SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 34

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RAFAEL HERNANDEZ,

Defendant.

DECISION AND ORDER
Index No. 3461/04

APPEARANCES:

For the People: Robert M. Morgenthau
District Attorney
New York County
1 Hogan Place
New York, New York 10013
By: Peter Hinckley, Esq.
Assistant District Attorney
Of Counsel

For the Defendant: Steven Banks
The Legal Aid Society
Criminal Appeals Bureau
199 Water Street-3rd Floor
New York, New York 10038
By: William B. Carney, Esq.
Of Counsel

WILLIAM A. WETZEL, J.:

The defendant was indicted by a New York county grand jury for two counts of Burglary in the Second Degree, in violation of Penal Law § 140.25(2), based on two separate incidents on two different dates. Both incidents involved illegal entry into residential apartments and theft from the apartments. The defendant was subsequently indicted for yet another burglary at a third

residence, and charged with the same crime, Burglary in the Second Degree. Attorney Theodore Herlich was assigned to represent the defendant on both indictments.

The defendant proceeded to trial on indictment 3461/04, which contained two counts of burglary. On January 12, 2005, a jury convicted the defendant on both counts. Defense counsel successfully challenged the validity of the remaining pending burglary indictment, resulting in the court's dismissal of the indictment. On February 10, 2005, the defendant was adjudicated a mandatory persistent violent felony offender, and sentenced to an indeterminate prison term of 20 years to life on each burglary count, to run concurrently with each other and consecutively to a separate sentence that the defendant was already serving on multiple attempted second-degree burglary charges. The defendant is currently incarcerated pursuant to that judgment, and has not yet perfected a direct appeal.

Defendant now moves pursuant to CPL § 440.10 to vacate the judgment of conviction in the instant case. Defendant asserts that his trial attorney, Mr. Herlich, was ineffective for two reasons: first, defendant faults Mr. Herlich for failing to move to dismiss the charges on a specific theory upon the completion of the People's direct case, i.e., that the People failed to produce evidence on the essential element of license or privilege to enter the apartments. The defendant characterizes this as a "winning issue." Second, defendant claims that his attorney's failure to inform him that if he testified, as he in fact did, that he had never been in either of the complainant's apartments, "he would in effect be filling in a gap in the prosecution's case and otherwise removing a cause for dismissal of these two counts from the case." Def. Aff. at p. 10, ¶ 23. These issues will be addressed *seriatim*. For the reasons which follow, the defendant's motion is in all respects denied.

Issues Foreclosed Because Direct Appeal is Available

The defendant's chief argument, namely, that "the People had failed to produce any evidence showing an absence of license or privilege to enter the apartment and that any entry was, therefore, unlawful," Def. Aff at p. 2, ¶ 2, is an issue as to the sufficiency of the evidence and is therefore subject to review upon appeal as a matter of record. Similarly, the legal significance of defense counsel's making a generalized request for dismissal at the close of the People's case on the ground that the People failed to present a prima facie case, while not specifically making a record of the issue of the alleged failure of proof on permission or authority to enter, is also a matter of record and subject to appellate review.

CPL § 440.10(2)(b) states in pertinent part that "...the court must deny a motion to vacate a judgment when: (b) the judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal.

Accordingly, the court "must deny" the motion as to those allegations.

Alleged Ineffective Assistance of Counsel

Analysis of an ineffective assistance of counsel claim begins with the well entrenched principle that "[o]ur] state standard for effective assistance of counsel has long been whether the defendant was afforded meaningful representation [*citations omitted*]. Applying this standard, [the Court of Appeals] has emphasized the difference between ineffective representation and losing trial tactics [*citations omitted*]." Indeed, counsel's performance will not be considered ineffective, even if unsuccessful, as long as it reflects an "objectively reasonable and legitimate

trial strategy under the circumstances and evidence presented [*citations omitted*]." People v. Berroa, 99 NY2d 134, 138 (2002); see also People v. Henry, 95 NY2d 563, 565 (2000), habeas corpus granted 409 F3d 48 (2nd Cir. 2005) cert denied __US __, 126 S. Ct. 1622. Further, "in applying this standard, counsel's efforts should not be second guessed with the clarity of hindsight to determine how the defense might have been more effective. The Constitution guarantees the accused a fair trial, not necessarily a perfect one [*citations omitted*]. That a defendant was convicted may have little to do with counsel's performance, and courts are properly skeptical when disappointed prisoners try their former lawyers on charges of incompetent representation." People v. Benevento, 91 NY2d 708,712 (1998); see also People v. Butler, 273 AD2d 613, 615-6 (3rd Dept. 2000) lv. denied, 95 NY2d 933.

