

People v Cyrus

2006 NY Slip Op 30254(U)

January 27, 2006

Supreme Court, New York County

Docket Number: 0008024/2002

Judge: Bruce Allen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. No. 8024/02

LOUIS CYRUS,
Defendant.

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For the People: Kavita Bovell
For the Defendant: Risa Gerson and Yehudah Buchweitz

JUSTICE BRUCE ALLEN:

At a jury trial before me in this “shoplift-gone-bad” case, the defendant was found guilty of Robbery in the First Degree and Criminal Possession of a Weapon in the Third Degree. He was sentenced as a persistent violent felony offender to concurrent terms of 20 years to life and 12 years to life. In April, 2005, the defendant filed a *pro se* motion to vacate the judgment pursuant to CPL §440.10. The moving papers alleged ineffective assistance by defendant’s trial counsel, Edward Land. The prosecution filed a response in opposition. That motion was denied in a written decision dated July 21, 2005.

Now represented by counsel, the defendant seeks leave to renew and reargue the motion. Such leave is granted. To be sure, it was the defendant’s decision to file the motion as a *pro se* litigant. Yet Mr. Land continued to advise the defendant with regard to the contents of the motion and the timing of its filing, even though he had been relieved and new appellate counsel was about to be appointed. Indeed, it appears that Mr. Land continued to advise the defendant even after the defendant’s counsel had actually been appointed. The defendant should have the opportunity, therefore, to litigate his motion with the assistance of an attorney who is not operating under the appearance of a conflict, as Mr. Land necessarily was.

In considering whether the defendant was denied his right to effective assistance, two points are beyond dispute. The first is that Mr. Land did make some mistakes and omissions, and some aspects of his representation of the defendant are unsettling, to say the least. The second is that the evidence of guilt adduced at trial was exceedingly strong.

At trial, two employees of a Duane Reade store, Diop and Sita, testified that they observed the defendant shoplifting cologne gift sets. When they confronted him, the defendant pulled out what appeared to be a knife and threatened them. The defendant left the store and got into a cab. Sita followed and banged on the cab, telling the driver to stop. Police Officers Accomando and Harper, who happened to be driving by in their patrol car, testified that they saw the commotion. They stopped their car and began to approach the cab. Meanwhile, the defendant got out of the cab and walked across the street. Accomando followed the defendant and stopped him. After Sita and others stated that the defendant had just robbed the store, Accomando arrested him. The gift sets was recovered from the inside of the cab. Officer Harper canvassed the area and found a box cutter on the side of the street where the defendant had been stopped.

Both Harper and Accomando testified that they had seen a store surveillance video of the incident, and that the defendant appeared to have a silvery object in his hand. The morning after his arrest, the defendant spoke to Accomando and A.D.A. Bovell. The interview took place in the ECAB office of the District Attorney. After receiving the *Miranda* warnings, the defendant made a statement, both orally and in writing. The defendant admitted that he had pulled out a rug cutter and threatened the store employees during the shoplift.

The defendant also testified at trial. He freely admitted that he had shoplifted the gift sets, but denied having any box cutter or similar instrument. He explained that he had made the

post-arrest statement about the rug cutter because he had been told by Accomando that he could help himself only by confessing fully and then giving information to the District Attorney's office about unrelated cases.

The defendant's claim of ineffective assistance does not involve any allegation that Mr. Land failed to discover or bring out at trial evidence that was actually exculpatory. Rather, the claims are that Mr. Land failed to act effectively in attempting to suppress or negate the weight of the defendant's confession and by allowing the testimony regarding the surveillance video to come in. Even without those two pieces of evidence, however, the People's case would have easily met the legal standard.

To sustain an ineffective assistance claim under the Federal standard, the defendant must establish that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 US 668. Given the strength of the People's case, defendant cannot establish such a probability.

