SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART DV.

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

Daniel Fried,
Defendant.

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Decision and Order
Indictment No. 2511/2000

Maria Park, Esq
Assistant District Attorney
For the People

Simon K. Moody, Esq.
For the Defendant

Date: September 18, 2007
Leventhal, J.

Defendant moves pursuant to CPL §440.10 to vacate the judgment of conviction entered against him on April 20, 2001 for the murder of his father, Solomon Fried. The defendant contends that he entered a guilty plea to Murder in the Second Degree (PL §125.25[1]) due to the ineffective assistance of his counsel. Specifically, the defendant asserts that his attorney failed to communicate with him on a regular basis from the time of his arrest until the day that he was sentenced. Due to this lack of communication, the defendant asserts that his attorney did not know that the defendant had a history of mental illness. Defendant argues that his defense counsel should have ordered psychiatric evaluations to assess his mental state at the time the murder was committed. Defendant maintains that the failure to order such evaluations prevented his attorney from preparing a solid defense and prevented the court from taking his mental status into account at the time his sentence was determined. In rendering its decision, the Court has considered the motion presented by the defendant, the People's answer, and the defendant's reply.[1]

[1]Defendant requested permission to submit, *pro se*, a supplement to his attorney's reply. The Court granted this request and considered defendant's five page submission dated August 27, 2007.

Statement of Facts

On March 11, 2000, the defendant, Daniel Fried, shot and killed his father, Solomon Fried, in their shared Brooklyn apartment. Thereafter, the defendant called 911 and reported the incident. When asked by the responding dispatcher whether he knew who had perpetrated the crime, the defendant responded, "I have no comment." The defendant declined "[t]o try to... do anything" to assist the victim before paramedics and police arrived on the scene. Upon the arrival of the police at the scene of the crime, the defendant informed the officers that he "shot [his] father in the head." (Affirmation in Response to Defendant's Omnibus Motion, p. 3.)

Three days following the arrest, the defendant was admitted to Kings County Hospital after complaining of depression. An assessment of the defendant's competency to proceed was ordered pursuant to CPL Article 730. Two qualified examiners concluded that the defendant was fit to proceed.

The defendant was also examined by Dr. Richard Weidenbacher, a defense psychiatrist, who opined that he saw "scant grounds for argument that at the time of the homicide, Daniel lacked by reason of mental illness or defect substantive capacity to know or appreciate the nature, consequences, or wrongfulness of his reported behavior." Nevertheless, Dr. Weidenbacher concluded that "in a medical or general sense, if not a legal one, [the defendant] was insane." (Psychiatric Report by Dr. Robert Berger, p. 15.) Dr. Weidenbacher went on to speculate that "Mr. Fried acted to fulfill a hidden desire for institutionalization." (Id.)

On April 20, 2001, "after numerous conferences with Mr. Daniel Fried, the District Attorney's office and family members of Mr. Fried who [he] called," defense counsel made an application to enter a guilty plea to Murder in the Second Degree on behalf of his client. (Plea

Minutes, p. 2.)

During his plea allocution, Mr. Fried affirmed that his "lawyer had provided [a psychiatric] defense in terms of getting [him] examined" by a psychiatrist and that he was "giving up [his psychiatric] defense willingly and knowingly." (Id., pp. 5, 6.) Mr. Fried also affirmed that he was entering guilty plea "voluntarily and of his own free will." (Id., p. 8) After establishing that Mr. Fried understood that he was "giving up [his] right to any kind of defense, psychiatric defense, diminished capacity defense, mental disturbance" and that he was "giving up [his] right to appeal to any decisions... made in this case" the Court accepted Mr. Fried's guilty plea. (Plea Minutes, pp. 5, 7.) Mr. Fried was sentenced to fifteen years to life pursuant to the plea agreement.

Discussion

By statute, a defendant is permitted to submit a motion to the court asking that the judgment against him/her be vacated on one or more of several grounds. In the present case, the defendant brings his motion under CPL §440.10 [1][h], contending that the judgment against him was obtained in violation of his constitutionally guaranteed right to the effective assistance of counsel.

