

People v Prescott

2008 NY Slip Op 32106(U)

July 18, 2008

Supreme Court, Kings County

Docket Number: 0000935/2005

Judge: James P. Sullivan

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 3**

-----X	
THE PEOPLE OF THE STATE OF NEW YORK	: DECISION AND ORDER
	:
-against-	:
	:
	: Indictment No. 0935/2005
RONALD PRESCOTT,	:
	:
Defendant.	:
-----X	
JAMES P. SULLIVAN, J.	

The defendant has moved, pursuant to CPL § 440.10 (1) (f) and (1) (h), for an order vacating the judgment of the Supreme Court, Kings County, convicting him, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree. In a motion dated December 12, 2007, the defendant alleges that his trial counsel provided ineffective assistance of counsel. On April 7, 2008, the People filed an answer in opposition. For the reasons stated below, the motion is denied.

Procedural History

The charges under Indictment 0935/2005 arose out of a shooting that occurred on January 31, 2005, resulting in the death of Phillip Mason. On April 26, 2005, the defendant was convicted, after a jury trial, one count of murder in the second degree and criminal possession of a weapon in the second degree. The defendant was sentenced to a concurrent prison term of 25 years to life and 15 years determinate, respectively, for these offenses. (Starkey, J., at trial and sentencing). Timely notice of appeal was filed, but no appeal has yet been perfected.

The Current Motion to Vacate the Judgment of Conviction

The defendant argues that his trial counsel provided ineffective assistance of counsel by: (1) failing to object to hearsay; (2) failing to object to the prosecutor’s opening statement; (3) failing to object to parts of the court’s closing instructions; (4) presenting inconsistent defenses to the jury; (5) failing to request a charge of manslaughter in the second degree; and (6) presenting the defendant’s aunt to provide alibi evidence for the defendant. Defendant’s claims are not supported

by an affidavit from the trial attorney. However, appellate counsel's moving papers indicate that he had a brief telephone conversation with trial counsel on October 8, 2007. In this conversation, appellate counsel states that the trial counsel indicated that he did not think that second-degree manslaughter was a lesser-included offense of second-degree murder as a matter of law. As to the issue of the alibi witness, trial counsel indicated that, contrary to what the alibi witness testified to during the trial, he had spoken to her prior to the commencement of the trial. Trial counsel further indicated that he "believed it would constitute ineffective assistance of counsel if he did not call an alibi witness his client wanted to testify." (Affirmation of Appellate Counsel, at 13). In support of his motion, appellate counsel has included a complaint follow-up report dated February 2, 2005 (Exhibit A), and an affidavit from the defendant (Exhibit B).

The defendant also claims that his trial counsel was ineffective by failing to object to hearsay testimony by prosecution witnesses, Ella Pack and Detective Faust. Additionally, the defendant claims that his trial counsel failed to object to portions of the prosecutor's opening statement referring to statements of individuals who were ultimately not called, nor did the trial counsel make any applications for a remedy when those persons were not called as witnesses.

This court notes, at the outset, that CPL §440.10 (2) (b) provides that a court *must* deny a motion to vacate judgment when sufficient facts appear on the record, and the judgment is appealable or pending appeal. In the instant case, the defendant's trial counsel's failure to object to hearsay of prosecution witnesses, or to the prosecution's opening statements, or to request curative instructions, are all set out in the record, and are, therefore, procedurally barred.

Also, the defendant's allegation that trial counsel was ineffective for failing to object to the court's charge on reasonable doubt must be denied without a hearing. The allegedly erroneous charge and counsel's failure to object to the charge are fully set out on the record. Therefore, this claim is procedurally barred. CPL §440.10 (2) (b).

Next, the defendant's claim that trial counsel's failed to sum up on the inconsistent defense of manslaughter in the first degree is also denied without a hearing. Although trial counsel requested and received a jury charge on intoxication and the lesser-included offense of manslaughter in the first degree, counsel did not address these issues during his summation. Instead, trial counsel attacked the credibility of the People's witnesses and suggested that the sole eyewitness, Dwayne Herbert, was the perpetrator. These claims are not outside the record and would appropriately be raised on direct appeal. CPL §440.10 (2) (b). Thus, this claim is procedurally barred.

In any event, defendant has failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failures. *People v. Rivera*, 71 NY2d 705, 709; see, *People v. Taylor*, 1 NY3d 174, 177; *People v. Bussed*, 6 AD3d 621, 622. Here, the record shows that the trial counsel extensively and effectively cross-examined Dwayne Herbert, the sole eyewitness to the shooting, who testified that at the time of the incident, he was taking heroin about four or five times a day. Thus, a review of the record, viewed objectively, "reveal[s] the existence of a trial strategy that might well have been pursued by a reasonably competent attorney". *People v. Satterfield*, 66 NY2d 796, 799 (1985). Accordingly, this claim is denied.

