

People v McCaa

2007 NY Slip Op 30656(U)

March 26, 2007

Supreme Court, New York County

Docket Number: 0002136/2001

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION

JAYSON McCAA :
Ind. No. 2136/01
Defendant. :

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Lewis Bart Stone, J:

On March 5, 2002, the defendant Jason McCaa (“McCaa”) was convicted, following a jury trial, of Attempted Assault in the First Degree, Attempted Assault in the Second Degree, Criminal Possession of a Weapon in the Third Degree, and Menacing in the Second Degree. On September 10, 2002, McCaa was sentenced to eight years determinate on the Assault charges, two to four years on the Weapons charge, and one year on the Menacing charge, all to run concurrently. The conviction was affirmed. People v. McCaa, 16 AD3d 138 (1st Dept. 2005), lv to app denied, 5 NY3d 765 (2005). McCaa now moves pursuant to C.P.L. §440.10 to set aside the judgment of conviction on the grounds of ineffective assistance of counsel. The People oppose the motion.

The case emanates out of an incident which occurred on a subway train during the late evening hours. The victim, Mr. Green, testified that while going home on the

subway at about midnight, he observed McCaa being loud and abusive and in what appeared to be an intoxicated condition. As Green was reading, McCaa placed his hands on him; Green pushed McCaa's hands away. McCaa took a box cutter out of his pocket and said to Green, "Now I have to cut you," and attempted to cut Green near his eyes and face. Green struggled with McCaa and was able to disarm him. The train stopped at the next station where the police arrested McCaa and recovered the box cutter on the subway tracks. Another witness, Ms. Parsons, who was also on her way home, observed the scuffle between two men on the subway train. She saw one man holding a knife during the struggle and eventually saw him disarmed.

McCaa testified in his own defense. He stated that on the day of this incident, he had worked putting up sheet rock. After finishing work, he smoked marijuana and drank alcohol before heading home on the subway. He testified that he began to fall asleep on the subway car but was suddenly awakened by a man who was choking him. McCaa identified this person as Green. McCaa stated he had a box cutter in his pocket which he took out in order to defend himself. McCaa denied ever assaulting or attempting to assault Green.

McCaa's claims that his counsel was ineffective on two grounds. First, he claims that he was not represented by counsel "during a critical time period when he could have exercised his right to testify before the grand jury," and second, that his

trial counsel failed to request the defense of justification.

On April 8, 2001, McCaa was arraigned in Criminal Court on a misdemeanor complaint charging him with Criminal Possession of a Weapon in the Fourth Degree, Menacing in the Second Degree, Assault in the Third Degree, Attempted Assault in the Third Degree, Harassment, and Unlawful Possession of Marijuana, all misdemeanor charges. McCaa states that he informed his counsel at his arraignment, Jeffrey Johnson, of his desire to testify before the grand jury. McCaa argues that because Johnson was not on the “felony panel,” he was unrepresented during the period between his arraignment and being informed that there was a vote on an indictment on April 13, 2001. However, Mr. McCaa is incorrect about his right to testify before the grand jury. Since he was only charged with misdemeanors, no right to testify ever attached. CPL §190.50 (5)(a) provides in pertinent part that “The district attorney is not obliged to inform such person [against whom criminal charges are about to or has been submitted to a grand jury] that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding.” Here, as there were no felony charges in the complaint, the district attorney was under no obligation to either inform McCaa of a grand jury

provided him with assistance to testify.

Regarding the claim that McCaa's trial counsel erred in not requesting the defense of justification, McCaa has failed to meet his burden regarding ineffective assistance of counsel and the strategic decisions of counsel during a trial. McCaa's claims appear in the record and could have been raised on appeal. CPL §440.10(2)(c). In this instance, the Court must deny the motion to vacate judgment, since the grounds alleged in support of ineffective assistance of counsel appeared on the record, and McCaa could have, with due diligence, placed them on the record prior to sentencing but failed to do so. On his appeal, which was unanimously denied, McCaa raised claims regarding the a violation of a Sandoval ruling by the prosecutor, and that his guilt was not proven beyond a reasonable doubt. It should also be noted that in a previous motion to set aside the verdict, McCaa complained that there was "newly discovered evidence" which showed that his level of intoxication was such that if the jury had a copy of this report, they "would have been able to determine the extent of (his) intoxication and whether it had the effect to prevent the necessary intent, deliberation and premeditation." The Court denied that motion on September 10, 2002.

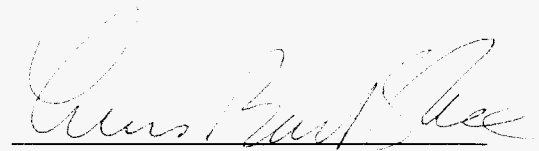
Defendant's claim that counsel's failure to request a charge of justification is not a ground to set aside a verdict due to ineffective assistance of counsel. People v. Wiggins, 89 NY2d 872 (1996); People v. Senior, 15 AD3d 302 (1st Dept. 2005).

Generally, the question of effective representation "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 the attorney provided meaningful representation." People v. Baldi, 54 NY2d 137 (1981). McCaa has the burden to show that the representation was less than meaningful or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 US 668 (1984). McCaa has failed to satisfy this burden.

Accordingly, the motion is denied.

This opinion constitutes the Decision and Order of the Court.

DATED: MARCH 26, 2007
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court