

**People v Royers**

2008 NY Slip Op 33545(U)

November 7, 2008

Supreme Court, Kings County

Docket Number: 1849/1993

Judge: James P. Sullivan

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

-----X	
<b>THE PEOPLE OF THE STATE OF NEW YORK</b>	<b>: DECISION AND ORDER</b>
	<b>:</b>
<b>-against-</b>	<b>:</b>
	<b>:</b>
	<b>:</b>
<b>LEONARDO ROYERS,</b>	<b>:</b>
	<b>:</b>
<b>Defendant.</b>	<b>: Indictment No. 1849/1993</b>
-----X	
<b>JAMES P. SULLIVAN, J.</b>	

The defendant has moved, pursuant to CPLR § 2221, for reconsideration of the order of the Supreme Court, Kings County, dated July 13, 2001, that summarily denied defendant’s motion to vacate his judgment of conviction pursuant to section 440.10 (1) (h) of the Criminal Procedure Law. Inasmuch as defendant’s motion adds new claims that were not raised in his original motion to vacate the judgment, defendant’s motion should be treated as a second motion to vacate the judgment. In a motion dated, April 22, 2008, defendant claims, as he did in his 2001 motion, that the prosecution used false evidence to convict defendant, and that his trial counsel provided ineffective assistance of counsel. The defendant now adds further claims that his counsel acted ineffectively. On July 28, 2008, the People filed an answer in opposition. Defendant filed a further response on August 19, 2008. For the reasons stated below, the motion is denied.

***Procedural History***

The defendant was charged, under Indictment Number 1849/93, with murder in the second degree; robbery in the first degree; burglary in the first degree; attempted murder in the second degree; and criminal possession of a weapon in the fourth degree. These charges involved a shooting that occurred on August 19, 1991, resulting in the death of Victor Vargus and Antera Vargus. On June 24, 1993, the defendant was convicted, after a jury trial of two counts of murder in the second degree (P.L. § 125.25 [3]) relating to Antera and Victor Vargus, one count of attempted murder in the second degree relating to Benancio Rodriguez, and one count of robbery in the first degree. The defendant was acquitted of two counts of intentional murder (P.L. § 125 [1]). The Court further dismissed the burglary ruling that the People had not established “permission or lack of authority.” *See, trial transcript* pg. 751. On November 12, 1993, the defendant was sentenced, as a second

felony offender, to a concurrent prison term of 25 years to life on each murder count, a consecutive prison term of 12 ½ to 25 years on the attempted murder count, and a prison term of 12 ½ to 25 years on the robbery charge to run concurrently with the other sentences. (Feldman, J., at Wade hearing, trial and sentence).

The defendant appealed from his judgment of conviction to the New York State Supreme Court, Appellate Division, Second Department, claiming that the People failed to prove his guilt beyond a reasonable doubt, and that his sentence was excessive. The Appellate Division unanimously affirmed defendant's conviction on October 10, 1995. *People v. Leo Rogers*, 220 A.D.2d 542 (2d Dep't 1995). Leave to appeal to the Court of Appeals was denied on January 2, 1996. *People v. Rogers*, 87 N.Y.2d 924 (1996).

On January 8, 2001, the defendant filed a motion pursuant to CPL § 440.10 to vacate the judgment of conviction, alleging that his trial counsel was ineffective for 1) failing to object to the victim's identification of defendant, and 2) for failing to investigate defendant's alibi defense. The defendant further claimed that the prosecutor used false evidence to convict him. On July 13, 2001, defendant's motion was denied (Feldman, J.).

On July 25, 2003, defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. On December 2, 2003, the petition was denied as untimely and the Court further denied the issuance of a certificate of appealability. On March 29, 2004, the defendant appealed from the District Court's denial of his petition to the United States Court of Appeals for the Second Circuit, claiming extraordinary circumstances prevented the timely filing of the original petition. On July 22, 2004, the Second Circuit denied defendant's application for a certificate of appealability. Then, on August 26, 2004, the Second Circuit denied defendant's petition for a panel rehearing of the defendant's claim.

### ***The Current Motion to Vacate the Judgment of Conviction***

The defendant now moves pursuant to CPLR § 2221 to renew and reargue his January 8, 2001, motion to vacate judgment on the grounds that 1) his trial attorney rendered ineffective assistance of counsel; 2) the prosecutor used false evidence to convict defendant; 3) the evidence was legally insufficient to convict him, and the verdict was against the weight of the evidence; and 4) the court sentenced him to an excessive term of imprisonment.

