

**People v Boisseau**

2008 NY Slip Op 31141(U)

April 17, 2008

Supreme Court, New York County

Docket Number: 0003891/2003

Judge: Marcy L. Kahn

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CRIMINAL TERM: PART 44

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND  
ORDER ON  
DEFENDANT'S  
CPL §440.10 MOTION

TIMOTHY BOISSEAU,

Ind. No.  
3891/03

Defendant.

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MARCY L. KAHN, J.:

Defendant Timothy Boisseau was convicted of robbery in the first degree (PL §160.15[3]) after trial by jury before another justice of this court. The defendant now moves pro se pursuant to Criminal Procedure Law §440.10 to vacate the judgment, principally on the ground that his trial counsel was ineffective. The People have opposed the motion.

For the reasons stated, the motion is summarily denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 9, 2003, defendant approached the complainant, Steven Merkle, outside of 146 W. 130<sup>th</sup> Street in New York County. Defendant spoke to Merkle, who was renovating the building, and persuaded him to hire defendant as a laborer. After two hours of demolition work, the two made an agreement for defendant to return to work the following Monday. Defendant requested an advance on future wages to buy proper construction

clothes and Merkle complied.

On Monday, May 12, 2003, defendant returned to the building and asked Merkle to provide an additional advance of funds to help pay for the clothing he had purchased. Again, Merkle did so. Several hours later, defendant returned and Merkle assigned him to do demolition work on the first floor while he attended to similar work on the second floor. Shortly thereafter, Merkle realized that a radio which had been playing on the first floor was suddenly silent. As Merkle proceeded to the first floor to investigate, he observed defendant leaving the building with the radio. Merkle inquired of defendant what he was doing, whereupon defendant brandished a knife and stated "Don't stop me, just let me go." Defendant then left the building. Merkle then notified police.

On July 1, 2003, Merkle observed the defendant on the street in front of 240 West 140<sup>th</sup> Street and immediately called the police. When the police arrived, Merkle identified defendant to the police, who placed him under arrest.

On July 10, 2003, defendant was indicted for robbery in the first degree based upon the May 12 incident. (PL §160.15[3]). On August 21, 2003, defendant's counsel, Joshua A. Benjamin, Esquire of The Legal Aid Society, filed an omnibus motion seeking, inter alia, dismissal of the indictment, discovery, a bill of particulars and suppression of Merkle's identification

testimony. On November 5, 2003, the court denied defendant's motion to dismiss, granted the defendant's request for discovery and a bill of particulars, and ordered Wade (United States v. Wade 388 US 218 [1967]) and Sandoval (People v. Sandoval, 34 NY2d 371 [1974]) hearings. Upon defendant's request, the court appointed Mark Weinstein, Esquire as defendant's new counsel.

On March 23, 2004 a Wade hearing was held on the photographic identification procedure used in the case and defendant's motion to suppress was denied. Defendant proceeded to trial and on March 30, 2004 was convicted of robbery in the first degree (PL §160.15[3]). On April 27, 2004, defendant was adjudicated a violent predicate felon and was sentenced to a twelve-year determinate term to be followed by five years of post-release supervision.

Also on April 27, 2004, defendant had filed a pro se motion pursuant to CPL §330.30 claiming the prosecutor employed racial discrimination during jury selection and that he received ineffective assistance of counsel. In a decision dated August 10, 2004, the trial court<sup>1</sup> denied the motion.

On his appeal from the judgment, defendant's assigned counsel, Laura R. Johnson, Esquire, argued that his conviction for robbery should be reduced to one for petit larceny and that

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<sup>1</sup> The case was tried by the Honorable Budd G. Goodman, who has since retired.

the trial court violated the order of trials prescribed in CPL §260.30. On October 31, 2006, the Appellate Division, First Department affirmed the conviction. (People v. Boisseau, 33 AD2d 568 [1st Dept. 2006]). Leave to appeal was denied by a Judge of the Court of Appeals (People v. Boisseau, 8 NY3d 844 [2007]).

Defendant now moves to vacate the judgment against him.

The People have opposed the motion.

## II. PARTIES' CONTENTIONS

On this motion, defendant argues that his conviction must be vacated on the ground that he was deprived of a fair trial because the People did not furnish his defense counsel with Rosario (People v. Rosario, 9 NY2d 286 [1961]; see CPL §240.45[1][a]) material in a timely manner. Defendant also contends that he received ineffective assistance of counsel, in that his trial attorney failed to provide Rosario material to him at trial, conducted the trial with only a legal pad, and advised not to listen to jailhouse lawyers.

The People contend that defendant's motion is barred by laches, citing People v. Friedgood, 58 NY2d 467 (1983). They state that the transcript of defendant's sentencing proceeding reflects defendant's awareness of the grounds now urged in support of the motion more than three years ago. They also maintain that defendant has failed to rebut the presumption that he received adequate representation.

