

**People v Hammon**

2008 NY Slip Op 31076(U)

April 1, 2008

Supreme Court, Kings County

Docket Number: 0011926/1998

Judge: Abraham G. Gerges

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 17

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

By: Hon. Abraham Gerges

-against-

Date: April 1, 2008

DECISION & ORDER

JOHN HAMMON

Indictment No. 11926/98

-----X  
Defendant moves, *pro se*, for an order pursuant to CPL §440.10(1)(a), (b) and (h) vacating his March 14, 2000 judgment of conviction. Following an incident in which defendant was apprehended fleeing an apartment building with stolen property, defendant was convicted by a jury of two counts of burglary in the second degree (PL §140.25[2]) and two counts of petit larceny (PL §155.25). For these crimes defendant was sentenced as a persistent felony offender to a term of imprisonment of twenty-two years to life.

Defendant was assigned an attorney to file his appeal in the Appellate Division, Second Department. His case was reassigned several times and his appellate brief was finally filed on May 14, 2007. Because of this delay, defendant filed for a writ of habeas corpus in the United States District Court for the Eastern District of New York in February 2007. While the district court indicated that the three-year delay had deprived defendant of his right to a speedy appeal, the court held that defendant had not been prejudiced and that he was entitled only to a conditional granting of the writ if the Appellate Division did not decide his appeal within a reasonable period of time. Defendant's conviction was affirmed on January 8, 2008 (*People v Hammon*, 47 AD3d 644 [2d Dept. 2008]).

Defendant filed the instant motion on July 25, 2007, alleging that he was deprived of his constitutional right to a fair trial due to numerous defects in the grand jury and pre-trial proceedings, prosecutorial misconduct, alteration of the trial minutes and ineffective assistance of counsel. For the following reasons, the motion is denied.

At trial, the People adduced evidence that on November 26, 1998, defendant entered an apartment building through an abandoned dumbwaiter shaft on the roof. Police had investigated defendant's possible involvement in several similar "unique MO burglaries" which suddenly stopped when defendant was arrested in 1997 and then began again upon his 1998 release into parole. In this case, defendant entered two apartments through the sealed-off dumbwaiter door and stole jewelry and other valuables inside. One of the victims, Mr. Baig, arrived home to find his door chained shut from the inside. He called 911 and waited in the lobby for police to arrive. Next, defendant came downstairs with a bicycle, holding two backpacks belonging to Baig. As police entered the building, Baig asked to see what was inside the bag and an officer repeated that request. Defendant threw his bicycle and one backpack at the officer and then fled the building. Police apprehended defendant outside shortly thereafter. The backpacks contained items stolen from both Baig and the second victim.

Police recovered several other items that incriminated defendant, including additional bags of stolen property left under a staircase. The jacket defendant discarded as he ran away also contained burglars' tools: gloves, a mask, a flashlight and a screwdriver with tar on its tip. The tar on the screwdriver matched the tar used to seal the roof door which showed marks from being pried open with a sharp object. Furthermore, the superintendent of another building that had been burglarized in the same manner selected defendant from a lineup after having seen him

carrying duffel bags out of his building. Police retrieved those duffel bags, containing property stolen from victims in that same building, from the basement of the home where defendant lived with his grandmother. Police obtained a search warrant after hearing defendant, then in custody, ask his grandmother to lock up some items left in the house. Both victims of the burglary at issue here testified that the property recovered from the bags in the lobby, including those defendant was carrying, belonged to them and had been in their apartments before the dumbwaiter break-in.

Sufficient facts appear on the record to have allowed defendant to raise the majority of his claims on direct appeal. However, defendant's unjustifiable failure to do so requires that they be mandatorily barred from review now (CPL §440.10[2][c]; *People v Cooks*, 67 NY2d 100, 500 [1986]). Defendant raises a host of claims pertaining to the Grand Jury proceedings, asserting that the felony complaint was factually insufficient; that the indictment was based on insufficient evidence; that the People failed to disclose exculpatory information to defendant and the Grand Jury (information which defendant already had); that the People failed to give a *Galbo* charge to the Grand Jury (*see People v Galbo*, 218 NY 283 [1916] [*Galbo* charge alerts jury to alternative charge of possession of stolen property]); and that defendant was denied the right to testify before the Grand Jury. All of these claims could have been raised on appeal but defendant neglected to do so.

Likewise, the court will not review defendant's claims regarding the trial proceedings. Defendant claims that he was denied the right to a preliminary hearing; that the transcripts incorrectly reflect defendant's waiver of his right to be present during bench conferences; and that he was prejudiced by prosecutorial misconduct consisting of false statements by the People

and incomplete photographic displays. As these claims were absent from defendant's appeal they are not reviewable now.

