

People v Williams

2011 NY Slip Op 31175(U)

January 31, 2011

Sup Ct, Kings County

Docket Number: 1881/93

Judge: Desmond A. Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 39

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Memorandum
Decision

Against

GREEN, J.
IND. 1881/93

TIMOTHY WILLIAMS,

January 31, 2011

Defendant.

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Upon the notice of motion dated July 2, 2010, defendant moves via his attorney for an order pursuant to Criminal Procedure Law (CPL) sections 440.10(1)(H) and 440.20 to vacate the within conviction and to have his sentence therewith set aside.

Defendant argues that his conviction should be vacated and the sentence set aside because of ineffective assistance of counsel, in that, although alibi notice was served and on notice with the court, trial counsel failed to present defendant's alibi defense and did not call alibi witnesses whose testimony would have exculpated defendant from the within conviction.

A hearing on this matter was granted without objection from counsel and held on October 28, 2010. The hearing was continued on December 16, 2010 with oral argument of counsel.

Based on a review of the transcript of the hearing as well as motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is denied in its entirety for the following reasons.

BACKGROUND

On February 3, 1993 at approximately 8:45 pm at 1033 Broadway in Kings County, the defendant along with three companions was alleged to have robbed four persons inside a pool hall located at that address. Defendant was said to be armed and in the course of the robbery shot two persons: Laquawn Moss, who died and wounded Shawn Moore, an eyewitness.

Eyewitnesses identified the defendant out of a line-up and photo array as one of the people who committed the crimes.

Defendant was charged with Murder in the Second Degree, Attempted Murder in the Second Degree, Robbery in the First Degree, and two counts of Criminal Possession of a Weapon.

Alibi notice had been presented in this matter by defendant's former Legal Aid attorney which offered the defense that defendant could not have committed the acts he is charged with because at the time of the commission of said crimes defendant was eighteen blocks away at 1217 Jefferson Avenue in Kings County, his family home. Defendant had intended to call Vicki Rice and Donald Rice, two tenants who live at 1217 Jefferson Avenue. The alibi notice dated April 12, 1993 is addended to defendant's motion as exhibit A.

According to defendant, Ms. Rice would have testified that "she returned from the grocery store in a cab just prior to the time that the shooting had occurred and that Donald Rice and the defendant carried her groceries into her apartment [at 1217 Jefferson Avenue in Kings County] and remained there." At the time, Ms. Rice possessed a receipt from the grocery store which was date/time stamped and assisted to establish the time in which she got back to her apartment with the groceries. A foot note in defendant's motion states that, "seventeen years later, the receipt has since been lost." Donald Rice would have testified similarly, that he had been "hanging out with the defendant on the front stoop [of 1217 Jefferson Avenue in Kings County] on that night [February 3, 1993] and that the two of them assisted his aunt with her groceries [into the apartment] before she then made them something to eat," and he would have told the court that it would have been impossible for the defendant to have been at the scene of the crime, 1033 Broadway in Kings County because as he stated in his affirmation, they both remained in and around the apartment the remainder of that night. Affirmations from Ms. Rice and Mr. Rice are addended to defendant's motion as Exhibits B and C. Although Ms. Rice states in her affirmation that on two occasions detectives came to question her and she was told by them, essentially, that she did not have to testify, yet, she still expected to be contacted in order to testify in court at defendant's trial. However, neither Ms. Rice nor her nephew, Mr. Rice was called to testify.

At some point before the start of trial, defendant retained another attorney, Stewart Leigh Orden, thereby relieving Legal Aid.

DEFENDANT'S APPEAL

Prior to the filing of the within 440 motion, defendant's appeal, by Susan B. Marhoffer, Esq., was denied by the Appellate Division, Second Department on February 3, 1997 and the judgment was affirmed. Defendant's issues on appeal dealt with a prosecutor who spoke with a prosecution witness while the witness was still under oath and was being cross examined. The appellate court held that while this conduct was not to be encouraged or approved, under the facts of this

case, the conduct did not deprive the defendant of a fair trial and the defendant was not unduly prejudiced.

