

People v DeGondea

2001 NY Slip Op 30044(U)

July 9, 2001

Supreme Court, New York County

Docket Number: 0002422/1993

Judge: Marcy L. Kahn

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM : PART 44
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THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. 2482/93

-against-

DECISION AND ORDER

DAVID DEGONDEA,

Defendant.

-----x
MARCY L. KAHN, J.:

On January 5, 1995, defendant was convicted after a jury trial before a different Justice of this court¹ of murder in the first degree, attempted murder in the first degree, criminal possession of a weapon in the second degree and criminal sale of marijuana in the first degree arising from a shootout which resulted in the death of an undercover police officer who was in the process of purchasing a large quantity of marijuana from the defendant. He is currently serving a term of imprisonment of 55 years to life.

Defendant appealed his conviction, contending, *inter alia*, that the trial court had erroneously denied for-cause challenges to prospective jurors numbers five and eleven. The Appellate Division held the appeal in abeyance and referred the matter to

¹ The trial Justice is now deceased.

² Defendant's co-defendant at trial, Edward Arce, was charged with criminal sale of marijuana in the first degree (PL § 221.55) and criminal sale of a firearm in the third degree (PL § 265.11(2)), and was convicted of both charges. Arce was neither a party to the appeal nor to the present proceedings before this court.

the Supreme Court to hold a hearing to reconstruct the *voir dire* examination of the two jurors. (People v. Desondea, 256 AD2d 39, 41-42 [1st Dept. 1998] ("Desondea I"). This court conducted the reconstruction hearing, made findings (People v. Degondea, Ind. No. 2442/93, slip op. [Sup. Ct., **NY Co.** Sept. 7, 1999] ("Degondea II")), and returned the case to the Appellate Division which affirmed defendant's conviction (People v. Desondea, 269 AD2d 243, 245 [1st Dept.], lv. denied, 95 NY2d 834 [2000] ("Desondea III").

Defendant now moves pursuant to CPL § 440.10(1)(f) and (h) to vacate the judgment against him on the following grounds: 1) the trial court erroneously denied a for-cause challenge as to juror number two, as a result of that court's failure adequately to supervise the *voir dire*; 2) the trial court was constructively absent from the courtroom during parts of the *voir dire* proceedings, which deprived defendant of his federal and state constitutional rights to a trial by jury; and 3) the trial court infringed defendant's right to appellate review of the denial of his for-cause challenges in violation of the equal protection and due process clauses of the state and federal constitutions. Defendant requests that a hearing be held to determine whether the trial court failed adequately to supervise //the *voir dire*, whether that failure resulted in an erroneous denial of the for-cause challenge to juror number two,' and whether the trial court's conduct during *voir dire* denied him

his state and constitutional rights to a jury trial and to

I. PRIOR PROCEEDINGS

Determination of defendant's motion initially requires a detailed review of the precise issues raised and decided during

numbers five and eleven, who expressed an inability to be fair, and impartial in the case due to their relationships with police officers. The Appellate Division found that meaningful appellate review of defendant's claim was impossible, as the jurors' responses during *voir dire* were not recorded and the trial court had refused defense counsel's request to re-interview the jurors, which resulted in defendant being thwarted from creating an adequate record for appellate review. (Degondea, ¶, supra, at 41-42). The court also observed that evidence in the record "suggest[ed] that the defense attorneys "consistently mischaracterized" the jurors' responses, and that given contradictory characterizations, it was "clear that the existing record establishes nothing definitively and precludes appellate review of the court's rulings on the challenges for cause." (Id., at 41).

The Appellate Division remanded the case for a reconstruction hearing "to determine the substance of the two jurors'

[five and eleven] statements during the voir dire proceedings that relate to whether either juror possessed any genuine bias that would preclude such juror from rendering an impartial verdict." (Id., at 41-42).

Pursuant to the Appellate Division's directive, this court conducted a reconstruction hearing on January 22, January 29, February 19, March 9, March 22, March 30 and June 11, 1999 at which witnesses testified, *inter alia*, to the trial court's impatience with the progress of jury selection (Tr., at 126 [Jan. 29, 1999], 80 [Feb. 19, 1999]) and periodic bouts of somnolence (Tr., at 216-18 [Jan. 29, 1999], 77, 81, 94-95 [Feb. 19, 1999]). Defendant's trial counsel also testified that he feared aggravating the trial court by pressing for-cause challenges in light of previous remarks made by the trial judge. (Tr., at 82 [Feb. 19, 1999]).

