

People v Antoine

2009 NY Slip Op 31487(U)

May 21, 2009

Supreme Court, Kings County

Docket Number: 7093/02

Judge: Jill Konviser

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 26**

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

-against- :

Ind. No. 7093/02

TED ANTOINE , :

Defendant. :

----- X

JILL KONVISER, JUSTICE:

On October 4, 2002, the defendant shot and killed Reynold Guerrier in front of Guerrier's young son and another eyewitness. The defendant admitted to the killing in written and videotaped confessions. On October 16, 2003, the defendant pleaded guilty to murder in the second degree, (Penal Law § 125.25[2]), before a now retired judge, with the understanding that he would be sentenced to an indeterminate prison term of fifteen years to life. On November 7, 2003, the promised sentence was imposed. On February 10, 2009, the defendant's conviction was unanimously affirmed by the Appellate Division, Second Department. See People v. Antoine, 59 A.D.3d 560 (2d Dept. 2009).

The defendant has now filed a pro se motion to vacate the judgment of conviction under Criminal Procedure Law §440.10 on the grounds that: (1) his guilty plea was involuntary and coerced by the Court; (2) the Court failed to advise him adequately of the rights he was giving up by pleading guilty; (3) the plea allocution was insufficient to show that the defendant meant to plead guilty to depraved indifference murder; (4) the circumstances surrounding his killing of Guerrier did not constitute depraved indifference murder; and, (5) counsel provided him with ineffective representation in connection with his guilty plea. The People filed an affirmation and memorandum of law in opposition to the defendant's motion. For the reasons that follow, the defendant's motion to vacate the judgment of conviction is denied without a hearing.

Procedural History

On the morning of October 4, 2002, the defendant shot and killed Reynold Guerrier, his mother's boyfriend, in front of two eyewitnesses, one of whom was Guerrier's young son; he later fully confessed to the shooting in written and videotaped statements. The defendant effectuated this crime by slashing the tires on Guerrier's car the night before the shooting to insure that Guerrier would not be able to leave his home. The morning after the defendant slashed Guerrier's tires, he waited on the street outside of Guerrier's home and shot and killed him at close range. The defendant admitted in his written statement to the police that he "pulled out the gun, pointed it at" Guerrier and "shot it" at him "because of all the anger I had for him [Guerrier] over the years from all the abuse[.]" The defendant, who was seventeen years old at the time of the shooting, explained in his written statement that the abuse had ended four years before the shooting.¹

The defendant was charged by a grand jury with two counts of murder in the second degree and criminal possession of a weapon in the second degree. On October 16, 2003, after a suppression hearing was held, the trial court ruled that the defendant's written statement, videotaped statement, and lineup identification would be admissible at trial. Thereafter, the trial court asked the defendant whether he wished to plead guilty or proceed to trial. After a bench conference with the attorneys, the trial court told the defendant that the People were unwilling to reduce the charges against him, which included two counts of murder in the second degree. The trial court however, told the defendant, that it was "prepared to offer . . . the least the law could give you for the crime of this nature [murder in the second degree], which is fifteen years to life. That is the only offer I could make you." Transcript at 4. The trial court explained to the defendant that it would accept a guilty plea to murder

¹The defendant further stated in his written statement that he "didn't come to kill him" and that he "was just trying to get him scared so he could leave me alone." The entirety of the defendant's written statement is set forth on pages 3-6 of the brief the People filed with the Appellate Division, Second Department, in connection with the defendant's direct appeal.

in the second degree only if the defendant admitted committing the crime.

The record shows that the trial court had an extensive discussion with the defendant emphasizing that it was his choice whether to plead guilty or proceed to trial. If he rejected the plea, the trial court told the defendant that he would receive a fair trial. The trial court also discussed the strength of the People's case and explained to the defendant, inter alia, that based on the anticipated testimony from two eyewitnesses who would identify him in court as the shooter and his written and videotaped statements in which he confessed to the shooting, that the People had "a lot of evidence" against him and had a "strong case" Transcript at 4, 8.² Indeed, the trial court informed the defendant that it would be difficult for him to persuade the jury that he was lying when he confessed to the police or that it was not in fact him who had made the confessions. The trial court also explained the risks of going to trial and emphasized that while the defendant could still receive a sentence of fifteen years to life if convicted after trial, he could possibly receive a higher sentence based on additional information regarding the case learned by the trial court during the course of the trial. Transcript at 4-9.

