

People v Roman

2013 NY Slip Op 31644(U)

July 9, 2013

Supreme Court, Kings County

Docket Number: 1621/08

Judge: Joel M. Goldberg

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 22

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs. -

HON. JOEL M. GOLDBERG
IND. NO. 1621/08
DATE: JULY 9, 2013

DAVID ROMAN

DEFENDANT.

The defendant's CPL 440.10 motion, dated February 25, 2013, to vacate the March 2, 2010 judgment convicting him after a jury trial of Robbery in the First Degree and sentencing him to five years' imprisonment and five years' post-release supervision (Goldberg, J. at trial and sentence; the sentencing minutes erroneously have the name of a different judge), upon consideration of the People's Answer, dated May 13, 2013, and the defendant's Reply, dated June 14, 2013, is denied.

The defendant's conviction was unanimously affirmed on direct appeal. *People v. Roman*, 91 AD3d 974 (2nd Dept. 2012). Leave to appeal to the Court of Appeals was denied. 18 NY3d 997 (2012).

1. Grand Jury Claims

The defendant contends that he received ineffective assistance from his then Legal Aid Society attorney when he testified on his own behalf before the Grand Jury in this case, because his attorney at that time did not adequately prepare him concerning how to testify about his prior youthful offender adjudication resulting in the defendant falsely testifying that he was never arrested prior to this case (Motion at 4-5). The defendant also claims that this attorney misinformed the defendant that the defendant had to testify before the Grand Jury. The defendant argues this improper advice resulted in false testimony that was used to

impeach the defendant at trial (Motion at 5).

The defendant also claims that his subsequent attorney, who represented the defendant at the trial, should have, but did not, submit a motion to dismiss the indictment, because the defendant's own false testimony impaired the integrity of the Grand Jury proceedings (Motion at 5).

2. Failures to Investigate

The defendant also contends that trial counsel was ineffective for failing to obtain certain video surveillance recordings from surveillance cameras at 370 Bushwick Avenue and 390 Bushwick Avenue which the defendant claims would have shown that he did not participate in the robbery. The videos, the defendant claims, would show he was with Trevor Ford at the time of the robbery.

In addition, the defendant claims trial counsel did not call at trial certain individuals, Joe Freeman and Juan Fernandez, as "character witnesses," and that trial counsel also did not call Trevor Ford as an exculpatory eyewitness (Motion at 6-8). (Although the defendant's motion, at 8, asserts Trevor Ford was an exculpatory witness, the motion does not include an affidavit from Trevor Ford.)

The defendant asserts that, Mr. Mendez, the manager of two buildings at the scene, 370 and 390 Bushwick Avenue, told the defendant that surveillance videos showed the defendant with Trevor Ford pressing an elevator button in building 390 (Motion at 9).

3. Pre-Trial Hearing Claims

The defendant contends trial counsel did not effectively cross-examine Detective Paredes at the *Huntley* hearing, citing certain portions of the record, resulting in defense counsel "bolster [ing] the witnesses' testimony" (Motion at 9-10).

The defendant also contends trial counsel was ineffective for failing to explain to him the purpose of the *Wade* and *Huntley* hearings, so that the defendant could intelligently decide whether to testify, asserting that the results would have been more favorable to the defendant if the defendant had testified (Motion at 10). Also, the defendant argues that

defense counsel was ineffective for electing to proceed at the hearing after the Detective testified that certain notes about the case constituting *Rosario* material in a spiral notebook were not turned over by the People (Motion at 10-11).

4. Trial Claims

The defendant further argues that at trial, due to “lack of pre-trial investigation,” counsel ineffectively cross-examined the complaining witness, Henry Mendoza, and Detective Paredes, citing various portions of the trial record (Motion at 11-13).

The defendant argues that during the trial counsel was ineffective in deciding and persuading the defendant to agree not to call the above-mentioned character witnesses (Motion at 13-14).

The defendant also claims he wanted to testify in his own defense but declined to do so based upon the advice of trial counsel, and that when the defendant told the Court that he understood that the decision to testify was his choice and not counsel’s, that response was also based on the advice of counsel (Motion at 14). The defendant also asserts that he did not have sufficient time to make an “informed choice,” but does not provide further details about this (Motion at 14-15).

The defendant next claims that trial counsel ineffectively examined Yudy Perez, who was called as a defense witness (Motion at 15-16) by failing to elicit certain details about the crime scene.

The defendant also argues that trial counsel was ineffective for requesting a specific jury charge on consciousness of guilt as a result of counsel’s “failure to investigate the facts and the law” (Motion at 16-17).

Further, the defendant claims that counsel’s trial strategy was constitutionally ineffective as a result of “lack of investigation and preparation,” citing certain statements in counsel’s opening statement and summation (Motion at 17).

The defendant also claims counsel was ineffective for failing to call an expert on eyewitness identification (Motion at 18).