On March 5, 1999, during the course of the hearing and based upon evidence adduced concerning juror number two, defendant applied pursuant to Judiciary Law § 509(a) to the Appellate Division for the release of identifying information concerning that juror, with the apparent purpose of expanding the scope of the reconstruction hearing to include his testimony as to both the trial court's supervision of the voir *dire* and the propriety of the trial court's denial of the for-cause challenge as to him. (Letter of Claudia S. Trupp, **Esq.**, dated March 5, 1999). On March 25, 1999, the Appellate Division denied defendant's application, without explanation.

On September 7, 1999, this court rendered a written decision finding that the preponderance of the credible evidence had established that prospective juror number five had stated, in substance, that he would **be** uncomfortable serving on the jury due to his relationship with one or more police officers, and that such feelings might affect his ability to be fair and impartial in the case. (Decondea 11, supra, at 54-55).³

In a supplemental brief to the Appellate Division filed after this court rendered its findings with respect to the reconstruction hearing, defendant asked that the Appellate Division reopen the reconstruction hearing to permit him to call juror number two as a witness to determine the substance of his responses during voir dire.

In its Memorandum Decision dated February 17, 2000 the Appellate Division affirmed defendant's conviction, holding that although juror number five may have initially expressed discomfort sitting on a case involving a police officer, the totality of the reconstruction record demonstrated that the trial court did not err in refusing defense counsel's for-cause challenge. (Desondea 111, supra, at 245). The court **did** not address defendant's application as to juror number two.

³ As defendant had conceded that the trial court's ruling as to juror number eleven had been correct, this court did not issue findings with respect to that juror. (Id.).

11. RELEVANT CPL § 440.10 LAW

Criminal Procedure Law § 440.10(1) provides that at any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon certain specified grounds. Such a motion informs the court of facts not appearing on the record and unknown at the time of the judgment, which as a matter of law, would undermine the basis of the judgment. (People v. Donovan, 107 AD2d 433, 444 [2nd Dept.], lv. denied, 65 NY2d 694 [1985]). The motion may not be used to obtain an additional appeal or as a substitute for direct appeal. (Id.; see also People v. Cooks, 67 NY2d 100, 103 [1986]).

Before a court may address the merits of such a motion, it must first determine whether the claim is procedurally barred by CPL § 440.10(2) or (3). Subdivision two of CPL § 440.10 "mandates the denial of a motion to vacate a judgment when, *inter alia*:

(a) [t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment . . .

Subdivision three affords the motion court discretion to deny a motion to vacate a judgment when, *inter alia*:

(a) [a]llthough facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal.

The CPL § 440.10 motion has been characterized as an "emergency measure" designed to provide a defendant with a remedy when no other relief is or ever was available. (People v. Donovan, supra). Thus, if the facts underlying a claim for relief were known prior to sentencing and the defendant unjustifiably failed to make such facts known to the court, then CPL § 440.10 relief is unavailable.

In deciding whether to exercise discretion in favor of a moving defendant pursuant to subdivision 3(a), the court may excuse the movant for failing to place an issue on the record so that it would have been amenable to appellate review, if the ability to raise it had been "substantially impaired or denied." (See People v. Bennett, 30 NY2d 283, 287-288 [1972]). Where the failure to object was motivated solely by strategy or game-playing, however, courts have found the failure unjustifiable. (See People v. Berezansky, 229 AD2d 78 [3rd Dept., lv. denied, 89 NY2d 919 [1996] [failure unjustified where defendant did not raise legal issue because he was ignorant of legal ramifications of underlying facts and did not inform his lawyer of them due to his distrust of lawyer]; see also People v. Tamayo, 222 AD2d 321 [1st Dept. 1995], lv. denied, 88 NY2d 886 [1996]).

Even if a motion to vacate is not barred by CPL § 440.10(2) or (3), the court may, in certain circumstances, decide the motion without a hearing, for example, where the moving papers, *inter alia*, fail to allege a ground constituting a legal or factual basis for the motion (CPL § 440.30(4)(a), (b)).

III. CONTENTIONS AND ANALYSES

A. Denial of for-cause challenge to juror number two

1. Parties' contentions

Defendant first moves to vacate the conviction pursuant to CPL § 440.10(1)(f),³ on the ground that the trial court improperly denied his for-cause challenge as to prospective juror number two. He alleges that notes prepared by the assistant district attorney and counsel for the co-defendant during jury selection and disclosed to defendant for the first time during the reconstruction hearing, reflect that juror number two was unable to serve fairly. Defendant further asserts that the trial court slept through portions of the *voir dire*, thereby failing adequately to supervise jury selection. Finally, defendant contends that his request to recall juror number two to clarify his answers was wrongfully denied by the trial court.

