

People v Cummings

2013 NY Slip Op 31340(U)

May 24, 2013

Sup Ct, Kings County

Docket Number: 9160/2010

Judge: Ozzi

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 17

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THE PEOPLE OF THE STATE OF NEW YORK

Indictment No.9160/2010

-against-

Decision & Order

ROBERT CUMMINGS,

Defendant.

-----X

Ozzi, J.

Charles Hynes, District Attorney, Kings County (Kevin Aulbach, Of Counsel)
Robert Cummings, Pro Se

By motion dated January 8, 2013, Defendant Robert Cummings moves, Pro Se, to vacate his judgment of conviction in the above-captioned matter pursuant to C.P.L. §440.10.

Specifically, Defendant claims that: (1) by reason of a mental disorder, his plea was not knowing, voluntary, and intelligent and that, as a corollary, counsel coerced a plea from Defendant through misrepresentations; (2) counsel was ineffective for failing to obtain Defendant's psychiatric records or present medical experts to contradict the allegations that Defendant caused Thomas Cummings's spleen injury; (3) there exists newly discovered evidence indicating that Thomas Cummings was injured during an attempted robbery on September 23, 2010, which was the actual cause of his spleen injury. The People submitted an affirmation in opposition to Defendant's motion dated March 25, 2013. For the reasons set forth below, Defendant's motion is denied.

FACTUAL HISTORY

On September 19, 2010, at 2377 Ralph Avenue in Brooklyn, Defendant had an altercation with Peter Eppolito, punching Mr. Eppolito several times about the face and body. At approximately 9:10 p.m. that evening, Defendant arrived at the home of his twin brother, Thomas Cummings ("Thomas"). When Thomas came outside, Defendant struck him with a tire iron multiple times about the head, arms, and body before fleeing the scene. As a result of the assault, Thomas suffered a contusion to the head, a fractured arm, and pain in his abdomen. He was treated for his injuries at Brookdale University Hospital in Brooklyn and released.

Four days after the incident, Thomas collapsed and was rushed to New York Presbyterian Hospital, where he underwent surgery. During the surgery, it was discovered that his spleen had ruptured and that Thomas was experiencing a substantial amount of internal bleeding. Thomas underwent an emergency splenectomy.

Defendant was arrested on October 15, 2010 and subsequently charged with Assault in the First Degree and other related charges under Indictment Number 9160/2010. Bail was set in the amount of \$7,500. Defendant posted the bail and was released on December 4, 2010.

On August 1, 2011, pursuant to Court Order (Foley, J.), Defendant underwent a C.P.L. §730.30 examination to determine his fitness to stand trial. After an examination, Defendant was found to be mentally fit to stand trial and found to possess the capacity to understand and assist in the criminal proceedings.

On October 4, 2011, Defendant made a number of threatening phone calls, text messages, and e-mail communications to Thomas. Defendant was charged under Indictment No. 8853/2011 with two counts of Criminal Contempt in the First Degree and other related charges. The two indictments were later consolidated under Indictment No. 9160/2010. Defendant was

apprehended on October 13, 2011 after Defendant was tracked down through his cell phone records.

On April 3, 2012, defense counsel Joel Brettschneider, Esq. withdrew, on the record, a previously interposed notice of psychiatric defense. C.P.L. §250.10(2); N.Y. Penal Law §40.15. On May 16, 2013, this Court issued several pre-trial rulings, one of which allowed the People to introduce on their direct case recorded telephone calls made by Defendant during his incarceration. During the telephone conversations, Defendant admitted his guilt. On May 17, 2012, Defendant pled guilty to all thirteen counts in the indictment without a promised sentence. On May 31, 2012, this Court sentenced Defendant to a term of 16 years incarceration for the assault in the first degree charge, to run concurrently with shorter periods of incarceration for the other twelve counts in the indictment, followed by a period of post-release supervision.

On January 8, 2013, Defendant filed the instant motion to vacate his judgment of conviction pursuant to C.P.L. §440.10

ANALYSIS

Defendant's Claim that His Guilty Plea Was Not Knowing, Voluntary, and Intelligent

C.P.L. §440.10(2)(c) requires the Court to deny a motion to vacate a judgment of conviction where there are sufficient facts on the record to have permitted an adequate review on appeal, and the defendant failed to raise the issue or issues with the appellate court. See C.P.L. §440.10(2)(c), People v. Josiah, 2 A.D.3d 877 (2nd Dep't 2003). The issue of whether Defendant's plea was knowing, voluntary, and intelligent is an issue that could have been raised on direct appeal. However, Defendant failed to do so. As such, the Court must deny Defendant's motion without prejudice to renewal to an appellate court.

Despite the procedural bar, the Court notes that Defendant's claim that his plea was not knowing, voluntary, and intelligent is wholly self-serving, belied by the record, and in any event not credible. Although Defendant claims that his plea was not voluntary by reason of mental disease or defect, during the plea allocution, this Court inquired as to Defendant's mental state. When asked if he was currently on medication, Defendant replied, under oath, that he was "on clinical medication from the prison, but I don't want to say it interferes with any of my decisions what [sic] have been made." (Transcript, Plea Allocution May 17, 2012, p. 5.) The Court asked Defendant if he understood the nature of the proceedings, to which Defendant replied that he understood "one hundred percent what's going on here, your Honor." (*Id.*). This Court further informed Defendant that by pleading guilty he would be forfeiting his right to a trial by jury, the right to testify on his own behalf, and the right to present witnesses and confront witnesses called to testify against him. (*Id.* at p. 6-7). Defendant replied that he understood. In making its determination that Defendant understood the nature of the proceedings, the Court reasonably relied on its own observations and interactions with Defendant, Defendant's sworn testimony during the allocution, as well as the results of the August 2011 C.P.L. §730.30 exam which found Defendant fit to stand trial.

