

People v Hamilton

2007 NY Slip Op 33792(U)

October 9, 2007

Supreme Court, Kings County

Docket Number: 0000142/1991

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-

DECISION AND ORDER
Kings County
Indictment Number 142/91

DERRICK HAMILTON,

Defendant.

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CHERYL E. CHAMBERS, J.S.C.

Defendant pro se moves pursuant to CPL 440.20 to set aside the sentence imposed upon his conviction of murder in the second degree. Defendant's motion is denied because it is without merit.

FINDINGS OF FACT

On June 17, 1992, a jury found defendant guilty of murder in the second degree for shooting and killing Nathaniel Cash on January 4, 1991, in the vestibule of 215 Monroe Street in Brooklyn. Defendant pro se moved to set aside the verdict pursuant to CPL 330.30. The court relieved trial counsel, who would be required to testify at a hearing on the motion, and appointed Howard H. Weiswasser to litigate the motion.

On October 19, 1992, during a colloquy between the court and the district attorney regarding scheduling a hearing on defendant's motion, the court remarked to defendant's former trial counsel, outside Mr. Weiswasser's presence, that defendant might withdraw his motion if he were to learn what a "great sentence" the court would impose – "15 to life." Defendant's motion to set aside the verdict was denied, after a hearing, by Decision and Order dated July 8, 1993.

At the sentencing proceeding on July 12, 1993, the People recommended imposition of the maximum sentence of 25 years to life, in light of defendant's long criminal record and his prior

conviction for manslaughter. Mr. Weiswasser asked the court to impose the minimum sentence of 15 years to life on the ground that the People's case at trial had been very weak. He also argued that the court should not give defendant's manslaughter conviction the weight of a conviction after trial because it had been a *Serrano* plea.

The court opined that a person convicted of a planned killing should be sentenced to life in prison without the possibility of parole. The court explained that in this case it would therefore sentence defendant to the maximum term allowed by law of 25 years to life in prison.

The judgment of conviction was affirmed (*People v Hamilton*, 272 AD2d 553 [2d Dept 200]), and leave to appeal to the Court of Appeals was denied (*People v Hamilton*, 95 NY2d 935 [2000]). Defendant has made numerous motions for collateral relief, all of which have been denied.

By his present motion pursuant to CPL 440.20 to set aside the sentence, defendant contends that counsel's advocacy at the sentencing proceeding was ineffective because he failed to present additional mitigation evidence: (1) the statement by the court, on October 19, 1992, to defendant's former trial counsel "offering" or "promising" a sentence of 15 years to life, and (2) proof that defendant's plea to manslaughter was coerced. Defendant has also submitted an affirmation from Mr. Weiswasser to the effect that Mr. Weiswasser had been unaware of the court's statement regarding a possible sentence of 15 years to life.

CONCLUSIONS OF LAW

To succeed on a claim of ineffective assistance of counsel at the sentencing proceeding, defendant must demonstrate that he was denied meaningful representation under the circumstances in totality as of the time of the representation (*People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Williams*, 255 AD2d 834 [3d Dept 1998], *lv denied* 93 NY2d 981 [1999]). In order to do so, and overcome the presumption that "counsel acted in a competent manner and exercised professional

judgment," defendant must show that counsel's strategy lacked a legitimate explanation (*People v Rivera*, 71 NY2d 705, 709 [1998]; *People v Clark*, 254 AD2d 299 [2d Dept 1998]). Moreover, "[t]here 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]).

Sentencing courts, in the exercise of their unique judicial function in criminal proceedings, are wisely allocated wide latitude as they are recognized to be in a superior position to dispense proportionate and fair punishment" (*People v Ramirez*, 89 NY2d 444, 450 [1996] [internal quotation marks and citation omitted]). The court in this case exercised its discretion in imposing the maximum sentence and gave a reasoned explanation for its decision, rejecting counsel's argument that the minimum sentence of 15 to life was appropriate in light of the weakness of the People's case at trial. Defendant's manslaughter conviction did not enter into the court's decision.

Counsel's advocacy at the sentencing proceeding provided meaningful representation by undermining the significance of defendant's most serious prior conviction and casting doubt on the jury's verdict, based on the testimony at the CPL 330.30 hearing.

Moreover, defendant's motion papers are insufficient under CPL 440.30 (4) (a) and (b) and therefore do not warrant the relief requested.

CPL §440.30(4)(a) authorizes the court to deny a motion to set aside the sentence without a hearing "if the moving papers do not allege any ground constituting a legal basis for the motion." In this case, defendant's contention that counsel was ineffective in failing to argue that the court should impose the minimum sentence because the court "offered" or "promised" that sentence on October 19, 1992 does "not allege any ground constituting a legal basis for the motion." Counsel was not

ineffective in failing to make that argument because it would not have been successful since the court did not in fact “offer” or “promise” the minimum sentence. Defendant’s characterization of the court’s statement as an “offer” or “promise” is completely without support in the record. In light of the court’s stated rationale for imposing the maximum sentence, it is clear that its remarks on October 19, 1992 were not a serious statement of its intentions. Moreover, the court’s remarks were not made to defendant’s counsel.

The court is also authorized to deny a motion to set aside the sentence 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”(CPL 440.30 [4] [b]). Here, defendant’s contention that counsel was ineffective in failing to argue that the court should not consider defendant’s manslaughter conviction because the plea was coerced is not supported by the required sworn allegations of fact. In order to establish that counsel was ineffective in failing to make that argument, defendant must allege facts that would tend to establish that his plea was in fact coerced. Defendant’s moving papers however contain only his conclusory and unsubstantiated allegation (*see People v Lake*, 213 AD2d 494 [2d dept 1995], *lv denied* 86 NY2d 737 [1995]).

For the foregoing reasons, defendant’s motion is denied.

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 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: October 9, 2007

ENTER
Cheryl C. ...

S.S.C.

ENTERED
OCT 12 2007
NANCY T. SUNSHINE
COUNTY CLERK