

People v Maldonado

2009 NY Slip Op 31471(U)

April 2, 2009

Supreme Court, Kings County

Docket Number: 7049/1994

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 31

-----X
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Michael A. Gary

Date: April 2, 2009

-against-

DECISION & ORDER

ULYSSES MALDONADO

Indictment No. 7049/1994

-----X

Defendant moves for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of counsel.

On October 31, 1992, defendant and two accomplices, all armed with guns, entered a Brooklyn jewelry store with the intent of committing a robbery. When the store manager approached from the back of the store, gunfire ensued and one person was killed and a second was left paralyzed from a gunshot wound to the spine. Although his accomplices were arrested shortly after the crime, defendant eluded apprehension for close to two years by hiding in his sister's apartment. Defendant was finally arrested on June 9, 1994, at which time he made a spontaneous statement to the arresting officer admitting to his role in the botched robbery. Defendant also gave a videotaped confession at the police precinct that same night.

For his participation in the shooting, defendant was charged with murder in the second degree (PL §125.25[3]) and one count of assault in the first degree (PL §120.10[4]), and other crimes. In the pre-trial *Huntley* hearing, defendant's motion to suppress his confessions as involuntary was denied.

On August 4, 1995, defendant was convicted by jury verdict of murder in the second

degree and assault in the first degree and sentenced to concurrent terms of imprisonment of a minimum of 25 years to a maximum of Life and 5 to 15 years, respectively.

Defendant argued on appeal that he was denied the effective assistance of trial counsel because counsel should have called defendant's two accomplices as trial witnesses. His conviction was affirmed and leave to appeal to the Court of Appeals was denied (*People v Maldonado*, 247 AD2d 555 [2d Dept 1998]; *People v Maldonado*, 91 NY2d 1009 [1998]).

A petition for a federal habeas corpus followed in which defendant raised the same ineffective assistance of counsel claim addressed in his state appeal. The Court found that defendant's petition was time barred and, in the alternative, was without merit (*Maldonado v Artuz*, 275 F Supp2d 387 [EDNY 2004]). In so doing the Court held that the Appellate Division's conclusion was "reasonable" (*Id.* at 393).

Defendant subsequently applied for a writ of error coram nobis, this time asserting that appellate counsel was ineffective for filing a short brief, raising an allegedly meritless issue, and failing to address other issues that defendant deemed meritorious. The omitted issues included contentions that defendant's videotaped confession should have been suppressed because it was made after defendant invoked his right to counsel, and that trial counsel, in his closing remarks, 'conceded' that defendant was guilty of the crimes charged. Defendant's petition was denied on the grounds that he had failed to establish that he was denied the effective assistance of appellate counsel (*People v Maldonado*, 3 AD3d 539 [2d Dept 2004]).

In the instant motion defendant again argues that he was denied the effective assistance of counsel. He now claims that trial counsel failed to fully investigate and present potential witnesses and to adequately challenge the voluntariness of his confession, both at the *Huntley*

hearing and at trial. In support of this claim, defendant has submitted his own affidavit and that of his sister and a neighbor, Milagros Suarez, in which they claim to have been present at the police precinct where defendant was brought after his arrest. Noemi Maldonado, defendant's sister, states that she told defendant not to speak to the police without an attorney present, that she told Detective Regina, the arresting officer, that she "did not want Ulysses to make any statements without an attorney present" and that she heard defendant request a lawyer from Regina. Suarez recounts in her affidavit that she heard Noemi Maldonado yell to defendant, "Don't talk until you get an attorney." Defendant states in his affidavit that he asked to speak to an attorney on more than one occasion.

Based on these affidavits, defendant contends that trial counsel was aware that Suarez had accompanied his sister to the precinct, that counsel should have investigated what evidence she had to offer and should have called her to testify at the suppression hearing. Defendant also contends that counsel should have called both Noemi Maldonado and Suarez to testify at trial in support of his assertion that his confession was not voluntary. In his final claim, defendant contends that counsel failed to advise him of his right to testify at the suppression hearing.

