

**People v Fominas**

2009 NY Slip Op 33007(U)

October 6, 2009

Supreme Court, Kings County

Docket Number: 4444/80

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- :  
 :  
 ANATOLIS FOMINAS, :  
 :  
 Defendant. : Indictment No. 4444/80  
 -----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 (P.L. § 125.25-2) and hindering prosecution in the first degree (P.L. § 205.65). In a *pro se* motion dated , December 23, 2008, defendant alleges that 1) the indictment was defective because it alleged both intentional murder and depraved indifference murder; 2) the prosecution prevented defendant from giving certain testimony at trial; 3) the prosecution prevented defense witnesses from testifying at trial; 4) the prosecution attempted to get the medical examiner to change her testimony with respect to whether the fatal injury was caused by a fall or a blow; 5) the evidence of depraved indifference murder was legally insufficient; 6) the prosecution obtained the conviction by knowing use of false testimony by Elisia Fominas; and 7) the prosecution failed to disclose the transcript of Elisia Fominas' Family Court testimony. The People have filed an answer in opposition. The defendant then filed a reply to the prosecution's answer in opposition. The defendant filed an additional motion dated July 2, 2009. The People then filed an answer in opposition. For the reasons stated below, the motions are denied.

***Procedural History***

The charges under Indictment 4444/80 arose over a period of weeks during the summer of 1980, where defendant beat and physically abused his three-year old stepdaughter, Cassandra Barret. In the course of the beatings and abuse, Cassandra sustained a fractured skull that caused her death. Defendant subsequently dismembered the child's body, and then, along with his wife, Elisia Fominas, disposed of the body parts at various locations in Brooklyn and Queens.

Defendant and Elisia Fominas were charged under Indictment Number 444/80 with murder in the second degree (P.L. § 125.25-2) and hindering prosecution in the first degree (P.L. § 205.65). In July 9, 1982, Elisia Fominas was tried and convicted of both charges at a non-jury trial held prior to defendant's trial. (Koooper, J.). She was sentenced after defendant's trial to concurrent terms of imprisonment of fifteen years to life on the murder count and two to six years on the hindering prosecution count. On December 8, 1982, defendant was convicted by a jury of both charges. On January 20, 1983, the defendant was sentenced to concurrent terms of imprisonment of twenty-five to life on the murder conviction and two and one-third to seven years on the hindering prosecution

conviction. (De Lury, J. At trial and sentence).

On February 2, 1984, defendant filed a *pro se* motion entitled “Motion to Dismiss Due to Discriminatory Prosecution.” On the same date, he filed a second *pro se* motion entitled “Motion of Conflict of Interest Between Attorney and Client and Attorney Misconduct.” The court treated defendant’s two motions as motions to vacate the judgment pursuant to C.P.L. § 440.10, and denied them on May 1, 1984.

The defendant appealed from the judgment of conviction on or about August 21, 1984, claiming 1) that the trial court erred when it allowed prosecution witness Pasquale Simone to invoke his Fifth Amendment right to silence during cross-examination; 2) the evidence was insufficient to establish defendant’s guilt of depraved indifference murder; 3) the trial court’s instruction to the jury on accessorial liability was incorrect; 4) the hearing court erred in admitting the medical examiner’s testimony; 6) the trial court erred in admitting a letter from defendant to Elisia Fominas; 7) the trial court’s jury charge on lesser included offenses was erroneous; 8) the prosecutor’s summation was unduly prejudicial; and 9) the sentence was excessive.

By decision and order dated June 17, 1985, the Appellate Division affirmed the defendant’s judgment of conviction. *People v. Anatolis Fominas*, 111 A.D.2d 868 (2d Dep’t 1985). The Court of Appeals denied defendant’s application for leave to appeal on August 27, 1985. *People v. Fominas*, 65 N.Y.2d 980 (1985) (Jasen, J.).

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

The defendant argues in his original motion that 1) that the indictment was defective because it alleged both intentional murder and depraved indifference murder; 2) the prosecution prevented defendant from giving certain testimony at trial; 3) the prosecution prevented defense witnesses from testifying at trial; 4) the prosecution attempted to get the medical examiner to change her testimony with respect to whether the fatal injury was caused by a fall or a blow; 5) the evidence of depraved indifference murder was legally insufficient; 6) the prosecution obtained the conviction by knowing use of false testimony by Elisia Fominas; and 7) the prosecution failed to disclose the transcript of Elisia Fominas’ Family Court testimony.

