

People v Soto

2011 NY Slip Op 31886(U)

May 27, 2011

Sup Ct, Kings County

Docket Number: 12408/1994

Judge: Larry D. Martin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV41

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THE PEOPLE OF THE STATE OF NEW YORK,

By: Hon. Larry D. Martin

Date: May 27, 2011

-against-

DECISION & ORDER

Indictment No. 12408/1994

JOSEPH SOTO
-----X

Defendant moves, *pro se* and subsequently with counsel, to vacate his judgment of conviction pursuant to CPL § 440.10(1), (g) and (h). Defendant claims that a juror was improperly dismissed during voir dire and that his attorney was ineffective for failing to address that issue before the court. For the following reasons, the motion is denied.

On October 5, 1994, defendant spent the evening drinking and playing cards in Karla Dickerson's apartment in Brooklyn. Defendant accused Dickerson of stealing his wallet and, when she denied the accusation, he punched her in the face multiple times. He then wrapped a shoelace around her neck and dragged her into the bedroom, causing her death by strangulation. Defendant signed a statement detailing how he had caused Dickerson's death and also confessed to the murder to his sister and to a friend. For his act, defendant was convicted by a jury of depraved indifference murder in the second degree (PL § 125.25[2]) and was sentenced on November 16, 1995 to a term of imprisonment of twenty-five years to life (Egitto, J., at trial and sentence).

Defendant subsequently appealed his judgment of conviction to the Appellate Division, Second Department, arguing that the evidence was legally insufficient to prove his guilt beyond a

reasonable doubt and that the sentence was excessive. His conviction was affirmed and leave to appeal was denied (*People v Soto*, 240 AD2d 768 [2d Dept 1997], lv denied 90 NY2d 911 [1997]).

On September 1, 1998, defendant moved, *pro se*, to vacate his judgment of conviction pursuant to CPL § 440.10 on the ground that his constitutional rights were violated when he invoked his right to counsel during an interrogation by an assistant district attorney. This court denied the motion on December 16, 1998, finding defendant's on-the-record claim both meritless and procedurally barred because of defendant's unjustifiable failure to raise it on appeal.

In the instant motion, defendant again moves pursuant to CPL § 440.10, seeking a reconstruction hearing to determine how prospective juror #12 was dismissed during voir dire. Specifically, defendant contends that (1) his right to a jury of his choice was violated by the improper discharge of a juror; (2) he received ineffective assistance of counsel with respect to counsel's failure to take notice of the allegedly improper juror discharge, and that counsel falsely advised him about a plea offer. In a reply to the People's answer, drafted by counsel, defendant reiterates the claim that a juror was inappropriately excused. Counsel has appended four pages of the voir dire transcript and represents that the full transcript is "available upon request."

The claim that juror #12 was improperly discharged is procedurally barred. The court must deny a motion to vacate judgment when sufficient facts appear on the record to have provided adequate review of this claim upon appeal, but no such review has occurred owing to the defendant's unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]; *People v Williams*, 5 AD3d 407 [2d Dept 2004]; see *People v Cooks*, 67 NY2d 100, 500 [1986]). Here, defendant's allegations rely on the record, which would have been available to defendant and

would have permitted review of the issue when he appealed in 1997. His failure to raise his claim on appeal is unjustified and unsubstantiated in his moving papers.

Moreover, defendant's claim is also procedurally barred by his failure to raise the instant issue in his prior motion (CPL § 440.10[3][c]). This claim does not depend on any new facts arising since his conviction and defendant has not provided any reasonable justification for his failure to raise the claim now, some seventeen years after the alleged violation took place.

In any event, defendant has failed to establish that any violation actually occurred. The minutes defendant provides establish only that prospective juror #12, who was questioned by counsel, was not among the named jurors who were discharged nor among the six named jurors who were seated during the morning voir dire session. From the record available defendant alleges that the court clerk or the court improperly discharged prospective juror #12. It is well settled that a presumption of regularity attaches to all judicial proceedings, and the defendant has the burden of rebutting this presumption by substantial evidence (see *People v Cruz*, 14 NY3d 814, 816 [2010]; *People v Andrew*, 1 NY3d 546, 547 [2003]; *People v Velasquez*, 1 NY3d 44, 48 [2003]; *People v Bogan*, 78 AD3d 855 [2d Dept 2010]). Here, defendant has not met his burden. The evidence is insufficient to establish that any impropriety took place during voir dire and it must be presumed that the court adhered to proper procedure. As defendant has failed to substantiate all the essential facts underlying his claim, the motion must be denied (CPL § 440.30[4][b]). Nor is a reconstruction hearing warranted (see *People v Brightley*, 56 AD3d 314, 315 [1st Dept 2008] [no reconstruction hearing required since defendant did not seek such a remedy until nearly seventeen years after trial]).