To the extent that defendant's current motion is deemed a motion to renew, it should be

denied. First, defendant's claim is not based upon new facts that would change the prior determination and were not offered on the prior motion. *See*, CPLR § 2221 (3) (e) (2). Additionally, the defendant provides new legal claims that cannot be raised in a motion to renew. A motion to renew should be utilized only to alert the court to facts which were not known by the moving party at the time of the original motion, but which support the grounds raised in the original motion. *Brooklyn Welding Corp. V. Chin*, 236 AD2d 392 (2d Dep't 1997); *Foley v. Roche*, 68 A.D.2d 558, 568 (1<sup>st</sup> Dep't 1979). Renewal is not available where the facts upon which the motion is based were known to the moving party at the time of the original motion. *LaRosa v. Trapani*, 271 A.D.2d 506 (2d Dep't 2000); *Palmer v. Toledo*, 266 A.D.2d 268, 269 (2d Dep't 1999); *Chin*, 236 A.D.2d at 392; *Roche*, 68 A.D.2d at 568. Moreover, defendant has not offered additional material facts in his present motion, nor has he provided any reasonable justification for his failure to present such facts in his prior motion. *See*, CPLR § 2221 (3) (e) (3); *Roche*, 68 A.D.2d at 568.

The defendant's motion should also be denied as a motion to reargue. C.P.L.R § 2221 (d) (3) provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Defendant's original motion to vacate the judgment was denied on July 13, 2001. Furthermore, the defendant moved for leave to appeal this denial to the Appellate Division on August 20, 2001. Thus, the filing of this motion to reargue is clearly untimely. Additionally, "motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision." *Loland v. City of New York*, 212 A.D.2d 674 (2d Dep't 1995); *accord*, *Perez v. Linshar Realty Corp.*, 259 A.D.2d 532 (2d Dep't 1995). Re-argument is not designed to afford the unsuccessful party to present arguments different from those originally asserted. *See*, *People v. Lopez*, 235 A.D.2d 496, 497 (2d Dep't 1997). Furthermore, the defendant has made no valid showing, that the order of former Justice Feldman, denying defendant's motion to vacate the judgement, overlooked or misapprehended the case law governing ineffective assistance of counsel or any other claim. Contrary to the defendant's claim, that the Court's decision was erroneously based on *People v. Taylor*, 211 A.D.2d 603 (1<sup>st</sup> Dep't 1995), this case in fact determined that the defendant's motion to vacate judgment "was properly denied since it was unsupported by any other affidavits or evidence." Thus, this claim is without merit.

Furthermore, to the extent that defendant's motion is considered a second motion to vacate the judgment pursuant to C.P.L. § 440.10, it must also be denied. The defendant presents two claims that were decided in a previous motion to vacate the judgment. He claims that the prosecutor used false evidence to convict him, and that his trial counsel provided ineffective assistance of counsel by failing to investigate defendant's alibi claim, and failing to object to the victim's identification

of the defendant. C.P.L. § 440.10 (3) (b) provides that a court *may* deny a motion to vacate judgment when “the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state.” Therefore, since these claims were previously determined on the merits, this portion of his motion to vacate judgment is denied pursuant to C.P.L. § 440.10 (3) (b). Additionally, with respect to the defendant’s claim that his counsel was ineffective for failing to object to the victim’s identification of the defendant, that application must be denied as this issue could have been raised upon defendant’s direct appeal but he unjustifiably failed to do so. C.P.L. § 440.10 (2) (c).

Defendant further claims that the evidence presented at trial was legally insufficient to convict him, and that his sentence was excessive. These claims are procedurally barred as they were previously raised, and decided on the merits, in defendant’s direct appeal. C.P.L. § 440.10 (2) (a). In affirming the judgment of conviction, the Appellate Division held that the evidence “was legally sufficient to establish the defendant’s guilt beyond a reasonable doubt.” The Court further determined that “[t]he defendant’s sentence was not excessive.” *People v. Rogers*, 220 A.D.2d 542, (2d Dep’t 1995), *lv. den.*, *People v. Rogers*, 87 N.Y.2d 924 (1996). Additionally, defendant’s claim that his sentence was excessive is further barred by C.P.L. § 440.20 (2), which states that the court *must* deny a motion to set aside the sentence “when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence.” Since these issues were previously determined as part of defendant’s direct appeal, this portion of his motion to vacate judgment must be summarily denied.

Defendant further claims that his trial counsel was ineffective by 1) failing to properly represent him in the grand jury; 2) coercing him to waive his *Antomarchi* rights to plead the trial court; 3) failing to object to the prosecutor’s alleged refusal to call Rodriguez as a witness at the *Wade* hearing; and 4) failing to object to allegedly inconsistent testimony during the trial. These claims must be denied as defendant was in a position to raise those claims in his original motion but failed to do so. C.P.L. § 440.10 (3) (c); *People v. Cochrane*, 27 A.D.3d 659, 660 (2d Dep’t 2006); *People v. Dover*, 294 A.D.2d 594, 596 (2d Dep’t 2002).

