

People v Jones

2007 NY Slip Op 32687(U)

August 1, 2007

Supreme Court, New York County

Docket Number: 0002722/1997

Judge: Roger S. Hayes

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

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

: Indictment No. 2722/1997

-against-

: Motion: CPL 440.10(1)(h)

ANTHONY JONES a/k/a RAY ANTHONY BROWN, :
Defendant.

-----X

Robert Morgenthau, District Attorney, New York County (ADA James Schiff, of counsel) for the People.

Defendant, pro se.

Honorable Roger S. Hayes:

Findings of Fact and Procedural History

Defendant was convicted, after a jury trial, of Robbery in the First Degree (Penal Law § 160.15[3]), Robbery in the Second Degree (PL § 160.10[1]) and Attempted Robbery in the Third Degree (PL § 110/160.05). On October 1, 1997, defendant was sentenced, as a second felony offender, to a determinate term of imprisonment of thirteen years on the first-degree robbery count, to run concurrently with a determinate term of imprisonment of thirteen years on the second-degree robbery count. Defendant was sentenced to an indeterminate term of imprisonment of from two to four years imprisonment on the attempted robbery count to run consecutively with the first and second-degree robbery counts (Cropper, J., at trial and sentence).

On his direct appeal, defendant claimed the trial court erred when it denied his *Batson* motion. On May 17, 2001, the Appellate Division affirmed the judgment of his

convictions (*People v Jones*, 284 AD2d 46 [1st Dept 2001]). On December 17, 2002, the Court of Appeals affirmed the Appellate Division's order (*People v Jones*, 99 NY2d 264 [2002]).

Now, by a motion dated April 26, 2007, defendant pro se moves pursuant to Criminal Procedure Law § 440.10(1)(h) for an order vacating the judgement of his conviction. Defendant claims he received ineffective assistance of counsel because his attorney failed to object to what he claims was an erroneous jury charge. As an alternative to vacating the judgment of his conviction, defendant requests an evidentiary hearing on the instant motion pursuant to CPL § 440.30(5). The People oppose the motion.

Conclusions of Law

Defendant's claims are procedurally barred from this Court's review and must be denied. CPL § 440.10(2)(c) provides that this Court must deny a motion to vacate a judgment when, although sufficient facts appear on the record to allow appellate review of the claims raised, no such review occurred due to defendant's unjustifiable failure to raise such claims upon an actual appeal perfected by him. Here, defendant's challenges to the court's charge are clearly on-the-record matters and could have been raised on his direct appeal. Indeed, defendant himself refers to the record and the court's charge in support of his arguments. Although adequate appellate review of these claims was available, defendant failed to raise these claims on his direct appeal and offers no

explanation for this failure. Accordingly, this Court is now foreclosed from reviewing his claims (*see People v Felton*, 239 AD2d 120 [1st Dept 1997]; *People v Skinner*, 154 AD2d 216 [1st Dept 1990]).

In any event, even if this Court were to consider defendant's claims, the failure to object to a proper jury charge does not constitute ineffective assistance of counsel. The right to effective assistance of counsel in criminal proceedings is guaranteed by the New York and Federal Constitutions. The state standard for effective assistance of counsel has long been whether the defendant has been afforded meaningful representation (*People v Henry*, 95 NY2d 563 [2000]). To succeed on a motion to vacate a judgment of conviction based on allegations of ineffective assistance of trial counsel, the defendant must prove that his attorney's ineptitude had a prejudicial effect on the outcome of the trial. "Mere losing tactics must not be confused with ineffectiveness and a contention of ineffective assistance of trial counsel requires proof of less than meaningful representation rather than simple disagreement with strategies and tactics" (*see People v Benevento*, 91 NY2d 708 [1998]; *People v Satterfield*, 66 NY2d 796, 798 [1985]; *People v Crippen*, 196 AD2d 548 [2d Dept 1993]).

Here, defendant criticizes his attorney for permitting the court to instruct the jury that in determining defendant's guilt of first-degree robbery the jury should consider whether 1) defendant "intended" to deprive another person of property; 2) the property was wrongfully taken; 3) the property belonged to a person not a participant in the crime;

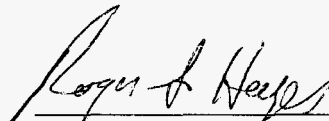
and 4)defendant forcibly stole the property by using or threatening the immediate use of physical force. Defendant further claims that he was prejudiced because had his attorney objected he would have been acquitted of all the charges.

The robbery charge was correct and there was nothing about it to which defense counsel could have objected. Accordingly, defendant's ineffective assistance of counsel claim is rejected as devoid of merit.

As an alternative to the Court's vacating the judgment of conviction, defendant requests an evidentiary hearing on the instant motion. However, defendant's conclusory statements, which are unsupported by any other affidavits or evidence, even if true, do not establish ineffective assistance of counsel. Therefore, a hearing on his motion is not warranted (*see* CPL §§ 440.30[4][b], [d]).

For the above stated reasons, defendant's motion is denied. This constitutes the Decision and Order of the Court.

New York, New York
August 1, 2007



Roger S. Hayes, J.S.C.