

**People v Clarke**

2007 NY Slip Op 32691(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0011467/1993

Judge: Charles H. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 82

-----X  
THE PEOPLE OF THE STATE OF NEW YORK, : **DECISION AND ORDER**  
 : **INDICTMENT 11467-93**  
 :  
 -against- :  
 :  
 OWEN CLARKE, DEFENDANT :  
-----X  
CHARLES H. SOLOMON, J.:

On March 13, 2007, defendant filed a motion pursuant to CPL 440.10 to vacate his conviction of Manslaughter in the First Degree on the ground that he was denied effective representation of counsel. In a response filed June 19, 2007, the People oppose defendant's motion. Defendant filed a reply to the People's opposition on June 22, 2007. Based upon the papers submitted and the court record, defendant's motion to vacate the judgment under 440.10 is denied. Further, defendant's request for a hearing on this issue under CPL 440.30(5) is also denied.

Defendant was indicted on November 23, 1993 for Murder in the Second Degree [Penal Law §125.25(1)]. The charges stemmed from allegations that defendant shot and killed Keith Hayes on May 13, 1991, in front of 121 St. Nicholas Avenue. Lori Cohen was assigned pursuant to County Law 18-b to represent defendant at his arraignment on April 14, 2004. She represented defendant throughout the pendency of the case. Defendant proceeded to trial on February 22, 2006, before this Court and a jury. He was acquitted of Murder in the Second Degree but was found guilty of the lesser included offense of Manslaughter in the First Degree [Penal Law §125.20(1)]. On April 11, 2006, defendant was adjudicated a second violent felony offender. On April 25, 2006, defendant was sentenced to an eight to sixteen year indeterminate term of imprisonment, which he is currently serving.

The testimony at trial established that Keith Hayes worked as a drug seller for the defendant.

On May 13, 1991, the defendant and Hayes got into a verbal argument which then escalated into a physical altercation. The fight started because Hayes had retained certain proceeds from drug sales that properly belonged to the defendant. Shortly thereafter, defendant fired his gun three times, once at the ground and twice at Hayes. Two bullets were recovered from Hayes' body, one in his lower left abdomen and the other from his upper thigh. Defendant testified at trial that he shot at Hayes in self defense and that at no time did he intend to kill Hayes. Defendant immediately fled the scene and shortly thereafter, the country. Defendant was ultimately arrested in Jamaica, West Indies and was returned to court on the indictment in April of 2004.

Defendant now moves to vacate the judgment of conviction claiming that he was denied effective assistance of counsel. Defendant argues that counsel was ineffective for two reasons. First, he alleges that it was error to fail to request the lesser included offense of Manslaughter in the Second Degree. Next, defendant contends that counsel was ineffective because she did not raise a statute of limitations defense to the Manslaughter in the First Degree charge.

The law in the area of ineffective assistance of counsel is clear. Under the United States Supreme Court decision in Strickland v. Washington, 466 US 668, 686-687 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his attorney's performance was deficient and that this deficiency prejudiced the defense. Under the Strickland test, as it has come to be known over the last twenty-three years, a defendant must demonstrate that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In New York, under our Court of Appeals decisions, the standard is somewhat different. Under this line of cases, an attorney is required to provide "meaningful representation" to a client. People v. Caban, 5 NY3d 143, 152 (2005); *see*

also People v. Ozuna, 7 NY3d 913 (2006). The New York definition of ineffective assistance of counsel is referred to as the Baldi test. People v. Baldi, 54 NY2d 137, 141 (1981). Under either standard, defendant's claim must fail.

The concept of ineffective assistance of counsel has never been subject to a precise definition. Yet, in analyzing a claim of ineffective assistance of counsel, certain well established principles must be kept in mind. Disagreement with an attorney's tactics or strategies is not the test of ineffectiveness. People v. Flores, 84 NY2d 184, 187 (1994). As our Court of Appeals has held, "[a]s 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, 713 (1998).

Defendant argues that counsel was ineffective by failing to request the lesser included offense of Manslaughter in the Second Degree. Defendant claims that Manslaughter in the Second Degree under Penal Law §125.15(1) should have been requested by counsel because there was evidence that defendant was intoxicated when he shot Hayes and that the jury could have found that defendant acted recklessly in causing Hayes' death. This Court disagrees. Defendant testified at trial that he acted in self-defense and that he intentionally fired at Hayes. He never testified, nor did any other evidence suggest, that he was so intoxicated that his ability to act intentionally was in any way impaired. While the Court did instruct the jury on the statutory defense of intoxication (*see* Penal Law §15.25), as requested by defense counsel, that instruction was not required to be given. That is so because although there was evidence that defendant had used cocaine shortly before the incident, there was no evidence to suggest that he was intoxicated as a result. It is clear from defense counsel's affirmations submitted on this motion that she did not request the lesser included

offense of Manslaughter in the Second Degree because it was inconsistent with the defense at trial and not supported by the record. Had this Court been requested to submit that charge to the jury, it would not have done so. No reasonable view of the evidence supported a charge of Manslaughter in the Second degree under the theory that defendant acted recklessly. Therefore, counsel was not ineffective for failing to request this charge.

Defendant also argues that trial counsel was ineffective by failing to object to the submission of the lesser included offense of Manslaughter in the First Degree on the ground that it was barred by the statute of limitations. In support of his present claim defendant cites People v. Turner, 5 NY3d 476 (2005). In this Court's opinion, the holding in Turner does not apply to the facts of this case. Here, although defendant was not tried until approximately fifteen years after the homicide because defendant fled the country, he was indicted in 1993, well within the five year statute of limitation set forth in CPL 30.10(2)(b). A discussion on this very issue was raised by the Court at the charge conference and this Court ruled that the submission of the lesser included offense of Manslaughter in the First Degree was not time barred under Turner. Certainly, under the circumstances, defense counsel was not at all ineffective.

For the reasons set forth above, the Court finds that defendant was not deprived of effective assistance of counsel. Accordingly, defendant's motion to vacate the judgment of conviction under CPL 440.10 is denied.

Dated: August 14, 2007  
New York, New York

  
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CHARLES E. SOLOMON, J.S.C.