00916

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, SMITH, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GARY N. MAULL, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (ASHLEY E. SMITH
OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), dated May 24, 2024. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: Defendant appeals by permission of this Court from an order denying, after a hearing, his motion pursuant to CPL 440.10 seeking to vacate a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), arising from an incident in which the victim was killed by a single gunshot to the head (murder case). We affirm.

The shooting took place in August 2014. DNA evidence recovered from the crime scene was linked to defendant and the codefendant, Thomas Hall (Turtle). The People's theory of the victim's death was that defendant shot and killed the victim in retribution for the victim having purportedly informed on defendant. At the time of the killing, defendant already faced charges in connection with a June 2013 burglary and assault (2013 case). After the victim's death, but before defendant was indicted for killing the victim, he was arrested for bail jumping in connection with the 2013 case.

While defendant was being held at the Cattaraugus County Jail on the bail jumping charges, he spoke by phone with the attorney representing him in the 2013 case. Pursuant to a jail policy that recorded all outgoing phone conversations, several phone conversations between defendant and the attorney were recorded and were subsequently listened to by the Cattaraugus County Sheriff's Office, including by

the detective who was the lead investigator in the murder case and who later testified at defendant's trial. As relevant here, the detective prepared notes memorializing the contents of three calls between defendant and the attorney, which occurred on September 29, October 7, and October 16, 2014. The detective's written notes of the three calls listed the phone number of the person to whom the calls were made and identified that person as defendant's attorney. During those phone calls, defendant and his attorney seemingly discussed the murder case. Relevantly, there were instances during the calls in which defendant and the attorney discussed Turtle and his involvement in the murder case. By the time the first call occurred, Turtle and another individual had already provided law enforcement with statements implicating defendant in the murder case. Both Turtle and the other individual testified at trial.

Defendant was indicted in the murder case some time after law enforcement listened to the phone calls. At sentencing following his conviction, defendant informed County Court that law enforcement had listened to the recorded phone calls with his attorney in the 2013 case. Defendant's trial counsel in the murder case had received the detective's notes memorializing the phone calls as *Rosario* material. Trial counsel stated at sentencing that, because of the homicide investigation, "[t]here may have been a reason [for law enforcement] to listen to those calls," and explained that he chose not to use the issue of law enforcement's actions in listening to phone calls as part of the defense because he "didn't think it was relevant" to the murder case. In response, the prosecutor stated that law enforcement is "not even able to access legal phone calls, none of us are . . . We can't [access those calls] under the software." The court took no action with respect to defendant's allegations.

On direct appeal, we modified the judgment with respect to the sentence imposed and otherwise affirmed the judgment. As relevant here, we concluded that "[t]he record [was] insufficient to establish that defendant's trial was affected by an alleged violation of defendant's right to counsel on the ground that law enforcement officers listened to at least three phone calls between defendant and [his attorney], or that [trial] counsel was ineffective for failing to seek a hearing on that matter" (*People v Maull*, 167 AD3d 1465, 1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). We characterized the allegations that law enforcement had listened to defendant's phone calls with the attorney as "alarming" but nonetheless noted that "the appropriate vehicle for challenging that conduct is a CPL 440.10 motion inasmuch as defendant's contention[s] concern[] matters outside the record on appeal" (*id.*).

Defendant thereafter moved—both pro se and, subsequently, through counsel—to vacate the judgment pursuant to CPL 440.10 on the grounds that, inter alia, he was deprived of his right to counsel by law enforcement's actions in listening to the recorded conversations with the attorney and that trial counsel was ineffective in failing to take action after learning about law enforcement's conduct. The court summarily denied defendant's motion, and on appeal we reversed that order and remitted the matter for a fact-finding hearing pursuant to

CPL 440.30 (5), concluding that the court abused its discretion in summarily denying the motion inasmuch as "ample evidence establish[ed] that a factfinding hearing [was] necessary to determine whether law enforcement's [conduct in listening to the three phone calls] violated defendant's right to counsel" (*People v Maull*, 218 AD3d 1236, 1240 [4th Dept 2023]), and "whether trial counsel was ineffective in failing to take any steps in response to learning about" law enforcement's conduct (*id.* at 1242). Pursuant to our remittal directive, the court conducted a full fact-finding hearing on the CPL 440.10 motion, and it thereafter denied the motion, prompting this appeal.

