

People v Campbell

2007 NY Slip Op 33871(U)

November 26, 2007

Supreme Court, Kings County

Docket Number: 0003842/2001

Judge: L. Priscilla Hall

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DECISION AND ORDER

ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 14

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

-against-

Indictment #3842/01

Date: November 26, 2007

JARVIS CAMPBELL,

Defendant.

-----X

L. PRISCILLA HALL, J.S.C.

On March 6, 2003, following a jury trial over which this court presided, the defendant was found guilty of “depraved indifference” murder in the second degree (PL §125.25[2]), and not guilty of “intentional” murder in the second degree (PL §125.25[1]). On April 9, 2003, this court rendered judgment and sentenced the defendant to an indeterminate prison term of twenty-one years to life. The conviction was affirmed on the defendant’s direct appeal (*People v Campbell*, 33 AD3d 716 [2d Dept. 2006], *lv denied*, 8 NY3d 879 [2007]).

In papers dated March 2, 2007, the defendant now moves *pro se* to vacate the judgment of conviction pursuant to CPL §440.10[1][h] on the ground that he was denied his constitutional right to effective assistance of counsel at both the pre-trial suppression hearing and at trial. Specifically, the defendant complains that his counsel failed to (1) challenge the admissibility of certain identification evidence; (2) obtain information from high school records to impeach a prosecution witness at trial; and (3) introduce as evidence allegedly exculpatory witness accounts summarized

in certain police reports. The defendant has submitted copies of two police reports and two affidavits as exhibits to his motion papers.

On June 14, 2007, the People filed an affirmation and a memorandum of law opposing the defendant's motion, both on procedural grounds and on the merits, and included excerpts from the trial transcript as exhibits thereto.¹

This court has reviewed the papers filed by both parties, and for the reasons set forth below, summarily denies the defendant's motion to vacate the judgment of conviction.

The Motion to Vacate Judgment

CPL §440.10 provides that at any time after a judgment is rendered, the defendant may move to vacate such judgment on a variety of grounds, including the claim that it was obtained in violation of his rights under the New York State and/or United States Constitution (CPL §440.10[1][h]); one such ground is a criminal defendant's right to effective assistance of counsel (*see Strickland v Washington*, 466 US 668 [1984]; *People v Linares*, 2 NY3d 507, 510 [2004]).

However, the legislature did not intend a *vacatur* motion to be used as a substitute for appeal. CPL §440.10[2][c] provides that a motion to vacate judgment must be denied when, although sufficient facts appear on the record underlying the judgment to have permitted adequate appellate review of the issue(s) raised, no such appellate review occurred due to the defendant's unjustifiable failure to raise such issue(s) upon his direct appeal; accordingly, grounds claimed under CPL §440.10 must be based on facts not included on the record (*see People v Cooks*, 67 NY2d 100

¹ The People have submitted pages 801-813 and 838 from the trial transcript; references to these excerpts herein are referenced by the letter "T" followed by the page number.

[1986]).

Ineffective Assistance of Counsel

A defendant claiming ineffective assistance of counsel as a ground to vacate judgment must meet a high burden; there is a strong presumption in the law that counsel's conduct fell within "the wide range of professionally competent assistance" (*Strickland v Washington, supra* at 687, 690). The standard for establishing that counsel rendered unconstitutionally ineffective assistance requires a defendant to demonstrate that under the totality of the circumstances at the time, counsel failed to provide the defendant with "meaningful" representation such that the defendant was deprived of a "fair" trial. The words "meaningful" and "fair" do not mean "perfect" (*see Yarborough v Gentry, 540 US 1 [2003]; People v Flores, 84 NY2d 184 [1994]*).

A defendant claiming that counsel failed to make a particular motion or application must demonstrate that such motion would have been successful (*see People v Mance, 269 AD2d 188 [1st Dept. 2000]; People v Seymour, 255 AD2d 866, 867 [4th Dept. 1998]; People v Wright, 12 Misc.3d 1164[A], 2006 WL 1525983 [N.Y. Sup.]*); counsel should not be criticized for failing to pursue a potentially futile endeavor (*People v Vecchio, 228 AD2d 820, 831 [3d Dept. 1996]*). Mere disagreement over strategy will not suffice "as long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful" (*People v Benevento, 91 NY2d 708, 712-713 [1998]*).

In order to show that a defendant's federal constitutional right to effective assistance of counsel was violated, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland v Washington, supra* at 694); "reasonable probability" means a probability that

undermines the fact-finder's confidence in the outcome of the trial (*Id.*). Under New York law, it is not essential to establish that the outcome of the trial would likely have been different, but it must be shown that counsel's conduct constituted such "egregious" error that it prejudiced the defendant or his right to a fair trial (*see People v Benevento, supra*). The defendant in the instant case has failed to make the requisite showing under either standard.

