

People v Holmes

2007 NY Slip Op 30316(U)

March 23, 2007

Supreme Court, Kings County

Docket Number:

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, PART 24

PEOPLE OF THE STATE OF NEW YORK

against

TREMAIN HOLMES,

Defendant

Indictment No.: 177/04

By: Hon. Thomas J. Carroll

Dated: March 23, 2007

The defendant filed a motion on December 20, 2006, pursuant to Criminal Procedure Law section 440.10, seeking to vacate the judgment of conviction. According to his 440 motion, the defendant also filed a notice of appeal but had not perfected it.

The People filed an affirmation in opposition to defendant's motion on February 8, 2007.

The defendant filed a reply affirmation on February 23, 2007.

In deciding this motion, the court has reviewed the motion papers of both counsel, the court file and relevant trial transcripts.

Defendant moves to set aside the verdict of guilty on two grounds:

1. CPL 440.10(1)(d) in that material evidence adduced by the People at trial was procured in violation of the defendant's constitutional rights; and
2. CPL 440.10(1)(h) in that the defendant was afforded ineffective assistance of trial counsel.

Delay

In this case, the defendant delayed in making his motion to vacate the judgment for more than a year and a half. In *People v Nixon*,¹ the Court stated:

“Quite important too, as revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have

¹ 21 NY2d 338, 352 (1967)

all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are; albeit, if they are made out, justice requires that they be explored in a hearing (cf. *People v Chait*, 7 AD2d 399, 401, *affd.* 6 NY 2d 855).”

A delay in making a claim can be considered in evaluating the seriousness and validity of a claim and may undermine the legitimacy of the claim.²

On the Record Bar

CPL 440.10 (2) (c) mandates that a court deny a motion to vacate a judgment if all the necessary facts relating to the legal issue appear “on the record.”³ The “on the record” bar applies whether or not the issue (as opposed to the facts) has been preserved for appellate review.⁴ As long as the issue could have been raised on appeal but was not, the defendant is mandatorily barred from raising the claim on a motion to vacate the judgment.⁵

Here, the defendant complains, in part, of alleged errors that are evidentiary in nature and appear on the record. Indeed, he has filed a notice of appeal. Therefore, they must be raised on direct appeal and the defendant’s motion to vacate judgment must be denied.

² *People v Melio*, 304 AD2d 247, 252 (2003); *People v Hanley*, 255 AD2d 837, 838 (1998).

³ *People v Cooks*, 67 NY2d 100 (1986); *People v Sadness*, 300 NY 69 (1949).

⁴ *People v Mower*, 97 NY2d 239, 245-246 (2002); *Cooks*, 67 NY2d at 103 n1, 104; *People ex rel. Gibbs v Vincent*, 39 NY2d 918, 919 (1976); *People v Jossiah*, 2 AD3d 877, 877 (2003); *People v Donovan*, 107 AD2d 433 (1985); *see also People v McKay*, 215 AD2d 221, 222 (1995).

⁵ *People v Williams*, 5 AD3d 407, 407 (2004); *People v Kandekore*, 300 AD2d 318, 319 (2002).

Adequacy of Counsel

“The Court of Appeals has time and time again advised that ineffective assistance of counsel is generally not demonstrable on the main record.”⁶ A motion to vacate the judgment is the appropriate vehicle to raise ineffective assistance, rather than a motion to set aside the verdict⁷ or by direct appeal.⁸ This is true because, even when the facts are on the record, the attorney's motivations are usually not reflected on the record.⁹ Further, where there are both record and non-record claims, a CPL 440 motion is the appropriate method by which to raise both claims¹⁰ if “closely related.”¹¹

Both the United States Constitution¹² and the New York State Constitution¹³ grant a defendant in a criminal proceeding the right to the assistance of counsel. This includes the right to “effective” assistance of counsel.¹⁴ However, “[a]n attorney, subject to constitutional limitation of effective assistance of counsel, has the right to make the day-

⁶ *People v Harris*, 109 AD2d 351, 360 (1985).

⁷ *People v Bagarozzy*, 182 AD2d 565, 566 (1992).

⁸ *Massaro v United States*, 538 US 500, 504-505 (2003); *People v Garcia*, 187 AD2d 868 (1992); *People v Jiggetts*, 178 AD2d 332 (1991); *People v Williams*, 178 AD2d 163, 165 (1991).

⁹ *Massaro*, 538 US at 505; *People v McNair*, 294 AD2d 952, 952-953 (2002); *People v Zeh*, 289 AD2d 692, 695 (2002); *People v Brown*, 232 AD2d 193 (1996); see also *People v Love*, 57 NY2d 998, 999-1000 (1982); *People v Castricone*, 224 AD2d 1019, 1020 (1996).

¹⁰ *Massaro*, 538 US 500; *People v Hoyte*, 273 AD2d 48 (2000).

¹¹ *Hoyte*, 273 AD2d 48.

¹² *Gideon v Wainwright*, 372 US 335 (1963).

¹³ *People v Linares*, 2 NY3d 507, 510 (2004).

