

People v Seeley

2007 NY Slip Op 31193(U)

May 9, 2007

Supreme Court, Kings County

Docket Number: 0000086/1998

Judge: John M. Leventhal

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART DV
-----X
THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
Indictment No. 86/98

Thomas Ross, Esq.
Assistant District Attorney
For the People

- against -

Valerie Seeley, *Pro Se*

VALERIE SEELEY,
Defendant.
-----X

By: LEVENTHAL, J.
Dated: May 8, 2007

Defendant moves, *pro se*, pursuant to Criminal Procedure Law §440.10 for an order vacating the judgment of conviction entered on March 31, 2003, (J. Leventhal) for Murder in the Second Degree. In deciding this motion, the Court has considered the defendant's original and amended motion, the People's affirmations in opposition and defendant's reply. For the reasons set forth below, defendant's motion is denied.

PROCEDURAL BACKGROUND

Defendant was charged with murdering her boyfriend, William Oliver, by stabbing him in the chest with a knife. On March 31, 2003, following a jury trial, defendant was convicted of Murder in the Second Degree under P.L. §125.25(2) (depraved indifference murder) and acquitted of Murder in the Second Degree under P.L. §125.25(1) (intentional murder). Defendant was sentenced to a prison term of nineteen years to life.

In June 2004, defendant appealed her conviction to the Appellate Division, Second Department. The only argument proffered by defendant in her appeal was that the court's failure to charge that an initial aggressor may be justified in using deadly physical force if she withdrew

from the encounter and communicated that withdrawal deprived her of a fair trial. The Appellate Division held that the claim was unpreserved for review and affirmed her conviction (*People v. Seeley*, 13 A.D. 3d 562). On January 7, 2005, defendant's application for leave to appeal to the Court of Appeals was denied (*People v. Seeley*, 4 N.Y.3d 767).

In a petition dated January 18, 2006, defendant applied for a federal writ of habeas corpus from the United States District Court for the Eastern District of New York (J. Dearie). In her habeas corpus petition, defendant claimed the following errors: the doctor who testified for the People was not qualified as an expert; the prosecution tampered with the recording of the 911 call; a police officer took statements from the defendant without giving her *Miranda* warnings; defendant's trial counsel failed to raise *Miranda* issues on appeal; the issue of the alleged fabrication of defendant's written statement was not raised on appeal; trial counsel failed to raise an affirmative defense of Battered Women's Syndrome.¹ Defendant's habeas corpus petition is currently pending.

On September 26, 2006, defendant filed a *pro se* motion to vacate the judgment against her pursuant to Criminal Procedure Law §440.10. By papers dated January 19, 2007, defendant submitted a motion to amend her original submission to include additional arguments.

PROCEDURAL BAR

A court must deny a motion to vacate judgment if sufficient facts appear on the record to permit adequate appellate review of the issue and the judgment is appealable, pending on appeal, or defendant has unjustifiably failed to raise such issue upon an appeal that he or she actually

¹The Court notes that defense counsel's strategy was to have an expert witness testify as to her opinion that defendant was a battered woman (*see, People v. Seeley II*, 186 Misc. 2d 715 [2000]). Defense counsel explicitly rejected the strategy of having an expert explain the dynamics of battering and its effects to the jury while having defendant testify as to how she was a battered woman. Battered Women's Syndrome is not a defense, *per se*, but is relevant to the defense of justification (*see, the subjective/objective test of People v. Goetz*, 68 NY 2d 96 [1986]).

perfected (CPL §440.10[2][b], [c]). CPL §440.10 should not be employed as a substitute for a direct appeal (*People v. Cooks*, 67 N.Y.2d 100, 103 [1986]).

In the original and amended motions, defendant asserts five grounds upon which her judgment should be vacated. For the reasons explained below, four of these claims are procedurally barred from review by this Court under the mandatory procedural bar set forth in CPL § 440.10(2)(c).

