

People v Gilmore

2012 NY Slip Op 31100(U)

April 13, 2012

Supreme Court, Kings County

Docket Number: 6594-2006

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION & ORDER
: *Pro Se* CPL § 440 Motion

TREVOR GILMORE : Indictment No. 6594-2006

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MICHAEL A. GARY, J.

Defendant moves *pro se* for an order vacating his judgment of conviction pursuant to CPL § 440.10, claiming that the judgment was obtained in violation of his rights under the federal and state constitutions. The People have filed papers opposing his motion, and the defendant has filed a reply to those papers as well.

The defendant's conviction arose from the following incident. The police, who were in the area, heard a gunshot and as a result of their investigation they radioed a description and a sector car stopped the defendant. After Mr. Gilmore was arrested, and following *Miranda* warnings, he made a statement indicating where the police could recover the gun. Accompanied by the sergeant, the defendant led them to a location where he allegedly had tossed the gun. When they could not locate it, the defendant called an unknown person, "a friend", who was instructed by the defendant to place the gun in the duffle bag at a specific street location. The police and the defendant went to that location and recovered a black duffle bag with a loaded 9 mm. semiautomatic gun, along with various clothing.

The defendant was charged with one count each of Criminal possession of a weapon in the second, third, and fourth degrees (Penal Law §§ 265.03, 265.02, 265.01, respectively).

After submitting to a pre-pleading investigation, on March 13, 2007, defendant waived his right to a trial by jury and a bench trial was held. Defendant was acquitted of Criminal possession of a weapon in the second degree, but convicted of Criminal possession of a weapon in the third degree. On April 10, 2007 Mr. Gilmore was sentenced to 5 years of probation and 300 hours of community service. Defendant subsequently violated the terms of his probation and on August 12, 2009 he was re-sentenced to a prison term of 7 years and 3 years of post release supervision (PRS), to be served concurrently with a prison term of 8 years followed by 10 years of PRS, imposed on Ind. No. 612-2008. Mr. Gilmore plead guilty to a charge of Attempted Rape in the first degree (Penal Law §§ 110/130.35) on that indictment before another judge.

Defendant did not appeal from his judgment of conviction on this case.

Defendant now moves to vacate his judgment of conviction pursuant to CPL § 440.10, based on several claims, including that he was denied effective assistance of counsel. Those claims are listed in the defense motions on pages 10-12 of his motion. As to the defendant's claims of ineffective assistance of counsel, he claims among other failures, that the defense attorney failed to tell him of his right to testify in the grand jury; 2) she failed to submit an omnibus motion; 3) failed to object to the commencement of the bench trial; 4) failed to inform the defendant of the stipulations; 5) counsel failed to get a witness list or to get *Rosario* material from the People; and 6) failed to subpoena records. At the trial, defense counsel: entered into unauthorized stipulations, failed to cross examine Sgt. Miller, and failed to object on the record to the People's request that the court consider the "intent to use" presumption in its deliberations, and most important, counsel did not file an appeal on the defendant's behalf.

The People oppose the defendant's motion and assert that it must be denied on procedural grounds. They assert that the court cannot consider most of the defendant's claims as they are record-based, and thus, must have been raised in an appeal of the case. See CPL § 440.10 (2) (c). Similarly, the defendant's claim that his attorney was ineffective for not filing a timely appeal of the case must, as the People assert, have been brought in a motion before the Appellate Division in a writ of error *coram nobis* (CPL § 460).

The court agrees with the People's position. For claims of error, including evidentiary matters, the alleged improper admission of testimony and exhibits, court rulings on objections, the propriety of the waiver of the right to a jury trial, etc. are all considered record-based claims and as such, must properly have been considered by the Appellate Division with the record of the trial before it. A motion brought pursuant to CPL § 440 is not a substitute for appellate review; its purpose is to enable a review of allegations and concerns that are not in the record (*e.g.*, evidence discovered since the time of the trial). Therefore, the court cannot consider the issues in this motion.

Similarly, the People are correct that the defendant would have had to have filed a writ of error *coram nobis* in the Appellate Division, regarding an issue with the failure to take an appeal, *See, People v. Syville*, 15 NY3d 391 [2010]). The court notes however, that the defendant waited approximately 3 years to even raise this issue. As part of this motion he has attached a letter he received in 2010 in response to an inquiry about filing an appeal on this case, for the first time. He claims in a letter he himself generated, dated January 8, 2012, that he requested of his attorney at the time of sentencing in a conversation in the hallway at the courthouse, that she file a notice of appeal on his behalf.

However, allegations of ineffective assistance of counsel are both record and non-

record based, and are therefore appropriately considered on a motion to vacate a judgment of conviction. 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., 6th Amend.; N.Y. Const., art. 1, §6). An attorney is “strongly presumed” to have rendered effective assistance to his client (*Strickland* at 690). To rebut this presumption, the defendant must be able to show that counsel’s conduct was outside the “wide range of professionally competent assistance” (*Id.*). 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).

Specifically, the defendant complains of counsel’s failure to notify him of his right to testify in the grand jury, her failure to sufficiently investigate, and her failure to properly conduct the trial.

In New York, “[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 the constitutional requirement will have been met” (*People v Baldi*, 54 NY2d 137, 147 [1981]). “This protection does not guarantee a perfect trial, but assures the defendant a fair trial” (*People v Flores*, 84 NY2d 184, 187 [1994]). 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]).

A review of the court file and of the transcribed minutes of the trial demonstrates the defendant knowingly opted for a non-jury trial. The record is clear that the court questioned the defendant about his discussions with his attorney both on the previous court appearance and the date on which the bench trial commenced; that he had enough time to speak with her, and that he understood the choice of having the judge act as the fact-finder. As to the assertion in his motion of defense counsel's failure to get *Rosario* material is rather curious, since the material that had been turned over to defense counsel was also turned over to the court, and is in the court file. Similarly, defendant fails to elucidate what evidence a pre-trial investigation would have yielded, when defendant's own statements led to the recovery of the gun he was accused of possessing.

With regards to the testimony before the grand jury, the decision whether or not to testify belongs to the attorney, not the defendant (*See People v. Ferguson*, 67 NY2d 383, [1986]). Further, defendant fails to allege what he would have stated that could possibly have led to a different result.

In this instance, all of the defendant's claims fall far short of the high threshold required to substantiate an allegation of ineffective assistance of counsel. Because he has failed to establish that counsel lacked a legitimate strategy or that he was prejudiced by the execution of his defense it remains "clear that the attorney provided meaningful representation" (*see People v Maldonado*, 278 AD2d 513 [2d Dept., 2000]). In fact, as is obvious, the defense attorney managed to avoid a conviction for the top count of Criminal possession of a weapon in the second degree, which would have mandated a sentence of a

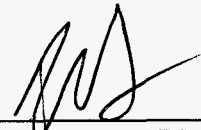
minimum of 3 years incarceration. Rather, because he was convicted of Criminal possession of a weapon in the third degree, the defendant was eligible for and did indeed receive the non-incarceratory sentence of Probation, which the defendant promptly violated.

Finding no basis to vacate the judgment of conviction, this court hereby denies defendant's motion in its entirety.

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.

Dated: Brooklyn, New York
April 13, 2012



MICHAEL A. GARY, J.S.C.

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