

People v Lopez

2009 NY Slip Op 31714(U)

July 30, 2009

Supreme Court, Kings County

Docket Number: 4940/2003

Judge: James P. Sullivan

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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. James P. Sullivan

Date: July 30, 2009

-against-

DECISION & ORDER

ERNESTO LOPEZ

Indictment No. 4940/2003

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Defendant moves, *pro se*, for an order vacating his judgment of conviction on the grounds that he was denied his right to a fair trial based on ineffective assistance of counsel and a *Rosario* violation. Defendant's claims are both procedurally barred and without merit. For the following reasons, the motion is denied.

On March 9, 2003, defendant and an accomplice robbed a thirteen-year-old boy and his twelve-year-old brother at a subway station in Brooklyn. For this act, defendant and co-defendant Edwin Cruz were charged under Indictment No. 4940/03 with one count of robbery in the second degree (PL § 160.10[1]), one count of robbery in the third degree (PL § 160.05), one count of grand larceny in the fourth degree (PL § 155.25) and other offenses. A joint *Dunaway-Wade-Mapp* hearing was held for both defendants on February 19, 2004. Cruz then pleaded guilty to second-degree robbery on February 20, 2004, implicating defendant (Feldman, J., at trial and sentence).

After a separate jury trial, defendant was convicted on March 2, 2004 of robbery in the second degree (PL § 160.10[1]) and endangering the welfare of a child (PL § 260.10[1]). On March 30, 2004, he was sentenced as a persistent violent felony offender to concurrent prison

terms of twenty-three years to life on the robbery count and one year on the endangering count.

Defendant appealed from his judgment of conviction on January 30, 2007. He argued that the trial court deprived him of due process by failing to give proper consideration to his application to replace his court-appointed attorney, and that his sentence should be vacated because the court did not follow the proper procedures in sentencing him as a persistent violent felony offender. Defendant also filed a *pro se* supplemental brief in which he argued that (1) the prosecution failed to disclose essential *Brady* and *Rosario* material to the defense; (2) he was deprived of his right to a speedy trial, and; (3) he was deprived of his right to a fair trial due to the cumulative improper conduct of the prosecutor. The Appellate Division, Second Department, affirmed the judgment of conviction, finding defendant's claims meritless (*People v Lopez*, 49 AD3d 899 [2d Dept 2008], lv denied *People v Lopez*, 10 NY3d 866 [2008]).

In the instant motion to vacate judgment, defendant raises a host of claims of ineffective assistance of counsel, alleging that counsel failed to present an alibi defense, failed to present co-defendant Cruz as a witness, failed to pursue defendant's *pro se* motion to dismiss the indictment on the ground that defendant was denied his right to testify before the grand jury, failed to prepare for trial and submit motions in defendant's case, failed to request missing police reports or memo book notes, failed to object to defendant's sentencing as a persistent violent felony offender, failed to pursue defendant's motion for reassignment of counsel, and failed to object to the prosecutor's opening statement and summation remarks. Defendant further claims that the prosecution failed to supply the defense with *Rosario* material consisting of a voucher for keys, a typed complaint report, Officer Medina's memo book notes, and notes of Officer Kasyjanski, referred to in the trial transcript, concerning money that was returned to the defendant.

Defendant has failed to substantiate the alleged non-record facts contained in his claims with sworn allegations or other evidence (CPL § 440.30[4][b]). While defendant attacks nearly every aspect of trial counsel's representation, defendant fails to document his claims with evidence to establish whether counsel's performance was indeed deficient, as alleged here. Accordingly, defendant's claims are now barred from collateral review.

Defendant's allegations of ineffective assistance of counsel are 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). 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" (*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]).

At the heart of defendant's claim is the proffered alibi testimony of co-defendant Cruz, who states in an affidavit that he does not know defendant and that the robbery was committed by a person other than defendant. This affidavit, however, is contradicted and undermined by Cruz's sworn testimony at his plea allocution. In recounting the robbery to the court, Cruz referred to a person named "Mike" as his accomplice but nevertheless indicated that the person who committed the robbery with him was the person in court with him that day: defendant Ernesto Lopez. When questioned further under oath about an affidavit in which he stated that a person named Dave committed the crime with him, Cruz answered that his prior statement was not true. Presented with such an unreliable witness who had identified defendant before the court in a plea allocution, defense counsel made a prudent decision not to call Cruz as a witness or to submit his admittedly false affidavit (*People v Stewart*, 248 AD2d 414 [2d Dept 1998] [defense counsel not ineffective for failing to call alibi witness whose testimony would have been weak and possibly detrimental to defendant]). Counsel, who pursued a legitimate defense strategy throughout defendant's trial, correctly determined that Cruz's prior inculpatory testimony and proposed perjurous testimony would damage the defense (*see Benevento* at 713). That choice of strategy is not a basis for finding that this decision constituted ineffective assistance (*People v Smith*, 82 NY2d 731, 733 [1993]).