In addition, the hearing court had been advised of the People's questionable conduct and found out that the prosecution had only advised the witness to rethink the answers previously given. In addition the underlying court made a determination that the witness's post recess testimony was not credible and as a result, the court suppressed the lineup identification of three eyewitnesses. The appellate court also pointed out that the "in-court identifications by those eyewitnesses had a sufficient independent source, considering that the scene of the incident was well-lit and was not crowded, and all of the witnesses had a five to ten minute opportunity to view the defendant and his accomplices." (see, *People v Paul*, 222 AD 2d 706)

Defendant's appeal did not deal with ineffective assistance of counsel, the issue now presented in the submission of the CPL 440 motion.

ARGUMENT HEREIN

Defendant's motion herein argues that several errors occurred on the record at trial resulting in prejudice to the defendant and therefore the conviction should be reversed or set aside because had the errors not occurred the verdict would have been different and such is in violation of his State and Federal Constitutional rights.

Specifically, defendant believes that ineffective assistance of counsel led to his conviction and sentence because, although alibi notice was served and on notice with the court, trial counsel failed to present defendant's alibi defense and did not call alibi witnesses whose testimony would have exculpated defendant. Therefore, had the testimony of the two alibi witnesses been heard by the jury, defendant would not have been convicted of the within charges.

The People oppose defendant's motion.

440 HEARING

A hearing was necessary to determine the extent of trial counsel's awareness of potential witnesses and whether there was a valid tactical reason for not presenting them at trial regarding the issue whether trial counsel's failure to present testimony of alleged alibi witnesses amounted to ineffective assistance as these issues could not be resolved upon the motion to vacate the conviction. U.S.C.A. Constitutional Amendment VI; McKinney's CPL section 440.10; *People v Coleman*, 10 AD 3d 487 (1st Dept 2004)

The issues presented by defendant here is that the defendant's prior counsel Stewart Orden failed to investigate the alibi witness and failed to call the alibi witnesses to testify. Defendant believes such failure to investigate alibi witnesses resulted in ineffective assistance of counsel.

The burden is on the defense to show that the defendant was prejudiced and that there was a reasonable likelihood that if the alibi witnesses had testified at trial, the outcome would have been different.

Testifying at the hearing for the defense were the two alibi witnesses, Vicki Rice, her nephew Donald Rice and the defendant Timothy Williams. Stewart Orden testified for the People.

The witnesses' testimony was consistent with the defendant's alibi that he was not at the location of the incident because he and Mr. Rice was together that day after they helped Ms. Rice with her groceries just prior to the time the crime was committed at the pool hall. At the time of the incident, Ms. Rice said she had a receipt from the grocery store and had held onto it expecting to testify in the defendant's behalf. She stated that she was visited on two occasions by detectives who told her that her testimony was not needed. She subsequently lost track of the receipt. The witnesses also testified that they were like family with the defendant and lived as tenants in the home that was owned by the defendant's family for almost two decades.

Defendant also testified that he had obtained Mr. Orden's information from another inmate, was impressed with him and secured Orden's counsel. Defendant's grandmother put her house up for collateral and Mr. Orden was paid \$25,000.00 after also meeting with defendant's father and grandmother. His former attorney, Ken Perry, who represented defendant at arraignment, had filed the notice of alibi statement. Defendant said he discussed his case with Mr. Orden including the quality of evidence and that Mr. Orden believed the description of defendant was an issue as well as the credibility of the prosecution witnesses. Defendant stated he had two meetings with Mr. Orden prior to the trial. They also discussed the alibi testimony and defendant said Mr. Orden told him he did not need it. [See, Hearing Transcript [HT] Oct. 28, 2010 P. 120 – 129]

Defendant stated in sum and substance that he went along with Mr. Orden because he was the expert. "...I had no idea about anything as far as the law was concerned. Everything he did, it seemed to me in my eyes, in my opinion, like he was going to bat for me, so to speak." Defendant mentioned reading about a case this year involving an attorney who failed to interview alibi witnesses as a reason for his bringing up the issue now and stated that between 1994 and 2009 he did not consider bringing up the issue because Mr. Orden had told him the alibi witnesses' testimony was not necessary. [See, HT P. 130 L11-23; P. 134 -135]

Mr. Orden testified that he knew of the alibi witnesses, had them both on his potential witness list which had been submitted to the court. An original copy of the defense witness list was in the court file and the People presented a copy of the list as evidence. Mr. Orden stated that he evaluated the credibility of the alibi witnesses and discerned that putting them on the stand would not help the defendant's case because the witnesses were too closely connected to the defendant and Mr. Rice had a criminal conviction that closely mirrored what the defendant was being charged with in this matter. He stated that he fully discussed the merits of putting the alibi witnesses on with the defendant as well as the best theory for the defense which was the tenuous description of the defendant and inconsistencies of the eyewitness testimony. Mr. Orden stated that his decision not to call the alibi witnesses to testify was a strategic one.

