

People v Davis

2007 NY Slip Op 30605(U)

March 16, 2007

Supreme Court, Kings County

Docket Number: 0002980/1997

Judge: Carolyn E. Demarest

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At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of March, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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

Indictment No. 2980/97

- against -

TYRONE DAVIS,

Defendant.

-----X

The above-named defendant moves for an order setting aside that portion of his sentence of 5 to 10 years for attempted assault in the first degree, which was order to run consecutively to a sentence of 22 years to life that was imposed, post-trial, by this court, or, in the alternative, for a hearing. He alleges, as grounds, that (1) the consecutive sentence was illegal, in that it was a product of the improper manipulation of the charges contained in the indictment, and (2) he was deprived of the effective assistance of trial counsel because trial counsel purportedly "solicited" the amendment of the felony murder charge and "acquiesced" to the jury instruction which led to the consecutive sentence.

BACKGROUND

On December 9, 1996, at approximately 8:00 p.m., defendant and three accomplices-- Jermaine Dawson, Victor Mack, and Corey Williams--pushed their way into the "New Lots

Express,” a grocery store located at 404 New Lots Avenue in Brooklyn. Defendant had a .38 caliber revolver and Jermaine Dawson had a .357 magnum revolver. Upon their entry into the store defendant and his accomplices fired several shots. Once inside, defendant and his accomplices demanded money from employees and a customer in the store. During the course of the robbery, defendant and his accomplices shot Winston Page and Reginald Jaex.¹

Winston Page was treated at Brookdale Hospital for gunshot wounds to his right side, left ankle, and left leg. Reginald Jaex, who was shot in the head, buttocks, and hand, died from a gunshot wound to the head.

Defendant was charged with one count of Murder in the Second Degree (Penal Law 125.25[3]), two counts of Robbery in the First Degree (Penal Law 160.15[1], [2]), two counts of Robbery in the Second Degree (Penal Law 120.10[1]), two counts of Attempted Robbery in the First Degree (Penal Law 110.00/160.15 [1], [2]), one count of Attempted Robbery in the Second Degree (Penal Law 110.00/160.10[1]), one count of Criminal Possession of a Weapon in the Second Degree (Penal Law 265.03), and one count of Criminal Possession of a Weapon in the Third Degree (Penal Law 265.02 [4]).

At trial, the jury was instructed that if it found the defendant guilty of Felony Murder under count 1, it should not consider whether defendant had committed the crime of Robbery in the First Degree of Winston Page as charged under count 2, based upon the legal theory

¹ The evidence established that Page was struck three times in the leg and body by shots from the gun fired by Davis; Jaex was later killed while he lay on the floor by shots fired at point-blank range from the gun of Jermaine Dawson.

that the robbery of Winston Page was a lesser-included crime and an element of the felony murder of Jaex and therefore merged into the crime of Murder in the Second Degree. The jury was further directed, regardless of its findings on count 1 charging the felony murder of Reginald Jaex and count 2 charging the robbery of Winston Page, to determine whether the defendant was guilty of Attempted Assault in the First Degree upon Winston Page under count 5, and, under count 7, of the Attempted Robbery in the First Degree of Reginald Jaex.

Defendant was convicted of one count each of Murder in the Second Degree (Penal Law 125.25[3]), Attempted Assault in the First Degree (Penal Law 110.00/120.10[1]), and Attempted Robbery in the First Degree (Penal Law 110.00/160.15 [2]).² On February 8, 1999, he was sentenced to concurrent terms of imprisonment of twenty-two years to life on the murder conviction and seven and one-half to fifteen years on the attempted robbery conviction, and also to a term of imprisonment of five to ten years on the attempted assault conviction, to run consecutively to the murder sentence.

