People v White
2013 NY Slip Op 31550(U)
June 24, 2013
Supreme Court, Kings County
Docket Number: 03850/2002
Judge: Carolyn E. Demarest
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV19

----------x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

GARY WHITE

By: Hon. Carolyn E. Demarest

Date: June 19, 2013

DECISION & ORDER

Indictment No. 3850/2002

----------x

Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10(1)(h), on the grounds that his inculpatory statement was the result of an unlawful arrest and that he was denied the effective assistance of counsel. For the following reasons, the motion is denied.

After shooting Albert Hansen to death on June 1, 2002, defendant was convicted by a jury of murder in the second degree (PL § 125.25[1]) and was subsequently sentenced to a term of imprisonment of twenty-two years to life. Since that time, defendant has raised numerous challenges to his conviction in both state and federal court, all of which were unsuccessful. These attempts include a direct appeal (*People v White*, 40 AD3d 662 [2d Dept 2007], aff'd *People v White* 10 NY3d 286 [2008], cert.denied *White v New York*, 129 S.Ct. 221 [2008]), a CPL § 440 motion (March 9, 2010 [Demarest, J.], lv. denied July 2, 2010 [Leventhal, J.]), a petition for a writ of error *coram nobis* (*People v White*, 78 AD3d 868 [2d Dept 2010], lv. denied *People v White*, 17 NY3d 803 [2011]), and a petition for a writ of *habeas corpus* (*White v Bellnier*, 2011 WL 6780995 [E.D.N.Y. 2011]). Defendant now moves for a second time to

vacate his judgment of conviction pursuant to CPL § 440.10.

Defendant first contends that he was arrested unlawfully in his home and that his ensuing confession was the fruit of this unlawful seizure. He further faults counsel for failing to challenge his warrantless arrest. These claims, both of which are based upon matters or omissions appearing on the record, are procedurally barred by defendant's unjustifiable failure to raise them on appeal (CPL § 440.10[2][c]; *see People v Cooks*, 67 NY2d 100, 103 [1986]). Additionally, defendant raised substantially the same arguments in his previous CPL § 440.10 motion, which the court rejected as meritless because it had already determined that the statement of Tyesha Kenney, defendant's girlfriend, provided probable cause to support defendant's arrest. Accordingly, the instant claims are procedurally barred pursuant to CPL § 440.10(3)(b), which permits the court to deny a motion when "the ground or issue raised...was previously determined on the merits upon a prior motion or proceeeding in a court of this state..."

Defendant next argues that counsel was ineffective for failing to call Tyesha Kenney as an alibi witness. In a detailed statement to the District Attorney's Office, Kenney stated that she left school in Queens between 8:30P.M. and 9:00P.M. and called defendant's cell phone from a pay phone once she reached the Broadway Junction subway stop. She had tried calling defendant several times before that but defendant did not answer. Kenney stated that when defendant answered, "I asked him what was wrong because he sounded nervous and he told me he wasn't gonna tell me until I got there–till I got to his house." She arrived at defendant's home in Brooklyn between 9:30P.M. and 10:00P.M. and defendant told her that "he shot the guy that beat him up, when he was 16." Defendant explained that at around 8:00P.M. he walked up behind the

victim and shot him twice in the head with a .25 caliber pistol.

Kenney was familiar with that particular gun and had seen it many times laying on the floor in defendant's house. Defendant told her that after the shooting he gave his bloody clothing to his wife, with whom he no longer lived, and the gun to a friend. Kenney helped him move the gun because he did not trust the friend who was keeping it for him and he was anxious about being tracked down by the police. Defendant has appended to his motion a transcript of Kenney's interview, from which he extrapolates that counsel should have discerned an alibi. According to defendant, Kenney would have testified that she spoke to defendant at 8:45P.M. at home, where he remained through the time she arrived there, and that because the murder occurred at 9:38P.M., this testimony would have provided him with an alibi.[1]

