SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: Part 38

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| PEOPLE OF THE STATE OF NEW YORK<br><br>-against-<br><br>DARREL HARRIS, | DECISION AND ORDER<br>Indictment No: 15265/96 |

Miriam Cyrulnik, J:

The defendant moves to vacate his judgment of conviction, pursuant to Criminal Procedure Law ("CPL") 440.10, alleging that he was denied the right to plead not guilty and proceed to trial, and that he was denied the effective assistance of counsel at trial. The People oppose. The defendant also filed a reply to the People's affirmation in opposition.

On May 19, 1998, the defendant was convicted by a 12-person jury of six counts of Murder in the First Degree, one count of Attempted Murder in the First Degree, and one count of Criminal Possession of a Weapon in the Second Degree. On June 6, 1998, the same jury sentenced the defendant to death on each count of Murder in the First Degree, which was subsequently imposed by the sentencing court on July 21, 1998, to run concurrently with consecutive sentences of 25 years to life on the attempted murder count and seven and one-half to 15 years on the weapons possession count.

The defendant appealed his conviction and death sentence to the New York Court of Appeals. On July 9, 2002, the Court of Appeals upheld the conviction for each of the counts, but vacated his death sentence. People v. Harris, 98 NY2d 452 (2002).[1] The defendant was resentenced on August 29, 2002 on the Murder in the First Degree counts, and received terms of life imprisonment without

[1] Vacatur was based on the Court of Appeals decision in Matter of Hynes v. Tomei, 92 NY 2d 613 (1998), cert denied, 527 US 1015 (1999), finding unconstitutional the guilty plea provisions of the death penalty statute. The court's holding pertained only to the sentence of death, and left the conviction itself in place.

parole on each count. The other sentences were not changed.

The defendant also brought a petition for a writ of habeas corpus in the United States District Court, for the Eastern District of New York, which was denied on July 23, 2004 on all grounds, including a request for heightened scrutiny, challenges to jurors, and the court's preclusion of a surrebuttal witness for the defense. Harris v. Goord, 2004 US Dist LEXIS 14017 (EDNY 2004). The defendant's ensuing requests for certificate of appealability were denied by both the Eastern District Court and the United States Court of Appeals for the Second Circuit.

DEFENDANT'S CLAIM THAT HE WAS DENIED
THE RIGHT TO PLEAD NOT GUILTY AND
PROCEED TO TRIAL IS PROCEDURALLY BARRED

Pursuant to Criminal Procedure Law 440.30(4):

> "Upon considering the merits of the motion, the court may deny it without conducting a hearing if:
> (d) An allegation of fact essential to support the motion is (ii) contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."

Here, the defendant has alleged that he was prevented from pleading not guilty[2] and proceeding to trial. The record clearly shows, however, that the defendant was given the opportunity to plead guilty, and due to his own answers to the court during the attempted allocution, declined to follow through with the guilty plea. Therefore, because the defendant did not plead guilty, the case proceeded to trial, completely contrary to the defendant's arguments here.

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[2] The court notes that in most instances in his motion, the defendant alleges he was denied the right to plead "not guilty," but on at least one occasion, he states that he was denied the right to "plead guilty." Either way, the defendant was afforded an opportunity to plead guilty, but because he was unable to complete the allocution, it resulted in a not guilty plea.

The court record, transcripts of the trial testimony, and records of the defendant's conviction and sentencing all serve as veritable proof that there is no reasonable possibility that the defendant was prohibited from pleading not guilty, as his advancement to the trial stage is direct evidence of his not guilty plea. Thus, the defendant's claim is procedurally barred under CPL 440.30(4)(d).

DEFENDANT'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IS PROCEDURALLY BARRED IN PART, AND WITHOUT MERIT IN ITS ENTIRETY

The defendant claims that he was ineffectively assisted by his defense counsel at trial. He contends that he wanted new attorneys, that he desired to plead not guilty and proceed to trial or to avail himself of other avenues of approaching the case, that he was coerced to plead guilty, that he never consented to the submission of the affirmative defense of extreme emotional disturbance to the jury, as well as other claims regarding the inefficacy of his team of attorneys.

To the extent that the defendant argues that he was dissatisfied with his attorneys and planned to seek the appointment of new counsel by the court, that claim is procedurally barred under CPL 440.30(4)(c)[3], (d). As the People point out, at the attempted plea allocution, the defendant was pointedly asked by the court whether he was satisfied with his legal representation, and he made no mention of any problems with his attorneys. Nor did he express a desire to acquire new counsel.

