

People v Marks
2012 NY Slip Op 32573(U)
September 21, 2012
Sup Ct, Kings County
Docket Number: 2479/2008
Judge: John G. Ingram
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 21

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

-against-

Indictment No. 2479/2008

GEORGE MARKS,

Defendant.

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INGRAM, J.

Defendant stands convicted on July 20, 2010, after jury trial in Supreme Court, Kings County, of Grand Larceny in the First Degree and other related charges. On December 21, 2010, this Court sentenced Defendant to fourteen to thirty years jail after denying Defendant's motion pursuant to C.P.L. § 330.30 . (J. Ingram, at trial and sentence).

In pro se motion dated August 2, 2011, Defendant moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that his trial counsel provided ineffective assistance.¹

The People filed their response on August 16, 2012, arguing that every aspect of Defendant's ineffective assistance of counsel claim is either procedurally barred from review or without merit.

¹Defendant also filed a motion, dated September 6, 2012, to recuse the undersigned from deciding the instant 440 motion. Defendant grounds for recusal are that: (1) I stated that defense counsel, Christopher Booth, Esq. , was an experienced trial lawyer, allegedly establishing that we were acquaintances from the past and (2) I threatened him at sentencing that if he brought a 440 motion before this court, I would impose restitution on Defendant. I deny both allegations and find that based on the statutory provisions of both Judiciary Law Section 14 and 22 NYCRR 100.3(E)(the Rules of the Chief Administrator of the Courts regarding disqualification), there are no grounds for recusal of this Court in the case at bar. I have never been associated with or socialized with attorney Booth. Accordingly, Defendant's motion for recusal is denied.

Defendant lists various alleged errors committed by trial counsel that precluded him from receiving a meaningful representation. An attorney's performance "will not be considered ineffective, even if unsuccessful, as long as it reflects an objectively reasonable and legitimate trial strategy under the circumstances and evidence presented." People v. Berroa, 99 N.Y.2d 134, 138 (2002). "To prevail on his claim that he was denied effective assistance of counsel, defendant must demonstrate that his attorney failed to provide meaningful representation...A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise the defendant's right to a fair trial." People v. Caban, 5 N.Y.3d 143, 152 (2005).

Defendant claims that trial counsel failed to make a demand for discovery, file pretrial motions or file a motion for the Court to review the grand jury minutes. Since the People had consented to Open File Discovery, the defense obtained material without the necessity of motion practice and the People also consented to necessary hearings. Despite Defendant's allegations to the contrary, discovery motion practice is not always necessary where, as here, the District Attorney's Office utilizes an Open File Discovery policy. People v. Clark, 115 A.D.2d 860, 861 (1985). In addition, Defendant's claim is also denied pursuant to C.P.L. § 440.30(4)(d) as Defendant's assertion is contradicted by the court record. A review of the file in this matter demonstrates that the Court conducted a review of the Grand Jury minutes and based on the Court's decision, dated November 19, 2008, the presentation was legally sufficient.

Defendant also alleges that his conviction for Grand Larceny in the Third Degree, relating to the theft of a \$10,000 down payment from Reverend and Mrs. Lee, is unsupported by the law and the evidence and that the verdict, as a whole, was obtained with hearsay evidence and the People failed to meet their burden of proof. To the extent that Defendant claims the verdict was against the

weight of the evidence, it is well settled that the authority to assess the weight of the evidence is reserved to the appellate court. People v. Colon, 65 N.Y.2d 888 (1985). In addition, Defendant never cited which evidence he considered to be “hearsay evidence”. These claims are denied as they are not matters beyond the scope of the record, and therefore, could be raised on direct appeal. See C.P.L. § 440.10(2)(b).

Defendant also claims that trial counsel failed to let Defendant testify on his own behalf. However, this Court thoroughly explained to Defendant on the record, at least twice, that the decision to testify was Defendant’s, not counsel’s. Defendant acknowledged that he understood that it was his decision, and he decided not to testify. CPL 440.30(4)(c).

Defendant also claims that defense counsel was ineffective because he failed to bring to the Court’s attention Defendant’s diminished mental capacity and illiteracy. Pursuant to C.P.L. § 440.30(4)(b), the Court may deny a defendant’s motion without a hearing where essential facts are unsupported by either sworn allegations or unrefuted documentary proof. Defendants are “presumed competent,” and the court is not obligated to order a competency examination, unless the court has reason to believe that the defendant is incapacitated. See People v. Morgan, 87 N.Y.2d 878 (1995).

