

**People v Evans**

2009 NY Slip Op 33232(U)

January 11, 2009

Sup Ct, Kings County

Docket Number: 6806/2006

Judge: Abraham G. Gerges

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 17

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

By: Hon. Abraham G. Gerges

Date: January 11, 2009

-against-

DECISION & ORDER

DORAN EVANS

Indictment No. 6806/2006

-----X

Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. For the following reasons, the motion is denied.

On the afternoon of September 4, 2005, defendant approached Eric Suber and asked him for five dollars. When Suber replied that he had no money, defendant asked his friends, including Dwayne Robbins and Tyrone Orr, for five dollars. Defendant then returned to Suber, demanding money, and Suber again refused. Defendant punched Suber and knocked him to the ground. As Suber got up, defendant cursed at him and pulled a gun, reiterating his demand for money. Defendant dug through Suber’s pockets, still demanding money, and Suber refused as he pushed defendant away. Defendant then shot Suber in the stomach, killing him. Before leaving the scene defendant went through Suber’s pockets and took his money.

Dwayne Robbins, who knew both defendant and the deceased, identified defendant in a photo array on September 6, 2005. Robbins also gave a sworn, taped statement to the Kings County District Attorney’s office, in which he stated that defendant, known to him as “Devine”, had shot his friend Suber.

Defendant was apprehended on September 9, 2005. Upon being questioned by police, he stated that he was in the Bronx on the date of the shooting and that he heard people were saying he was the perpetrator. He declined to make a statement and instead asked to speak to a lawyer. On that same date, Robbins identified defendant in a lineup as the person who shot Suber.

For his crime, defendant was charged with one count of murder in the first degree (PL § 125.27[1][a][vii]), two counts of murder in the second degree (PL § 125.25[1][3]), two counts of robbery in the first degree (PL § 160.15[1][2]), and one count each of criminal possession of a weapon in the second and third degrees (PL §§ 265.03, 265.02). Defendant was first represented by Kenneth Perry, Esq., who was relieved, by defendant's application, by Ivan Vogel, Esq. on November 6, 2006.

At trial counsel presented an alibi defense including defendant's own testimony that he could not have committed the crime because he was at a cookout at his brother's house in the Bronx. Both defendant's brother, Kevin Evans, and sister, Denise Evans, testified in support of defendant's proposed alibi. In rebuttal, the People offered a statement from Kevin Evans that provided conflicting details about the alleged cookout.

On January 25, 2007, the jury found defendant guilty of murder in the first degree.

On February 21, 2007, defendant moved, pro se, to set aside the verdict pursuant to CPL § 330.30(1), alleging that his state and federal constitutional rights were violated based on three grounds: an abuse of discretion by the trial court, prosecutorial misconduct, and ineffective assistance of counsel. Nine different sub-issues were listed under the claim of ineffective assistance of counsel, several of which are raised again in the instant motion. The following day, the court relieved trial counsel and assigned a new attorney, Harold Baker, to represent defendant

at sentencing. This new attorney filed another motion dated May 9, 2007 to set aside the verdict.

At sentencing on May 10, 2007, the court heard oral argument on counsel's motion to set aside the verdict; counsel also noted that he was adopting certain portions of defendant's pro se motion. The court denied the motion in its entirety and sentenced defendant to life imprisonment without parole.

Although defendant has since filed a notice of appeal with the Appellate Division, Second Department, his appeal is not yet perfected.

In the instant motion to vacate his judgment of conviction, defendant raises numerous instances of ineffective assistance of trial counsel, directed at both of his trial attorneys. The People oppose the motion and have submitted a supporting affirmation from Ivan Vogel, Esq. Defendant alleges that:

- A. Counsel waived his preliminary hearing without defendant's consent; defendant's waiver was not knowing, voluntary and intelligent;
- B. Counsel gave defendant wrong advice, thus inducing him not to testify before the Grand Jury; counsel was ineffective because he ignored the People's failure to indict defendant before the CPL § 180.80 date;
- C. Counsel did not inform the court or the People of an allegedly exculpatory affidavit containing a confession by a third party;
- D. Counsel failed to investigate an alleged CPL § 190.75 violation and failed to adopt defendant's pro se motion;
- E. Counsel failed to avoid a "conflict of interest" by handling the case in a manner that did not reflect defendant's best interest;
- F. Counsel failed to present an alibi defense and call alibi witnesses;
- G. Counsel failed to introduce an affidavit of Darryl Bennett as a declaration against penal interest, or to call Neil Johnson as a witness or introduce an affidavit by him;
- H. Counsel failed to impeach witness Tyrone Orr with a prior inconsistent statement, thus depriving defendant of his right to confront the witness.

