

**People v Peters**

2009 NY Slip Op 30572(U)

January 12, 2009

Supreme Court, Kings County

Docket Number: 5267/97

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART 3

-----X	
THE PEOPLE OF THE STATE OF NEW YORK	: DECISION AND ORDER
	: :
-against-	: :
	: January 12, 2009
	: :
CLIFFORD PETERS,	: :
	: :
Defendant.	: Indictment No. 5267/97
-----X	
JAMES P. SULLIVAN, J.	

The defendant has moved, *pro se*, for an order pursuant to CPL § 440.10, vacating the judgment of the Supreme Court, Kings County, convicting him, after a jury trial, of murder in the second degree (Penal Law § 125.25[2]); and criminal possession of a weapon in the second degree (Penal Law § 265.03). In a motion dated May 6, 2008, defendant alleges that his trial counsel provided ineffective assistance of counsel. The People have filed an answer in opposition. For the reasons stated below, the motion is denied.

***Procedural History***

The charges under Indictment 5267/97 arose out of an incident occurring on April 13, 1997, where the defendant pulled out a gun and shot Collic Dunbar in the abdomen, leg, and arm, causing his death. Defendant was convicted, after a jury trial, of murder in the second degree (§125.25[2]), and criminal possession of a weapon in the second degree (Penal Law §265.03). Defendant was sentenced to concurrent prison terms of twenty-four to life for the murder and seven and one-half to fifteen years for the weapon possession (Juviler, J., at trial and sentence).

The defendant’s conviction, and sentence, was upheld by the Appellate Division, Second Judicial Department. *People v. Peters*, 290 A.D2d 520 (2d Dep’t 2002). Leave to appeal to the Court of Appeals was denied. *People v. Peters*, 97 N.Y.2d 759 (2002) (Smith, J.). Defendant filed a petition for a writ of *habeas corpus*, dated June 9, 2003, in the United States District Court for the Eastern District of New York. The defendant then filed a motion, dated June 13, 2003, pursuant to CPL § 440. 10 to vacate the judgment of conviction, alleging that his trial counsel was ineffective for failing to call Rasheem Smith as a material witness at trial, and for failing to request a missing witness charge as to a witness named “James.” In an order dated September 11, 2003, the defendant’s request to hold his petition for a writ of *habeas corpus* in abeyance pending the disposition of his state court proceeding was granted (Trager, U.S.D.J.). On October 8, 2003, the defendant’s 440.10 motion was denied (Silverman, J.). The Court found that the defendant received meaningful representation. Defendant’s application for leave to appeal the Supreme Court’s denial of his motion to vacate his judgment of conviction to the Appellate Division was granted on January 30, 2004 (Prudenti, J.). Defendant was assigned counsel for purposes of the appeal on April 2, 2004.

Defendant, represented by new counsel, filed his brief in the Appellate Division in June 2005.

Defendant claimed that he was denied due process by the Supreme Court's summary denial of his C.P.L. § 440.10 claim that counsel was ineffective for failing to call an eyewitness who would have testified that the defendant was not the shooter.

On April 18, 2006, the Appellate Division unanimously affirmed the order of the Supreme, Kings County (Silverman, J.), denying, without a hearing, the defendant's motion to vacate his judgment of conviction, on the grounds of ineffective assistance of counsel. The Appellate Division determined that when viewed objectively, the trial record demonstrated a legitimate and strategic reason for trial counsel to have not called the witness in question to testify at trial, and as such, defendant failed to demonstrate that he was deprived of meaningful representation. *People v. Peters*, 28 A.D.3d 686 (2d Dept' 2006). By certificate dated July 21, 2006, leave to appeal to the Court of Appeals was denied. *People v. Peters*, 7 N.Y.3d 793 (2006) (Smith, J.). The defendant then, *pro se*, sought leave for a writ of *certiorari* to the United States Supreme Court, which was denied on January 8, 2007. *Peters v. New York*, 127 S.Ct. 964, 166 L. Ed. 2d 733 (2007).

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

In the current motion, the defendant argues that his lawyer was ineffective by failing to investigate and call two witnesses who would have testified at trial that someone other than the defendant shot the victim. In support of his ineffective counsel claim, defendant has included affidavits from Terrence Slater and Lewis Smoke who claim that the victim, Collic Dunbar, was not shot by the defendant, but by an individual named as "Jay Jackson" or "Jason Jackson." Both individuals state that they were available to testify, but were never interviewed by the police, or any other individuals at the time of the incident or immediately thereafter. The defendant does not claim that he informed his trial counsel regarding the existence of these witnesses. The People indicate that they had a telephone conversation with trial counsel on August 11, 2008. In this conversation, the People indicate that trial counsel, Mr. Lewis Cohen, Esq., stated that he did not have a specific recollection of the defendant's case. Mr. Lewis further stated that his routine practice was to go to the crime scenes, or locations of an incident and investigate the existence of any possible witnesses. In this conversation, Mr. Cohen further stated that had he been informed by his client that possible witnesses did exist, he would have made every effort to locate and speak to them. ( Affirmation of Prosecutor, at 7).

