

People v Johnson

2010 NY Slip Op 33418(U)

May 14, 2010

Supreme Court, Kings County

Docket Number: 7450/2004

Judge: Abraham G. Gerges

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MEMORANDUM**SUPREME COURT****KINGS COUNTY****BY ABRAHAM GERGES, J.**

The People of the State of New York**Date: May 14, 2010****v.****James Johnson,****Defendant.****Ind. # 7450/2004**

Defendant moves to vacate the judgment of conviction on the grounds of ineffective assistance of counsel.

In determining the instant motion, the court has reviewed defendant's motion papers and reply papers, the district attorney's affirmation including defense counsel's affidavit, the court file and the trial transcript. The court also recalls in detail the pre-trial and trial proceedings conducted in this matter.

Procedural History

Defendant was indicted for the murder of Andrew Morgan on April 9, 2002. The victim and defendant's estranged wife were involved in an ongoing affair. The victim had just left the wife's apartment when he was shot while sitting in his car. Defendant, who had been seen in the area prior to the homicide, was also observed standing next to the victim's vehicle immediately after the shots were fired. After the homicide, defendant fled New York, leaving his job precipitously without picking up his paycheck. He was apprehended in Alabama, living under an assumed name, on January 31, 2005.

The above-referenced indictment charged defendant with Murder in the Second and Criminal Possession of a Weapon in the Second and Third Degrees.

On January 19, 2006, after a jury trial, defendant was convicted of Murder in the

Second Degree. On February 15, 2006 defendant was sentenced to an indeterminate term of incarceration of a minimum of twenty-five years to a maximum of life.

An appeal was filed in the Appellate Division, Second Department. On March 11, 2008, the conviction was affirmed (*People v. Johnson*, 49 AD3d 664 [2008]). Defendant was denied leave to appeal to the Court of Appeals (*People v. Johnson*, 10 NY23d 865 [2008]).

Defendant contends counsel was ineffective; he now raises, for the first time, that counsel failed to advise defendant that he had an absolute right to testify on his own behalf at trial and that counsel prevented him from testifying. He further contends that he had inadequate opportunities to consult with counsel and family during the proceedings.

Law

CPL 440 & Defendant's Right to Testify

It is axiomatic that a defendant in a criminal proceeding has the right to testify; this right is guaranteed by both the Federal and New York State Constitutions, and by statute (U.S. Const. 14th Amend.; N.Y. Const., Art. I, §6; CPL 60.15; *see also People v. Terry*, 309 AD2d 973 [App. Div., Third Dept. 2003]; *People v. Mason*, 263 AD2d 73 (App. Div., First Dept. 2000); *People v. Harami*, 93 AD2d 867 (App. Div., Second Dept. 1983)). It is also well-settled that a defendant, upon accepting the assistance of counsel, retains authority only over certain fundamental decisions, one of which is the decision as to testify on his or her own behalf (*People v. White*, 73 NY2d 468, *cert denied* 493 US 859; *Jones V. Barnes*, 463 US 745).

In reviewing a post-judgment claim, CPL 440.30 (4) (d) permits a court to deny a motion to vacate a judgment without a hearing if an allegation of fact essential to support the motion is made solely by the defendant and is unsupported by other affidavit or evidence. CPL 440.30 (4) (d) further provides that under these, and all the other circumstances attending the case, there is no reasonable possibility that such allegation is

true.

In *People v. Velez*, the court held that in the absence of any other evidence to support defendant's claim and given the circumstances of the case, if there is no reasonable possibility that defendant's allegations are true, denial of the post-judgment motion is warranted (*see People v. Velez*, 18 Misc. 3d 1101(A) [2007]). Likewise, in *People v. Hunt*, the court found that denial of defendant's 440 claim was warranted as the claims were "unsubstantiated" (*People v. Hunt*, 15 Misc. 3d 1142(A) [2007]).

In the instant case, defendant's claim that counsel failed to advise him of his absolute right to testify are belied by counsel's highly detailed affidavit, and unsubstantiated by anything other than defendant's own self-serving affidavit.

As to defendant's claim that he was not afforded adequate opportunities to consult with counsel and family members, this claim too is meritless as it is unsubstantiated and belied by counsel's affidavit. The court's recollection of these proceedings is similar to counsel's. Defendant was daily afforded many off the record opportunities to conference with counsel and family during the over two week time period from suppression hearings to jury verdict. It is this court's longstanding practice not to deny any party's request for additional time to consult during proceedings. There is nothing in the record to indicate that, at any time, counsel or defendant needed additional time for consultation. Defendant cannot now, over four years after trial, advance this uncorroborated claim; it is hereby denied.

Adequacy of Counsel

“The Court of Appeals has time and time again advised that ineffective assistance of counsel is generally not demonstrable on the main record” (*People v Harris*, 109 AD2d 351, 360 [1985]). A motion to vacate the judgment is the appropriate vehicle to raise ineffective assistance, rather than a motion to set aside the verdict (*People v Bagarozy*, 182 AD2d 565, 566 [1992]) or by direct appeal (*People v Bagarozy*, 182 AD2d 565, 566 [1992]). This is true because, even when the facts are on the record, the attorney's motivations are usually not reflected on the record (*Massaro*, 538 US at 505; *People v McNair*, 294 AD2d 952, 952-953 [2002]; *People v Zeh*, 289 AD2d 692, 695 [2002]; *People v Brown*, 232 AD2d 193 [1996]; see also *People v Love*, 57 NY2d 998, 999-1000 [1982]; *People v Castricone*, 224 AD2d 1019, 1020 [1996]). Further, where there are both record and non record claims, a CPL 440 motion is the appropriate method by which to raise both claims. (*Massaro*, 538 US 500; *People v Hoyte*, 273 AD2d 48 [2000]).