To sustain an ineffective assistance claim under the State standard, the defendant must establish that his counsel's performance was so deficient that he was denied meaningful representation. People v. Baldi, 54 NY2d 137; People v. Alicea, 229 AD2d 80 (1st Dept 1997); People v. Nickelson, 174 AD2d 492 (1st Dept 1991). In turn, that means that he must show that counsel's errors were so egregious, inexplicable, and prejudicial that they deprived defendant of a fair trial. People v. Benevento, 91 NY2d 708.

As noted above, there are aspects of Mr. Land's representation which are troubling. Particularly disturbing is the lengthy correspondence from Mr. Land that the defendant has included in his exhibits. Even taking into account that only one side of the correspondence is

shown, Mr. Land's letters raise serious questions about his fitness and professionalism as an attorney, if not his mental health. The letters contain inaccurate statements of the law and inappropriate references to Mr. Land's own personal, financial, and legal problems. They also describe the criminal justice system, as well as the police department and the District Attorney's office, as being corrupt. Such accusations could certainly undermine a defendant's expectation that he would receive a fair trial.

As the defendant notes, Mr. Land has had problems apart from this case. He has been disciplined by the First Department in 2002. Matter of Land, 299 AD2d 83. As referenced in his correspondence, he was held in contempt by Justice Budd Goodman. On at least one other occasion, he made inappropriate and rather bizarre arguments in support of a defense motion. See People v. William Petty, Ind. No. 647/2002, (Sup Ct, NY County, Feb.25, 2004; Carruthers, J.). Apparently, he may face further disciplinary charges. He claims that he is now working as a messenger rather than as a lawyer.

However, at the time of the defendant's trial, Mr. Land was a duly licensed attorney with an active practice. The problems he has encountered in other cases are not directly relevant on the question of whether the defendant received meaningful representation in this case. People v. Hogan, 259 AD2d 1025 (4th Dept 1999); People v. Powell, 197 AD2d 544 (2nd Dept 1993). And as disturbing as the correspondence may be, the defendant has not alleged any direct effect of that correspondence on Mr. Land's conduct of the trial.

The defendant's chief allegation of ineffective assistance concerns the surveillance video. Surveillance cameras at the store apparently picked up at least some of the incident. Following the defendant's arrest, the People attempted to copy the videotape onto a DVD, but an

error in the process resulted in the DVD being blank. Nevertheless, the People's VDF indicated that there was an electronic recording. As Mr. Land explained at the trial, he assumed that the recording was of a 911 call, and never bothered to inspect it. During his cross-examination of Officer Harper, Mr. Land asked him if he had viewed any videotaped footage from inside the store regarding the incident. Officer Harper answered that he had. On re-direct examination, the prosecutor asked Officer Harper what he had seen on the videotape. The officer replied that he had seen the defendant with a metallic object in his hand. When Mr. Land objected, the court ruled that he had opened the door to such testimony. Officer Accomando later was permitted to give similar testimony.

The defendant contends that if Mr. Land had inspected the DVD, he would have learned that it was blank, and that this in turn would have prevented him from making the damaging inquiry about the videotape. However, ineffectiveness will not be found where the record, viewed objectively, reveals the existence of a trial strategy that might well have been pursued by a reasonably competent attorney. People v. Satterfield, 66 NY2d 796; People v. Alicea, 229 AD2d 80 (1st Dept 1997). In applying this standard, counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective. People v. Benevento, *supra*. Here, at the time Mr. Land made his inquiries about the videotape, there was clearly a tactical reason for so doing. The defendant's position at trial was that he had shoplifted, but that he had never had a knife or box cutter as the store employees claimed. That was what he testified to. Presumably that is what he told his attorney. Given that position, it was entirely logical for Mr. Land to inquire on cross-examination about a videotape. Determining that the People's DVD was blank would not have changed that. It is not clear

whether the defendant is contending that Mr. Land should have assumed that defendant himself was lying about the incident or that Mr. Land should have anticipated that Officer Harper might totally fabricate testimony about what he saw on the videotape. Either way, the defendant has not made out ineffective assistance on this issue.

