

People v Polite

2011 NY Slip Op 32046(U)

July 14, 2011

Supreme Court, Kings County

Docket Number: 2771/99

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 24

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PEOPLE of the STATE of NEW YORK,

- against -

By: Hon. Thomas J. Carroll

Dated: June 13, 2011

DECISION & ORDER

Indictment No. 2771/99

MARK POLITE,

Defendant.

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The defendant moves pro se to vacate judgment pursuant to CPL § 440.10 (1)(b)(d)(g)(h) and (3)(a) claiming ineffectiveness of trial counsel, the Court favored the prosecution and prosecutorial misrepresentation. The People oppose. In deciding this motion, the court has considered the motion papers, the affirmation in opposition, the defendant's reply and the court file.

Background

On October 6, 1999, following a jury trial, the defendant was found guilty of one count of attempted murder in the second degree predicated on the shooting of Tyrone Bowman on March 21, 1999, near 1164 Halsey Street in Brooklyn, New York. At trial, the People presented evidence consisting of the testimony of the complainant Tyrone Bowman who testified that: he knew the defendant, the defendant approached Bowman, they had a conversation and the defendant shot him. The People also called Indira Rodriguez and Leslie Bravo, friends of Bowman, who testified that although they could not identify the person who confronted Bowman, they did observe that that person had a gun and shot Bowman. The People also called

Cyde Logan, another friend of Bowman, who observed a person hold a gun at Bowman.

The People called Det. Christopher Monzert who testified that at the scene, Bowman stated to Det. Monzert that "Mark Polite" shot him. The People also called Police Officer Brian Erdody who also testified that in the ambulance Bowman stated to Officer Erdody that "Mark Polite" shot him. In addition, the People called other police personnel and the treating surgeon.

The People also introduced the defendant's, Mark Polite's, grand jury testimony in which he testified that he knew Bowman, he was at the scene with Bowman, they had a conversation, Bowman pulled out his gun on him (Polite) and they wrestled. Polite testified that as he was running the gun went off. Polite testified that did not have a gun and did not shoot Bowman. During cross-examination in front of the grand jury, Polite also testified that as he and Bowman were wrestling, the gun went off.

The defendant called Ronald Wright. Wright's testimony placed the defendant at the scene in an altercation with the defendant. Wright testified the defendant fled before the shots were fired.

As noted above, the defendant was found guilty of one count of attempted murder in the second degree. On October 18, 1999, the court sentenced the defendant to twenty years to life as a persistent felony offender (Carroll, J., at trial and sentence).

In February 2001, appellate counsel for the defendant filed a brief in the Appellate Division, Second Department, presenting the following issues:

1. Whether the defendant should have been present at a sidebar conference at which the parties discussed whether to allow the prosecutor to cross-examine a defense witness about whether he knew appellant in an Elmira prison;

2. Whether the trial court abused its discretion and denied the defendant his constitutional right to confront witnesses against him when it refused to re-open cross-examination of the complainant as a “penalty” for alleged witness intimidation.

In July 2001, the defendant filed a supplemental *pro se* brief claiming the court erred in admitting testimony from both Det. Monzert and Bowman regarding a photographic array identification. He also claimed he was denied the effective assistance of counsel based on the “cumulative effects” of counsel’s alleged errors and omissions but only alleged a single error, namely counsel’s failure to challenge the accuracy of the Grand Jury minutes notwithstanding defendant’s claim that they were inaccurate.

On February 19, 2002, the defendant’s judgment of conviction was affirmed. *People v Polite*, 291 AD2d 511 (2d Dept 2002). The Appellate Division also noted that the defendant’s contentions which were raised in his supplemental *pro se* brief were without merit. *Id.* On June 14, 2002, the defendant’s application for leave to appeal to the Court of Appeals was denied. *People v Polite*, 98 NY2d 679 (2002).

The defendant petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of New York. On April 8, 2004, the petition was denied and the defendant was denied a certificate of appealability. *Polite v Duncan*, No. 03–CV-2405 (EDNY, 2004) (Ross, J.).

In August 2004, the United States Court of Appeals for the Second Circuit denied the defendant’s application for a certificate of appealability. *Polite v Duncan*, No. 04-3864 (2d Cir. 2004).

In 2008, the defendant moved to vacate his conviction pursuant to CPL § 440.10.

Defendant claimed that Bowman continued to sell drugs at the time of his testifying, and that the prosecutor knew of this. The People opposed the motion. By decision dated August 4, 2009, the motion was denied (Carroll, J.).

The defendant was unsuccessful in his motion to reargue the court's decision. His application seeking leave to appeal the denial of the CPL § 440.10 decision was denied as well as his subsequent petition seeking reargument of the Order denying his application for leave to appeal.