With respect to defendant’s claim that the indictment was defective, that claim must be denied, pursuant to C.P.L. § 440.10 (2) (c), as sufficient facts appear on the record to have permitted adequate review of the claim on direct appeal, but defendant unjustifiably failed to raise this claim on direct appeal. The indictment is part of the record of appeal. Additionally, this claim may be denied as defendant failed to raise this issue in his prior motion to vacate his judgment of conviction. C.P.L. § 440.10 (3) (c).

Further, a review of the court file indicates that the only murder charge alleged in the

indictment is depraved indifference murder, and that the only murder count charged to the jury was depraved indifference murder. Thus, the defendant's claim that he was charged under an indictment alleging both intentional and depraved indifference murder is contradicted by the record and without merit. Thus, this claim is denied.

The defendant's second claim, that the prosecutor prevented him from giving certain testimony at trial, is also denied without a hearing. Defendant claims that the prosecutor would not allow him to testify 1) that Elisia Fominas had lied when she testified that defendant had abused her children and had held her hostage in his apartment; 2) that it would have been impossible for him to have committed the crimes because of his physical disabilities, among other reasons; and 3) that defendant had taken his other stepdaughter, Chelsea Barret, to the hospital when she needed medical care. Initially, defendant's claim is procedurally barred. C.P.L. § 440.10 (2) (c) states that a court must deny a motion to vacate judgment when sufficient facts appear on the record to permit appellate review of the issue raised, but the defendant unjustifiably failed to raise the issue on direct appeal. *See, People v. Cochrane*, 27 A.D.3d 659, 660 (2d Dep't 2006). The defendant testified at trial, thus sufficient facts appear on the record to have permitted review of this claim on direct appeal. A review of his testimony reveal that these issues were addressed by him during his testimony. Therefore, this claim is procedurally barred because it could have been raised on direct appeal, and it was not. *See, People v. Pedraza*, 56 A.D.3d 390 (1<sup>st</sup> Dep't 2008). Additionally, pursuant to C.P.L. § 440.10 (3) (c), the Court may deny defendant's claims as the defendant was in a position to adequately raise this issue in his previous motion to set aside his judgment of conviction, however he failed to do so. Thus, this claim is denied.

With respect to defendant's further claim that the prosecutor prevented him from testifying about alleged problems he was having with his trial attorney, that application is denied as defendant was in a position to raise that allegation in his previous motion but failed to do so. *See, C.P.L. § 440.10 (3) (c); People v. Cochrane*, 27 A.D.3d 659 (2d Dep't 2006).

Moreover, the defendant's various claims that the prosecution prevented him from giving various testimony at trial is belied by the record of his testimony at trial. This court has carefully reviewed the moving papers, as well as the full transcript, which indicates that the defendant had a full opportunity to testify at trial. Thus, the court determines that this claim is contradicted by court records and is without merit. *See, C.P.L. § 440.30 (4) (c) (d)*. Accordingly, the court denies the motion to vacate judgment on these claims.

The defendant's third claim that the prosecutor prevented defense witnesses from testifying at trial is also denied without a hearing. First, this claim may be denied as the defendant raised this claim in his prior motion to vacate judgment and the court denied this claim. *See, C.P.L. § 440.10 (3) (b)*. Additionally, the court may deny this claim as facts in support of this issue could with due diligence have readily been made to appear on the record, however the defendant unjustifiably failed to adduce such matter prior to sentence. Therefore, this claim is denied pursuant to C.P.L. § 440.10 (3) (a) because the issue could have been raised on defendant's direct appeal. Further, the court may deny the defendant's claim if the allegations of fact are made solely by the defendant and are

unsupported by any other affidavit or evidence.. *See*, C.P.L. § 440.30 (4) (b), (d). The claim is procedurally deficient, as the defendant makes only bare, conclusory allegations. *See*, *People v. Sessions*, 34 N.Y.2d 254 (1974). Moreover, in light of the record, the court finds no support for the defendant's conclusory allegation that the prosecutor prevented defense witnesses from testifying at trial. Based on defendant's failure to submit sufficient sworn allegations to support his claim, the lack of support from the record, and all other circumstances attending the case, there is no reasonable possibility that such allegation is true. C.P.L. § 440.30 (4) (d). Thus, the court denies the motion to vacate the judgment on this claim.