On page 143 (line 25) to 144, (line 1) of the hearing transcript, during cross examination of the defendant, the People questioned whether defendant asked Mr. Orden if he spoke to Vicky and Donald Rice. At line 2, defendant responded, "the first time he said it wasn't necessary, I didn't mention no more about it." Further on line 14 to 25, the People questioned, "When Mr. Orden said we don't need those witnesses, did you ask why not? Defendant's response, "he said he was going to focus his defense on attacking them. He said it wasn't necessary. It was clear to him that the prosecution witnesses were lying, that was his battle song. I had to hear that every court appearance."

Mr. Orden contradicted defendant stating that it was impossible for him to tell defendant after first meeting him that alibi witnesses were not needed because he would want to evaluate the entire case before making that decision and would have been considering the alibi up until the point he was ready to rest. (Hearing Transcript [HT] p 175) Mr. Orden testified that he did not have any independent recollection of speaking to the alibi witnesses. But he stated that he would not have included the two alibi names on the list without having spoken to them directly. (HT p 173)

On page 174 of the transcript, Mr. Orden testifies that in his practice, as a seasoned trial attorney for six years at the time, he did not have a standard method regarding investigation of alibi but "I would have personally reached out to the alibi witnesses and tried to contact them myself, or I would have had an investigator try to reach out and contact the alibi witnesses."

At page 177 of the hearing transcript, Mr. Orden stated, "there were tens of hundreds of discrepancies. It was forever. The cross-examination was voluminous and extensive with respect to height, number of people, jackets worn, the types of jackets worn, who wore the jackets, who was standing there, who was the shooter at various times, because there was another shot victim..."

Mr. Orden further explained his reasoning regarding the risk of putting on alibi witnesses whether weak or not, because if they are found to lack credibility "you get a burden shifting result" where the defendant is convicted because the jury imparts witnesses they perceive as lying to the defendant. He goes on to say, "in this case, there is no way I would have put on anything short of an absolute black and white alibi and even then I might not have because in this case it was riddled....based on the discrepancies in identification. (HT p 178) And, not proffering an alibi defense was a tactical decision on Mr. Orden's part. (HT p179)

If the defendant had insisted on putting on alibi witnesses where Mr. Orden believed it would be unwise to do so, he says he would have notified the court and put a 'divide' like that between him and his client on the record, however he recalls no such insistence by the defendant in this matter. (HT p 181)

Mr. Orden also informed the court that when he entered the area near the courtroom he saw an individual that he recognized as Donald Rice sitting outside the courtroom. He stated that he recognized Mr. Rice immediately because of his unique look. "I suppose I recognized him from meeting him before in this case," Mr. Orden stated on cross examination in response to defense attorney's question as to how he recognized Mr. Rice. (HT p 189)

The prosecution also offered in evidence a map of the location showing that the building where the alibi witnesses and defendant lived was in very close proximity to the pool hall where the crime occurred.

ANALYSIS

Defendant admitted he discussed the alibi witness and his case with Mr. Orden. Mr. Orden presented the alibi witnesses on the list of potential defense witnesses to the court. Defendant testified that Mr. Orden told him that his focus for the defense would be on the credibility of the prosecution witnesses and the inconsistency in the description of the defendant. Mr. Orden's testimony was consistent with the defendant's in this regard. Defendant stated that he was impressed with Mr. Orden, did not question his strategy and went along with the decision that Mr. Orden made until he came across a case this year that made him question whether Mr. Orden did something wrong.

In weighing all of the factors of defendant's case, Mr. Orden essentially decided that the alibi was tainted and that calling Ms. Rice and Donald Rice may have further prejudiced defendant because of the close familial connection as well as the fact that one of the alibi witnesses had a criminal record which would result in an improper burden shifting against the defendant.