Defendant contends that the court erred in denying his motion insofar as it sought to vacate the judgment on the ground that law enforcement's conduct in listening to his phone conversations violated his right to counsel. We reject that contention. "[T]he fundamental right to counsel in a criminal case includes 'the right to consult counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to what has been said' " (*People v Gamble*, 18 NY3d 386, 396 [2012], *rearg denied* 19 NY3d 833 [2012], quoting *People v Cooper*, 307 NY 253, 259 [1954]; see *Maull*, 218 AD3d at 1240). To that end, the courts "have often condemned, without reservation, any intrusion into private communications between counsel and client" (*People v Poblner*, 32 NY2d 356, 369 n 2 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; see *Glasser v United States*, 315 US 60, 76 [1942]; *Matter of Fusco v Moses*, 304 NY 424, 433 [1952]). The right to counsel, "based as it is on a fundamental principle of justice, must be protected by the trial judge" (*People v McLaughlin*, 291 NY 480, 482 [1944]; see *People v Hollmond*, 191 AD3d 120, 138 [2d Dept 2020]). Nonetheless, a court is not automatically required to grant a CPL article 440 motion and vacate the judgment of conviction where the court concludes that there has been an intrusion on a defendant's right to private consultation with defense counsel. To warrant vacatur of the judgment, the court must determine "whether the People's evidence on defendant's trial was 'tainted' " by the improper intrusion (*People v Morhouse*, 21 NY2d 66, 77 [1967]; see also *Poblner*, 32 NY2d at 369; see generally *Weatherford v Bursey*, 429 US 545, 552 [1977]).

Here, there is no dispute that law enforcement listened to recordings of three of defendant's phone calls with the attorney who represented him in the 2013 case. There also is no dispute that, during those phone conversations, defendant and the attorney discussed certain aspects of the murder case at a time when defendant was already a suspect in that investigation. That conduct clearly constituted an intrusion on defendant's right to private communication with counsel. Indeed, having listened to the recordings of the phone calls, we note that, contrary to the testimony of the lead investigator at the fact-finding hearing, it is readily apparent from the beginning of the first phone call that defendant was speaking to an attorney. We adhere to our prior characterization of law enforcement's conduct in listening to defendant's conversations with the attorney as "alarming" (*Maull*, 218 AD3d at 1241; see *Maull*, 167 AD3d at 1468). We also note that, at oral argument, the People

correctly conceded that it was improper for law enforcement to listen to those conversations.

Nevertheless, as we previously stated, "the operative question for purposes of defendant's entitlement to vacatur of the judgment of conviction is whether [law enforcement's listening to the recordings of] defendant's conversations with his attorney 'tainted' the People's evidence at trial" (*Maul*, 218 AD3d at 1241; see *Pobliner*, 32 NY2d at 369; *Morhouse* 21 NY2d at 77). Despite the impropriety of law enforcements' behavior here, we conclude that the evidence at the fact-finding hearing supports the conclusion that the intrusion on defendant's right to private communication with the attorney did not taint the murder investigation or prosecution in this case (see *Weatherford*, 429 US at 558). The evidence established that, by the time of the recorded phone calls, law enforcement had already identified defendant as a prime suspect in the victim's death; indeed, two separate individuals (one of whom was Turtle) had already accused defendant of the killing. The evidence at the hearing thus established that the phone calls were not a significant factor causing law enforcement to focus on defendant as a suspect. Moreover, there was no evidence that, as a result of listening to the phone calls, law enforcement developed a new theory of the murder case or obtained any new leads or avenues of investigation. Further, to the extent defendant suggests that Turtle agreed to testify on the People's behalf only after he was provided with a copy of the lead investigator's notes summarizing the phone calls, we note that Turtle's testimony at trial somewhat contradicted his prior statements to law enforcement implicating defendant; indeed, his trial testimony cast doubt on whether defendant was the only person who could have killed the victim. Based on the record developed at the fact-finding hearing, we conclude that defendant's right to counsel was not violated by law enforcement's actions here and that the court thus did not err in denying defendant's motion insofar as it sought to vacate the judgment on that ground (see generally *Pobliner*, 32 NY2d at 369; *Morhouse*, 21 NY2d at 77).

In light of our conclusion that defendant's right to counsel was not violated when law enforcement listened to the recorded phone calls between him and the attorney, we further conclude that trial counsel was not ineffective in failing to take action when he learned about the recorded calls inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]; see *People v Perkins*, 160 AD3d 1455, 1457 [4th Dept 2018], lv denied 31 NY3d 1151 [2018]). In addition, to the extent that the record establishes that trial counsel did not diligently review the materials that revealed law enforcement's improper conduct and to the extent that trial counsel arguably took a position adverse to defendant at sentencing, those isolated errors were not "sufficiently egregious and prejudicial as to deprive . . . defendant of [the] constitutional right to effective legal representation" (*People v Hayward*, 42 NY3d 753, 755 [2024] [internal quotation marks omitted]). Thus, we reject defendant's contention that the court erred in denying his motion

insofar as it sought vacatur of the judgment on the ground that he was denied effective assistance of counsel.

We have considered defendant's remaining contention and conclude that it does not warrant reversal or modification of the order.