Background Facts in the Case at Bar

On November 13, 2000, the defendant approached Kareem Durham, Jamel Bascomb and the decedent, Demetrius Wright, on a walkway in a Brooklyn public housing project. Mr. Durham testified at trial that the defendant asked him the whereabouts of a person named "Born," and that after he replied, "we don't mess with them dudes," the defendant reached into his waistband. Believing that the defendant was reaching for a gun, Durham turned and ran, as did both Mr. Bascomb and the decedent. A moment later, the defendant fired multiple shots in the direction of the three fleeing men, one of which struck and killed the decedent. Bascomb identified the defendant as the shooter to police by the defendant's street name ("J" or "Jay"), and provided a physical description which was consistent with the defendant's physical appearance.

The People state that shortly after the shooting, the defendant learned that police were looking for him and fled. The defendant says he was arrested on May 8, 2001, inside an apartment he shared with Gwendolyn Bedell and Kimberly Liles.

Bascomb identified the defendant as the shooter in a lineup conducted on May 9, 2001, and again at trial; he also testified at trial that he knew the defendant, not personally, but from having seen him at high school and knowing his family. Durham was unable to identify the defendant as

the shooter in the lineup, but did so at trial.

The Defendant's Claims

Identification Evidence. The defendant first argues that counsel erred in failing to produce Ms. Bedell and Ms. Liles as witnesses at the pre-trial suppression (*Wade*) hearing² to challenge the admissibility of Bascomb's lineup identification as the "fruit" of an arrest which violated the defendant's rights under *Payton v New York* (445 U.S. 573 [1979]).³

The defendant supports the allegation that his arrest violated *Payton* with affidavits from Bedell and Liles, averring that on May 8, 2001, police forcibly entered the apartment they shared with the defendant, without a warrant and without their consent, and then handcuffed the defendant, searched the premises, recovered a gun, and threatened Bedell [the tenant of record] with "25 to life" if she did not sign a consent form. Both women say they were willing to testify for the defendant at the suppression hearing, but were never contacted by counsel.

The People contend that this claim is based entirely on the record and must therefore be denied pursuant to CPL §440.10[2][c]. They also point out that the claim lacks merit because a lineup identification subsequent to a *Payton* violation is not "the product of" such violation, and is therefore not subject to suppression on the ground that the means of effecting the defendant's arrest violated *Payton* (see *People v Jones*, 2 NY3d 235, 243 [2004]).

² *Dunaway/Wade/Huntley/Mapp* hearings were held prior to trial (Reichbach, J.).

³ *Payton v New York* holds that the Fourth Amendment prohibits a warrantless arrest of a person in his home, absent consent or exigent circumstances and despite the existence of probable cause.

Inasmuch as an alleged *Payton* violation is irrelevant to determining whether evidence of a lineup identification should be suppressed, counsel did not render ineffective assistance by not producing Bedell and Liles to testify that a *Payton* violation had occurred (*see People v Vecchio, supra*).

Second, the defendant argues that counsel erred in failing to move to reopen the pre-trial *Wade* hearing to challenge Durham's in-court identification as "impermissively suggestive." Referring to Durham's failure to identify the defendant at the lineup, and to Durham's testimony on cross-examination that after the lineup, Bascomb gave Durham a description of the person he [Bascomb] had identified (T at 803), the defendant contends that Durham's in-court identification should not have been admitted without a hearing to determine whether Durham had a "valid, independent recollection from the crime scene." The defendant further claims that counsel failed to impeach Durham's credibility.

The People assert that this claim is also based on the record and must be denied under CPL §440.10[2][c]. They further note that because Durham did not make an identification at the lineup, there would have been no point in moving for a *Wade* hearing – the purpose of which is to determine whether an identification made at a pre-trial, police-arranged identification procedure, like a lineup, was tainted by undue suggestion (*see* CPL §710.20[6]; 710.60[4]).

The defendant misunderstands the law on this point. A defendant has no right to notice of, or a hearing on, or suppression of a court-supervised identification made in counsel's presence (*see People v White*, 73 NY2d 468, *cert denied*, 493 US 859 [1989]). The reliability of an identification made in front of a jury at trial is for the jury to decide, and the witness's prior failure to have made an identification affects the weight, not the admissibility of the in-court identification (*see People*

v Alexander, 227 AD2d 498, 498-99 [2d Dept. 1996]).

The defendant's claim that counsel failed to challenge Durham's credibility is patently false. Counsel vigorously cross-examined Durham, eliciting testimony on the brief duration of his encounter with the shooter, his failure to identify the defendant as the shooter at the lineup, and his post-lineup conversations with Bascomb in which Bascomb described the person he had identified at the lineup (T at 801-807). Counsel also cross-examined Durham about his previous conviction for felony robbery, a crime Durham had committed with Bascomb. As such, counsel rendered appropriate assistance on this issue, and was not remiss in not moving to reopen the *Wade* hearing, an application which would have been inapposite and doomed to certain failure (see *People v Vecchio, supra*).

Impeachment Material. Bascomb testified at trial that he and the defendant "used to go to Redirection High School and I seen him [the defendant] over there" (T at 838). The defendant asserts in his motion papers that he did not go to high school with Bascomb, and that he so advised counsel. The defendant, who further asserts that he never attended high school at all, contends that if counsel had "conducted an investigation and obtained the high school records," he could have impeached Bascomb's credibility on this point.

