People v Vasquez
2007 NY Slip Op 32278(U)
June 28, 2007
Supreme Court, Kings County
Docket Number: 0004105/1982
Judge: Cheryl E. Chambers
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

NOEL VASQUEZ,

Defendant.

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DECISION AND ORDER
Kings County
Indictment Number 4105/82

CHERYL E. CHAMBERS, J.S.C.

Defendant *pro se* moves to vacate his judgment of conviction pursuant to CPL 440.10. He contends that his constitutional right to the effective assistance of counsel was violated by counsel's failures in a number of respects. Defendant's motion is denied because it is, in part, procedurally barred and, in part, meritless.

FINDINGS OF FACT

On July 22, 1982, in front of the Exhibit Group, a company located at 53rd Street and First Avenue in Brooklyn, defendant, his codefendants Ricardo Diaz and Pedro Lopez, and Jorge Rodriguez robbed and shot to death Russell Gordon and Herman Biarsky, two payroll guards who were attempting to deliver money to the Exhibit Group. For these actions, defendant and his codefendants were each charged by a Kings County grand jury with four counts of murder in the second degree, three counts of criminal possession of a weapon in the second degree, and criminal possession of a weapon in the fourth degree.

At trial, the principal direct evidence of defendant's role in the robbery/murders was provided by the testimony of Hector Sanchez, an employee of Exhibit Group. Sanchez testified that he knew defendant and had seen him at the Exhibit Group on a number of prior occasions, including earlier on the day of the robbery. Sanchez knew that defendant's father, Victor, also

worked at Exhibit Group. Approximately six weeks prior to the robbery, defendant told Sanchez that he intended to "rip off the payroll."

Sanchez saw defendant shoot Gordon and Biarsky and remove the money from the trunk of their car. Sanchez also saw defendant flee the scene in a cream-colored car that he identified to the police. Defendant's fingerprint was recovered from the front passenger's side of that car.

Defendant and his codefendants were each convicted by a jury of four counts of murder in the second degree and three counts of criminal possession of a weapon in the second degree. On July 6, 1983, defendant and his codefendants were each sentenced to terms of incarceration of twenty-five years to life for the murder of Russell Gordon, twenty-five years to life for the murder of Herman Biarsky and five to fifteen years for the weapons possession. The sentences for the murder of Herman Biarsky were ordered to run consecutively to the sentences for the murder of Russell Gordon, and the sentences for the weapons possession were ordered to run concurrently with the sentences for the murder of Russell Gordon.

Defendant appealed from the judgment of conviction, claiming that (1) the court erroneously denied his motion for a *Mapp* hearing; (2) the court should have charged the jury that prosecution witness Abimael Torres was an accomplice as a matter of law or fact; and (3) his sentence was excessive. The judgment was affirmed (*People v Vasquez*, 134 AD2d 468 [2d Dept 1987]), and leave to appeal to the Court of Appeals was denied (*People v Vasquez*, 70 NY2d 1011 [1988).

Defendant *pro se* now moves to vacate the judgment of conviction pursuant to CPL 440.10 on the ground of ineffective assistance of trial counsel. Defendant ascribes error to seven failures in counsel's representation of him at trial: (1) counsel did not investigate and vigorously present an alibi defense; (2) counsel did not object to the court's dismissal of sworn juror #12 as

being grossly unqualified to serve; (3) counsel did not move for a mistrial or seek an adverse inference charge after prosecution witness Ellemuel Rodriguez's psychiatric history was revealed during his cross-examination by a co-defendant; (4) counsel did not ask the court to charge that Ellemuel Rodriguez was an accomplice as a matter of law; (5) counsel did not ask the court to charge that Abimael Torres was an accomplice either as a matter of law or of fact; (6) counsel did not object to the submission of a verdict sheet containing references to elements of the crimes charged; and (7) counsel did not properly advise defendant about a plea offer of 15 years to life.

