

People v Harris

2008 NY Slip Op 32361(U)

August 13, 2008

Supreme Court, Kings County

Docket Number: 0004926/1996

Judge: Abraham G. Gerges

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MEMORANDUM

SUPREME COURT

KINGS COUNTY

BY ABRAHAM GERGES, J.

The People of the State of New York

Date: August 13, 2008

v.

Lydell Harris,

Defendant.

Ind. #4926/96

Defendant moves to set aside the judgement of conviction imposed for the above-referenced indictment.

In addition to the defendant's motion papers and the People's reply, the court has reviewed the transcript of the trial in determining this motion.¹

Facts

Defendant was tried and convicted of Murder in the Second Degree in 1977; this conviction was reversed by the Court of Appeals because of the trial court's failure to charge the defense of extreme emotional disturbance (*People v. Harris*, 95 NY2d 316

¹Despite repeated attempts to locate the file from archives, the court file for indictment #4926/96 is unavailable.

[2000]). After a retrial, defendant was again convicted by a jury of Murder in the Second Degree. He was sentenced to a term of incarceration of a minimum of twenty-five years to a maximum of life. Defendant appealed this conviction on several grounds; however no claim of ineffective assistance of trial counsel was raised. The Appellate Division, Second Department unanimously affirmed the judgement of conviction(*People v. Harris*, 8 AD3d 402). Defendant's application for leave to appeal to the Court of Appeals was denied (*People v. Harris*, 3 NY3d 674 [2004]).

By *pro se* motion dated May 3, 2005 defendant moved the Appellate Division for a writ of error *coram nobis* alleging ineffective assistance of appellate counsel. This application was denied by the Appellate Division (*People v. Harris*, 23 AD3d 398 [2005]). Defendant's application for leave to appeal to the Court of Appeals was denied (*People v. Harris*, 7 NY3d 902 [2006]).

By petition dated March 14, 2006, defendant brought a writ of *habeas corpus* in the United States District Court for the Eastern District of New York. On March 15, 2007, the District Court granted defendant's motion to amend his petition to assert a claim of ineffective assistance of appellate counsel, but denied his motion to amend regarding the claim of ineffective assistance of trial counsel as defendant had not yet exhausted that claim in state court (*Harris v. Artuz*, CV -06-1337 E.D.N.Y. J. Feuerstein). In a decision dated June 6, 2006, the District Court denied defendant's application (*Harris v. Artuz*, CV -06-1337 E.D.N.Y. J. Feuerstein).

By amended petition dated April 10, 2007 defendant again asserted in federal court that he was denied effective assistance of trial and appellate counsel.

Defendant now claims, pursuant to CPL. §440.10, that he was denied due process and equal protection of the laws by an alleged improper amendment of the indictment; that trial counsel was ineffective for failing to object to this alleged amendment and the placement of the counts on the verdict sheet, and the depraved indifference murder statute is unconstitutionally vague.

Law

CPL §440.10 (2) (c) mandates that a court deny a motion to vacate a judgment if all the necessary facts relating to the legal issue appear “on the record of the proceeding underlying the judgement to have permitted, upon appeal from such judgement, adequate review of the ground or issue raised upon the motion,” and “no such appellate review or determination occurred owing to defendant’s ...unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.” (*see also People v Cooks*, 67 NY2d 100 [1986]; *People v Sadness*, 300 NY 69 [1949]).

While ineffective assistance often occurs “off the record,” in this instance, all of defendant’s assertions are on the records claims (*Trial Transcript* May 8, 2003 pp. 737-737). A CPL 440 motion is not a substitute for a direct appeal; defendant was already afforded the opportunity to raise these issues before the appellate court. The court is procedurally barred from reviewing these claims.

In any event, defendant's claims are without legal merit.

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 show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). The defendant must also 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]).

An attorney is not ineffective for failing to make a motion that has little or no chance of success (*People v. Rivera*, 71 NY2d 705 [1988]; *People v. DeFreitas*, 213 AD2d 96 [1995]). Defendant's argument that counsel was ineffective for not objecting to the placement of the depraved indifference count before the intentional murder count on the indictment is baseless. Counsel actually affirmatively consented on the record to the verdict sheet and there is no indication that it was not for legitimate, strategic reasons.

Additionally, the murder counts were properly charged in the alternative (*People v. Gallagher*, 69 NY2d 525 [1987]).² There is no statutory requirement that counts be submitted to the jury in any particular order or that the verdict sheet numbering must correspond to the numbering in the indictment (*see* CPL 300.10(4)). There is no indication, other than defendant's unsubstantiated characterization as such, that the indictment was amended. Merely submitting the counts to jury in a different order from that voted in the indictment cannot be deemed an "amendment." Defendant received ~~effective assistance of trial counsel.~~

Defendant's remaining claims are meritless (*see* PL §125.25).

The motion is hereby denied.

This constitutes the Decision and Order of the Court.

²Until the Court of Appeals decisions in *People v. Payne*, 3 NY3d 266 [2004], *People v. Gonzalez*, 1 NY3d 464 [2004], and *People v. Hafeez*, 100 NY2d253 [2003], the law regarding submission of both an intentional murder count and a depraved indifference murder count to the jury was well-settled.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

E N T E R ,

Alm. J. J.

J. S. C.

