SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 25
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PEOPLE OF THE STATE OF NEW YORK

-against-

ANDRE KIRBY
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Decision and Order

Indict.#: 5282-2002

Hon. Vincent Del Giudice
Dated: June 19, 2008

On November 14, 2003, a Kings County jury convicted the defendant of five counts of robbery in the first degree (PL 160.15 [4]) and one count of robbery in the third degree (PL 160.05). On December 18, 2003, he was sentenced, as a mandatory persistent violent felony offender, to an indeterminate term of imprisonment of one hundred and three-and-a-half years to life (Collini, J.).

The defendant's conviction, and sentence, was upheld by the Appellate Division, Second Judicial Department (*People v Kirby*, 34 AD3d 695). Leave to appeal was denied (*People v Kirby*, 8 NY3d 881).

The defendant has now filed a motion to vacate judgment, dated February 27, 2008 (CPL 440.10).[1] The defendant claims the trial court failed to instruct the jury that it was required to consider each of the robbery charges separately and that trial counsel's failure to make such request of the court constituted ineffective assistance of counsel. The People have filed an answer in opposition.

In support of his ineffective assistance of counsel claim, defendant has

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[1]This case has been assigned to me, as part of my Miscellaneous Motion calendar, because the trial court judge has relocated to another county.

included an affidavit from his trial attorney, Robert A. Walters, in which counsel claims he was unaware that in a written decision granting the People's motion to consolidate, the trial court stated that with proper limiting instructions the jury would be able to separate the individual robbery counts from one another and would be able to decide each individual count on its merits. Mr. Walters goes on to say that he was not only unaware of the papers filed by the defendant's prior attorney, and the court's ruling granting consolidation, but he "did not have time to fully familiarize" himself with all prior proceedings and issues before commencing trial (Affirmation of Robert A. Walters, at 1).

Pursuant to CPL 440.10 (1), the court in which judgment was entered may vacate such judgment upon certain specific enumerated grounds.[2]

Notwithstanding the claims raised by the defendant in his motion, pursuant to CPL 440.10 (2), the court must deny the motion whenever :

> (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment ....

In addition, CPL 440.10 (3) states that notwithstanding the merits of the defendant's claims, the court may deny the defendant motion to vacate judgment whenever:

> (a) Although facts in support of the ground or issue raised upon the

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[2]Defendant bases his current claim on CPL 440.10 (1)(h), which provides a ground to vacate if judgment was obtained in violation of a right of the defendant under the constitution of either the State of New York or of the United States.

> motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal ...

This court has carefully reviewed the moving papers. The issue raised by the defendant, with respect to the trial court's failure to instruct the jury that it was to consider each charge separately and to render individual verdicts with respect to each count, was previously raised, and decided on the merits, in defendant's direct appeal. In affirming the judgment of conviction, the Appellate Division held that in light of the overwhelming evidence of guilt with respect to each incident, the court's failure to charge the jury with respect to keeping the various incidents separate was harmless error.

Although not mentioned in the appellate decision, the petit jury acquitted the defendant of count eight of the verdict sheet, charging him with Robbery in the first degree, with respect to the robbery of Curtis Bailey, and convicted him only of the lesser included offense of Robbery in the third degree. In addition, the jury acquitted the defendant of all charges with respect to the complainant Ernie John.[3] It is therefore apparent that the jury did, in fact, treat each of the charges separately, regardless of the court's failure to deliver the charge at issue.

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[3]Counts ten and eleven on the verdict sheet.

Since this issue was previously determined, on the merits, as part of the defendant's direct appeal, this portion of his motion to vacate judgment must be summarily denied, pursuant to CPL 440.10 (2)(a).

With respect to the defendant's claim that he was denied the effective assistance of trial counsel, that application must be denied, pursuant to CPL 440.10 (3)(a), because, based on the narrow claim made herein, this issue could have been raised upon the defendant's direct appeal.

Trial counsel was supplied with a written copy of the court's charge prior to the People resting.[4] Assuming Mr. Walter's affirmation as true, this issue could have been raised prior to sentencing and made part of the defendant's direct appeal.

Even if this court were to review the defendant's ineffective assistance of counsel claim on the merits, his motion must be denied (CPL 440.30 [3][b]).[5]

The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (US Const 6th Amend; NY Const, art I, § 6; *People v McDonald*, 1 NY3d 109, 113).

In *Strickland v Washington* (466 US 668), 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

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[4]Although it was the practice of the trial court to provide counsel with a copy of the proposed final charge to the jury, both parties were invited to raise objections or suggest additions or deletions at any time during the trial.