Defendant first claims that the judgment was obtained in violation of her right to a fair trial under the federal and state constitutions because she was convicted of depraved indifference murder. Relying on the recent Court of Appeals cases distinguishing between depraved indifference murder and intentional murder (*see, e.g., People v. Hafeez*, 100 N.Y. 2d 253 [2003]; *People v. Gonzalez*, 1 N.Y. 2d 464, *People v. Payne*, 3 N.Y. 2d 266 [2004]; *People v. Suarez*, 844 N.E. 2d 721 [2005]), she argues that the People did not present sufficient evidence to sustain her conviction for depraved indifference murder. Defendant further argues that there has been a retroactive change in the law that should be applied to her case. The record shows that defendant's counsel made a motion for dismissal of the charges shortly before the prosecution rested its case, arguing that the prosecution had not made out a prima facie case of depraved indifference murder (Tr.1194). Therefore this issue is a matter of record that should have been raised on appeal, and the Court is required to deny relief under CPL §440.10(2)(c).²

Secondly, defendant claims that the Court erred in failing to submit to the jury instructions on the lesser-included offenses of Manslaughter in the First and Second Degrees.

²Parenthetically, because defendant's motion is procedurally barred, the Court need not address defendant's argument that the Court of Appeals decisions distinguishing between depraved indifference murder and intentional murder apply retroactively to her claim (*see, People v. Feingold*, 852 N.E. 2d 1163 [2006], *People v. Suarez*, 844 N.E. 2d 721 [2005], *People v. Payne*, 3 N.Y. 3d 266 [2004], *People v. Gonzalez*, 1 N.Y. 2d 464 [2004], *People v. Hafeez*, 100 N.Y. 2d 253 [2003], *People v. Sanchez*, 98 N.Y. 2d 373 [2002], *People v. Register*, 60 N.Y. 2d 270 [1983]). The Court notes that the Court of Appeals declared that its holding in *Feingold* does not apply retroactively (*People v. Policano*, 7 N.Y. 3d 588 [2006]).

Not only is this issue a matter of record necessitating denial of relief under CPL §440.10(2)(c), but also defendant explicitly waived any objection to the exclusion of lesser-included offenses. The record indicates that on March 25, 2003, the Court specifically asked defense counsel whether defendant wanted lesser included charges presented to the jury. Defendant's attorney replied that he opposed the presentation of lesser included offenses to the jury (Tr. 1473-1474). On March 28, 2003, the Court asked defense counsel to consult with defendant about the inclusion of lesser included offenses in the jury charge, and defense counsel indicated that defendant understood the potential consequences of not including such charges in the jury instructions (Tr. 1652-1653).

Defendant also claims that the People failed to instruct the grand jury on justification. This issue is a matter of record and therefore procedurally barred (CPL §440.10[2][c]). However, even if the Court were to address this issue on the merits, it would deny relief because a review of the grand jury minutes reveals that on January 6, 1998, the Assistant District Attorney did, in fact, give an instruction on justification to the grand jury (pp. 24-26).

Additionally, defendant claims that the trial court refused admission of certain evidence pertaining to defendant's mental disease or infirmity, and that such refusal deprived her of her right to a fair trial. In particular, she claims that she has a low I.Q. and mental retardation and that evidence of these conditions should have been admitted as part of a defense of not guilty by reason of mental disease or defect.³ Defendant asserts that this error occurred when the Court

³The Court notes that the decision of whether to interpose a defense of not responsible by reason of mental disease or defect belongs solely to the defendant (*see, People v. Smith*, NYLJ, Jan. 7, 2002, at 29, col. 1 [Sup Ct, Kings Co.]). Defendant did not choose to present such a defense, but rather made the tactical decision to present a justification defense. It appears that such a decision was based on a consideration that a defense of justification, if successful, is a complete defense resulting in a finding that no homicide was committed, while a successful not responsible defense results in the institutionalization of the defendant (*see* "Ineffective Assistance of Counsel" discussion). Furthermore, the Court's observations of defendant during the court proceedings indicated she was not interested in such a plea.

precluded the prosecution from using privileged records on March 24, 2003. What the Court actually ruled on that date was that defendant had waived her privilege with regard to certain medical and hospital records by affirmatively placing her mental condition in issue. Defendant is thus incorrect in asserting that she was precluded from entering a not responsible defense because of the Court's denial of the admission of these records. In any event, as this is an evidentiary issue, it is a matter of record and therefore this Court's review is barred by CPL §440.10(2)(c).