In 2010, the defendant's appellate attorneys made a motion to set aside sentence pursuant to CPL § 440.20. That motion has been scheduled for a hearing.

In his current motion, the defendant moves, for the second time, to vacate his judgment of conviction pursuant to CPL § 440.10. He claims that his trial counsel was ineffective for failing: (1) to request that the prosecutor turn over *Rosario/Brady* material relating to defendant's witness Ronald Wright's having been in Elmira prison with the defendant in 1982 for eight months; (2) to investigate the prosecutor's representations regarding Elmira; (3) to request that the defendant be present at the sidebar conference regarding Elmira. He also asserts the prosecutor misrepresented material facts regarding Elmira during the sidebar conference. Although not identified in his Notice of Motion, in his supporting papers the defendant also claims: (4) the trial court favored the prosecution in its rulings and that defense counsel was ineffective for: (5) opening the door to the admission of the photo array identification by the complaining witness Tyrone Bowman; and (6) misadvising the defendant about the use of his grand jury testimony. Defendant also claims (7) appellate counsel was ineffective.

Discussion

Defendant's First and Second Claims:

Defendant's first claim is that defense counsel was ineffective for failure to request that the prosecutor turn over *Rosario/Brady* material relating to Wright having been in Elmira prison with the defendant in 1982 for eight months. The defendant's second claim is that defense counsel was ineffective for failing to investigate the People's representations about the Elmira issue.

As to the first claim, the defendant could have raised this claim in his prior CPL § 440.10 motion. Thus, it is denied pursuant to CPL § 440.10(3)(c).

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]; *People v Baldi*, 54 NY2d 137, 146 [1981]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, §6). Under the federal standard, to prevail on an ineffective assistance of counsel claim 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] quoting *Baldi* at 147. 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 explanations” for counsel’s conduct (*Baldi* at 146; *People v Rivera*, 71 NY2d 705, 708 [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, 712-713 [1998]). Furthermore, “defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation” *People v Flores*, 84 NY2d 184, 187. Moreover, even though the defendant is not required to show *Strickland* prejudice, New York courts “are not indifferent to whether the defendant was or was not prejudiced by trial counsel’s ineffectiveness. We would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice” Defendant’s showing of prejudice is “a significant but not indispensable element” (*People v Stultz*, 2 NY3d 277, 283-284 [2004]).

As to the first claim, the defendant not established that any *Rosario* or *Brady* material existed. The alleged failure to request disclosure of *Rosario/Brady* material and the failure to investigate arose in the context of the prosecutor, at side bar, establishing a good faith basis for cross-examining witness Wright about having been in Elmira with the defendant in 1982. An Elmira prison official was not called as a witness. Furthermore, the Elmira issue was collateral and did not go directly to the guilt or non-guilt of the defendant. Accordingly, the defendant has not established a basis for his *Rosario/Brady* discovery claim. Moreover, counsel can not be faulted for not making a futile request. *People v Stultz*, 2 NY3d 277 (2004).

As to the second claim, if defense counsel had investigated, he would have learned that witness Wright and the defendant were in fact both in Elmira in 1982. As seen by defendant’s exhibits to this current CPL § 440.10 motion, their terms may not have coincided for eight

months but their terms did coincide for more than a month.

Thus, such an investigation by defense counsel would have, at least to a limited extent, supported the prosecutor's position, to wit, that they were both in Elmira in 1982. Such a investigation would have tended to undermine the defendant's position that Wright was a disinterested witness who had only met the defendant in 1998, the year before the incident. Thus, the defendant has not shown how he was prejudiced by the lack of an investigation into the Elmira issue.

Moreover, witness Wright's answers on cross-examination provided information consistent with establishing that Wright did not know the defendant from Elmira. Witness Wright testified he did not see the defendant (in Elmira). In fact Wright testified that the first time he saw the defendant was in 1998 on Wilson Avenue (presumably in Brooklyn, NY). In addition, Wright testified that: Elmira was not a relatively small facility; there are nine different blocks; and not everyone lives together. The defendant has not specified what additional information an investigation by defense counsel would have provided. Thus, the defendant has again not shown how he was prejudiced by the lack of an investigation into the Elmira issue.

Consequently, since Wright denied seeing the defendant in Elmira and his testimony regarding the above information was consistent with the defendant's position, the defendant has not demonstrated to this court what more information defense counsel would have learned if he had conducted an investigation and of what value, or materiality, it would have been. Thus, the defendant has not demonstrated any prejudice.

The defendant asserts he was prejudiced by the prosecutor's alleged sidebar misrepresentations about Elmira based on false information provided by Elmira officials. The

defendant has not provided any sworn affidavits from Elmira officials to support this assertion. Since this assertion is based upon the existence of facts “. . . the motion papers must contain sworn allegations thereof” CPL § 440.30 (1) and (4)(b). Consequently, this assertion is denied.

