

People v Allah

2011 NY Slip Op 31526(U)

May 13, 2011

Sup Ct, Kings County

Docket Number: 1426/2000

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART CV19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

Date: May 13, 2010

-against-

DECISION & ORDER

ASIATIC ALLAH,

Defendant.

IND No. 1426/2000

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Defendant moves, *pro se*, pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of his conviction, alleging that the court's instruction to the jury was erroneous and that trial counsel was ineffective. Defendant further moves this court to recuse itself from deciding the motion based on a conflict of interest.

On February 4, 2000, defendant and Levar Davis attempted to rob a grocery store in Brooklyn. While defendant waited by the doorway, Davis approached the counter, pointed the handgun at the store owner, Khalil Hussein, and demanded money. Hussein, however, did not immediately turn over the money in the cash register. Instead, he ducked underneath the counter and attempted to fire his own handgun. When defendant heard a clicking sound, he ordered Davis to shoot him. Davis reached over the counter and shot Hussein, who later died from the bullet wound.

During plea negotiations, the court promised defendant and Davis an indeterminate term of imprisonment of fifteen years to life in exchange for a guilty plea of murder in the second degree (PL § 125.25). On August 23, 2000, Davis pleaded guilty to murder in the second degree (PL § 125.25[3]), and was sentenced as promised. Defendant, however, refused to accept the plea offer and instead proceeded to trial.

On December 18, 2000, defendant was convicted upon a jury verdict of murder in the second degree (PL § 125.25[3]). On January 17, 2001, defendant was sentenced to an indeterminate term of imprisonment of twenty-two years to life (Demarest, J., at trial and sentence).

On appeal, defendant made several claims, among them that (1) the People violated *Brady v Maryland*, 373 US 83 (1963) when the police lost a surveillance videotape recovered from the security camera inside the grocery store, (2) the court's adverse inference charge at trial was insufficient to cure the *Brady* violation, and (3) the sentence imposed was excessive. The Appellate Division Second Department affirmed the judgment of conviction (*People v Allah*, 302 AD2d 535 [2d Dept 2003]). The Court of Appeals denied defendant leave to appeal (*People v Allah*, 99 NY2d 652 [2003]).

While defendant's appeal was pending, the missing videotape was located at the property clerk's office. Defendant subsequently moved pursuant to CPL § 440.10 for an order vacating the judgment of his conviction, claiming that the videotape constituted *Brady* material and that it would establish that defendant was not acting in concert with Davis at the time of the shooting. Although the videotape did not record the actual shooting, the court ordered a hearing to view the videotape and to determine whether it recorded any movements of defendant prior to the shooting that may have potentially impeached Davis' testimony at trial.

The evidence at the hearing established that the activities depicted on the videotape did not relate to the day of the shooting. Accordingly, on December 8, 2003, the court denied defendant's motion, concluding that "there really wasn't anything [in the videotape] that would have in any way influenced the outcome of this trial, as there is nothing relevant to the events

surrounding the crime and there is certainly nothing exculpatory and, therefore, the tape is not Brady.”

Defendant next moved to vacate the judgment of his conviction, claiming that Davis’ post-trial recanting affidavit was newly discovered evidence and that it demonstrated Davis acted alone in shooting Hussein. On July 15, 2005, this court denied defendant’s motion without a hearing. The Appellate Division denied defendant’s application for leave to appeal the court’s order on December 19, 2005.

Defendant subsequently moved to vacate the judgment of the conviction, arguing, as he had previously, that the surveillance videotape established he was not guilty of Hussain’s murder. Defendant structured his claim as a *Rosario* violation, alleging that the videotape contradicted the testimony of Davis and that the results of the trial would have been different if the videotape had been produced by the People for defendant’s use at trial. The court denied the motion, holding that the videotape did not contain any recorded statements of defendant or any of the prosecution witness, and therefore, defendant could not claim that the videotape was material required to be disclosed under *Rosario*.