The remainder of defendant's motion focuses on various allegations of ineffective assistance of counsel. Defendant argues that he was represented by a stand-in when counsel failed to appear for several pre-trial court dates; that no omnibus motion was filed; that counsel failed to call the building superintendent as a witness; that counsel failed to raise a possible defense; that counsel did not challenge the allegedly defective Grand Jury proceedings; that he was prejudiced by routine scheduling adjournments that somehow reflected counsel's "conflict of interest"; and that he waived his right to testify based on counsel's erroneous advice.

To the extent that defendant's assertions of ineffectiveness are based upon matters appearing on the record, the Appellate Division found that trial counsel provided defendant meaningful representation and thus this court may not consider such matters again (CPL §440.10[2][a]; *Hammon*, 47 AD3d 644). Other claims unjustifiably absent from defendant's appeal are also reviewable from the record and are barred from review in this motion (CPL§440.10[2][c]).

Only those assertions that rely on matters outside the record are reviewable now. Remaining are the three contentions that counsel failed to call the building superintendent to testify, that counsel failed to raise the unsecured lobby entry as a defense and that defendant based his decision not to testify on erroneous advice from counsel. These outside-the-record claims are meritless because defendant has failed to establish an absence of strategic explanation for counsel's conduct or to show how he was prejudiced.

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., 6<sup>th</sup> 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). The 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]). The 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]).

Counsel made a legitimate strategic decision not to call the building superintendent as a witness. Defendant contends that the superintendent would have testified that the dumbwaiter shaft was very dirty. However, counsel chose not to risk opening the door to incriminating testimony and instead argued in summation that defendant's clothing was clean when he was

apprehended. It is not clear that the superintendent's testimony would have benefitted defendant or even been relevant to the question of guilt, especially where counsel argued that it was unlikely that defendant would have been clean if he had been climbing in the abandoned dumbwaiter shaft. Additionally, the tar on defendant's screwdriver suggested that he had indeed opened the sealed-off entry door. Counsel's employed a "reasonable and legitimate strategy under the circumstances and evidence presented" and, though ultimately unsuccessful, "it [does] not fall to the level of ineffective assistance" (*Benevento* at 712-713).

Counsel's decision not to pursue defendant's misplaced assertions about the unlocked lobby door was also legitimate strategy. The burglary charges stem from defendant's illegal entry into two specific apartments, so whether he had license to enter the building lobby is immaterial. Nor would the fact that the door was unlocked undermine the People's case because any unlocked door would have provided defendant access to the building. Accordingly, counsel presented a viable defense that, because of the large quantity of stolen property, the burglary was an inside job perpetrated by someone who knew about the dumbwaiter shaft entrance on the roof and that the two victims would not be home on November 26, 1998. Defendant's contentions, which appear to come from confusion about the burglary charge, amount to a "simple disagreement with strategies and tactics" that does not suffice as ineffective assistance (*Flores* at 187; *Rivera* at 708-709).

In light of the overwhelming evidence against defendant and the implausibility of his proffered explanation, the claim that counsel misled defendant to waive his right to testify is meritless. Defendant has not established that, but for counsel's alleged error, he would have chosen to testify over counsel's advice to the contrary. Had he testified in his own defense,

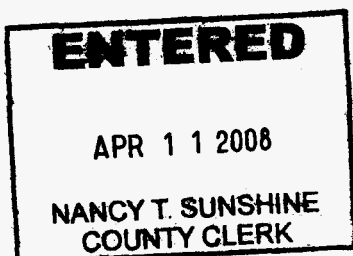
defendant faced questioning on his prior felony convictions. It is very unlikely that defendant would have exposed himself to such incriminating questions, and much more likely that he would have heeded counsel's advice not to take the stand. Moreover, defendant has failed to show that his testimony would have changed the outcome of the trial. In these respects, defendant has failed to make out the prejudice requirement of his claim (*Stulz* at 284).

"When viewed in totality as of the time of trial, [counsel's] professional services at trial did not deprive this defendant of meaningful representation" (*Flores* at 189). The record as a whole demonstrates that counsel represented his client "diligently and vigorously" during the course of the trial by thoroughly cross-examining the People's witnesses, raising appropriate objections and delivering "opening and closing statements that were consistent with defendant's defense" (*id.*). Based on counsel's legitimate strategic decisions, overall fairness of the proceedings and the lack of prejudice to defendant, this court finds that defendant was not denied effective assistance of trial counsel.

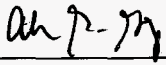
In any event, the claim of ineffective assistance of counsel is also procedurally barred because defendant relies solely on his own allegations (CPL §440.30[1]). Defendant's moving papers do not contain an affidavit from his trial counsel and, based on the record, "there is no reasonable possibility that [his] allegation[s] [are] true" (CPL §440.30[4][d]).

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

This decision shall constitute the order of the court.



ENTER:

  
 ABRAHAM GERGES, J.S.C.

**HON. ABRAHAM G. GERGES**  
**J.S.C.**