Several of defendant's claims were already raised in defendant's pro se CPL § 330.30(1) motion. At that time, defendant raised claims on the same grounds as those listed under points

F, G and H, above. That motion was denied in its entirety. Accordingly, those grounds are procedurally barred from reconsideration in the instant motion (CPL § 440.10[3][b]).

In addition, 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.

With respect to the merits of defendant's motion, a defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 US 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland* at 690). The 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]). The 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]).

Defendant's numerous claims of ineffectiveness are refuted by the record, which indicates that counsel provided meaningful representation throughout the course of the proceedings. Defendant has failed to establish that he was denied the effective assistance of counsel under either the federal or state standard, nor has he proven that his attorney's performance had a prejudicial effect on the outcome of the case (*Strickland* at 668; *Benevento*, at 713). In viewing the proceedings as a whole, defendant received meaningful representation where counsel made appropriate objections and motions and pursued a reasonable defense strategy by presenting an alibi defense complete with testimony from multiple alibi witnesses (*see People v Satterfield*, 66 NY2d at 799-800 [1985]; *People v Cesario*, 157 AD2d 795, 796 [2d Dept 1990]).

The claim that counsel improperly waived defendant's right to a preliminary hearing is without merit. While a preliminary hearing is required for a case pending in Criminal Court, defendant's case was heard by the Grand Jury in Supreme Court. Defendant was properly indicted by the Grand Jury and, as a result, no preliminary hearing was required (*see People v Hodge*, 53 NY2d 313, 319 [1981] [right to preliminary hearing obviated when People present case to grand jury in first instance]; *see also Vega v Bell*, 47 NY2d 543 [1979]). Accordingly, counsel had no reason to seek a preliminary hearing and cannot be considered ineffective for failing to do so.

Under point B, defendant alleges that counsel induced him not to testify before the Grand

Jury. Defendant's own moving papers belie this claim, as defendant states that the matter of testifying was actually discussed with counsel and decided together for tactical reasons. Even assuming the truth of defendant's allegations, counsel's failure to effectuate a defendant's wish to testify before the grand jury, without more, does not establish ineffective assistance of counsel (*People v Wiggins*, 89 NY2d 872 [1996]; *Baldi*, 54 NY2d 137). Nor was defendant prejudiced by counsel's alleged error (*Stulz* at 284). Counsel presented an alibi defense at trial, including testimony from several witnesses and defendant himself, which the jury unanimously rejected. Considering this failed effort at trial, there is no reason to believe that the Grand Jury would have credited defendant's proffered alibi testimony and that defendant's testimony would have changed the outcome of the proceeding (*see People v Simmons*, 10 NY3d 946 [2008] [counsel's failure to effectuate defendant's appearance before grand jury did not prejudice defendant]).

Defendant also alleges that the People failed to indict him before the CPL § 180.80 date and that counsel was ineffective for "ignoring" this violation. Defendant states that he made *pro se* CPL § 180.80 motions on several occasions, all of which were denied. Justice Walsh denied his requests on both November 3, 2005 and November 10, 2005. Defendant also states that he raised his claim again before the court on November 18, 2005, January 24, 2006 and January 26, 2006. Therefore, defendant's claim is procedurally barred pursuant to CPL § 440.10(3)(b) because it has already been raised and rejected by the court. Moreover, the Grand Jury minutes indicate that defendant was indeed indicted in a timely manner when the Grand Jury returned a True Bill as to second-degree murder on September 15, 2005, the same as the CPL § 180.80 date. Accordingly, as defendant's claim is contradicted by court records (CPL § 440.30[4][d]) there can be no finding of ineffectiveness by counsel.

With respect to claim C, defendant obtained and submitted to counsel affidavits from two fellow prisoners, Darryl Bennett and Neil Johnson, while incarcerated at Rikers Island. Bennett claims that he was the person who actually shot the victim, while Johnson claims that Bennett confessed to him. Now defendant argues that counsel failed to investigate these allegedly exculpatory affidavits. In the very same moving papers defendant also acknowledges that he discussed the affidavits with counsel on several occasions, that counsel hired an investigator who interviewed the proposed affiants, and that the court was informed about the affidavits.