When defendant perfected her appeal in 2004, she failed to raise any of these claims. The only issue presented for appellate review pertained to the adequacy of the jury instructions on justification.

Because these arguments concern matters of record, they are proper for appeal and are improper for a motion pursuant to Criminal Procedure Law §440.10. Therefore her motion to vacate the conviction on these grounds is denied because each ground is procedurally barred.

INEFFECTIVE ASSISTANCE OF COUNSEL

In defendant's final assignment of error, she contends that she received ineffective assistance of counsel at trial. The state constitutional right to effective assistance of counsel is met if the evidence, the law, and the particular circumstances of the case, "viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v. Baldi* 54 N.Y. 2d 137, 147 [1981]; *see also, People v. Benevento*, 91 N.Y.2d 708, 712 [1998]). In applying this standard, the court should not second-guess counsel's efforts "with the clarity of hindsight to determine how the defense might have been more effective" (*Id.*). The federal constitution guarantees a right to "reasonably effective assistance" of counsel. The test

for determining whether this standard has been met is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result” (*Strickland v. Washington*, 466 U.S. 668, 686 [1984]).

Defendant asserts that the representation she received was ineffective for three reasons. First, she claims that her counsel failed to request “a trial order of dismissal on legally insufficiency evidence that was against the weight of the evidence.” While a trial court may set aside a jury verdict that is incorrect as a matter of law (CPL §330.30[1]), it is not authorized to do so based on a finding that it is against the weight of the evidence (*People v. Carter*, 63 N.Y.2d 530, 536 [1984]). Therefore, even if defense counsel had requested dismissal of the verdict as against the weight of the evidence, this Court was not empowered to grant relief on this basis. Furthermore, defense counsel did, in fact, make an oral motion to dismiss based on the People’s failure to make out a prima facie case on March 24, 2003, when the People rested their case. Therefore defendant’s motion to dismiss on this ground is denied.

Defendant next claims that her trial counsel was ineffective because he failed to raise an affirmative defense of extreme emotional disturbance. However, defendant’s Notice of Intent to Proffer Psychiatric Evidence Pursuant to CPL §250.10(c), dated February 16, 2001, specifies that the defense would not be offering an affirmative defense of extreme emotional disturbance. Defense counsel further specified that the decision to not offer such a defense was a “strategic decision on our part based upon a number of considerations.” These considerations included the fact that conviction for manslaughter in the first degree carries a maximum sentence of twenty five years, while a successful defense of justification is a complete defense resulting in a finding that no homicide was committed. The decision to forego a defense of extreme emotional

disturbance was clearly a strategic choice, and this Court will not second-guess that choice
(*People v. Benevento*, 91 N.Y.2d 708, 712 [1998]).

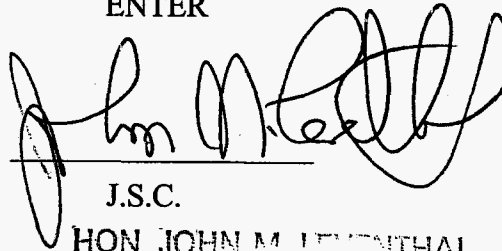
Defendant's final contention that defense counsel was ineffective for his failure to use
psychiatric testimony to suppress defendant's statements made to police is without merit.

CONCLUSION

The defendant's motion to vacate the judgment of conviction is denied in all respects.

This constitutes the decision and order of the Court.

ENTER



J.S.C.

HON. JOHN M. LEVENTHAL
Justice of the Supreme Court

ENTERED
MAY 11 2007
NANCY T. SUNSHINE
COUNTY CLERK