> "THE COURT: Your lawyers in this case have been Miss Brady, Mr. Neufeld, and Mr. Rountree [sic]; is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Have you been satisfied with their representation of you?
> THE DEFENDANT: Yes.

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[3] CPL 440.30(4)(c) reads "Upon considering the merits of the motion, the court may deny it without conducting a hearing if: An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof."

THE COURT: Have you had enough time to discuss this case and this plea with them?
THE DEFENDANT: Yes.
THE COURT: Have they explained your rights to you?
THE DEFENDANT: Yes."
(Plea Allocution Tr., p. 2-10, February 23, 1998).

The defendant claims in his reply motion that he only sought to appear in court in order to express his dissatisfaction with his counsel to the court. However, as shown above, that suggestion is directly contradicted by the record. The defendant was plainly asked numerous questions about his representation, and not once did he request new attorneys or even voice his concerns or disapproval of his current counsel, even before, as the defendant claims, he was "forcibly removed" from the courtroom. See Defendant's Reply Motion, p. 5. There is no credible evidence to support the defendant's version of the events surrounding this failed allocution.

Accordingly, as that particular instance is abundantly clear from the court record, which serves also as "unquestionable documentary proof," that aspect of the defendant's claim is denied. See People v. Sayles, 17 AD3d 924, 924-5 (3rd Dept 2005), lv denied 5 NY3d 794 (2005) (holding that the "defendant's self-serving and conclusory affidavit is directly contradicted by the record evidence before Supreme Court, including his unequivocal affirmations to the court during his plea allocution that he was entering the plea of his own free will, fully understood its consequences, had not been pressured by anyone to plead guilty and was satisfied with the services of counsel"); see also CPL 440.30(4)(d); People v. Buffaloe, 2010 NY Slip Op 31135U, 4-5 (Sup Ct, Kings County 2010) (dismissing defendant's motion to vacate the judgment of conviction, because his "claim that counsel threatened and coerced him to plea guilty is contradicted by the record" based on defendant's "sworn statements made at the time of the plea").

Additional claims made by the defendant are likewise procedurally barred. Since the New York Court of Appeals has already upheld the trial court's refusal to permit the expert defense witness' rebuttal testimony at trial, see People v. Harris, supra, due to the cumulative nature of the proposed testimony, any claim by the defendant related to this issue, i.e., that defense counsel erred in their handling of this matter, should have been appealed to the Court of Appeals at that time as well. Thus, such a claim, whether made in the defendant's original motion or as repeated in his reply motion, is procedurally barred pursuant to CPL 440.10(2)(c).[4] Furthermore, the defendant's attempts to challenge the sufficiency of the evidence and conviction in his reply motion, including the veracity of witness statements, are procedurally barred at this time, as the conviction has already been upheld by the Court of Appeals. See People v. Harris, supra; CPL 440.20(2).

The remaining claims made by the defendant are substantively without merit. Initially, the court notes that the correct standard to employ here in determining the quality of the defense attorneys is whether they provided "meaningful representation" to the defendant. See People v. Caban, 5 NY3d 143, 155-156 (2005) (noting that the New York standard of "meaningful representation" affords the defendant greater protection than the federal standard requiring a showing of prejudice in Strickland v. Washington, 466 US 668 [1984]). Thus, contrary to the defendant's claim, his rights are actually more protected in New York- not less- than under federal guidelines.

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[4] The court notes that it was the trial court that precluded Dr. Sanford Drob from testifying as a rebuttal witness, not defense counsel, as the defendant claims in his reply motion. See People v. Harris, supra at 488-490 (upholding the trial court's decision that such testimony would be cumulative). To the extent that the defendant claims this preclusion was the result of ineffective assistance of counsel, in particular, counsel's decision to proffer Dr. Drob instead of Dr. H. Westley Clark, those contentions have been addressed at length below.

Having reviewed the record and the pertinent transcripts of the proceedings, the court finds that the defense attorneys, members of the Capital Defense Unit of the Legal Aid Society, were skilled and competent in their knowledge, preparation and implementation of this case. They employed investigators, doctors, consultants, and other professionals, in order to present the best possible defense here, a claim acknowledged by the defendant himself in his motion. See Defendant's Memorandum of Law, p. 2 (noting "The record demonstrates that the defense team carefully considered its overall strategy, its tactics and objections, and spared no expense or effort on defendant's behalf").