After the damaging testimony about the videotape came out, Mr. Land did object and asked for a mistrial. The defendant contends that Mr. Land should also have moved to exclude the testimony under the “best evidence” rule, citing People v. Jiminez, 8 Misc3d 803 (Sup Ct, Bronx County, 2005). Jiminez was not decided until a year and a half after this defendant’s trial. The decision notes that it was a case of first impression. The issue in that case was also somewhat different, since the evidence was offered in the People’s case in chief, rather than after the door had been opened.

The defendant’s written confession was obviously one of the People’s strongest pieces of evidence. Defendant contends that Mr. Land failed to investigate the circumstances of the written statement or to ask pertinent questions at the suppression hearing. The record does not support those contentions.

Regarding the circumstances leading to his confession, the defendant’s affidavit in support of the motion is unclear and self-contradictory. Obviously, the defendant himself would be aware of the pertinent facts, and thus his attorney would not be required to conduct any outside investigation to ascertain them. People v. Barrett, 17 AD3d 688 (2nd Dept 2005). Contrary to the defendant’s claims, it is clear from the hearing minutes that Mr. Land had discussed the circumstances with the defendant, and he asked pertinent questions based on those discussions. He asked Officer Accomando if he had questioned the defendant prior to the session

at ECAB. He also asked the officer if he had made certain threats and promises, the very same threats and promises the defendant now claims that Mr. Land never addressed. As noted in the July 21 decision, the version of events that the defendant now alleges with respect to the ECAB session is materially different from his own testimony at trial. It is simply implausible that Mr. Land could have brought out at hearing the version that the defendant now alleges.

The failure to pursue at hearing an issue that would not have led to suppression does not deprive the defendant of a fair trial, and thus does not constitute ineffective assistance. People v. Patterson, 22 AD3d 228 (1st Dept 2005); People v. Barnes, __AD3d__ (1st Dept 2005); People v. Moldonado, __AD3d__ (1st Dept 2006). The defendant's allegations regarding his heroin withdrawal fall far short of the showing that would be required to render his statement involuntary. People v. Dlugas, 237 AD2d 754 (3rd Dept 1997). Similarly, if Mr. Land had raised an argument regarding the brief delay in arraignment caused by the ECAB session, it would not have led to suppression. People v. Ramos, 99 NY2d 27; People v. Batista, 303 AD2d 293 (1st Dept 2003).

The defendant also contends that Mr. Land should have moved prior to trial to disqualify Ms. Bovell from prosecuting the case. The defendant cites three questions posed by Ms. Bovell to him regarding the ECAB interview. These few questions did not inject the prosecutor's credibility into the trial so as to make her an unsworn witness. People v. Barrow, 19 AD3d 189 (1st 2005); People v. Laufer, 275 AD2d 655 (1st Dept 2000).

Meaningful representation does not mean perfect, mistake-free representation. The standard is one of reasonable competence in counsel's overall performance. People v. Stultz, 2 NY3d 277. Here, Mr. Land's self-serving characterization of his overall performance as an

“excellent job” may be far off the mark. Nevertheless, he made appropriate motions, vigorously cross-examined the People’s witnesses at hearing and trial, and presented a coherent, if ultimately futile, defense based on the theory that the defendant had never displayed a box cutter and had been induced to write out a false confession. He requested and argued successfully for appropriate jury instructions, including one on the voluntariness of the defendant’s statement. He also persuaded the court to give the jury the misdemeanor charge of Petit Larceny as a lesser included offense. Under the circumstances of the case, Mr. Land’s efforts were more than sufficient to provide the defendant with meaningful representation. People v. Taylor, 268 AD2d 281 (1st Dept 2000).

Accordingly, the motion to vacate judgment is denied.

January 27, 2006


