SUPREME COURT - STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM : PART 33
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THE PEOPLE OF THE STATE OF NEW YORK

v

GARY BALLINGER,

DEFENDANT
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BY: McKay, J.

DATE: AUGUST 25, 2011

IND. NO.: 8191-05

DECISION AND ORDER

Defendant Gary Ballinger has submitted a pro se CPL 440.10 motion dated April 14, 2011 seeking to set aside his June 16, 2006 trial judgment of conviction under consolidated Indictment No. 8191-05 for burglary in the third degree (Penal Law § 140.20) relating to a March 1, 2005 commercial burglary.[1] Defendant maintains inter alia that 1) the People knowingly presented perjured testimony before the Grand Jury; 2) he received ineffective assistance of counsel, including counsel's alleged failure to apprise him of his right to testify at a suppression hearing; 3) there were various Rosario/Brady violations and 4) he is actually innocent of the March 1, 2005 burglary. The People have submitted a May 31, 2011 Affirmation in Opposition to defendant's motion accompanied by a Memorandum of Law. In a June 21, 2011 Order this Court directed the People to brief the Rosario/Brady issues since they had failed to do so in their original response. In accordance with that Order the People have submitted a July 18, 2011 Supplemental Affirmation in Opposition to defendant's motion and a Supplemental Memorandum of Law.

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[1] Defendant was also convicted of attempted burglary in the third degree (Penal Law §§ 110.00/140.20) relating to a November 2, 2005 incident involving another commercial establishment. As limited by his 440 moving papers defendant does not appear to be challenging that conviction.

Procedural History

Defendant was charged with the March 1, 2005 burglary of Games-R-Us video store in Brooklyn.[2] Defendant was also charged with the attempted burglary of a Brooklyn bodega on November 2, 2005.[3] A combined Wade/Dunaway/Payton hearing was conducted by this Court on June 7-8, 2006, relating to both incidents. This Court made oral findings of fact and conclusions of law on the record in open court which were incorporated by reference in a June 8, 2006 short form Order. A police scanner was suppressed as the fruit of a Payton violation but identification evidence was not suppressed. On June 16, 2006 a jury convicted defendant of burglary in the third degree (Penal Law § 140.20) relating to the March 1, 2005 incident and attempted burglary in the third degree (Penal Law § 110.00/140.20) relating to the November 2, 2005 incident. On July 10, 2006 this Court sentenced defendant to consecutive terms of imprisonment of three and one-half to seven years for the burglary and two to four years for the attempted burglary. Defendant's judgment of conviction was affirmed by the Appellate Division - Second Department in 2009. See People v Ballinger, 62 AD3d 895 (2d Dept 2009). Defendant's application for leave to appeal to the Court of Appeals was denied. See People v Ballinger, 13 NY3d 794 (2009) (Read, J). The instant CPL 440.10 motion is defendant's first 440 collateral attack against his judgment of conviction.

Claims

Defendant contends that the People knowingly introduced before the Grand Jury perjured testimony of two police academy cadets who witnessed the March 1, 2005 video store

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[2] According to the People's supplemental response co-defendant Leonard Lewis pleaded guilty on November 15, 2005 to burglary in the third degree and petit larceny.

[3] Co-defendant Gary Hilliard pleaded guilty to attempted burglary in the third degree and was sentenced to a prison term of two to four years.

break-in. Defendant raised this same claim in his pro se supplemental brief before the Appellate Division and accordingly this Court is mandatorily barred from addressing it now. See CPL 440.10(2)(a). The Appellate Division in fact rejected the claim on its merits, stating:

> "The defendant's contention that indictment No. 2478-05, later consolidated with indictment No. 8191-05 should have been dismissed is not reviewable since the judgment of conviction was based upon legally sufficient trial evidence (see People v Hayes, 44 AD3d 683; People v Ragland, 36 AD3d 934, 944 cert denied 552 US 1317; People v Nealy, 32 AD3d 400, 402)."

