SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART CV 11

The People of the State of New York	By: Hon. Carolyn E. Demarest
-against-	Date: November 4, 2010
	DECISION & ORDER
ELIAS SANTANA	Indictment No. 2315/2000

Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds of ineffective assistance of trial counsel and newly discovered evidence. Specifically, defendant claims that trial counsel failed to challenge the verdict as repugnant, and that affidavits from two brothers constitute newly discovered evidence and prove defendant's innocence. Defendant also moves to set aside his sentence pursuant to CPL § 440.20 on the grounds that it is illegal because the trial court failed to impose a period of postrelease supervision. For the following reasons, the motion is denied in part.

On November 18, 1999, at approximately 3:30 P.M., in front of 102 Essex Street, two rival gang members, Christian Valdez of the Netas and King Flaco of the Latin Kings, had a fist fight to settle an accusation that Valdez had been disrespectful of the Latin Kings' gang symbol. After the fight, a group of Latin Kings rushed Valdez and attempted to stab him but were thwarted by Marcos Valle, a member of the Netas. During the ensuing melee, Valle was knocked to the ground and then picked up by three Latin Kings and held before defendant and codefendant Hector Burgos. Defendant produced a gun and pointed it at Valle. Codefendant Burgos instructed defendant to shoot Valle, and when defendant failed to comply, codefendant Burgos took the gun from defendant and shot Valle once in the chest, killing him.

Defendant and codefendant were charged, under a theory of acting in concert, with two counts of murder in the first degree (Penal Law § 125.25[1], [2]), two counts of assault in the first degree (PL § 120.10[1], [3]), two counts of attempted assault in the first degree (PL § 110/120.10 [1], [3]), gang assault in the first degree (PL § 120.07), attempted gang assault in the first degree (PL § 110/120.07), criminal possession of a weapon in the second degree (PL § 265.03) and criminal possession of a weapon in the third degree (PL § 265.04[4]).

After a jury trial, defendant was found guilty of manslaughter in first degree (PL § 125.20[1]) and attempted assault in the first degree. Codefendant was convicted of murder in the second degree and attempted assault in the first degree. Defendant was sentenced to concurrent determinate terms of 20 years for manslaughter and eight years for attempted assault (Demarest, J., at hearings, trial and sentence).

Defendant's conviction was affirmed by the Appellate Division (*People v Santana*, 294 AD2d 543 [2d Dept 2002]), and leave to appeal to the Court of Appeals was denied (98 NY2d 771 [2002]). Defendant also moved for a writ of habeas corpus to the United States District Court for the Eastern District of New York, but that Court denied defendant's petition (*Santana v Poole*, 2006 US Dist LEXIS 86530 [EDNY 2006]).

Ineffective Assistance of Counsel

Defendant claims that he was denied effective assistance of counsel because his attorney did not contest the verdict as repugnant. He contends that because he and codefendant were charged with acting in concert in the commission of the same crimes, the separate verdicts finding them to have committed different crimes was inherently inconsistent and repugnant.

Under Penal Law § 20.15, when two or more persons are criminally liable for an offense that is delineated by degree, each person, the principal and the accomplice, is "guilty of such degree as is compatible with his own culpable mental state and his own accountability for an

aggravating fact or circumstance." The degree of the crime is compatible with the defendant's "own mental state" when the defendant acts with the requisite culpable mental state required from the commission of the particular degree of the offense. For example, a jury "may reasonably hold a defendant guilty of murder on finding that the defendant acted with a specific intent to kill, and hold the codefendant guilty, as an accomplice, of manslaughter on finding that the codefendant intended only to cause serious physical injury" (Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 20.15 at 144-5). "The fact that defendant and codefendant were convicted of different degrees of homicide does not undermine the inference of accessorial liability" (*People v Dedaj*, 303 AD2d 285 [1st Dept 2003]).

In determining whether a jury verdict is repugnant, "the record should be reviewed only as to the jury charge" (*People v Tucker*, 55 NY2d 1, 7 [1981]). The charge must be examined to see whether the essential elements of each count, as described by the trial court, can be reconciled with the jury's findings (*People v Loughlin*, 76 NY2d 804, 807 [1990]). Repugnancy is established "only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered" (*Tucker*, at 7). Courts have held that this rule also applies when a codefendant is convicted of a crime while another is acquitted of the same crime (*People v McLaurin*, 50 AD3d 1515, 1516 [4th Dept 2008]; *People v Green*, 71 NY2d 1006, 1008 [1988]).

In this instance, there was nothing inherently repugnant in the jury's verdict based on the charge as given. The finding that codefendant intended to kill is not incompatible with the finding that defendant only intended to cause serious physical injury (*see People v Cohen*, 223 NY 406, 429-30 [1918], *cert denied* 248 US 571 [defendant's argument rejected that, because charged with codefendant as acting in concert, separate verdicts of murder in the second degree and manslaughter in the first degree were illogical]). Here, defendant initially possessed the

firearm, which was taken from him by codefendant when defendant failed to obey the command to shoot Marcos Valle. Codefendant then fired the fatal shot himself. Under such circumstances, it was not unreasonable for the jury to find that while defendant acted in concert with codefendant to cause the death of Valle, they did so with different states of mind. Furthermore, it is important to note that the jury was instructed to consider the evidence separately as to each defendant (*see People v Collado*, 187 AD2d 444, 445 [2d Dept 1992]; *People v Brown*, 158 AD2d 528 [2d Dept 1990]).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his attorney did not provide meaningful representation (*People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY 137, 147 [1981]). "So 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" (*Baldi*, at 147). A reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for the counsel's conduct (*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 (*Benevento*, at 713). 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]).