In reply, the People note that Bascomb never testified that he and the defendant attended a class together, pointing out that Bascomb's claim to have seen the defendant "over there" at Redirection High School is not inconsistent with the defendant's claim that he was not enrolled. The defendant does not deny that he was ever "at" the school.

It should be noted that Bascomb readily admitted at trial that on the day of the shooting, he had not seen the defendant “in years” and did not know who he was “at first,” and that although he knew the defendant’s grandmother and “half his family” [in addition to having seen the defendant at the high school], he did not know the defendant personally (T at 838). In the context of this testimony, Bascomb’s statement that he and the defendant “used to go to” the same school, even if erroneous, would hardly constitute “perjury,” as the defendant asserts, nor materially mislead the jury as to the degree of Bascomb’s familiarity with the defendant.

The defendant also fails to specify when he allegedly advised counsel that he had not attended high school with Bascomb; the defendant seems to imply that counsel should have investigated the defendant’s school records prior to trial. As the People note, “an attorney’s decision not to investigate ‘must be assessed for reasonableness in all the circumstances’” (citing *Wiggins v Smith*, 539 US 510, 521-22). Under the circumstances in the case at bar, even if it could be said that counsel’s failure to research the defendant’s school records, and/or the records at Redirection High School, was “error” at all, it was far from sufficiently egregious to deprive the defendant of a fair trial.

Exculpatory Evidence. The defendant asserts that counsel was ineffective for failing to “present exculpatory evidence at trial in the nature of two police reports.” The defendant has submitted redacted copies of these reports, and also makes reference to a third.

One report relates information provided by a woman who claimed to have seen the shooting. The woman said the decedent’s name was “Sam,” also called “Powerful,” and that she knew “Jay” from Brownsville. She said she saw Jay approach and ask [name redacted] if he knew who “Born” was, and “Jamel said no,” and then ask the decedent if he knew who “Powerful” was, and the decedent replied “that’s me.” She said Jay then pulled a gun from his waist and shot Powerful,

adding that Jay had a beef with Powerful over a prior incident in which Jay's brother was "slashed."

The defendant contends that counsel erred in failing to "present this report" at trial because it provides evidence that the decedent's killing was "intentional" murder, rather than "depraved indifference" murder, the charge on which the defendant was convicted.

The report itself is hearsay, and would not have been admissible at trial. The People, apparently presuming that the defendant meant that counsel should have presented this witness at trial, submit that "no reasonable attorney would have called this individual to establish that the defendant had intentionally shot the victim." This would seem particularly true in a case like this where, as the defendant states in his motion papers, a "principal line of defense" was mistaken identification, and the witness quoted in this report claimed to know the shooter personally, and identified him by the defendant's name. Suffice it to say that this witness's account is not in the least exculpatory,⁴ and counsel did not err in not presenting it at trial.

The other police report submitted by the defendant recounts an interview with Norma Lamboy, who said that two days before the shooting, the decedent's ex-girlfriend, the mother of the decedent's baby, had a party for the baby, and the decedent took the baby from the party over his ex-girlfriend's objection. Ms. Lamboy said the decedent returned the baby that same evening, but "the word on the street" was that a guy from Brownsville called "PAC-MAN," the current boyfriend of the decedent's ex-girlfriend, shot the decedent in retaliation for taking the baby.

⁴ In using the term "exculpatory," the defendant may mean that had this witness's account been introduced at trial, it would have strengthened his claim that the evidence at trial was insufficient to support his conviction of depraved indifference, rather than intentional, murder (*see People v Campbell, supra*). In making this argument, however, the defendant neglects to consider that had this witness testified at trial, he might have been convicted of intentional murder, and lost that ground for appeal altogether.

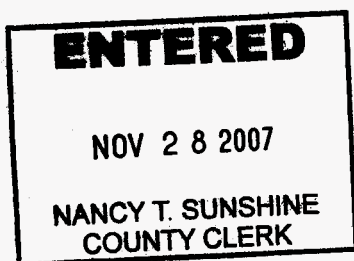
The defendant contends that counsel erred in not presenting this report at trial and/or not calling Lamboy to testify, asserting that her account also demonstrated that the murder was intentional, and that the shooter was PAC-MAN, and not the defendant.

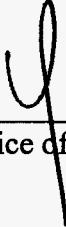
The defendant is mistaken. Not only does the report constitute inadmissible hearsay, Ms. Lamboy's account, which is based solely on rumor, also constitutes inadmissible hearsay. Accordingly, counsel did not err in not producing her to testify at trial.

Finally, the defendant refers to a third police report, not included in his motion papers, in which he says police "mistakenly" identify him, "the perpetrator Jarvis Campbell," as the boyfriend of the decedent's ex-girlfriend. The defendant's rationale for wanting this report admitted at trial is not clear, but in any event, it is not exculpatory, and counsel did not err in not seeking to introduce it.

In summary, the defendant has failed to establish that he was denied his right to effective assistance of counsel. The defendant's motion to vacate judgment is denied in its entirety.

The foregoing constitutes the opinion, decision and order of the court.





L. Priscilla Hall, Justice of the Supreme Court