The relevant allegations of fact made in support of, and in opposition to defendant's motion, and any other evidence the parties have submitted, are detailed below.

CONCLUSIONS OF LAW

I. Defendant's Contentions Two through Six

"If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial [of a motion to vacate judgment] pursuant to subdivision two of section 440.10 . . . the court must summarily deny the motion" (CPL 440.30 [2]).

CPL 440.10 (2) (c) mandates denial of a motion to vacate a judgment when:

> [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon an appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him.

"The purpose of [this] provision is to prevent CPL 440.10 from being employed as a substitute for direct appeal when defendant . . . . could readily have raised [an issue] on appeal but failed to do so (CPL 440.10[2][c]) [citations omitted]" (*People v Cooks*, 67 NY2d 100, 103

[1986]). Thus, where the alleged deficiencies in counsel's performance appear on the record, and therefore could have been raised on direct appeal, summary denial of the motion is mandated (*People v Baxter,* 262 AD2d 1068 [4th Dept 1999], *lv denied* 93 NY2d 1014 [1999]; *People v Pachay,* 185 AD2d 287[2d Dept 1992], *lv denied* 82 NY2d 757 [1993]).

Defendant's ascriptions of error numbered four and five are based solely on facts which appear in the record. Defendant contends that counsel was ineffective in failing to ask the court to charge that two of the People's witnesses were accomplices. In his affidavit, and in his memorandum of law, defendant refers solely to facts in the trial record in support of his contention.

Defendant's allegations of nonrecord facts in support of contentions two and three, and his submission of nonrecord documents in support of contention six, are immaterial to those contentions, as discussed below. The People have not alleged nonrecord facts in opposing defendant's motion to the extent it is based on these contentions. Therefore, the parties have impliedly conceded that sufficient facts appear on the record to have permitted adequate review on direct appeal.

A. Defendant's allegations of nonrecord facts in support of contentions two and three

Defendant alleges that he urged counsel to object to the dismissal of the sworn juror. Assuming *arguendo* that defendant's allegation is true, it is, nonetheless, immaterial to his contention that counsel was ineffective in failing to object to the dismissal. "The selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments" (*People v Colon*, 90 NY2d 824, 826 [1997]).

Defendant alleges that he urged counsel to cross-examine Ellemuel Rodriguez concerning Rodriguez's psychiatric history, that he told counsel that it was "common knowledge within the community (neighborhood)" that Rodriguez had been confined to a psychiatric institution in the past, and that he gave this information to counsel for a co-defendant, who then brought out Rodriguez's psychiatric history upon cross-examination.. Assuming *arguendo* that defendant's allegations are true, they are immaterial to his contention that counsel was ineffective when he failed to move for a mistrial or seek an adverse inference charge upon the revelation of prosecution witness Rodriguez's psychiatric history during cross-examination. More importantly, the allegations completely undermine defendant's contention. Counsel could not be ineffective for failing to seek a mistrial or an adverse inference instruction for a *Brady* violation that did not occur.

Brady material is evidence favorable to the accused: "[e]vidence is favorable to the accused if it either tends to show the accused is not guilty or impeaches a prosecution witness [citation omitted]" (*Boyette v Lefevre*, 246 F3d 76, 90 [2d Cir 2001]). "*Brady* does not, however, require prosecutors to supply a defendant with evidence when the defendant knew of, or should reasonably have known of, the evidence and its exculpatory nature [citation omitted]" (*People v Doshi,* 93 NY2d 499, 506 [1999]). Therefore, the People would not have committed a *Brady* violation by failing to timely disclose the information defendant had already imparted to his counsel and a codefendant's counsel.