[5]Upon considering the merits of the motion, the court may deny it without conducting a hearing if: (b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one.

such claim, a "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense" (*Strickland*, 466 US at 687; *Mc Donald*, 1 NY3d at 113). "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" (*Mc Donald*, 1 NY3d at 113; *Hill v Lockhart*, 474 US 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 NY3d 277, 283-284).

New York has long recognized the importance of adequate counsel in criminal cases (*People v Silverman*, 3 NY2d 200; *People v McLaughlin*, 291 NY 480). In *People v Baldi* (54 NY2d 137, 147), 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 NY3d at 283). As stated by our Court of Appeals:

> Under our *Baldi* standard, we are not indifferent to whether the defendant was or was not prejudiced by trial counsel's ineffectiveness. We would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice. But under our *Baldi* jurisprudence, a defendant need not fully satisfy the

> prejudice test of *Strickland*. We continue to regard defendant's showing of prejudice as a 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 NY2d 708, 714). "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 NY2d at 714, *quoting People v Donovan*, 13 NY2d 148, 153-154).

Since the Appellate Division has already determined that the failure to give the disputed jury charge was harmless error, this court must be "skeptical" of any ineffective assistance of counsel claim based on the deficiency of counsel to request such charge, since prejudice is a significant, but not dispositive, element in assessing whether the defendant was provided meaningful representation (*Stultz*, 2 NY3d at 283-284).

"To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate

explanations for counsel's failure[s]" (*People v Rivera*, 71 NY2d 705, 709; *see People v Taylor*, 1 NY3d 174, 177; *Benevento*, 91 NY2d at 712; *People v Bussey*, 6 AD3d 621, 622). "[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 NY2d at 146-147; *Bussey*, 6 AD3d at 622).

Although defendant failed to obtain an acquittal of all charges, the record shows that his attorney delivered cogent and coherent opening and closing statements, raised proper and relevant objections, and extensively and effectively cross-examined the People's witnesses, all actions appellate courts have held to constitute "meaningful representation" (*People v Hewlett*, 71 NY2d 841, 842). As stated earlier, counsel was able to obtain an acquittal as to three of the felony charges against the defendant.

"What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation" (*Baldi*, 54 NY2d at 146). Even the most skilled advocate cannot be expected to prevail when faced with compelling evidence of his or her client's guilt.[6] Accordingly, "trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness" (*Rivera*, 71 NY2d at 708; *Baldi*, 54 NY2d at 146-147). This court must "avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective

[6]This court often informs defendants that their lawyers are not magicians.

analysis. It is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy" (*Baldi*, 54 NY2d at 146). Thus, "simple disagreements with strategies and tactics" will not suffice (*Rivera*, 71 NY2d at 709).

Trial counsel's subjective reasoning as to his or her effectiveness is not even determinative, so long as 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).

To be successful on a claim of ineffective assistance of counsel, a defendant must establish the "absence of strategic or other legitimate explanations" for counsel's conduct (*Rivera*, 71 NY2d at 709) and overcome the legal presumption that counsel's performance falls within the wide range of reasonable professional competence (*Strickland v Washington*, 466 US at 688-689). Without such a demonstration, "it will be presumed that counsel acted in a competent manner and exercised professional judgment" (*Rivera*, 71 NY2d at 709).

Accordingly, the question to be resolved is not only whether the defendant demonstrated that his counsel provided "*less than meaningful representation*" (*Benevento*, 91 NY2d at 713), under the broad standards detailed above, but "whether the attorney's conduct constituted '*egregious and prejudicial' error* such that defendant did not receive a 'fair trial'" (*Benevento*, 91 NY2d at 713, *quoting People v Flores*, 84 NY2d 184, 188)(*emphasis added*).

The defendant has failed to meet his burden[7] of proving that trial counsel failed to provide meaningful representation and/or committed such egregious and prejudicial errors that deprived him of a fair trial.[8]

Accordingly, defendant's motion to vacate the judgment entered against him is denied (CPL 440.30 [2]).

This constitutes the decision and order of the court (CPL 440.30 [7]).

Vincent M Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

Dated: June 19, 2008
Brooklyn, New York

[7]Pursuant to CPL 440.30 (6), at a CPL 440.30 (5) fact finding hearing, the defendant has the burden of proving every fact essential to support the motion by a preponderance of the evidence.

[8]Apart from Mr. Walters' affirmation claiming he did not review any of the case documents or decisions generated prior to jury selection, no other claim was set forth disparaging the legal representation provided by Mr. Walters in this case. Mr. Walters provided this defendant with a vigorous and professional defense. Mr. Walters' trial strategy and skills in the instant case are not at issue.