

People v Medina

2013 NY Slip Op 30820(U)

April 12, 2013

Supreme Court, Kings County

Docket Number: 7233/2008

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. 7233/2008

JOHNNY MEDINA,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, following a jury trial in Supreme Court, Kings County, on September 24, 2009 of Rape in the Second Degree(P.L. 130.30(1)), Rape in the Third Degree (P.L. 130.25(3)), Attempted Rape in the Third Degree (P.L. 110/130.00(1)) and Endangering the Welfare of a Child (P.L. 260.10(1)). On October 19, 2009, Defendant was sentenced as a second felony offender to consecutive prison terms of three and a half to seven years for the count of second degree rape, four years for the count of third degree rape, and one year each on the attempted rape and child endangerment counts. (Ingram, J., at trial and sentence). Defendant appealed from his judgment of conviction. In motion filed in the Appellate Division, Second Department, Defendant made various claims concerning the sufficiency of the evidence and ineffective assistance of counsel .

On December 20, 2011, the Appellate Division modified the judgment of conviction, vacating Defendant’s conviction on the count of rape in the third degree and dismissing that count, and affirmed Defendant’s conviction for the remainder of the counts. People v. Medina, 90 A.D.3d 950 (2d Dept. 2011). The Second Department held that Defendant’s claim of ineffective assistance was without merit. Medina, 90 A.D.3d at 951. In addition, it held that the verdict of guilty with

respect to all the charges, except for the charge of rape in the third degree, was not against the weight of the evidence. Id. at 950. On March 23, 2012, the Court of Appeals denied Defendant's leave application. People v. Medina, 18 N.Y.3d 960 (2012)(Graffeo, J.).

The Motion Before the Court

In a pro se motion dated February 20, 2013, 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 in that he failed to: 1) move to set aside the verdict on the ground that the evidence was legally insufficient, 2) object to the People's expert witness, 3) object to the prosecutor's cross-examining Defendant about criminal convictions of members of his family and questioning Defendant about his participation in a work release program, 4) cross-examine Detective Soto and the complaining witness about alleged inconsistent statements made by the complaining witness, 5) raise a claim that the rape counts that Defendant were convicted on were multiplicitous and 6) object to the prosecutor, who was pregnant at the time of the trial, allegedly rubbing her stomach in front of the jury. In addition, Defendant claims that defense counsel was ineffective because he elicited from the complaining witness' mother false testimony that Defendant had been convicted of possessing drugs.

The People filed their response on April 3, 2013, arguing that Defendant's ineffective assistance of counsel claims are procedurally barred from review and are without merit.

The Court's Decision

Pursuant to C.P.L. § 440.10(2)(a) a motion to vacate a judgment of conviction must be denied if the issue was determined previously on the merits upon an appeal of the judgment. The Defendant's claims that his counsel was ineffective because he failed to object to the People's expert

witness, he elicited from the complaining witness' mother false testimony that Defendant had been convicted of possessing drugs, he failed to object to the prosecutor's cross examining Defendant about criminal convictions of his family members and eliciting from Defendant that he was in a work release program and for failing to raise a claim that the rape counts were multiplicitous, are the same claims that he raised on his direct appeal and were rejected by the Second Department. See People v. Medina, 90 A.D.3d 950 (2d Dept. 2011). Therefore, the claims are procedurally barred from review. C.P.L. § 440.10(2)(a).

In addition, Defendant's claim regarding counsel's failure to move to set aside the verdict on the ground that the evidence was legally insufficient to support Defendant's conviction, is also procedurally barred from review. A motion to vacate a judgment of conviction must be denied if there are sufficient facts on the record to have allowed adequate review of the issue on direct appeal. C.P.L. § 440.10(2)(c). A motion to vacate a judgment of conviction should not be "employed as a substitute for direct appeal when Defendant was in a position to raise the issue on appeal, but failed to do so." People v. Cooks, 67 N.Y.2d 100, 103 (1986). Defendant's claim that he received ineffective assistance of counsel because of his counsel's failure to list a witness on the witness list is purely record based. The record presented sufficient facts from which Defendant could have raised his present claim. However, Defendant unjustifiably failed to do so. Since this issue could have been raised on direct appeal, it cannot properly be raised on the instant motion. Furthermore, since the Second Department held that it was satisfied that the verdict of guilty with respect to rape in the second degree, attempted rape in the third degree and endangering the welfare of a child was not against the weight of the evidence, it follows that the evidence of Defendant's guilt as to those counts was legally sufficient. Since there is no merit to Defendant's claim that the evidence of his

guilt of rape in the second degree, attempted rape in the third degree and endangering the welfare of a child was legally insufficient, trial counsel was not ineffective for failing to move to set aside the verdict on the ground that the evidence was legally insufficient to support Defendant's conviction