Defendant now moves pursuant to CPL § 440.10 for an order vacating the judgment of his conviction, alleging that the court’s jury instructions were erroneous, and that trial counsel was ineffective for failing to (1) object to the court’s curative instruction regarding the outburst by the victim’s son during the court’s preliminary instructions to the jury and the presence of the victim’s daughter in court; (2) request the court to examine the jurors regarding any inference they may have drawn based on the outburst; and (3) move for a mistrial. Defendant also moves

this court to recuse itself from considering the motion because he believes the claim against the court creates a conflict of interest.

CPL § 440.10(2)(c) mandates that a court deny a motion to vacate a judgment where sufficient facts appear on the record to have permitted an issue to have been raised on appeal but the defendant unjustifiably failed to do so (*People v Cooks*, 67 NY2d 100 [1986]). Defendant's claim that the court's jury instructions were erroneous could have been raised on appeal but was not. Accordingly, this court is now foreclosed from reviewing the claim (*People v Cooks*, 67 NY2d 100; *People v Jossiah*, 2 AD3d 877 [2d Dept 2003]).

In any event, the court sufficiently instructed the jury and "neither misstated the applicable law nor tended, in the end, to confuse or coerce the jury" (*People v Ellis*, 81 NY2d 854, 857 [1st Dept 1993]).

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., 6th 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). 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) moved to suppress the identification procedure, property recovered and statements made by defendant; (2) delivered persuasive opening and closing statements at trial; (2) effectively cross-examined the People’s witnesses; (3) made numerous objections that were sustained; and (4) vigorously argued that defendant should be sentenced to the minimum sentence allowable.

In this instance, trial counsel’s alleged failure to object to the court’s jury instructions does not constitute ineffective assistance. The jury was properly charged, and any objection would have been futile (*People v Stulz*, 2 NY3d 277). Moreover, since defendant has not shown

he was prejudiced by trial counsel's alleged failure (*see People v Barnes*, 249 AD2d 239 [1st Dept 1998]), his claim is denied.

Similarly, counsel's alleged negligence in failing to (1) object to the court's curative instruction regarding the outburst by the victim's son and the presence of the victim's daughter in court; (2) request an examination of the jurors regarding any inferences they may have drawn from the outburst; and (3) move for a mistrial is also unfounded. During the court's preliminary instructions to the jury, three individuals, the victim's son and daughter and another female, entered and approached the front of the courtroom. The son then threatened defendant and shouted obscenities at him. The jury was immediately excused, and the court staff forcibly removed the three individuals. In response, counsel requested that the court instruct the jury to disregard the outburst and also requested that both the son and the daughter, who was crying and allegedly also whispered something to defendant, be excluded from the court proceedings. The district attorney, having spoken to the victim's family, assured the court that there would be no further disruptions in the court proceedings.

After hearing both sides, the court excluded the son from the court proceedings and warned the daughter that she would not be permitted to remain in the courtroom if she continued to cry or demonstrate any kind of emotion in front of the jury. The court further directed the jury to disregard the interruption and ordered a court officer to stand by the jury at all times. Given the circumstances, any objection by counsel would have been futile. "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

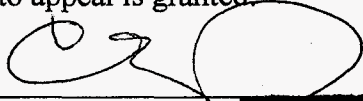
not established that he was denied the effective assistance of counsel under either the federal or state standard (*Strickland v Washington*, 466 US 668; *People v Benevento*, 91 NY2d at 713).

Finally, there is no basis for the court to recuse itself from deciding this motion. Absent statutory grounds for disqualification pursuant to Judiciary Law § 14, a trial judge is the sole arbiter of recusal (*People v Moreno*, 70 NY2d 403, 405 [1987]). The question of whether a judge should disqualify herself to avoid the appearance of impropriety is thus a determination left to the personal conscience of the court (*People v Gallagher*, 158 AD2d 469 [1990]; *People v Bartolomeo*, 126 AD2d 375 [1987]). Since defendant has failed to demonstrate any bias or prejudice on the part of the court that unjustly affected the result of the case, his request is denied.

Accordingly, defendant's motion is denied.

This decision constitutes the order of the court.

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 E. Demarest, J.S.C.