Several factors must be examined when considering whether to grant or deny a motion to vacate a judgment. Most relevant in the present case is 1) whether the judgment is appealable at the time of the motion and 2) whether "sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal." (CPL 440.10 [2][b].) Motions to vacate a judgment based on a claim of ineffective assistance of counsel, like that which is asserted by the defendant in the present case, are properly brought forward under CPL 440.10[2][b] because "[g]enerally ineffective assistance of counsel is not demonstrable on the main record." (*People v. Brown*, 45 N.Y.2d, 852,853 [1978].)

The right to counsel in a criminal proceeding is guaranteed under the federal and state constitutions. (U.S. Const., 6th Amend.; NY Const. Art. 1 §6.) The Supreme Court has held that a criminal defendant is not only entitled to assistance of counsel, he/she has a right to the "effective" assistance of counsel. (*Strickland v. Washington*, 466 US 668 [1984].) Although not clearly defined, effective assistance of counsel is rendered and constitutional requirements are satisfied when "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." (*People v. Baldi*, 54 N.Y.2d 137, 147 [1981].)

To be successful in ineffective assistance of counsel claims, defendants "must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies [or] tactics... does not suffice." (*People v. Flores*, 84 N.Y.2d 184, 187 [1994].) Effective assistance of counsel is presumed when a defense attorney negotiates a favorable plea agreement that reduces his/her client's prison term. (*People v. Gayle*, 224 A.D.2d 710 [1996]; *People v. Walker*, 152 A.D.2d 644 [1989]; *People v. Wood*, 150 A.D.2d 411 [1989].)

The record clearly indicates that Mr. Fried received effective assistance of counsel. Mr. Fried was evaluated by a defense psychiatrist, Dr. Weidenbacher, who found "scant grounds" for the argument that defendant lacked capacity to "appreciate the nature, consequences, or wrongfulness of his reported behavior"at the time of the homicide. (*Quoted in* Psychiatric Report by Dr. Robert Berger, p. 15.) Defendant's counsel could arguably have sought other experts who might have come to a more favorable conclusion about his client's mental health at the time the crime was committed. However, precedent precludes the court from second guessing defense counsel's strategic decisions.

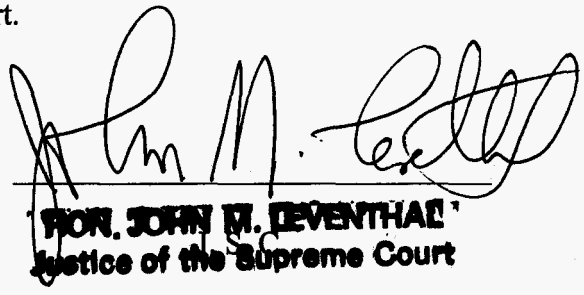
Mr. Fried's assertion that his attorney was incommunicado from the time of his arrest until

his sentencing is directly contradicted by the record. Mr. Fried did not inform the court that his attorney was being untruthful when the latter stated that he was making an application to enter a guilty plea "after numerous conferences with Mr. Daniel Fried, the District Attorney's office and family members of Mr. Fried." (Plea Minutes, p. 2.) During his sentencing hearing, defendant affirmed that he was satisfied with the legal advice his attorney had provided and thanked his attorney "for the efforts he made in [his] case." (Id., p. 4, 8.) Such affirmations demonstrate that defendant was satisfied with the quality of representation he had received from his attorney. (Id., p. 8.)

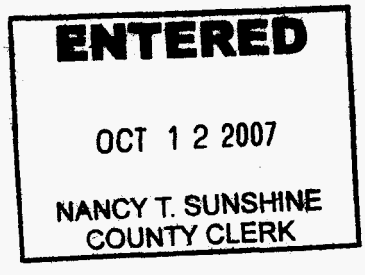
Finally, defendant's reduced sentence belies a claim of ineffective assistance of counsel. Defendant received the minimum sentence for Murder in the Second Degree.[2]

Accordingly, the defendant's motion to vacate the judgment of conviction is denied in all respects.

This constitutes the Decision and Order of the Court.



HON. JOHN M. LEVENTHAL
Justice of the Supreme Court



[2]Had defendant asserted an extreme emotional disturbance defense, and had he been convicted at trial, he could have received a sentence of twenty-five years in jail (P.L.§70.02 [1][a]).