

People v White

2010 NY Slip Op 31195(U)

March 24, 2010

Supreme Court, Kings County

Docket Number: 3850/2002

Judge: Carolyn E. Demarest

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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. Carolyn E. Demarest

Date: March 9, 2010

-against-

DECISION & ORDER

GARY WHITE

Indictment No. 3850/2002

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Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10(1)(h), on the grounds that he was denied the effective assistance of counsel. His five claims are without merit. For the following reasons, the motion is denied.

On June 1, 2002, defendant ran up behind two people walking on Flatbush Avenue. He pushed aside Marilyn Hextall and then shot her companion, Albert Hansen, twice in the head, killing him. Defendant was later arrested at approximately 2:00am on June 9, 2003, upon the complaint of his girlfriend, Tyesha Kenney, based on a domestic assault. Kenney had advised Police Officer Conde that defendant had told her of his participation in the Hansen shooting and that defendant had prepared an alibi in the event he was questioned. While in custody, defendant gave the expected alibi and then confessed to the killing, stating that Hansen had beaten him sixteen years earlier and had threatened him again recently. For this act, defendant was convicted by a jury of murder in the second degree (PL § 125.25[1]) and was subsequently sentenced to a term of imprisonment of twenty-two years to life.

Defendant appealed from his judgment of conviction, arguing that the hearing court

should have granted his motion to suppress his statements based on a *Miranda* violation. The Appellate Division, Second Department affirmed defendant's judgment of conviction (*People v White*, 40 AD3d 662 [2d Dept 2007]). The Court of Appeals affirmed the Appellate Division's decision (*People v White*, 10 NY3d 286 [2008]). Defendant next sought a writ of certiorari in the United States Supreme Court, arguing again that his constitutional rights had been violated by the alleged *Miranda* violation. His request was denied (*White v New York*, 129 S.Ct. 221 [Oct. 6, 2008]).

Defendant has also petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of New York. By papers dated June 30, 2009, he claimed that his out-of-court statements should have been suppressed and that he was denied the effective assistance of counsel at trial and on appeal. Conceding that he had not exhausted his claims of ineffective assistance of counsel, defendant requested that his petition be held in abeyance until he could file a CPL § 440 motion and a writ of error coram nobis. Defendant's habeas corpus petition is currently pending determination of the instant motion.

Defendant now moves to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of counsel. Specifically, defendant claims that counsel failed to (1) challenge defendant's arrest as lacking probable cause, and defendant's subsequent statement as fruit of the poisonous tree; (2) object to the admission of hearsay testimony at trial; (3) conduct a pre-trial investigation and to call as witnesses Denise Scott and Robin Halloway; (4) properly cross-examine the People's witnesses, and; (5) object to the playing of defendant's videotaped statement invoking his right to counsel.

The five claims raised are 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). 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). 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]).

With respect to defendant's first challenge to his arrest and subsequent inculpatory statement, the record indicates that a *Huntley* hearing was held to determine the admissibility of several statements made by defendant to police. Defendant gave both an oral and written confession; in a videotape of an interview with the assistant district attorney, defendant invoked

his right to counsel. Although the court originally granted the suppression motion from the bench, it later vacated its decision upon reargument and allowed the evidence of the post-*Miranda* statements to come in while precluding the videotaped statement, which the People did not offer as trial evidence. Defendant now contends that defense counsel should have requested a *Dunaway* hearing to challenge the probable cause for his initial arrest.

The failure to request a particular hearing does not, in and of itself, constitute ineffective assistance of counsel particularly where, as here, such endeavor was potentially futile (see *Rivera* at 709; *People v Perea*, 27 AD3d 960, 961 [3d Dept 2006]). Moreover, defendant has not carried his burden of showing that his trial counsel's failure to request a *Dunaway* hearing was not based on a legitimate defense strategy. Indeed, it is not clear that the defendant even informed his attorney of the relevant facts prior to trial, and the trial record alone does not permit the court to reject all legitimate explanations for counsel's failure to pursue a hearing without "resorting to supposition and conjecture" (*Rivera* at 705). Here, where defendant's arrest was justified by legitimate report of domestic assault, counsel had no viable basis to challenge whether police had probable cause to effectuate that arrest and thus could not legitimately challenge his subsequent statement pursuant to the fruit of the poisonous tree doctrine. Testimony elicited during the *Huntley* hearing also established that defendant's confession was voluntary.

