

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-23 - QUEENS COUNTY
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM, J.S.C.
Justice

_____	:	
THE PEOPLE OF THE STATE OF NEW YORK	:	
_____	:	
-against-	:	
NEAL DOUGLAS,	:	Ind. No. 4678/95
Defendant.	:	Motion: Vacate Judgment
_____	:	

The following papers numbered
1 to 3 submitted in this motion.

RICHARD L. GIAMPA, ESQ.
For The Motion

HON. RICHARD A. BROWN, D.A.
BY: VERED ADONI
Opposed

	Papers Numbered
Notice of Motion and Affirmation _____	<u>1-2</u>
Affirmation in Opposition _____	<u>3</u>

Upon the foregoing papers, defendant's motion is denied. See the accompanying memorandum.

GLORIA D'AMICO
Clerk

Date: SEPTEMBER 6, 2005

ROBERT CHARLES KOHM, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART K-23

THE PEOPLE OF THE STATE OF NEW YORK	:	BY: ROBERT CHARLES KOHM, J.
	:	
-against-	:	DATE: SEPTEMBER 6, 2005
	:	
NEAL DOUGLAS,	:	IND. NO. 4678/95
Defendant.	:	

Defendant makes this motion for an order vacating the judgment of conviction pursuant to section 440.10 of the Criminal Procedure Law.

Defendant was indicted by a Queens Grand Jury for robbery in the first degree, robbery in the second degree, and unlawful imprisonment in the first degree. Defendant initially said that he would call two alibi witnesses, Sean Saigo and Irving Briggs to testify. Mr. Saigo was the only alibi witness who testified. After defendant rested the People called Irving Briggs in rebuttal.

After a jury trial defendant was convicted of robbery in the second degree and unlawful imprisonment in the first degree. On August 1, 1996, he was sentenced as a persistent felony offender to concurrent indeterminate prison terms of from twenty years to life.

The judgment of conviction was appealed and defendant argued that he was deprived of a fair trial. Defendant maintains that the prosecutor improperly examined the alibi witness; the

trial court gave an incorrect identification charge, and the prosecutor's closing comments were improper. Also, the guilty verdict was against the weight of the evidence and the court abused its discretion as the sentence was too harsh.

On March 16, 1998, the Appellate Division, Second Department affirmed the judgment of conviction rejecting all of defendant's claims as being without merit (see, People v Douglas, 248 AD2d 550). Defendant sought leave to appeal to the Court of Appeals and the application for leave was denied (see, People v Douglas, 92 NY2d 851).

Defense counsel now makes this motion to vacate the judgment of conviction. He argues that defendant was denied effective assistance of counsel because counsel failed to present an adequate alibi defense. In support of the motion counsel submitted affidavits from several people who would have corroborated the testimony of Mr. Saigo, defendant's cousin, the sole alibi witness. Also, because identification was a critical issue, trial counsel was ineffective for failing to present documentary evidence to prove that there was a misidentification by the victim.

There is no merit to defendant's argument.

That part of the motion based on a claim of counsel's ineffectiveness for not presenting documentary evidence to support a misidentification must be denied as it is subject to a mandatory

procedural bar. There are sufficient facts on the record to have allowed adequate review of the issue on direct appeal but no such appellate determination occurred because defendant unjustifiably failed to raise the issue on appeal (CPL § 440.10[2][c]). Defendant was in a position to raise the issue on appeal, but failed to do so (see, People v Cooks, 67 NY2d 100, 103).

What constitutes effective assistance of counsel varies according to the unique circumstances of a particular case. The circumstances must be viewed in their totality as of the time of representation to determine whether the attorney provided meaningful representation (People v Wilson, 133 AD2d 179, citing People v Baldi, 54 NY2d 137). Care must be taken "to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (People v Baldi, supra, at 146).

A contention of ineffective assistance of counsel requires proof of true ineffectiveness rather than mere disagreement with strategies and tactics (People v Benn, 68 NY2d 941). "So 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" (People v Baldi, supra, at 147). To establish a claim of ineffective assistance of counsel, defendant must

demonstrate the absence of strategies or other legitimate explanations for counsel's failure to pursue other claims (People v Rivera, 71 NY2d 705).

In the instant case, defense counsel maintains that trial counsel was remiss for not calling five alleged alibi witnesses during trial to strengthen the alibi defense. In support of this claim counsel now, nine years after trial, submits affidavits from the five people who maintain that they were with defendant.

The Court finds that counsel has failed to allege claims which would constitute a lack of "meaningful representation" (People v Baldi, supra). Trial counsel competently represented defendant. He made proper pretrial motions, and he made an appropriate opening statement. He thoroughly cross-examined the People's witnesses, and presented an alibi defense.

It is very possible that calling these additional witnesses could have damaged defendant's alibi defense. Briggs testified as a rebuttal witness for the prosecution and his testimony corroborated only part of Saigo's testimony. Trial counsel's not calling Briggs prevented the People from cross-examining and impeaching Briggs, which was to the defense's advantage. As Briggs only partly corroborated Saigo's testimony, by not calling Briggs it reduced the chances of discrediting the alibi defense.

As to the other alleged alibi witnesses, there is nothing that would indicate that trial counsel knew of their existence. Assuming arguendo that counsel did know of the existence of these witnesses and what the witnesses would have testified to, their testimony would have contradicted Saigo's testimony. The other witnesses would have rendered Saigo's testimony suspect and might have discredited the alibi defense completely. By only presenting a single alibi witness there was no chance that another defense witness would impeach Saigo's testimony.

There is no showing that the result of the trial would be different had trial counsel called the other alleged alibi witnesses. It was defense counsel's strategy to pursue the alibi defense with only Saigo testifying (see, People v Park, 229 AD2d 598).

It is purely conjectural, and it is not the duty of the court "to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (People v Satterfield, supra, 799-800). "A convicted defendant, with the benefit of hindsight, often can point out where he or she thinks trial counsel went awry" (People v Rivera, supra, at 708; see also, People v Aiken, 45 NY2d 394).

The Court has reviewed and evaluated defense counsel's

claims and finds that defendant failed to sustain his burden of proving that he was denied a fair trial based on ineffective assistance of counsel (see, People v Flores, 84 NY2d 184; People v Baldi, supra; People v DeFreitas, 213 AD2d 96; People v Hamlin, 153 AD2d 644).

Based on the foregoing, defense counsel's motion to vacate the judgment of conviction is denied.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this memorandum and order to the attorney for defendant and to the District Attorney.

ROBERT CHARLES KOHM, J.S.C.