

**People v Nash**

2007 NY Slip Op 34064(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0006549/2003

Judge: Daniel P. FitzGerald

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 65

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The People of the State of New York

Ind. No: 6549/2003

-against-

MICHAEL NASH,

Defendant.

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Daniel P. FitzGerald, J.

The defendant was convicted, after a jury trial in November, 2004, of two counts of robbery in the second degree. On December 9, 2004, he was sentenced as a persistent violent felony offender to concurrent terms of twenty years to life. He appealed to the Appellate Division, First Department, which affirmed the conviction (*People v Nash*, 30 AD3d 1137), and the Court of Appeals thereafter denied leave to further appeal (7 NY3d 792).

The defendant has now filed a *pro se* motion pursuant to Criminal Procedure Law §440.10 to vacate the judgment of conviction. He claims that he received ineffective assistance of trial counsel because: 1) his counsel failed to object to the joinder of the two robbery charges in a single indictment, and 2) counsel neglected to challenge the indictment as defective. He seeks dismissal of the

charges for which he has been convicted. In the alternative he requests that a hearing be held.

The defendant's initial claim is that his counsel should have sought separate trials for the two robbery charges. Those charges were properly joined in one indictment pursuant to Criminal Procedure Law ("CPL") §200.20(2)(c). However, the defendant says that he wanted to testify about one of the robberies but not about the other, and that he told his counsel of his desire. Instead of moving pursuant to CPL §200.20(3) for the separate trials that he sought, the defendant claims that counsel persuaded him not to testify.

Although a CPL 440 motion may be used to develop additional background facts in order to decide whether a defendant has received effective assistance of counsel, a defendant is not automatically entitled to a hearing (see *People v Satterfield*, 66 NY2d 796). In the first instance a court must determine whether the motion can be denied on the written submissions without a hearing (*Id.*, at 799). Moreover, "[c]laims of ineffective assistance of counsel may . . . be denied without delving into the factual accuracy of the allegations where an inspection of the trial record reveals that the factual basis, if true, would at most show

a tactical error by counsel, as opposed to denial of meaningful representation," (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 440.30, p 579-580, citing *People v Satterfield*, supra).

Additionally, a motion to vacate a judgment which fails to contain sworn allegations substantiating all the essential facts of the motion is subject to summary denial (see CPL 440.30(4)(b)). The motion is further subject to summary denial if the sworn allegations are made solely by the defendant "unsupported by any other affidavit or evidence, and . . . under . . . all the . . . circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL 440.30(4)(d)).

Here, the defendant has provided no basis to credit his claim of ineffective assistance of counsel. The standard for determining a claim of ineffective assistance of counsel under the federal constitution is whether counsel's representation fell below an objective standard of reasonableness, and whether there is a "reasonable probability" that, but for counsel's errors, the result of the proceeding would have been different (*Strickland v. Washington*, 466 U.S. 668, 694), and the standard under the New York State Constitution is whether defendant received

"meaningful representation" (*People v. McDonald*, 1 NY3rd 109, 114 n. 2; *People v Ford*, 86 NY2d 397, 404).

Under either standard, the defendant's unsupported claim of ineffective assistance is contradicted by the record, which establishes that counsel aggressively challenged the admissibility of evidence during the pre-trial suppression hearing, and presented a coherent trial strategy. "[T]he 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," and the constitutional requirement of effective assistance appears to have been met. (*People v. Baldi*, 54 NY2d 137, 147 [1981] [Emphasis added]).

Moreover, the defendant's claim does not amount to a "convincing showing" that the defendant had "both important testimony to give concerning one count and a need to refrain from testifying on the other, which [would satisfy] the court that the risk of prejudice is substantial." (CPL §200.20[3][b]. Significantly, the defendant has failed to include an affirmation from his counsel explaining whether the subject of defendant's testimony had even been discussed before or during the trial, and whether counsel


had a tactical reason for choosing the course of action that he chose. Indeed, among many potential reasons why an attorney may not have wanted the defendant to testify - if, in fact, his claim that he actually wanted to testify is truthful - may have been the defendant's background. At the time of the trial the defendant was a two-time violent felony offender, who had previously committed robberies with guns. Testifying before a jury could likely have opened a door to these negative aspects of his background and may have influenced a jury. Given this and other sensible reasons why testifying might have been against his interests, the defendant had a duty to submit an affirmation from prior counsel to support his claim of ineffective assistance, or to proffer an explanation for the lack of such an affirmation. (*People v. Fu Chen*, 293 AD2d 362). In sum, therefore, defendant has not provided any showing, much less a convincing one, that there was any ineffectiveness on the part of his attorney.

Finally, the defendant's claim that his counsel was ineffective for failing to object to a defective indictment involves a matter which is readily apparent from the trial record. As such, it is an issue for appeal (*See People v. Cook*, 67 NY2d 100, 103 [1986]), and the defendant's

unjustified failure to raise the issue on appeal precludes him from raising it for the first time on a CPL §440 motion to vacate judgment. (See CPL §440.10[2][c]).

In any event the claim is meritless. The defendant insists that the indictment is defective because, with respect to each count, the name of the alleged victim is not revealed. Nothing in CPL §200.50, which details what an indictment must contain, requires that a victim's name must be revealed. All that is required is a plain and concise factual statement which asserts facts supporting every element of the offense charged and the defendant's commission thereof, with enough precision so that the defendant is clearly apprised of the conduct which is the subject of the accusation. (CPL §200.50[7][a]). The indictment herein satisfied that very basic requirement (*See People v. Iannone*, 45 NY2d 589, 598-99 [1978]), and was supplemented by a Voluntary Disclosure form which disclosed the date, time of day and location of each offense, as well as the statements allegedly made by the defendant. In addition, at defense counsel's request, the trial court reviewed the grand jury minutes and determined that they were legally sufficient.

For all of these reasons, the defendant's motion is denied.



Daniel P. Fitzgerald, J.S.C.

December 4, 2007