

People v Worley

2011 NY Slip Op 33423(U)

September 29, 2011

Sup Ct, Kings County

Docket Number: 2783/2007

Judge: John G. Ingram

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 21

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THE PEOPLE OF THE STATE OF NEW YORK, DECISION AND ORDER

-against-

Indictment No. 2783/2007

JAMES WORLEY,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, in Supreme Court, Kings County on March 28, 2008 of one count of Burglary in the Second Degree (P.L. § 140.25(2)). On April 16, 2008, this Court sentenced Defendant, as a predicate felon, to thirteen years imprisonment and five years post-release supervision. (Ingram, J., at trial and sentence).

Defendant filed brief in the Appellate Division, Second Department, appealing his judgment of conviction. Defendant claimed that his conviction was not supported by legally sufficient evidence. By decision and order dated June 8, 2008, the Second Department affirmed Defendant's judgment of conviction. People v. Worley, 74 A.D.3d 999 (2d Dept. 2010). The Second Department held that Defendant's legal sufficiency claim was unpreserved but that the evidence was legally sufficient to establish Defendant's guilt and that the verdict was not against the weight of the evidence. Worley, 74 A.D.3d at 999-1000. On January 20, 2011, the Court of Appeals denied leave to appeal. People v. Worley, 16 N.Y.3d 747 (2011)(Jones, J.).

The Motion Before the Court

In a pro se motion dated May 3, 2011, Defendant moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that his trial counsel provided ineffective assistance in that he failed to: impeach Rhena Richards with certain prior inconsistencies between her trial and grand jury testimony, contact two alibi witnesses, Defendant's nieces, who allegedly would have corroborated his alibi, and preserve his legal sufficiency claim for appellate review. In papers dated August 1, 2011, the People opposed. In deciding the instant motion, this Court considered Defendant's moving papers, the People's papers in opposition, copy of Indictment 2783/2007 and applicable law.

The Court's Decision

Defendant's first claim, that counsel was ineffective for failing to impeach Richards with alleged inconsistencies between her trial testimony and grand jury testimony and her trial testimony and certain police paperwork, including the sprint report and a Complaint Room Screening Sheet, is denied. Defendant's claim that counsel was ineffective for failing to impeach Richards with her grand jury testimony is based on facts which appear on the record and could have been raised as part of an ineffectiveness claim on direct appeal. A motion to vacate a judgment of conviction must be denied if there are sufficient facts on the record to have allowed adequate review of the issue on direct appeal. C.P.L. § 440.10(2)(c). A motion to vacate a judgment of conviction should not be "employed as a substitute for direct appeal when Defendant was in a position to raise the issue on appeal, but failed to do so." People v. Cooks, 67 N.Y.2d 100, 103 (1986). Defendant's claim that he received ineffective assistance of counsel because of his counsel's failure to cross examine

Richards with alleged inconsistencies is fact based. The record presented sufficient facts from which Defendant could have raised his present claim. However, Defendant unjustifiably failed to do so. Since this issue could have been raised on direct appeal, it cannot properly be raised on the instant motion.

In any event, Defendant has not shown that counsel's alleged failure to use Richards' grand jury testimony or the sprint report to impeach Richards' trial testimony reflected an unreasonable strategy or prejudiced Defendant. See People v. Spencer, 262 A.D.2d 1062, 1063(4th Dept. 1999)(rejecting defendant's claim of ineffective assistance of counsel because defendant failed to demonstrate absence of strategic explanation for defense counsel's failure to cross-examine victim on inconsistencies in her grand jury and trial testimony). In addition, Defendant failed to establish any major inconsistencies between Richards' trial testimony and both her grand jury testimony and 911 phone call. Even without using Richards' grand jury testimony or the sprint report to impeach her trial testimony, the record indicates that defense counsel's cross-examination of Richards was constitutionally adequate.

