

**People v Davis**

2010 NY Slip Op 31228(U)

March 26, 2010

Supreme Court, Kings County

Docket Number: 14845/1995

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 31

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

-against- : Date: March 26, 2010

: DECISION & ORDER  
440 Motion

CLIFTON DAVIS, : Indictment No. 14845/1995  
Defendant

-----X  
MICHAEL A. GARY, J.

Defendant moves for an order vacating his adjudication and sentence as a persistent violent felony offender and for re-sentencing pursuant to CPL § 440.20. Defendant claims that his adjudication as a mandatory persistent violent felony offender was invalid and illegal. Specifically, he asserts that the court improperly considered a prior violent felony conviction that had previously been ruled not to be a predicate felony. Defendant also alleges that he received ineffective assistance of counsel when counsel failed to challenge his adjudication as a persistent violent felony offender at sentencing. For the following reasons, the motion is denied.

Background

Before his conviction for the instant offense, defendant was convicted of two violent felonies. In the first, which took place in 1980 in New York County, defendant was convicted upon a guilty plea to attempted criminal possession of a weapon in the third degree (PL §§ 110/265.02). In a 1983 Queens County case, defendant was convicted of

criminal possession of a weapon in the third degree (PL § 265.02). At sentencing in that 1983 case, the People sought to use the 1980 conviction to adjudicate him a second violent felony offender but the court ruled that the conviction could not be used because “defendant was not informed nor did the People prove that he knew the constitutional rights he was waiving at the time he took the plea” (*citing People v Alicea*, 89 AD2d 872 [2d Dept]). Accordingly, the Queens County court sentenced defendant as a first-time violent felony offender to an indeterminate prison term of 2 1/3 to 7 years.

Shortly after defendant’s 1983 conviction, the Court of Appeals in *People v Harris*, 61 NY2d 9 (1983), held that “a prior felony conviction based upon a guilty plea which was entered without the defendant having been advised by the court of the specific constitutional rights being waived by that plea may constitute a predicate felony for the purpose of sentencing defendant as a second felony offender” (*Harris*, 61 NY2d at 11). The Court further held that although a conviction obtained in violation of a defendant’s constitutional rights may not be used to enhance punishment for another offense, “there is no requirement for a uniform mandatory catechism of pleading defendants,” and “a sound discretion, exercised in cases on an individual basis is preferable to a ritualistic uniform procedure” (*id.* at 16-17).

In the case at issue in the instant motion, defendant was convicted on May 15, 1996 upon a jury verdict of robbery in the first degree (PL § 160.15) and two counts of robbery in the second degree (PL § 160.10). At sentencing, the court adjudicated him a mandatory persistent violent felony offender and sentenced him to concurrent terms of imprisonment of twenty years to life for the first count and sixteen years to life for each of

the second-degree robbery counts. The mandatory persistent violent felony offender adjudication was based upon defendant's 1980 New York County conviction and his 1983 Queens County conviction. The People provided the requisite predicate felony statement listing these two predicate felonies. Defendant initially challenged the 1983 conviction, alleging that he "never had the weapon," but withdrew his objection after consulting with his attorney.

#### Procedural History

On appeal, defendant made several claims, among them that the hearing court improperly denied his motion to suppress the identification testimony and physical evidence. On June 15, 1998, the Appellate Division Second Department affirmed the judgment of conviction (*People v Davis*, 251 AD2d 511 [2d Dept 1998]). The Court of Appeals denied defendant leave to appeal (*People v Davis*, 92 NY2d 949 [1998]).

Defendant next moved to vacate his judgment his conviction, alleging that (1) the People knowingly used false testimony at trial; (2) the People violated *Rosario* and *Brady* by failing to make available to defendant the actual 911 tape recording; and (3) he was denied his right to effective assistance of counsel when his attorney failed to address the issues he raised in the motion. On August 24, 1999, this court denied defendant's motion, finding that defendant received effective assistance of counsel as his "attorney clearly made all relevant pre-trial motions, presented a defense, and cross-examined witnesses on the defendant's behalf."