In viewing the timeline presented in Kenney's statement, it would not have been reasonable for counsel to discern an alibi. Accordingly, the claim that counsel was ineffective for failing to call her as an alibi witness is without merit. Under the federal standard for ineffective assistance of counsel, the defendant must first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on "prevailing professional norms (*Strickland v Washington*, 466 US 668, 687-688 [1984]). Second, the defendant must "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different (*Strickland* at 693). "The likelihood of a different result must be substantial,

[1]According to the trial evidence, the shooting took place at approximately 8:30P.M., not 9:38P.M. as defendant now asserts. The only reference to 9:38P.M. is in the testimony of the responding officer, who received a radio call at that time stating that a person had been shot.

not just conceivable" (*Harrington v Richter*, __ U.S.__, 131 S.Ct. 770, 792 [2011]).

Under New York law, counsel's representation is adequate "so 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 NY2d 137, 147 [1981]; *People v Benevento*, 91 NY2d 708 [1998]). With respect to prejudice under state law, "the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*Benevento* at 714). The "question is whether the attorney's conduct constituted 'egregious and prejudicial' error such that defendant did not receive a fair trial" (*id.* at 713, quoting *People v Flores,* 84 NY2d 184, 188 [1994]). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for counsel's conduct (*People v Baldi* at 146; *People v Rivera,* 71 NY2d 705, 709 [1988]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

Counsel had no basis to call Kenney as an alibi witness because her statement recounting defendant's admission of guilt was internally consistent and credible. The People presented evidence that the shooting took place around 8:30P.M. The timeline provided by Kenney indicates that defendant would have been free to commit the murder sometime after 8:00P.M., during which time he could not be reached by phone, and before Kenney spoke to him on his cell phone from Broadway Junction. In addition, she has not recanted her statement implicating defendant; nor has defendant submitted a sworn affidavit indicating that she was able and willing

to testify as to defendant's whereabouts on the night of the murder (*see* CPL § 440.30[4][b]).

Moreover, Kenney's statement was consistent with the other trial evidence, including defendant's own admission of guilt. At trial, the victim's friend gave testimony that she had witnessed defendant threaten to shoot Hansen. Defendant also confessed to police that he had killed Hansen in retaliation for a robbery and beating that had taken place sixteen years ago, providing the same story that he had told Kenney. Before defendant was questioned at the precinct, Kenney had warned police that defendant would claim to have been at his friend Mike's house on the night of the murder. Defendant, consistent with Kenney's warning, gave that very alibi but proceeded to confess upon further questioning. In sum, Kenney's statement only bolstered the People's case and left counsel with little room for doubt. Accordingly, counsel would have had grave concerns in calling Kenney to the stand as a defense witness because she had previously inculpated defendant and would have likely harmed the defense at trial. Counsel's decision not to call her as a potentially hostile defense witness was objectively reasonable and did not prejudice defendant (*Strickland* at 687, 693).

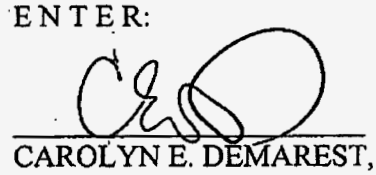
Moreover, defendant received meaningful representation. Faced with the compelling evidence of defendant's own post-arrest confession, counsel pursued a strategic defense which sought to undermine the credibility of the detectives who took the statement and to argue that the statement was false or had never been made. The record indicates that counsel made opening and closing statements which advanced this defense theory, made appropriate objections and thoroughly cross-examined the People's witnesses. In viewing the proceedings as a whole, defendant received competent representation as part of a fair trial (*Benevento* at 708, *Stulz* at

284).

Accordingly, the motion is denied.

This decision shall constitute the order of the court.

ENTER:



CAROLYN E. DEMAREST, J.S.C.

This decision

You are advised that your right to an appeal from the order determining your motion 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.

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 District Attorney.

APPELLATE DIVISION, 2ND 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