In addition, Defendant alleged that trial counsel's failure to contact and call two alleged alibi witnesses, Defendant's nieces, Latisha and Latasha Worley, constituted ineffective assistance of counsel. The law is well established that "[t]he defendant bears the high burden of demonstrating that he was deprived of a fair trial as the result of counsel's performance, and simple disagreement with strategies and trial tactics will not suffice." People v. Schreter, 252 A.D.2d 563 (2d Dept. 1998); People v. Balbuena, 264 A.D.2d 424 (1st Dept. 1999). Furthermore, "[a] defendant is not entitled to error-free representation, and here defendant failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failures." People v. Grey, 34 A.D.3d 832, 833

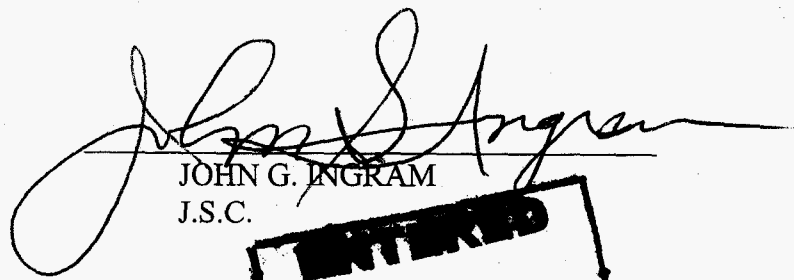
(2d Dept. 2006); People v. Williams, 24 A.D.3d 575, 575-76 (2d Dept. 2005). Defendant stated on the record prior to trial that family members informed him that defense counsel stated that it would not look good for them to testify on his behalf because they are family members. Defense counsel corroborated Defendant's statement in that he stated that he told the family that if family members testified then the Court would submit an interested witness charge and that possibly could influence the jury on how it views their testimony. In this case, counsel's decision not to call the Worley sisters as witnesses was a strategic decision. See People v. Brown, 286 A.D.2d 687(2d Dept. 2001)(holding that "[i]neffective assistance of counsel may not be premised upon unsuccessful trial strategy by defense counsel"). Defense counsel stated, on the record, that he believed he met with the sisters prior to trial and believed that their versions of events were not consistent with Defendant's sister's version or Defendant's version. In fact, Defendant's sister did testify at trial and stated that only Latisha Worely was with her and Defendant in the house on the day of the crime and Defendant did not leave until after 4:30 p.m., even though she had testified in the grand jury that she had left the house at 3:30 p.m. on the day of the crime. She admitted that she had difficulty in recalling when Defendant was present in her house. In addition, at one of the grand jury proceedings, Defendant testified that he had been at home with his sister on the day of the crime. Therefore, Defendant's attack on counsel's decision not to call the Worley sisters does not indicate ineffectiveness, but rather, a disagreement over trial tactics because there was a potential risk that these witnesses' testimony could have damaged Defendant's position. See People v. Brooks, 283 A.D.2d 367, 368(1st Dept. 2001)(holding that counsel's decision not to call certain witnesses "is, at most, a disagreement over trial tactics that does not indicate ineffectiveness" and "there was a real risk...that [these] witnesses would have furnished testimony damaging to the defendant's position.") There

is no reason to believe that additional alibi witnesses, who are family members and are deemed interested witnesses, would have changed the jury's verdict. See People v. Stewart, 248 A.D.2d 414 (2d Dept. 1998)(holding that counsel's failure to call additional alibi witness not ineffective assistance where benefit of witness' testimony would have been questionable).

Accordingly, Defendant's motion to vacate the judgment of conviction is denied.

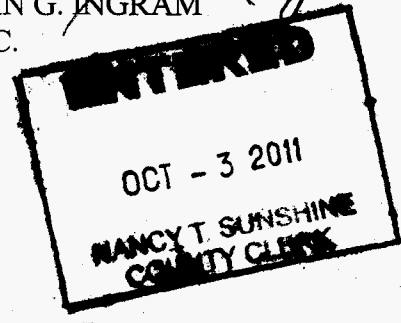
This opinion constitutes the Decision and Order of this Court.

Dated: September 29, 2011
Brooklyn, New York



Handwritten signature of John G. Ingram in cursive script.

JOHN G. INGRAM
J.S.C.



ENTERED
OCT - 3 2011
NANCY T. SUNSHINE
COUNTY CLERK