The defendant initially informed the trial court, through counsel, that he was "hesitant to take the plea because he didn't do it." Transcript at 6. Immediately prior to the anticipated entrance into the courtroom of a panel of prospective jurors, however, the defendant informed the trial court that he wished to plead guilty and that he in fact "did it." Transcript at 9. Thereafter, the following colloquy ensued:

²The record shows that the trial court stated, inter alia, "[t]he jury is going to hear your videotape. They are also going to have an opportunity to read your handwritten statement and they are going to hear testimony from two witnesses who say you're the person who committed the crime I don't know if the jury is going to believe it or not believe it. If they believe that and they accept that they have no choice but to find you guilty." Transcript at 3.

The Court: Mr. Antoine, stand up for a minute please. I want you to be sure you understand my questions and that when you're answering them you're answering them truthfully. What is your name?

The Defendant: Ted Antoine

The Court: How old are you?

The Defendant: Eighteen.

The Court: How far did you go in school?

The Defendant: About ninth grade.

The Court: [Defense counsel] . . . is your lawyer; is that right?

The Defendant: Yes.

The Court: You were talking about this case and about this plea?

The Defendant: Yes.

The Court: Now, you understand that we have a jury standing out in the hall. If we wanted to we could start the trial. We had the hearing. We heard your statement. We are prepared to bring in a jury and try to select a jury that will give you a fair and impartial trial. Do you understand we are ready to do that?

The Defendant: I understand.

The Court: Do you understand when the jury comes in we tell them that you're denying your guilt. We don't tell them anything about the statement or anything like that. We select a jury and that jury will hear the evidence in this case and decide whether the District Attorney presented evidence that convinces them beyond a reasonable doubt that you are guilty; do you understand that?

The Defendant: Yes, I know.

The Court: Do you want to have a trial?

The Defendant: No.

The Court: You want to plead guilty?

The Defendant: Yes.

The Court: Are you pleading guilty voluntarily?

The Defendant: Yes.

The Court: Has anyone threatened you or influenced you to plead guilty?

The Defendant: No.

The Court: If you want me to accept the plea and give you the promised sentence of fifteen years to life then you have to tell me about the crime you committed. What happened?

The Defendant: I came up to my stepfather and shot him.

The Court: You came up to him and what?

The Defendant: I shot him.

The Court: You killed him?

The Defendant: Yes.

The Court: Did you intend to kill him?

The Defendant: No.

The Court: What did you do? You pulled the trigger?

The Defendant: Yes.

The Court: You understand pulling the trigger when somebody is at close range is what we call depraved indifference murder. In other words,

a reasonable person wouldn't do that under that kind of circumstance; do you understand that?

The Defendant: Yes.

The Court: So even if you didn't intend to do it the way you came out, you acted under circumstances that would show that you didn't obey the common laws of decency or the common laws of cautious behavior; do you understand?

The Defendant: Yes.

The Court: Is that true?

The Defendant: Yes.

The Court: Where did this happen?

The Defendant: Avenue D.

The Court: And who was the person you killed?

The Defendant: Reynold Guerrier.

The Court: What was he to you?

The Defendant: My younger brother's father.

The Court: Was he your stepfather?

The Defendant: No.

The Court: He was not your stepfather?

The Defendant: No. He didn't get married to my mother.

The Court: I beg your pardon?

The Defendant: He didn't get married to my mother.

Transcript at 10-14. The case was then adjourned until November 7, 2003 when the promised sentence of fifteen years to life was imposed.

