

People v Garcia

2011 NY Slip Op 33583(U)

November 23, 2011

Sup Ct, Kings County

Docket Number: 473/2004

Judge: John G. Ingram

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

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

-against-

Indictment No. 473/2004

JOSE GARCIA,

Defendant.

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INGRAM, J.

Defendant stands convicted, in Supreme Court, Kings County on November 28, 2005 of one count of Murder in the Second Degree (P.L. § 125.25(1)). On January 27, 2006, this Court sentenced Defendant to a prison term of twenty-five years to life. (Ingram, J., at hearing, trial and sentence).

Defendant appealed from his judgment of conviction. In motion filed in the Appellate Division, Second Department, Defendant claimed that : (1) his first attorney, Herbert Moses, Esq., was ineffective for failing to move to preclude Defendant's videotaped statement; (2) this Court violated C.P.L. § 710.40 by revisiting its suppression ruling after the commencement of the trial; and (3) this Court was biased against him. On February 2, 2010, the Appellate Division rejected Defendant's argument and affirmed Defendant's conviction. People v. Garcia, 70 A.D.3d 711 (2d Dept. 2010). The Appellate Division found that Defendant was not deprived of effective assistance of counsel and that Defendant's contention that this Court failed to comply with C.P.L. 710.40(3) does not require reversal. Garcia, 70 A.D.3d at 711. In addition, the Appellate Division found that Defendant's argument that the Court was biased was without merit. On May 10, 2010, the Court of

Appeals denied Defendant's request for leave to appeal. People v. Garcia, 14 N.Y.3d 887 (2010)(Smith, J.).

The Motion Before the Court

In pro se motion dated July 21, 2011, Defendant moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that his trial counsel, Peter Bark, Esq., provided ineffective assistance in that he failed to: (1) obtain Defendant's records from Bellevue Hospital, and as a result, failed to use those records to support his argument at the suppression hearing to establish that Defendant was in custody at the time he allegedly made a statement to police and (2) to seek a jury instruction based on the United States Supreme Court's decision in Missouri v. Seibert, 542 U.S. 600 (2004). The People filed a response on October 4, 2011 arguing that Defendant's claims are procedurally barred from review and without merit.

The Court's Decision

Defendant requests this Court vacate his judgment of conviction pursuant to C.P.L. 440.10 because he contends that his trial counsel was constitutionally ineffective. The Court of Appeals has held that a defense attorney's performance will not be considered ineffective "[s]o long as 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. Baldi, 54 N.Y.2d 137, 147 (1981). Meaningful representation does not mean perfect representation. People v. Benevento, 91 N.Y.2d 708 (1998). "The question is whether the attorney's conduct

constituted egregious and prejudicial error such that defendant did not receive a fair trial.”

Benevento, 91 N.Y.2d at 713.

In order to establish that Defendant’s Federal constitutional right to effective assistance of counsel was violated, Defendant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 694(1984). Under New York law, prejudice is examined in terms of errors that deprive the defendant of a fair trial. Benevento, 91 N.Y.2d at 713.

Applying the above legal principle, this Court finds that Defendant’s ineffective assistance of counsel claim is without merit. Defendant received meaningful representation and the record reflects that defense counsel exceeded both State and Federal criteria. At the suppression hearing, defense counsel argued that Defendant had been in custody at the time he made his statement to police. He vigorously cross-examined Detective Gardner and Police Officer Ecker as to whether Defendant was in custody at the time he made his statement. In addition, defense counsel made a strong closing statement at the conclusion of the hearing arguing that Defendant had been in custody prior to making his statements. Defendant has not established that had defense counsel obtained and used the hospital records during the hearing, he would have been able to make a stronger argument that Defendant was in custody. The particular entries in the hospital records that Defendant makes reference to add nothing substantive to enhance or strengthen Defendant’s argument. They either support the testimony of both Officer Ecker and Detective Gardner, hurt Defendant’s argument that he believed he was in custody or are totally irrelevant. This Court cannot second guess defense counsel’s tactics or strategies pursued during the hearing. “Trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and

the circumstances of the particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.” Baldi, 54 N.Y.2d at 146-47. A claim of ineffective assistance of counsel requires proof of less than meaningful representation, not just a mere disagreement over strategies and tactics. People v. Benn, 68 N.Y.2d 941(1986).

Nonetheless, whether or not Defendant was in custody is irrelevant because this Court ruled that even if Defendant was in custody when he was brought to the 79th Precinct, his arrest was supported by probable cause, and Defendant had been advised of and had waived Miranda rights prior to making his statements at the 79th Precinct.

Defendant also claims that his attorney was ineffective for failing to seek a jury instruction in accordance with the Supreme Court’s decision in Missouri v. Seibert, 542 U.S. 600 (2004). Defendant’s claim is barred procedurally and is without merit. C.P.L. § 440.10(2)(c) provides that the Court must deny a motion to vacate a judgment when, “although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant’s unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.” Defendant’s allegation that the jury charge did not incorporate language from the Seibert case is denied because Defendant’s claim relies on facts appearing on the record. Defendant clearly relies on the record to support his claim. Although adequate appellate review of this claim was available, Defendant failed to perfect an appeal and offered no explanation for this failure. Accordingly, this Court is now foreclosed from reviewing his claims. People v.

Jossiah, 2 A.D.3d 877 (2d Dept. 2003); People v. Levine, 188 A.D.2d 665 (2d Dept. 1992); People v Cooks, 67 N.Y.2d 100 (1986).

Even if this Court were to consider Defendant's argument on the merits, his motion must be denied. Defendant's reliance on the Supreme Court's decision in Missouri v. Seibert is misplaced. 542 U.S. 600(2004). In Seibert, the Supreme Court dealt with the legality of a police technique, where the police would interrogate a suspect while intentionally withholding Miranda warnings until the suspect would make an incriminating statement. Seibert, 542 U.S. at 600. In Seibert, a police officer intentionally questioned defendant Seibert without giving her Miranda warnings, and after she made an inculpatory statement, administered Miranda warnings and continued the interrogation, during which Seibert repeated her inculpatory statement. Id. at 604-06. The Supreme Court held that because the "question first" technique deliberately violated the Miranda rule and the interrogation was a continuous event, the subsequent Miranda warnings were ineffective and the post-Miranda statement should have been suppressed. Id. at 616-17.

The facts in this case are not similar to the facts in Seibert. In this case, Defendant was given Miranda warnings when he was brought to the 79th Precinct on January 15, 2004. He waived his Miranda rights and then made an inculpatory statement. Therefore, defense counsel was not ineffective for failing to request jury instructions based on the Seibert decision.

Even though the facts in this case are not comparable to the facts in the Seibert case, this Court's final instructions, clearly apprised the jury of the proper legal standards for determining the voluntariness of Defendant's statements. This Court informed the jurors that the People had to prove, beyond a reasonable doubt, that the statements made by Defendant were given to the police voluntarily. The instructions included directions for the jury to look at factors relevant to

attenuation in order to determine the voluntariness issue. The instructions, when read as a whole, conveyed the appropriate principles of law and provided adequate guidance to the jury.

Accordingly, Defendant's motion is denied.

This opinion constitutes the Decision and Order of this Court.

You are advised that your right to an appeal from the order determining your motion is

not automatic except in the single instance where the motion was made under CPL §440.30(1-a)

for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division, Second Department, for a certificate granting leave to appeal.

This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.


The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney of Kings County.

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Dated: November 23, 2011
Brooklyn, New York


JOHN G. INGRAM
J.S.C.