Defendant petitioned the Appellate Division Second Department for a writ of error

coram nobis to vacate the court's June 15, 1998 decision and order on the ground of ineffective assistance of appellate counsel. Defendant claimed that his appellate counsel was ineffective on appeal because he did not challenge defendant's adjudication as a persistent violent felony offender; that the People did not provide sufficient documentation of his prior convictions; and that the People failed to establish that his prior convictions qualified as violent felony offenses. On November 12, 2008, the Appellate Division denied defendant's petition (*People v Davis*, 56 AD3d 571 [2d Dept 2008]). The Court of Appeals denied defendant leave to appeal (*People v Davis*, 12 NY3d 757 [2009]).

#### Defendant's Current Motion

Defendant now moves for an order vacating his adjudication and sentence as a persistent violent felony offender and for re-sentencing as a second violent felony offender. Defendant claims that his sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law," because this court adjudicated him a persistent violent felony offender using a prior violent felony that had been ruled "invalid" by the Queens County court. Defendant further asserts that because the 1983 Queens County conviction was final when he was sentenced on the instant case, "the People are estopped from arguing that the ruling concerning the validity of the 1980 New York County conviction for persistent violent felon status was incorrect." Finally, defendant claims that had he received effective assistance of counsel at his 1996 sentence, he would not have been adjudicated a persistent violent felony offender.

### Conclusions of Law

Defendant waived his instant claim when he failed to controvert the constitutionality of his predicate violent felony conviction at sentencing. At a persistent violent felony offender adjudication, the defendant may “controvert an allegation with respect to such conviction in the [predicate felony] statement on the grounds that the [predicate] conviction was unconstitutionally obtained” (CPL § 400.15[7][b], 400.16[2]). Accordingly, the failure to challenge the previous conviction constitutes a waiver of any allegation of unconstitutionality (*id.*). Having failed to challenge the constitutionality of the 1980 conviction at the predicate felony proceeding held at the 1996 sentencing, defendant waived his current claim (*People v Carrion*, 65 AD3d 693 [2d Dept 2009]; *People v Odom*, 61 AD3d 896 [2d Dept 1999]; *People v Cruz*, 56 AD3d 570 [2d Dept 2008] [defendant’s failure to object to the use of his prior felony conviction as a predicate felony was a waiver of his right to challenge that conviction and its validity]).

The instant claim is also without merit. Sentencing a defendant as a persistent violent felony offender is proper when a defendant “stands convicted of a violent felony offense” and has “previously been subjected to two or more predicate violent felony convictions” (PL §§ 70.02[1], 70.04[1][b], 70.08[1][a]; CPL § 400.16[1]). The People must prove the existence of these predicate violent felony convictions beyond a reasonable doubt but need not establish their constitutionality (*see* CPL § 400.15[2], [3], [7][a][b]); *People v Diggins*, 11 NY3d 518 [2008]; *People v Harris*, 61 NY2d 9, 15 [1983]). The record from the 1996 sentencing indicates that the People satisfied their

burden by submitting the requisite predicate felony statement along with certificates of disposition concerning defendant's prior felony convictions and certificates describing defendant's terms of incarceration. Thus, as defendant stood convicted of a class B violent felony (PL § 70.02[a]) and had two prior class "D" violent felony convictions (PL § 70.02[c]) from the 1980 and 1983 cases, he was properly adjudicated and sentenced as a persistent violent felony offender (PL §§ 70.08, 70.10).

Moreover, defendant is mistaken that his conviction in the 1980 case was invalidated by the Queens County court's decision not to use it as a predicate felony at the 1983 sentencing. The court did not vacate his conviction or sentence; it simply held that, pursuant to *People v Alicea*, his 1980 conviction did not qualify as a predicate felony for the purposes of sentencing him as a second felony offender. The Court of Appeals's decision in *People v Harris*, 61 NY2d 9 (1983), soon after invalidated the Queens County court's determination and rendered the 1980 conviction eligible for use as a predicate felony. Accordingly, defendant's 1996 adjudication as a persistent violent felony offender was properly based upon his two valid predicate violent felony convictions.