Defendant's claim that his attorney coerced him into pleading guilty is also belied by the record. Defendant indicated that he had a full and fair opportunity to speak to his attorney and that he was "absolutely" pleased with Joel Brettschneider's services. (*Id.* at p. 5). Before entering his plea, the Court asked Defendant if his guilty plea was the result of any threats or coercion, to which Defendant replied that it was not. (*Id.* at p. 6). By filing this motion, Defendant essentially claims that he intentionally lied to the Court during his plea allocution, despite his oath to tell the truth. Furthermore, Defendant has not provided the Court with any psychiatric records to

support his claim that he was incapable of understanding the nature of the proceedings against him at the time of his plea.

Based on the facts as enumerated above, Defendant has not shown and cannot show that his plea was not entered knowingly, voluntarily, and intelligently. Therefore, this portion of Defendant's motion is denied.

Defendant's Ineffective Assistance of Counsel Claim

The Court now turns to Defendant's ineffective assistance of counsel claim. When deciding whether to plead guilty to a charged offense, a criminal defendant is constitutionally entitled to effective assistance of "competent counsel." McMann v. Richardson, 297 U.S. 759, 771 (1970); see also Strickland v. Washington, 466 U.S. 668, 686 (1984). When evaluating a claim for ineffective assistance of counsel, a court must determine whether counsel provided the defendant with "meaningful representation." People v. Benevento, 91 N.Y.2d 708, 709 (1998). A defendant has received meaningful representation in the context of a guilty plea when he "receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." People v. Ford, 86 N.Y.2d 397, 404 (1995). An attorney is "strongly presumed" to have rendered effective assistance to his client. Strickland v. Washington, 466 U.S. 668, 690 (1984).

In Strickland, the Supreme Court proffered a two-part test for analyzing claims of ineffective assistance of counsel. Strickland, 466 U.S. at 687. In the first prong of the Strickland test, the defendant must show that his attorney's representation was "deficient" and "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-688. This is basically a "restatement of attorney competence." People v. McDonald, 1 N.Y.3d 109, 113 (2003). In making such a determination, the Court should assess the attorney's performance

against “prevailing professional norms.” Strickland at 688. Under the second prong of the Strickland test, commonly referred to as the “prejudice prong,” the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. More specifically, the defendant must show that there is a reasonable probability that but for the errors of his attorney, he would not have pled guilty; rather, he would have insisted on going to trial.

Defendant claims that he was denied effective assistance of trial counsel due to his attorney’s failure to investigate the defendant’s psychiatric history. However, such claim is belied by the record, which indicates that defense counsel was wholly familiar with Defendant’s psychiatric history. Moreover, in August 2011, the defendant was evaluated to determine whether he was fit to stand trial pursuant to C.P.L. §730.30. The defendant’s examiner, Dr. Beverly Martin, stated in her Report that the “defendant is psychiatrically stable and has the capacity to effectively assist in his defense in a rational matter at this time.” (Dr. Beverly Martin C.P.L. §730.30 Report, August 10, 2011, p. 4). Dr. Michael Fuller also conducted a C.P.L. §730.30 examination of the Defendant and concluded that the defendant was fit to stand trial. (Dr. Michael Fuller C.P.L. §730.30 Report, August 10, 2011, p. 4) There is absolutely nothing in the record to suggest that trial counsel was unfamiliar with the defendant’s psychiatric history, that he failed to obtain his psychiatric records, or that he failed to request a mental health examination for Defendant. Defendant’s claim is therefore without merit.

When a defendant claims he received ineffective assistance of counsel in the context of a guilty plea, the defendant must show that there is a reasonable probability that, but for his attorney’s errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S.52, 29 (1985). Given the strong case against him, including the telephone

conversations in which Defendant admitted assaulting his brother, there was a strong likelihood that Defendant would have been convicted after a jury trial. If convicted, Defendant would have faced a maximum sentence of twenty nine years incarceration. By pleading guilty, Defendant was the beneficiary of a favorable plea bargain that limited his sentence to sixteen years incarceration plus a period of post-release supervision. Furthermore, as stated above, there is absolutely no evidence to suggest that defense counsel coerced Defendant into pleading guilty. In fact, everything in the record points to the opposite; that Defendant, on his own volition, pled guilty to the indictment in its entirety. The Defendant has not shown that there is a reasonable probability that, but for his attorney's errors, he would have insisted on going to trial.

Based on the foregoing, this portion of Defendant's motion to vacate his judgment of conviction is denied.

Newly Discovered Evidence

Defendant's claim that there exists newly discovered evidence that Thomas Cumming's spleen injury was the result of a physical assault during an attempted robbery on September 23, 2010, and that such evidence requires vacatur of his plea, is without merit. C.P.L. §440.10(1)(g) is limited by its terms to evidence discovered "since the entry of a judgment based upon a verdict of guilty after trial." A defendant who pleads guilty may not thereafter move to vacate his judgment of conviction based on this ground. See People v. Phillips, 30 A.D.3d 621 (2nd Dep't 2006).

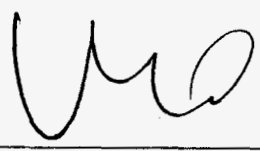
CONCLUSION

For the reasons set forth above, Defendants motion to vacate his judgment of conviction is denied in its entirety.

The above constitutes the decision and Order of the Court. The Court wishes to express

its appreciation to Allison L. File, Esq. for her assistance in the research and drafting of this decision.

Dated: May 24, 2013



HON. WAYNE M. OZZI, J.S.C.

ENTERED
MAY 24 2013
NANCY T. SUNSHINE
COUNTY CLERK