

People v Campos

2010 NY Slip Op 33586(U)

July 2, 2010

Supreme Court, Kings County

Docket Number: 790/88

Judge: Carolyn E. Demarest

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM IC-1

| | |
|-------------------------------------|--------------------------------|
| -----X | |
| The People of the State of New York | : By: Hon. Carolyn E. Demarest |
| | : Date: July 2, 2010 |
| -against- | : DECISION & ORDER |
| VLADYMIR CAMPOS | : Indictment No. 790/88 |
| | : -----X |

Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that the evidence at trial was insufficient and because of numerous improprieties in the Grand Jury proceedings. Specifically, defendant claims that (a) his conviction was based on legally insufficient evidence; (b) he was denied effective assistance of counsel because his attorney did not allow defendant to testify before the Grand Jury; (c) the indictment was defective because the People failed to inform the Grand Jury that a witness had recanted; (d) the indictment was defective because the People failed to present sufficient evidence to the Grand Jury; and (e) the indictment was defective because the People failed to properly instruct the Grand Jury on the law of corroboration. For the following reasons, the motion is denied.

Background

On December 29, 1997, at approximately 9:00 P.M., in the lobby of an apartment building located at 523 E. 180th Street, Kings County, defendant shot Feliz "Pito" Gonzalez, causing his death. Defendant was charged by Kings County Indictment No. 790/88 with three counts of murder in the first degree (Penal Law § 125.27[1][a][vii] [two counts], 125.27[1][a][vi]), three counts of murder in the second degree (PL § 125.25[1], [2], [3]),

three counts of robbery in the first degree (PL § 160.15[1], [2], [4]), criminal possession of a weapon in the second degree (PL § 265.03) and criminal possession of a weapon in the third degree (PL § 265.02[4]). Defendant was found guilty of murder in the second degree after a jury trial, and on November 4, 1998, was sentenced to a term of incarceration of twenty-five years to life.

Defendant appealed his conviction, claiming that the trial court erred in denying his request for a mistrial based on the delayed disclosure of *Brady* material and that the trial court improperly denied his motion to strike the testimony of a witness for the prosecution. The Second Department affirmed defendant's judgment of conviction (*People v. Campos*, 281 AD2d 638 [2001]). The Court of Appeals denied defendant leave to appeal (*People v. Campos*, 96 NY2d 827 [2001]).

Defendant then moved *coram nobis* for a writ of error, arguing that his appellate counsel was ineffective for failing to raise the claims that defendant's trial counsel was ineffective for adopting a defense which conceded that defendant was the shooter, and also that the verdict sheet was improperly annotated. The Second Department denied defendant's motion (*People v. Campos*, 23 AD2d 396 [2005]).

Defendant again moved for a writ of error *coram nobis*, claiming that his trial counsel was ineffective for failing to claim that defendant had been arrested without probable cause. The Second Department again denied defendant's motion (*People v. Campos*, 60 AD3d 689 [2009]).

Conclusions of Law

A court must deny a motion to vacate judgment when sufficient facts appear on the record to permit review on appeal, but no such review has occurred owing to the defendant's

unjustifiable failure to raise the issue on direct appeal (CPL § 440.10[2][c]). In this instance, defendant's claim that he was convicted based upon insufficient evidence is based on matters appearing on the record. Defendant had a full opportunity to raise the issue on direct appeal, and his failure to do so is unjustified. A motion to vacate the judgment of conviction is not a substitute for an appeal (*People v Cooks*, 67 NY2d 100, 500 [1986]). Defendant's claim is procedurally barred from collateral review.

Defendant further claims that he was denied effective assistance of counsel because his attorney did not allow him to testify before the Grand Jury. Trial counsel's performance is effective "[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" (*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 of counsel 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]).

It is well settled that a failure by defense counsel to secure a defendant's intention to testify before the grand jury does not by itself constitute ineffective assistance of counsel (*People v Wiggins*, 89 NY2d 872 [1996]; *People v Owens*, 43 AD3d 1185 [2d Dept 2007];

People v Venable, 7 AD3d 647, 648 [2d Dept 2004]; *People v Sherrod*, 306 AD2d 503 [2d Dept 2003]). Defendant further fails to demonstrate any prejudice which resulted from his failure to testify before the Grand Jury (*See People v Sturgis*, 199 AD2D 549, 550 [2d Dept 1993] [“The defendant’s bald statement was insufficient to meet his burden of establishing his rights pursuant to CPL 190.50 were violated”]). As defendant has failed to sufficiently allege ineffective assistance of counsel, his claim is denied.

Defendant’s claim that the evidence before the Grand Jury was legally insufficient is misplaced. Upon a conviction after trial, a claim of insufficiency of evidence to support an indictment is barred (*People v Huston*, 88 NY2d 400, 411 919960; CPL § 210.30[6]). The higher standard of proof at trial cures any questions regarding the sufficiency of the evidence before the Grand Jury (*People v Boynton*, 35 AD3d 875 [2d Dept 2006]; *People v Bedell*, 272 AD2d 622 [2d Dept 2000]; *People v Taylor*, 225 AD2d 640 [2d Dept 1996]).

Defendant also asserts that the indictment is defective because the People failed to present certain alleged *Brady* material to the Grand Jury. Defendant contends that the Grand Jury should have been informed that the witness who testified in the Grand Jury to overhearing defendant’s discussions of a contract killing had previously made contradictory statements to the prosecutor. The witness later recanted the same testimony at trial in the presence of the jury following a violent outburst by defendant. The testimony was subsequently expunged from the record and in its absence the counts of murder in the first degree could not be submitted to the jury. Accordingly, because the witness’s testimony had no bearing on defendant’s guilt, no *Brady* violation occurred and defendant’s contention is rendered moot.


Likewise, defendant's final claim is rendered moot because it rests on the same testimony that was precluded. Defendant contends that the indictment is defective because the People failed to properly instruct the grand jury on the law of corroboration. Defendant argues that the prosecutor in the Grand Jury should have offered corroboration for the witness who recanted his testimony at trial. Since the witness' testimony ultimately had no material impact on defendant's guilt, this claim is irrelevant.

Accordingly, defendant's motion is denied in its entirety.

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.

