

**People v Howell**

2007 NY Slip Op 30607(U)

April 10, 2007

Supreme Court, Kings County

Docket Number: 0005158/1999

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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

-against-

**DECISION AND ORDER**  
Kings County  
Indictment Number 5158/99

JEROME HOWELL,

Defendant.

-----X  
CHERYL E. CHAMBERS, J.S.C.

Pursuant to CPL 440.10, defendant moves pro se to vacate the judgment of conviction entered against him on June 19, 2000 upon a jury verdict. Defendant's motion is denied because his claims are meritless.

Findings of Fact

Defendant was charged by Kings County Indictment Number 5158/99 with murder in the second degree and criminal possession of a weapon in the second and third degrees for shooting Kenneth Baker five or six times on April 8, 1999, and thereby causing his death. After he was arrested on June 21 in North Carolina, defendant admitted shooting Baker once in the leg, but claimed the gun continued to fire on its own when he and Baker fell to the ground. Defendant was convicted of murder in the second degree and sentenced to a prison term of twenty-five years to life.

Defendant appealed from the judgment of conviction, claiming that the court's instruction to the jury on murder in the second degree was erroneous in that it did not inform the jurors that the People were required to prove beyond a reasonable doubt that defendant's actions had actually caused Baker's death. Defendant's judgment of conviction was affirmed (*People v*

*Howell*, 11 AD3d 560 [2d Dept 2004]) and leave to appeal to the Court of Appeals was denied (*People v Howell*, 4 NY3d 744 [2004]). Defendant sought a writ of error *coram nobis* on the ground that appellate counsel failed to argue that trial counsel was ineffective when he did not object to the court's charge on murder in the second degree and when he failed to object to a remark made by the prosecutor during his summation. Defendant's application was denied (*People v Howell*, 2006 NY App Div LEXIS 12783).

Defendant now moves to vacate the judgment of conviction, pursuant to CPL 440.10, on the ground that trial counsel was ineffective. Defendant contends that counsel did not meet with him in order to develop a defense, nor did he conduct a pre-trial investigation. During the trial counsel did not call defendant's mother as a witness even though she was available, and otherwise did not vigorously represent defendant.

As part of his motion, defendant has submitted an affirmation alleging that he was not permitted to testify at trial, and setting forth the testimony he would have given. The substance of the testimony defendant alleges he would have given is consistent with the statement he gave to the police upon his arrest, which was admitted at trial. In both statements, defendant admits shooting the victim once, and claims that the weapon then fired repeatedly while in his hand. In both statements, defendant claims he was intoxicated and did not intend to kill the victim. Defendant contends that, but for counsel's failure to present evidence of what really happened, as now revealed in defendant's affirmation, defendant would have been convicted of manslaughter in the second degree, rather than of intentional murder.

#### Conclusions of Law

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 (*Baldi*, 54 NY2d at 146). “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 rather than a perfect one (*People v Flores*, 84 NY2d at 187).

A court should take care "to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (*People v 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 the assistance provided has been effective within constitutional parameters (*People v Satterfield*, 66 NY2d 796, 799 [1985]). The choice of trial tactics is evaluated objectively (*People v Angelakos*, 70 NY2d 670 [1987]; *People v Satterfield*, 66 NY2d at 799), and 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” (*People v Satterfield*, 66 NY2d at 799-800).

When a claim is made that counsel failed to make a particular motion or failed to object, defendant must show that the motion or objection would have been successful (*see People v Mance*, 269 AD2d 188 [1<sup>st</sup> Dept 2000], *lv denied* 95 NY2d 836 [2000]; *People v Seymour*, 255 AD2d 866, 867 [4<sup>th</sup> Dept 1998], *lv denied* 93 NY2d 902 [1999]). Further, 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 [1998]).

The People’s eyewitnesses testified that defendant fought with Baker, left the scene, returned with a gun, and shot Baker repeatedly. The People’s experts testified that the shooting could not have occurred the way defendant claimed it did in his statement to the police. In response to this evidence, defense counsel’s strategy was to challenge the voluntariness of defendant’s statement, and to impeach the credibility of the People’s eyewitnesses.

Defendant now disagrees with that strategy: he claims now that he should have been permitted to testify, and that his mother should have been called as a witness, in order to prove he did not intend to kill Baker. He claims that, as a result of these changes in strategy, the jury would have convicted him of the crime that he was actually guilty of – manslaughter in the second degree, rather than intentional murder.

At trial, however, defendant declined to testify, and assured the trial court that he freely chose not to testify after discussing it with his attorney. During the charge conference, defense counsel informed the court that defendant asked that the court not submit manslaughter in the second degree to the jury. Defendant’s current complaints therefore simply constitute, in the words of the Court in *People v Flores*, 84 NY2d 184, 187 , “a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, [which] does not suffice [to establish that counsel was ineffective].”

In order to be entitled to a hearing on his claim that his mother should have been called as a witness, “defendant must supply the substance of the testimony [she] would have given and indicate in what way this testimony would have benefited him” (*People v Session*, 34 NY2d 254,

256 [1974]; *People v Jon*, 26 AD3d 245 [1<sup>st</sup> Dept 2006], *lv denied* 6 NY3d 849 [2006]). He does not allege that his mother was a witness to the incident nor what her testimony would have been.

The trial transcript reveals “a trial strategy that might well have been pursued by a reasonably competent attorney,” (*People v Satterfield*, 66 NY2d at 799) faced with the testimony of multiple eyewitnesses and expert testimony that refuted much of his client’s description of the incident. This was, moreover, a strategy actively supported by defendant at trial. Defendant has thus failed to meet his burden of demonstrating the absence of strategic or other legitimate explanations for his counsel’s allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1998]). Absent such a showing, it is presumed that counsel acted in a competent manner and exercised professional judgment...” (*People v Rivera*, 71 NY2d 705)

For the foregoing reasons, defendant’s motion is denied.

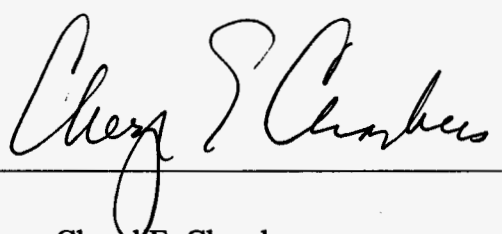
This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty 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. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

Dated: April 10, 2007

ENTER



Cheryl E. Chambers

**ENTERED**  
APR 10 2007  
NANCY T. SUNSHINE  
COUNTY CLERK