Defendant's claim that counsel failed to pursue his *pro se* motion to dismiss the indictment based on the alleged violation of his right to testify before the grand jury is

contradicted by the record (CPL § 440.30[4][c], [d]). The transcript indicates that defendant was present on February 24, 2004 when counsel argued his motion to dismiss the indictment on speedy trial grounds and stated that he had spoken to defendant “prior to July 25th and communicated to the assigned assistant prior to July 25th the withdrawal of his cross 190.50 notice.” Thus, the court finds credible defense counsel’s affirmation stating that he discussed withdrawal of the notice of intent to testify before the grand jury with defendant and that defendant agreed. Finally, while defendant now submits a copy of his motion to dismiss the indictment, there is no indication that it was ever filed with the court or adopted by counsel in light of his statements on the record.

Defendant’s additional allegations of ineffective assistance of counsel are baseless and therefore without merit. Defendant’s cursory allegations fail to establish what information defense counsel should have investigated or what additional motions would have been viable. For example, as defense counsel received open file discovery there was no need to make additional discovery motions, and defense counsel did in fact move to dismiss the indictment based on speedy trial grounds. With respect to the argument that counsel should have requested police memo book notes and other police reports, the assistant district attorney provided the defense with a copy of Officer Medina’s memo book notes on the day of the suppression hearing on February 19, 2004. The transcript reflects that defense counsel cross-examined Officer Medina about the notes, and a copy of the typed complaint report was also given to defense counsel at the suppression hearing. Thus, even if counsel never specifically asked for these materials, he nevertheless had access to them and used them to further the defense.

Moreover, counsel could not have been ineffective for failing to pursue defendant’s

motion for reassignment of counsel because the trial court did in fact consider and reject a motion for reassignment; the Appellate Division reviewed the trial court's decision and found it reasonable (*Lopez*, 49 AD3d at 900). Defendant's claim that counsel was ineffective for failing to object to prosecutorial misconduct is based on unspecified, unsubstantiated and conclusory allegations. In viewing the proceedings as a whole, defendant received meaningful representation where counsel made appropriate objections and motions and pursued a reasonable defense strategy (*see People v Satterfield*, 66 NY2d at 799-800 [1985]; *People v Cesario*, 157 AD2d 795, 796 [2d Dept 1990]). Defendant has not established prejudice on account of counsel's performance (*Stulz* at 284).

The Appellate Division has already reviewed and rejected defendant's challenges to his sentencing as a persistent felony offender and to counsel's failure to object to allegedly prejudicial remarks by the prosecutor (*Lopez* at 900). These claims are therefore procedurally barred pursuant to CPL § 440.10(2)(a), and are also without merit. As the Appellate Division noted, defendant was aware that the sentencing court was considering his four previous felonies and knew that he was being sentenced as a persistent violent felony offender. Finding the preliminary examination sufficient, the Appellate Division determined that it would be futile and pointless to remit the case for resentencing. Accordingly, defendant has failed to show that he was prejudiced by counsel's failed to challenge his sentencing as a persistent violent felony offender. Likewise, as the Appellate Division concluded that the prosecutor's remarks were not prejudicial, counsel's conduct with respect to those remarks was not ineffective.

Finally, defendant's *Rosario* claims were already addressed on appeal and are thus barred from collateral review (CPL § 440.10[2][a]). Those claims are also belied by the record, as

discussed above. Although it was not raised on appeal, the claim regarding the police voucher is nevertheless procedurally barred. Here, despite testimony by arresting officers, defendant failed to adduce facts on the record prior to sentence to provide "adequate basis for review of such ground or issue upon an appeal from the judgment...and the ground or issue in question was not subsequently determined upon appeal" (CPL § 440.10[3][a]).

Accordingly, defendant's motion is denied in its entirety.

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:



James P. Sullivan, J.S.C.

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

