

People v Gonzalez

2010 NY Slip Op 31182(U)

February 23, 2010

Supreme Court, Kings County

Docket Number: 758/2005

Judge: Alan D. Marrus

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

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Alan D. Marrus

Date: February 16, 2010

-against-

DECISION & ORDER

ORLANDO GONZALEZ

Indictment No. 758/2005

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

On November 17, 1999, defendant and his cousin, Sammy Vargas, broke into the apartment of a seventy-five-year-old woman and smothered her to death with a pillow. The perpetrators also stole a large sum of cash from the victim. After he was apprehended by police, defendant confessed in both written and videotaped statements that he had participated in the burglary, but he denied his role in the homicide. Nevertheless, defendant confessed to his aunt that he and Vargas had held a pillow over the victim's face to keep her from screaming. DNA recovered from the victim's body matched that of the co-defendant.

Following a jury trial defendant was convicted of murder in the second degree (PL § 125.25[3]) and was sentenced to an indeterminate prison term of twenty-five years to life. Sammy Vargas pleaded guilty to robbery in the first degree and was sentenced to a determinate prison term of twenty-two years.

On appeal defendant argued that he had proven the affirmative defense to felony murder

by a preponderance of the evidence and that his sentence was harsh and excessive. The Appellate Division, Second Department affirmed the judgment of conviction, finding that the jury properly rejected defendant's affirmative defense based on his confession to his aunt (*People v Gonzalez*, 48 AD3d 698 [2d Dept 2008]).

In the instant motion, defendant raises three alleged instances of ineffectiveness. He claims that (1) counsel failed to present an alibi defense; (2) counsel failed to challenge the medical examiner's assessment of the victim's cause of death, and; (3) counsel failed to impeach the testimony of defendant's accomplice.

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). 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 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]).

Defendant's first claim that counsel failed to present an alibi defense is meritless. In his moving papers, defendant alleges that he could not have committed the crime because he was in the hospital on November 17-18, 1999, and that his injuries resulting from a slip and fall accident rendered him physically unable to commit the crime. Defendant now submits a letter from Coney Island Hospital as an exhibit to his motion. His proposed alibi is undermined in several respects.

Defendant's own documentary evidence belies his claim of innocence. The letter from the hospital, dated November 13, 2007, shows that defendant was admitted to the hospital on August 31, 1999 and released on September 1, 1999; that he was treated in the emergency room on August 22, 1999 and November 15, 1999; and that he was treated in the outpatient department on August 25, August 27, September 9, September 23, September 30, October 14-15, and November 18, 1999. Notably, this letter does not support the allegations that defendant was at the hospital on November 17, 1999 or that his injury made him unable to commit the crime. In addition, defendant's failure to present any alibi witnesses to corroborate his story makes it all the more incredible (CPL § 440.30[4][d] [the claim is made solely by the defendant and is unsupported by any other affidavit or evidence, and under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true]).

In addition, defendant alleges that he had informed counsel of his so-called alibi. When viewed alongside the hospital letter and defendant's own inculpatory statements, whether or not counsel knew about defendant's proposed alibi is of no matter. Even if counsel was aware of and investigated the claimed alibi, he would have determined that it was not viable because the hospital had no record of defendant ever being treated on the date of the crime. Accordingly, counsel cannot be faulted for failing to present the alibi at trial.

Finally, defendant's repeated admissions of guilt made any proposed alibi untenable as a trial strategy. Defendant gave videotaped and written confessions to police and the district attorney's office. His aunt also testified that he had confessed to the murder. Considering the irrelevant hospital records defendant now offers and the overwhelming evidence of defendant's guilt, counsel cannot be faulted for choosing to forego an alibi defense. Counsel had no basis to present an alibi defense, pursued a legitimate trial strategy and avoided subjecting such a weak alibi to cross-examination. That choice of strategy is not a basis for finding that this decision constituted ineffective assistance (*People v Smith*, 82 NY2d 731, 733 [1993]; see *People v Park*, 229 AD2d 598, 599 [2d Dept 1996] [counsel had valid tactical reason for not pursuing a weak alibi defense]; see also *People v Wicker*, 229 AD2d 602, 602-603 [2d Dept 1996] [where the evidence of guilt is strong, questionable trial strategies do not rise to the level of ineffective assistance of counsel]).

Defendant also claims that his attorney was ineffective for failing to impeach the medical examiner's testimony about the victim's cause of death, failing to obtain independent expert testimony, and for failing to cross-examine the medical examiner. Defendant's claim rests on the medical examiner's report, which originally listed the cause of death as "undetermined" and was

later amended to reflect a homicide caused by smothering. The medical examiner provided clarification for this change at trial when she testified that she was initially unsure of the victim's cause of death, but that she requested more investigation from detectives to provide additional details from the crime scene. Upon learning that the victim was found with a pillow on top of her head, small abrasions on her face, and with her dentures upside down in her mouth, the medical examiner determined the cause of death as smothering. These details enabled the medical examiner to conclude that the pillow had occluded the victim's nose and mouth, making her unable to breathe.

Consistent with these findings, defendant stated to police that his accomplice had smothered the victim with a pillow. He also admitted to his aunt that he had taken part in the smothering. Defendant's own statements, along with the physical evidence recovered from the crime scene, corroborated the medical examiner's assessment. There were no inconsistencies in the medical examiner's testimony or between her professional findings and defendant's own version of the crime. As counsel had no meaningful basis to challenge the medical examiner's testimony, counsel's failure to impeach or otherwise challenge her findings did not affect the fairness or outcome of the trial (*see People v Hobot*, 84 NY2d 1021, 1024 [1995]; *Stulz* at 284).

Third, defendant argues that counsel failed to introduce at trial evidence to impeach the credibility of defendant's accomplice, Sammy Vargas. Defendant claims that he and Vargas were enemies and that counsel should have exposed any potential Vargas may have had to fabricate. In this instance, defendant claim's is belied by the record (CPL § 440.30[4][d]). Vargas did not testify at trial. The only testimonial evidence introduced at trial with respect to Vargas was statements that defendant himself had attributed to Vargas. Accordingly, counsel

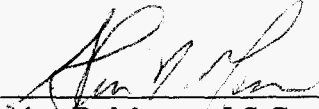
could not possibly cross-examine Vargas or otherwise introduce impeachment material. In light of the overwhelming evidence of defendant's guilt and defendant's failure to establish unfairness in the proceedings as a whole, counsel's performance cannot be considered ineffective (*Strickland* at 694; *Stulz* at 284). Defendant received meaningful representation despite the mountain of evidence against him, derived mainly from his own inculpatory admissions (*Baldi* at 147).

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:


 Alan D. Marrus, J.S.C.

ENTERED
 FEB 23 2010
 NANCY T. SUNSHINE
 COUNTY CLERK