The strategy appeared to be reasonable and sound and one that the defendant did not object to at the time of the trial.

Defendant's affirmation papers, in support of defendant's motion to vacate the judgment pursuant to CPL section 440.10 (1) (h), focuses on failure to investigate the alibi and point out that despite the myriad inconsistencies in the prosecution's case, "the only evidence inculpatory defendant was the four in-court identifications" pointing to defendant as the perpetrator of the crimes charged and defendant believes that presenting the alibi "would have tipped the scales in defendant's favor."

Further, no evidence was presented in the hearing that Mr. Orden failed to investigate the alibi witnesses.

Under the facts and circumstances of this matter, this court is in no position to substitute its judgment for that of the trial attorney. *Strickland v Washington*, 466 U.S. 668 (1984) Here, the defendant has not met either prong of *Strickland*, the first being that Mr. Orden's representation fell below an objective standard of reasonableness and defendant failed to meet his burden in showing prejudice in that the outcome of the trial would have been different had the alibi witnesses been called.

In *People v Vigilante*, 153 Misc 2d 206 (Kings Cty 1992), the court deemed that defense counsel's failure to call the defendant's girl friend and mother as alibi witnesses based upon the determination that their testimony would not have been credible reflected the existence of trial strategy that might have been pursued by a reasonably competent attorney and was not ineffective assistance of counsel.

This court echoes the *Vigilante* reasoning, that the defense attorney is "strongly presumed to have rendered adequate and effective assistance to defendant and to have made all significant decisions in exercise of reasonable professional judgment; the court should not second guess defense counsel's trial strategy."

Also, in *People v Angel De La Cruz*, 11 Misc 3d 1069(A) (Sup Ct Bx Cty 2006) "the record established that defense counsel made an intentional tactical decision to forego an alibi defense in favor of a claim of misidentification. The fact that counsel's strategy was unsuccessful by no means rendered his assistance ineffective." See, *People v McDonald* 255 AD 2d 688 (3rd Dept 1998)

Viewed in totality, as the hearing testimony shows, pursuant to the Federal and State Constitutions, defendant received effective assistance of counsel.

CONCLUSION

Although, the alibi issue has been apparent for well over seventeen years, the defendant did not raise the issues in his submission to the Appellate Division and here offers no justifiable reason for failing to do so.

Although defendant knew from the inception of his trial in discussions with his attorney that alibi witnesses were not likely going to be called as a result of the trial strategy; rather, defendant asserts that he was not aware that anything might have been wrong until he read a case where there was a failure to investigate alibi witnesses.

Here, the issues defendant presents in his instant motion were known at the time of judgment and defendant had the opportunity to present such issues heretofore for appellate review.

Accordingly, defendant is barred from raising the issue of evidentiary insufficiency in this collateral proceeding pursuant to CPL 440.10(2) (c).

Further, determining whether a verdict is against the weight of the evidence is the purview of the function of an intermediate appellate court, and not a trial court.

Increasingly, the use of *Coram Nobis* was expanded to include a variety of constitutional errors based upon facts in the record as well as other reasons enunciated in the CPL 440.10 statute. *People v Huntley*, 15 NY 2d 72 (Ct of App 1967)

Notwithstanding the foregoing, even if defendant's reason for not including the instant issues in his appeal were justified, a hearing on this matter was granted, without opposition of the People, and based on the testimony adduced at the hearing; the defendant has not met his burden showing ineffective assistance of counsel; that he was prejudiced and that there was a reasonable likelihood that if the alibi witnesses had testified at trial, the outcome would have been different.

Consequently, defendant's motion herein must be denied in its entirety.

Accordingly, based on the foregoing, the defendant's CPL 440.10 (1) (h) motion to set aside his conviction is DENIED.


This constitutes the decision and order of the Court.

Notice of Right to Appeal for a Certificate Granting Leave to Appeal

Defendant is informed that his right to appeal from this order determining the within 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, 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 your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

Dated: January 31, 2011
Kings County, NY



Hon. Desmond A. Green, J.S.C.

ENTERED
APR - 8 2011
NANCY T. SUNSHINE
COUNTY CLERK