Thus, "where as here, the evidence, the law and the circumstances of a particular case, viewed together and as of the time of representation, reveal that meaningful representation was provided, defendant's constitutional right to the effective assistance of counsel has been satisfied." People v. Satterfield, 66 NY2d 796, 798-9 (1985). In this regard, the Court of Appeals "has clarified meaningful representation to include a prejudice component which focuses on the 'fairness of the process as a whole rather than any particular impact on the outcome of the case'". People v Henry, 95 NY2d 563, 566 (2000); see also People v. Ozuna, 7 NY3d 913, 915 (2006). Most importantly, "the benchmark for judging any claim of ineffectiveness must be 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 US 668, 686 (1984); People v. Schulz, 4NY3d 521,531 (2005).

Application of the foregoing well established principles to the case at bar leads to the inexorable conclusion that the defendant's ineffective assistance of counsel claim is frivolous. At the outset, it must be noted that counsel successfully managed to obtain dismissal of a second burglary indictment based on his objection to the admission of a police fingerprint report as a business record. He filed all appropriate pretrial motions in connection with the instant indictment, and retained an independent fingerprint expert to examine the fingerprints which the People claimed linked the defendant to all of the burglaries. He zealously opposed the admission of an excited utterance that was a key piece of evidence in the People's proof. At the close of the People's case, he made a generalized trial order of dismissal.

Mr. Herlich also conscientiously discussed the defendant's wish to testify in his own behalf in this case and wisely attempted to dissuade the defendant from doing so. See Def. Aff. at pp. 9-10, ¶23. Defense counsel, aside from advising his client not to testify, was helpless to prevent such testimony, as the decision to testify rests solely with the defendant. See People v. White, 73 NY2d 468, 478 (1989) cert denied 493 US 859 (1989); People v. Ferguson, 67 NY2d 383, 390 (1986).

Defendant complains that although counsel attempted to dissuade him from testifying, he neglected to explain to him that if he took the stand and testified "that he had never been in either of the defendants' [sic] [should be complainants' apartments] he would in effect be filling in a gap in the prosecution's case and otherwise removing a cause for dismissal of these two counts from the case." Def. Aff. at p 10, ¶ 23. According to the defendant's affidavit, Mr Herlich stated in a conversation with appellate counsel that although he did not specifically explain the fine points of such a sufficiency argument to the defendant, he attempted to convince the defendant

that it would be foolish to testify. Mr. Herlich also indicated that since the defendant "adamantly denied that he was ever in the apartment, there seemed to be no point in pursuing a strategy of innocent explanation." Def. Aff. at p. 10, ¶ 24. [1]

This claim must be evaluated in the specific circumstances of this case. This defendant is a career thief. See generally Defendant's New York State Criminal History Report. Many of his convictions involve burglaries or attempted burglaries. Accordingly, it is reasonable to assume that the defendant must have known that the key to a successful resolution of this case had to include a successful challenge to the reliability of the forensic evidence, a non-criminal explanation for the presence of his fingerprint in those apartments, or a "Hail Mary play" in which he would sit before the jury, swear to tell the truth, and convince the jury that it had all been some horrendous forensic mistake, and he had never been inside those apartments.

Despite his attorney's efforts to dissuade him, he took the stand and attempted the "Hail Mary" play. He has supplied no sworn affidavit that his attorney forced him to testify, failed to explain the ramifications of testifying to him, or failed to explain how the defendant's chosen strategy might backfire. Once the defendant insisted on pursuing the "Hail Mary" strategy, a good attorney had no choice but to attempt to present a straight-faced defense consistent with the defendant's choice. Mr. Herlich pursued that defense the only way he could, by calling an independent fingerprint expert to challenge the reliability of the fingerprint evidence and by objecting to the testimony of an excited utterance that was key evidence in the People's case as to the issue of permission and authority to enter the apartment. Under the circumstances, counsel cannot be faulted for failure to achieve divine intervention in the case. Despite significant

[1] Defendant's Affirmation states that counsel on the instant motion drafted an affidavit reflecting his recollection of his telephone conversation with Mr. Herlich and sent it to Mr. Herlich for his review and signature, but Mr. Herlich did not respond to that communication. Def. Aff. at pp. 10-11, ¶ 25.

obstacles, he achieved his legally required goal which was to afford the defendant "meaningful representation." Berroa, supra, 99 NY2d at 138.

In view of the foregoing, the defendant's motion is in all respects denied.

The foregoing constitutes the Decision and Order of the court.

Dated: May 9, 2007
New York, NY

William A. Wetzel