B. Defendant's submission of nonrecord documents in support of contention six

Defendant submits a copy of a verdict sheet used at his trial that he received from the Kings County Supreme Court Criminal Term Correspondence Unit in response to his request (Defendant's Exhibit 41). The exhibit does not show that it was initialed. He also submits a copy

of a letter from trial counsel stating that counsel did not recall anything about the verdict sheet in his trial. Counsel advised defendant that the law required the court to show counsel the verdict sheet for approval, and that counsel's approval would be evidenced by initialing the verdict sheet. Counsel also opined that he seriously doubted that the trial court did not follow the law.

Assuming *arguendo* that Defendant's Exhibit 41 establishes that counsel did not view or approve the verdict sheet prior to its submission, these facts are immaterial to his contention that counsel was ineffective in failing to object to the submission of the verdict sheet. Counsel's failure to object is already plain on the trial record. Moreover, these facts tend to suggest, if anything, that counsel did not have an opportunity to object to its submission.

Defendant did not raise contentions two through six on direct appeal, and he offers no justification for failing to do so. "[W]here the question of justification for failure to raise the issue when it could have been dealt with on direct review is relevant . . . sworn allegations of fact must directly address [that matter] or the motion is subject to summary denial" (Preiser, Practice Commentaries [Mc Kinney's Cons Laws of NY, Book 11A. CPL 440.30 at 47, *citing, e.g., People v McDonald*, 1 NY3d 109, 115 [2003] and *People v Friedgood*, 58 NY2d 467, 471-472 [1983]).

Thus, "it appears by conceded or uncontradicted allegations of the moving papers [and] of the answer . . . that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10" (CPL 440.30 [2]). Summary denial of the motion, to the extent it is based on defendant's contentions two through six, is thus mandated by statute

II. Defendant's contentions two and seven

The procedural bars to consideration of the merits of a motion to vacate a judgment (CPL 440.10 [2], [3]) do not apply to defendant's ascriptions of error numbered one and seven.

Therefore, the court will consider the merits of defendant's contentions. "CPL 440.30 contemplates that a court will in the first instance determine on written submissions whether the motion can be decided without a hearing" (*People v Satterfield,* 66 NY2d 796, 799 [1985] [internal citations omitted]). In order to be entitled to a hearing '[d]efendant must show that the nonrecord facts sought to be established are material and would entitle him to relief" (*People v Satterfield,* 66 NY2d at 799).

Here, defendant must show that the nonrecord facts he has alleged, if true, establish that he has been denied the constitutional right to the effective assistance of counsel. "To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Benn*, 68 NY2d 941, 942 [1986]). "So long as the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," *People v Baldi*, 54 NY2d 137, 147 (1981), defendant's right to the effective assistance of counsel has not been violated. "Counsel's performance should be objectively evaluated to determine whether it was consistent with strategic decisions of a reasonably competent attorney. 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 of counsel" (*People v Benevento*, 91 NY2d 708, 712-713 [1998] [citations and internal quotation marks omitted]). Moreover, to prevail on such a claim, and overcome the presumption of counsel's effectiveness, "it is incumbent on [the] defendant to demonstrate the absence of strategic or other

legitimate explanations for counsel's [alleged] failure[s]" (*People v Rivera*, 71 NY2d 705, 709 [1998]; *People v Clark*, 254 AD2d 299 [2d Dept 1998]).

Examination of the trial record reveals that counsel provided meaningful representation. He moved for pre-trial hearings and ably litigated at the *Wade* hearing he obtained. He filed a notice of alibi. At trial, counsel made an opening statement, effectively cross-examined the People's witnesses, and presented the testimony of three witnesses, including two alibi witnesses who testified that they saw defendant in Florida on the day the crime was committed. In his summation, counsel attacked the credibility of the prosecution witnesses and argued that the alibi evidence gave rise to a reasonable doubt. *See People v Turner*, 265 AD2d 588 (2d Dept 1999), *lv denied* 94 NY2d 908 (2000) [counsel was effective where he obtained pretrial hearings, effectively cross-examined witnesses and delivered a cogent summation]; *People v Groonell,* 256 AD2d 356 (2d Dept 1998) [counsel was effective where he effectively cross-examined witnesses, delivered cogent opening and closing statements, and presented a plausible defense].

