

People v Zapulla

2012 NY Slip Op 30987(U)

February 16, 2012

Supreme Court, Kings County

Docket Number: 2948/98

Judge: Deborah A. Dowling

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MEMORANDUM

**SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)**

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
By: Justice Deborah A. Dowling

-against-

Dated: February 16, 2012

Indictment No:2948/98

GUY ZAPULLA,

Defendant(s).

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This matter is before the Court based upon a *pro se* motion filed by the defendant. The defendant submitted this motion pursuant to CPL §440.10(1)(h) seeking to vacate the judgment of conviction rendered against him. The People opposed the motion. Based upon the reason detailed herein the defendant's motion is denied.

PROCEDURAL HISTORY

The defendant was indicted under the instant indictment and charged with Murder in the Second Degree and Escape in the Second Degree as well as a number of their charges and possession of a controlled substance. The murder charge was severed from the other charges in the indictment for the purpose of the trial. The first trial in this matter was declared a mistrial on February 25, 1999 when the jury declared they were deadlocked and could not reach a consensus. In March of 1999, the defendant was tried again and convicted of Murder

in the Second Degree on March 10, 1999. On March 30, 1999, the defendant was sentenced to twenty-five years to life incarceration.

The defendant appealed his conviction and on April 23, 2001, the Appellate Division, Second Department unanimously affirmed the judgement of conviction entered against the defendant. The Court of Appeals denied the defendant's subsequent application for leave to appeal. The defendant then submitted a writ of habeas corpus before the United States District Court of New York. The district court denied the defendant's petition and agreed with Appellate Division's findings. The defendant appealed the matter to United States Court of Appeals for the Second Circuit and the Second Circuit reversed the district court's finding.

The United States Court of Appeals for the Second Circuit issued an order vacating the defendant's state conviction and granted a new trial. The appeal issues centered around whether it was proper to allow the defendant's incriminating statement to be used at the trial. The United States Court of Appeals ultimately held it was unreasonable to conclude the defendant's confession to police did not contribute to the jury's guilty verdict. The defendant was granted a new trial and the matter was sent to the instant court part for the purpose of conducting a new trial.

A jury trial was conducted before this Court beginning on June 5, 2008. The defendant was convicted of Murder in the Second Degree after a jury trial and sentenced to a period of incarceration of twenty-five (25) years to life, on July 21, 2008. The defendant

filed a notice of appeal from the judgement of conviction but has since filed a motion seeking an extension to finalize the appeal pending the conclusion of the instant motion. The defendant filed the instant motion on August 23, 2011. The defendant's motion is voluminous containing multiple attachments and addendums. The defendant subsequently submitted an addendum to the instant motion and the People requested significant time to respond to all the claims raised by the defendant.

On January 24, 2012, the defendant again submitted supplemental response papers, entitled reply brief, to the opposition papers submitted by the People. The defendant has been afforded every conceivable opportunity to present his arguments before the Court. Having reviewed all the papers and evidence submitted in support of the defendant's motion and the People's opposition papers, the motion is denied for the reasons stated herein.

CONCLUSIONS OF LAW

The core inquiry on a claim of ineffective assistance of counsel is whether the defendant received meaningful representation by legal counsel. The defendant asserts he did not receive legal counsel which even seemingly resembled meaningful representation. The defendant's claims are centered around his contention trial counsel "was so incompetent that even with the benefit of being able to utilize the transcripts of two previous trials [defense counsel] still managed to fumble the ball each and every chance it was thrown to him." Defendant's Reply Brief pg.1-2. The defendant contends the ineffective assistance rendered by trial counsel was a glaring violation of his due process rights which warrants an order vacating his conviction pursuant to CPL §440.10(1)(h).

In determining a defendant's motion on the asserted grounds of ineffective assistance of counsel, the defendant must establish the two prong test set forth in *Strickland v. Washington*, 466 US 668 (1984). Namely, the defendant must establish defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability, but for counsel's errors, the proceeding(s) would have resulted in a different outcome. *Strickland v. Washington*, 466 US 668 (1984). The *Strickland* standard requires any judicial scrutiny brought to bear upon defense counsel's performance be highly deferential in an effort to avoid the distorting effects of hindsight. *Id.*

Further, the court is required to evaluate claims of ineffectiveness without confusing real ineffectiveness with circumstances amounting to nothing more than losing tactics employed by trial counsel. The defense need only reflect a reasonable and legitimate strategy under the particular circumstances of a case. A defense theory which is ultimately a losing theory does not amount to ineffective assistance of counsel. It is only when the evidence presented on a motion of ineffective assistance of counsel clearly establishes counsel partook in an inexplicable prejudicial course of conduct will courts deem the representation ineffective. *People v. Benevento*, 91 NY2d 708 (1998).

