

**People v Johnson**

2008 NY Slip Op 32764(U)

August 28, 2008

Supreme Court, Kings County

Docket Number: 7782/2002

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

Date: August 28, 2008

-against-

DECISION & ORDER

KEITH JOHNSON

Indictment No. 7782/2002

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Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of counsel. The motion is denied.

On September 23, 2002, defendant and his friends spotted Calvin Chandler driving defendant's car without his consent. Defendant jumped into the driver's seat and drove Chandler to the Marlboro Houses in Brooklyn, where several of defendant's friends were waiting. One person took out a gun and hit Chandler in the head, then Chandler pulled loose and ran away. Defendant grabbed the gun and chased him, firing several shots. Chandler was hit six times in the back and died from his gunshot wounds.

Defendant was charged in a twin-count indictment with two counts of murder in the second degree under both depraved indifference and intentional murder theories, and other weapons charges. The murder counts were submitted to the jury in the alternative. Defendant was convicted by a jury of depraved indifference murder (PL § 125.25[2]) and was sentenced to a prison term of twenty-five years to life on July 9, 2003.

Defendant appealed his judgment of conviction, arguing that the evidence was not legally sufficient to support his conviction for depraved indifference murder because the evidence was

consistent with intentional murder. Defendant also claimed that trial counsel was ineffective for failing to preserve the issue for appellate review by moving for a trial order of dismissal. The Appellate Division affirmed his judgment of conviction on the grounds that the legal sufficiency claim was unpreserved for appellate review, and declined to reach the issue in the interest of justice. The court also rejected remaining his claims as without merit (*People v Johnson*, 22 AD3d 601 [2d Dept 2005]).

Defendant next moved for a writ of error *coram nobis* on January 19, 2007, claiming he was denied effective assistance of appellate counsel. Defendant argued that appellate counsel failed to raise an ineffective assistance of trial counsel claim based upon the sufficiency of the evidence. The Appellate Division denied defendant's motion on April 10, 2007 on the grounds that defendant had failed to establish that he was denied the effective assistance of counsel (*People v Johnson*, 39 AD3d 670 [2d Dept 2007]). The Court of Appeals denied defendant leave to appeal from the decision of the Appellate Division (*People v Johnson*, 9 NY3d 877 [2007]).

In the instant motion, defendant claims that trial counsel was ineffective for failing to move for a trial order of dismissal based on the alleged legal insufficiency of the depraved indifference murder count. He also argues that trial counsel should have objected to the Court's decision to include both murder counts in its charge to the jury. In additional papers dated April 2, 2008, defendant seeks to amend his original CPL § 440.10 motion to include another ineffective assistance of counsel claim based on counsel's failure to move for a CPL § 730 hearing to determine defendant's fitness for trial. Defendant alleges that counsel knew he was on medication and that he was at or below a fifth-grade reading level at the time of trial. For the following reasons, the motion is denied.

Defendant's first claim of ineffective assistance of counsel is procedurally barred because the record indicates that counsel did in fact make a motion to dismiss. The record also reflects that the trial court entertained the motion before issuing its denial. Pursuant to CPL § 440.30[4][d], the court may deny a motion to vacate judgment if "[a]n allegation of fact essential to support the motion (i) is contradicted by a court record...and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."

At sentencing, counsel informed the court:

"...at the end of the entire case I don't believe I made the appropriate motion, but at this time based on the evidence brought before the Court, I would ask the Court to direct a – to not allow the verdict of guilty to stand, and direct a verdict of not guilty, in that there is no reasonable view of the evidence by which a verdict of guilty could be reached."

The court responded, "I believe the evidence presented to the jury would sustain the verdict and was sufficient, and I'm going to deny that motion to dismiss, or, in the alternative, treat it as a 330 motion and deny it." Here, although counsel's motion was not raised at the customary time, the court accepted it as a motion to dismiss and denied it on the record. Accordingly, defendant's claim that counsel failed to make a motion to dismiss is belied by the record and thus rejected on procedural grounds.

Nevertheless, defense counsel's motion failed to preserve the issue of legal sufficiency for appeal because it was not specifically addressed to the claimed legal deficiencies in the depraved indifference count (*see People v Gray*, 86 NY2d 10, 19 [1995] ["even where a motion to dismiss for insufficient evidence was made, the preservation requirement compels that the argument be 'specifically directed' at the alleged error..."]). At the same time, the fact that neither of defendant's claims as to the legal sufficiency of the evidence and the jury charge were

preserved does not establish that counsel was ineffective for failing to make proper or timely motions. Based on the law at the time of defendant's trial in 2002, counsel acted in accordance with acceptable legal strategy. Thus, an examination of the relevant legal standards and the evidence adduced at trial is now warranted.

Although the law of depraved indifference murder has recently changed, defendant's case is governed by the law in effect at the time he was convicted (*Policano v Herbert*, 7 NY3d 588, 603 [2006]). At the time of defendant's trial in 2002, it had to be shown that the defendant's reckless conduct was imminently dangerous and created a grave risk of death (*People v Register*, 60 NY2d 270, 276 [1983]; *People v Gomez*, 65 NY2d 9, 11 [1985]; see *People v Feingold*, 7 NY3d 288, 294 [2006] [overruled *People v Register*]). The escalation of reckless conduct to the gravity required for murder depended on the wantonness of the defendant's acts or whether the acts were committed "under circumstances evincing a depraved indifference to human life" (PL §125.25[2]). The finding of such wantonness was based not on the subjective intent of the defendant but rather on an objective assessment of the circumstances surrounding the acts and the factual setting in which the risk-creating conduct occurred (*Register* at 276). The assessment of the objective circumstances was a qualitative judgment by the trier of fact (*People v Roe*, 74 NY2d 20, 24 [1989]).