Even if defendant had controverted the constitutionality of his 1980 conviction, he would have failed to meet his burden of proving it unconstitutional under the current *Harris* standard. Under *Harris*, which overruled the Queens County court's determination under *Alicea*, defendant knowingly, voluntarily and intelligently waived his rights upon pleading guilty in 1980 and the court properly accepted his plea, despite omitting from its enumeration of rights surrendered defendant's right to call witnesses and testify on his own behalf (*see Harris* at 17). The court's oversight did not affect the

validity of defendant's plea and his resulting predicate felony conviction (*id.* at 20).

With regard to defendant's claim that the People are collaterally estopped from claiming that "the ruling concerning the validity of the 1980 New York County conviction for persistent violent felon status was incorrect," his arguments are misguided and baseless. The court agrees with the People's argument on this matter.

Defendant's claim that his attorney was ineffective for failing to contest his felony offender adjudication at sentencing is procedurally barred. On a previous motion to vacate his judgment of conviction, this court reviewed defendant's allegation of ineffective assistance on the merits and determined that counsel had provided meaningful representation and that defendant was not prejudiced by counsel's performance. Accordingly, the instant claim is barred from review pursuant to CPL § 440.20(3).

In any event, defendant's claim of ineffectiveness is also 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., 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 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]).

Here, counsel provided meaningful representation. At sentencing, counsel conferred with defendant concerning his prior convictions and advocated for a favorable sentence. That defendant received the minimum allowable sentence indicates that counsel’s efforts were successful (*People v Richards*, 227 AD2d 419 [2d Dept 1996]). Moreover, counsel’s failure to object to defendant’s adjudication as a persistent felony offender did not render him ineffective because it would have been futile for him to do so (*see People v Rincon*, 62 AD3d 574 [1<sup>st</sup> Dept 2009] [claim of ineffective assistance without merit where a challenge to the constitutionality of a prior plea would have been futile]). As discussed above, the People provided a predicate felony statement listing two valid prior violent felony convictions, both of which defendant declined to challenge. Thus, as counsel had no basis to contest defendant’s adjudication as a persistent violent felony offender, he was not ineffective for failing to raise a futile claim (*People v Caban*, 5

NY3d 143, 152 [2005]; *Stulz* at 287; *Rincon* at 574; *People v Lane*, 60 NY2d 748 [1983] [counsel not ineffective for failing to challenge defendant's status as a second felony offender where such challenge would have been futile]). Given the futility of such a claim defendant was not prejudiced by counsel's decision.

Nor was counsel ineffective for failing to notice that defendant had never been adjudicated a second violent felony offender before his 1996 adjudication as a mandatory persistent violent felony offender. As explained above, proper adjudication as a persistent violent felony offender under PL § 70.02, *et. al.* requires proof only of prior violent felony convictions, not previous violent felony offender adjudications. Accordingly, a defendant need not be adjudicated a second violent felony offender prior to being sentenced as a persistent violent felony offender (*People v Morse*, 62 NY2d 205 [1984]; *People v Solomon*, 156 AD2d 400 [2d Dept 1989]; *People v Herrar*, 120 AD2 614 [2d Dept 1986]). Such a challenge by counsel would have been futile because defendant's 1980 conviction was rendered valid as a predicate felony under the *Harris* case, which overruled the *Alicea* case in effect at the time of conviction (*see Harris* at 15-16). In viewing counsel's performance as a whole, defendant received meaningful representation and suffered no prejudice on account of counsel's reasonable choice of strategy (*Stulz* at 284).

Accordingly, defendant's motion is denied.

This decision constitutes the order of the court.

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.

Dated: Brooklyn, New York  
March 26, 2010

  
MICHAEL GARY, J.S.C.