In April 2008 the defendant, through appellate counsel, filed a brief in the Appellate Division, Second Department in which he argued that his guilty plea was involuntary as it was induced by misleading and coercive statements made by the trial court. Specifically, the defendant claimed that the trial court coerced his guilty plea by misleading him about the strength of the People's case. The defendant argued that the trial court, in its discussions with the defendant prior to the entry of the plea, ignored the possibility that the circumstances of the shooting showed that the defendant was guilty of a less culpable offense such as manslaughter in the first or second degree and, instead, falsely led him to believe that his confessions to the crime and the anticipated testimony identifying him as the shooter would likely result in a murder conviction if he went to trial.

The defendant further claimed in his appellate brief: (1) that his plea was not knowing and voluntary as the Court failed adequately to inform him of the rights that he was giving up by pleading guilty; (2) the plea allocution was insufficient to show that the defendant meant to plead guilty to depraved indifference murder and the Court's misleading statements during the allocution caused him to plead guilty to murder; and, (3) the circumstances of the shooting did not constitute depraved indifference murder.

On February 10, 2009, the Appellate Division, Second Department, unanimously affirmed the defendant's conviction. See People v. Antoine, 59 A.D.3d 560 (2d Dept. 2009). The Court rejected the defendant's claim "that his plea of guilty was not voluntary because it was coerced" as such claim was "unpreserved for appellate review" and the Court declined to review the defendant's coercion claim in the interest of justice. Id. The Court also held that "the defendant's claim that his plea and waiver were not intelligently, knowingly, and voluntarily made because the court failed to specifically enumerate all of the rights to which he was entitled is without merit[.]" Id. The defendant's

challenge to the facial sufficiency of the plea allocution was also rejected as the Appellate Division ruled that “the Supreme Court made an inquiry sufficient to conclude that the defendant meant to plead guilty to depraved indifference murder[.]” Id. Moreover, with respect to the sufficiency of the plea allocution, the Appellate Division held that “[b]ecause the court made a further inquiry to ensure that the plea was knowing and voluntary, and the defendant did not complain about the court’s remedial action, the defendant has waived any further challenge to the allocution[.]” Id. Finally, the Court ruled that “the defendant’s contention that the circumstances surrounding his shooting of the victim in this case did not constitute depraved indifference murder was forfeited by his plea of guilty.” Id.

The Motion Before the Court

The defendant’s motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is copied almost verbatim from the brief he filed with the Appellate Division, Second Department, in connection with his direct appeal. Thus, to the extent that the defendant is raising the very same claims that were rejected by the Appellate Division, Second Department on his direct appeal namely that -- (1) his guilty plea was involuntary and coerced by the Court; (2) his plea was not knowing and voluntary as the Court failed to inform him adequately of the rights he was giving up by pleading guilty; (3) the plea allocution was insufficient to show that the defendant meant to plead guilty to depraved indifference murder and the Court’s misleading statements during the allocution caused him to enter such a plea; and; (4) the circumstances surrounding his killing of Guerrier did not constitute depraved indifference murder -- such claims are barred from this Court’s consideration by C.P.L. §440.10(2)(a). C.P.L. §440.10(2)(a) provides that this Court “must deny a motion to vacate a judgment when . . . the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there

has been a retroactively effective change in the law controlling such issue.”

In this case, the claims set forth above were rejected on the merits by the Appellate Division, Second Department. In addition, there has been no retroactive change in the law with respect to these claims.³ Accordingly, the defendant’s motion to vacate the judgment of conviction on the grounds that: (1) his guilty plea was involuntary and coerced by the Court; (2) the Court, at the time of the plea, failed to enumerate specifically all the rights to which he was entitled; (3) the plea allocution was insufficient to show that the defendant meant to plead guilty to depraved indifference murder and the Court’s misleading statements during the allocution caused him to enter such a plea; and; (4) the circumstances surrounding his killing of Guerrier did not constitute depraved indifference murder, is denied. See C.P.L. §440.10(2)(a).