¹⁴ *Strickland v Washington*, 466 US 668 (1984); *Linares*, 2 NY3d at 510.

to-day decisions governing the case”¹⁵

Counsel renders effective assistance 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.”¹⁶ What constitutes effective assistance, moreover, is not susceptible to precise measurement.¹⁷ “To prevail on a claim of ineffective assistance, defendants must demonstrate that they were 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 the trial, does not suffice.”¹⁸ This standard is designed to provide the defendant with a fair trial, not a perfect one.¹⁹

Isolated errors in defense counsel’s representation ordinarily do not constitute ineffective assistance of counsel.²⁰ A single error, if it affects the fairness of the trial, may rise to the level of ineffective assistance of counsel.²¹

A court should take care “to avoid both confusing true ineffectiveness with mere

¹⁵ *People v Jordan*, 96 AD2d 1060 (1983), *affd*, 62 NY2d 825 (1984).

¹⁶ *People v Baldi*, 54 NY2d 137, 147 (1981).

¹⁷ *id.* at 146-147.

¹⁸ *People v Flores*, 84 NY2d 184, 187 (1994); *People v Benn*, 68 NY2d 941, 942 (1986).

¹⁹ *Yarborough v Gentry*, 540 US 1, 8 (2003); *Flores*, 84 NY2d at 187.

²⁰ *Yarborough*, 540 US at 8-9 ; *People v Henry*, 95 NY2d 563, 565-566 (2000).

²¹ *id.*; *Flores*, 84 NY2d at 188-189; *see People v Turner*, 5 NY3d 476 (2005).

losing tactics and according undue significance to retrospective analysis.”²² If transcripts and submissions reveal a trial strategy that might well have been pursued by a reasonably competent attorney, then assistance is effective, even if trial counsel disavows the tactic.²³ Courts will not second guess whether defense counsel’s trial strategy “was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation.”²⁴ The choice of trial tactics is viewed objectively.²⁵ Trial strategies that might well have been pursued by a reasonably competent attorney and are objectively reasonable are within the constitutional parameters.²⁶

A defendant must “demonstrate the absence of strategic or other legitimate explanations for counsel's failure . . . Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment.”²⁷

In order to show that defendant’s Federal constitutional right to effective assistance of counsel was violated, the defendant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

²² *Baldi*, 54 NY2d at 146.

²³ *People v Satterfield*, 66 NY2d 796, 799 (1985); see *People v Washington*, 21 AD3d 648, 651(2005).

²⁴ *Satterfield*, 66 NY2d at 799-800; *Yarborough*, 540 US 1.

²⁵ *Strickland*, 466 US at 688; *People v Angelakos*, 70 NY2d 670, 673 (1987); *Satterfield*, 66 NY2d at 799; *People v Butler*, 273 AD2d 613, 615 (2000); *People v Castellano*, 203 AD2d 116, 117 (1994).

²⁶ *Satterfield*, 66 NY2d at 799; *People v Nichols*, 289 AD2d 605, 606 (2001).

²⁷ *People v Rivera*, 71 NY2d 705, 709 (1988).

proceeding would have been different.”²⁸ Reasonable probability means a probability that undermines the fact finder’s confidence in the outcome of the trial.²⁹

Under New York law, prejudice is examined in terms of errors that deprive the defendant of a fair trial.³⁰ Prejudice is a significant factor, but not an “indispensable element in assessing meaningful representation.”³¹

The federal and state standards are different.³² The federal standard focuses on “the outcome of the proceeding.”³³ The state standard focuses on the “fairness of the process as a whole.”³⁴

Generally, “[a] simple disagreement with . . . the scope of possible cross-examination, weighed long after the trial, does not suffice” to establish ineffective assistance of counsel.³⁵ This is true because cross-examination is largely categorized as “trial strategy.”³⁶

Defendant has failed to demonstrate that trial counsel did not render “meaningful

²⁸ *Strickland*, 466 US at 694, *see also Benevento*, 91 NY2d at 713.

²⁹ *id.*

³⁰ *Benevento*, 91 NY2d at 713.

³¹ *People v Stultz*, 2 NY3d 277, 284 (2004); *People v Caban*, 5 NY3d 143, 155-156 (2005).

³² *Benevento*, 91 NY2d at 713-714.

³³ *id.* at 714; *see also Henry v Poole*, 409 F3d 48 (2005); *Caban* 5 NY3d at 155.

³⁴ *Benevento*, 91 NY2d at 714; *Caban*, 5 NY3d at 156; *see also Henry*, 409 F3d at 69.

³⁵ *Flores*, 84 NY2d at 187.

³⁶ *People v Schlageter*, 238 AD2d 891, 892 (1977); *Cannon v Mullin*, 383 F3d 1152, 1163-1164 [2004].

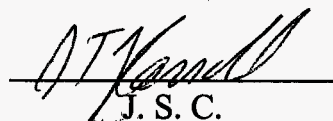
representation” despite the fact that the strategies employed, in hindsight, were, ultimately, unsuccessful in that the defendant was convicted.

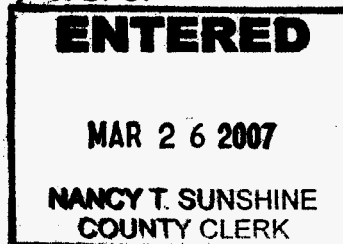
Therefore, the defendant’s motion is denied in all respects.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing costs. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted.³⁷

This constitutes the decision and order of the court.

ENTER,


J. S. C.



³⁷ 22 NYCRR § 671.5.