

People v Lebron

2011 NY Slip Op 32775(U)

September 30, 2011

Supreme Court, Kings County

Docket Number: 3781/99

Judge: Thomas J. Carroll

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

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

By: Hon. Thomas J. Carroll

Date: September 30, 2011

-against-

DECISION & ORDER

Indictment No.: 3781/99

WILFREDO LEBRON,

Defendant

-----X

Defendant moves, pro se, to vacate the judgment of conviction pursuant to CPL § 440.10(1)(h). Claiming ineffective assistance of counsel, he contends that his attorney committed a long list of errors by engaging “in a series of arbitrary and capricious actions or inactions which resulted so inadequate, negligent, careless, damaging, and irreparably prejudicial to him that they only served to deprive him of his fundamental constitutional guaranteed right to a fair and impartial jury trial, due process and equal protection of the laws, and to the effective assistance of counsel”. He also claims the trial court committed errors. The court has reviewed defendant’s claims and denies them in their entirety.

Background

On May 7, 1999, at approximately 3:15 P.M., defendant and an unknown accomplice entered a bodega at 1377 Madison Street in Brooklyn. Defendant displayed a gun, punched and kicked the owner, Angel Cortez, took \$25 from Cortez’s pocket and stabbed Cortez in the shoulder before fleeing. Cortez followed defendant out of the store and pointed him out to a police officer who immediately gave chase. Minutes later defendant was apprehended by police with a bloody knife in his pocket. Within moments, defendant was identified by Cortez. The blood on the knife was found to match the store owner’s blood through DNA analysis.

Defendant was charged with two counts each of robbery in the first degree (PL § 160.15),

robbery in the second degree (PL § 160.10), and assault in the second degree (PL § 120.05) and one count each of grand larceny in the fourth degree (PL § 155.30), petit larceny (PL § 155.25), assault in the third degree (PL § 120.00), menacing in the second degree (PL § 120.14) and criminal possession of a weapon in the fourth degree (PL § 265.01).

The People provided defendant with open file discovery. *Huntley, Wade, Mapp*, and *Dunaway* hearings were granted. Defendant's motions to suppress evidence were denied (Rivera, J.).

On January 19, 2000, defendant was convicted by jury verdict of robbery in the first degree and sentenced on February 24, 2000, to a term of imprisonment of twenty-five years to life as a mandatory persistent felony offender (Carroll, J., at trial and sentence).

Defendant's conviction was affirmed by the Appellate Division (*People v Lebron*, 293 AD2d 689 [2d Dept 2002]). The Court held that defendant had waived his rights under *People v Antommarchi*, 80 NY2d 247 (1992), that the defense had improperly challenged a prospective juror under *Batson v Kentucky*, 476 U.S. 79 (2000), and that defendant's challenge to the constitutionality of his sentence was unpreserved for appellate review. Leave to appeal to the Court of Appeals was denied (*People v Lebron*, 98 NY2d 711 [2002]).

Defendant petitioned, pro se, for a writ of habeas corpus based on the same grounds as his appeal. That application was denied (*Lebron v Phillips*, 03-CV-4145[CBA] [EDNY 8/4/06]).

Defendant's Allegations

In the instant motion defendant claims that counsel's performance was ineffective for numerous reasons. He contends that counsel (1) failed to conduct interviews with potential witnesses; (2) never visited the crime scene and conducted an inadequate investigation; (3) improperly proceeded with open file discovery; (4) failed to move to suppress evidence; (5)

failed to move in a timely fashion to suppress an “improperly enhanced statement”; (6) undermined defendant’s intention to testify at the suppression hearing ; (7) failed to move to dismiss the indictment based on defendant’s claim that the arresting officer testified falsely; (8) made disparaging remarks to the court about defendant; (9) “usurped the defendant’s statutory right of peremptory challenge” and exercised “systemic and purposeful” racial discrimination in the jury selection process; (10) failed to make an opening statement to the jury; (11) failed to object when defendant was “improperly paraded” before the complainant in handcuffs; (12) introduced “evidence of defendant’s incarceration before the jury”; (13) “permitted the eye-witness to obviously lie about having witnessed” the defendant in handcuffs; (14) failed to present “any of the listed witnesses for the defense”; (15) failed to “call the medical physician whom attended Mr. Cortez” to refute the complainant’s testimony about being kicked and punched; (16) precluded defendant from testifying at trial “when he threatened” to force defendant to testify in narrative form; (17) did not provide defendant with “adequate time to reflect and determine whether or not to go ahead and testify in the narrative form”; (18) subjected defendant to racial epithets during summation; and (19) negligently submitted incorrect information in defendant’s notice of appeal.