The defendant's fourth claim that the prosecutor attempted to get the medical examiner, Dr. Beverly Leffers, to change her testimony as to whether the fatal injury was caused by a blow or a fall is denied without a hearing. First, defendant's claim is procedurally barred pursuant to C.P.L. § 440.10 (2) (c) as sufficient facts appear on the record to have permitted adequate review of the claim, however the defendant unjustifiably failed to raise the claim on his direct appeal. Further this court may deny this claim as defendant was in a position to raise that claim in his original motion but failed to do so. *See*, C.P.L. 440.10 (3) (c); *People v. Cochrane*, 27 A.D.3d 659, 660 (2d Dep't 2006). Moreover, the defendant's claim is belied by the record of the witnesses's testimony at trial. Thus, this claim is contradicted by the record and is without merit. C.P.L. § 440.30 (4) (c) (d). Accordingly, the court denies the motion to vacate the judgment of conviction on this ground.

With respect to defendant's fifth claim that the evidence was legally insufficient to sustain a conviction for depraved indifference murder, this allegation is denied as this claim was previously determined on the merits in defendant's direct appeal. In affirming the judgment of conviction, the Appellate Division held that "[t]he evidence presented at trial was legally sufficient to prove beyond a reasonable doubt that the defendant was guilty, both as a principal and an accessory, of depraved indifference murder." *People v. Anatolis Fominas*, 111 A.D.2d 868 (2d Dep't 1985). Further, although the law on depraved indifference murder has changed since defendant's final conviction in 1985, this change does not apply retroactively to cases on collateral review after the conviction has become final. The Court of Appeals determined that "non-retroactivity poses no danger of a miscarriage of justice." *Policano v. Herbert*, 7 N.Y.3d 588, 603-604 (2006). Thus, the court denies the defendant's motion on this ground.

The defendant's sixth claim that the prosecution knowingly presented false testimony by Elisia Fominas must also be denied without a hearing. The defendant claims that Ms. Fominas falsely testified that she was sentenced to twenty-five years to life and had had no cooperation agreement with the prosecution. He further claims that the prosecution knew that this testimony was false, took no action to correct this testimony, and denied the existence of an agreement. The defendant additionally claims that his wife's trial testimony, which indicated that the defendant had abused her and her children, was false because it was inconsistent with her Family Court testimony. Initially, this application must be denied as a review of Ms. Fominas' trial testimony indicates that sufficient facts appear on the record to have permitted adequate review of the claims on direct appeal, but no such review occurred due to defendant's unjustifiable failure to raise these claims on direct appeal. *See*, C.P.L. 440.10 (2) (c). To the extent that it is alleged that the record is insufficient

to support the defendant's claim, the application may be denied as facts supporting the ground could have been placed on the record, allowing adequate review of the claim on direct appeal, however, the defendant unjustifiably failed to do so. C.P.L. § 440.10 (3) (a). Additionally, these claims are denied because the defendant was in a position to raise these claims in his prior motion to set aside his judgment of conviction but failed to do so. C.P.L. § 440.10 (3) (c).

Further, the claim that the prosecutor knowingly presented false testimony by Elisia Fominas is contradicted by court records, and "under these and all circumstances attending the case, there is no possibility that such allegation[s] [are] true." C.P.L. § 440.30 (4) (d). In fact, a review of the record indicates that although initially Ms. Fominas declined to characterize her agreement with the prosecution as a "deal", she ultimately testified that she received a sentence of fifteen years to life in return for her testimony.

With respect to defendant's claim that the prosecution failed to disclose the substance of his wife's Family Court testimony, and failed to provide the defense with the transcript of the proceedings, this claim must be denied as sufficient facts appear on the record, but the defendant unjustifiably failed to raise the claim on his direct appeal. C.P.L. § 440.10 (2) (c). Additionally, this claim is denied because defendant failed to raise this issue in his prior motion to set aside his judgment of conviction. C.P.L. § 440.10 (3) (c).

Moreover, the defendant's claim that the prosecutor failed to provide the defendant with a copy of the Family Court Transcript is contradicted by the court record. C.P.L. § 440.30 (4) (d). In fact a review of the record clearly demonstrates that defense counsel had the transcripts and used them during the cross-examination of Elisia Fominas. Thus this claim must be denied.

