

People v Rodriguez
2012 NY Slip Op 33077(U)
December 19, 2012
Sup Ct, Kings County
Docket Number: 100636-2006
Judge: Vincent M. Del Giudice
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 25

Decision and
Order

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PEOPLE OF THE STATE OF NEW YORK

Ind.#: 100636-2006

-against-

Hon. Vincent Del Giudice
Dated: December 19, 2012

ROBERTO RODRIGUEZ

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On December 2, 2006, the defendant, co-defendant Christopher Gray and Anthony Montalvo entered a mechanic's garage, robbed two men at gunpoint, chased and shot dead one of the victims who had fled from the garage. The defendant was apprehended at the scene by Police Officer Thomas Castro. The robbery inside the garage was recorded on video surveillance.

The defendant was indicted under indictment 10636-2006. On January 26, 2009, a Kings County jury found the defendant guilty of Murder in the Second Degree, Robbery in the First Degree and Criminal Possession of a Weapon in the Second Degree. On February 18, 2009, this court sentenced the defendant to twenty-five years to life on the murder conviction, twenty-five years on the robbery conviction and fifteen years on the gun conviction. The court ordered the murder and robbery sentences run consecutive to each other and concurrent with the gun sentence.

Defendant's conviction and sentence was affirmed by the Appellate Division, Second Judicial Department (*People v Rodriguez*, 92 AD3d 902). Leave to appeal was denied (*People v Rodriguez*, 18 NY3d 997).

On September 26, 2012, defendant filed the pending motion, *pro se*, seeking to vacate his conviction and sentence. Defendant's sole claim is that he received ineffective assistance of trial counsel as a result of counsel not adequately informing him of the possible sentence he could receive if he were to be convicted after trial. No other arguments were advanced in support of defendant's allegation that he received ineffective assistance of counsel.

Apart from defendant's two affidavits and a six page memorandum of law, no other evidentiary facts, exhibits or transcripts were submitted in support of

defendant's motion.

The People have filed an answer in opposition. In addition to their moving papers and memorandum of law, the People have attached an affirmation from the Assistant District Attorney who prosecuted the defendant's case and a portion of the transcript of the proceedings immediately before the pre-trial hearings commenced.

At the request of the court, defendant's trial counsel submitted a four page affirmation in opposition to the defendant's motion to vacate.

A judgment of conviction is presumed valid and a defendant moving to vacate his conviction bears the "burden of coming forward with sufficient allegations to create an issue of fact" (*People v Session*, 34 NY2d 254, 255-256 [1974]; *People v Braun*, 167 AD2d 164, 165 [1st Dept 1990]).

Under federal law, a defendant challenging his conviction after trial, on the grounds of ineffective assistance of counsel, must meet the two-prong test set forth by the United States Supreme Court in *Strickland v Washington* (466 US 668 [1984]). Under *Strickland*, the "defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense" (*Strickland*, 466 US at 687). In other words, in order to establish ineffective assistance of counsel, a defendant must prove both the absence of a strategic or other legitimate explanation for counsel's conduct and a demonstration of prejudice (*Strickland*, 466 US at 687).

According to New York's interpretation of this constitutional requirement, a defendant need not prove prejudice: he may prevail merely by establishing that his attorney failed to provide meaningful representation by demonstrating "the absence of strategic or other legitimate explanations" for counsel's allegedly deficient representation (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Rivera*, 71 NY2d 705, 708-709 [1988]). Under Article I, §6 of the New York State Constitution, success of an ineffective assistance of counsel claim rests on whether or not "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation" (*People v Henry*, 95 NY2d 563, 565 [2000], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]).

Effective assistance of counsel, therefore, is "meaningful representation" not "perfect representation" (*People v Ford*, 86 NY2d 397, 404, quoting *People v Modica*, 64 NY2d 828, 829 [1985]). Hindsight does not transform tactical errors into ineffective assistance (*Baldi*, 54 NY2d at 151, citing *People v Jackson*, 52 NY2d 1027 [1981]). In the end, a "claim of ineffectiveness is

ultimately concerned with fairness of the process as a whole rather than its particular impact on the outcome of the case” (*Caban*, 5 NY3d at 156; *People v Benevento*, 91 NY2d 708, 741 [1998]; *Baldi*, 54 NY2d at 147).

“Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has been proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable ... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, allegedly deficient and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the alleged action ‘might be considered sound trial strategy’” (*Strickland*, 466 US at 689, *quoting Michael v Louisiana*, 350 US 91, 101 [1955][*internal citation omitted*]).

Here, defendant’s motion is based on his assertion that his counsel’s failure to advise him of the potential maximum sentence that could be imposed after trial denied him the effective assistance of counsel. Defendant claims that had he known he faced fifty years to life after conviction, he would have accepted the prosecution’s plea offer of twenty years to life, or at least thrown himself on the mercy of the court.

The minutes submitted by the People show that immediately prior to the commencement of the pre-trial hearings, this court asked each of the defendants whether they wanted to engage in plea negotiations prior to the commencement of the hearings. The defendant was informed that once the hearing commenced, there would be no further opportunities to engage in plea bargaining.¹ Despite this court’s warning, the defendant did not avail himself of the plea discussions and the hearing and subsequent trial commenced and concluded to his detriment.

¹In his moving papers, the defendant confirms that the court advised him, on the record, that “the ship is about to leave the pier; they’re pulling up the gang plank” (Minutes of January 8, 2009, at page 5) and that “[r]ight now I can render mercy before the trial. After the jury speaks, I dispense justice. Justice and mercy often aren’t the same” (Minutes of January 8, 2009, at page 6).

In his affirmation, ADA Thomas Ridges states he never engaged in plea negotiations with the defendant or his attorney. ADA Ridges claims he was advised by defendant's counsel, on numerous occasions, that the defendant was not interested in a plea deal. ADA Ridges also states that prior to the trial this court, in an off-the-record conversation, advised the defendant, in the presence of his attorney, that should the defendant go to trial and be convicted of both murder and robbery he would likely be sentenced consecutively but if he pled guilty prior to trial the court would consider running the proposed sentences concurrently.²

In his affirmation, defendant's trial counsel, Kleon C. Andreadis, stated that he specifically remembers advising the defendant of the maximum sentencing possibilities, should the defendant be convicted after trial. Counsel remembers advising the defendant that should he be convicted after trial, the court could sentence him to fifty years to life. Counsel further states that immediately prior to the commencement of the hearing, the court advised counsel that if the defendant pled guilty to the indictment the court would promise him a sentence of twenty-five years to life. Counsel states that what makes this case stand out is the defendant's response to the court's plea offer. In response to the court's offer, the defendant stated that if he was sentenced to twenty-five years to life he would serve at least thirty-two years because he would be turned down for parole at least two times. He further stated that there is no real difference between serving thirty-two years than in serving fifty years in prison. Counsel recalls being shocked that this defendant, in his early twenties, would have such a flippant attitude to eighteen additional years of incarceration.

Defendant's self-serving allegations, without any further evidence, are insufficient to meet his burden of proving that counsel's performance was ineffective (*People v Ozuna*, 7 NY3d 913, 915 [2006])[holding that the failure to submit an affidavit from a corroborating source or to explain the failure to do so warranted summary denial of his motion to vacate judgment]).

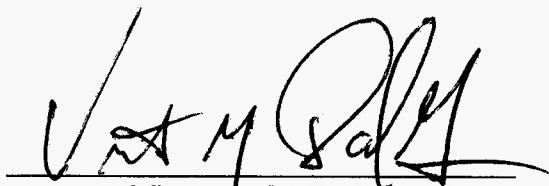
Thus, defendant's moving papers lack sufficient allegations to substantiate all the essential facts he sets forth in his claim and his claims are unsupported by any other affidavit or evidence. Under CPL §440.30(4), upon

²Although it is this court's practice only to engage in plea negotiations prior to the commencement of a pre-trial hearing or trial, it has been this court's practice to put all such conversations on the record, in order to dispel post-judgment claims such as we have herein.

considering the merits of the motion, the court may deny it, without conducting a hearing, if: (b) the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or (d) an allegation of fact essential to support the motion (i) is contradicted by a court record or other official document or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

For the reasons stated herein, this court finds that the defendant received effective assistance at all stages of the proceedings and his motion to vacate his judgment is denied.

This constitutes the decision and order of the court (CPL 440.30 [7]).



Vincent M Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

Dated: December 19, 2012
Brooklyn, New York

Hon. Vincent M. Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