In cases involving close-range, one-on-one shootings, depraved indifference murder was often distinguished from intentional murder by conduct that is "sudden, spontaneous and not well-designed to cause imminent death" (*People v Sanchez*, 98 NY2d 373, 377 [2002] [depraved mind murder even though victim was shot at point-blank range). Intent, not depraved indifference, is evident when the victim is shot multiple times at close range in places most likely

to cause death (*People v Gonzalez*, 1 NY3d 464, 466 [2002] [intentional murder found when defendant fired at victim's face, chest, and back of head from very close range]; *People v Breedlove*, 26 AD3d 641, 642 [3d Dept 2006] [a close-range shooting was intentional, not reckless]; *People v Payne*, 3 NY3d 266 [2004] [point-blank shooting was not depraved indifference murder]). In contrast, sufficient evidence of recklessness was proven in a case where the defendant spontaneously fired multiple times into the victim's car, killing both the intended victim and the passenger (*People v Baptiste*, 306 AD2d 562, 565 [3d Dept 2003]). Evidence of depraved indifference was also sufficient when the defendant suddenly pulled out a gun and shot the victim in the neck from a distance of four to five feet away (*People v Atkinson*, 21 AD3d 145, 155 [2d Dept 2005] [the jury could have reasonably found that the "act of discharging a weapon in [the victim's] direction created a substantial and unjustifiable risk that the deceased would die, and that the defendant was aware of that risk and consciously disregarded it"]).

In this case, the evidence presented at trial was sufficient to support the depraved indifference murder charge under the then-existing law. In a last-minute attempt to stop the victim, defendant felt "he had to do something before something was done to him" and spontaneously grabbed a gun from his friend, firing several times as the victim ran away. Considering that the entire incident occurred quickly and that defendant was not himself armed, the evidence shows that defendant acted without planning or premeditated revenge (*see People v Parker*, 29 AD3d 1161, 1164 [3d Dept 2006]; *see also Policano, supra*). Nor was this a point-blank shooting designed to kill the victim instantly. Here, defendant fired multiple shots from a distance. Defendant's conduct was also very risky since the victim was already impaired from

having been hit in the head. In fact, “defendant’s conduct was so manifestly destined to result in...death as to deserve the same societal condemnation as purposeful homicide” (*Sanchez* at 378 [2d Dept 2002]). In view of these facts and the circumstances of the crime, there is “a valid line of reasoning that could support a jury’s conclusion that defendant possessed the mental culpability required for depraved indifference murder” (*People v Hafeez*, 100 NY2d 253, 259 [2003]). The jury “could reasonably have concluded that defendant’s conduct was either reckless and depraved or intentional. The jury chose the former, and as there is evidence in the record to support it” the depraved indifference murder charge was proper (*Sanchez* at 386).

As to defendant’s ineffective assistance of counsel claim, 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). 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]). 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]).

Based upon the law of depraved indifference murder at the time of defendant’s trial, “neither the failure to challenge the prosecution’s use of twin-count indictments...nor the failure to move to dismiss the depraved indifference murder count constituted ineffective representation” (*People v Orcutt*, 49 AD3d 1082, 1086 [3d Dept 2008], lv denied, 10 NY3d 938 [2008]). Under the *Register* standard, it was proper to charge both depraved indifference murder and intentional murder as long as the two counts were charged in the alternative (*People v Gallagher*, 69 NY2d 525 [1987]). Although the Court of Appeals has since determined that twin-count indictments should be rare, this pronouncement was not made until after defendant’s trial (*see People v Suarez*, 6 NY3d 202, 215 [2005]). Therefore, defense counsel may not be faulted in hindsight for proceeding under both murder counts based upon not-yet established jurisprudence (*see, e.g., Orcutt* at 1087; *People v Carter*, 40 AD3d 1310, 1313 [3d Dept 2007]). Such adherence to the law at the time simply does not constitute ineffective assistance of counsel (*People v Parker*, 29 AD3d 1161 [3d Dept 2006], *aff’d*, 7 NY3d 907).

Defendant’s amended claim that counsel should have moved for a CPL § 730 hearing is also without merit. Preliminarily, the court rejects this claim because “[a]lthough facts in support of the ground or issue raised upon the 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 was not subsequently determined upon appeal" (CPL § 440.10[3][a]). Defendant has also failed to substantiate his claims with supporting evidence and sworn affidavits (CPL § 440.30[4][b]). There is no affidavit from either counsel or defendant's mother, both of whom defendant claims were aware of defendant's alleged mental incapacity. Furthermore, defendant's moving papers do not show that he had a colorable claim and that a motion made on these grounds would have been successful (*DeFreitas* at 101; *Mance* at 188, *Seymour* at 867).

Accordingly, the motion is denied.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 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 his 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 certification granting leave to appeal is granted.

ENTER:



CAROLYN E. DEMAREST, J.S.C.