Because the verdict in this case was not repugnant, counsel may not be faulted for failing to make an application that was destined to fail. "There can be no denial of effective assistance of counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005], *quoting People v Stutz* at 287).

Newly Discovered Evidence

Defendant's claim that newly discovered evidence proves his innocence and thus he should be given a new trial fails on multiple grounds. CPL § 440.10(1)(g) permits a court to vacate a judgment of conviction when "[n]ew evidence has been discovered since the entry of a judgment based on a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of new evidence." To constitute newly discovered evidence within the meaning of the statute, defendant must establish that the new evidence in question: (1) will probably change the result upon a new trial; (2) has been discovered since the trial; (3) could have not been discovered before trial by the exercise of due diligence; (4) is material to the issue; (5) is not cumulative to the former issue; and, (6) is not merely impeaching or contradicting the former evidence (*People v Salemi* at 215-6). The new evidence must also be admissible at trial (*see People v Boyette*, 201 AD2d 490, 491 [2d Dept 1994]).

The power to grant a new trial on the grounds of newly discovered evidence is purely statutory and may not be exercised unless all of the requirements of the statute have been satisfied (*People v Salemi*, 309 NY 208 [1955]; *People v Taylor*, 246 AD2d 410, 411 [1st Dept 1998]; *People v Gurley*, 197 AD2d 534, 536 [2d Dept 1993]). The decision as to whether the statutory criteria has been met rests within the sound discretion of the court (*People v Baxley*, 84 NY2d 208, 212 [1994]; *People v Tankleff*, 49 AD3d 160 [2d Dept 2007]).

The affidavits submitted by defendant fall far short of satisfying this legal standard. They are lacking on two fronts: the lack of due diligence and the inability to demonstrate that a more favorable verdict would have resulted. The first affidavit, sworn by Christian Manuel

Valdez, is not pertinent to the matter of defendant's innocence as the affiant himself admits that he did not witness the incident. In his affidavit, Mr. Valdez merely discusses the observations of actual witnesses and their purported admission of perjured testimony during defendant's trial. Such hearsay is inadmissible for the truth of the matter presented (*People v Caviness*, 38 NY2d 227, 230 [1975]). With such vague and unreliable assurances, the affidavit fails to demonstrate that Mr. Valdez's testimony would have resulted in a more favorable verdict.

In the second affidavit, Victor Valdez, Christian Valdez's younger brother, describes what he observed as an eyewitness to the incident. Mr. Valdez claims that defendant did not have a gun and that codefendant Burgos obtained the gun used in the shooting from another individual. Mr. Valdez, however, does not provide the identity, a description or even the gender of the alleged gun supplier, nor does he elaborate on the specifics of the transfer. These allegations are vague and unsubstantiated by any details at all, and absent any further specifics, Mr. Valdez's claim fails to demonstrate that a more favorable verdict would have resulted.

Finally, defendant has failed to explain why either individual did not testify at trial, or why ten years passed before they came forward with their information. Defendant has also failed to disclose when he became aware of this newly discovered evidence and thus fails to demonstrate the due diligence required for this motion to be successful.

Postrelease Supervision

Defendant claims that his sentence is illegal because the court failed to impose a period of postrelease supervision (PRS) as required by PL § 70.45(1). Having acknowledged that the law requires the court to resentence him to a PRS period of between 2 ½ and 5 years, defendant argues that any period of PRS should be deducted from his term of imprisonment.

Under PL § 70.45, when a court imposes a determinate sentence it must also pronounce a mandatory period of PRS as a component of that sentence. The Court of Appeals has held that a

sentencing court's failure to pronounce PRS during sentencing proceedings results in an illegal sentence (*Garner v New York State Department of Correctional Services*, 10 NY3d 358, 360 [2008]). Nevertheless, "the failure to pronounce the required sentence amounts only to a procedural error akin to a misstatement or clerical error, which the sentencing court could easily remedy" (*People v Sparber*, 10 NY3d 457, 472 [2008]). "The sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (*Id.* at 471). The Legislature responded in 2008 by enacting Correction Law § 601-d to provide a mechanism for courts to resentence defendants serving determinate sentences without court-ordered PRS terms.

In *Garner*, the Court of Appeals further held that only the sentencing court is authorized to pronounce the PRS component of a defendant's sentence and that DOCS has no authority to impose a period of PRS administratively (10 NY3d at 362). CPL § 440.20 "only permits challenges to judicially imposed sentences, not those administratively imposed by DOCS." (*Id.* at 363). Accordingly, as the sentence herein was imposed, following a jury verdict, on June 29, 2000, without the inclusion of the mandatory period of post-release supervision, that sentence was illegal as a matter of law and, pursuant to CPL § 440.20, the sentence must be set aside.

However, as the relief requested under CPL § 440.20 has no effect upon the validity of the conviction, resentencing remains the sole remedy available to defendant whose mandatory PRS term was never pronounced at sentencing (*Sparber*, 10 NY3d at 471).[1] Defendant is thus eligible for resentencing pursuant to Correction Law § 601-d.

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[1] It is noted that CPL § 440.20(2) precludes consideration of any other issue which was or could have been addressed upon appeal. It is only because intervening case-law has established the merits of the argument raised regarding the failure to impose post-release supervision that defendants's motion must be granted.

Accordingly, defendant's motion for resentencing is granted. The court declines to order an updated pre-sentence report in light of defendant's incarceration from the date of sentence (see *People v Watkins*, 71 AD3d 799 [2d Dept 2010]).

It is ORDERED that defendant be produced before this court for a resentencing hearing on December 6, 2010.

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 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

CAROLYN E DEMAREST, J.S.C.