

**People v Brown**

2007 NY Slip Op 30374(U)

March 21, 2007

Supreme Court, Kings County

Docket Number: 0014222

Judge: L. Priscilla Hall

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION

By: L. Priscilla Hall, J.

vs.

Dated : March 21, 2007

DANIEL BROWN,

Indictment No.: 14222/95

Defendant.

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The defendant moves, pursuant to CPL §440.10 (1)(h), to vacate his judgment of conviction on the ground that his trial counsel was ineffective, in that counsel failed: (1) to object to admission of “prejudicial” evidence, (2) to prepare the defendant to testify; (3) to move for a mistrial on the ground that the prosecution’s summation was improper; and (4) to interview and present testimony from “exculpatory witnesses.”

In deciding this motion, the court has considered the motion papers and exhibits, the memorandum of law submitted by the defendant, the affirmation in opposition, the trial record and the court file which included defendant’s CPL §330.30 motion and prior Appellate briefs and decisions.

CPL §440.10 (2) (a) mandates that a court deny a post conviction motion if the ground or issue has previously been determined on the merits upon appeal and there has been no retroactive change in the controlling law. The issue of trial counsel’s ineffectiveness was raised on direct appeal and found to be without merit by the Appellate Division.<sup>1</sup> The

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<sup>1</sup> Defendant’s Appellate Brief, filed January 27, 2003; People v. Brown, 308 AD2d 547

specific allegations of counsel's ineffective conduct or omissions contained in defendant's brief involved, *inter alia*, his waiver of a Dunaway hearing, the failure to request a Darden hearing, object to leading questions, while permitting the prosecutor to elicit hearsay statements and otherwise prejudicial testimony from the People's witnesses.

The issue presented in the instant motion, is once again an allegation that his trial counsel was ineffective. The defendant's claim of ineffectiveness of counsel based on his failure to object to the admission of these forms of "prejudicial" evidence is mandatorily barred pursuant to CPL §440.10 (2) (a).

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."<sup>2</sup> The "on the record" bar applies whether or not the issue (as opposed to the facts) has been preserved for appellate review.<sup>3</sup> 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.<sup>4</sup> Thus, any claims that trial counsel was ineffective for failing to object to "prejudicial" evidence, not previously presented in his direct appeal, as well as his claim of ineffectiveness for counsel's

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<sup>2</sup> *People v Cooks*, 67 NY2d 100 (1986); *People v Sadness*, 300 NY 69 (1949).

<sup>3</sup> *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).

<sup>4</sup> *People v Williams*, 5 AD3d 407, 407 (2004); *People v Kandekore*, 300 AD2d 318, 319 (2002).

failure to move for a mistrial after the prosecutor's summation could have been raised on his direct appeal since all of the necessary facts were "on the record." His failure to do so precludes their consideration in a CPL §440.10 motion.<sup>5</sup>

CPL §440.30 (4) (c) permits a court to deny a motion to vacate a judgment without a hearing if the allegations of fact are conclusively rebutted by "unquestionable documentary proof."<sup>6</sup> Hearing and trial minutes constitute "unquestionable documentary proof."<sup>7</sup>

The defendant claims that counsel failed to properly prepare him to testify. He claims the sole preparation occurred only thirty minutes before his testimony and only for a short time frame. A review of the transcript of defendant's trial including counsel's opening, the various statements made by counsel about the defendant's potential testimony, well before the defendant testified, his knowledge of defendant's alibi defense and the manner in which trial counsel posed and the defendant responded to defense questioning, all contradict the defendant's assertion of lack of preparation. The fact that a particular area of questioning was not broached during direct testimony, but was elicited by the People, shows current counsel's disagreement with trial strategy and is not indicative of a lack of preparation. The court finds that the trial minutes constitute "unquestionable documentary proof" conclusively rebutting any claim that trial counsel failed to prepare himself or the defendant for trial. A

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<sup>5</sup> *People v. Jossiah*, 2 AD3d 877 (2003).

<sup>6</sup> *People v Lindsey*, 179 AD2d 915 (1992).

<sup>7</sup> *People v. Vellucci*, 13 NY2d 665 (1963); *People v. White*, 309 NY 636 (1955).

hearing will not be granted based on this claim, pursuant to CPL §440.30 (4) (c).

Both the United States Constitution<sup>8</sup> and the New York State Constitution<sup>9</sup> grant a defendant in a criminal proceeding the right to the assistance of counsel. This includes the right to “effective” assistance of counsel.<sup>10</sup>

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.”<sup>11</sup> What constitutes effective assistance, moreover, is not susceptible to precise measurement.<sup>12</sup> “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.”<sup>13</sup> This standard is designed to provide the defendant with a fair trial not a perfect one.<sup>14</sup>

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<sup>8</sup> *Gideon v Wainwright*, 372 US 335 (1963).

