

**People v DeBerry**

2013 NY Slip Op 32011(U)

August 21, 2013

Supreme Court, Kings County

Docket Number: 6281/99

Judge: Lawrence S. Knipel

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MEMORANDUM

SUPREME COURT : KINGS COUNTY (Civil Term)

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People of the State of New York,

By: Lawrence Knipel, J.S.C.

- against -

Dated: August 21, 2013

Eric DeBerry,

Indictment No.: 6281/99

Defendant.

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Defendant pro se once again moves to vacate the judgment of conviction, this time on the ground that he was denied the effective assistance of counsel "during a critical state of the proceedings."

To review the salient facts: on March 28, 2000, this court sentenced defendant to 25 years to life upon the conviction of robbery in the first degree; 20 years to life for assault in the first degree; and 20 years to life upon the conviction of criminal possession of a weapon in the second degree, to run concurrently. The court noted that the evidence was strong, the crime brutal and that defendant had an egregious criminal background. The sentencing minutes reflect that defendant said he was sorry for what happened to the victim "but I didn't do it to him" and that he was sorry his family "had to go through this again, especially for something that I didn't do."

Defendant moved, prior to sentencing, *inter alia*, to set aside the verdict due to newly-

discovered evidence, to wit that someone else confessed to the crime. The court listened to a tape recording and heard oral argument on the motion, and denied it. In January 2003 defendant moved to vacate the conviction due to newly discovered evidence, this time providing an affidavit from the individual allegedly claiming to have committed the crime, Roberto Velasquez. A hearing was held at which Velasquez testified, and the motion was denied. The Appellate Division denied defendant's motion to appeal that denial, and to consolidate it to his direct appeal. In April 2005 the Appellate Division affirmed the judgment of conviction (17 AD3d 480). The Court of Appeals denied leave to appeal (5 NY3d 787).

In December 2006 defendant moves to vacate his conviction alleging that he was denied effective assistance of trial counsel because of the failure to present Velasquez and another individual as witnesses. This motion was denied in July 2007. Another motion was made to vacate the judgment of conviction for ineffective assistance of trial counsel, which was denied in April 2009. In October 2009, this court denied defendant's motion to reargue.

Defendant moved again to vacate his conviction on the ground that he was improperly adjudicated as a persistent violent felony offender. The District Attorney agreed, and on March 16, 2010, this court resentenced defendant to a determinate term of imprisonment of 25 years as a second violent felony offender and to five years of post-release supervision. The court explained that defendant had been arrested in October 1992 and charged, *inter alia*, with two counts of robbery in

the first degree; in December 1992 in New York County and charged with robbery in the second degree; and in March 1993 in Kings County and charged, *inter alia*, with two counts of robbery in the first degree. From February through April 1993, defendant pleaded guilty, in each of these three matters, to attempted robbery in the second degree. Notwithstanding that defendant was convicted of a violent felony offense in each of these three matters, they did not qualify defendant as a persistent violent felony offender since they were committed prior to his being sentenced on any of them.

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Concurrently, defendant filed petitions for habeas corpus which ultimately were denied, and on April 16, 2013, a petition for a writ of certiorari was filed with the United States Supreme Court.

The current motion again alleges ineffective assistance of trial counsel, for not determining that he was not a persistent violent felony offender and for not securing a more advantageous plea offer prior to trial, which, defendant asserts, he would have accepted. Defendant annexes the supporting affirmation of his former trial counsel, that prior to trial, the assistant district attorney made an offer of 15 years to life for a plea of guilty to the top charge. That offer, with life as the necessary maximum, was, it is alleged, based on the belief defendant was a persistent violent felony offender. The offer was purportedly conveyed to defendant, who rejected it.

Defendant pro se argues that his trial counsel's failure to adequately investigate his criminal history was "extremely prejudicial" and had counsel done so, he would have secured "a more

advantageous plea for the defendant to the life sentence he proffered on the respondent's behalf." Had counsel corrected this "significant error" it is argued, he "would have been in a favorable position to negotiate a plea for the defendant's status as a predicate violent felony offender."

To establish a claim of ineffective assistance of counsel under the Federal Constitution, a defendant is required to show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different (*see People v Thomson*, 46 AD3d 939 [3d Dept. 2007]; *Pham v United States*, 317 F3d 178 [2003]). Under New York law, courts must view a case in its entirety to determine whether the defendant received meaningful representation, and the defendant must show he was prejudiced by counsel's errors (*People v Thomson, supra*; *People v Baldi*, 54 NY2d 137 [1981]; *People v Williams*, 299 AD2d 580 [2002]).

