

**People v Davis**

2011 NY Slip Op 31176(U)

April 8, 2011

Sup Ct, Kings County

Docket Number: 2980/1997

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART CV-19

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

By: Hon. Carolyn Demarest

Date: April 8, 2011

-against-

DECISION & ORDER

TYRONE DAVIS,

Ind No. 2980/1997

-----X

Defendant moves pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of his conviction on various grounds. In the alternative, defendant requests that the court conduct an evidentiary hearing to determine whether his conviction should be vacated.

On December 9, 1996, at approximately 8:00 p.m., defendant and three accomplices, Jermaine Dawson, Victor Mack and Corey Williams, entered a grocery store located at 404 New Lots Avenue in Brooklyn. Defendant had a .38 caliber revolver and Dawson had a .357 magnum revolver. Once inside the store, defendant and his accomplices fired several shots. They then demanded money from the employees and a customer in the store. During the robbery, defendant and his accomplices shot Winston Page and Reginald Jaex. Page was treated at Brookdale Hospital for gunshot wounds to his right side, left ankle and left leg. Jaex, who was shot in the head, buttocks and hand, died from a gunshot wound to the head.

For these acts, defendant was charged with one count of murder in the second degree (Penal Law § 125.25[3]), two counts of robbery in the first degree (PL § 160.15[1], [2]), two counts of robbery in the second degree (PL § 160.10[1]), two counts of assault in the first degree (PL § 120.10[1]), two counts of attempted robbery in the first degree (PL § 110/160.15[1], [2]), one count of attempted robbery in the second degree (PL § 110/160.10[1]), one count of criminal

possession of a weapon in the second degree (PL § 265.03) and one count of criminal possession of a weapon in the third degree (PL § 265.02[4]).

Following a jury trial, defendant was convicted of murder in the second degree, attempted assault in the first degree and attempted robbery in the first degree. On February 8, 1999, he was sentenced to concurrent indeterminate terms of imprisonment of twenty-two years to life on the murder conviction and seven and one-half to fifteen years on the attempted robbery conviction, and to an indeterminate term of imprisonment of five to ten years on the attempted assault conviction to run consecutively to the murder sentence (Demarest, J., at trial and sentence).

On appeal, defendant claimed that the trial court (1) denied him a fair trial under the federal and state constitutions, (2) improperly permitted the People to introduce testimony by detectives that bolstered the identification evidence and (3) violated PL § 70.25[2] by imposing consecutive sentences. The Appellate Division affirmed the judgment of conviction, holding that the trial court properly imposed consecutive sentences as the crimes were separate and distinct and that defendant's remaining contentions did not require reversal (*People v Davis*, 286 AD2d 774 [2d Dept 2001]). The Court of Appeals denied defendant leave to appeal (*People v Davis*, 97 NY2d 655 [2001]).

Defendant next petitioned the United States District Court for the Eastern District of New York for habeas corpus relief, again asserting that (1) the trial court erred in its admission of the testimony of detectives, which allegedly bolstered a witness' identification testimony; and (2) his consecutive sentence should be set aside because it violated a state statute. Defendant's petition was denied (*Davis v Greiner*, 2003 WL 23198786 [EDNY October 30, 2003]).

Defendant then moved to set aside his sentence under CPL § 440.20, claiming that his consecutive sentences were illegal. Defendant also asserted that he was denied effective assistance of counsel because his attorney “solicited” the amendment of the felony murder charge and “acquiesced” to the jury instructions, which led to his consecutive sentence. On April 9, 2007, this court denied defendant’s motion, holding that the sentencing claim was procedurally barred pursuant to CPL § 440.20(2) and that the ineffective assistance of counsel claim was procedurally barred pursuant to CPL § 440.10(2)(c) and meritless.

Defendant now moves pursuant to CPL § 440.10 to vacate the judgment of conviction, claiming (1) the prosecutor committed several instances of prosecutorial misconduct throughout the trial; (2) the court failed to administer the “truthfulness oath” to the jury as required by CPL § 270.15[1][a] and failed to administer admonitions to the jury as required by CPL §§ 270.40 and 310.10[2]; (3) he was denied effective assistance of counsel because his attorney failed to object to the alleged instances of prosecutorial misconduct and neglected to object to the court’s failure to properly instruct the prospective jurors and jury; and (4) the cooperation agreement between the prosecution and Page constitutes newly discovered evidence in that it would have affected the outcome of the trial had it been presented to the jury.

With the exception of the newly discovered evidence claim and the ineffective assistance of counsel claim, all of defendant’s claims are subject to a mandatory procedural bar because while sufficient facts appear on the record to have permitted adequate review of the ground or issue raised on direct appeal, no such review occurred because of defendant’s unjustifiable failure to raise such issues upon an appeal (CPL § 440.10[2][c]). Accordingly, this court is now

foreclosed from reviewing these claims (*People v Jossiah*, 2 AD3d 877 [2d Dept 2003]; *People v Cooks*, 67 NY2d 100 [1986]).

Because defendant's allegation of prosecutorial misconduct is so broad, the court will also address it on the merits. First, defendant's claim that the prosecutor solicited perjured testimony of three witnesses is without merit and entirely unsubstantiated (CPL § 440.30[4][b]). Specifically, defendant alleges that the testimonies of Page and Williams are false because they are inconsistent with prior statements made to the police and that the testimony of Detective Richard Burzotta is false because it is contradicted by the testimony of Page. That the testimony of these three witnesses may be inconsistent with prior statements or contradicted by other evidence does not, by itself, establish that the testimony was false. The alleged inconsistencies merely create factual issues for the jury to resolve and given that counsel impeached the witnesses with numerous prior inconsistent statements, the jury was in a position to determine the credibility of each witness. The "resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses" (*People v Diaz*, 30 AD3d 436, 437 [2d Dept 2006]; *see also People v Argentina*, 27 AD3d 569 [2d Dept 2006]). Because defendant's allegations fail to establish any likelihood that the People knowingly solicited perjury by the witnesses, the court rejects defendant's claim of prosecutorial misconduct.