In addition, according to C.P.L. § 440.30(4)(a) the court may deny defendant’s motion without conducting a hearing if the moving papers do not claim any ground constituting a legal basis for the motion. Illiteracy and a “diminished mental capacity” do not, by themselves, render Defendant unfit to proceed. The court needs to determine whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.” People v. Arnold, 113 A.D.2d 101, 102-03 (4th Dept. 1985) quoting Dusky v. United States, 362 U.S. 402, 402 (1960). In

none of Defendant's motion papers has he ever alleged that he did not understand any of the proceedings against him, nor has he ever alleged that he was unable to communicate with his attorney to defend his case effectively. In addition, Defendant's papers are devoid of any documents or records that indicate that he was irrational or unable to communicate with his counsel or could not understand the proceedings. Furthermore, Defendant alleges to have owned a construction company since 2000 without any issues. Defendant's mere allegation that he is illiterate or has a "diminished mental capacity" does not constitute a legal basis for the motion. In reviewing Defendant's pro se motion papers, they certainly do not indicate that Defendant has a diminished mental capacity or that he is illiterate.

Defendant also argues that trial counsel failed to effectively cross-examine the People's witnesses concerning the filing dates of certain documents and whether Defendant actually filed any of the alleged false deeds. However, trial counsel conducted thorough cross-examinations of all of the People's witnesses regarding the filing of documents and attempted to establish that Defendant was not the individual who actually physically submitted the documents for filing. Disagreements with counsel over trial strategy, tactics or the scope of cross-examination do not suffice to establish the absence of the requisite meaningful representation. People v. Flores, 84 N.Y.2d 184, 187 (1994).

Defendant argues that trial counsel was ineffective for failing to move to dismiss the indictment pursuant to C.P.L. §30.30 and for failing to challenge the legality of his arrest. "[T]he failure of defense counsel to move to dismiss the indictment pursuant to C.P.L. § 30.30 did not constitute ineffective assistance of counsel inasmuch as such a motion would not have been successful." People v. McDuffie, 46 A.D.3d 1385, 1386 (4th Dept. 2007). Nor was defense counsel

ineffective based on his failure to challenge the legality of Defendant's arrest base on an alleged fraudulent arrest warrant inasmuch as such a challenge also would have been unsuccessful. People v. Garcia, 75 N.Y.2d 973, 974(1990).

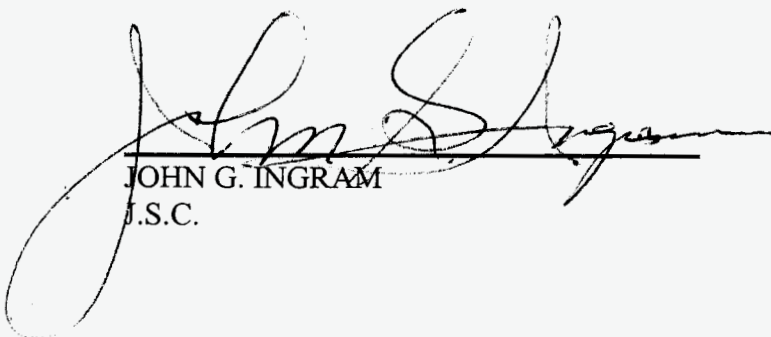
Defendant further argues that counsel failed to bring forth "significant documents" and "significant witnesses". When a claim of ineffective assistance of counsel is based upon defense counsel's alleged failure to call a witness, the moving papers must contain an affidavit from such witness setting forth the substance of the witness' testimony. People v. Ford N.Y.2d 1021, 1023 (1971). In this case, Defendant failed to provide any such affidavits or to even confirm that such witness actually existed and possessed material information.

Defendant's various arguments concerning prosecutorial misconduct are without merit and totally unsubstantiated by anything other than Defendant's own conclusory assertions. Therefore his motion based on this claim must be denied as well. C.P.L. § 440.30(4)(b); People v. Brown, 56 N.Y.2d 242 (1982); People v. Baachi, 186 A.D.2d 663 (2d Dept. 1992).

Accordingly, Defendant's motion is denied.

This opinion constitutes the Decision and Order of this Court.

Dated: September 21, 2012
Brooklyn, New York



JOHN G. INGRAM
J.S.C.