

People v Zalevsky

2010 NY Slip Op 31183(U)

February 17, 2010

Supreme Court, Kings County

Docket Number: 4320/04

Judge: Matthew J. D'Emic

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M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM, PART 4

THE PEOPLE OF THE STATE OF NEW YORK
- against -
Gregory Zalevsky

| By: Justice D'Emic, M. J.
|
Date: February 17, 2010
IND # 4320-04

Defendant moves the court pursuant to C.P.L. § 440.10 for an order vacating his judgment of conviction on the following grounds: (1) due to a mental disorder, defendant was not capable of making an intelligent waiver of his right to counsel, (2) the court did not allow defendant to choose his own legal advisor, (3) defendant's legal advisor acted improperly and (4) there is newly discovered evidence.

Motion denied.

On June 8, 2007 defendant was tried and convicted of Murder in the Second Degree for killing his girlfriend Irina Ilyina under indictment# 4320/2004, and for Criminal Possession of a Weapon in the Third Degree under indictment # 4408/04. These indictments were consolidated under 4320/04. Defendant filed an appeal with the Appellate Division Second Department and was given permission to file a supplemental brief.

Defendant's claims are procedurally barred because " the

judgment is, at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof..."(C.P.L. § 440.10 (2) (b)). According to court records an appeal is pending on some of the issues raised in this motion which bars them from a collateral attack. Regarding those grounds which were not raised on direct appeal, defendant's motion is denied due to "his unjustifiable failure to raise such a ground or issue on an appeal actually perfected by him..."(C.P.L. § 440.10 (2)(c)).

In any event defendant's claims are without merit.

Defendant maintains that he was medicated and cognitively impaired and therefore unable to make a knowing and intelligent waiver of his right to counsel.

Defendant made around 28 court appearances prior to trial and filed two dozen motions, or letters serving as motions, with the court. During the trial defendant gave an opening statement, vigorously cross examined witnesses, and offered his defense during summations. In addition, he filed a voluminous Motion for a Trial Order of Dismissal and a Motion to Set Aside the Verdict.

All of these actions gave the court ample opportunity to evaluate the defendant's behavior, state of mind and abilities. At no time did the court find the defendant to be suffering any impairment of his mental faculties, including any deficits due to medication.

Defendant objected to three seasoned attorneys that were assigned to him seriatim. He then made a knowing, voluntary and intelligent decision to proceed pro se. Defendant was carefully and thoroughly questioned by the court regarding this decision, and advised that he would not be given any special treatment. In response, defendant informed the court that he possessed two master's degrees and wished to proceed pro se.

Defendant objected to the court's assignment of his third attorney as his legal advisor and maintains that he was prejudiced by this decision. Notwithstanding the defendant's objections to having this particular legal advisor present, he consulted with him briefly during jury selection, and allowed the advisor to make objections on his behalf on several occasions.

While a defendant may be entitled to assigned counsel if he is unable to retain counsel "...defendants have no choice in selecting their assigned counsel" (People v. Linares, 2 N.Y. 3d 507).

Defendant's claims regarding the behavior of his legal advisor are also either specious or unsupported by the record. Defendant's assertion that his legal advisor withheld the minutes of a transcript from him is immaterial. The court addressed defendant's complaint by having the court reporter provide them promptly to the defendant and he was in no way prejudiced. Defendant's other conspiracy theories involving the prosecutor and his legal advisor are also without merit. The court presided over

this case in its entirety and found no behavior between the prosecutor and defendant's legal advisor that was inappropriate or improper.

Defendant's claim of newly discovered evidence rests on his assertion that he never received the People's response to his motion opposing the taking of a DNA sample. He maintains that this is newly discovered evidence which, if timely received, would have changed the outcome of the trial (Defense Exhibit 4B).

The evidence in question does not meet the criteria for newly discovered evidence. It is evidence that could have been discovered during the trial with due diligence, having been referred to in court several times by counsel. Furthermore, it is not evidence that would probably change the result of the trial.

Defendant misconstrues the People's position in this response as some sort of "offer" to him, or as conceding and "giving up on DNA evidence" (Defense Motion at page 12). The People were merely suggesting alternative sanctions in the event the court found the request for a DNA sample untimely.

The court granted the People's motion to take a DNA sample and reaffirmed that decision on January 9, 2006. Since the court did not change its decision to grant the test, nothing would have changed as a result of defendant's knowledge of the missing response.

In any event the case did not hinge on DNA evidence, and since the remaining evidence adduced at trial was overwhelming,

there is no probability that DNA evidence or the lack of it would have resulted in defendant's acquittal.

Defendant's motion is procedurally barred and fails on the merits.

This constitutes the Decision and Order of the court.

HON. MATTHEW J. D'EMIC

Matthew J. D'Emic

J.S.C.
FEB 17 2010
NANCY T. SUNSHINE
COUNTY CLERK