Ineffective Assistance of Counsel

The defendant claims that counsel provided him with ineffective representation in connection with his guilty plea. The Court of Appeals has held that “[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the effectiveness of counsel.” People v. Ford, 86 N.Y.2d 397, 404 (1995). As this Court finds that the defendant received an advantageous plea agreement and, further, that there is nothing in the record that casts doubt on counsel’s effectiveness, the motion to vacate the judgment on the ground that the defendant received the ineffective assistance of counsel is denied.

The Defendant Received an Advantageous Plea

In this case, the defendant’s ineffective assistance of counsel claim is rejected as the record shows he received an advantageous plea. The defendant, who shot the decedent at close range in front

³See Policano v. Herbert, 7 N.Y.3d 588 (2006).

of two eyewitnesses and admitted to the killing in written and videotaped statements, was charged with murder in the second degree and could have received up to twenty five years to life in prison if convicted after trial. See Penal Law §§70.00(2)(a), 70.00(3)(a)(i). The defendant, however, with the assistance of counsel, received the minimum sentence permitted by law for the crime of murder in the second degree – fifteen years to life. See Penal Law §§70.00(2)(a), 70.00(3)(a)(i) Under these circumstances this Court finds that the defendant received an advantageous plea arrangement. See People v. Ford, 86 N.Y.2d at 404; People v. Johnson, 54 A.D.3d 1133 (3d Dept. 2008); People v. Bristol, 273 A.D.2d 248 (2d Dept.), lv. denied, 95 N.Y.2d 904 (2000); People v. Rodriguez, 189 A.D.2d 684 (1st Dept.), lv. denied, 81 N.Y.2d 892 (1993).

Nothing in the Record Casts Doubt on Counsel’s Effectiveness

Despite the advantageous plea agreement that he received, the defendant claims, on various grounds, that counsel provided him with ineffective representation. Each of these claims has been considered and rejected as this Court finds there is nothing in the record that casts doubt on the effectiveness of counsel.” People v. Ford, 86 N.Y.2d at 404.

The Defendant’s Claim’s that Counsel was Ineffective for Failing to Advise him, Prior to the Entry of his Guilty Plea, that if he Proceeded to Trial that a Jury could have Found him Guilty of the Lesser Included Offenses of Manslaughter in the First or Second Degrees.

The defendant claims that he told counsel, prior to pleading guilty, that shooting Guerrier was a mistake and an accident, but counsel never discussed with him that this, along with his statement to the police that he had intended to scare and not shoot Guerrier, could have led the jury to convict him of a lesser included offense. Instead, the defendant maintains that counsel simply told him, in the same way that the trial court had, that if the jury believed the contents of his written and videotaped

statements along with the eyewitness testimony, that it would have no choice but to find him guilty of murder. The defendant maintains that if counsel had provided him with effective representation and fully advised him about the lesser included offenses of manslaughter in the first and second degrees, he would not have pleaded guilty to deliberate indifference murder and would have proceeded to trial.

To prevail on a claim that counsel was ineffective, a defendant bears the “high burden of demonstrating” that counsel provided him with “less than meaningful representation.” People v. Hobot, 84 N.Y.2d 1021, 1022 (1995); People v. Finley, 27 A.D.3d 763 (2d Dept.), lv. denied, 7 N.Y.3d 788 (2006). The concept of “meaningful representation is a flexible one, incapable of precise definition.” People v. Curry, 294 A.D.2d 608, 611 (3d Dept.), lv. denied, 98 N.Y.2d 674 (2002); see People v. Benevento, 91 N.Y.2d 708, 712 (1998); People v. Rivera, 71 N.Y.2d 705, 708 (1988). Indeed, the Court of Appeals has held that “[w]hat constitutes effective assistance of counsel is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation.” People v. Berroa, 99 N.Y.2d 134, 138-39 (2002), quoting People v. Baldi, 54 N.Y.2d 137, 146 (1981); see People v. Hobot, 84 N.Y.2d at 1022 (“There is no precise definition of what constitutes ineffective legal representation, nor is there a particular standard applicable to every case[.]”). As such, a court reviewing an ineffective assistance of counsel claim must analyze “the evidence, the law, and the circumstances of a particular case” in its “totality and as of the time of the representation” in order to assess whether counsel provided meaningful representation. People v. Henry, 95 N.Y.2d 563, 565 (2000); People v. Hobot, 84 N.Y.2d at 1022.