Moreover, these alleged misrepresentations were made at sidebar, not in front of the jury. In front of the jury, witness Wright, when cross-examined, denied the information in the prosecutor’s alleged misrepresentation. Thus, even if the information the prosecutor proffered at side bar was inaccurate, Wright testified in front of the jury along lines consistent with the defendant’s position. Thus, again, the defendant has not shown any prejudice.

Delay:

Moreover, all of the defendant’s claims, except the claim about appellate counsel, are being made more than 10 years after his conviction. Defendant asserts Wright only allowed access to his Elmira records in March 2010. However, since the defendant has proffered no explanation as to why it took him 10 years after his conviction to obtain Wright’s permission, the defendant has not adequately explained the delay. This delay undermines the legitimacy of his claim in bringing this motion. *People v Nixon*, 21 NY2d 338, 352 (1967).

Defendant’s Third Claim:

The defendant’s claim regarding his presence at the sidebar discussion was raised in his direct appeal. The Appellate Division held that defendant’s objection to his non-presence at the sidebar discussion was unpreserved for appellate review and without merit.

To the extent that the defendant now repeats this claim, it is procedurally barred. CPL § 440.10(2)(a).

Defendant's Fourth Claim:

Defendant claims that the Court favored the prosecution on two occasions: once during the side bar conference regarding Elmira; and, again, during the prosecutor's summation. As both of these claims were part of the trial record, they could have been raised on direct appeal. Defendant's failure to do so bars him from raising such claim in the current motion. CPL § 440.10 (2)(c).

Defendant's Fifth Claim:

The defendant's contention that the trial court erred in permitting the introduction of the photo identifications of the defendant by Bowman is procedurally barred. This claim , along with other claims, was raised in the defendant's supplemental *pro se* appellate brief. The Appellate Division found those claims to be meritless. *People v Polite*, 291 AD 2d511. CPL § 440.20 (2)(a).

Defendant's Sixth Claim:

Defendant's sixth claim is that defense counsel was ineffective for advising the defendant that his grand jury testimony could not be used unless he took the stand at trial. In fact, over defense counsel's objection, the court properly admitted the defendant's grand jury testimony during the trial as part of the People's case. *People v Rullo*, 31 NY2d 894 (1972); *People v Jones*, 236 AD2d 217 (1 Dept 1997); *People v Rose*, 224 AD2d 643 (2d Dept 1996); *People v Koestler*, 91 AD2d 176 (4 Dept 1991). In this current motion the defendant asserts he did not take the stand because the court violated the law.

Since the defendant was in a position to raise this ground or issue in his previous CPL § 440.10 motion and did not, it may be denied pursuant to CPL § 440.10 (3)(c). This claim is hereby so denied.

Furthermore, the defendant raised this issue in his unsworn memorandum of law and did not provide a sworn affidavit as required by CPL § 440.30 (1) and 4 (b). This claim is also denied on that ground.

Further still, the admission by the court of the defendant's grand jury testimony did not as a matter of law prohibit him from testifying. Even if defense counsel gave the defendant this alleged misadvice, this did not impair the defendant's ability to testify. Thus, the defendant was not prejudiced and this alleged misadvice did not constitute ineffectiveness of counsel.

Defendant's Seventh Claim

Finally, defendant claims that his appellate counsel was ineffective. A claim of ineffectiveness of appellate counsel is not the proper subject of a motion to vacate under CPL § 440.10. *People v Bachert*, 69 NY2d 593.

Wright's assertion regarding defense counsel

In his sworn affidavit, dated November 16, 2010, attached as Exhibit E to defendant's motion papers, Wright asserts that defense counsel never advised him, Wright, not to speak with any other witnesses while sitting in the court corridor. However, during the trial, Wright testified, in response to defense counsel's questions, that defense counsel told him (Wright), "Don't discuss the case with nobody. . . ." Thus, this sworn assertion by Wright's in his affidavit is contradicted by his sworn testimony at the trial.

Decision

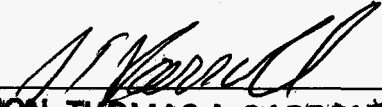
Accordingly, defendant's motion is denied in its entirety.

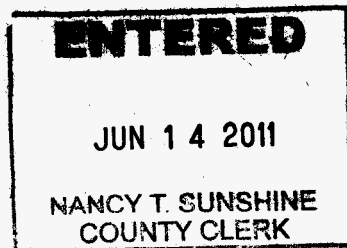
This shall constitute the decision and order of the Court.

Right to Apply to Appeal

The defendant is hereby advised 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 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 certificate granting leave to appeal is granted.¹

E N T E R ,


HON. THOMAS J. CARROLL
Thomas J. Carroll
J. S. C.



¹ 22 NYCRR § 671.5.