As to Defendant's remaining claims, he failed to establish that trial counsel was ineffective under either the State or Federal standard. The Court of Appeals has held that a defense attorney's performance will not be considered ineffective "[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..." People v. Baldi, 54 N.Y.2d 137, 147 (1981). Meaningful representation does not mean perfect representation. People v. Benevento, 91 N.Y.2d 708 (1998). "The question is whether the attorney's conduct constituted egregious and prejudicial error such that defendant did not receive a fair trial." Benevento, 91 N.Y.2d at 713.

In order to establish that Defendant's Federal constitutional right to effective assistance of counsel was violated, Defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694(1984). Under New York law, prejudice is examined in terms of errors that deprive the defendant of a fair trial. Benevento, 91 N.Y.2d at 713.

Applying the above legal principles, this Court finds that Defendant's ineffective assistance of counsel claim is without merit. Defendant received meaningful representation and the record reflects that defense counsel exceeded both State and Federal criteria. Defense counsel had a legitimate reason for not cross examining Detective Soto and the complaining witness about prior inconsistent statements. Such a cross examination risked eliciting prejudicial evidence of uncharged crimes of Defendant. Other inconsistencies that defense counsel failed to cross examine the

witnesses about were minor and not substantial enough to deem counsel ineffective. This Court cannot second guess defense counsel's tactics or strategies pursued during the trial. "Trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and the circumstances of the 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." Baldi, 54 N.Y.2d at 146-47. A claim of ineffective assistance of counsel requires proof of less than meaningful representation, not just a mere disagreement over strategies and tactics. People v. Benn, 68 N.Y.2d 941(1986). "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's [supposed] failure." People v. Rivera, 71 N.Y.2d 705 (1988). Since Defendant here has failed to carry his burden, "it will be presumed that counsel acted in a competent manner and exercised professional judgment". Rivera, 71 N.Y.2d at 705.

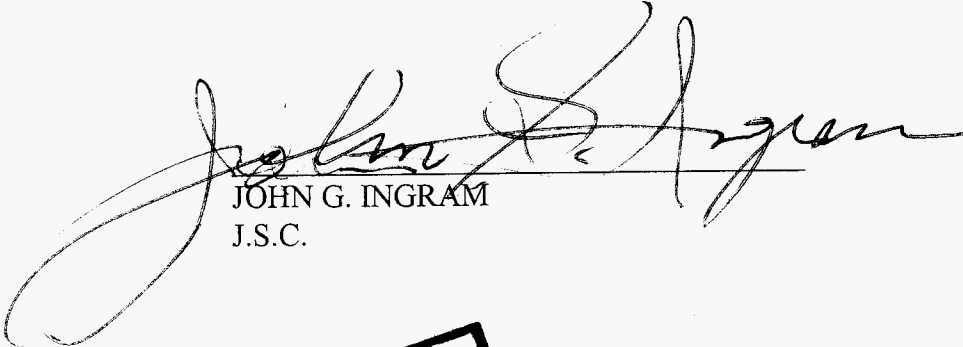
Defendant also claims that defense counsel was ineffective for failing to object to the prosecutor, who was pregnant at the time of the trial, constantly rubbing her stomach in front of the jury. This Court presided over this trial and did not see the prosecutor rub her stomach in front of the jury or this Court. In addition, this Court cannot see how the prosecutor's alleged conduct could have prejudiced Defendant.

In addition, the Second Department held that Defendant was afforded meaningful representation. Medina, 90 A.D.3d at 951.

Accordingly, Defendant's motion is denied.

This opinion constitutes the Decision and Order of this Court.

Dated: April 12, 2013
Brooklyn, New York



JOHN G. INGRAM
J.S.C.

ENTERED
APR 17 2013
NANCY T. SUNSHINE
COUNTY CLERK