The above cases cited by the Appellate Division specifically address and reject claims that an indictment should be dismissed because perjured testimony was submitted to the Grand Jury, just as defendant alleges here in his 440 motion.

Defendant also claims that his assigned counsel failed to render effective representation.[4] To the extent that any of defendant's somewhat confusing ineffective assistance of counsel claims are matters of record which were reviewed and rejected by the Appellate Division[5] this Court is procedurally barred from considering them. See CPL 440.10(2)(a).

As for matters dehors the record defendant now claims as an instance of ineffective assistance that his attorney failed to advise him of his right to testify at the suppression hearing. In response, the People cite to CPL 440.30(4)(d)(i) and (ii) which provide that: "Upon considering the merits of the motion, the court may deny it without conducting a hearing if [a]n allegation of fact

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[4] The Court notes that at the time of the suppression hearing conducted by this Court defendant was represented by his third assigned attorney.

[5] The Appellate Division stated: "To the extent that the defendant's claims of ineffective assistance of counsel are based upon matters dehors the record, they may not be reviewed on direct appeal. Insofar as we are able to review these claims, defense counsel provided the defendant with meaningful representation." (Citations omitted).

essential to support the motion. . . is made solely by the defendant and is unsupported by any other affidavit or evidence and under these and all other circumstances attending the case, there is no reasonable possibility that such allegation is true." The People contend that this Court should apply this statutory provision to summarily deny defendant's motion. The People note that defendant has only filed a self-serving affidavit in support of his claim that counsel failed to apprise him of his right to testify at the suppression hearing. This Court recognizes, however, that in many claims of ineffective assistance of counsel it is quite difficult for a defendant to get a supporting affidavit from the attorney in question who is the subject of the ineffective assistance claim. See People v Stevens, 64 AD3d 1051, 1054 n.1 (3d Dept 2009), lv denied 13 NY3d 939 (2009); People v Radcliff, 298 AD2d 533 (2d Dept 2002). The People also maintain there is no reasonable possibility that defendant's allegation is true. See CPL 440.30(4)(d)(i) and (ii). The People note that the following day after the suppression hearing was held this Court conducted a Sandoval hearing at which time defendant was asked if he was considering testifying at trial and he indicated that he was. In addition, at the conclusion of the People's case at trial defense counsel made a record in defendant's presence that he had discussed with defendant his fundamental absolute right to testify in the case, which defendant confirmed.[6] It is the People's position therefore that defendant, who made several pro se statements to the Court throughout the proceedings and who had been to trial before on an unrelated matter, never contended at any of these junctures, as would have been expected, that counsel had failed to inform him of the right to testify at the suppression hearing as well. In support of their argument the People cite to People v Maldonado, 2009 WL 2029568 (Sup Ct, Kings County 2009) [Trial Order] wherein the trial court stated:

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[6] Defendant exercised his right not to testify at trial.

> "In this instance, defendant has failed to corroborate his self-serving affidavit with evidence of any sort, most notably absent is an affidavit or explanation from trial counsel (see People v Hayward, 46 AD3d 209 [1st Dept 2008]; People v Woodard, 23 AD3d 771 [3d Dept 2005]; People v Taylor, 211 AD2d 603 [1st Dept 1995]). Considered in the context of counsel's performance having passed muster under both state appellate and federal habeas review and in light of defendant's diminished credibility for having relied on his sister's discredited account of the precinct encounter, it is extremely unlikely that counsel concealed from defendant his right to testify at the hearing. Whether counsel advised defendant not to testify need not be considered here. It is sufficient that defendant was not prejudiced by his failure to testify at the hearing because it is clear from the record that his testimony would not have altered the findings of the hearing court."

In the instant case this Court finds it unnecessary to speculate whether defendant's unsupported allegation is true because, even if it were true, defendant has failed to demonstrate any prejudice[7] by his not testifying at the suppression hearing. [8] Defendant avers that "my proposed testimony would have been to a denial of involvement in the crime charged and that the photo-array identification of me was the product of police fabrication and known use of false evidence to implicate me in the crimes and not any actual observation of me committing any such crimes."