<sup>9</sup> *People v Linares*, 2 NY3d 507, 510 (2004).

<sup>10</sup> *Strickland v Washington*, 466 US 668 (1984); *Linares*, 2 NY3d at 510.

<sup>11</sup> *Baldi*, 54 NY2d 1at 147.

<sup>12</sup> *id.* at 146-147.

<sup>13</sup> *People v Flores*, 84 NY2d 184, 187 (1994); *People v Benn*, 68 NY2d 941, 942 (1986).

<sup>14</sup> *Yarborough v Gentry*, 540 US 1, 8 (2003); *Flores*, 84 NY2d at 187.

Isolated errors in defense counsel's representation ordinarily do not constitute ineffective assistance of counsel.<sup>15</sup> A single error, if it affects the fairness of the trial, may rise to the level of ineffective assistance of counsel.<sup>16</sup>

A court should take care "to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis."<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup> The choice of trial tactics is viewed objectively.<sup>20</sup> Trial strategies that might well have been pursued by a reasonably competent attorney and are objectively reasonable are within the constitutional parameters.<sup>21</sup>

A defendant must "demonstrate the absence of strategic or other legitimate

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<sup>15</sup> *Yarborough*, 540 US at 8-9 ; *People v Henry*, 95 NY2d 563, 565-566 (2000).

<sup>16</sup> *id.*; *Flores*, 84 NY2d at 188-189; *see People v Turner*, 5 NY3D 476 (2005).

<sup>17</sup> *Baldi*, 54 NY2d at 146.

<sup>18</sup> *People v Satterfield*, 66 NY2d 796, 799 (1985); *see People v Washington*, 21 AD3D 648, 651(2005).

<sup>19</sup> *Satterfield*, 66 NY2d at 799-800; *Yarborough*, 540 US 1.

<sup>20</sup> *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).

<sup>21</sup> *Satterfield*, 66 NY2d at 799; *People v Nichols*, 289 AD2d 605, 606 (2001).

explanations for counsel's failure . . . Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment.”<sup>22</sup>

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 proceeding would have been different.”<sup>23</sup> Reasonable probability means a probability that undermines the fact finder’s confidence in the outcome of the trial.<sup>24</sup>

Under New York law, prejudice is examined in terms of errors that deprive the defendant of a fair trial.<sup>25</sup> Prejudice is a significant factor, but not an “indispensable element in assessing meaningful representation.”<sup>26</sup>

The federal and state standards are different.<sup>27</sup> The federal standard focuses on “the outcome of the proceeding.”<sup>28</sup> The state standard focuses on the “fairness of the process as a whole.”<sup>29</sup>

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<sup>22</sup> *People v Rivera*, 71 NY2d 705, 709 (1988).

<sup>23</sup> *Strickland*, 466 US at 694, *see also Benevento*, 91 NY2d at 713.

<sup>24</sup> *id.*

<sup>25</sup> *Benevento*, 91 NY2d at 713.

<sup>26</sup> *People v Stultz*, 2 NY3d 277, 284 (2004); *People v Caban*, 5 NY3d 143, 155-156 (2005).

<sup>27</sup> *Benevento*, 91 NY2d at 713-714.

<sup>28</sup> *id.* at 714; *see also Henry v Poole*, 409 F3d 48 (2005); *Caban* 5 NY3d at 155.

<sup>29</sup> *Benevento*, 91 NY2d at 714; *Caban*, 5 NY3d at 156; *see also Henry*, 409 F3d at 69.

Generally, the failure to call a witness comes under the rubric of trial strategy.<sup>30</sup> As such, when asserting a claim of ineffectiveness of counsel a defendant is required to show the lack of a legitimate explanation for counsel's decision not to call a witness.<sup>31</sup> The defendant, herein, alleges that trial counsel was ineffective for not investigating and calling Ms. Christine Norvil, Ms. Lucy Norvil, Ms. Asha Lewis and Mr. Kevin Beckford as defense witnesses at his trial.

Initially, it is noted that the court records show that the defendant had an investigator who was searching, even during trial, for certain witnesses. An alibi witness was called by the defense, trial counsel was able to impeach prosecution witnesses with inconsistent statements and an alternate theory concerning the identity of the shooter was presented to the jury by trial counsel. It is clear from the trial record that an investigation was in fact done on behalf of the defendant and that trial counsel had made himself familiar with the information which it produced. The trial minutes clearly rebut any claim that trial counsel failed to investigate sources available to the defense. The fact that witnesses were not uncovered as a result of the investigation does not render counsel's representation ineffective.

