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| <b>People v Rivers</b>                                                                                                                                                                                                           |
| 2012 NY Slip Op 33139(U)                                                                                                                                                                                                         |
| January 23, 2012                                                                                                                                                                                                                 |
| Supreme Court, Kings County                                                                                                                                                                                                      |
| Docket Number: 2461-05                                                                                                                                                                                                           |
| 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

Dated: January 23, 2012

Indictment No: 2461-05

-against-

SHERMAN RIVERS,

Defendant(s).

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The defendant submitted the instant motion, *pro se*, seeking an Order to vacate his conviction pursuant to Criminal Procedure Law §440.10(1)(h) after a complete Plenary hearing pursuant to Criminal Procedure Law §440.30(5)<sup>1</sup>. The defendant contends the court should appoint counsel, pursuant to Article 18B, for the purpose of furthering this post conviction application<sup>2</sup>.

The defendant contends his conviction was obtained in violation of his right to effective assistance of counsel. Specifically, the defendant contends trial counsel's failure to call certain witnesses during the course of his trial amounted to ineffective assistance of

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<sup>1</sup>The defendant's request for a hearing is denied pursuant to CPL §440.30(4)(d)(i).

<sup>2</sup>The court declines to appoint counsel as the claims raised are readily identifiable and adjudication of those claims are possible without the assistance of counsel. Moreover, the defendant is not entitled to counsel at this time.

counsel. The defendant further asserts the court should order a hearing to fully litigate the issues raised herein. The People submitted opposing papers to the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

### **PROCEDURAL HISTORY**

The underlying facts of the defendant's conviction are based upon a scheme the defendant developed in order to sell a residential building which he did not own. The defendant fraudulently transferred the subject premises to himself so that he could sell it for a specified amount. However, the condition of the sale required the subject property be vacant with no tenants therein. At the time of the fraudulent sale, there were tenants residing in the property. The defendant engaged in a course of conduct to set fire the building in order to drive the tenants out of the building and fulfill his obligation to the buyer by delivering a vacant building. The defendant caused two fires to the subject property located, at 408 Greene Avenue, in Kings County, on May 25, 2004 and May 30, 2004, respectively.

Based on the defendant's involvement in the fires, the defendant was charged with numerous offenses including three counts Arson in the First Degree, Arson in the Second and Third Degree, Reckless Endangerment in the First Degree and Criminal Possession of a Weapon in the Third Degree. The defendant was also charged with Conspiracy in the Fourth Degree under a separate indictment 7370/05. The defendant was convicted on March 27, 2007. The jury found the defendant guilty of two counts of Arson in the First Degree (Penal Law §150.20) for the fire on May 25, 2004 and one count of Arson in the First Degree in

connection with the fire on May 30, 2004. The defendant was sentenced on April 18, 2007 to twenty (20) years to life on the conviction for the incident on May 25, 2004 and two terms of fifteen (15) years to life for the fire on May 30, 2004.

The defendant appealed the judgement of conviction and the sentences imposed by the Court. On June 8, 2010, the Appellate Division, Second Department, modified the judgment of conviction in so far as the matter was sent back to the sentencing court to determine whether the sentences were to run consecutively or concurrently. *See People v. Rivers*, 74 A.D. 3d 995 (2010). The Appellate Division also found any violation of the trial court's ruling by the People was harmless error in so far as there was overwhelming evidence of the defendants guilt and no significant probability the defendant would have been acquitted absent the improper questions. *Id* at 995. Upon remittance, the sentencing court amended the defendant's sentence in accordance with the order of the Appellate Division.

The defendant again appealed his conviction before the New York State Court of Appeals. On November 22, 2011, the Court rendered a decision denying the defendant's application seeking to vacate his conviction. *See People v. Rivers*, 18 N.Y.3d 222 (2011). The Court found the evidence adduced at trial overwhelming established the defendant's guilt of the crimes charge and any error committed was harmless. *Id* at 226. The defendant now seeks to vacate his conviction in the instant application based upon his contention trial counsel rendered ineffective assistance of counsel.

## CONCLUSIONS OF LAW

The question presented is whether there exists a legal basis to vacate the defendant's judgment of conviction and whether a hearing is necessary to determine the merits of the defendant's motion. The answer to both questions is a resounding no. There is no merit to the claims raised herein by the defendant. The Court is empowered to deny the defendant's request for a hearing to determine the merits of the instant motion where there is no evidence to support the defendant's motion. *See Criminal Procedure Law* § 440.30(4)(d)(i). Here, the defendant failed to present evidence establishing his claims and a determination of the claims raised by the defendant is readily discernable by the submissions and record of this case. Nor is the defendant entitled to a hearing to re-litigate the entirety of his trial, where there exists no factual or legal basis to do so.

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 strategy under review upon a claim of ineffectiveness need only reflect a reasonable and legitimate strategy under the particular circumstances of the subject 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 trial 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 present certain witnesses to testify during the course of the trial. However, the defendant's claims are without merit. The defendant's claims are unsubstantiated and insufficient 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.

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. This fact is underscored particularly by the findings of the appellate courts which have reviewed the evidence presented at trial. The Appellate Division, Second

Department and the New York State Court of Appeals collectively found the evidence presented at trial overwhelming established the defendant's guilt of the crimes charged. Moreover, as the trial court, having viewed the evidence first hand, there is a little doubt the claims raised by the defendant would have served to undermine the defendant's obvious guilt of the crimes charged. Accordingly, there is no basis to find trial counsel acted in manner which was ineffective as a matter of law. Accordingly, the defendant's motion is denied in its entirety. It is hereby,

**ORDERED**, the defendant's motion is denied. 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;

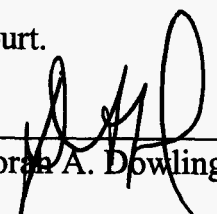
APPELLATE DIVISION, 2<sup>ND</sup> Department  
45 Monroe Place

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

This shall constitute the decision and order of this Court.

  
Deborah A. Dowling, J.S.C

HON. DEBORAH A. DOWLING  
JUSTICE SUPREME COURT

