

People v Ennis

2005 NY Slip Op 30328(U)

October 7, 2005

Supreme Court,, New York County

Docket Number: 7870/98

Judge: Robert M. Stolz

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment No. 7870/98

SHELDON ENNIS,

Defendant.

-----X
ROBERT M. STOLZ, J.,

Defendant has filed a motion to vacate the judgment entered against him on March 21, 2001. Defendant was convicted of Conspiracy in the Second Degree, two counts of Assault in the First Degree and other crimes related to the operation of a drug-selling organization, and he is currently serving a sentence of 43 and 1/3 years. Defendant has previously filed a motion to set aside the jury's verdict pursuant to CPL §330.30. That motion was denied by the trial court (Leslie Crocker Snyder, J.). Perfection of defendant's direct appeal is pending.

In this motion, defendant alleges the following grounds for vacatur pursuant to CPL §§440.10 and 440.20:

(1) exculpatory evidence was withheld by the prosecution by their failure to disclose that, in a pretrial proffer session, defendant's co-defendant/brother had claimed sole responsibility for one of the assaults and purportedly exonerated the defendant;

(2) his constitutional right to the effective assistance of counsel was violated due to his trial attorney's promise to co-counsel not to reveal the substance of the proffer session when he learned

of it, and counsel's further failure to move for a severance based on the information;

(3) his constitutional right to counsel was violated by the substitution of counsel; and

(4) his sentence constitutes cruel and unusual punishment and is illegal.

The People oppose the motion.

The Court finds that defendant's claims alleging a *Brady* violation and ineffective assistance of counsel were previously determined by the trial court on the merits in defendant's prior motion to set aside the verdict and consequently, they are rejected. CPL §440.10(3)(b). It is undisputed that defendant's trial counsel learned about the proffer session from co-counsel during the trial, but promised not to reveal the information until after the verdict. However, before sentencing, defendant's trial counsel filed a motion pursuant to CPL §330.30 in which he revealed what he had learned in confidence from co-counsel, and moved to set aside the verdict for the same reasons as those asserted herein. In a decision dated March 1, 2001, Justice Snyder denied the motion. While stating that the People should have disclosed the alleged exculpatory evidence from the proffer session, the court found no *Brady* violation since the defense had knowledge of the evidence. Further, although ineffective assistance of counsel was not specifically pleaded, Justice Snyder examined defense counsel's explanation for his promise of confidentiality and found that it was a tactical choice. It is well-settled that "mere losing tactics" or the "strategic decisions of a 'reasonably competent attorney'" even if unsuccessful, do not constitute a deprivation of the right to effective assistance of counsel. *People v. Benevento*, 91 NY2d 708, 712 (1998).

Defendant also contends that his right to counsel was violated when his assigned counsel was relieved by Justice Harold Beeler, apparently off the record and not in the presence of the defendant, and new assigned counsel was substituted. Patrick Joyce, Esq. has submitted an Affirmation in

which he states that was assigned to represent the defendant at his arraignment (his notice of appearance is dated November 4, 1998), that he had numerous meetings with the defendant and filed pretrial motions on his behalf. Mr. Joyce states that in “late spring or early summer of 1999”, he was informed off the record by Justice Beeler that he was removed from the case due to “an alleged conflict with a prosecution witness”. David Cooper, Esq. has also submitted an Affirmation stating that “in or around September 1999”, he was assigned as new counsel for the defendant. Despite motion counsel’s diligent search of the minutes of adjourned dates during this period, there appears to have been no record made of the reason for the substitution of counsel. Mr. Cooper continued as defendant’s counsel through pretrial proceedings, a lengthy trial, sentencing, and post-trial motions as described above.

Defendant argues that his right to counsel was violated because there is no explanation in the record for the judge’s action in removing Mr. Joyce and substituting Mr. Cooper as his counsel, and furthermore, it was taken in his absence and he was not afforded the option of waiving any purported conflict. This argument is rejected both procedurally and on the merits.

In *People v. Espinal* (10 AD3d 326 [1st Dept 2004]), the conviction was reversed and a new trial granted upon a finding that defendant’s attorney had been relieved over vigorous objection and for legally insufficient reasons. In that decision, the court stated that interference with “an established attorney-client relationship” is reversible error in the absence of a determination that an attorney’s participation presents a conflict of interest or disrupts orderly proceedings. *Id. at* 329. While it is true that no such “determination” appears in the instant trial record, the defendant himself has supplied the explanation in Mr. Joyce’s Affirmation: that is, that there was a potential conflict of interest. Mr. Joyce does not dispute that such a conflict or potential conflict existed and, in my view,

his failure to protest his removal at that time reflects his contemporaneous agreement with the judge's determination. In fact, a conflict of this kind may be so severe as to be essentially unwaivable. *See e.g. People v. Krausz*, 84 NY 2d 953 (1994) (concurrent representation of defendant and father of complainant "manifests a conclusive and inextricable conflict").

The case before me is also distinguishable from *Espinal* for the lack of any objection by the defendant to the substitution of counsel. There is nothing in the trial record, nor any sworn allegations from the defendant in support of this motion to establish that he objected to the substitution of counsel, or that he would have attempted to waive any known conflict. CPL §440.30(4)(b) provides that the motion may be denied when the moving papers lack sworn allegations substantiating all of the essential facts. For this reason, the motion is denied.

Finally, defendant's absence from the proceedings resulting in Mr. Joyce's removal does not warrant relief. Ancillary proceedings concerning purely legal issues may be conducted in the defendant's absence without abridging his right to be present at all important stages of his trial. *People v. Morales*, 80 NY2d 450, 456 (1992); *People v. Jones*, 213 AD2d 250 (1st Dept 1995) *app denied* 86 NY2d 796 (1995). The proceedings at which Mr. Joyce's potential conflict were discussed were such ancillary proceedings and, accordingly, defendant's absence from those proceedings does not warrant the relief he seeks. *People v. Medina*, 208 AD2d 774 (3rd Dept 1994) *lv denied* 84 NY2d 1035 (1995).

Defendant moves to vacate the sentence imposed on two grounds. His first claim, that it was cruel and unusual in its length and severity, must be advanced on direct appeal as such a claim is not a factor specified in CPL §440.20(1). The defendant's alternate argument, that the sentence was illegal, is considered and rejected. The imposition of consecutive sentences for the separate crimes

of conspiracy and assault such as occurred in this case does not run afoul of recent U.S. Supreme Court opinions which require submission to the jury of any fact that increases a sentence beyond the statutory minimum (*Blakely v. Washington*, 542 US 296 [2004]; *Apprendi v. New Jersey*, 530 US 466 [2000]). Indeed, by its verdict convicting the defendant of the conspiracy charge, the jury must necessarily have found the elements of that crime. The law is well-established that imposition of consecutive sentences for the separate crimes of conspiracy and assault is proper. *People v. Arroyo*, 93 NY2d 990 (1999).

For all of the foregoing reasons, the motion to vacate is denied.

Dated: 10/7/05



J.S.C.

HON. ROBERT STOLZ