The allegations of nonrecord facts defendant seeks to establish in support of his contentions one and seven would not entitle him to relief.

A. Failure to investigate and vigorously present defendant's alibi defense

In support of his first contention, defendant alleges that counsel failed to file a notice of alibi, and that, without any legitimate explanation, counsel failed to present testimony from three additional alibi witnesses and the defendant himself, all of whom were ready and willing to testify. These allegations lack evidentiary support.

Defendant also alleges that counsel failed to prove that on the day defendant was arrested Carmen Jorge, an alibi witness, told a detective, in a telephone conversation, that defendant was in Florida on July 22, 1982. Defendant claims that evidence of this conversation would have

rebutted any claim that his alibi was a recent fabrication. Defendant misapprehends the prior consistent statement exception to the hearsay rule.

1. Alibi notice

Defendant's claim that counsel did not file such notice, supported by Defendant's Exhibit 24, is both "conclusively refuted by unquestionable documentary proof" (CPL 440.30 [4] [c]), and "contradicted by a court record" (CPL 440.30 [4] [d]). The People have submitted as their Exhibit D copies of the notice of alibi, stamped received by the District Attorney's Office on April 19, 1983, and a supplemental notice of alibi, stamped received on May 9, 1983. The trial court's chronological record of the case contained in the court file contains a notation that counsel filed a notice of alibi on April 25, 1983. Moreover, the prosecutor did not seek to preclude the testimony of the alibi witnesses, as surely he would have if the proper notice had not been served.

2. Failure to call additional alibi witnesses

The court may deny a motion to vacate judgment without a hearing if "the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one"(CPL 440.30 [4] [b]). CPL 440.30 (1) provides that sworn allegations must be based on personal knowledge or information and belief; further, the sources of the information and the grounds for the belief must also be stated

In order to be entitled to a hearing on this claim, defendant was required to submit sworn affidavits from the witnesses revealing what their testimony would have been at trial, and sworn statements attesting that counsel was made aware of their potential testimony and their willingness to testify (*People v Ford,* 46 NY2d 1021 [1021]; *People v Coleman,* 10 AD3d 487

[1st Dept 2004]). Here, defendant did not submit such affidavits from the witnesses. Rather, he submitted as his Exhibit 23 what purport to be notarized statements of the witnesses, dated February 22, 1983. Defendant alleges Carmen Jorge, one of the witnesses, gave these statements to counsel prior to the trial. Defendant does not state how these documents came into his possession.

Each purported statement is the same but for one particular: "This statement is a verification of the presence of Noel Vasquez on the 22nd day of July, 1982 and thereafter. The presence and residence of Noel Vasquez is noted at the home of" either Carmen or Helen Jorge in Fort Myers, Florida. Not one of the witnesses states that he or she saw defendant in Fort Myers on July 22, 1983, nor that he or she is willing to testify to that effect at his trial. Defendant alleges that he told counsel that the witnesses were ready and willing to testify but he does not state the source of his information or the ground of his belief.

3. Failure to present defendant's testimony

Pursuant to CPL 440.30(4)(d), a court may deny a motion to vacate judgment when

> [a]n allegation of fact essential to support the motion (i) . . . 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.

CPL 440.30(4)(d) "permits a trial court to reach the merits of a post-judgment motion without a hearing, [and] is designed to weed out manufactured claims premised on nothing more than a defendant's self-serving affidavit" (*People v Mackenzie,* 224 AD2d 173 [1st Dept 1996]; *see People v Shenouda,* 307 AD2d 938 [2d Dept 2003], *lv denied* 100 NY2d 645 [2003]; *People v Oliviery-Perez,* 248 AD2d 645 [2d Dept 1998], *lv denied* 91 NY2d 1998).