The People argue that defendant's motion must be summarily denied pursuant to CPL § 440.10(2)(a). They assert that the Appellate Division rendered a decision on the merits of

³ CPL § 440.10(1)(f) provides that:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

[i]mproper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom . . .

defendant's claim concerning the erroneous denial of the for-cause challenge of juror number two when it denied defendant's application for access to information concerning the juror and in its decision affirming defendant's conviction. They cite in support People v. Kahn, 281 AD 982 (2nd Dept. 1953), and People v. Speilman, 26 AD2d 574, 575 (2nd Dept. 1966).

2. Analysis

a. CPL § 440.10(2)(a)

I turn first to the issue of whether the Appellate Division previously determined on the merits the propriety of the trial court's denial of the for-cause challenge to juror number two. (CPL § 440.10(2)(a)). Neither party has asserted that the issue of the denial of the for-cause challenge as to the juror was raised on defendant's initial appeal. Rather, both sides apparently recognize that defendant appealed on the basis of the challenges to jurors five and eleven only, and the Appellate Division ordered reconstruction as to their *voir dire* examination responses only. (See Desondea I, *supra*, at 41). Moreover, the Appellate Division denied defendant's mid-hearing request for access to information with which to contact juror number two, presumably because defendant had not raised an appellate issue concerning that juror.

The Appellate Division's ultimate determination of the appeal, therefore, addressed only the issues which were originally raised on appeal and referred for reconstruction,

namely the issues relating to the impartiality of jurors five and eleven. Defendant's claim concerning juror number two was not addressed in the opinion, and under these circumstances, clearly could not have been determined on the direct appeal.'

The People's contention that the Appellate Division's reference in its original decision ordering reconstruction to evidence in the record suggesting that the defense attorneys had mischaracterized jurors' responses on *voir dire*, including, presumably, the responses of prospective juror number two, could not possibly constitute a decision on the merits as to the denial of the cause challenge to that juror. First of all, the claim had not even been raised by defendant on appeal. Second, the court had reached no decision on the merits of the appeal in its original opinion, but rather had ordered a reconstruction hearing which was to address the issues which had been raised on appeal, *i.e.*, the for-cause challenges to jurors numbers five and eleven. Finally, examination of the court's next statement makes clear that when examined in context, the Appellate Division's statement merely prefaced, and explained, its

² Indeed, the court observed that when the appeal was originally before it, "defendant urged a reversal based, *inter alia*, upon two *jurors'* statements that they could not be fair due to friendships with police officers, and we remitted the case to the Supreme Court for a reconstruction hearing 'to determine the substance of ... two jurors' statements'during the *voir dire* proceedings that relate to whether either juror possessed any genuine bias that would preclude such juror from rendering an impartial verdict'" (Desondea III, *supra*, at 245 [referring to jurors five and eleven] [emphasis added]).

conclusion that "the existing record establishes nothing definitively." (Id., at 41). Accordingly, the court's statement in no sense constituted a determination of the issue on the merits at that stage of the appeal.

For similar reasons, defendant's submission of a supplementary, post-hearing brief addressing the Appellate Division's denial of his request for information with which to summon juror number two as a witness at the reconstruction hearing could not have enlarged defendant's appeal to include a new claim involving juror number two, particularly in light of the fact that his testimony was never reconstructed.

Moreover, as the People conceded in their supplemental appellate brief, the Appellate Division's denial of defendant's request for information concerning the juror pursuant to Judicial Law § 509(a) was not "an order made by a criminal court" within the scope of permissible review by an intermediate appellate court pursuant to CPL § 470.15 (Supp. Brief for Respondent, at 54; Exh. S in Support of Defendant's Motion to Vacate Judgment), and could not put before that court an issue which had never been the subject of the appeal.

Finally, the cases cited by the People are inapposite, as they each involve situations in which the contentions argued on *coram nobis* review had been raised and reviewed upon the defendant's appeal. (People v. Speilman, supra; People v. Kahn, supra). Here, as explained above, the issue of juror number two's competence was neither raised nor reviewed on the appeal.

