

**People v Almonte**

2007 NY Slip Op 31939(U)

July 2, 2007

Supreme Court, Queens County

Docket Number: 0007140/1990

Judge: Barry Kron

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Motion

SUPREME COURT OF THE STATE OF NEW YORK  
CRIMINAL TERM: PART K-8

P R E S E N T: HON. BARRY KRON,  
Judge.

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

- against-

Indictment Nos.: 7140/1990

JOSE ALMONTE,

Motion: To Vacate Judgment of  
Conviction and Sentence

Defendant.

-----X


DEFENDANT PRO SE  
For the Motion

RICHARD A. BROWN, D.A.

BY: A.D.A. Jennifer Etkin  
Opposed

Upon the foregoing papers, the motion is denied. See the accompanying memorandum.

Kew Gardens, New York  
Dated: July 2, 2007

  
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BARRY KRON  
A.J.S.C

M E M O R A N D U M

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-8

<p>THE PEOPLE OF THE STATE OF NEW YORK:</p> <p style="text-align: center;">-against-</p> <p>JOSE ALMONTE,</p> <p style="text-align: center;">Defendant.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>BY: BARRY KRON, AJSC</p> <p><b>DATED: July 2, 2007</b></p> <p><b>IND. NO.:7140-90</b></p>
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Defendant has moved, *pro se*, to vacate his judgment of conviction upon the ground that he received ineffective assistance of counsel. Defendant claims that counsel violated his constitutional rights when he was not called to testify at trial. Moreover, defendant claims that counsel should have advanced an “affirmative defense.”<sup>1</sup> Defendant further moves to set aside his sentence arguing that it is invalid as a matter of law.<sup>2</sup>

The People oppose defendant's motion, contending that it is procedurally barred and meritless.

On December 6, 1990, an indictment was filed against defendant charging him with: two counts of Murder in the Second Degree (P.L. § 125.25[1] & [3]); one count of Robbery in the First

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Defendant asserts that his defense was that he did not want to do the robbery because he was familiar with the victim/deceased from a prior occasion. He only agreed to participate in the crime as a result of peer pressure. Furthermore, he claims, as part of this defense, that he did not know that the victim would be shot.

Defendant argues that his sentence is invalid as a matter of law because the Appellate Division reversed the intentional murder count conviction and he believes that the sentence he received upon his felony murder conviction was based in part on the intentional murder count.

Degree (P.L. § 160.15[1]); and one count of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03)(Queens County Indictment 7140-90). Defendant was convicted, after a jury trial, of two counts of Murder in the Second Degree, one count of Robbery in the First Degree and one count of Criminal Possession of a Weapon in the Second Degree (Demakos, J.). Defendant was sentenced to concurrent indeterminate terms of imprisonment of twenty-five years to life on the murder convictions, eight and one-third to twenty-five years on the robbery conviction, and five to fifteen years on the weapon possession conviction (Demakos, J.). Thereafter, defendant appealed his conviction.

On appeal, the convictions for intentional Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree were reversed, while the second degree Felony Murder conviction was affirmed (People v. Almonte, 223 A.D.2d 593 [2d Dept. 1996]).<sup>3</sup> The Court of Appeals denied defendant's application for leave to appeal (88 N.Y2d 979 [1996]).

On February 11, 1997, defendant filed a motion to vacate his judgment of conviction pursuant to C.P.L. § 440.10, claiming that his trial counsel was ineffective, that reversible improper and prejudicial off the record conduct occurred, and that the judgment was obtained in violation of his constitutional rights.<sup>4</sup> In a decision dated September 4, 1997, defendant's motion was denied as

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The appellate court held that the evidence was insufficient to convict defendant on the intentional murder count and that the prosecutor violated defendant's right to confrontation when questioning an accomplice and alluding to a statement indicating defendant was present when the victim was shot. These errors, however, did not have an impact on the felony murder or the robbery conviction.

Defendant is essentially advancing the same arguments in his present motion, in addition to the claim that his desire to testify at trial was not honored.

procedurally barred and meritless (see Decision, dated Sept. 4, 1997 [Demakos, J.]).<sup>5</sup>

On December 12, 1997, the Appellate Division denied defendant's application for leave to appeal the decision and order denying his C.P.L. § 440.10 motion. On February 17, 1998, defendant's application for leave to appeal to the Court of Appeals was dismissed (91 N.Y. 2d 923 [1998]).

