

People v Adams

2001 NY Slip Op 30042(U)

July 9, 2001

Supreme Court, Kings County

Docket Number: 0010106/1998

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER

AXEL ADAMS :
: IND. NO. 10106-98
Defendant :

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MICHAEL A. GARY, J.

Defendant moves pro se , pursuant to CPL § 440.10, to vacate his judgment of conviction and the imposed sentence, in a motion dated January 26, 2001. A supplemental affidavit was submitted on March 2, 2001. The People have filed a response opposing the defendant's motion in papers dated May 15, 2001. Defendant argues, pursuant to CPL §440.10 subdivisions (1)(f) and (h) that the judgment was obtained in violation of his rights under the state and federal constitutions because of the ineffective assistance of counsel. In the alternative, he moves for a hearing on the issues.

The defendant's conviction arose from the following incident. As found by the jury, on October 2, 1998 at approximately 5:30 P.M. the defendant along with one other man, who was not apprehended, entered a commercial location containing two businesses. In the front was a printing business run by Jorge Olsen and in the rear an export/import business run by Ingrid Scholl. The unapprehended man was carrying a large box that was packaged as if ready to ship to another country. He approached the rear of the store, while Mr. Adams entered the store and stayed in the front at the printing business. The unapprehended man grabbed Ms. Scholl, and kept demanding money. A struggle ensued and Ms. Scholl ultimately suffered a knife wound to her hand. In the meantime, the defendant was holding a

large knife to Jorge Olsen's stomach, also demanding money. The defendant grabbed Mr. Olsen's chain during a struggle and Olsen escaped from the store and screamed for help. The defendant and the unapprehended other fled the building in opposite directions, and Jorge Olsen chased the defendant for three blocks. Police officers were alerted to the robbery and the chase, and eventually apprehended the defendant in an abandoned lot. Jorge Olsen immediately identified the defendant as the man who took his chain and Ingrid Scholl later did so in a line-up. The police recovered a knife and Mr. Olsen's gold chain in the lot.

The defendant was charged in Kings County Indictment 10106-98 with the crimes of Robbery in the first degree (Penal Law §160.15), and related counts regarding Jorge Olsen and Attempted Robbery in the first degree (Penal Law § 110/160.15), and related counts regarding Ingrid Scholl, under an acting-in-concert theory. After the defendant's arraignment, bail was posted, and after several court appearances for discovery and plea negotiations, the court conducted pretrial hearings. Up till that time the defendant was represented by a privately retained attorney, Alan Stutman. At the next adjournment, when the case was scheduled to begin trial the defendant failed to show up in court. His bail was forfeited and a bench warrant was issued on June 14, 1999.

Upon the defendant's involuntary return on the warrant by bail bondsmen in December, 1999, the case was adjourned for trial. Sometime in January, the defendant requested that new counsel be assigned and on February 8, 2000 Brian Perskin, Esq. was given the case to try. The court adjourned the case until February 17, for final plea negotiations and/or for preliminary trial matters, and then again until February 22, for jury selection to begin.

The defendant was convicted on February 28, 2000, of Robbery in the first degree and Attempted Robbery in the second degree. He was adjudicated a second felony offender and sentenced on March 21, 2000 to respective determinate terms of imprisonment of 15 years and 7 years to run concurrently.

The defendant's appeal has been perfected, as appellant's brief was filed on April 5, 2001 with the Appellate Division Second Department.

The defendant now moves to vacate the conviction stating that he was deprived of his right to counsel under the constitution in that Mr. Perskin was unprepared, failed to properly cross-examine the complainant regarding a previous arrest, failed to strenuously argue the defendant's CPL §30.30 claim, failed to present the defendant's "derivative defense"(?) (Def.'s motion, page 8, paragraph 7) that there was a struggle but he did not initiate it and failed to challenge the court's charge to the jury in this regard, and failed to give a strong summation. Defendant also maintains that his common law wife was willing to substantiate information regarding defendant's blindness, that it was his own chain he recovered, and that he feared turning in other neighborhood people who put him up to bringing the package into the store in the first place, and how both attorneys ignored this information and failed to summon her as a witness. Additionally, the defendant complains that Mr. Perskin, and before him, Mr. Stutman, treated both him and his common-law wife with disregard and contempt. The defendant has attached to his moving papers Exhibits A through R, as documentation to support his position as well as an affirmation by his common law wife, Tawana Middleton.

The People counter in their response that as a procedural matter, all the allegations

are reviewable in the Appellate Division on direct appeal, as they are matters that appear on the record. CPL § 440.10 (2) (b). As a substantive matter, the People argue that the defendant received effective assistance of counsel under the law, and as such the motion to vacate must be denied.

CPL § 440.10 governs the court's decision making capacity in regards to the motion to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . .

- 2.(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, . . .
- (b) the judgment is at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or
- (c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

A court is mandated to deny a motion to vacate a judgment of conviction when the issues raised therein should be raised in appellate proceedings. The court agrees with the People that the failures alleged by the defendant in his papers are largely matters that appear on the record and are reviewable on the appeal of this case, and thus not cognizable in this motion to vacate. Nevertheless, this court finds that the defendant's claim is without merit.

Mr. Adams complains that Mr. Perskin, the defense attorney who represented him at trial, was unprepared to go forward with the case. He illustrates this by way of the attorney's inability to argue the defendant's speedy trial motion, because he was not there on previous adjournments. The court notes that the record was very clear on the purposes of the previous adjournments, and that there was nothing substantive in the way of legal argument that Mr. Perskin, or anyone else, could have contributed to the court's decision in denying the

motion. With regards to the actual trial, the court supplied the defense attorney with all the materials that it had, had the previous defense attorney do the same and adjourned the case for over 10 days to prepare. Mr. Perskin had sufficient time to familiarize himself with the materials, and ably demonstrated his ability on cross-examination. Of course, as a matter on the record, this is properly handled on direct appeal.

Next, the defendant argues that his attorney failed to take into account in presenting his defense case or in cross-examination of any of the witnesses, the difficulties that the defendant has with his vision. Mr. Adams claims that his poor eyesight was in fact to blame for him picking up the victim's chain along with his own, but more immediately the defendant claims that he was unable to see one of the 18 jurors in the venire, because of that chair's position. Though this was addressed on the record, he now claims that he was concerned that the juror may have had a hidden agenda or a vendetta against the defendant and the attorney failed to explore this possibility. Of course, the defendant fails to allege that though he heard the juror's name and biography, any such facts emerged on the record, when it would have been timely to deal with. This juror was seated as an alternate but did not deliberate. Further, the People point out as a matter of substance, that the defendant neither in his statement to the police, nor in his testimony on the stand did he mention his poor eyesight, nor that he had a chain that he lost in a struggle with the victim.

The defendant next complains that his attorney failed in his obligations to represent him in that he failed to properly cross-examine Mr. Olsen, the complainant, after it became known that he was wanted for a matter in New Hampshire. The defendant further alleges that the court's instruction on Olsen's use of the privilege against self-incrimination was in error. However, as the People point out, once the witness refuses to answer a question and invokes his rights under the Fifth Amendment, cross-examination on the substance of the

charges is foreclosed and the court properly instructed the jury how to consider the answer in its evaluation of the testimony. And of course, this is a matter on the record for consideration by the appellate court.

Exhibit I, Tawana Middleton's affidavit, necessitates comment as this is a matter outside the record. The information regarding the defendant's alleged vision problems are inapposite since the defendant could have raised the issue during his testimony; it was well within his knowledge. He, however, did not. And though she now complains about Mr. Stutman's performance, her remedy as was exercised, was to terminate his representation.

The court cannot make a determination as to the allegations that Mr. Perskin was dismissive of the defendant outside of court proceedings. The court's view of the overall representation by the attorney must be viewed in the totality of the circumstances, and as discussed below the court finds that representation was more than adequate. In fact, Mr. Perskin succeeded in obtaining an acquittal of the most serious charge, Attempted Robbery in the first degree, as it related to Ms. Scholl.

The defendant's right to effective assistance of counsel is governed by the standards enunciated in *Strickland v. Washington*, 466 US 668 (1984) and *People v. Baldi*, 54 NY2d 137 (1981). He has a right to competent counsel. The record here reveals that the each of defendant's attorneys effectively made motions, conducted plea negotiations and cross-examined witnesses at the hearing and at trial. The defendant's failure to persuade the jury that his version of events was to be believed after he testified, can not be attributed to the performance of his attorney. The court notes that at no time did the jury request readback of any testimony. In rendering a guilty verdict within approximately five hours of being charged, the jury obviously rejected defendant's testimony in its entirety.

More importantly, under the standard enunciated in *People v. Satterfield*, 66 NY2d

796, it is precisely the kind of speculation that is attempted here that is anathema to a review of these type of claims.

... [C]ounsel's subjective reasons for his choice of [this] strategy in this case were immaterial. Viewed objectively, the transcript and the submissions reveal the existence of a trial strategy that might have been pursued by a reasonably competent attorney ...it is not for the court to second guess whether a course chosen by defense counsel was the best trial strategy or even a good one, so long as defendant was afforded meaningful representation. At p. 799

As the defendant has not proffered a cognizable ground under CPL § 440.10 (1) (h)

to convince the court that any violation of the defendant's rights under the constitution occurred, the court hereby denies this motion to vacate the judgment.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
July 9, 2001

HON. MICHAEL A. GARY
J.S.C.
MICHAEL A. GARY, J. S. C.