

People v Kirk

2006 NY Slip Op 30620(U)

March 22, 2006

Supreme Court, New York County

Docket Number: 2436/02

Judge: Ronald A. Zweibel

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

:Indictment Number 2436/02

-against-

JAMES KIRK,

:
DECISION & ORDER

:
Defendant.

-----X
ZWEIBEL, J.:

Defendant moves to vacate a March 4, 2004 Judgment of this Court, convicting him, after a trial by jury, of two counts of Robbery in the First Degree (Penal Law § 160.15[2] and [4]), Robbery in the Second Degree (Penal Law § 160.10[1]) and Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[2]) and sentencing him to concurrent terms of incarceration of 25 years on each of the first degree robbery counts, fifteen years on the second degree robbery count and fifteen years on the second degree weapon possession count. Defendant was assigned appellate counsel by the Appellate Division, First Department, and on August 22, 2005, filed a CPL 330.30 motion seeking vacatur of the jury verdict. In that appeal, the defendant challenged several of the court's evidentiary rulings as well as his convictions on all counts. The motion is pending. However, defendant does not raise the issue of ineffective assistance of counsel in his CPL 330.30 motion.

In the instant motion, defendant alleges that his conviction was obtained in violation of his rights under the State and Federal

constitutions (see CPL 440.10[1][h]). As the People observe, the main crux of the defendant's argument is that he was denied his constitutional right to the effective assistance of counsel. In support of his claim, defendant points to the following alleged instances of ineffectiveness: (1) counsel failed to object to testimony the defendant alleges was "improper bolstering;" (2) defendant was not present at side bar conferences during the voir dire; (3) counsel failed to request a missing witness charge for Ms. Powell's husband; (4) counsel failed to object to the multiple robbery and weapons counts submitted to the jury; (5) counsel opted not to make an opening statement without consulting defendant; and (6) counsel failed to object to the introduction of photographs as evidence in the People's case. The People oppose defendant's motion.

Defendant currently is incarcerated pursuant to this sentence.

At the outset, the Court notes that there are sufficient facts appearing on the record to have permitted appellate counsel to raise a challenge to both the court's instruction and many of trial counsel's action on direct appeal. Indeed, the defendant himself relies heavily on the record throughout his motion in order to highlight the instances during which he alleges counsel's representation was ineffective. When an issue raised in a CPL 440.10 motion is, at the time of the motion, appealable or pending 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 appeal, the court must deny the motion, even if the defendant raised an otherwise valid ground or issue (CPL § 440.10[2][b]; People v. Cooks, 67 N.Y.2d 100 [1986]; People v. Skinner, 154 A.D.2d 216 [1st Dept.], app. den. 76 N.Y.2d 796 [1990]). Here, while represented by appellate counsel, the defendant failed to raise the issue of ineffective counsel based on the alleged instances of ineffectiveness in the record on his direct state court appeal, though he choose to litigate numerous other matters. Therefore, those portions of the motion that refer to matters on the record are denied.

The motion is also denied, without the need for a hearing, pursuant to CPL 440.30(1) and 4(b), (c) and (d). The defendant's factual allegations of ineffective assistance of counsel are either directly contradicted by the record; are made solely by the defendant and are unsupported by any other evidence or affidavit; or are factually and legally insufficient. The Court notes that there is no indication that defendant even approached his trial attorney for an affidavit to support his claims and was refused.

In any event, defendant has failed to establish that he received anything but the effective assistance of counsel. In order to establish ineffective assistance of counsel, defendant "must demonstrate that [he was] deprived of a fair trial by less than meaningful representation; a simple disagreement with

strategies, tactics or the scope of possible cross-examination, weighed long after trial, does not suffice" (People v. Flores, 84 N.Y.2d 184, 187[1994]). This is because of the strong presumption that the attorney's performance was reasonably competent (see Strickland v. Washington, 466 U.S. 668, 669[1984]). "That a defendant was convicted may have little to do with counsel's performance, and courts are properly skeptical when 'disappointed prisoners try their lawyers on charges of incompetent representation'" (see People v. Benevento, 91 N.Y.2d 708, 712 [1998] quoting People v. Brown, 7 N.Y.2d 359, 361). Indeed, a claim of ineffective assistance of counsel will be sustained only when it is shown that counsel partook "an inexplicably prejudicial course" (People v. Benevento, 91 N.Y.2d, at 713).

"Trial practice is as much an art as a science. Trial lawyers bring their own talents, experiences and personality into the courtroom, and given the unique attributes of each case, must devise and execute appropriate strategy. It is therefore impossible to formulate a litmus test for 'inadequate' or 'ineffective' legal representation" (People v. Ellis, 81 N.Y.2d 854, 856[1993]; see People v. Baldi, 54 N.Y.2d 137, 146 [[1981]]). A court must take care "to avoid both confusing true ineffectiveness [of counsel] with mere losing tactics and according undue significance to retrospective analysis" (People v. Baldi, 54 N.Y.2d, at 146). The constitutional requirement of effective

assistance of counsel is satisfied when "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" (People v. Baldi, 54 N.Y.2d, at 147 [emphasis added]; see also People v. Flores, 84 N.Y.2d, at 187). This protection does not guarantee a perfect trial, but assures the defendant of a fair trial (see, People v. Flores, 84 N.Y.2d, at 187; People v. Claudio, 83 N.Y.2d 76, 80 [1994], citing United States v. Cronin, 466 U.S. 648, 658 [1984]). Defense counsel must commit egregious and prejudicial error (see People v. Flores, 84 N.Y.2d, at 188-89).