The defendant further moves in his motion, dated July 2, 2009, for the unsealing of the Family Court minutes, pursuant to C.P.L. § 160.50. Additionally, the defendant makes supplemental claims regarding his prior motion pursuant to C.P.L. § 440.10 to vacate his judgment. The defendant argues that 1) the prosecution failed to disclose its agreement with Elisia Fominas; 2) that he was denied a fair trial in violation of *Bruton v. United States*, 391 U.S. 123 (1968); 3) that his trial attorney provided ineffective assistance of counsel; and 4) that his appellate attorney provided ineffective assistance of counsel.

First, C.P.L. § 160.50 is inapplicable to defendant's motion to unseal the Family Court proceeding. Additionally, the defendant has not established that he is entitled to Family Court minutes under Family Court Act § 166 and § 205.5 of the Uniform Rules for the Family Court. Moreover, a review of the record indicates that the defendant's attorney was provided with a copy of these minutes, and in fact used them extensively during the trial. Thus, this claim is denied.

With respect to the defendant's claim that the prosecutor failed to disclose its agreement with Elisia Fominas, this claim is procedurally barred pursuant to C.P.L. § 440.10 (3) (c), because defendant could have raised the claim in his prior motion to vacate the judgment. Further, this claim is belied by the record of Ms. Fominas' testimony at trial. Thus this claim is contradicted by court records and is without merit. *See*, C.P.L. § 440.30 (4) (c) (d).

As to defendant's claim pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), that application must be denied, pursuant to C.P.L. § 440.10 (3)(a), because this issue could have been raised upon the defendant's direct appeal. Further, this claim is also denied, pursuant to C.P.L. § 440.10 (3) (c), because defendant could have raised this claim in his prior motion to vacate the judgment. Additionally, the defendant's reliance on *Bruton* is misplaced as his co-defendant, Elisia Fominas, testified at trial and was extensively cross-examined. Thus, defendant's claim is without merit and denied.

To the extent that the defendant appears to raise a claim of ineffective assistance of trial counsel in that he claims that he and his attorney did not get along, and that there existed some dispute regarding attorney fees, that claim is denied. First, this court may deny this claim because the issue could have been raised in the defendant's previous 440 motion. C.P.L. § 440.10 (3) (c). Additionally, the defendant has not provided sufficient sworn allegations to support his claim. See, C.P.L. § 440.30 (4) (b), (d). Further, the defendant has not met his burden that any dispute with respect to attorney's fees deprived him of meaningful representation. See, *People v. Winkler*, 179 A.D.2d 711 (2d Dep't 1992); *People v. Tippins*, 173 A.D.2d 512 (2d Dep't 1991).

With respect to defendant claim that he received ineffective assistance of trial counsel by his failure to effectively cross-examine Elisia Fominas, that application must be denied pursuant to C.P.L. § 440.10 (3) (a), because based on the narrow claim, this issue could have been raised upon defendant's direct appeal. Further, this claim is denied pursuant to C.P.L. § 440.10 (3) (c) because the defendant could have raised this claim in his prior motion to vacate the judgment.

Even if this court were to review the defendant's claim on the merits, his motion must be denied. C.P.L. § 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 a 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.

“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.

The question to be resolved is not only whether the defendant demonstrated that his counsel provided “less than meaningful representation”, under the broad standards detailed above, but “whether the attorney’s conduct constituted ‘egregious and prejudicial’ error such that defendant did not receive a ‘fair trial.’” *Benevento*, 91 N.Y.2d at 713, quoting *People v. Flores*, 84 N.Y.2d 184, 188.

A review of the record shows that his 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.

Thus, the defendant has failed to meet his burden of proving that trial counsel failed to provide meaningful representation and/or committed such egregious and prejudicial errors that deprived him of a fair trial. Therefore, this claim is denied.

To the extent that the defendant is raising a claim of ineffective assistance of counsel against his appellate attorney, this court cannot decide this issue in a motion pursuant to C.P.L. § 440.10, and it must be heard by the Appellate Division as a writ of error *coram nobis*. See, *People v. Bachert*, 69 N.Y.2d 593 (1987).

For the foregoing reasons defendant’s motion to vacate his judgment of conviction is denied.

This constitutes the decision and order of the Court.

Dated: October 6, 2009

**ENTERED**  
  
OCT - 6 2009  
  
NANCY T. SUNSHINE  
COUNTY CLERK

*JPS*  
James P. Sullivan, J.S.C.  
**HON. JAMES P. SULLIVAN**  
Judge N.Y.S. Supreme Court