For all of these reasons, defendant's motion is not subject to summary denial pursuant to CPL § 440.10(2)(a).

b. CPL § 440.30(4)(a)

In considering the merits of defendant's motion, the court may deny it without a hearing pursuant to CPL § 440.30(4)(a) if the moving papers do not allege a ground constituting a legal basis for the motion. The asserted legal basis for defendant's motion is the trial court's off-record improper and prejudicial conduct in denying defendant's for-cause challenge as to prospective juror number two. (CPL § 440.10(1)(f)).

The right to trial by an impartial jury is a fundamental constitutional right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the New York State Constitution, art. I, § 2. (Duncan v. Louisiana, 391 US 145, 151-54 [1968]; People v. Branch, 46 NY2d 645, 652 [1979] ["[n]othing is more basic to the criminal process than the right of an accused to trial by an impartial jury."]). Criminal Procedure Law § 270.20(1)(b) safeguards that right by providing that a party may challenge a prospective juror for cause if the juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial." The Court of Appeals most recently held that a for-cause challenge must be granted when a juror expresses doubt about her ability to serve impartially "unless the juror states unequivocally on the record that she can be fair." (People v. Arnold, ___ NY2d ___, 2001 WL 670065 [2001]).

Here, defendant alleges that prospective juror number two had said that he could not be fair and that the trial court erred in denying the for-cause challenge. There being both a legal and a factual basis for his motion, a hearing is ordered to determine the substance of the juror's responses when examined by the attorneys during *voir dire*. (CPL § 440.30[4](a), (b)).

B. Trial court's constructive absence from *voir dire*

1. Parties' contentions

Defendant next asserts that the trial court was constructively absent during portions of the *voir dire*. He relies on People v. Tolliver, 89 NY2d 843 (1996), in arguing that the trial judge's periodic sleeping during *voir dire* amounted to a relinquishment of control over the proceedings which deprived him of his constitutional right to a jury trial.

The People argue that summary denial of this aspect of defendant's motion is authorized by CPL § 440.10(3)(a), as defendant unjustifiably failed to raise any objection to the trial court's alleged somnolence and that this failure to object constituted an improper attempt to obtain a tactical advantage. They also argue that the trial court's expressed familiarity with the juror's background establishes that he was not sleeping during that portion of the *voir dire*, and have submitted an affirmation from the assistant district attorney who tried the case for the People attesting to the fact that he did not

observe the trial court sleeping. (Aff. of William Greenbaum, dated June 4, 2001).

Defense counsel responds by observing that such an objection would have antagonized an already impatient judge and could have seriously prejudiced defendant. The defense also maintains that defense counsel effectively raised the issue through his repeated requests to requestion the prospective jurors on the record, which were to no avail.

2. Analysis

a. CPL § 440.10(3)(a)

According to witnesses for both the People and defendant at the reconstruction hearing, the trial court was extremely impatient during jury selection. Indeed, this court made an explicit finding in its ruling after reconstruction that the trial court was impatient and, at times, inattentive. (Desondea II, supra, at 50). Moreover, the Appellate Division's finding that defendant was "**thwarted**" in his effort to create an adequate record for appellate review supports defendant's claim that an objection would have been unavailing. (See also People v. Yut Wai Tom, 53 NY2d 44, 55 [1981] [recognizing that extreme form of trial court intervention in examining witnesses may excuse defendant's failure to register objection]).

Thus, I find that trial counsel was "substantially impaired" in his ability to register an objection to **the** trial court's somnolence by that court's refusal of counsel's request to recall the juror for further questioning. In any case, I

find that trial counsel raised the issue with the trial court by requesting that the prospective jurors be recalled. Under the circumstances, such a request could have been viewed as a tactful and risk-free method of permitting the trial court to ensure that its previous failure to adequately attend to the proceedings did not result in error. Realistically, there was little more trial counsel could do, short of leveling an embarrassing accusation at the court.

Accordingly, CPL § 440.10(3) (a) poses no procedural bar to defendant's motion to vacate the conviction due to the court's somnolence.

b. CPL § 440.30(4)(a), (b)

The legal basis for defendant's complaint that the trial court slept during *voir dire* is that he was thereby deprived of his constitutional right to a jury trial.