With regard to the Williams' cooperation agreement, no misconduct can be attributed to the prosecutor for eliciting testimony about its terms. Pursuant to his cooperation agreement, Williams was required to provide truthful testimony at defendant's trial in order to receive a reduced state sentence. Recognizing that there are both bolstering and impeaching aspects of a

cooperation agreement, courts have held that the prosecution should not be permitted to introduce, on their direct case, any bolstering aspects of the agreement, unless there has been an attack on the witness' credibility (*People v Santana*, 55 AD3d 1338 [4<sup>th</sup> Dept 2008]; *People v Cherry*, 161 AD2d 185, 187 [1<sup>st</sup> Dept 1990]). In this instance, however, counsel raised the issue of William's credibility and motive to testify during opening statements. Counsel commented that Williams "might as well come in here with a for sale sign on his head" because when the district attorney office's offered him a reduced sentence if he would join the "team" and help "nail" defendant, Williams accepted. Counsel also stated that the People could not offer Williams money so they offered him "freedom, liberty" and made "him a deal." Thus, the prosecutor was properly permitted to elicit the bolstering aspect of the cooperation agreement, i.e. the promise by Williams to testify truthfully.

Contrary to defendant's contention, the statement he made in which he admitted that he shot one of the victims in the leg during the robbery was properly admitted into evidence under the party admissions exception to the hearsay rule (*People v Valdes*, 66 AD3d 925, 926 [2d Dept 2009]). His claim that the prosecutor committed misconduct by eliciting such testimony is therefore without merit.

Defendant further alleges that the prosecution violated its *Brady* obligations by failing to disclose a cooperation agreement with the witness Winston Page (*Brady v Maryland*, 373 US 83 [1963]). While a prosecutor is under a duty to disclose the existence of an agreement between the prosecution and a witness (*People v Steadman*, 82 NY2d 1 [1993]; see also *People v Novoa*, 70 NY2d 490, 497 [1987]), a predicate to the obligation is the existence of an agreement. Here defendant has failed to establish that the prosecution entered into any such cooperation

agreement with Page. He bases his claim on Page's plea minutes showing that the prosecutor dismissed two felony counts and allowed him to plead to a misdemeanor "with leave to reinstate [the felony counts] should the sentence not go through." Defendant also attaches the hearsay affidavit of a Jermaine Dawson, who claims that he was informed by a third person that Page "had work[ed] out a deal with the District Attorney's Office" and in exchange agreed to testify against defendant at trial. This is not competent evidence that a cooperation agreement existed. Moreover, the facts undermine any possibility that such an agreement existed. Page's sworn testimony was first memorialized in the Grand Jury on December 12, 1996, well before his arrest for weapons' possession and before any motive to lie in order to gain a benefit from the prosecutor. Additionally, Page's trial testimony, which is consistent with his Grand Jury testimony, did not take place until a year and a half after his guilty plea and sentence were completed, and thus after any motive to lie had ended. Thus, because defendant has failed to establish that any cooperation agreement existed, he has not established a *Brady* violation.

Defendant's newly discovered evidence claim regarding the alleged cooperation agreement between the prosecution and Page is also rejected. The court has determined that such evidence does not exist and could therefore not be discovered. Moreover, other than his own self-serving affidavit, defendant has failed to set forth sworn allegations of fact adequate to establish this claim (CPL § 440.30[4][b]).

Regarding the allegation of ineffective assistance of counsel, a defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 US 668 [1984]; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1, §6). Under the federal standard, the defendant must be able to show

that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

In New York, "[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, the constitutional requirement will have been met" (*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 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]).

To prevail on a claim of ineffective assistance of counsel, defendant must also overcome the strong presumption that counsel rendered effective assistance (*People v Baldi*, 54 NY2d 137 [1981]). In this instance, the record establishes that trial counsel provided meaningful and competent representation and that defendant has not established that his attorney's performance had a prejudicial effect on the outcome of the case. Counsel worked vigorously on behalf of defendant. The attorney, among other things, (1) delivered persuasive opening and closing statements; (2) effectively cross-examined the People's witnesses often attacking the credibility

of Page and Williams with inconsistent statements; (3) made numerous objections that were sustained; (4) presented several defense witnesses; (5) moved to dismiss the charges against defendant at the conclusion of the People's case; and (6) vigorously argued at sentencing that consecutive sentences would be inappropriate in defendant's case.

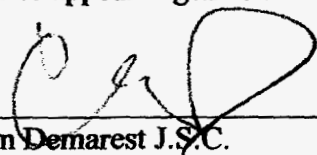
Nonetheless, defendant's claims counsel was ineffective in not objecting to the court's failure to administer the "truthfulness oath" and to properly admonish the jury and in not objecting to the prosecutor's alleged misconduct. The court's alleged error and the alleged instances of prosecutorial misconduct, however, are without merit. Any objection would have been futile, and "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d at 287). Defendant has therefore not established that he was denied the effective assistance of counsel under either the federal or state standard (*Strickland v Washington*, 466 US 668; *People v Benevento*, 91 NY2d at 713).

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 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.



Carolyn Demarest J.S.C.

**ENTERED**  
APR 21 2011  
NANCY T. SUNSHINE  
COUNTY CLERK