Discussion

1. Grand Jury Claims

The defendant claims that prior to testifying before the Grand Jury, his attorney advised him to testify that he had no prior arrests, when, in fact, he had a prior sealed youthful offender adjudication and that this advice resulted in his being impeached in the Grand Jury and at trial to the extent that otherwise he would not have been either indicted or convicted. The defendant presents no factual support for this claimed improper advice other than his own affidavit. It is more probable that the defendant misunderstood the attorney's advice on this subject, than the attorney actually giving the defendant advice not to tell the truth and that he was required to testify.

The fact that the defendant himself knew he had been previously arrested and knew at the time of his Grand Jury testimony that his assertion of no prior arrests was false, should estop him from asserting that he should now benefit from his own false testimony even in the unlikely event it had been suggested by his attorney. *See People v. Avery*, 129 AD2d 852, 857 (3rd Dept. 1987) (the defendant "is not in a position to ask this Court to undo the consequences of his own conscious wrongdoing [i.e. false testimony] on the ground that he was encouraged in this attempt by his defense attorney."), citing *People v. Nelli*, 29 AD2d 725, 726 (3rd Dept. 1987).

The defendant's further claim that his then Legal Aid Society attorney misinformed him that he was obligated to testify before the Grand Jury is supported only by the defendant's bald assertion and, as with his allegation concerning the allegedly improper legal advice he received about testifying he had no prior arrests, is simply not worthy of belief. Indeed, the typical waiver of immunity discussion with counsel that precedes Grand Jury testimony, as well as the immunity waiver proceeding itself before the Grand Jury prior to the defendant being sworn, would have established that the defendant was aware his appearance before the Grand Jury was voluntary. Thus, the waiver of immunity document and proceeding would be evidence that this claim is without merit. CPL 440.30 (4) (d). The defendant's claim that trial counsel was ineffective for not making a motion to dismiss the

indictment based on the defendant's false grand jury testimony is likewise without merit.

2. Failures to Investigate

The defendant claims trial counsel was ineffective for not obtaining certain video surveillance footage from buildings in the area which the defendant claims "Mr. Mendez," a building manager, told him showed the defendant and "Trevor Ford" pressing an elevator button inside one of the buildings near the scene of the robbery, 390 Bushwick Avenue.

However, even if such evidence existed, the defendant's motion does not state the date and time of this footage or how it would tend to exculpate the defendant. To the contrary, it would tend to show the defendant was with Trevor Ford in the vicinity of the crime, which would corroborate the defendant's statement to the police that he was with Trevor Ford in the park outside the buildings watching two other people attack the victim.

The defendant does not claim there is video evidence to establish conclusively that the robbery was taking place at the time the defendant was in 390 Bushwick Avenue with Trevor Ford pressing an elevator button.

Further, the victim told the investigating detective that two of the robbers had run into that building. If this is when the elevator button was pressed in the "missing" surveillance video by the defendant and Trevor Ford, it would support the victim and not conclusively establish an alibi for the defendant.

In fact, in his Reply, at 13, par. 44, the defendant claims he was with Trevor Ford and actually witnessed the robbery before going to 390 Bushwick with Trevor Ford. Thus, the defendant's version given in his own Reply negates his claim that the "missing" surveillance video from 390 Bushwick would have provided an alibi.

3. Pre-Trial Hearing Claims

The defendant's claims concerning the pre-trial hearings were all capable of being adequately reviewed on direct appeal and may not, therefore, be reviewed on this motion. CPL 440.10 (2) (c). The defendant's attempt to frame these arguments as being the consequence of off-the-record failures to investigate does not change this result.

4. Trial Claims

A. The defendant has not established that trial counsel was ineffective for not calling Joe Freeman and Juan Fernandez (who had two prior felony convictions and six misdemeanor convictions [See People's Answer at 11]) as "character" witnesses, and Trevor Ford as an alibi witness, because no affidavit from these individuals has been submitted to support the defendant's assertions concerning what they would have had to offer. *People v. Ford*, 46 NY2d 1021, 1023 (1979). Neither has the defendant explained his failure to do so. *People v. Ozuna*, 7 NY3d 913, 915 (2006).

In his Reply, at 5-6, par. 21, the defendant claims he would now need the services of a private investigator to obtain statements from these witnesses. However, each of these witnesses was available at the time of trial, and the defendant offers no explanation of any unsuccessful efforts he made to contact them after the trial to support this motion.

Further, it appears from the record, as noted in the People's Answer at 8-9, that the decision not to call Freeman and Fernandez as character witnesses was a strategic decision by trial counsel made after discussion with the defendant and not the result of trial counsel's failure to adequately investigate the case as is now claimed by the defendant.

As to defense counsel's decision not to call Trevor Ford as an exculpatory alibi witness to testify that he and the defendant were in the vicinity at the time of the robbery but did not participate, this also appears to have been a reasonable strategic decision based, if on nothing else, Ford's prior conviction for First Degree Robbery which would have been made known to the jury as well as his pre-existing friendly relationship with the defendant. It appears objectively reasonable for defense counsel not to want the jury to know that the defendant was in the company of someone with a prior robbery conviction as an explanation for why the defendant was not involved in this robbery.