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[7] Under the two-prong Strickland v Washington, 466 US 668 (1984) federal test for an ineffective assistance of counsel claim a defendant must show 1) that counsel's performance was deficient and 2) defendant was prejudiced by that deficient representation. Under the New York State People v Baldi, 54 NY2d 137 (1981) test the Court of Appeals has "created a standard of 'meaningful representation' to evaluate the effectiveness of trial counsel, where the 'prejudice' component focuses on the 'fairness of the process as a whole rather than its particular outcome of the case.' (People v Caban, 5 NY3d 143, 156 [2005] quoting People v Benevento, 91 NY2d 708, 714 (1998)"; People v Feliciano, 17 NY3d 14, 20-21 (2011).

[8] Defendant claims that he is entitled to a "de novo suppression hearing on the Wade identification issues as well as on the Payton violation and whether the in-court and line-up identifications should have been suppressed as part of the poisonous tree." (Defendant's moving papers at 13).

(Defendant's moving papers at 10).

Only one witness testified at the suppression hearing involving the March 1, 2005 burglary and that was a Detective Carlos Medina. Defendant nevertheless throughout his papers challenges the veracity of the two police academy eyewitnesses, Ralph Brooks and Troy Luis, who viewed photo arrays prepared by Det. Medina, as well as lineups conducted by the detective. Luis made positive identifications of defendant regarding both the photo array and lineup, whereas Brooks identified defendant in the lineup but not in the photo array. Defendant has not proffered a scintilla of admissible relevant testimony he could have provided if he had testified at the suppression hearing. The credibility of Brooks and Luis was not a suppression issue. This Court instead relied upon Det. Medina's testimony, as well as the photo arrays themselves and photographs of the lineups, in its determination that the out-of-court identification procedures were not unduly suggestive. The Court concluded that the positive identifications gave Det. Medina probable cause to arrest defendant. However, this Court held that Det. Medina's entry with other officers into an apartment where defendant was sleeping violated defendant's Payton protection and accordingly suppressed a recovered police scanner. Nevertheless, this Court also held that in accordance with People v Jones, 2 NY3d 235 (2004), the subsequent identifications and potential in-court identifications should not be suppressed as the fruits of the Payton violation. Therefore, whether or not a defendant has a fundamental right to testify at a suppression hearing, this defendant has not demonstrated that he was prejudiced by his not doing so.[9]

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[9] See Rock v Arkansas, 483 US 44 [1987]; Parker v Ercole, 582 FSupp2d 273, 296-298 (NDNY 2008) (Hurd, J); Gomez v Duncan, 2004 WL 119360 at 33 (SDNY 2004) (Preska, J), aff'd 317 Fed Appx 79 (2d Cir 2009); Narvaez v United States, 1998 WL 255429 at 5 n 6 (SDNY 1998) (Sotomayor, J).

Defendant also contends that there were Rosario/Brady violations in this case.[10] However, he has not carried his burden on this 440 motion of establishing that any Brady or Rosario violations occurred, or that there is any reason to believe that additional material, if it existed (such as Det. Medina's notes or a record of any statements by co-defendant Lewis) would have had a material effect on defendant's trial. See 440.30(4)(b); People v Lake, 213 AD2d 494,495-496 (2d Dept 1995), lv denied 86 NY2d 737 (1995); People v Harris, 198 AD2d 117, 118 (1st Dept 1993), lv denied 83 NY2d 853 (1994), habeas corpus 1997 WL 633440 (SDNY 1997); see also People v Pannell, 3 AD3d 541 (2d Dept 2004), lv denied 2 NY3d 743 (2004); People v Jones, 2002 WL 432864 (App Term - 1st Dept 2002); People v Parkinson, 268 AD2d 792 (3d Dept 2000), lv denied 95 NY2d 801 (2000), habeas corpus denied 2006 WL 721645 (NDNY 2006). Defendant also argues Brady/Rosario violations regarding Sergeant Joseph Vera and Officer Patrick Geraghty, but they did not testify at the hearing or trial nor is there any reason to believe that a Brady violation occurred in this context. See June 8, 2006 Transcript of Proceedings at 41-42.