"The presence of and supervision by a Judge constitutes an integral component of the right to a jury trial." (People v. Tolliver, supra, 89 NY2d at 844). In Tolliver, the trial court had absented itself from portions of the *voir dire* examination of jurors by counsel. Observing that it is the trial court which must rule with respect to the prospective jurors' fitness to serve, the Court of Appeals held that "[a] Judge who relinquishes control over the proceedings . . . deprives a defendant of the right to a trial by jury, requiring reversal." (Id., at 844; see People v. Pinckney, 272 AD2d 52 [1st Dept.], lv. denied, 95 NY2d 937 [2000] [reversing conviction due to

trial court's absence from portion of voir dire, despite defendant's consent]). Clearly, a judge who sleeps intermittently during voir dire cannot be viewed as exercising any greater supervision over jury selection than the judge who has physically removed himself or herself from the courtroom during portions of voir dire.

While research reveals no New York decision addressing a defendant's entitlement to a new trial due to a claim that the trial judge slept through a portion of the trial, in a case closely paralleling this one, an Illinois appellate court reversed the summary denial of a post-conviction motion raising such a claim. In People v. Donley, 314 Ill.App.3d 671 (4th Dist.), app. denied, 191 Ill.2d 541 (2000), the defendant sought post-conviction review based upon the allegation that the trial judge had been asleep for fifteen minutes during defendant's bench trial on first-degree murder charges. There, the court reversed the lower court's summary denial of the petition, holding that the defendant had sufficiently raised the "gist" of a meritorious claim for relief which was reviewable collaterally, notwithstanding the defendant's failure to raise the issue at trial and despite the absence of any specific allegations of prejudice.

The People maintain that federal courts require that the defendant demonstrate that he was prejudiced by the court's somnolence. (See, e.g., United States v. White, 589 F.2d 1283,

1289 [5th Cir. 1979] [defendant must show prejudice due to court's somnolence in order to preserve issue for appellate review]). In White, though, the defendant had complained of the trial court's somnolence during the defense counsel's opening statement to the jury as constituting judicial disparagement of counsel's argument. The Fifth Circuit found that any resulting prejudice "was so attenuated as to be non-existent." (United States v. White, supra, at 1289).

This case, however, presents a situation much closer to the facts of Donley than to those of White. Defendant Degondea complains that the court failed to supervise *voir dire*, thereby depriving him of his fundamental right to an impartial jury. (See People v. Arnold, supra; People v. Tolliver, supra; People v. Branch, supra). As was the case in People v. Donley, supra, where the judge was the finder of fact, defendant's allegations that the court did not supervise the *voir dire* bear directly upon a critical role played by the trial judge, namely, the guardian of defendant's right to a fair trial, and do not merely concern the court's level of interest in a defense counsel's opening statement. Accordingly, they are sufficient to merit a hearing on his motion. Moreover, defendant has alleged that he was in fact prejudiced, in that the for-cause challenge to juror number two was erroneously denied as a result of the court's somnolence.

Finally, given the factual dispute presented as to the trial court's conduct, a hearing must be held on whether the

trial court, in fact, slept. (CPL § 440.30 ~~41~~ [a], [b]).

C. Trial court's refusal to permit recall of juror Watson

1. Parties' contentions

Defendant finally maintains that the trial court arbitrarily and capriciously denied his request to recall juror number two, thereby denying him the right to create an appellate record. Defendant claims that without the ability to provide a record on appeal due to the trial court's refusal, he is entitled to a reversal of his conviction pursuant to CPL § 40.10(1)(h).⁶

2. Analysis

The Appellate Division clearly held in its decision remanding for the reconstruction hearing that defendant was denied an opportunity to make a record for appellate purposes. (Desondea I, supra, 256 AD2d at 40; see Desondea II, supra, at 5). Given this decision, defendant's motion must be summarily denied pursuant to CPL § 440.10(2)(a), on the ground that it was previously resolved on direct appeal.

IV. CONCLUSION

For all of the foregoing reasons, defendant's motion is granted to the extent that a hearing is ordered to determine:

⁶ CPL § 440.10(1)(h) provides that:

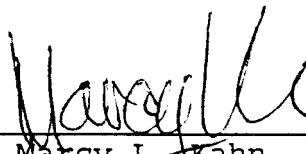
At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

1) whether the trial court's somnolence or inattentiveness resulted in a failure to supervise the *voir dire*, which caused that court to fail to hear the complete *voir dire* examination of juror number two; and 2) whether the juror's responses revealed that he was unqualified to serve as a juror and thus should have been excused for cause.

Defendant's motion is otherwise denied.

This constitutes the findings of fact and decision and order of this court.



Marcy L. Kahn, J.S.C.

HON. MARCY L. KAHN

Dated: July 9, 2001
New York, New York

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