In determining whether meaningful representation was provided, “counsel’s efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective.” People v. Benevento, 91 N.Y.2d at 712; People v. Satterfield, 66 N.Y.2d 796, 799 (1985).

Rather, “it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations’ for counsel’s alleged shortcomings.” People v. Benevento, 91 N.Y.2d at 712, quoting People v. Rivera, 71 N.Y.2d 705, 709 (1988). Simple disagreement with the “strategies and tactics” employed by counsel is insufficient to meet this burden. People v. Grey, 34 A.D.3d 832 (2d Dept. 2006), lv. denied, 9 N.Y.3d 865 (2007); People v. Kliti, 25 A.D.3d 568 (2d Dept.), lv. denied, 7 N.Y.3d 758 (2006); People v. Usher, 2 A.D.3d 545 (2d Dept. 2003), lv. denied, 1 N.Y.3d 635 (2004).⁴ Instead, a defendant may prevail on an ineffective assistance of counsel claim only by establishing “that there were no strategic or other legitimate explanations for his trial counsel’s decisions.” People v. Grey, 34 A.D.3d at 832; see People v. Caban, 5 N.Y.3d 143, 152 (2005) (“to establish ineffective assistance, a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel’s allegedly deficient conduct”); People v. Williams, 24 A.D.3d 575 (2d Dept. 2005), lv. denied, 6 N.Y.3d 782 (2006) (to prevail on an ineffective assistance claim the defendant must establish a “prima facie” case that there was an absence of “strategic or other legitimate explanations for counsel’s alleged shortcomings”).

Finally, to prevail upon a claim of ineffective assistance of counsel, a defendant must overcome the strong presumption that trial counsel rendered effective assistance. People v. Louissant, 8 A.D.3d 407 (2d Dept.), lv. denied, 3 N.Y.3d 677 (2004); People v. Myers, 220 A.D.2d 461 (2d Dept.), lv. denied, 87 N.Y.2d 905 (1995); People v. Finch, 199 A.D.2d 278 (2d Dept. 1993), lv. denied, 83 N.Y.2d 804 (1994).

In this case, the defendant has failed to overcome the strong presumption that he was provided

⁴ See People v. Satterfield, 66 N.Y.2d 796, 799-800 (1985) (a court will not “second-guess whether a course chosen by defendant’s counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation.”).

with effective representation. Even assuming the truth of the defendant's allegation that counsel told him that he would be convicted of murder if the jury believed the contents of his written and videotaped statements and neglected to advise that if he proceeded to trial the jury could have convicted him of lesser included offenses, the totality of the circumstances shows that the defendant was provided with meaningful representation. People v. Benevento, 91 N.Y.2d at 712.

Given that the defendant's motion to suppress his written and videotaped statements had been denied by the trial court, counsel made the sound strategic decision to advise the defendant that if he proceeded to trial the jury likely would have convicted him of second-degree murder if it credited his written and videotaped statements. After all, the defendant's own statements, in which he detailed with great precision the circumstances under which he shot and killed Guerrier, constituted devastating and powerful evidence against him. This is especially so when considered in conjunction with the anticipated testimony from the two eyewitnesses who saw him shoot Guerrier at close range on the street in broad daylight.

Under the law as it existed at the time of counsel's representation,⁵ a jury would have considered the counts of intentional murder and depraved indifference murder in the alternative⁶ and would have had ample grounds to convict the defendant of either offense. With respect to the intentional murder charge, a jury could have found that the defendant intended to murder Guerrier notwithstanding the defendant's claims that he did not intend to kill him. See Penal Law §125.25-1. After all, the defendant admitted that he slashed Guerrier's tires the night before the shooting to insure

⁵See People v. Danielson, 9 N.Y.3d 342 (2007) (a court reviewing counsel's effectiveness is required to examine the law as it existed at the time of the representation).