Defendant also asserts that the trial court’s denial of the People’s motion for a mistrial with regard to its *Batson* challenge constitutes “a fundamental structural error”. In the alternative, he asserts that the trial court should have acted sua sponte. Defendant claims that with this error “defense counsel persisted in injecting further racial discrimination into an already infested, perverted, and contaminated jury selection process”

Along with their response, the People submit an affirmation from defense counsel which addresses some of defendant’s allegations. While counsel is no longer in possession of the file

for defendant's case, he notes that access to prosecution witnesses is not assured and they are not obliged to speak to defense attorneys. He states that in his professional experience he has found that open-file discovery is helpful because it provides a defendant "with better and earlier access to more prosecution documents" Also according to counsel, he filed the proper motions to suppress evidence seized from defendant, statements made by defendant and evidence of procedures by which defendant was identified. He notes that it was his usual and customary practice to visit a crime scene unless he decides it is unnecessary. Finally, counsel states that in his experience an opening statement is not always warranted and that if he makes the strategic decision not to make an opening statement, he would always consult his client beforehand.

Procedural Bars

The majority of defendant's allegations of ineffectiveness are barred from collateral review because defendant failed to raise them on direct appeal. 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 adequate appellate review of certain issues and no such appellate review occurred because of defendant's unjustifiable failure to raise those issues on direct appeal. Here, sufficient facts appear on the record for defendant to have raised claims 4-13 and 17-18 on appeal and his failure to do so bars him from raising them now (*People v Mobley*, 59 AD3d 741, 742 [2d Dept 2009]; *People v Maldonado*, 34 AD3d 497 [2006]; *People v Jossiah*, 2 AD3d 877 [2003]). Defendant's claim of court error is also denied for the same reason.

Defendant's claims that counsel was ineffective for not interviewing certain potential prosecution witnesses and for not visiting the crime scene are also procedurally barred. CPL § 440.30(4)(b) permits a court to deny a motion to vacate a judgment without a hearing if the moving papers do not contain sworn allegations substantiating all essential facts (*People v Lane*,

213 AD2d 494, 495-496 [2d Dept 1995]; *People v Lawson*, 191 AD2d 514, 515 [2d Dept 1993]).

The affidavit must be from a person having actual and personal knowledge of the facts at issue (*People v Pan*, 245 AD2d 149, 150 [1st Dept 1997]). Conclusory allegations or unsubstantiated allegations are insufficient (*People v Lake*, 213 AD2d 494,496 [2d Dept 1995]).

Legal Analysis

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 explanations" 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]). Furthermore, the Court of Appeals, in *People v Stulz*, 2

NY3d 277, 284, held “[w]e would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice. . . . We continue to regard a defendant’s showing of prejudice as a significant but not indispensable element in assessing meaningful representation.”

In this instance, defendant has fallen far short of reaching the high threshold for establishing ineffective assistance of counsel with respect to all of his allegations. Specifically, counsel’s decision to engage in open-file discovery, to decline to present an opening statement and to call certain witnesses all rest on strategic choices that are legitimate and reasonable under the circumstances of this case. In his affirmation, counsel pointed to valid reasons for the benefits of open-file discovery for defendant and for focusing on maintaining flexibility by not restricting himself to any particular theory before hearing the prosecution’s case. Defendant has also failed to show that counsel did not exercise professional competent judgement in his strategic choice of witnesses.

Regarding defendant’s allegations about defense counsel’s conduct related to the defendant testifying at the suppression hearing and also at the trial, there is colloquy on the record related to both occasions and both colloquies include a statement by the defendant. The defendant has not demonstrated an absence of “strategic or other legitimate explanations” (*People v Rivera*, supra). Moreover, the defendant has not shown any prejudice (*People v Stultz*, supra).

Finally, defendant has failed to establish that he was prejudiced in any way by counsel’s performance.

In light of the overwhelming evidence of guilt, the errors attributed to defense counsel are inconsequential.

Defendant’s final claim regarding the imperfect filing of his notice of appeal is

misplaced. The proper recourse for an error in filing a notice of appeal is an application for a writ of coram nobis (see *People v Syville*, 15 NY3d 391 [2010]; *People v Pecararo*, 83 AD3d 1284,1287 [3d Dept 2011]). In any event, defendant was able to correct any mistakes in a timely fashion and preserve his access to appellate review.


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.

ENTER:

ENTERED
SEP 30 2011
NANCY T. SUNSHINE
COUNTY CLERK


HON. THOMAS J. CARROLL
THOMAS J. CARROLL
J. S. C.