

People v Siriani

2008 NY Slip Op 30562(U)

January 29, 2008

Supreme Court, Kings County

Docket Number: 0005091/2002

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 18

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

By: Hon. Cheryl Chambers

Date: January 29, 2008

-against-

DECISION & ORDER

KYLE SIRIANI

Indictment No.5091/02

-----X

Defendant was convicted by a jury of burglary in the second degree on August 13, 2003. He was subsequently sentenced as a persistent felony offender to a term of imprisonment of eighteen years to life on September 4, 2003. Defendant's conviction arises from an apartment burglary following which defendant fell from a fourth-floor window and was found with stolen jewelry in his pockets. Defendant has since appealed to the Appellate Division, filed for a writ of error *coram nobis* from the Appellate Division and filed for a writ of *habeas corpus* from the District Court. His conviction was affirmed on appeal (*People v Siriani*, 27 AD3d 670 [2 Dept. 2006]) and he was denied leave to appeal to the Court of Appeals (*People v Siriani*, 6 NY3d 898 [2006]); defendant's latter two filings are still pending at this time.

Defendant now moves pursuant to CPL §440.10 for an order vacating the judgment of conviction on the grounds that: (1) his conviction was against the weight of the evidence; (2) the prosecutor's misconduct deprived him of his constitutional rights; and (3) he was deprived of effective assistance of trial counsel. For the following reasons, the motion is denied in its entirety.

Defendant's claim that the conviction was against the weight of the evidence is based entirely on facts appearing in the record, yet defendant did not include this claim in his direct appeal. Accordingly, this claim is statutorily barred from this court's review because defendant unjustifiably failed to raise it on appeal (CPL §440.10[2][c]). A motion to vacate the judgment of conviction is not a substitute for an appeal and defendant already had a chance to raise the instant claim before the appellate court (*People v Cooks*, 67 NY2d 100, 500 [1986]).

In contrast, defendant already raised the issue of prosecutorial misconduct on appeal. Defendant's allegation that numerous instances of prosecutorial misconduct deprived him of his right to a fair trial was rejected both procedurally and on the merits when the court found that his claims were unpreserved and constituted harmless error in light of the overwhelming evidence of his guilt (*Siriani*, 27 AD3d 670). Accordingly, this court is mandatorily barred from reviewing this claim again (CPL §440.10[2][a]).

The court also rejects defendant's allegation of ineffective assistance of counsel. Defendant raises a host of grounds including counsel's alleged failure to secure defendant's right to testify before the grand jury, counsel's inadequate investigation and preparation for trial, his failure to call certain witnesses at trial, and his failure to impeach a trial witness. As a threshold matter, defendant's claim is wholly unsupported by sworn allegations of fact (CPL §440.30[1]). Defendant's moving papers do not contain an affidavit from his trial counsel and, based on the record, "there is no reasonable possibility that [his] allegation[s] [are] true" (CPL §440.30[4][d]).

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of

counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

In New York, "[s]o long as 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 the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). "This protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187 [1994]). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for counsel's conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel's choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

In this case, counsel may not be faulted for choosing not to call witnesses who would have testified to defendant's fall from the apartment building. The question of how defendant fell, whether by accident or by being pushed, as defendant claims, is entirely collateral to the matter of defendant's guilt on the burglary charge. The People's evidence tying defendant to the crime included defendant's fingerprint, found on a jewelry box in the victims' apartment, and a stash of jewelry in defendant's pockets that police determined belonged to the victims. Thus, the

fact that defendant fell from the building is of no consequence to his burglary conviction.

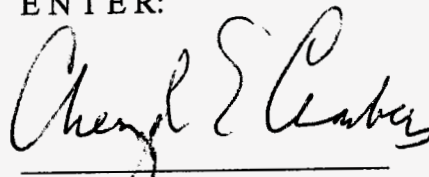
In support of his motion, defendant claims that counsel should have played the 911 tape from the witness who reported his fall and then called the 911 caller as a witness at trial. Defendant also argues that counsel should have called the two EMT workers who attended him after the fall, the building tenants who witnessed the fall, and those witnesses present when the police searched defendant. While defendant claims that these witnesses could have exonerated him, he does not allege specifically what testimony these witnesses could have given that relates to the offenses charged. Rather, the circumstances of defendant's fall are irrelevant to defendant's guilt. Furthermore, the EMT witnesses would likely have testified to inadmissible self-serving statements by defendant. Counsel's conduct here was competent and certainly did not compromise defendant's right to a fair trial (*Flores*, 84 NY2d at 188) (overall representation must be substantially inadequate to constitute ineffectiveness).

Defendant raises several other grounds where, upon review of the record, counsel's conduct was entirely reasonable under the circumstances (*Benevento*, 91 NY2d at 713). Even though the fingerprint report was not disputable, defendant faults counsel for failing to call his own expert to dispute the findings of the People's fingerprint expert and for failing to object to the expert's testimony at trial. Defendant also claims that counsel should have impeached the arresting officer with his grand jury testimony. These are all instances where counsel properly exercised his professional judgment and there is no evidence that counsel's legitimate strategy prejudiced defendant (*id*).

Accordingly, defendant's four claims are denied both procedurally and on the

merits. This decision shall constitute the order of the court.

ENTER:



CHERYL CHAMBERS, J.S.C.

ENTERED
FEB 4 2008
NANCY T. SUNSHINE
COUNTY CLERK