

People v Williams

2008 NY Slip Op 33562(U)

December 19, 2008

Supreme Court, Kings County

Docket Number: 8140/97

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: December 19, 2008

-against-

DECISION & ORDER

ISHMEL WILLIAMS

Indictment No. 8140/1997

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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 and actual innocence. The motion is denied both procedurally and on the merits.

On July 26, 1997, the Collins family hosted their annual backyard barbecue party at their home on East 16th Street in Brooklyn. Although defendant was not invited, defendant and several friends from nearby Marborough Road attended the party. When the party ended at around 1:00 a.m., people streamed out of the backyard and into the street in front of the house. Defendant fired several gunshots into the air as the crowd gathered. Neftfali Collins and several others confronted defendant for “disrespecting” the house. The scene escalated into a brawl and spilled over to the intersection of Cortelyou Road. In the midst of the fight, defendant again fired the gun into the crowd, injuring three people and killing Neftali Collins with a single bullet.

For his criminal conduct, defendant was charged with two counts of murder in the second degree (PL § 125.25[1], [2]), manslaughter in the second degree (PL § 125.15[1]), three counts of assault in the first degree (PL § 120.10[3]), one count of criminal possession of a weapon in

the second degree (PL § 265.01) and one count of criminal possession of a weapon in the third degree (PL § 265.02[4]).

At trial, four eyewitnesses identified defendant as the shooter of the second round of shots that killed Collins and injured three others. The defense produced seven witnesses who testified that, by circumstantial evidence, defendant could not have been the shooter. Gabriel Rivera, whose affidavit accompanies defendant's motion, was one of those witnesses.

Defendant was found guilty by the jury of manslaughter in the first degree and three counts of assault in the first degree. On May 21, 1998, he was sentenced to a term of imprisonment of twelve to twenty-four years for the homicide, to be served consecutively to three concurrent terms of imprisonment of three to six years for the assaults.

Soon after sentencing, defendant moved to vacate his judgment of conviction on November 15, 1998. Defendant claimed that he had newly discovered evidence from a witness who had seen the shooter and would have testified at trial that the shooter was not defendant. Although this court granted a hearing, defendant was not able to produce competent evidence tending to prove that someone other than defendant was the shooter. On March 5, 1999, defendant's motion was thus denied.

Defendant also appealed his conviction, arguing (1) that the conviction was against the weight of the evidence, and (2) that the court should have discharged a juror during the trial after it was discovered that he had not disclosed his place of employment during jury selection. The Appellate Division unanimously affirmed defendant's conviction (*People v Williams*, 272 AD2d 563 [2d Dept 2000]). Leave to appeal to the Court of Appeals was denied, as was reconsideration of the application for leave to appeal (*People v Williams*, 95 NY2d 859 [2000]);

People v Williams, 95 NY2d 893 [2000]).

Defendant's instant motion is accompanied by an affidavit from Gabriel Rivera, who states when that he drove several men involved in the street fight to the subway station after the Collins party, one of them said, "I shot". Now, defendant argues that he was denied his right to the effective assistance of counsel because his trial attorney was aware of this allegedly exculpatory evidence but failed to elicit trial testimony from Gabriel Rivera concerning that particular incident. Defendant claims that Rivera's testimony would have proven that this man, and not defendant, was the shooter. Defendant also insists that the People did not turn over notes from the detectives' investigation and that counsel was at fault for failing to request this alleged *Rosario* material. Finally, defendant claims that he is actually innocent.

The instant claims are procedurally barred by defendant's failure to raise them in either his previous CPL § 440.10 motion or on appeal (CPL § 440.10[3][c], [2][c]). Defendant has had prior opportunities to raise these claims before this court and the appellate court, yet he has neglected to do so.

The instant motion is also without 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 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]).

Furthermore, Rivera’s proposed testimony constituted hearsay that would not have been relevant under the circumstances and therefore would have been inadmissible at trial. “Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it make determination of the action more probable or less probable than it would be without the evidence (*People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Lewis*, 69 NY2d 321, 325 [1987]). In this case, Rivera claims that an unidentified person merely uttered the words, “I shot” and nothing more. Those words alone are insufficient to establish a connection to the incident in question or to prove whether or not defendant fired the fatal shots. Furthermore, the identity of the speaker is unknown and cannot be verified. For these reasons, the statement would not have been admissible in court.

Given the unreliable and irrelevant nature of Rivera's statement, counsel cannot be faulted for making the competent decision not to introduce such testimony. Rather, counsel appropriately followed the rules of evidence and the conventions of proper trial practice. "When viewed in totality as of the time of trial, [counsel's] professional services at trial did not deprive this defendant of meaningful representation" (*Flores* at 189). The record as a whole demonstrates that counsel represented his client "diligently and vigorously" during the course of the trial by calling sixteen defense witnesses, thoroughly cross-examining the People's witnesses, raising appropriate objections and delivering cogent "opening and closing statements that were consistent with defendant's defense" (*id.*). Based on the overall fairness of the proceedings and defendant's failure to explain how counsel's conduct prejudiced the outcome of the trial, there is no basis to grant defendant's claim of ineffective assistance of counsel.

With respect to defendant's claim that counsel should have requested additional *Rosario* material, the allegations are "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..." (CPL § 440.30[4][b]). It is thus rejected on procedural grounds.

Defendant's claim of actual innocence is also rejected because he has presented no more than self-serving, conclusory allegations that lack evidentiary support. Defendant offers as proof only Rivera's affidavit and his own allegation that he told his lawyer that he was innocent. As discussed above, Rivera's affidavit is irrelevant and unreliable to the extent that it does not establish that defendant was not the shooter who killed Collins. The statement "I shot" lacks any context to establish the identity of the speaker or any connection at all to the particular incident in question. Rivera's credibility is further undermined by several inconsistencies between his

affidavit and his trial testimony. Defendant's own claim of innocence to his attorney is also inadequate because it is self-serving and without any other evidentiary support (CPL § 440.30[4][b], [d]). Thus, defendant's claim of innocence is without merit.

Accordingly, the motion is denied both procedurally and on the merits.

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.