⁶See People v. Gallagher, 69 N.Y.2d 525, 529 (1987) (intentional murder and deliberate indifference murder charges are required to be submitted in the alternative).

that he would be unable to leave the following morning and then returned the following morning with a loaded gun and shot Guerrier at close range. Significantly, the defendant admitted that he shot Guerrier because he was angry with him.

As this evidence strongly supports the conclusion that the defendant intentionally murdered Guerrier on the morning of October 3, 2003, counsel made a legitimate strategic decision to advise the defendant to accept the plea offer made by the trial court as a jury would have likely found him guilty of intentional murder if it credited the eyewitness testimony and his written and videotaped confessions. See People v. Hunter 23 A.D.3d 767 (3d Dept. 2005) (Due to the “likelihood that the People would have been able to secure a conviction” of the defendant after trial “[d]efense counsel’s conduct in encouraging defendant to accept the plea bargain here was nothing more than the product of reasonable and legitimate strategy in the best interest of the defendant.”); People v. Babcock, 304 A.D.2d 912 (3d Dept. 2003) (In light of “defendant’s earlier statements to police fully describing his sexual contact with the victim” counsel provided the defendant with meaningful representation by advising him to accept a plea offer as such a “plea strategy might well have been pursued by any reasonably competent attorney.”).

Likewise, viewing the law with respect to deliberate indifference murder, which was governed by People v. Register, 60 N.Y.2d 270 (1983) and its progeny at the time of the defendant’s October 2003 guilty plea, counsel reasonably concluded that the defendant’s confessions and the anticipated eyewitness testimony from two separate witnesses made it highly likely that a jury would find him guilty of this crime. See People v. Danielson, 9 N.Y.3d 342 (2007).⁷ As a jury considering the merits

⁷Under Register, depraved indifference murder required a showing of “ ‘circumstances evincing a depraved indifference to human life.’ ” 60 N.Y.2d at 276 (citation omitted). Register held that “the focus of the offense is not upon the subjective intent of the defendant, as it is with intentional murder ..., but rather upon an objective assessment of the degree of risk presented by

of a deliberate indifference murder charge at the time of the defendant's plea was required to limit its analysis to "an objective assessment of the degree of risk presented by defendant's reckless conduct," see People v. Sanchez, 98 N.Y.2d 373, 379-80 (2002), an objective assessment of the degree of risk presented by the defendant's conduct in this case shows that he shot Guerrier at close range in broad daylight on an urban public street, firing the fatal shot while Guerrier was standing in the vicinity of innocent bystanders, including at least one small child. Under then existing law, this conduct, "which presented a very high risk of death to others," arguably constituted deliberate indifference murder. See People v. Hafeez, 100 N.Y.2d 253, 159 (2003); People v. Sanchez, 98 N.Y.2d at 384 (2002) (shooting victim in chest at close range in an area where children were playing "would permit a jury rationally to conclude that defendant demonstrated an indifference to human life so depraved as to be deserving of the same punishment as intentional murder; that it was virtually a knowing, although not intentional, homicide.")). Thus, counsel reasonably advised the defendant that if the jury credited his written and videotaped statements as well as the testimony of the eyewitnesses who identified him as the shooter, he would be convicted of deliberate indifference murder. People v. Caban, 5 N.Y.3d at 152.

At bottom, the record shows that counsel provided the defendant with meaningful representation as he had legitimate strategic reasons for advising the defendant that he would be convicted of second degree murder after trial if the jury credited his statements and the eyewitness

defendant's reckless conduct." Id. (citations omitted). According to Register, deliberate indifference murder was not premised upon the defendant's mens rea, but upon "the factual setting in which the risk creating conduct . . . occur[red]." Id. at 276-78. Register was reaffirmed by the Court of Appeals in People v. Sanchez, 98 N.Y.2d 373 (2002), where the Court again emphasized that depraved indifference murder was not premised on "the subjective intent of the defendant, 'but rather upon an objective assessment of the degree of risk presented by defendant's reckless conduct.'" Id. at 379-80; quoting People v. Register, 60 N.Y.2d at 277. Register and its progeny have since been overruled by People v. Feingold, 7 N.Y.3d 288 (2006).

testimony. People v. Benevento, 91 N.Y.2d at 713. Indeed, in light of the overwhelming evidence against the defendant and the plea offer made by the court, the minimum sentence available under law, this Court finds that counsel provided the defendant with meaningful representation by advising him to accept the trial court's offer. See People v. Lewis, 116 A.D.2d 778 (3d Dept.), lv. denied, 67 N.Y.2d 885 (1986).