Defendant's allegation is made solely by defendant and is unsupported by any other evidence. Defendant implausibly alleges details of 23-year-old conversations he had with counsel before and during the trial regarding his desire to testify. Yet, he waited 23 years to make this claim. He offers no reason for the delay. Under these circumstances, there is no reasonable possibility that defendant's allegation is true.

4. Counsel's failure to elicit the contents of a telephone conversation between Carmen Jorge and a detective

"There can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success [citation and internal quotation marks omitted]" (*People v Caban,* 5 NY3d 143, 152 [2005]). Carmen Jorge's prior statement, consistent with her trial testimony, would only have been admissible as an exception to the hearsay rule if it had been made prior to the existence of a motive to fabricate (*People v Seit,* 86 NY2d 92 [1995]).

Here, the People elicited from Ellemuel Rodriguez that on January 2, 1983, one day before defendant was arrested, defendant told Rodriguez that he had some people from Florida who would testify on his behalf. Under these circumstances, Carmen Jorge's prior consistent statement, allegedly made the next day, would not have been admissible. Therefore, counsel's failure to prove the contents of the conversation did not constitute ineffective assistance of counsel.

B. Counsel's failure to advise defendant adequately regarding a plea offer

Defendant alleges that counsel told him that the People had offered to allow him to plead guilty in exchange for a sentence of 15 years to life. Defendant also alleges that counsel did not

advise him whether to plead guilty, nor did counsel advise him that he could receive a sentence of up to 50 years. There is no reasonable possibility that defendant's allegation is true.

"To prevail on a claim of ineffective assistance of counsel based upon the defense counsel's failure to advise the defendant with respect to an offer of a plea agreement, a defendant must demonstrate that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer. A defendant's self-serving statement, without more, is insufficient to establish such a claim" (*People v Goldberg*, 33 AD3d 1018 [2d Dept 2006] [internal quotation marks and citations omitted]). Defendant has submitted only his own self-serving statement made 23 years after the events he alleges occurred.

The court file does not contain any reference to a plea offer. The People have submitted counsel's affirmation, in which he states that he does not remember whether there was a plea offer in defendant's case, but that it was his invariable practice to convey plea offers to his clients, and to give them his professional opinion regarding the likelihood of success at trial. Counsel would also invariably advise his clients concerning the possible maximum sentence that could be imposed.

In her affirmation submitted in opposition to defendant's motion, the assistant district attorney states that there is a notation on the prosecutor's trial folder, written by the then Chief of the Homicide Bureau, to the effect that the only acceptable plea would be to murder in the second degree; there is no indication of the acceptable length of sentence. It is highly improbable that, in light of the strong evidence that defendant brutally murdered two men, the District Attorney would offer defendant a plea to the minimum sentence for one count of murder in the second degree (*see People v Toal,* 260 AD2d 512 [2d Dept 1999 [no reasonable possibility that

District Attorney would have offered plea bargain in brutal and senseless murder where the People had overwhelming evidence]).

Under all of the foregoing circumstances, there is no reasonable possibility that defendant's allegations are true (CPL 440.30 [4] [d];

In sum, defendant has failed to meet his burden of showing that the nonrecord facts he seeks to establish in support of his first and seventh contentions would "demonstrate the absence of strategic or other legitimate explanations for counsel's [alleged] failure[s]" (*People v Rivera*, 71 NY2d at 709).

For all of the foregoing reasons, defendant's motion pursuant to CPL 440.10 is denied. Defendant's claim that his trial counsel was also ineffective under the federal constitutional standard is necessarily rejected by the finding that he was not denied meaningful representation under the state standard (*People v Caban,* 5 NY3d 143, 156 [2005]). Therefore, defendant's motion to vacate judgment is denied in its entirety.

This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of

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counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

Dated: June 28, 2007

ENTER

J. S. C.

HON. CHERYL E. CHAMBERS
N.Y.S. SUPREME COURT

ENTERED
JUL - 9 2007
NANCY T. SUNSHINE
COUNTY CLERK