Defendant appealed from his judgment of conviction to the Appellate Division. In his brief, defendant claimed that: (1) the trial court denied defendant his due process right to a fair trial under the federal and state constitutions and improperly permitted the People to bolster the identification evidence, by admitting the detectives' testimony, reiterating the eyewitness's description of his assailant and indicating that after speaking with the witness

² According to the verdict sheet, the jury reached a guilty verdict as to Count 2, but, based on the court's instructions, this verdict was not taken.

a wanted card was issued for defendant; (2) the trial court violated New York Penal Law § 70.25(2), by imposing consecutive sentences in this case.

On September 24, 2001, the Appellate Division, Second Department, unanimously affirmed defendant's judgment of conviction (*People v Davis*, 286 AD2d 774 [2001]). The court held that the trial court properly imposed consecutive sentences under Penal Law 70.25(2) because the evidence at trial established that defendant's acts underlying his crimes were separate and distinct. It rejected defendant's remaining claim, finding that it did not require reversal.

By letter dated October 4, 2001, defendant applied for permission to appeal from the Appellate Division's decision to the New York Court of Appeals. On November 27, 2001, defendant's application seeking leave to appeal to the New York Court of Appeals was denied (*People v Davis*, 97 NY2d 655 [2002]).

By papers dated December 20, 2002, defendant made a pro se application for a writ of habeas corpus in which he made the following claims: (1) the trial court denied defendant his due process right to a fair trial under the federal and state constitutions and improperly permitted the People to bolster the identification evidence, by admitting the detectives' testimony, reiterating the eyewitnesses' description of his assailant and indicating that after speaking with the witness a wanted card was issued for defendant; and (2) the trial court violated the federal constitution by imposing consecutive sentences. By order dated October 30, 2003, the United States District Court for the Eastern District of New York (Weinstein,

J.) denied defendant's petition for a writ of habeas corpus (*Davis v Greiner*, 2003 WL 23198786).

DISCUSSION

Defendant's sentence

CPL 440.20(1) provides: “[a]t any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law” (*see People v Cooks*, 113 AD2d 975 [1985]). CPL 440.20 (2) provides: “[n]otwithstanding the provisions of subdivision one, the court must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.”

Here, the Appellate Division rejected defendant's claim that the consecutive sentence was illegal, explicitly holding that “[t]he evidence at trial demonstrated that the defendant's acts underlying the crimes were separate and distinct (citation omitted) (*Davis*, 286 AD2d at 774).

Defendant attempts to challenge his sentence by raising what he claims to be different grounds than those upon which the Appellate Division reached its determination. Defendant contends that: (1) the felony murder charge voted by the grand jury did not specify the victim or the circumstances of the underlying robbery; (2) the remaining counts of the indictment

were concurrent or inclusory counts as defined under CPL 300.30, for which only concurrent sentences could be imposed; (3) where the indictment contained robbery in the first degree and felony assault counts that included causing serious physical injury to Winston Page, such counts were inclusive of attempted assault on Page; (4) amending the felony murder count to specify a robbery of Winston Page and withholding the first degree robbery and felony assault counts relating to Page “created the illusion” that the death of Reginald Jaex was the only injury resulting from the robbery of Winston Page, thus (5) resulting in the “improper manipulation” of the charges “making it possible for [this] court to appear justified in asserting that the attempted assault of Winston Page was an independent count for which consecutive sentences could be imposed.”

Defendant’s argument in this regard is unavailing. Since defendant, who does not allege any retroactive change in the law, could have raised said issue on appeal, but fails to set forth any reason for his failure to do so, his claim is procedurally barred (*see People v Cephus*, 13 Misc 3d 1211[A] [2006]). In any event, defendant’s argument is devoid of merit.

On February 8, 1999, prior to this court’s imposition of the sentence, the People, defense counsel, and the court discussed, on the record, the issue of whether a consecutive sentence on defendant’s attempted assault conviction would be legally permissible. The People stated that consecutive sentences would be inappropriate and that sentences on each of defendant’s three convictions should run concurrently. This court rejected the People’s position, and issued a written sentencing decision at the time it imposed the sentence. In said

decision, the court specifically noted that “since the felony murder indictment was expressly predicated on the robbery of Winston Page rather than on the attempted robbery of the deceased, the jury was instructed that in order to find the Defendant guilty of the felony murder of Reginald Jaex, it must find that Defendant or an accomplice “forcibly stole property from Winston Page.”