Finally the Court finds defendant's unsupported claim of actual innocence to be belied by the record and far from established by clear and convincing evidence. See Wheeler-Whichard, 25 Misc3d 690 (Sup Ct, Kings County 2009).

Accordingly for all the reasons addressed herein defendant's pro se motion is

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[10] The Court notes that an extended record was made at the trial court level of all discovery that was turned over by the People, after defendant, who was representing himself pro se at the time while "stand-by" counsel was present, objected to its completeness. (June 8, 2006 Transcript of Proceedings at 38-46, and June 12, 2006 Transcript of Proceedings at 58-59; see also discovery documents attached as Exhibit A to the People's supplemental response to defendant's instant motion). Defendant opted not to proceed pro se immediately before the start of jury selection (June 12, 2006 Transcript at 59-60) and "stand-by" counsel then took over the defense. No issues concerning any Rosario/Brady violations were raised by trial counsel or on direct appeal, including in defendant's pro se supplemental brief.

summarily DENIED in all respects.

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 the denial of defendant's CPL 440.10 motion. This application must be made within 30 days of service of this Decision and Order. 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 (22 NYCRR 671.5).

The Clerk is directed to mail a copy of this Decision and Order to defendant Gary Ballinger, DIN # 06-A-4065, Gowanda Correctional Facility, P.O. Box 311, Gowanda, New York 14070-0311 and to Assistant District Attorney Sholom J. Twersky, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201.

IT IS SO ORDERED.

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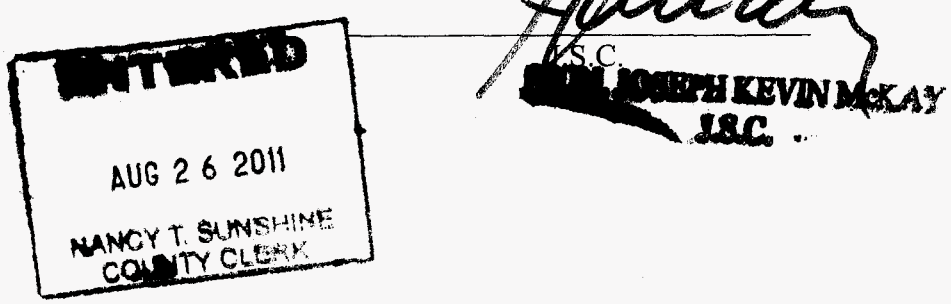

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THE PEOPLE OF THE STATE OF NEW YORK

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GARY BALLINGER,

DEFENDANT
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BY: McKay, J.

DATE: JUNE 21, 2011

IND. NO.: 8191-05

ORDER

Defendant Gary Ballinger has submitted a pro se CPL 440.10 motion dated April 14, 2011 seeking to set aside his judgment of conviction in the above-captioned case. The People have submitted a May 31, 2011 Affirmation in Opposition to defendant's motion accompanied by a Memorandum of Law. Although defendant's pro se motion contains a myriad of issues, some confusing and undeveloped, the Court finds that the People failed to address defendant's claims concerning alleged Rosario/Brady violations. Accordingly, the People are now hereby directed to serve and file supplemental papers by July 7, 2011 addressing these issues.

The Clerk is directed to mail copies of this Order to defendant Gary Ballinger, DIN #06-A-4065, Gowanda Correctional Facility, PO Box 311, South Road, Gowanda, New York 14070-0311 and to Assistant District Attorney Sholom J. Twersky, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201.

IT IS SO ORDERED.

J.S.C.
HON. JOSEPH KEVIN McKAY
J.S.C.