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). An attorney is "strongly presumed" to have rendered effective assistance to his client (*Strickland* at 690). To rebut this presumption, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Id.*). 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]).

In this instance, defendant’s claims fall far short of the high threshold required to substantiate an allegation of ineffective assistance of counsel. Because he has failed to establish that counsel lacked a legitimate strategy or that he was prejudiced by the execution of his defense it remains “clear that the attorney provided meaningful representation” (*see People v Maldonado*, 247 AD2d 555).

With regard to counsel’s failure to call Milagros Suarez as a witness at the suppression hearing, the affidavits submitted by defendant fail to establish that Suarez had relevant testimony to offer let alone whether counsel should even have been aware of her existence. Noemi Maldonado, whose testimony about requesting an attorney generally mirrored her affidavit, had ample opportunity to speak at the hearing of Suarez’s presence at the precinct but neglected to do

so until now, more than a decade later. Rejecting her testimony as false and contrived, the hearing court found credible Detective Regina's account which included the timely administering of Miranda warnings but not a request for an attorney or mention of Suarez. Moreover, Suarez, in her affidavit, merely states that while she was at the precinct, she only overheard defendant being told by his sister not to speak to the police without an attorney. She does not claim to have either heard Noemi Maldonado instruct the detective to refrain from speaking to defendant absent an attorney or to have heard defendant personally ask for a lawyer. In any event, defendant had already made an inculpatory statement before arriving at the precinct and his subsequent videotaped repetition was relaxed and showed none of the strains alleged in the affidavits. Under the circumstances, counsel had no reason to call Suarez and the admissibility of defendant's statements was unaffected by her absence.

Counsel's decision not to present Suarez or defendant's sister as witnesses at trial is equally reasonable and strategically sound. Suarez's testimony would have been presented for the same purpose as in the hearing, to corroborate the allegations of Noemi Maldonado.. But as indicated by her affidavit, Suarez had not observed any direct, unequivocal request by defendant or his sister for an attorney. Her proposed testimony, therefore, had little bearing on the voluntariness of defendant's statements. Moreover, in light of the hearing court's obvious disapproval of Noemi Maldonado's testimony, Maldonado's credibility had been so severely undermined that nothing was left to corroborate. Thus, the presentation of either woman as a witness at trial would not have advanced defendant's case.

Defendant's final claim that he was never informed of his right to testify at the suppression hearing is rejected on procedural grounds. CPL § 440.30(4)(d) permits a court to

deny a motion to vacate judgement without a hearing if an essential allegation of fact is made solely by the defendant without the support of other affidavits or evidence where under the circumstances no reasonable possibility exists that the allegation is true. In this instance, defendant has failed to corroborate his self-serving affidavit with evidence of any sort, most notably absent is an affidavit or explanation from trial counsel (*see People v Hayward*, 46 AD3d 209 [1st Dept 2008]; *People v Woodard*, 23 AD3d 771 [3d Dept 2005]; *People v Taylor*, 211 AD2d 603 [1st Dept 1995]). Considered in the context of counsel's performance having passed muster under both state appellate and federal habeas review and in light of defendant's diminished credibility for having relied on his sister's discredited account of the precinct encounter, it is extremely unlikely that counsel concealed from defendant his right to testify at the hearing. Whether counsel advised defendant not to testify need not be considered here. It is sufficient that defendant was not prejudiced by his failure to testify at the hearing because it is clear from the record that his testimony would not have altered the findings of the hearing court.

Defendant's credibility is further weakened by the substantial period of time that passed before submitting this motion. In *People v Nixon*, 21 NY2d 338, 352 [1967] the Court held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claim. The Court stated, "revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are...." Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255

AD2d 837, 838 [3d Dept 1998]). The weakness of defendant's position is compounded by his failure to offer a reason for the extremely long delay after having submitted a number of other post-judgement motions. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (*see People v Degondea*, 3 AD3d 148, 160 [1st Dept 2003]).

Accordingly, defendant's 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:



MICHAEL A. GARY, J.S.C.

ENTERED
APR - 6 2009
NANCY T. SUNSHINE
COUNTY CLERK