The defendant's claim that counsel was ineffective for failing to advise him of the possibility that a jury could have convicted him of a lesser included offense is the type of retrospective second-guessing that is insufficient to prove that counsel provided deficient representation. People v. Benevento, 91 N.Y.2d at 712; People v. Satterfield, 66 N.Y.2d at 799. Indeed, it represents nothing more than a simple disagreement with counsel's "strategies and tactics." See People v. Grey, 34 A.D.3d at 832; People v. Usher, 2 A.D.3d at 545. As the defendant has failed to meet his burden of demonstrating "that there were no strategic or other legitimate explanations for his trial counsel's decisions," his ineffective assistance of counsel claim is rejected. People v. Grey, 34 A.D.3d at 832; see People v. Caban, 5 N.Y.3d at 152.⁸

Equally without merit is the defendant's claim that counsel coerced his plea by advising him that the jury would have convicted him after trial if it credited his statements and the eyewitness testimony identifying him as the shooter. Rather than constituting coercion, this Court finds that counsel's conduct "amounted to nothing more than the attorney's fulfillment of his obligation to render

⁸In any event, counsel's act of negotiating a plea bargain notwithstanding a potential defense that the defendant may have had to the charges, does not, on this record, constitute ineffective assistance "[a]s counsel secured an advantageous plea, which included the minimum sentence permitted by law." People v. Johnson, 54 A.D.3d 1133 (3d Dept. 2008); see People v. Riddick, 40 A.D.3d 1259 (1st Dept.), lv. denied, 9 N.Y.3d 925 (2007); People v. Anderson, 38 A.D.3d 1061 (3d Dept.), lv. denied, 8 N.Y.3d 981 (2007).

appropriate advice concerning the strength of the prosecution's case." People v. Cross, 262 A.D.2d 223 (1st Dept. 1999), lv. denied, 94 N.Y.2d 902 (2000); see People v. Spinks, 227 A.D.2d 310 (1st Dept.), lv. denied, 88 N.Y.2d 995 (1996) (defendant's claim that counsel coerced his plea by telling him, inter alia, that "the case could not be won" was rejected as counsel was simply fulfilling his "duty to warn clients of the risks of going to trial"); People v. Bowden, 186 A.D.2d 362 (1st Dept. 1992) (defendant's claim that counsel coerced his plea by telling him it would be "stupid" for him to take his case to trial was rejected as the Court found that this was merely "blunt advice" that did not coerce the defendant into pleading guilty).

The defendant's motion to vacate the judgment of conviction on the ground that he was provided with the ineffective assistance of counsel is rejected.

The Defendant's Claim That Counsel Was Ineffective for Failing to "Request a Downward Departure of Manslaughter in the Second Degree."

The defendant claims that counsel was ineffective as he "didn't request a downward departure of manslaughter in the second degree." See Defendant's Motion at 2. While the precise nature of this claim is not entirely clear to the Court, to the extent that the defendant is claiming that counsel was ineffective for failing to request that the trial court allow him to plead guilty to the lesser charge of manslaughter in the second degree, such claim is wholly without merit. The law is well-settled that a defendant does not have the right to plead guilty to a lesser included offense without the prosecutor's consent. People v. Machare, 264 A.D.2d 487 (2d Dept.), lv. 94 N.Y.2d 864 (1999); People v. Rosner, 185 A.D.2d 686 (4th Dept.), lv. denied, 80 N.Y.2d 976 (1992); Himelein v. Nenno, 168 A.D.2d 957 (4th Dept. 1990); People v. Melo, 160 A.D.2d 600 (1st Dept.), lv. denied, 76 N.Y.2d 792 (1990). In this case, the record shows that the People would not consent to a plea of guilty to a lesser