### III. LEGAL STANDARDS

#### A. CPL Article 440 Standards

##### 1. CPL §440.10

Criminal Procedure Law §440.10(1) provides that at any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment, inter alia, on the ground that "[i]mproper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom . . ." (CPL §440.10[1][f]) or on the ground that "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." (CPL §440.10[1][h]). A CPL §440.10 motion is not a vehicle for a second appeal, however. (People v. Cooks, 67 NY2d 100, 103 [1986]). Rather, it is designed to inform a court of facts not appearing on the record and unknown at the time of judgment that would, as a matter of law, undermine the judgment. (People v. Harris, 109 AD2d 351 [2d Dept. 1985], lv. denied, 66 NY2d 919 [1985]).

Criminal Procedure Law §440.10(2) sets forth the circumstances under which a court must deny a motion to vacate judgment, while CPL §440.10(3) establishes a court's permissive authority to deny the motion. A motion to vacate judgment must

be denied, inter alia, when, notwithstanding the existence of a sufficient factual record, no appellate review occurred owing to the defendant's unjustifiable failure to raise such ground on appeal. (CPL §440.10[2][c]).

B. CPL §440.30

Where the motion to vacate is not barred by the applicable provisions of CPL §440.10(2) or CPL §440.10(3), the court must consider the motion on its merits. (CPL §440.30[2][b]; People v. Harris, 109 AD2d 351, 354 [2d Dept.], lv. denied, 66 NY2d [1985]). The court may deny the motion without a hearing, if the moving papers, inter alia, fail to allege a ground constituting a legal basis for the motion (CPL §440.30[4][a]) or fail to allege sufficient facts to support the legal ground asserted (CPL §440.30[4][b]; see People v. Session, 34 NY2d 254 [1974]). The motion may also be denied if such an allegation (i) is contradicted by a court record or other official document or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true. (CPL §440.30[4][d]). Only in the event that the court does not determine the motion pursuant to the other provisions of CPL §440.30 must a hearing be conducted. (CPL §440.30[5]). If the court orders a hearing, the defendant bears the burden of proving, by a preponderance of

the evidence, every fact essential to support the motion. (CPL §440.30[6]).

C. Constitutional Right to Counsel Standards

Both the federal and state constitutions protect the right of a criminal defendant to counsel at trial with the guarantee of effective assistance of counsel to mount a defense. (U.S. Const., amend. VI; N.Y. Const., art. I, § 6). "It is well established that these constitutional rights are violated if a defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure." (People v. Turner, 5 NY3d 476, 479-80 [2005], citing Strickland v. Washington, 466 US 668 [1984]; People v. Baldi, 54 NY2d 137 [1981]). In order to establish a constitutional violation under the federal Sixth Amendment standard, a defendant must satisfy a two-pronged test, demonstrating first, "that counsel's representation fell below an objective standard of reasonableness" (Strickland v. Washington, supra, 466 US at 688), and second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Id. at 694; People v. Turner, supra, 5 NY3d at 480). The Supreme Court has explained that:

a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . [T]he court should keep in mind

that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

(Strickland v. Washington, 466 US at 690).

Under Article I, §6 of the New York State Constitution, to prevail on a claim of ineffective assistance of counsel, the movant must show deprivation of "meaningful representation."

(See People v. Baldi, 54 NY2d 137, 147 [1981]). This standard is flexible and is satisfied so long as the evidence, the law and the circumstances of a particular case, viewed in totality at the time of the representation, reveal that counsel provided "meaningful representation." (People v. Henry, 95 NY2d 563, 565 [2000], citing People v. Benevento, 91 NY2d 708, 712 [1998]; People v. Baldi, supra, 54 NY2d at 147).

#### IV. DISCUSSION

##### A. The People's Failure to Provide Rosario Material

To the extent that defendant argues that the judgment against him should be vacated either pursuant to CPL §440.10(1)(f), on the ground that in failing to provide Rosario material to defense counsel, the People engaged in improper or prejudicial conduct not appearing on the record which, had it appeared on the record, would have required a reversal on appeal, or pursuant to §440.10(1)(h), on the ground that the

failure to provide Rosario material deprived defendant of his right to a fair trial, defendant's argument must fail.

Pursuant to CPL §240.45(1)(a), the prosecutor must produce Rosario material to defense counsel "[a]fter the jury is sworn, but before the prosecutor's opening address . . . ." (CPL §240.45[1][a]). Here, any question as to whether defense counsel received the Rosario material was clearly resolved by the court at the time of defendant's sentencing. At that time, the following exchange occurred:

DEFENDANT: . . . I have all the letters which I wrote him asking for my legal documents.

As of today, I just received it right here in front of me, okay. Whatever is in there, I don't know, but I went through this whole trial, pretrial with nothing. The only thing I have is my Omnibus motion, which my first lawyer done.

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THE COURT: The record should reflect that, obviously, the defendant was [not]<sup>2</sup> entitled to paperwork until after the jury was sworn, and obviously, at that time, the appropriate paperwork was turned over to counsel.