Defendant also contends that Trial counsel's failure to call certain "exculpatory"

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<sup>30</sup> *People v Schulz*, 4 NY3d 521, 531 (2005); *People v Smith*, 82 NY2d 731, 733 (1993); *People v Peake*, 14 AD3d 936, 937 (2005); *People v Botting*, 8 AD3d 1064, 1066 (2004); *Eze v Senkowski*, 321 F3d 110, 129 (2003); *Pavel v Hollis*, 261 F3d 210, 217 (2001); *United States v Luciano*, 158 F3d 655, 660 (1998).

<sup>31</sup> *People Stewart*, 248 AD2d 414, 414 (1998).

witnesses amounted to ineffective assistance. Once again, turning to the trial minutes and court records, defendant's claims are refuted.

Ms. Lucy Norvil, appeared in court during the trial and trial counsel made a full record that, with the consent of the defendant, he was not calling her to testify.<sup>32</sup> Under, these circumstances, the record shows that not calling Ms. Norvil was a legitimate trial strategy to which defendant consented and conclusively belies the allegation presented in the instant motion.

With regard to Ms. Christine Norvil, the defendant's current position is inconsistent with his sworn, *pro-se*, CPL §330.30 motion to set aside the jury verdict, made prior to his sentencing. In that motion defendant claimed that Ms. Christine Norvil would testify that the defendant "was not in the area at the time of the incident" and that this information was "newly discovered." The fact that this information was "newly discovered" after the trial indicates that trial counsel had no knowledge of it during the trial. In defendant's affidavit, in support of the instant motion, he states that he told his trial counsel that he spoke with Ms. Norvil and she could "corroborate his account." Defendant has, it would seem, provided two sworn statements each contradicting the other.

Nevertheless, Ms. Norvil knew of the defendant's situation since her daughter Lucy, with whom she lived, had attended the trial. It seems incredulous to this court that she would allow the defendant to be sent to jail, knowing that he was innocent, rather than provide a

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<sup>32</sup> Trial Transcript at pp. 623, 624.

credible statement which would have saved him from that fate. Finally, in her affidavit, appended to defendant's current motion, Ms. Norvil does not make a representation that the defendant was "not in the area" at the time of the shooting. Rather, she merely states that Mr. Jean-Paul made a statement to her which was inconsistent with his trial testimony. Such a challenge could have been easily rehabilitated since Mr. Jean-Paul was in the hospital recovering from being shot several times and likely medicated when the statement is alleged to have been made.

An affidavit has been submitted by Ms. Asha Lewis indicating that she spoke with Mr. Brown near the barbershop sometime in the afternoon on the day of the shooting. She saw the defendant enter a cab and thereafter heard what could have been gunshots. While the affidavit indicates that Ms. Lewis' testimony may have provided circumstantial evidence that the defendant left the area, it nevertheless places him near the scene at the time of the shooting. Ms. Lewis knew the police were looking for the defendant shortly thereafter but neglected to offer her assistance. The affidavit also mentions that Ms. Lewis and the defendant had a conversation before he got into the cab but the defendant failed to mention Ms. Lewis' name in his own affidavit or in his motion. His failure to provide such vital information to his trial counsel cannot now become the basis for an allegation of ineffectiveness of counsel's representation.

With regard to Kevin Beckford, as the instant motion indicates, one aspect of trial counsel's strategy was to attempt to portray Mr. Beckford as the shooter. The affidavit of Mr. Beckford indicates that he was not involved in the shooting. Any testimony Mr.

Beckford might have provided would have been counter productive to the defense trial strategy. Mr. Beckford's affidavit states that he is the defendant's cousin and has known the defendant for his entire life. The court finds hard to believe that even though his testimony would exculpate the defendant, Mr. Beckford chose to let the defendant go to prison rather than make trial counsel aware of it. The trial minutes again demonstrate that the failure to call Mr. Beckford was indeed a legitimate trial strategy and does not demonstrate a lack of investigation or ineffectiveness by trial counsel.

Thus, the trial minutes and the court records demonstrate that the defendant consented to not having Ms. Lucy Norvil testify, that the value of Ms. Christine Norvil's testimony was unknown to trial counsel until after trial, information regarding Ms. Lewis' testimony was never provided to counsel and the decision not to call Mr. Beckford was an integral part of the defense strategy.

The court finds that the affidavits provided by the parties, the trial minutes and the court records demonstrate that defendant's claim of ineffectiveness on the part of trial counsel is without merit.

For all of the above reasons, the defendant's motion to set aside his judgment of conviction is denied in its entirety.

This constitutes the decision and order of the court.

*C*  
HON. J. PRISCILLA HALL  
S. C.