offense. Transcript at 4. As such, the trial court was not empowered to offer such a plea. Instead, the trial court in this case was limited to offering the defendant an opportunity to plead guilty to the top count in the indictment, murder in the second degree. See C.P.L. 220.10.(2); Himelein v. Nenno, 168 A.D.2d at 957; People v. Antonio, 176 A.D.2d 528 (1st Dept.), lv. denied, 79 N.Y.2d 824 (1991). As the trial court was not empowered to offer the defendant a plea to a lesser offense, trial counsel was not ineffective for requesting that the defendant be given the opportunity to plead guilty to such an offense.

Moreover, to the extent that the defendant may be claiming that counsel was ineffective for failing to ask the prosecutor to offer a lesser offense, such claim is belied by the record. The record shows that after a bench conference was held between the parties and the trial court, the trial court revealed that the prosecutor was unwilling to offer the defendant the opportunity to plead guilty to a reduced charge. Based on this colloquy it is clear that a request was made of the prosecutor to offer a reduced charge and such request was rejected. Under these circumstances, the defendant's unsubstantiated claim that counsel was ineffective for failing to seek from the prosecutor a plea offer to a reduced charge is rejected. See C.P.L. 440.30(4)(d).

The Defendant's Claim that Counsel was Ineffective for Failing to Advise him Adequately of the Rights that he was Giving Up by Pleading Guilty.

On direct appeal, the Appellate Division, Second Department rejected, on the merits, the defendant's claim that his plea was involuntary because the trial court failed to advise him adequately of the rights he was giving up by pleading guilty. See People v. Antoine, 59 A.D.3d at .560 ("the defendant's claim that his plea and waiver were not intelligently, knowingly, and voluntarily made because the court failed to specifically enumerate all of the rights to which he was entitled is without merit[.]"). As the Appellate Division has found that the defendant was properly advised of all the

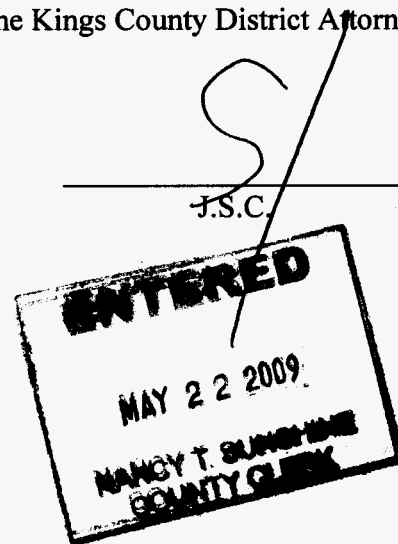
rights to which he was entitled at the time of his guilty plea, the defendant's claim that counsel was ineffective for failing to so advise him is rejected. See C.P.L. 440.30(d); People v. Kenneth Gonzales, 19 Misc.3d 1128(A), 2008 WL 1932226 at *5-6 (Sup. Ct. N.Y. Co. April 25, 2008).

Conclusion

The motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied in its entirety without a hearing.⁹

This constitutes the Decision and Order of the Court. The Clerk of the Court is directed to mail copies of this Decision and Order to the defendant and to the Kings County District Attorney.

Dated: Brooklyn, New York
May 21, 2009



⁹As this Court has determined that the defendant was provided with the effective assistance of counsel under the New York State Constitution, the defendant's claim that he was provided with ineffective assistance under the Federal Constitution is rejected as our "state standard [for the effective assistance of counsel] offers greater protection than the federal test[.]" See People v. Caban, 5 N.Y.3d 143, 156 (2005) ("Because our state standard [for determining the effective assistance of counsel] . . . offers greater protection than the federal test, we necessarily rejected defendant's federal constitutional challenge by determining that he was not denied meaningful representation under the State Constitution.").