In *People v Thomson, supra*, defendant claimed he was prejudiced by counsel's failure to ascertain that a prior New Jersey conviction did not constitute a predicate felony. The Appellate Division, Third Department, held that counsel's failure to verify defendant's criminal history prior to plea negotiations constituted inadequate legal assistance (*cf. People v Mosby*, 78 AD3d 1371 [3d Dept. 2010][“even if we were to find that counsel erred in failing to challenge the predicate felony offender statement, that error, in our view, did not rise to the level of ineffective assistance of counsel under the circumstances of this case]). However, the court held that defendant had to also establish that the People would have offered a more favorable plea deal and that if such a deal were

offered defendant would have pleaded guilty. The Third Department was unpersuaded that a change in defendant's status would have led to a more favorable plea offer, "especially considering the serious nature of the charges here" (*People v Thomson*, 46 AD3d at 941).

On the other hand, in *People v Wimberly* (86 AD3d 651 [3d Dept. 2011]), it was assumed that due to a prior federal conviction, defendant was a violent predicate felon, but the People failed to enumerate a State statute under which defendant could be considered a predicate felon. The Appellate Division, Third Department, found "a question as to whether counsel provided inadequate legal assistance by failing to detect and correct the mistaken impression of defendant's sentencing status" and held that "defendant raised an issue sufficient to require a hearing as to whether counsel's representation was deficient and, if so, whether defendant was prejudiced thereby" (86 AD3d at 653).

In *People v Garcia* (19 AD3d 17 [1<sup>st</sup> Dept. 2005]), the People offered a sentence based on the incorrect assumption that defendant was a persistent violent felony offender rather than a second violent felony offender, apparently because defendant was sentenced on the same day for two prior violent felonies which should not have been treated as two separate predicate convictions. The Appellate Division, First Department, held (19 AD3d at 21-22) that a hearing should have been held to determine whether there was a reasonable probability that a more favorable plea bargain would have been struck but for the mistake, and whether defendant would have accepted such an offer. The Court explained that an indeterminate term of 16 years to life leaves open the possibility that a

defendant may be denied parole and remain in prison for his entire life, while a determinate term guarantees release after the term is served.

In *People v Baker* (85 AD3d 935 [2d Dept. 2011]), defendant claimed he was incorrectly sentenced as a persistent violent felony offender based on the mistaken belief that a conviction for attempted criminal possession of a weapon in the third degree was a violent felony conviction, and that he did not receive effective assistance of counsel because trial counsel did not properly investigate his criminal history. The Appellate Division, Second Department, held these contentions required a hearing (85 AD3d at 936).

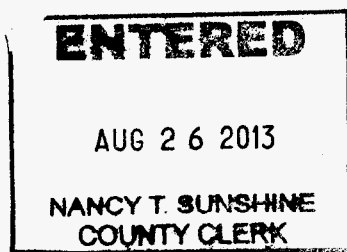
As noted above, defendant submits an affirmation from his trial counsel in which counsel stated he recalled “this trial distinctly,” that the Assistant District Attorney offered a plea of 15 years to life in the mistaken belief defendant was a persistent violent felony offender, and that defendant rejected the plea. In reply papers in further support of his motion, defendant submits a partial transcript of an appearance before trial, before Justice Michael Juviler, attended by the very same trial counsel and the same Assistant District Attorney who would eventually try the case. At that appearance, the Judge stated clearly that if defendant was guilty he would be a second felony offender, i.e. there was thus no mistake as to his status. The ADA stated for the record that he conveyed an offer of 15 years to defense counsel. Defendant argues in his reply papers that he “properly raised his ineffective assistance of counsel claim for counsel’s failure to adequately convey

the plea offer” thus suggesting that counsel was ineffective because he did not convey the plea offer of 15 years. However, in the complete transcript obtained by the People, the clerk states explicitly “Defendant is in the courtroom.”

The crux of defendant’s motion is that counsel was ineffective for not ascertaining his correct status, to wit second violent felony offender, and for not obtaining and/or not conveying a more favorable plea of a definite term of 15 years. This court agrees with the People that the documentary evidence shows incontrovertible evidence that plaintiff *was* offered a plea of a definite term of 15 years before the confusion of his status, that he was in the courtroom when that offer was made, and that he nonetheless rejected it and chose to go to trial. On this record it cannot be said that counsel provided ineffective assistance, because when there was no confusion as to his status, an offer defendant considered advantageous was obtained and rejected. No hearing is necessary, and no evidence is offered to contradict the record demonstrating that defendant was offered the relatively favorable plea of a definite term of 15 years and that he rejected it (*see People v Mims*, 94 AD3d 909 [2d Dept. 2012]).

Accordingly, the motion to vacate the judgment of conviction is denied.

ENTER,



J. S. C.