Indeed, as this court noted in said decision, the evidence amply supported the imposition of consecutive sentences. The intent to forcibly steal property from Winston Page was a material element of the crime of felony murder, and, since in addition to the commission or attempted commission of a felony enumerated in PL 125.25 (3), the only other legal element of felony murder is the death of a non-participant caused in the course of and in furtherance of or in flight therefrom, the Felony Murder of Jaex occurred when Jermaine Jackson fired shots at his person while movant-defendant was removing property from the pockets of Winston Page. Moreover, as further discussed by this court in said decision, the crime of Assault or Attempted Assault in the First Degree, which, under PL 120.10 (1), requires an intent to cause serious physical injury and the causing or intent to cause such injury by means of a weapon, was complete when, upon rushing into the store firing his loaded and operable handgun and prior to any demand for money having been made, Davis inflicted injury upon Page by striking him with bullets from his weapon.

Consecutive sentences may be imposed when either the elements of the crimes do not overlap, or the facts demonstrate that the defendant’s acts underlying the crimes are separate

and distinct (PL 70.25 [2]; *see People v Salcedo*, 92 NY2d 1019, 1021 [1998]; *People v Ramirez*, 89 NY2d 444, 451 [1996]; *see also People v Daniels*, 240 AD2d 590 [1998] [imposition of consecutive sentences proper where the defendant's act of displaying a gun and demanding money from three occupants in a parked truck, causing them to surrender their money, was separate and distinct from the defendant's subsequent act of ordering one of the three occupants out of the truck and then shooting him several times, killing him]).

Here, the evidence at trial amply supports the imposition of consecutive sentences and refutes defendant's unsupported claim of "improper manipulation," which appears to be premised upon the unavailing contention that the felony murder charge was amended in such a way as to change the theory or theories reflected in the evidence before the grand jury, thus prejudicing defendant. In this regard, CPL 200.70 (1) provides that "[a]t any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits." Even accepting, as true, defendant's assertion that the indictment was amended in the manner stated, such amendment would not have altered the theory on which he was indicted as reflected in the evidence before the grand jury, or add a new offense or a new count to the indictment (*see People v*

Jeanty, 268 AD2d 675, 677-678 [2000]; *People v Ramos*, 134 AD2d 295, 296 [1987] [where the indictment simply charged the defendant with murder in the second degree without specifying the victim of the underlying robbery or limiting the crime to any particular victim, the trial court, by specifying such victim or limiting itself to only naming specific individual as the victim in its instructions to the jury, actually narrowed the possible theories upon which the jury could find the defendant guilty and did not improperly amend indictment]). Moreover, defendant fails to demonstrate how he was prejudiced by any such amendment (see *Jeanty*, 268 AD2d at 678; see also *People v Daniels*, 240 AD2d 590 [1997]; *People v LaGrave*, 122 AD2d 294 [1986]). Accordingly, the court rejects defendant's contention that his sentence to consecutive terms was illegal.

Adequacy of Counsel

Both the United States Constitution (*Gideon v Wainwright*, 372 US 335 [1963]) and the New York State Constitution (*People v Linares*, 2 NY3d 507, 510 [2004]) grant a defendant in a criminal proceeding the right to the assistance of counsel. This includes the right to "effective" assistance of counsel (*Strickland v Washington*, 466 US 668 [1984]; *Linares*, 2 NY3d at 510).

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" (*People v Baldi*, 54 NY2d 137, 147 [1981]). What constitutes effective assistance is not susceptible

to precise measurement (*Id.* at 146-147). “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” (*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Benn*, 68 NY2d 941, 942 [1986]). This standard is designed to provide the defendant with a fair trial, not a perfect one (*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 (*Yarborough*, 540 US 1, 8; *People v Henry*, 95 NY2d 563 [2000]). A single error, if it affects the fairness of the trial, may rise to the level of ineffective assistance of counsel (*Id.*; *Flores*, 84 NY2d at 188-189).

