

**People v Woods**

2012 NY Slip Op 30528(U)

January 17, 2012

Supreme Court, Kings County

Docket Number: 3564/2006

Judge: John G. Ingram

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

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

-against-

Indictment No. 3564/2006

ANTHONY WOODS,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, in Supreme Court, Kings County on July 5, 2007 of one count of Burglary in the First Degree, three counts of Assault in the Third Degree and two counts of Reckless Endangerment in the Second Degree. On April 22, 2008, this Court sentenced Defendant to a prison term of twenty years prison for Burglary in the First Degree and one year each on the remaining counts to run concurrently. (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 convictions of Burglary in the First Degree and Reckless Endangerment in the Second Degree were against the weight of the evidence; (2) the evidence was legally insufficient to support his convictions for the three counts of Assault in the Third Degree; and (3) Defendant was denied a fair trial by improper remarks during the prosecutor’s summation. On March 29, 2011, the Appellate Division rejected Defendant’s argument and affirmed Defendant’s conviction. People v. Woods, 82 A.D.3d 1277 (2d Dept. 2011). The Appellate Division found that verdict of guilt was not against the weight of the evidence. Woods, 82 A.D.3d at 1278. In addition, the Appellate Division found that Defendant’s remaining

contentions were without merit. Id. On May 25, 2011, the Court of Appeals denied Defendant's request for leave to appeal. People v. Woods, 16 N.Y.3d 901 (2011)(Graffeo, J.).

#### The Motion Before the Court

In pro se motion dated September 8, 2011, Defendant moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that the evidence in the grand jury was insufficient to support his indictment for first degree burglary and that his burglary conviction after trial was against the weight of the evidence. Defendant also alleges that his trial counsel, Danielle Eaddy, Esq., provided ineffective assistance in that she failed to: (1) introduce evidence that allegedly would have proven that Defendant lived with Chandra Sutton; (2) make a motion for a trial order of dismissal at the end of the People's case; and (3) object that jury's verdict be dismissed on the grounds of repugnancy. The People filed a response on November 23, 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 burglary conviction after trial was against the weight of the evidence. Under C.P.L. 440.10(2)(a), a motion must fail when it is based on issues that were "previously determined on the merits upon an appeal...unless since the time of such appellate determination there was been a retroactively effective change in the law." Since the Appellate Division considered and rejected Defendant's contention that the verdict of guilty for burglary in the first degree was against the weight of the evidence, Defendant cannot now relitigate it in a collateral attack on this judgment

of conviction. People v. Woods, 82 A.D.3d 1277 (2d Dept. 2011). Thus, CPL 440.10 (2) (a) mandates denial of Defendant's motion on this ground.

Defendant also claims that his indictment for Burglary in the First Degree was defective. Defendant alleges that the People should have submitted a police report which documented an interview with the complainant, Chandra Sutton, in which she stated that Defendant lived with her for four months. This argument is meritless. Defendant testified before the grand jury and stated that he did not live with Ms. Sutton. He testified that he did not have keys to her apartment and would have to wait for her in order to gain access to her house. Defendant's act of waiting by Ms. Sutton's back door, forcing his way into her home at gunpoint is inconsistent with any theory that he had a license to enter. See People v. Dela Cruz, 162 A.D.2d 312, 313 (1st Dept. 1990).

In addition, by Decision and Order dated March 1, 2007, Judge D'Emic upon inspection of the grand jury minutes found the grand jury evidence legally sufficient and denied Defendant's motion to dismiss the indictment. In affirming Defendant's judgment of conviction, the Appellate Division specifically ruled as to the legal sufficiency of the trial evidence. See People v. Woods, 82 A.D.3d 1277 (2d Dept. 1991). Since the evidence at Defendant's trial was found to be legally sufficient, this Court will not review the validity of Judge D'Emic's Order denying Defendant's motion to dismiss the indictment for legal insufficiency.

Defendant also alleges that his conviction of Burglary in the First Degree was repugnant. His argument is procedurally barred pursuant to C.P.L. § 440.10(2)(c), because the claim was discernable from the record and should have been raised on Defendant's direct appeal. Furthermore, Defendant raised this very same argument in his C.P.L. § 330 motion to this Court, which the Court denied.

As this Court stated in its decision, dated October 17, 2007, Defendant did not raise the issue of repugnancy until after the jury was discharged. Any argument that a jury's verdict is repugnant must be made prior to the discharge of the jury or it is waived as a matter of law. People v. Stahl, 53 N.Y.2d 1048 (1981); People v. Satloff, 56 N.Y.2d 745 (1982). Defendant did not object until after the jury was released, failing to allow the jury to rectify any potential issues. In order to preserve a repugnancy claim, Defendant must raise the issue prior to the jury's being discharged. People v. Pelligrino, 60 N.Y.2d 636 (1983).