Moreover, the discussions with the defendant regarding whether he should consider pleading guilty were not tactics of coercion, but sound legal advice, particularly when he could have avoided the death penalty as part of the plea agreement. Given that possible sentence, and the overwhelming evidence of guilt in this case, both testimonial and other forms, including the defendant's own statements, the defense attorneys and supporting professionals were more than justified in thoroughly discussing this plea option with the defendant, in the context of concern for his avoidance of the death penalty. See People v. Smelefsky, 182 Misc 2d 11, 13 (Sup Ct, Queens County 1999) (noting that the Supreme Court in United States v. Jackson, 290 US 570 [1968], "never suggested that the possibility of a death sentence exerts so coercive an influence on capital defendants as to render their pleas involuntary"); see also Brady v. United States, 397 US 742, 755 (1970).

Furthermore, there has been no showing made out by the defendant that he withheld consent to use the affirmative defense of extreme emotional disturbance at trial. On the contrary, as the People correctly contend, through the multitude of discussions and consultations with the defendant at various stages of his case, by legal, medical and other professionals, this affirmative defense was

conveyed to him as the only viable strategy for proceeding at trial, and not one forced upon him. Other suggestions proffered by the defendant in his motion, such as pleading guilty while utilizing the affirmative defense at the same time, are simply not valid legal options. As discussed above, the defense attorneys exercised great diligence in preparing the most effective strategy possible for the defendant. Their legal advice does not devolve into coercion because the outcome was not favorable for the defendant.

The court additionally notes that as the defendant's death sentence was subsequently overturned on appeal and reduced to life imprisonment without parole, see People v. Harris, supra at 495-6, following the application of Matter of Hynes v. Tomei, 92 NY2d 613 (1998), his argument that his case deserves a heightened level of scrutiny due to the involvement of the death penalty is rendered moot. The defendant, in his reply motion, again contends that because heightened review is applicable on direct appeal, it should be imposed here too. However, as stated above, on direct appeal, that standard was already utilized in order to overturn the death sentence.

In any event, courts have routinely declined to impose heightened scrutiny in an existing death penalty case beyond the sentencing phase. See People v. Bonton, 1999 NY Slip Op 40001U, 6 (Sup Ct, Kings County 1999), lv denied 3 NY3d 671 (2004) (noting that "Nowhere in this vast body of caselaw, has it been mandated that heightened due process be applied at a stage other than the penalty phase"); see also People v. Rodriguez and Sanchez, 168 Misc. 2d 219, 223 (Sup Ct, NY County 1996), aff'd People v. Sanchez, 268 AD2d 364 (1st Dept 2000), lv denied People v. Sanchez, 95 NY2d 838 (2000) (holding that "[s]tricter scrutiny of a capital case is, thus, limited to the penalty phase of the proceeding"). Thus, this argument is without merit.

Finally, the court observes that the defendant has waited 12 years since his conviction, and

eight years since his appeal, to initiate this motion to vacate his judgment. Though not dispositive of the substantive issues here, it certainly does not bolster the defendant's credibility in this case that he has allowed such a lengthy period of time to elapse before filing this motion. See People v. Torres, 2010 NY Slip Op 33167U, 6 (Sup Ct, Kings County 2010) (holding that "defendant's credibility is undermined by the substantial period of time that passed before submitting" a CPL 440.10 and 440.20 motion, 15 years after appealing the decision, and noting that in People v. Nixon, 21 NY 2d 338 [1967], the court "held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claims"). See also People v. Sheppard, 2010 NY Slip Op 32887U (finding defendant's credibility undermined by a 10-year delay in filing his CPL 440.10 motion). Therefore, a delay as lengthy as the one in the present case "can be considered in evaluating the validity and legitimacy of a post-judgment motion." People v. Torres, supra at 6.

Accordingly, the defendant's motion to vacate his judgment of conviction is denied.

The defendant's right to an appeal from the order determining this motion is not automatic except in the single instance where the motion was made under CPL 440.30 (1)(a) for forensic DNA testing of evidence. For all other motions under article 440, the defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after the defendant has been served by the District Attorney or the court with the court order denying this motion.

The application must contain the defendant's name and address, indictment number, the questions of law or fact which the defendant believes ought to be reviewed and a statement that no prior application for such certificate has been made. The defendant must include a copy of the court

order and a copy of any opinion of the court. In addition, the defendant must serve a copy of his application on the District Attorney.

This constitutes the decision and order of the Court.

Dated: January 18, 2011
Brooklyn, New York

Miriam Cyrulnik
A.J.S.C.