Initially, defendant's motion is procedurally barred. He filed a previous C.P.L. § 440.10 motion and "was in a position adequately to raise the ground or issue underlying the present motion but did not do so. See, C.P.L. § 440.10 (3) (c) ; *People v. Dominguez*, 257 A.D.2d 511 (1<sup>st</sup> Dep't 1999); *People v. Cochrane*, 27 A.D.3d 659, 660 (2d Dep't 2006); *People v. Dover*, 294 A.D.2d 594 (2d Dep't 2002). Specifically, defendant raised the argument of ineffective assistance of counsel in his first motion claiming that his counsel was ineffective for failing to call another witness, Rasheen Smith, an alleged eyewitness who defendant claimed had identified someone else as the shooter. In the present motion, the defendant for the first time, approximately ten years after his conviction, mentions the names of Terrence Slater and Lewis Smoke as possible eyewitnesses to

the incident. The defendant did not raise this claim in his previous motion, nor in any subsequent proceedings.

Further, the defendant has not demonstrated good cause for not raising these claims in his previous motion. Indeed, a delay in making a claim can be considered in evaluating the seriousness and validity of a claim and may undermine the claim's legitimacy. *See, People v. Nixon*, 21 N.Y.2d 338, 352 (1967). The defendant has provided no sufficient explanation for his failure to provide the names of William Slater, who is incarcerated at defendant's current correctional facility, and Lewis Smoke, until approximately ten years after his conviction. Thus, this claim 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).

Additionally, the defendant does not claim in his motion that he ever notified defense counsel of the existence of these witnesses. Nor does he provide support for his allegation that trial counsel was aware of the existence of these witnesses prior to the trial. Furthermore, although the defendant has included sworn affidavits from Terrence Slater and Lewis Smoke, neither one of them asserts that they informed trial counsel, or the authorities, that they were available to testify at defendant's trial. Thus, this claim is procedurally deficient, as defendant makes only bare, conclusory allegations which do not substantiate or tend to substantiate "all the essential facts". *See*, C.P.L. 440.30 (4) (b); *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 court records. C.P.L. § 440.30 (4) (c), (d). The allegations of Slater and Smoke that they were willing to testify at defendant's trial, and could have been located at the scene following the incident are contradicted by the record. Detective Caffrey testified that he conducted several canvasses of the area after the shooting of Collic Dunbar. However, despite his investigation, no one other than Grayson Cooper came forward and admitted to being an eyewitness to the shooting. (Tr. 307). Furthermore, the allegation by Slater and Smoke that they were present during the shooting is contradicted by the record. Grayson Cooper testified that the only people remaining at the location at the time of the shooting were himself, Collic Dunbar, and an individual by the name of "James". Cooper testified that everyone, including the people located on the sidelines, had walked off when the game ended and that the defendant was alone when he shot the deceased. (Tr. 223-24). In light of this record, the court finds no support for defendant's allegations that Terrence Slater and Lewis Smoke were present at the time of the shooting, and that they were available and willing to testify at trial. Furthermore, the court finds no support for the defendant's conclusory allegation that trial counsel was aware of the existence of these witnesses. 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.

Even if this court were to review the defendant's claim on the merits, his motion must be denied. CPL §440.30 (3) (b). The right to effective assistance of counsel is guaranteed by the

Federal And State Constitutions (US Const 6<sup>th</sup> Amend; NY Const, art 1 §6; *People v. McDonald*, 1 NY3d 109, 113).

In *Strickland v. Washington*, 466 U.S. 668 (1984), 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 such a claim, a "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *McDonald*, 1 N.Y.3d at 113. In *People v. Baldi*, 54 N.Y.2d 137, 147, (1981), 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*. The Court of Appeals has indicated that "a defendant need not fully satisfy the prejudice test of *Strickland*. We continue to regard defendant's showing of prejudice as significant, but not dispositive, element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole." *People v. Stultz*, 2 N.Y.3d 277 (2004).

"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 N.Y.2d 708, 714 (1998). "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 integrity of the judicial process as with the issue of guilt or innocence." *Benevento*, 91 N.Y.2d at 714, quoting *People v. Donovan*, 13 N.Y.2d 148, 153-154.

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." *People v. Rivera*, 71 N.Y.2d 705, 709; see, *People v. Taylor*, 1 N.Y.3d 174, 177, *Benevento*, 91 N.Y.2d at 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 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. 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).

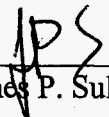
In the present matter, the record shows that the defendant's attorney delivered cogent and

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.

The defendant has failed to meet his burden of proving that trial counsel has 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: January 12, 2009

  
James P. Sullivan, J.S.C.

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

**ENTERED**  
**JAN 14 2009**  
**NANCY T. SUNSHINE**  
**COUNTY CLERK**