In this case, defendant's representation more than satisfied this standard. Defendant received a fair trial and was not denied his constitutional right to effective assistance of counsel. Counsel made appropriate motions on defendant's behalf and succeeded in obtaining a pre-trial hearing. Counsel was well prepared as is evidenced from the cross-examination of the People's witnesses and by the arguments advanced during the defense's summation. Defense counsel made appropriate objections during the course of the trial.

Defendant's litany of complaints against Steven Pugliese, his trial counsel, include claims that : (1) counsel failed to object to testimony the defendant alleges was "improper bolstering;" (2) defendant was not present at side bar conferences during the voir

dire; (3) counsel failed to request a missing witness charge for Ms. Powell's husband; (4) counsel failed to object to the multiple robbery and weapons counts submitted to the jury; (5) counsel opted not to make an opening statement without consulting defendant; and (6) counsel failed to object to the introduction of photographs as evidence in the People's case.

Defendant's claim that counsel was ineffective for objecting to the introduction of the 911 tape as hearsay, but not objecting to its admissibility on the ground that it was "improper bolstering," is meritless. This Court finds that the admission of the 911 tape did not constitute improper bolstering and was properly admitted. Defendant also argues that certain testimony by the police witnesses that "reiterates" the contents of the 911 tape and aspects of the officer's pursuit of defendant was improper bolstering. It was not. Thus, trial counsel was not ineffective on this ground.

Defendant also claims that he did not waive his Antommarchi rights and counsel did not object when he was not present at side bar conferences during the voir dire (see People v. Antommarchi, 80 N.Y.2d 247 [1992]). Trial courts must retain appropriate discretion to control their courtrooms and trial proceedings generally and the process of voir dire examination of prospective jurors in particular (see People v. Vargas, 88 N.Y.2d 363, 377 [1996]). In People v. Velasco, 77 N.Y.2d 721 [1991], the Court of

Appeals held that defendants do not have the right to be personally present during informal questioning of prospective jurors that relates only to grounds for juror disqualification by the court, such as physical impairment, family obligations, language difficulties and work commitments.

In this case, while it is true that defendant did not waive his Antommarchi rights, he was not excluded from any sidebar conference during jury selection where his presence would have provided a meaningful opportunity to affect the outcome. Apparently, defendant cannot grasp the difference between questioning as to matters of a prospective juror's bias or prejudice, since such questioning constitutes a "material stage" of the trial (People v. Antommarchi, supra) and matters relating solely to ministerial matters, such as availability for jury service, which does not trigger a right to be present (People v. Velasco, supra; see People v. Vargas, 88 N.Y.2d, at 377 [1996]). If a juror wished to bring a matter beyond the ministerial to the Court's attention, the juror was told to return to his or her seat. Accordingly, there is no basis for finding counsel ineffective on this ground.

Most of defendant's other criticisms of defense counsel's conduct at trial, including those concerning counsel's failure to request a missing witness charge for Ms. Powell's husband; his failure to object to the multiple robbery and weapons counts

submitted to the jury; his failure to make an opening statement without consulting defendant; and counsel's failure to object to the introduction of photographs as evidence in the People's case, are attributable to defense strategy. For example, with respect to the counsel's decision not to request a missing witness charge with respect to Mr. Powell, given Mrs. Powell's testimony regarding the robbery, defendant has failed to establish that the alleged missing witness, if produced at trial, would have offered anything other than cumulative testimony corroborating his wife's testimony, thus bolstering her credibility. Thus, this Court can conceive of a strategic reason for not requesting a missing witness charge with respect to Mr. Powell or calling him as a witness.

Similarly, with respect to defense counsel's failure to make an opening statement, assuming arguendo that defense counsel did not consult with defendant before waiving an opening statement, defendant has failed to point to any evidence that would suggest that counsel's waiver of an opening statement in any way impacted defendant's ability to present a defense or that it denied him a fair trial (see People v. Miller, 13 A.D.3d 890, 891 [3rd Dept. 2004]).

With respect to the Court's charge, the record seems to rebut defendant's claim as defense counsel did object to all the counts going in and requested that the Court just submit Robbery in the First Degree under the second count of the indictment.

The trial record further establishes that defense counsel engaged in motion practice, obtained discovery materials from the District Attorney's office and conducted a vigorous pretrial suppression hearing. He made a cogent closing statement, and he thoroughly cross-examined the People's witnesses. As such, absent a demonstration that defense counsel's trial strategy unduly prejudiced defendant, this Court is satisfied that defendant was adequately represented by counsel under both the State and Federal Constitutions (see People v. Baldi, 54 N.Y.2d, at 152; Strickland v. Washington, 466 U.S. 668, 687 [1984]).

The New York courts recognize that criminal convictions are presumptively valid (People v. Session, 34 N.Y.2d 254, 255 [1974]; People v. Gonzalez, 110 A.D.2d 592 [1st Dept. 1995]; People v. Crippen, 196 A.D.2d 548, 549 [2d Dept. 1993]). Nothing in defendant's motion papers overcomes this presumption.


The right to meaningful assistance of counsel does not guarantee a perfect trial, but assures the defendant of a fair trial (see, People v. Flores, 84 N.Y.2d, at 187; People v. Claudio, 83 N.Y.2d 76, 80 [1994], citing United States v. Cronin, 466 U.S. 648, 658 [1984]). In this case, defendant's representation more than satisfied this standard. Defendant received a fair trial and was not denied his constitutional right to effective assistance of counsel.

Accordingly, defendant's motion to vacate his judgment of

conviction is denied in its entirety.

This constitutes the decision, order and judgment of this Court.

ENTER:



Hon. Ronald A. Zweibel, J.S.C.

Dated: March 22, 2006