In the instant case, it is clear the defendant has failed to meet the two-prong test of *Strickland*. The claims raised by the defendant do not rise to the level of an inexplicable prejudicial course of conduct on the part of trial counsel. The defendant contends defense counsel failed to conduct adequate pre-trial investigations as part of the defense strategy and failed to properly utilize expert testimony as well as DNA evidence. However, the

defendant's claims are without merit. The defendant's claims are unsubstantiated and even assuming *arguendo* there is evidence to support the defendant's contention there is no evidence, but for the alleged mistakes by counsel, the outcome of the trial would have been different. The defendant's claims regarding trial counsel's failures are not sufficient to establish a course of conduct which was inexplicably prejudicial. For each claim raised by the defendant there are equally plausible explanations why trial counsel proceeded in the manner which he did at the time of the trial. Accordingly, there is no basis to find trial counsel acted in manner which was ineffective as a matter of law.

The defendant's case has been litigated before three different jury panels and being unhappy with the final outcome of this trial is not a sufficient rationale to seek an Order vacating the jury's findings. The defendant has had the benefit of experienced trial counsel as his advocate and there is nothing in the record to establish the defendant received representation which fell below an objective standard. The defendant's *pro se* motion papers fail to provide any evidence establishing his claim of ineffective assistance.

Clearly the defendant is an intelligent man and has utilized that intelligence to advance his legal causes. The organization and volume of the defendant's legal briefs show the defendant employed ingenuity and dedication to lawful endeavors in his legal arguments. In retrospect had the defendant employed this type of persistence and dedication to lawful endeavors he may not have ended up in the present predicament. No matter how well written the defendant's legal papers are they fail to set forth a legal basis to grant the relief requested.

Additionally, the defendant's remaining contentions are equally without merit.

Criminal Procedure Law (CPL) §440.10(1) permits the Court, in which a judgment was entered, to vacate such judgment any time after the entry of judgment. However, Criminal Procedure Law §440.10(2)(b) provides that the Court **must** deny a motion to vacate a judgment if :

“The judgement is, at the time of the motion, appealable or pending appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such appeal . . .” *CPL* §440.10(2)(b).”

In the instant case, the claims raised by defendant are all claims which appear on the record and claims which the defendant could have litigated by appellate review. The claims raised by the defendant, namely prosecutorial misconduct, Department of Corrections theft of documents from his cell and being prohibited from going to the prison law library, are claims for which sufficient facts appear in the record to permit them to be adequately reviewed by the Appellate Division.

More significantly, the claims raised are not substantiated by any factual evidence. The defendant failed to proffer any evidence of prosecutorial misconduct nor is there any evidence which can be gleaned from the facts of this case to establish the defendant's contentions. While the defendant contends the People allowed a prosecution witness, Felix Pabon, to profit from stealing documents from the defendant's cell, there is no basis to the claim and no way to establish whether in fact Mr. Pabon stole those documents or profited from them. There is also no basis to believe Mr. Pabon took those items at the behest of law enforcement.

Similarly, the defendant's contention regarding the Department of Corrections stealing documents regarding his legal strategy and providing those documents to the People is also a specious claim. It should also be noted during the course of the defendant's third trial the issue of whether the materials taken from the defendant's prison cell constituted materials protected under the attorney client privilege was litigated. The Court made its ruling however, the issue became moot as the prosecutor did not seek to introduce the materials at trial or use those materials during the course of the trial. The defendant's claim regarding those documents which were not utilized during the course of the trial is rendered moot by virtue of the fact those materials were never placed before the jury as evidence.

Further, the defendant's claim regarding being prohibited to use the law library is also not borne out by the evidence. During the course of the defendant's trial before this court, the defendant raised issues concerning the lack of access to the law library. The court attempted to make every concession necessary to allow the defendant access to the law library. However, issues concerning prisoner safety and movement are solely within the discretion and province of the Department of Corrections.

It appears the defendant may have presented a security risk as he previously escaped custody while being transported from the precinct where he was arrested to central booking. Based upon the defendant's previous history, the Department of Corrections may have deemed the defendant a significant security risk. During the course of the defendant's trial, the court was not in position to insert itself into matters which are in the exclusive control of the Department of Corrections. However, the court made every effort to direct when

possible that the defendant be given access to the law library during the pendency of his trial.

Accordingly, the defendant failed to provide any evidence to establish the claims raised against the Department of Corrections. The defendant's contention regarding denial of access to the prison law library is without merit.

The defendant's claims regarding the prosecutorial misconduct, Department of Corrections theft of documents from his jail cell and being prohibited from going to prison law library are not claims for which vacatur of the duly rendered verdict of conviction is a remedy. These claims appear on the record and the proper vehicle for readdress would be for the defendant to perfect his pending appeal. There is no basis to grant the requested relief. Accordingly, the defendant's motion is denied in its entirety. It is hereby,

ORDERED, the defendant's motion is denied in its entirety. It is further,

ORDERED, the defendant's right to appeal from this order 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 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. It is further,

ORDERED, 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

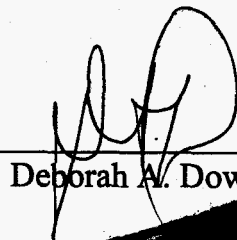
application on the following parties;

APPELLATE DIVISION, 2ND 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

This shall constitute the decision and order of the Court.



Deborah A. Dowling, J.S.C

ENTERED
FEB 16 2012
NANCY T. SUNSHINE
COUNTY CLERK