

People v Rodriguez

2010 NY Slip Op 33587(U)

July 9, 2010

Supreme Court, Kings County

Docket Number: 1604/04

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER

Indictment # 1604/04

-against-

ALVIN RODRIGUEZ,

Defendant.

----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On June 16, 2002, in front of 61 Martense Street, in Kings County, defendant shot Kemar McCormack in the head at close range, killing him instantly. The shooting was most likely the result of internecine arguing amongst members of the Crips gang, which included both defendant and the victim McCormack. The crime occurred at approximately 4:00 a.m.

For this crime, defendant was charged by Kings County Indictment Number 1604/04, with two counts of Murder in the Second Degree (Penal Law §§ 125.25[1], and[2]); one count of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[2]); and one count of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[4]).

On March 15, 2005, following a jury trial before the Honorable L. Priscilla Hall, JSC, defendant was convicted of one count of Murder in the Second Degree (Penal Law § 125.25[1]). The Court sentenced defendant on May 9, 2005, to a term of imprisonment of twenty years to life.

Despite being represented by counsel at trial, defendant filed a motion to set aside the verdict pursuant to CPL § 330.30(1) by *pro se* papers on March 24, 2005. Defendant argued that his

conviction was the result of violations of his constitutional rights, specifically that he was deprived the effective assistance of counsel, as well as other grounds. By decision and order dated June 2, 2005, Justice Hall denied defendant's motion to set aside the verdict in its entirety.

Defendant, represented by appellate counsel, filed an appeal of his conviction with the Second Department. Defendant's counsel, after initially asserting an ineffective assistance of counsel claim, sent a letter to the Second Department withdrawing those claims prior to oral argument. Defendant then asserted an ineffective assistance of counsel claim by filing a *pro se* supplemental brief on his own behalf.

By decision and order dated December 1, 2009, the Second Department rejected defendant's arguments and affirmed his conviction. People v Rodriguez, 68 AD3d 789 (2d Dept 2009). The Court held "The defendant failed to demonstrate that he was denied the effective assistance of counsel. A review of the record in its entirety reveals that defense counsel provided meaningful representation." Id (citations omitted).

By *pro se* papers dated December 12, 2009, defendant moved this Court, pursuant to CPL § 440.10(1)(h) to vacate his judgment of conviction on the grounds that he was denied the effective assistance of counsel. The People filed opposition to defendant's motion on January 29, 2010. By letter dated February 12, 2010, defendant sought to withdraw his motion so that he could refile it at another time. The People filed a letter in opposition to that application on March 1, 2010.¹

For the following reasons defendant's motion is denied.

¹ The Court will not allow defendant to withdraw his motion at this time as there were no grounds stated by defendant for such action and doing so would prejudice the People who have already compiled opposition papers, including an affidavit from trial counsel.

LEGAL ANALYSIS

The motion presently before this Court represents defendant's third application for relief on the grounds that his trial counsel was ineffective. Defendant raises eight claims in the instant application, two of which were previously submitted and rejected in the CPL § 330.30 motion. Specifically, defendant reasserts the arguments that trial counsel's failure to challenge the probable cause for the arrest, and trial counsel's failure to investigate and call an individual named Darren Williams as a witness constituted ineffective assistance of counsel. Pursuant to CPL § 440.10(3)(b) the Court will not address these already litigated and decided issues.

Defendant again raised the issue of ineffective assistance of counsel on his direct appeal, which was decided by the Second Department on December 9, 2009. People v Rodriguez, 68 AD3d 789 (2d Dept 2009). The Second Department rejected that argument finding that defendant was not denied his right to the effective assistance of counsel during the trial. Insofar as the Second Department has already ruled that defendant received meaningful representation and rejected the ineffective assistance of counsel claim, the present motion is procedurally barred pursuant to CPL § 440.10(2)(a). Even if defendant's claims of ineffective assistance of counsel were not procedurally barred, defendant's motion would still be denied as his motion is meritless.

In any action asserting ineffective assistance of counsel, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings." People v Benvento, 91 NY2d 708, 712 (1998) (*quoting*, People v Rivera, 71 NY2d 705, 709 [1988]; other citations omitted). "A contention of ineffective assistance of trial counsel requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics." People v Rivera, 71 NY2d at 708-709 (*citing* People v Benn, 68 NY2d 941 [1986]).