Defendant filed for a writ of *coram nobis* in the Appellate Division on the ground of ineffective assistance of appellate counsel. On May 17, 1999, the appellate court denied defendant's application, stating that he failed to establish that he was denied effective assistance of appellate counsel (261 A.D.2d 552 [2d Dept. 1999]). On July 14, 1999, defendant's application for leave to appeal to the Court of Appeals was dismissed (93 N.Y.2d 1001 [1999]).

Defendant filed a *habeas corpus* petition in federal court, claiming that his trial counsel was ineffective for failing to sufficiently question police detectives at the suppression hearing regarding the timing of a telephone call and for failing to call a witness regarding the telephone call. Defendant also claimed that he had ineffective assistance of appellate counsel. After an evidentiary hearing, the United States District Court for the Eastern District denied defendant's petition (Weinstein, J.). On February 11, 2003, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court, stating that defendant failed to establish ineffective assistance of counsel (56 Fed. Appx. 4 [2d Cir. N.Y. 2003]).

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The court held that because defendant's arguments could have been raised on appeal and were not, the claims were procedurally barred, and that his assertions of ineffective assistance were meritless. Furthermore, defendant failed to state what and how any of his constitutional rights were violated.

Defendant moved for reargument, which was granted. Nevertheless, the court adhered to its initial decision denying defendant's application (see Decision, dated Sept. 30, 1997 [Demakos, J.]).

On April 19, 2004, the United States Supreme Court denied defendant's application for a *writ of certiorari* (541 U.S. 994 [2004]).

#### DECISION

Criminal Procedure Law §440.10 (2)(c) states that a court must deny a motion to vacate a judgment of conviction when sufficient facts appear on the record to permit adequate review of the claim on a direct appeal. Here, defendant unjustifiably failed to raise his on the record claims on direct appeal.

At the sentence proceeding defendant specifically addressed the issue regarding his desire to testify. Because this claim was made a part of the record and defendant could have raised it on his direct appeal but failed to do so, it is procedurally barred (C.P.L. § 440.10 [2][c]; People v. Cooks, 67 N.Y.2d 100 [1986]).

Likewise, any claim defendant raises as to an affirmative defense is an on the record claim that should have been raised on appeal (see C.P.L. § 440.10 [2][c]). Therefore, this issue is also procedurally barred .

Additionally, C.P.L. § 440.10 (3)(c) provides that the court may deny such motion when: "Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." Here, defendant has already availed himself of a C.P.L. § 440.10 motion to vacate the judgment, and although he could have raised these issues in his prior motion he failed to do so. Specifically, defendant now claims that he was denied effective assistance of counsel because he was not called to testify at trial despite his claim that he wished to do so. These allegations all arise under the claim of ineffective assistance of counsel. Thus, because these claims could have and should have been raised in defendant's prior

application alleging ineffective assistance of counsel, he can not do so now. Notably, defendant already raised these issues in both state and federal court (C.P.L. § 440.10[3][b], [c]).

Pursuant to C.P.L. § 440.30(3)(a), a court is permitted to deny a motion to vacate a judgment without a hearing where all the essential facts could have been placed on the record by a defendant acting with due diligence before sentencing. Here, defendant was certainly aware, based upon his own knowledge as alleged in his motion papers, that he wanted to testify and did not receive this opportunity. However, to the extent that defendant never made a record that he was denied an opportunity to testify, his current application is denied without a hearing.<sup>6</sup>

Aside from the procedural flaws, defendant's current claim is meritless. Effective assistance of counsel has been defined as follows: "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" (see People v. Baldi, 54 N.Y.2d 137 [1981]). Moreover, a defendant must demonstrate the absence of strategic or other legitimate expectations for counsel's failure to pursue a particular course of action (see People v. Garcia, 75 N.Y.2d 973 [1990]).

It is well-settled that under the federal standard in order to establish ineffective assistance of counsel defendant must demonstrate that his counsel's performance was so deficient that his counsel was not functioning within the meaning of the Sixth Amendment to the United States Constitution and that his counsel's deficient performance prejudiced him (see Strickland v. Washington, 466 U.S. 668 [1984]). To establish the "prejudice" prong, defendant must show that a reasonable probability

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<sup>6</sup> To the extent that defendant stated on the record that he thought he was going to testify at trial and did not, this on the record claim must be raised on appeal and not by way of a C.P.L. § 440 motion (C.P.L. § 440.10[2][c]).

exists that, but for counsel's unprofessional errors, the result of the trial would have been different.

