

People v Illescas

2010 NY Slip Op 33697(U)

July 1, 2010

Supreme Court, Kings County

Docket Number: 763/04

Judge: Sheryl L. Parker

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 5**

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THE PEOPLE OF THE STATE OF NEW YORK :

-against-

JOSE ILLESCAS,

Defendant

-----X

:
:
: **DECISION AND ORDER**

:
: **IND. 763/04**

Justice Sheryl L. Parker

Defendant moved under C.P.L. §440.10 (1)(h) for an order vacating his judgement after trial. A written decision dated January 7, 2010, ordered a hearing to expand the record solely on the issue of trial counsel’s decision not to request manslaughter in the second degree to be charged to the jury. (C.P.L. §440.30[5]). That hearing was conducted on April 27, 2010, and concluded on April 28, 2010. Defendant presented two witnesses, James Pepe, Esq. and Ellen Dille, Esq. of the Legal Aid Society.

The trial

Defendant was indicted for causing the death of Amador Garcia on January 29, 2004. According to the evidence at trial, the victim died as a result of being struck at least three times in the head with a hard object. The victim suffered from bone fractures to the head which were consistent with trauma from being hit by a shovel or a piece of wood. A witnesses recounted hearing the defendant and another male arguing with the deceased. There was a noise which a witness illustrated by banging his hand on the witness box and then the defendant was heard

saying “go to hell”. A witness observed the defendant throw a shovel at the deceased who was now lying on the ground with his head “broken” and the witness was able to “see [the victim’s] brain”.

The defendant made a statement to the police which was suppressed by the hearing court yet subsequently played for the jury for the purpose of impeaching the defendant. The defendant stated on the video that he and the decedent fought, the decedent swung a shovel at the defendant but the defendant ducked and then the defendant struck the victim with a two-by-four. He observed the victim fall down and then the defendant fled. The defendant testified at trial that Garcia hit the defendant with a shovel on his side and the defendant then threw a piece of wood at the deceased and left the scene. Defendant claimed that he hit the decedent to protect himself, but admitted that he could have retreated to avoid the victim’s further attack.

Defendant was charged with murder under both the depraved indifference and intentional theories. At the end of the evidence the court proposed submitting four counts to the jury: the two counts of murder in the second degree, and the lesser included counts of manslaughter in the first degree (P.L. §125.20[1]: with intent to cause serious physical injury to another person, he causes the death of that person) and manslaughter in the second degree (P.L. §125.15[1]: recklessly causing the death of another). The trial court, upon the prosecution’s application, did not submit depraved indifference murder to the jury. In relation to that charge, the court indicated that it would not submit manslaughter in the second degree to the jury because the court did not see a reasonable view of the evidence that would support that conviction and thought that it “...would be inconsistent with the charge of depraved indifference.” Defense counsel did not object. Justification was charged to the jury. The defendant was convicted on one count: Manslaughter in the first degree.

The hearing

The Court takes judicial notice of the entire trial transcript. Portions of that transcript were admitted into evidence. (Defense Exhibits A-D).

The evidence elicited at the hearing was that James Pepe, Esq. represented defendant at trial approximately six years in the past. Mr. Pepe was admitted into the New York State bar to practice law in 1974. He has specialized in the practice of criminal law for the past 20 years. He is a member of the assigned counsel felony homicide panel and has been for approximately ten to fifteen years. He estimates representing 1,000 criminal clients and of those approximately 50 were charged with homicide.

Mr. Pepe's memory of the specifics of representing this defendant are vague and based mainly on a review of his file. He did not dispute the contents of the portions of trial transcript presented to him at the hearing. Counsel recalled successfully litigating the suppression of his client's video-taped statement. It is agreed upon by both the People and the defendant that the charge of justification was presented to the jury in this matter, and Mr. Pepe recalled that defense being part of the trial. He also recalled that the defendant testified at trial, however counsel could not recall whether that was against his advice. He did recall that the previously suppressed statement was admitted after defendant's testimony. Mr. Pepe was unable to recollect the details of the charge conference at the conclusion of the trial. However, he did concede on cross-examination that if justification was charged in the case, as it was, that would have been his main

defense and submitting the fewest counts possible to a jury would have reduced the risk for a compromised verdict.

Ellen Dille, Esq., defendant's appellate attorney and counsel who filed the instant motion, testified as well. She has been an attorney in the Legal Aid Society Appeals Division since 1987. In 2006 she filed defendant's appeal. Subsequent to the denial of the defendant's appeal, Ms. Dille contacted Mr. Pepe and spoke with him about his trial representation. Ms. Dille testified that she and Mr. Pepe spoke on more than one occasion. She stated that during those conversations she asked Mr. Pepe if he agreed with the trial court's legal analysis that if the court were to dismiss murder in the second degree, depraved indifference, that manslaughter in the second degree must be dismissed as well. Ms. Dille further testified that during the conversation Mr. Pepe agreed by saying that "second degree manslaughter is a lesser included offence of depraved indifference murder but not of intentional murder. 'Man one' can be a lesser included of the intentional murder." This assertion is the same as alleged in Ms. Dille's motion papers. Ms. Dille further stated that Mr. Pepe told her that he believed his client's testimony at trial was extremely damaging to the case and that he believed that justification was a weak defense and that the trial judge was "very generous to even give the charge". Ms. Dille indicated that she took notes during these telephonic exchanges. Those notes were not admitted into evidence. However, four letters, which were not included in Ms. Dille's moving papers, were admitted into evidence (Defendant's exhibit E) after they were referred to by both witnesses and requested by the Court.

By letter dated February 11, 2009 Ms. Dille wrote:

“Dear Mr. Pepe: Enclosed please find an affirmation, in which I have summarized our conversations about the above case. Please read it, sign it and return it to me at the above address. If you have any questions or comments, please do not hesitate to call me....”

