

People v Killiebrew

2007 NY Slip Op 33794(U)

October 9, 2007

Supreme Court, Kings County

Docket Number: 0005214/2000

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 5214/00

SHELDON KILLIEBREW,
Defendant.

-----x
CHERYL E. CHAMBERS, J.S.C.

Defendant pro se moves pursuant to CPL 440.10 to vacate the judgment which convicted him, upon a jury verdict, of assault in the first degree, burglary in the first degree, criminal possession of a weapon in the fourth degree, and aggravated criminal contempt. He further moves pursuant to CPL 440.20 to set aside the sentence imposed. Defendant's motion to vacate the judgment is denied. Defendant will, however, be resentenced.

FINDINGS OF FACT

On May 2, 2000, defendant threatened his wife Jacqueline with a knife in their marital residence at 3405 Neptune Avenue in Brooklyn. On June 9, at approximately 12:30 a.m.,

defendant unlawfully entered 3405 Neptune Avenue in violation of an Order of Protection that had been issued as a result of the May 2 incident. In the bedroom, he stabbed his wife with a knife several times, causing permanent nerve damage in her left arm. For these acts, he was indicted by a Kings County grand jury.

At the trial of the indictment, Jacqueline and their daughter, Dominique, were among the witnesses for the People. Jacqueline testified that she is legally blind. She and Dominique both testified that defendant was also visually impaired. Both described defendant's threatening

behavior on May 2. Jacqueline described defendant's knife attack on her on June 9. Dominique was awoken by her mother's screams and found her mother on the floor in the hallway outside her bedroom bleeding profusely. She saw her father standing in the hallway and saw him leave without helping her mother.

Defendant testified on his own behalf. As relevant to this motion, defendant admitted that he entered his wife's bedroom in the early hours of June 9 and that they struggled over a knife. He left the apartment in order to go to the Security Office and report that his wife had stabbed him. He denied knowledge of how his wife received her stab wounds.

Police officers responded to his complaint of an assault. However, defendant did not appear to be injured. Upon attempting to arrest his wife for stabbing defendant, they found her on the floor, covered in blood. Defendant was arrested.

The jury convicted him of assault in the first degree, burglary in the first degree, criminal possession of a weapon in the fourth degree, and aggravated criminal contempt. He was sentenced on February 5, 2001 to concurrent prison terms of 14 years on the burglary and assault counts, 1 to 3 years on aggravated criminal contempt, and one year on each count of criminal possession of a weapon. The court did not specify imposition of a period of post-release supervision, nor was it mentioned on his order of commitment.

Defendant appealed from the judgment, claiming that the court's reasonable doubt charge and the prosecutor's misconduct during his cross-examination of defendant and on summation deprived him of a fair trial, and that the sentence imposed was harsh and excessive. The judgment was affirmed (*People v Killiebrew*, 297 AD2d 823 [2d Dept 2000]) and leave to appeal to the Court of Appeals was denied (*People v Killiebrew*, 99 NY2d 537 [2000]).

Defendant now moves to vacate the judgment on the ground that his constitutional right to the effective assistance of counsel was violated when counsel failed to present testimony from an expert witness concerning defendant's visual impairment. In support of his motion, defendant submits two letters, dated January 11, 2006, from Ira Marc Price, O.D, of Helen Keller Services for the Blind. Dr. Price states that he examined defendant on February 18, 2000 and that, if he had been called to testify at defendant's trial, he would have opined that defendant would have been unable to commit the crimes charged because of his visual impairment.

Defendant also contends that the sentence imposed is illegal because a period of post-release supervision was not imposed as required by Penal Law 70.45 (1).

CONCLUSIONS OF LAW

Upon considering the merits of the motion [to vacate judgment], the court may deny it without conducting a hearing if:

- (a) The moving papers do not allege any ground constituting legal basis for the motion; or
- (b) 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) (a), (b). Defendant's motion is subject to denial under both paragraphs of subdivision 4 of CPL 440.30.

"[F]ailure to call a specific witness . . . in and of itself, does not establish the ineffective assistance of counsel" (*People v Damphier*, 13 AD3d 663, 665 [3d Dept 2004]). "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. 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]).