As noted in the People's Answer at 12, the decision not to call these three witnesses was not final until the People rested their case without calling Yudy Perez who had been with the victim prior to the robbery. The defense then called Yudy Perez as a witness who

testified that the victim had twice told her that the defendant had been present but not involved in the robbery. Rather than dilute the impact of this testimony with the testimony of questionable value from the above three uncalled witnesses, the decision not to call these witnesses was objectively reasonable. *People v. Madison*, 31 AD3d 974 (3rd Dept. 2006) (failure to call character witnesses, standing alone, does not constitute ineffective assistance of counsel without a showing of an absence of a strategic or other legitimate explanation for not doing so); *People v. Caban*, 5 NY3d 143, 152 (2005); *People v. Rivera*, 71 NY2d 705, 709 (1988).

B. The defendant makes several claims of ineffective assistance of counsel based on pre-trial hearing and trial conduct that was on the record and fully capable of being reviewed on direct appeal. As noted above, these are not genuine “mixed claims” of ineffective assistance concerning both on and off-the-record conduct that could not be heard on direct appeal. *See, People v. Maxwell*, 89 AD3d 1108 (2nd Dept. 2011). Therefore, such claims cannot be reviewed on this motion. CPL 440.10 (2) (c).

Although the defendant attempts to preface these claims by stating that such alleged errors by trial counsel were due to his failure to conduct an adequate pre-trial investigation, and thus circumvent the bar to raising these alleged on-the-record errors on this motion, the alleged errors about which the defendant complains were sufficiently clear on the record to have permitted their adequate review on direct appeal.

It is noteworthy that the only two issues raised on the defendant’s direct appeal were the sufficiency of the evidence and the prosecutor’s summation. To now allow these on-the-record issues to be reviewed under the rubric of “ineffective assistance of counsel” by combining that allegation with a claim of “ineffective pre-trial investigation” would effectively eliminate the statutory purpose underlying CPL 440.10 (2) (c) requiring that on-the-record claims of error be raised on direct appeal.

For a detailed discussion of these issues where it will be plainly seen that these issues were all on-the-record, as well as meritless – which explains why none of them were raised

as issues on the defendant's direct appeal – *see* the People's Answer at 12-16.

C. The defendant claims that trial counsel acted improperly when he advised the defendant to tell the Court that the defendant understood that it was the defendant's choice whether to testify and that counsel's advice to the defendant not to testify was deficient, because trial counsel did not adequately investigate the case. However, this claim concerning "inadequate investigation" is simply not supported by "sworn allegations substantiating or tending to substantiate" this claim. CPL 440.10 (4) (b). The defendant's motion does not provide the substance of the testimony the defendant would have given or how his attorney's "failure to investigate" prevented him from giving that testimony.

In his Reply at 12, par. 41 - 13, par. 44, the defendant provides a detailed exculpatory version which he now claims he would have given if he had testified at trial. It is noteworthy in this obviously self-serving and belated version, that these details were not mentioned by the defendant either in his Grand Jury testimony or in his statements to the police. The defendant's attempt in his Reply, at 13-14, par. 46, to explain these omissions by asserting he "was going through a disassociative process," and "had a particular motivation for omitting details," and "was also doubting his own recall," and "had a specific reason for suppressing certain information," does not provide any reason to believe that his current version is any more truthful than his prior ones.

What is controlling on this motion is that the defendant chose not to testify at trial and, further, even if his trial counsel had advised him not to do so, that advice, based on this record, has not been shown to have been constitutionally deficient.

The defendant also claims his trial counsel failed to properly examine Yudy Perez, who was called as a defense witness concerning the dimensions of the crime scene, where the defendant was at various times, and who the defendant was with. The defendant in his motion provides all these details as he recalls them. The defendant was in a position to provide this information to defense counsel. The fact that Yudy Perez, called as a defense witness, did not recall the details in a way that would have possibly been more helpful to the

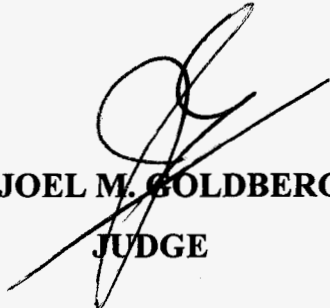
defendant does not establish that defense counsel was ineffective.

The defendant also claims trial counsel was ineffective for consenting to a jury charge on "consciousness of guilt" relating to alleged inconsistent statements to the police and testimony in the Grand Jury. The prosecutor in summation, regardless of whether the charge was given, would not have been precluded from arguing that the defendant's inconsistent statements demonstrated a consciousness of guilt. Therefore, the language of the Court's charge, which tended to minimize the probative value of this evidence, and trial counsel's use of this language in summation, served to minimize the strength of the prosecution's summation on this subject (*See People's Answer at 18-22*).

The defendant's claim that defense counsel was ineffective for not hiring an expert on eyewitness identification fails to take into account the complaining witness's testimony that he recognized the defendant as someone he had seen three to four times a week prior to the incident and the defendant's own statements that he was present but did not participate in the robbery.

Accordingly, the defendant's motion is denied.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

ENTERED
JUL 09 2013
NANCY T. SUNSHINE
COUNTY CLERK