Attached was the following affirmation for signature by Mr. Pepe:

JAMES PATRICK PEPE, an attorney admitted to practice before the courts of this State, does hereby affirm, under the penalties of perjury, that the following statements are true, except those made upon information and belief, which he believes to be true:

1. I represented Mr. Illescas at his 2005 trial before Justice Collini. Mr. Illescas was charged with intentional murder and depraved indifference murder. Against my advise, Mr. Illescas testified on his own behalf. I believe had he not testified, we could have won an acquittal because the prosecution failed to prove who killed the decedent.
2. During the charge conference, the trial assistant moved to dismiss the depraved indifference murder count. At that point, the court determined that, because it was dismissing depraved indifference murder, it could not submit second-degree manslaughter as a lesser include offense, as it had proposed. I consented to the court's proposed submission of first degree manslaughter because that offense was a lesser of the intentional murder count. Second degree manslaughter could have been submitted as a lesser of depraved indifference murder but it is not a lesser included offense of intentional murder. I therefore agreed with the court's decision that, because it was dismissing the depraved indifference count, it could not submit second-degree manslaughter.
3. I did not object to Justice Collini's failure to charge that, if the jurors found Mr. Illescas not guilty on the basis of justification, they were to stop deliberating without considering the manslaughter count because, in my experience, the judge would instruct the jury the way he wanted.

On February 13, 2009 Mr. Pepe sent the following response:

“This office is in receipt of your letter of February 11, 2009. With respect to the proposed Affirmation which you have asked to be signed in order to memorialize our conversation, you are advised that it does

not properly and completely reflect our conversation. Indeed, many areas are inconsistent with my understanding of our conversation. Therefore, you should be well-advised to draw any reliance for an appeal or other action upon the record of the case as it stands....”

On February 26, 2009 Ms. Dille wrote:

“Dear Mr. Pepe: As I told you several months ago, I am preparing a CPL 440 ineffective assistance of counsel motion in the above case. I am sorry that you believe that the affirmation I sent you, a copy of which is enclosed, does not ‘properly and completely reflect’ our conversations about the case and that ‘many areas are inconsistent with [your] understanding of our conversation.’ Obviously, my position is that the document accurately summarized what you told me. Because you seem to disagree, however, I ask that you send me your own account. If you are not willing to do so, please write and tell me....”

Mr. Pepe responded *via* letter dated February 29, 2009:

“This office is in receipt of your letter of February 26, 2009. It appears clear that you did not properly perceive the crux of our conversations, and further incorrectly embellished them with matters not discussed. As this situation is wrought with inherent conflicts and inconsistencies, you are, once again, advised to rely upon the trial record as it stands. Accordingly, any further dialogue between this office and yours with respect to this matter and the manner in which you are proceeding, in light of the foregoing, appears to be fruitless and not within the interests of Mr. Illescas....”

Based on the testimony and demeanor of the witnesses and the letters that were admitted into evidence, this Court finds Mr. Pepe to be a credible witness.

Conclusions of Law

Defendant has alleged that trial counsel, Mr. Pepe, failed to request manslaughter in the second degree (P.L. §125.15[1]) as a lesser included count of

intentional murder in the second degree (P.L. §125.25[1]) due to a mistake in the law as opposed to a strategic trial decision and that mistake rose to the level of ineffective assistance of counsel.

The record does not support any claim that Mr. Pepe failed to request manslaughter in the second degree due to a misunderstanding of the law. There is no reliable evidence that he stated his alleged misperception to Ms. Dille, and such allegations are refuted by letters written contemporaneously with the telephone exchanges between Ms. Dille and Mr. Pepe.

Conversely, the record supports the conclusion that Mr. Pepe's failure to request manslaughter in the second degree was an "all-or-nothing" strategy intended to secure a full acquittal were the jury to accept defendant's justification defense. (*People v. Lane*, 60 NY2d 748 [1983]). Losing trial tactics should not be confused with ineffective assistance of counsel (*People v. Baldi*, 54 NY2d 137 [1981]) or second guessed with the clarity of hindsight (*People v. Benevento*, 91 NY2d 708 [1998]; *People v. Turner*, 5 NY3d 476 [2005]).

The Court of Appeals has held that under the New York State constitution "as long as the evidence, the law, and the circumstances of a particular case, viewed in the 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]). Under the state rule, a defendant need only show that under the totality of the case he was deprived meaningful representation. Under federal law, defendant must first show that his attorney's actions or advice fell below an objective standard of reasonableness and that there is a reasonable probability that, but

for counsel's deficiency the result of the case would have been different. (*Strickland v. Washington*, 466 US 608 [1984]). Therefore, under the federal standard the defendant must additionally show that but for counsel's alleged errors defendant would have received a more favorable outcome at trial.

The Appellate Division, Second Department has already held that, based on the record before them, the defendant received effective assistance of counsel. (*People v. Illescas*, 47 AD3d 840 [2008]), *appeal denied*, 10 NY3d 864). The Appellate Division stated that:

“[o]n the existing record, to the extent that it permits review, we find that the defendant received the effective assistance of counsel. Reasonable strategic concerns would support counsel's decision not to request submission of a lesser-included offense. The defendant failed to demonstrate that there was no strategic or other legitimate explanations for counsel's alleged shortcomings.” (Citations omitted).

This Court, based on the record before it, declines to find any differently.

Accordingly, for the aforementioned reasons, the defendant's motion to vacate his judgement is denied.

This constitutes the Decision and 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 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: July 1, 2010
Brooklyn, NY



J.S.C.

ENTERED
JUL - 2 2010
NANCY T. SUNSHINE
COUNTY CLERK