In his next claim, defendant argues that counsel should have objected to so-called hearsay testimony at trial. Particularly, defendant states that both the prosecutor and defense counsel elicited hearsay testimony consisting of Kenney's statement to police and various, vague references to the testimony of police officers at trial. Defendant also objects to the prosecutor's characterization of the case in her opening statement. Here, he has failed to provide specific

references to the testimony in question and to establish that such testimony was legally inadmissible. Moreover, it cannot be concluded that counsel's alleged failure to object so negatively affected defendant's case that it rose to the level of ineffective assistance of counsel. "Any error in eliciting or in failing to object to hearsay or bolstering testimony 'was at most a mistaken judgment as to trial strategy and cannot be characterized as ineffective assistance of counsel'" (*People v Hyatt*, 2 AD3d 749, 750 [2d Dept 2003], quoting *People v Jackson*, 52 NY2d 1027, 1029 [1981]).

Defendant's challenge to counsel's investigation and choice of defense witnesses is also without merit. Defendant now alleges that counsel failed to visit the crime scene or have an investigator interview Denise Scott and Robin Halloway. Here, defendant has not established what relevant evidence would have been discovered from the crime scene or the nature of such evidence (*see People v Ozuna*, 7 NY3d 913 [2006]; *see also People v McDonald*, 1 NY3d 109, 113-114 [2003]). Moreover, in order to prevail on a claim of ineffective assistance of counsel based upon defense counsel's alleged failure to call a witness, the moving papers must contain an affidavit from such witness setting forth the substance of the witness' testimony (*People v Ford*, 46 NY2d 1021, 1023 [1979]; *Session* at 256). In this case defendant has failed to provide any such document or to even allege that the proposed witnesses possessed material information. Defendant has thus fallen short of his burden to establish that he was prejudiced by counsel's conduct (*Strickland* at 694; *Stulz* at 284).

Furthermore, the determination whether to call particular witnesses is generally a question of trial strategy and is ordinarily not viewed as a lapse in professional representation (*People v Smith*, 82 NY2d 731 [1993]). Defendant's moving papers fail to even establish, at bare

minimum, who Scott and Halloway are and how they were connected to the investigation, making it impossible to determine whether they had testimony relevant to the defense. In light of these deficiencies and the potential for testimony irrelevant or damaging to the defense, 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).

Defendant also raises a litany of minor complaints about counsel's conduct in cross-examining the People's witnesses, claiming that he was prejudiced because counsel elicited damaging testimony and failed to further his claim of innocence. For example, defendant believes that the cross-examination of two police witnesses was "designed to elicit" testimony about Tyesha Kenney's statement implicating defendant, and then claims that the prosecutor's characterization of defendant's conduct in the closing argument demonstrates that counsel's deficient cross-examination "backfired." These contentions involve "simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial," and thus are insufficient to establish ineffective assistance of counsel (*Flores* at 187; *Baldi* at 147). Faced with the compelling evidence of defendant's own admission of guilt, counsel wisely chose to employ a strategy of undermining the credibility of the detectives who took the inculpatory statement and to argue to the jury that the statement either had never been made or was false. The record indicates that counsel performed competent cross-examinations of the people's witnesses in an attempt to impeach their credibility. Such a legitimate strategy, though ultimately unsuccessful, does not rise to the level of ineffective assistance (*People v Henry*, 95

NY2d 563 [2000]; *Rivera* at 708; *Baldi* at 146-7).

Finally, defendant argues that counsel should have objected when a videotape showing defendant invoke his right to counsel was played for the jury. Although the hearing court determined that the video could not be used as evidence at trial, the record shows that the prosecutor properly used it as impeachment material to indicate defendant's calm and sober demeanor during the taped interview (*see Harris v New York*, 401 US 222 [1971] [confessions which are suppressed because they were not knowingly made, may nevertheless be used to test the credibility of the defendant by means of impeachment]; *see also People v Cartagena*, 128 AD2d 797 [2d Dept 1987]). In any event, as the videotape only showed defendant invoking his right to counsel, it contained no substantive evidence to otherwise inculcate defendant. Accordingly, counsel is not at fault for failing to object to a legitimate exhibit used as impeachment material.

Accordingly, the motion is denied.

This decision shall constitute 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.

ENTERED
MAR 24 2010
NANCY T. SUNSHINE
COUNTY CLERK

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ENTER
[Signature]
HON. CAROLYN E. DEMAREST
J.S.C.