This unsubstantiated claim is also contradicted by defendant's own exhibits, which include letters from Mr. Perry regarding the potential defense evidence and a report from the investigator. This documentation, produced during the course of counsel's investigation, demonstrates that counsel made diligent efforts to locate the proposed witnesses and determine whether they possessed viable alibi evidence. Accordingly, as defendant's allegations are conclusively refuted by unquestionable documentary proof, there can be no finding of neglect by counsel (CPL § 440.30[4][c]; see *People v Session*, 34 NY2d 254, 256 [1974] [even though submission of evidence creates a question of fact, defendant is not entitled to a hearing when claim has been refuted by documentary evidence]). Moreover, defendant's documentation leads the court to credit the People's affirmation from counsel, who states that, after an investigator attempted to locate the witnesses and obtained one witness account, he determined that the information would not be effective at trial as viable defense evidence. In sum, counsel performed adequate investigation of the affidavits and made a reasonable strategic decision not to present them as evidence (*Benevento* at 713).

Under point D, defendant contends that counsel was ineffective for failing to adopt his

pro se CPL § 190.75 motion. In that motion defendant claimed that the prosecutor had improperly presented his case to two different grand juries. According to defendant, his pro se motion was denied based on the People's representation that there was only one Grand Jury presentation. As defendant has failed to substantiate this claim with any reference to the record or other documentary proof, there is no reasonable possibility that this allegation is true (CPL § 440.30[4][d]). Counsel would have had no basis to pursue a motion so lacking in merit and defendant has not established that such a motion would have been successful had one been made. Defendant has also neglected to demonstrate the absence of strategic or other legitimate explanations for counsel's conduct (*Rivera* at 709). Accordingly, counsel was not ineffective for deciding against making a motion that he legitimately believed had no merit (*see People v Caban*, 5 NY3d 143, 152 [2005] ["There can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success"]).

Next, defendant claims that his second attorney was ineffective because he had a conflict of interest relating to his refusal to raise a claim of ineffective assistance of counsel against his first attorney. Defendant argues that this was a "conflict of interest" because counsel failed to act in his best interest. This claim is denied because the moving papers do not allege any ground constituting legal basis for the motion (CPL § 440.30[4][a]).

Defendant's remaining three claims, F, G and H, are procedurally barred pursuant to CPL § (3)(b), as discussed above, and do not merit reconsideration. In any event, they are without merit. The determination whether to call particular witnesses is a question of trial strategy and is ordinarily not viewed as a lapse in professional representation (*People v Smith*, 82 NY2d 731

[1993]). As defendant states, the defense investigator was unable to locate Bennett, thus counsel could not present him as a witness. In addition, after the investigator interviewed Johnson counsel determined in his professional judgment that Johnson's testimony would not be credible before the jury.

Counsel also had good reason not to call Rene Donaldson and Mahogany Davis, both witnesses to the shooting. Counsel devised a successful strategy to present testimony that neither witness could identify defendant in the lineup while avoiding potentially damaging testimony from them at trial. Their statements to police corroborated the People's version of the shooting and counsel also made the prudent decision not to subject Mahogany Davis, an eight-year-old child, to cross-examination. Had they testified, these witnesses could have contradicted defendant's alibi defense and corroborated the People's evidence. In considering the potential for damaging testimony from Bennett, Johnson, Donaldson and Davis, counsel pursued a legitimate defense strategy (*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]; see *Benevento* at 713). That choice of strategy is not a basis for finding that this decision constituted ineffective assistance (*Smith* at 733).

Nor can counsel be faulted for failing to introduce Bennett's and Johnson's affidavits as third-party culpability evidence or declarations against penal interest. As already discussed, after investigation counsel made the professional determination that the statements were unreliable and chose not to introduce them at trial because they would likely harm the defense (see *People v Park*, 229 AD2d 598, 599 [2d Dept 1996] [counsel had valid tactical reason for not pursuing a weak alibi defense]).

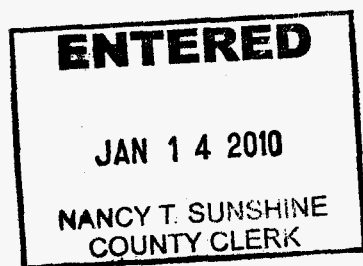
Finally, claim H pertaining to counsel's cross-examination of Tyrone Orr is baseless. The record reveals that counsel cross-examined Orr thoroughly about his criminal history, open cases and his cooperation with the People. Counsel also inquired about Orr's prior statements to detectives and his identification of defendant in photographic arrays. In viewing the record, counsel engaged in an effective cross-examination and any quibble over particular questions is a matter of trial strategy. Counsel's performance was thus meaningful in this regard (*see Strickland* at 690; *Baldi* at 146).


Accordingly, the 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:



  
Abraham G. Gerges, J.S.C.  
**HON. ABRAHAM G. GERGES**  
J.S.C.