Both the United States Constitution (*Gideon v Wainwright*, 372 US 335 [1963]) and the New York State Constitution (*People v Linares*, 2 NY3d 507, 510 [2004]) grant a defendant in a criminal proceeding the right to the assistance of counsel. This includes the right to “effective” assistance of counsel (*Strickland v Washington*, 466 US 668 [1984]; *Linares*, 2 NY3d at 510).

Counsel renders effective assistance when “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”(*People v Baldi*, 54 NY2d 137, 147 [1981]). What constitutes effective assistance, moreover, is not susceptible to precise measurement.(*id.* at 146-147). “To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice”(*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Benn*, 68 NY2d 941, 942 [1986]). This standard is designed to provide the defendant with a fair trial not a perfect one (*Yarborough v Gentry*, 540 US 1, 8 [2003]; *Flores*, 84 NY2d at 187).

Isolated errors in defense counsel’s representation ordinarily do not constitute ineffective assistance of counsel (*Yarborough*, 540 US at 8-9 ; *People v Henry*, 95 NY2d 563, 565-566 [2000]). A single error, if it affects the fairness of the trial, may rise to the level of ineffective assistance of counsel (*id.*; *Flores*, 84 NY2d at 188-189; *see People v Turner*, 5 NY3d 476 [2005]).

A court should take care “to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis” (*Baldi*, 54 NY2d at 146). If transcripts and submissions reveal a trial strategy that might well have been pursued by a reasonably competent attorney, then assistance is effective, even if trial counsel disavows the tactic (*People v Satterfield*, 66 NY2d 796, 799 [1985]; *see People v Washington*, 21 AD3d 648, 651[2005]). Courts will not second guess whether defense

counsel's trial strategy "was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*Satterfield*, 66 NY2d at 799-800; *Yarborough*, 540 US 1). The choice of trial tactics is viewed objectively (*Strickland*, 466 US at 688; *People v Angelakos*, 70 NY2d 670, 673 [1987]; *Satterfield*, 66 NY2d at 799; *People v Butler*, 273 AD2d 613, 615 [2000]; *People v Castellano*, 203 AD2d 116, 117 [1994]). Trial strategies that might well have been pursued by a reasonably competent attorney and are objectively reasonable are within the constitutional parameters (*Satterfield*, 66 NY2d at 799; *People v Nichols*, 289 AD2d 605, 606 [2001]).

A defendant must "demonstrate the absence of strategic or other legitimate explanations for counsel's failure . . . Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment" (*People v Rivera*, 71 NY2d 705, 709 [1988]).

In order to show that defendant's Federal constitutional right to effective assistance of counsel was violated, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 455 US at 694, *see also Benevento*, 91 NY2d at 713). Reasonable probability means a probability that undermines the fact finder's confidence in the outcome of the trial (*id.*).

Under New York law, prejudice is examined in terms of errors that deprive the defendant of a fair trial (*Benevento*, 91 NY2d at 713). Prejudice is a significant factor,

but not an “indispensable element in assessing meaningful representation”(*People v Stultz*, 2 NY3d 277, 284 [2004]; *People v Caban*, 5 NY3d 143, 155-156 [2005]).

The federal and state standards are different.(*Benevento*, 91 NY2d at 713-714). The federal standard focuses on “the outcome of the proceeding”(*id.* at 714; *see also Henry v Poole*, 409 F3d 48 [2005]; *Caban* 5 NY3d at 155). The state standard focuses on the “fairness of the process as a whole” (*Benevento*, 91 NY2d at 714; *Caban*, 5 NY3d at 156; *see also Henry* , 409 F3d at 69).

Counsel’s representation in the instant trial was effective. The People’s case included evidence that defendant had been seen in the area of his estranged wife’s apartment earlier on the day of the homicide, that defendant was extremely jealous and had been seen near the victim’s car before and after the shots were fired. Defendant fled New York immediately after the crime, leaving both job and paycheck, and was arrested in Alabama years later living under an assumed name. Based on this, and other evidence elicited at trial, counsel made a reasoned strategic decision advising defendant against testifying.

Further, as demonstrated by the record, counsel had a keen grasp of the facts and issues involved in this case. Counsel vigorously examined the People’s witnesses at both hearing and trial, skillfully attempting to elicit testimony to buttress the defense contention that there was no eyewitness to the crime and that the People failed to prove their case beyond a reasonable doubt. Counsel gave a comprehensive summation

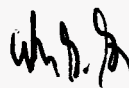
detailing the many weaknesses in the People's circumstantial case. The claim of ineffectiveness of counsel lacks merit.

Defendant's motion to vacate the judgment of conviction is hereby denied.

This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 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 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 certificate granting leave to appeal is granted (22 NYCRR 671.5).

E N T E R,



J. S. C.

**HON. ABRAHAM G. GEROGES
J.S.C.**

ENTERED
MAY 18 2010
NANCY T. SUNSHINE
COUNTY CLERK