Defendant's claim that counsel was ineffective for failing to address the alleged juror

dismissal also relies on facts appearing on the record and is thus barred from collateral review (CPL § 440.10[2][c]). Here, defendant failed to raise this claim on his direct appeal from the judgment, and the record presented sufficient facts to have permitted adequate appellate review of that claim (*People v Mobley*, 59 AD3d 741, 742 [2d Dept 2009]; *People v Maldonado*, 34 AD3d 497 [2006]; *People v Jossiah*, 2 AD3d 877 [2003]; *People v Smith*, 269 AD2d 769, 769-770 [2000]).

Furthermore, defendant has failed to adequately substantiate the rather vague claim that counsel falsely promised him a plea agreement for eight and one-half to twenty-five years for first-degree manslaughter. The moving papers do not provide any details about conversations with counsel, the court or the District Attorney's Office regarding such an offer. Indeed, trial counsel Michael Baum states in an affidavit that it was his routine practice to convey plea offers to his clients and that, while he may have conveyed to the court that defendant would have been interested in accepting such a plea as defendant now alleges, that plea was never offered. The court's notation on June 22, 1995 indicating "Def wishes Man 1 w/8½ - 25" further corroborates counsel's recollection. Defendant has not substantiated the claim that counsel failed to convey a plea offer providing for a shorter sentence, and thus, that claim is denied on procedural grounds (CPL § 440.30[4][b]).

Defendant received effective assistance of counsel under the circumstances of this case. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim 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).

Under New York law, the constitutional standard of effective assistance of counsel will be satisfied when “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” (*People v Flores*, 84 NY2d 184, 187 [1994]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, “[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial” (*Flores* at 187). 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]).

In this instance defendant has failed to establish that counsel’s performance was deficient pursuant to the Constitutional standard set out in *Strickland*, and that, had counsel raised the juror issue before the court, the outcome of the trial would have been different. In light of the overwhelming evidence of guilt, including defendant’s own written and verbal confessions, defendant cannot show that he was prejudiced by counsel’s conduct (see *People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Rivera*, 19 AD3d 620 [2d Dept 2005]). Defense counsel

prepared and pursued trial strategies and defense theories, presented a clear and cogent opening and summation, and adequately cross-examined the People's witnesses to develop his defense theories (*People v Gillespie*, 36 AD3d 626 [2d Dept 2007]). Hindsight cannot elevate counsel's ultimately unsuccessful trial strategies into ineffective assistance of counsel (see *People v Benevento* at 712; *People v Satterfield*, 66 NY2d 796 [1985]; *People v Baldi*, supra). Moreover, nothing in the record casts doubt on counsel's strategy and the resulting the fairness of the proceedings on the whole. Absent any evidence to the contrary, defendant's claim comes short of overcoming the strong presumption that defense counsel rendered effective assistance (*People v Walker*, 35 AD3d 512 [2d Dep't 2006]).

As part of his motion defendant has also submitted three subpoenas ordering the trial judge, clerk of the court and chief clerk to provide copies of all court records pertaining to the voir dire proceedings. While CPL 440.30(1) permits the submission of "documentary evidence or information" in support of the allegations made in the post-judgment motion, nowhere does the Criminal Produce Law authorize the use of compulsory process to obtain such evidence prior to the court's ordering a hearing on the motion. There are other means by which records can be obtained for presentation to a court in support of a post-judgment motion, such as a request pursuant to the Freedom of Information Law. In any event, defendant has made an insufficient showing that any impropriety occurred during voir dire or that the records would reveal exculpatory material (see *People v Gissendanner*, 48 NY2d 543, 550 [1979]). His request is also moot because the court must presume defendant has already obtained the full transcript, as defense counsel states in his reply that a full transcript is available.


Accordingly, defendant's motion is denied in its entirety.

This decision constitutes 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.

ENTER:

JUN 07 2011


LARRY D. MARTIN, J.S.C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

ENTERED
JUN - 8 2011
NANCY T. SUNSHINE
CLERK