In addition, defendant's claim that trial counsel was ineffective for failing to request a charge of manslaughter in the second degree must also be denied without a hearing. This claim is procedurally barred as it is reviewable on the record and would be appropriately brought on direct appeal. CPL §440.10 (2)(b). Nevertheless, as long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance. *People v. Benevento*, 91 NY2d 708, 711 (1998). A review of the record indicates that trial counsel chose to pursue a strategy of attacking the credibility of the prosecution witnesses. As already indicated, considering the testimony of the sole eye-witness to the incident, it cannot be determined that this strategy was inconsistent with reasonable representation. Although the trial attorney was said to have stated in his phone conversation with appellate counsel that he (trial counsel) did not think that second degree manslaughter was a lesser- included offense of second degree murder, an erroneous opinion, the court does not find that this error rises to the level of ineffective assistance of counsel. The record indicates that the defense strategy of arguing that the defendant did not commit the crime, and was not present at the scene of the crime, was consistent throughout the trial. Furthermore, the Court of Appeals has made it clear that it is not ineffective to choose to pursue an "all-or-nothing" strategy as trial counsel did in this case. *People v. Lane*, 60 NY2d 748 (1983). Accordingly, this claim is also denied.

Defendant's final claim that counsel was ineffective by putting on an alibi defense through the defendant's aunt, Linda Prescott, must also be denied without a hearing. The fact that trial counsel may have believed that he was compelled to present this defense if the defendant wanted to do so, and that the testimony of the alibi witness was contradicted by the testimony of Detective Habert (See, Defendant's Exhibit B), does not indicate that the defendant did not receive "meaningful representation." *People v. Baldi*, 54 N.Y.2d 137, (1981). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two- part test for evaluating a defendant's Sixth Amendment claim of ineffective assistance of trial counsel. To prevail upon such claim, a "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, *People v. McDonald*, 1 N.Y.3d 109. "The first prong of the *Strickland* test is essentially a restatement of attorney competence, which

requires a showing that counsel's representation fell below an objective standard of reasonableness". *McDonald*, 1 N.Y.3d at 113; *Hill v. Lockhart*, 474 U.S. 52, 58. The second prong, the requirement of prejudice, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the trial. *People v. Stultz*, 2 N.Y.3d 277, 283-284.

New York State has long recognized the importance of adequate counsel in criminal cases. In *People v. Baldi*, 54 N.Y.2d 137,147 (1981), the New York Court of Appeals set standards for claims of ineffective assistance of counsel in this state, holding that the constitutional requirements are met whenever the defense attorney provides "meaningful representation."

The absence of *Strickland's* prejudice requirement is the distinguishing characteristic of *Baldi* (*Stultz*, 2 N.Y.3d at 283). The Court of Appeals has indicated that "a defendant need not fully satisfy the prejudice test of *Strickland*. We continue to regard defendant's showing of prejudice as significant, but not dispositive, element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole." *Stultz*, 2 NY3d at 283-284.

"While the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." *People v. Benevento*, 91 N.Y.2d 708, 714 (1998). "Whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel," because "our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence." *Benevento*, 91 N.Y.2d at 714, quoting *People v. Donovan*, 13 N.Y.2d 148, 153-154.

To prevail on a claim of ineffective assistance of counsel, the defendant must "demonstrate the absence of strategic or other legitimate explanations for counsel's failure[s]." *People v. Rivera*, 71 N.Y.2d 705,709; see, *People v. Taylor*, 1 NY3d 174, 177; *Benevento*, 91 N.Y.2d at 712. Additionally, the defendant must overcome the legal presumption that counsel's performance falls within the wide range of reasonable professional competence. *Strickland v. Washington*, 466 U.S. at 688-689. Without such a demonstration, "it will be presumed that counsel acted in a competent manner and exercised professional judgment." *Rivera*, 71 N.Y.2d at 709. "[T]rial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So 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." *Baldi*, 54 N.Y.2d at 146-147; *Bussed*, 6 A.D.3d at 622.

Thus, what constitutes effective assistance varies according to the unique circumstances of each representation. This court must “avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis. It is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy.” *Baldi*, 54 N.Y.2d at 146. Thus, “simple disagreements with strategies and tactics” will not suffice. *Rivera*, 71 N.Y.2d at 709.

Therefore, the question to be resolved is not only whether the defendant demonstrated that his counsel provided “*less than meaningful representation*”, but “whether the attorney’s conduct constituted ‘*egregious and prejudicial*’ error such that defendant did not receive a ‘fair trial’”. *Benevento*, 91 N.Y.2d at 713, quoting *People v. Flores*, 84 N.Y.2d 184, 188. (emphasis added). Here, the record shows that the defendant’s attorney delivered cogent and coherent opening and closing statements, and effectively and extensively cross-examined the People’s witnesses. Counsel represented defendant’s interests and pursued a strategy of attacking the credibility of the prosecution witnesses, as well as trying to show that the sole eyewitness to the incident had a motive to fabricate his testimony. See, *People v. Hobot*, 84 N.Y.2d 1021 (1995). Although the People may have discredited the alibi testimony, this did not “seriously compromise” the defendant’s right to a fair trial as the sole witness to the shooting knew the defendant very well and identification was not in issue. Accordingly, this claim is denied without a hearing.

For all of the reasons stated herein, the defendant’s motion to vacate the judgment of conviction is denied. This constitutes the decision and order of the Court.

Dated: July 18, 2008

ENTER,



James P. Sullivan, J.S.C.