Under New York law, the Court of Appeals has reiterated the standard for determining whether a defendant received effective assistance of counsel. In People v. Benevento, (91 N.Y.2d 708 [1998]), the Court found that "effective assistance" varies depending upon the circumstances of the case and that a flexible standard to analyze ineffective assistance of counsel claims must be applied under the New York State Constitution. Specifically, the Benevento Court addressed the term "meaningful representation" and how it is defined. Meaningful representation does not mean a perfect trial and efforts of counsel should not be second-guessed with hindsight (see Benevento, *supra* at 712). Thus, "a reviewing court must avoid confusing 'true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis'" (see Benevento, *supra*, quoting, Baldi, *supra*).

Defendant has failed to demonstrate prejudice under the New York test for ineffective assistance of counsel and has also failed to provide any objective evidence to support his claims under federal law.<sup>7</sup> Defendant's bare assertion that he wanted to testify and did not do so is insufficient to demonstrate that there was no strategic reason for his not testifying. Significantly, defendant has failed to demonstrate that he was not informed that it was up to him to decide if he was testifying and that he was not independently aware of this right (see e.g. United States v. Defeo, 1996 U.S. Dist. Lexis 22523, No. 90 CR 250 [S.D.N.Y. 1996]). A review of the record demonstrates that defendant's attorney(s) did provide him with effective assistance of counsel. The strategy

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The issue was previously decided by the federal courts as outlined herein and no ineffective assistance of counsel was found.

advanced, that defendant had serious learning and emotional deficiencies and could not have planned the incident and could not read or understand the statement he provided, was rationally argued by counsel. Under these circumstances, defendant's testimony may not have enhanced that defense and could have damaged it, thereby legitimizing the decision not to testify at trial.<sup>8</sup> Defendant can not now in hindsight question his decision or the trial tactics.

In any event, it is unlikely that if defendant would have testified it would have changed the result of the trial. It appears only in retrospect, after he has been convicted, that he alleges these claims. Accordingly, under both the federal and state standards, defendant has failed to establish that he received ineffective assistance of counsel.

In sum, counsel properly engaged in pre-trial motion practice and sought to suppress his statement and the car seats found in his apartment. Counsel even called a detective at the hearing and strenuously cross-examined witnesses. Additionally, counsel presented a well-reasoned and cogent defense at trial.

Criminal Procedure Law §§ 440.30 (4)(d)(i) provides that a motion to vacate a judgment and set aside a sentence may be denied, when the court reaches the merits if:

(d) An allegation of fact essential to support the motion ( i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Defendant's self-serving affidavit is insufficient and unsupported by any other evidence.

Thus, for these reasons outlined herein, defendant has not shown that there is a reasonable possibility

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Defendant alleges that he wanted to explain to the jury that "he did not want to rob the place in the first place, and that only upon a pier [sic] pressured decision, my brother agreed to drive one of the vehicles that were to be robbed, but that he did not want and/or gained [sic] any benefit from the theft of the cars" (see Defendant's Exhibit "D").

that his allegations are true and this Court denies defendant's motion without a hearing after also considering the merits (C.P.L. § 440.30 [4][d]).

Addressing defendant's application to set aside his sentence, a motion to set aside a sentence pursuant to C.P.L. § 440.20 is applicable only to a sentence which is "unauthorized, illegally imposed, or otherwise invalid as a matter of law" (see People v. Minaya, 54 NY2d 360, cert. denied, 455 US 1024). In the instant case, defendant's sentence is none of these things. Defendant was properly sentenced. Defendant's moving papers do not allege any ground constituting a legal basis to set the sentence aside. The court is "expressly prohibited by C.P.L. § 430.10" from altering a lawful sentence once it has commenced (see People v. Minaya, *supra*) even if it were inclined to do so. Moreover, defendant's speculation that his sentence on the felony-murder count was influenced by his conviction of intentional murder is meritless based upon the trial record. Furthermore, the appellate court, when reversing the conviction for intentional murder due to error in the prosecutor's cross-examination of a witness at trial, held that there was no reasonable possibility that the felony murder or robbery conviction were effected by the error and did not reverse these convictions.

Finally, a claim of an excessive sentence must be made on direct appeal, not by way of a motion to vacate sentence (People v. Boyce, 12 AD3d 728 [3d Dept. 2004]); People v. Cunningham, 305 A.D.2d 516 [2d Dept. 2003]).

Based on the foregoing, the motion to set aside his conviction and sentence is denied.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for the defendant and the District Attorney.

  
BARRY KRON, A.J.S.C.