Here, counsel provided meaningful representation under the circumstances. While a defendant who is represented by counsel retains the authority to decide only certain fundamental issues, one of those issues is whether to testify on his own behalf (*People v White*, 73 NY2d 468, 478 [1989], *cert denied* 493 US 859 [1989]). Defendant decided to testify. His testimony was not credible in important respects, most notably in his disavowal of any knowledge of how his wife came to be seriously injured.

Defendant also placed himself in the bedroom struggling with his wife over the knife. This testimony provides a legitimate explanation for counsel’s decision not to present testimony from an expert regarding defendant’s visual impairment. It would have been difficult to understand how defendant’s visual impairment could have made it impossible for defendant to stab his wife under the circumstances that defendant described.

In spite of defendant’s testimony, and what the Appellate Division called “overwhelming evidence,” counsel was able to obtain acquittal of the most serious charge, attempted murder, and of attempted rape and assault in the third degree, through effective cross-examination of the People’s witnesses and a persuasive summation (*see People v Love*, 307 AD2d 528 [3d Dept 2003] [counsel effective considering active role at trial and acquittal of most serious charge], *lv*

denied 100 NY2d 643 [2003]).

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]).

In any event, defendant's allegations and submissions do not provide the evidentiary support required for his motion. In order to be entitled to a hearing on this claim, defendant was required to submit a sworn affidavit from the expert witness revealing what his or her testimony would have been at trial, and a sworn statement attesting that counsel was made aware of the potential testimony and the witness's 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 witness. Rather, he submitted as his Exhibit D, copies of two letters from Dr. Ira Mark Price. Dr. Price does not state his qualifications to testify as an expert. He does not state what his testimony would have been at trial, beyond his diagnosis and ultimate conclusion. He does not state how defendant's condition would have prevented him from committing the crimes charged. Nor does defendant allege that ~~counsel was aware of the potential testimony and the witness's willingness to testify~~

Further, a court record casts doubt on the exculpatory value of Dr. Price's potential testimony. Another letter from Dr. Price, dated January 25, 2001, and addressed to the trial judge, is contained in the court file. While the letter is substantially similar to the letters comprising Defendant's Exhibit D, the last paragraph strongly suggests that Dr. Price's testimony would not have assisted defendant:

If the incident happened as it was described, that the lights were off in the home and that Mr. Killebrew had just come into the apartment from a well lit area, Mr. Killebrew would have been falling over the

furniture without any ability to locate another person in the home.

Defendant's testimony obviated the difficulty described by Dr. Price by placing him in the bedroom struggling with his wife over the knife.

For the foregoing reasons, defendant's motion to vacate the judgment is denied.

RESENTENCE

On the date defendant was sentenced, Penal Law 70.45 (1) and (2) provided that a period of post-release supervision of not less than two and one-half years and not more than five years is a part of a determinate sentence imposed upon conviction of a class B violent felony offense. Defendant was convicted of the class B violent felony offenses of assault in the first degree and burglary in the first degree. The Trial Court did not specify a period of post-release supervision on the record or on the order of commitment.

It is "within the trial court's inherent power to correct [an] error made at sentencing which is, plainly, the result of some inadvertence on the Judge's part, and which our reason tells us is a mere mistake" (*People v. Wright*, 56 NY2d 613, 614 [1982]; see also *Matter of Kisloff v Covington*, 73 NY2d 445 [1989]; *People ex rel Hirschberg v Orange County Court*, 271 NY 151 [1936]) In order to correct the error, this Court orders a resentencing proceeding at which defendant will be present. The Court will assign counsel to represent defendant for this proceeding.

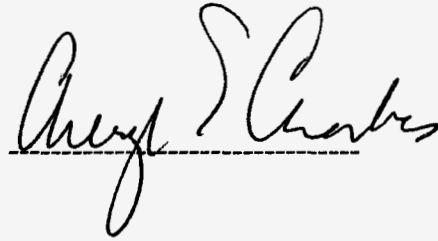
This constitutes the decision and order of the Court.

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

A handwritten signature in cursive script, appearing to read "Cheryl S. Charles", is written over a horizontal dashed line.

J. S. C.

ENTERED
OCT 12 2007
NANCY T. SUNSHINE
COUNTY CLERK