A court should take care “to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis” (*Baldi*, 54 NY2d at 146). 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 (*People v Satterfield*, 66 NY2d 796, 799 [1985]). 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” (*Satterfield*, 66 NY2d at 799-800; *Yarborough*, 540 US 1; *see also People v Turner*, 5 NY3d 476 [2005]). The choice of trial tactics is viewed objectively (*Strickland*, 466 US

at 688; *People v Angelakos*, 70 NY2d 670, 673-670 [1987]; *Satterfield*, 66 NY2d at 799; *People v Butler*, 273 AD2d 613, 615 [2000]; *People v Castellano*, 203 AD2d 116, 117 [1994]). Trial strategies that might well have been pursued by a reasonably competent attorney and are objectively reasonable are within the constitutional parameters (*Satterfield*, 66 NY2d at 799; *People v Nichols*, 289 AD2d 605, 606 [2001]).

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” (*People v Rivera*, 71 NY2d 705, 709 [1988]).

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” (*Strickland*, 466 US at 694, *see also Benevento*, 91 NY2d at 713). Reasonable probability means a probability that undermines the fact finder's confidence in the outcome of the trial (*Id.*).

Under New York law, prejudice is examined in terms of errors that deprive the defendant of a fair trial (*Benevento*, 91 NY2d at 713). Prejudice is a significant factor, but not an “indispensable element in assessing meaningful representation” (*People v Stultz*, 2 NY3d 277, 284 [2004]).

[12]

The federal and state standards are different (*Benevento*, 91 NY2d at 713-714). The federal standard focuses on “the outcome of the proceeding” (*Id.* at 714; *see also Henry v Poole*, 409 F3d 48 [2005]; *People v Caban*, 5 NY3d 143[2005]). The state standard focuses on the “fairness of the process as a whole” (*Id.* at 714; *see also Henry*, 409 F3d at 69).

In the present motion, defendant claims that “[t]o the degree that trial counsel solicited the amendment of the felony murder charge and acquiesced in the court’s failure to submit the first-degree robbery and felony assault counts, counsel’s actions must be deemed ineffective.” As previously discussed, defendant’s substantive claims lack merit. Moreover, even if such claims possessed merit, as correctly argued by the People in opposition to defendant’s motion, defendant’s claim as to ineffective assistance of counsel is based upon facts fully contained in the record. Accordingly, it is barred pursuant to CPL 440.10 (2) (c)³ (*see People v Hernandez*, 191 AD2d 511 [1993]; *People v Pachay*, 185 AD2d 287 [1992]). In any event, there is no merit to defendant’s contention that he was denied the effective assistance of counsel, since defendant’s challenge to counsel’s alleged acquiescence to the amendment of the felony murder

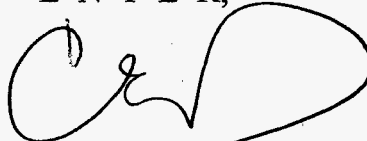
³ CPL 440.10 (2) provides that: “[n]otwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when: (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant’s unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him[.]”

charge, or his failure to object to the submission of charges which led to his consecutive sentence, amount to nothing more than "post-trial disagreement with strategies or tactics adopted by counsel [which] will not suffice to establish the requisite deprivation" (*People v Koufomichalis*, 2 AD3d 987, 989 [2003]; *People v Rivera*, 166 AD2d 367 [1990]; see also *People v Drummond*, 188 AD2d 312 [1992]).

In view of the foregoing, the defendant's motion is in all respects denied. Since the parties' submissions are sufficient in order for the court to render a determination, there is no need for a hearing to be held on the instant motion (CPL 440.30[1], [4]; see *Satterfield*, 66 NY2d at 799; *People v Demetsenare*, 14 AD3d 792, 793 [2005]).

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

