

People v Bilbrew

2007 NY Slip Op 31574(U)

May 1, 2007

Supreme Court, Kings County

Docket Number: 0006727/1995

Judge: Abraham G. Gerges

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 17

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Abraham G. Gerges

Date: May 1, 2007

-against-

DECISION & ORDER

MICHAEL BILBREW

Indictment No. 672⁶/1995

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Defendant was convicted by jury verdict of murder in the second degree (P.L. §125.25[3]), attempted robbery in the first degree (P.L. §§110/160.15[2]) and criminal possession of a weapon in the second degree (P.L. §265.03) and sentenced on June 11, 1996 to concurrent terms of imprisonment of twenty-five years to life for the murder, seven and one-half to fifteen years for the attempted robbery and six to twelve years for the weapon possession as a second felony offender (Aiello, J., trial and sentence). He was convicted along with a co-defendant of the felony murder of a grocery store clerk with the underlying crime based on the attempt to take a chain from the neck of the deceased's niece who was visiting him in the store at the time of the killing.

Defendant's conviction was affirmed by the Appellate Division Second Department (*People v Bilbrew*, 268 AD2d 591 [2d Dept 2000]) and leave to appeal to the Court of Appeals was denied (*People v Bilbrew*, 95 NY2d 832 [2000]). His petition for a federal writ of habeas corpus was denied on May 17, 2001 and a certificate of appealability was denied by the Second Circuit Court of Appeals.

Defendant now moves pursuant to CPL§440.10 to vacate the judgement of conviction on

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the grounds of ineffective assistance of counsel and prosecutorial misconduct. Specifically, he claims that counsel failed to investigate both a potential witness and the contents of police reports concerning the attempted robbery. The witness, whose identity was unknown, was referred to in a police report as being near the scene and heard shots followed by screams coming from the store. Because the report states that this individual did not see anyone flee from the scene, defendant contends that such potential testimony would contradict the decedent's niece, Maria Martinez, who testified that the perpetrators fled immediately after the shooting.

Defendant's second claim revolves around other police reports that indicate that the killing took place "during a commission of a robbery of a grocery store" and that a witness who testified at trial provided information during the investigation that an "[u]nknown perp stated 'hold up' went behind the counter unk. [unknown] amount of usc [U.S. currency] taken". Defendant contends that counsel could have used these reports to undermine the People's proof of the nature of the attempted robbery.

Finally, defendant alleges that counsel was ineffective for failing to object to the prosecutor's introduction of perjured testimony. He claims that discrepancies in the testimony of two witnesses as to details of the incident reflects perjury on the part of one witness and that the prosecutor's knowing presentation of such testimony constitutes prosecutorial misconduct.

After reviewing the record and the submissions of the parties, defendant's complaints against his attorney are without merit and fall far short of the threshold that must be met to prevail on a claim of ineffective assistance of counsel.

A defendant in a criminal proceeding has a constitutional right to the effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668 [1984]; *People v Linares*, 2 NY3d 507, 510

[2004]; see U.S. Const., 6th Amend.; NY Const., art.1, §6). That right “is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial” (*People v Claudio*, 83 NY2d 76, 80 [1993] quoting *United States v Cronin*, 466 U.S. 648, 658 [1984]). “So long as 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 the constitutional requirement will have been met.” (*People v Baldi*, 54 NY2d 137, 147[1981]). “This protection does not guarantee a perfect trial, but assures the defendant a fair trial.” (*People v Flores*, 84 NY2d 184,187 [1994]).

Counsel’s performance must not be second-guessed with the benefit and clarity of hindsight (*People v Satterfield*, 66 NY2d 796, 799 [1985]) and the “reviewing court must avoid confusing true ineffectiveness with mere losing tactics” (*People v Baldi* at 146). Rather “it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanation” for counsel’s conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]). “Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgement.” (*Id.*). “As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance.” (*People v Benevento*, 91 NY2d 708, 712-713 [1998]).

Moreover, to prevail on a claim of ineffective assistance of counsel, a defendant must also show that his right to a fair trial was prejudiced by his attorney’s performance (*People v Benevento* at 713). The acts or omissions of the attorney must be demonstrated to be sufficiently egregious to have prejudiced the defense or the defendant’s right to a fair trial (*People v Hobot*, 84 NY2d 1021, 1024 [1994]; *People v Flores* at 187). Thus, while isolated errors in defense

counsel's representation generally do not constitute ineffectiveness, a single error affecting the fairness of the trial may rise to the level of ineffectiveness of counsel (*People v Henry*, 95 NY2d 563, 565-566 [2000]).

This prejudice component departs from the federal standard in *Strickland* "adopting a rule somewhat more favorable to defendants" (*People v Turner*, 5 NY3d 476, 480 [2006]). To show that his federal constitutional right to effective assistance of counsel was violated, a 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 v Washington* at 694). In contrast, the New York standard focuses on "the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento* at 714). Thus, a showing of prejudice is "a significant but not indispensable element in assessing meaningful representation" (*People v Stutz*, 2 NY3d 277, 284 [2004]; *People v Caban*, 5 NY3d 143, 155-156 [2005]).

In this instance, defendant has failed to demonstrate the absence of a reasonable strategy or explanation for counsel's performance. The unknown witness would have added little to defendant's case because the witness did not claim to have seen anything. A review of the record indicates that the first line of defense for counsel was that the eyewitnesses could not have accurately identified defendant under the circumstances. In a situation where chaos and fear reigned, such a strategy was reasonable. The unknown witness would not have contributed to a misidentification defense in light of testimony that defendant was described as wearing a hood over his head and considering the distance from which the witness would have had to have observed the perpetrators fleeing. Moreover, there is no doubt that the intruders fled because they were not to be found when the police arrived minutes later. Thus, the impeachment value of

testimony challenging the niece's account of the sequence of events would have been slight and inconsequential.

Defendant's argument with regard to the nature of the attempted robbery is equally unavailing. The statements in the police reports about money taken from the store were attributed to a second eyewitness, Manual Hidalgo, who was a worker in the store and was also present during the incident. On cross-examination defense counsel challenged Hidalgo's credibility based on his illegal entry into the United States and confronted him with the information in the police reports. The witness acknowledged his immigration problems but denied that he had told the police that money had been taken from the store. The issue of the police reports was thus raised before the jury which instead accepted the niece's testimony regarding her chain as credible. Under the circumstances, any failure of counsel to have pursued the matter further would have been minor and isolated in contrast to his otherwise competent and diligent representation. The fairness of defendant's trial would not have been tarnished.

Finally, sufficient facts appeared on the record concerning defendant's claims about the presentation of perjured testimony for him to have raised the issue on appeal. His failure to do so requires that this claim be summarily rejected (CPL§440.10[2][c]).

Accordingly, defendant's motion is denied.

This decision shall constitute the order of the court.

ENTER:



ABRAHAM G. GERGES

J.S.C.

HON. ABRAHAM G. GERGES
J.S.C.