Defendant’s claims that his counsel failed to object to the People’s alleged refusal to call a witness at the *Wade* hearing, as well as to allegedly inconsistent testimony during the trial are procedurally barred because they could have been raised on direct appeal, and were not. C.P.L. § 440.10 (2) (c) provides that a court *must* deny a motion to vacate judgment when sufficient facts appear on the record to permit appellate review of the issue raised, but the defendant has unjustifiably failed to raise the issue on direct appeal. *See, People v. Cochrane*, at 660; *People v.*

*Jossiah*, 2 A.D.3d 877 (2d Dep't 2003), *lv denied*, 2 N.Y.3d 742 (2004). Thus, these claims are barred pursuant to C.P.L. § 440.10 (2) (C). Furthermore, defendant's claim that trial counsel did not object to Mr. Rodriguez not testifying at the *Wade* hearing is incorrect. A review of the court records indicate that Rodriguez did in fact testify at the hearing on June 9, 1993, and that defense counsel effectively cross-examined him. *See, Hearing transcript*, pg. 117- 138. Thus, this claim is denied as without merit.

With respect to defendant's claim that he was denied effective assistance of trial counsel by counsel's advising him to waive his *Antomarchi* rights, that application must be denied pursuant to C.P.L. § 440.10 (3) (c), as defendant was in a position to raise that claim in his original motion, however, he failed to do so. Additionally, defendant fails to provide sufficient sworn allegations to support his claim. *See*, C.P.L. 440.30 (4) (b), (d). This claim is procedurally deficient, as defendant makes only bare, conclusory allegations. *See, People v. Session*, 34 N.Y.2d 254, 256 (1974); *People v. Montalvo*, 258 A.D.2d 353 (1<sup>st</sup> Dep't 1999).

Moreover, this claim is contradicted by documentary evidence and court records. C.P.L. § 440.30 (4) (c), (d). On June 8, 1993, when the defendant first indicated that he wished to be present at side conferences with jurors, Justice Anne Feldman explained the defendant's two options. She indicated that if the defendant was willing to waive his *Antomarchi* rights, she would arrange for the defendant to be present during the sidebar with a particular juror if either defense counsel, or defendant after a discussion with his counsel, thought he should be present. Justice Feldman then indicated that her alternate procedure, should the defendant not wish to waive, was that all juror statements would be held in open court. She informed the defendant that jurors were "not inclined to say things if he is in the room." *See transcript*, pg. 59-61. Justice Feldman told the counsel to discuss it with his client. After another discussion was held between trial counsel and the defendant, counsel indicated that the defendant did wish to waive his right to be present at side bar conferences with jurors. *See transcript*, pg. 61. The court made sure that the defendant understood that he would be advised by counsel what the juror said at the side bar conference, and if the defendant then wished to be present the court would make the arrangement to do so. In light of this record, the court finds no support for the defendant's conclusory allegation that the defense attorney coerced the defendant to waive his right to be present at side bar conferences. Based on the defendant's failure to submit sufficient sworn allegations to support his claim, as well as the contradiction from record evidence, the court denies the motion to vacate the judgment on this claim.

Defendant's further claims of ineffective assistance of counsel must be denied without a hearing. Defendant claims that his trial counsel was ineffective because he did not properly

represent him in the grand jury. This claim must be denied pursuant to C.P.L. § 440.10 (3), as defendant was in a position to raise that claim in his original motion, however, he failed to do. Additionally, this claim is conclusory, and is not supported by sufficient sworn allegations. The defendant has not shown sufficient facts to entitle him to a hearing. *See*, C.P.L. § 440.30 (4) (b), (d). The defendant does not explain how his attorney's conduct with respect to the grand jury was inadequate. Therefore, the claim is procedurally deficient, as the defendant makes only bare, conclusory allegations. *See, People v. Session* at 256. Therefore, the court denies to vacate judgment on this claim.

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

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 N.Y. 3d 174, 177; *People v. Benevento*, 91 N.Y.2d 708, 714. 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. 668, (1984). 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. *People v. Baldi*, 54 N.Y.2d 137, 146-147; *people v. Bussed*, 6 A.D.3d 621, 622. 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 the 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).

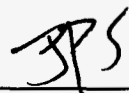
In the present case, the record shows that his attorney delivered cogent and coherent opening and closing statements, raised proper and relevant objections, and extensively and effectively cross-examined the People's witnesses, all actions appellate courts have held to constitute 'meaningful representation. *People v. Hewlett*, 71 N.Y.2d 841, 842. In fact, counsel was able to obtain an acquittal on the two intentional murder charges (P.L. § 125.25 [1]), as well as a dismissal on the burglary charge.

The defendant has failed to meet his burden 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.

Accordingly, the defendant's motion to vacate the judgment of conviction is denied. This constitutes the decision and order of the Court.

Dated: November 7, 2008

ENTER,



James P. Sullivan, J.S.C.

HON. JAMES P. SULLIVAN  
Justice N.Y.S. Supreme Court

**ENTERED**  
NOV 10 2008  
NANCY T. SUNSHINE  
COUNTY CLERK