“The standard of review to support a claim that counsel was ineffective is whether, under the circumstances of the case, the defendant received meaningful representation.” People v Williams, 59 AD3d 576, 577 (2d Dept 2009) (citing People v. Caban, 5 N.Y.3d 143, 152 [2005]; People v. Urena, 23 A.D.3d 587, 588 [2d Dept 2005]).

"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." People v Baldi, 54 NY2d 137 (1981). Defendant bears the burden of demonstrating that he was deprived of a fair trial by less than meaningful representation. *See*, People v Caban, 5 NY3d 143 (2005)

Defendant's six remaining contentions are: (1) that trial counsel should have called Sharay Carrington as a defense witness; (2) that trial counsel should have called his mother as a defense witness; (3) that trial counsel failed to properly investigate an alibi defense; (4) that trial counsel failed to cross-examine Detective Rivera about an interview with an individual named Randall Ramirez; (5) that trial counsel failed to investigate an "ear" witness mentioned in Detective Doherty's memo book; and (6) that trial counsel failed to properly cross-examine Detective Platt regarding certain physical features of a building. None of these issues deal with what occurred in front of 61 Martense Street at 4:00 a.m., on June 16, 2002.

Sharay Carrington was a witness who called the police when she recognized defendant on a wanted poster. Defendant's mother would have testified that she had requested counsel for her son while he was at the precinct. Defendant is not a minor, and he alone can assert his right to counsel. *See*, People v Grice, 100 NY2d 318 (2003). Also, defendant's mother could not testify about anything that transpired between defendant and Detective Platt because she was not a witness to their

conversations and any of her testimony concerning those conversations would have been disallowed as impermissible hearsay.

Defendant avers that trial counsel should have compiled school records which would have shown defendant was taking classes that summer. Such a showing is not alibi defense because it would have no bearing on what transpired at 4:00 a.m., on June 16, 2002, in front of 61 Martense Street. The interview by Detective Rivera of Randall Ramirez offered no illumination as to what happened in front of 61 Martense Street, but instead established that defendant was seen twice in a McDonald's restaurant that summer. Detective Rivera was not a witness called by the People at trial.

Defendant also maintains that trial counsel failed to investigate an "ear" witness who heard two shots, when all of the People's witnesses testified there was one shot. Whatever the value of this testimony, trial counsel believed that there was no benefit in calling this witness who did not see the event and whose testimony would have been unlikely to contradict the eyewitness accounts offered by the People at trial, as stated in trial counsel's affirmation.

Finally, defendant claims that trial counsel should have investigated and challenged Detective Platt over the testimony that there were fire escapes on the exterior of certain Starret City buildings. It is clear from the transcript that Platt did not make an affirmative assertion that there were fire escapes, but rather that fire escapes would be something he would have been looking for in the building. Also, this has no relationship to the events which occurred in front of 61 Martense Street on June 16, 2002.

In the present motion, defendant has failed to demonstrate that his trial counsel failed to provide meaningful representation or that there were no strategic or legitimate explanations for his allegedly deficient conduct. Each of defendant's six contentions clearly constitute areas where it

appears defendant disagreed with the strategies and tactics of his trial counsel. Additionally, defendant has failed to show that any of these strategic decisions made by his trial counsel deprived him of meaningful representation, or prejudiced him in any way.

The Court does not credit defendant's new assertions based on the totality of the record, including the trial record, the appellate record and the previously filed CPL § 330.30(1) motion. The Court finds that there is no reasonable possibility that these new allegations, essential to the motion, are true and defendant's motion is denied in all respects.


Because the court does not credit defendant's assertions, no hearing on this matter is necessary pursuant to CPL § 440.30(4)(d)(ii).

CONCLUSION

For the foregoing reasons, defendant's motion to vacate his judgment of conviction pursuant to CPL § 440.10 is denied.

This opinion shall constitute the decision and order of this court.

Dated: July 9, 2010
Brooklyn, New York


RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED
JUL 12 2010
NANCY T. SUNSHINE
COUNTY CLERK