Were this Court to consider Defendant's arguments, it would find the verdict was not repugnant. When there is a claim of repugnancy, the verdict shall be viewed in light of the elements of each crime as charged to the jury, and the court can only consider the verdict from a legal perspective as opposed to a factual perspective, because it is impossible and inappropriate to try and determine a jury's thought process. People v. Tucker, 55 N.Y.2d 1 (1981). A conviction must be reversed only "in those instances where acquittal on the one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged for which the guilty verdict was rendered." Tucker, 55 N.Y.2d at 10.

The verdict acquitting Defendant of Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree, Criminal Possession of a Weapon Fourth Degree or Reckless Endangerment in the First Degree did not preclude a finding of guilty as to Burglary in the First Degree since the material elements of the burglary charge were not identical, and therefore, not inconsistent with the weapon charges and the reckless endangerment charge. Burglary in the First Degree, as submitted to the jury, only required the People to prove that Defendant display what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

See § 140.30(4). Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree, and Criminal Possession of a Weapon in the Fourth Degree, as submitted to the jury, required Defendant to possess a firearm. See C.P.L. §§ 265.03, 265.02 and 265.01. While the weapon charges require Defendant to possess a firearm, the burglary charge only requires that Defendant display what appears to be a firearm. Therefore, it is clear that the elements of these crimes are not identical to each other and Defendant's acquittal of the weapons charges did not negate an essential element of the burglary charge.

A similar analysis would also be applicable to Defendant's claim that his conviction for Burglary in the First Degree and acquittal for Reckless Endangerment in the First Degree are repugnant. The Defendant's acquittal for reckless endangerment is not conclusive as to any necessary element of the other crimes, as charged, for which guilty verdicts were rendered. People v. Tucker, 55 N.Y.2d 1, 7 (1981). Defendant's argument that by the acquittal of Defendant of the charge of Reckless Endangerment in the First Degree, the jury rejected the People's contention that Defendant was in possession of a handgun, and therefore, would have to find Defendant not guilty of Burglary in the First Degree. As stated previously, Burglary in the First Degree, P.L. § 140.30(4), does not require People to prove Defendant possessed a firearm, simply that he displayed what appeared to be a firearm. Defendant's argument that in order to have displayed a handgun, the Defendant would have necessarily had to have been in possession of a handgun is faulty. As stated in the Criminal Jury Instruction, which this Court recited to the jury, "[i]t need not be shown, however, that the object displayed was, in fact, a pistol, revolver, rifle, shotgun, machine gun or other firearm." See CJI2d [NY] Penal Law § 140.30(4).

Finally, Defendant alleges that his trial counsel was 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 principles, 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. Defense counsel challenged the sufficiency of the grand jury minutes, participated actively in voir dire and made an opening statement. Defense counsel cross examined each of the People's witnesses and delivered a sound summation. In addition, defense counsel cross examined Ms. Sutton extensively about whether she told Detective Mirailh that Defendant had lived with her. Each time she admitted that she did. There was no reason for defense counsel to call Detective Mirailh in that Ms. Sutton already admitted to making this statement and Detective Mirailh's testimony regarding this statement would

have been inadmissible. 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). "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's [supposed] failure." People v. Rivera, 71 N.Y.2d 705 (1988). Since Defendant here has failed to carry his burden, "it will be presumed that counsel acted in a competent manner and exercised professional judgment". Rivera, 71 N.Y.2d at 705.

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

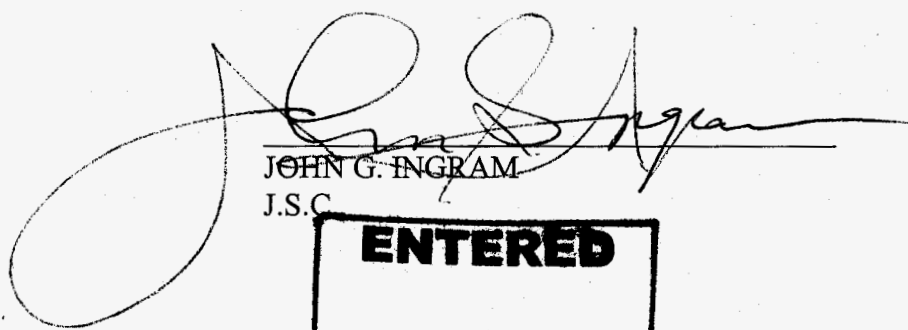
Attorney of Kings County

APPELLATE DIVISION, 2<sup>ND</sup> Department  
45 Monroe Place  
Brooklyn, NY 11201

Kings County Supreme Court  
Criminal Appeals  
320 Jay Street  
Brooklyn, NY 11201

Kings County District Attorney  
Appeals Bureau  
350 Jay Street  
Brooklyn, NY 11201

Dated: January 17, 2012  
Brooklyn, New York



JOHN G. INGRAM  
J.S.C.

**ENTERED**  
JAN 18 2012  
NANCY T. SUNSHINE  
COUNTY CLERK