

People v Ernest Hayes
2007 NY Slip Op 34365(U)
January 17, 2007
Supreme Court, New York County
Docket Number:
Judge: Rena K. Uviller
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

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THE PEOPLE OF THE STATE OF NEW YORK

Indictment No.
1623/2002

- against -

ERNEST HAYES,

DECISION & ORDER

Defendant.

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R. UVILLER, J.:

The defendant *pro se*, moves pursuant to CPL §440.10, to vacate the judgment entered against him after trial. The jury convicted defendant of first degree robbery, first degree burglary, attempted second degree murder and related crimes. Defendant was sentenced to an aggregate term of fifty years to life. Upon appeal, the judgment was affirmed. People v. Hayes, 22 AD3d 253, *lv denied*, 5 NY3d 882.

Defendant claims (i) that he received ineffective assistance of counsel; (ii) that a ruling by the Court with respect to a Wade hearing was in error; and (iii) that there was error in the Grand Jury proceeding.

Claim of Ineffective Assistance of Counsel

Defendant claims that he was denied effective assistance of counsel because (i) the victim did not testify at a Wade hearing; (ii) counsel agreed at trial to stipulate to testimony by a police officer, rather than calling the officer as a witness; and (iii) counsel allegedly failed to challenge the sufficiency of evidence before the Grand Jury, the legal basis for defendant's arrest and the victim's identification of defendant.

In order to prevail on an ineffective assistance claim, a defendant must first overcome the strong presumption that his attorney's performance was reasonably competent. See, People v. Benevento, 91 NY2d 708; People v. Baldi, 54 NY2d 137. See also, Strickland v. Washington, 466 U.S. 668, 669. Unless a defendant proves otherwise, "it will be presumed that counsel acted in a competent manner and exercised professional judgment." People v. Rivera, 71 NY2d 705. Further, a defendant must demonstrate that his attorney's conduct was so "egregious and prejudicial" that he did not receive a fair trial as a result. People v. Benevento, supra; People v. De La Hoz, 131 AD2d 154; People v. Duell, 266 AD2d 649. While the Constitution guarantees a defendant a fair trial, it does not guaranty a perfect trial. People v. Ford, 86 NY2d 397, 404.

Moreover, it is incumbent on a defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failures. People v. Rivera, supra. Disagreement with strategies, tactics or the scope of cross-examination is insufficient. People v. Benevento, supra at 713.

Defendant's claim of ineffective representation because the victim did not testify at a Wade hearing, is without merit. Although a Wade hearing was initially ordered counsel, who had been present at the lineup, withdrew his request for the hearing, because the only basis to challenge the lineup was the skin tone of the fillers. Accordingly, the parties agreed to permit the Court to review the lineup photographs to determine whether the lineup was unduly suggestive in its composition. The Court ruled it was not. Moreover, the issue of the lineup's suggestiveness was explored at trial by defense counsel on cross-examination (Trial Transcript at pages 500-504; 606-608). Presumably defense counsel, who was present at the lineup, knew there was no basis to challenge the conduct of the lineup.

In any event, absent some indication that a pretrial identification is suggestive, there is no right to call the victim as a witness. See, People v. Chipp, 75 NY2d 327, *cert denied*, 498 U.S. 833; People v. Jackson, 17 AD3d 148, *lv denied* 5 NY3d 790; People v. Scott, 290 AD2d 522, *lv. denied* 98 NY2d 655. See also, People v. Peterkin, 27 AD3d 666, *lv denied* 7 NY3d 793.

Defendant further claims counsel was ineffective because he stipulated that the police paperwork reflected that the victim informed Officer Waldron that the men who robbed and shot him were either black or Hispanic. Defendant contends that Officer Waldron should have been called as a witness. This claim is without merit.

Officer Waldron was unavailable to testify and defendant does not state how his attorney could have obtained Officer Waldron's presence at trial. In any event, the stipulated statement conflicted with the trial testimony of another police officer, who stated that when he and Officer Waldron spoke to the victim, the victim stated that the men who attacked him were black, rather than black or Hispanic. (Trial Transcript at page 49). Counsel was thus able to put before the jury evidence that contradicted one of the People's witnesses.

Defendant also claims ineffectiveness because counsel did not move to dismiss pursuant to CPL. §170.30(1)(a). That section of the Criminal Procedure Law pertains to dismissals of information and misdemeanor complaints, and is therefore inapplicable to the instant indictment.

Defendant's further claims that his attorney failed to challenge the legal basis for his arrest; to suppress the lineup identification; and move for inspection of the Grand Jury minutes. These claims are similarly without merit. Upon counsel's motion, defendant obtained Mapp, Dunaway and Huntley hearings. The existence of probable cause for defendant's arrest was litigated at the Mapp/Dunaway hearings. Counsel also succeeded keeping defendant's videotaped confession from

the jury.

Defendant has failed to meet his burden of demonstrating that there was no reasonable trial strategy involved in the procedural decisions of his attorney, and the record indicates that counsel provided meaningful representation.

Accordingly, defendant's motion to vacate the judgment based upon ineffective assistance of counsel is **denied**.

Claim of Error Regarding Wade Hearing

Defendant's claim that the lineup was unduly suggestive and that an independent source hearing should have been conducted is without merit for the reasons stated above.

Defendant also argues that the identification by the victim was not sufficiently reliable for the jury to have reached a guilty verdict. In affirming defendant's conviction, the Appellate Division specifically found that "[t]he verdict convicting defendant . . . was based on legally sufficient evidence and was not against the weight of the evidence." People v. Hayes, supra. Moreover, that claim could have been raised on defendant's direct appeal, but he unjustifiably failed to raised it.. CPL §440.10(2)(c).

Accordingly, defendant's motion to vacate the judgment based upon the foregoing claims is **denied**. CPL §440.10(2)(a)(c).

Claim that the Grand Jury Proceedings were Defective

Prior to trial, the Court determined that sufficient evidence was presented to the Grand Jury to sustain the indictment and that the Grand Jury proceedings were not defective or impaired. In any event, any claim regarding the sufficiency of the evidence before the Grand Jury could have been made on defendant's direct appeal, but he unjustifiably failed to raised it.

Accordingly, defendant's motion to vacate the judgment based upon these claims is **denied**.
CPL §440.10(2)(c).

Conclusion

Defendant's motion to vacate the judgment entered against him after trial, is **denied** in its entirety without a hearing. CPL §440.10(2)(c); 440.30(4)(a)(b)(d). See also, People v. Burt, 246 AD2d 919, 923-924, *lv denied* 91 NY2d 1005; People v. Goodell, 221 AD2d 1009, *lv denied* 88 NY2d 848; People v. Tinsley, 35 NY2d 926, 927; People v. Satterfield, 66 NY2d 796, 799; People v. Turcotte, 252 AD2d 818, 820; People v. Bangert, 107 AD2d 752; People v. Consalvo, 222 AD2d 302; People v. Santana, 176 AD2d 360.

This constitutes the Decision and Order of this Court.

DATED: January 17, 2007



RENA K. UVILLER, J.S.C.

PEOPLE: ADA David O'Keefe

DEFENSE: Pro Se