(People v. Boisseau, Ind. No. 3891/93, Transcript of Sentencing Proceedings April 27, 2004 ["Sent. Tr."] at 9-10). No objection was raised to the court's statement by defendant or his counsel.

The record of proceedings thus makes clear that the trial justice responded to defendant's complaint of the prosecution's

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<sup>2</sup> From the context it seems clear that the court's intention was to include the word "not" in his remarks at that point.

delayed Rosario production by stating that the People had fully complied with their obligations under CPL §240.45(1). To the extent that the defendant now seeks to controvert this contention on collateral review, he is precluded from doing so by the mandatory bar provisions of CPL §440.10(2)(c). Sufficient facts were placed on the record to have permitted appellate review of the issue on direct appeal, but defendant unjustifiably failed to raise this ground upon his appeal of the judgment. Accordingly, his motion on this ground must be denied in accordance with CPL §440.10(2)(c).

In any case, even were this court to reach the merits, the record reveals no legal or factual basis for concluding that defendant was either subjected to improper or prejudicial conduct by the People (CPL §440.10[f]) or deprived of his right to a fair trial (CPL §440.10[h]) by reason of any prosecutorial delay in production of Rosario material. Accordingly, if this court were to reach the merits of defendant's claim, it would deny the motion on this ground pursuant to CPL §440.30(4)(a) and (b). Finally defendant's contention is contradicted by the record, is made solely by him, is unsupported by any other evidence and, under all the circumstances attending the case, there is no reasonable possibility that it is true. (CPL §440.30[4][d]).

Thus, for all of these reasons, defendant's motion on this

ground is denied.

B. Ineffective Assistance of Counsel Claims

Each of defendant's four grounds for vacating the judgment pursuant to CPL 440.10(1)(h) due to ineffective assistance of trial counsel will be addressed in turn. (CPL §440.30[4][d]).

1. Failure of Defense Counsel to Provide Rosario Material to Defendant Until Sentencing

Defendant contends that he was denied the effective assistance of counsel because trial counsel failed to provide him with any Rosario material until the date of sentence. This claim furnishes no basis for vacation of the judgment, however, because based upon the record quoted in section IV. A., above, defendant could have raised this claim on his direct appeal but unjustifiably failed to do so. Accordingly, defendant's motion on this ground must similarly be denied pursuant to CPL §440.10(2)(c).

2. Defendant's Claim that Counsel Went to Trial With Only a Legal Pad

Defendant further alleges that counsel rendered ineffective assistance to him by going to trial with only a legal pad. Assuming, arguendo, the truth of this claim, defendant has neither stated how he was prejudiced by this action or how it deprived him of meaningful representation under the Strickland

or Baldi standards, respectively.<sup>3</sup> Accordingly, he has failed to state a legally cognizable claim of ineffective assistance of counsel and his motion on this ground is, therefore, denied.

(CPL §440.30 [4] [a]).

3. Defendant's Claim that Defense Counsel Advised Him Not to Listen to "Jailhouse Lawyers"

Defendant also contends that counsel's assistance fell below the federal and state constitutionally acceptable standards when counsel advised defendant to ignore advice from "jailhouse lawyers." Again, this claim has no legally cognizable basis, and his motion on this ground is denied pursuant to CPL §440.30(4)(a).

4. Defendant's Claim that Defense Counsel Failed to Object to False Testimony

Finally defendant asserts that the prosecutor's direct examination of Detective Roberts elicited the false testimony that defendant hit Merkle while leaving with the radio. (Transcript of Hearing, March 23, 2004 at 4-5). Defendant claims that his counsel's failure to object immediately to this testimony demonstrates counsel's ineffectiveness.

Once again, defendant's contention is meritless. The same portion of the transcript reveals that the prosecutor immediately led Detective Roberts to correct the erroneous

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<sup>3</sup> The record also reveals that at the sentencing proceeding, both the trial Justice and defendant praised defense counsel's performance. (See Sent. Tr. at 9-10).

statement by refreshing his memory and correcting the record. (Id.) According, no objection by defense counsel to the erroneous testimony was required. For that reason, defendant's motion on this ground is likewise denied, as without legal basis. (CPL §440.30[4][a]).

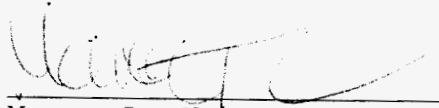
In sum, defendant has failed to establish that he is entitled to vacation of the judgment against him on the ground of failure to have Rosario material or on the ground that he received ineffective assistance of counsel. Accordingly, his motion is denied in its entirety, without a hearing.

V. CONCLUSION

For all the reasons stated, defendant's motion pursuant to CPL §440.10 to vacate the judgment is denied in its entirety, without a hearing.

The foregoing constitutes the decision and order of this court.

E N T E R:

  
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Marcy L. Kahn, J.S.C.

**RON. MARCY KAHN**

Dated: New York, New York  
April 17, 2008