

**People v Ayala**

2011 NY Slip Op 33572(U)

October 24, 2011

Supreme Court, Kings County

Docket Number: 8342/2006

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 15

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

By: Hon. Patricia M. DiMango

Date: October 24, 2011

-against-

DECISION & ORDER

JIMMY AYALA

Indictment No. 8342/2006

-----X  
Defendant moves, pro se, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. For the following reasons, the motion is denied.

On October 3, 2006, at approximately 5:30A.M., defendant climbed into the window of an apartment belonging to Sheridan Roberts, threatened to "pop" the occupant, Susan Tabet, pressed a sharp object against the back of her neck, and stole property. A neighbor saw defendant climb into the apartment and called the police. Upon arriving, the police saw defendant flee the apartment and chased him from the rear of the building. An officer observed defendant drop a ski mask and gloves on the sidewalk. The police chased defendant for four blocks and apprehended him hiding under a car with Roberts' property and two knives in his pockets.

For these acts, defendant was charged with one count each of burglary in the first degree (PL § 140.30), burglary in the second degree (PL § 140.25), burglary in the third degree (PL § 140.20), criminal trespass in the second degree (PL § 140.15), trespass (PL § 140.05), two counts of petit larceny (PL § 155.25), and two counts of criminal possession of stolen property in the

fifth degree (PL § 165.40).

On January 29, 2007, the People offered defendant a plea to attempted burglary in the second degree in exchange for a promised sentence of five years' imprisonment with five years' post-release supervision. According to the People, this was a "one time offer" that defendant refused.

At the following court date on February 13, 2007, the People offered defendant a plea to attempted second-degree burglary in exchange for a promised sentence of seven years' imprisonment and five years' post-release supervision. That same offer remained available at defendant's next appearance on March 13, 2007, when defendant was represented by a new attorney, George Sheinberg, Esq. At the following court date on April 3, 2007, defense counsel requested that the five-year sentence be re-offered because he had recently entered the case and had not had an opportunity to discuss the plea with defendant.

On April 9, 2007, the People agreed to the five-year plea offer and stated that the offer would only be available that day. Both the court file and the People's status sheet note that the defendant refused the plea offer and wanted a trial instead.

On October 31, 2007, the day before jury selection began, the parties appeared before this court. Outside the presence of defendant the People informed the court of the previous plea offers. After defendant appeared, the court informed defendant that if he were found to be a persistent felony offender he faced a sentence with a maximum term of life imprisonment. Defense counsel told the court that he had informed defendant of the five and seven-year plea offers, but that defendant had insisted upon going to trial. Counsel stated:

The defendant refused that offer and has steadfastly refused any offer indicating his non-guilt so I have advised him, also, that if he is found guilty, he is facing a minimum of ten

years, maximum of twenty-five years not being considered a predicate felon.

In any event, Judge, he has indicated to me over and over his non-guilt. In fact, he has even testified in the Grand Jury that he was not guilty, so we are ready for trial.

On November 8, 2007, the jury convicted defendant of burglary in the first degree (PL § 140.30[3]). On December 6, 2007, defendant was sentenced as a second felony offender to a term of twenty-five years' imprisonment and five years of post-release supervision.

Defendant appealed from his judgment of conviction, challenging the court's *Sandoval* ruling and the People's summation. On January 19, 2010, the Appellate Division affirmed his judgment of conviction (*People v Ayala*, 69AD3d 869 [2d Dept 2010]). Leave to appeal to the Court of Appeals was denied (*People v Ayala*, 14 NY3d 885 [2010]).

Defendant now claims that he was denied the effective assistance of counsel when his attorney, who despite conveying to him the plea offer and explaining the maximum sentencing exposure at trial, failed to tell him that he would definitely be convicted at trial and that going to trial was "suicide". This claim lacks sufficient factual and evidentiary support and is without merit.

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., 6<sup>th</sup> 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]).

Meaningful representation by counsel includes the conveyance of accurate information regarding plea negotiations, including relaying all plea offers made by the prosecution (*see People v Sherk*, 269 AD2d 755 [4<sup>th</sup> Dept 2000], lv. denied 95 NY2d 804; *People v Reed*, 152 AD2d 481, 481 [1989]). In order to prevail on his claim of ineffective assistance of counsel, the defendant has the burden to establish that his trial counsel failed to discuss the plea offer with him and that he would have accepted the plea had his attorney properly advised him (*People v Fernandez*, 5 NY3d 813, 814 [2005]; *People v Goldberg*, 33 AD3d 1018 [2d Dept 2006]). The defendant must establish that he would have accepted the plea by “objective evidence” (*Fernandez* at 814).

Here, defendant’s claim falls far short of establishing that counsel failed to adequately advise him about the desirability of the plea offers. Primarily, defendant does not contest the fact

that the plea offers were properly conveyed to him by counsel. His contention that counsel should have told him that trial was “suicide” unfairly asks counsel to divine the future. The evidence against defendant, including the identification of him by police and the stolen property recovered from him after a foot chase was so overwhelming that the likelihood of conviction at trial, without a plausible defense, was readily apparent. Though counsel knew the strength of the evidence against defendant he nevertheless could not inform defendant that conviction was a certainty. Such advice would have been coercive, as the decision whether to plead guilty ultimately rests with the defendant (*see Jones v Barnes*, 463 US 745 [1983]; *People v White*, 73 NY2d 469 [1989]). Defendant’s bare bones claim fails to elaborate upon his conversations with counsel and, without more, cannot establish that counsel’s representation was less than meaningful.

Moreover, defendant never states that he would have actually accepted the plea offer had he received proper advice. His claim of innocence further undermines the likelihood that he would have agreed to admit his guilt to the court. The record indicates that several generous plea offers were made to defendant and that he rejected each one, claiming that he was innocent. As defendant also concedes that he was aware of his maximum sentencing exposure upon conviction at trial, he had all the relevant information necessary to weigh his decision whether to accept a plea. Accordingly, defendant’s claim that he would have changed his mind about pleading guilty upon hearing counsel’s assurance that he would absolutely be convicted is simply not credible.

The record also reflects counsel advocated vigorously on defendant’s behalf. Most notably, after he took over defendant’s case he successfully negotiated to re-submit to defendant the five-year plea offer after it had been withdrawn. Counsel met his obligation to convey this offer to defendant but defendant rejected it. It was only through counsel’s persistent efforts that

defendant had the opportunity to take a very favorable plea. That counsel was ultimately unsuccessful in convincing defendant to accept the plea offer is no reflection on his performance but rather a result of defendant's insistence that he was innocent.

Accordingly, the motion is denied.

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:

  
PATRICIA M. DIMANGO, J.S.C.

**ENTERED**  
OCT 3 1 2011  
NANCY T. SUNSHINE  
COUNTY CLERK