

People v Grist
2013 NY Slip Op 33487(U)
December 3, 2013
Supreme Court, Kings County
Docket Number: 4047/2008
Judge: John G. Ingram
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PT. 21

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THE PEOPLE OF THE STATE OF NEW YORK, DECISION AND ORDER

-against-

Indictment No. 4047/2008

DAVID GRIST,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, after a jury trial in Supreme Court, Kings County on September 9, 2009, of Grand Larceny in the Fourth Degree, and related charges. On November 25, 2009, Defendant was sentenced, as a persistent felony offender, to concurrent terms of imprisonment of fifteen years to life on the count of Grand Larceny in the Fourth Degree, fifteen years to life on the count of Criminal Possession of Stolen Property in the Fourth Degree and one year on the count of Criminal Mischief in the Fourth Degree. (Ingram, J., at trial and sentence).

Defendant appealed from his judgment of conviction. Defendant claimed that the evidence was legally insufficient to establish that the stolen card was a credit card, that the amendment of the indictment to change the stolen subject matter from a credit card to a credit card or a debit card was improper and the adjudication of Defendant as a persistent felony offender was an abuse of discretion. In a decision dated September 19, 2012, the Appellate Division, Second Department, affirmed Defendant's judgment of conviction. People v. Grist, 98 A.D.3d 1061 (2d Dept. 2012). The Second Department held that the evidence was legally sufficient and the verdict was not against the weight of the evidence; the amendment of the indictment was proper and the adjudication of

Defendant as a persistent felony offender was a proper exercise of discretion. Grist, 98 A.D.3d at 1061. On February 19, 2013, the Court of Appeals denied Defendant's leave application. People v. Grist, 20 N.Y.3d 1061 (2013)(Lippman, Ch. J.).

The Motion Before the Court

In pro se motion dated June 13, 2013 Defendant now moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the following grounds: (1) Officer Jaber's testimony was false; (2) Defendant has newly discovered evidence that the card at issue was not a credit card; (3) the grand jury testimony about the number of cards and the damage to the car was false; (4) the failure to preserve the card at issue prejudiced Defendant; and (5) ineffective assistance of counsel for failure to file an omnibus motion or to seek preclusion of lost evidence. Defendant also moves to set aside his sentence, on the ground that defense counsel was ineffective for failing to challenge Defendant's persistent felony conviction.

The People filed response on October 8, 2013 arguing that Defendant's claims are procedurally barred from review and without merit.

In deciding the instant motion, this Court considered Defendant's moving papers, the People's papers in opposition, the court file, transcripts and applicable law.

The Court's Decision

Pursuant to C.P.L. § 440.10(2)© a motion to vacate a judgment of conviction must be denied when, although sufficient facts appear on the record to have permitted adequate review, the defendant unjustifiably failed to raise the issue on his direct appeal. The record presented

sufficient facts from which Defendant could have raised all of his present claims. Since these issues could have been raised on direct appeal, it cannot properly be raised on the instant motion.

C.P.L. §440.30 (4) (a) provides that a court may deny a motion to vacate a judgment without conducting a hearing “if the moving papers do not allege any ground constituting a legal basis for the motion.” Defendant’s allegations regarding Officer Jaber’s testimony in the grand jury and evidence in the grand jury as to the number of cards in the wallet and the damage to the complainant’s car are insufficient to state “any ground constituting a legal basis for the motion.”

Defendant appears to base his claim on CPL 440.10 (1) ©, which provides that such a motion may be granted when “[m]aterial evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false.” Defendant’s allegations are, however, insufficient to state this ground. Officer Jaber’s testimony and evidence regarding the cards and damage to complainant’s car was adduced in the grand jury, and not at trial. Moreover, the testimony was not “material” to a determination of Defendant’s guilt or innocence. See People v James, 226 AD2d 393 (2d Dept 1996)(holding that whether witness was charged with sale of controlled substance or use and possession was not material to jury’s determination of whether Defendant murdered one person and assaulted another). Defendant’s allegations regarding Officer Jaber’s testimony and evidence presented in the grand jury do not state any of the other grounds for a motion to vacate judgment enumerated in CPL 440.10 (1).

The court is also authorized to deny a motion to vacate judgment without conducting a hearing if “the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts”

(CPL 440.30 [4] [b]). Here, the essential facts Defendant seeks to establish are that the witnesses perjured themselves, and that the prosecutor knowingly adduced the perjured testimony. The exhibits and allegations Defendant relies upon to prove that the grand jury testimony and exhibits were false, do not establish that. Defendant's claim that the prosecutor knew the testimony was perjurious is not supported by any allegation of fact. Thus, Defendant's allegations of wrongdoing are conclusory, speculative, and unsupported by any evidence, warranting summary denial. People v Brown, 56 NY2d 242 (1982); People v Stern, 226 AD2d 238 (1st Dept 1996) lv denied 88 NY2d 1072 (1996); People v Gates, 168 AD2d 995 (4th Dept 1990), lv denied 77 NY2d 906 (1991).

Defendant also claims that he has newly discovered evidence that the card at issue was not a credit card. As the Second Department held, a jury could convict if it found that the card at issue was either a credit card or debit card. People v. Grist, 98 A.D.3d 1061, 1062 (2d Dept. 2012). Therefore, Defendant is not entitled to relief on this claim. See C.P.L. 440.30(1). New York Criminal Procedure Law provides that trial judge may, on timely motion by the defendant, vacate a judgment after its entry when "new evidence has been discovered since the entry of a judgment . . . which could not have been produced by the defendant at the trial even with due diligence on his part [which would] create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant." C.P.L. § 440.10(1)(g). In order to qualify as newly discovered evidence, the evidence must: 1. be such as will probably change the result if a new trial is granted; 2. have been discovered since the trial; 3. be such as could have not been discovered before the trial by the exercise of due diligence; 4. be material to the issue; 5. not be cumulative to the former issue; and, 6. not be merely impeaching or

contradicting the former evidence.” People v. Salemi, 309 N.Y. 208, 215-216 (1995), cert. denied, 350 U.S. 950 (1956)). In addition, it is implicit in the requirements of newly discovered evidence is that the evidence be admissible at trial. People v. Dabbs, 587 N.Y.S.2d 90 (Sup. Ct. Westchester Co. 1991). This Court finds that the Defendants’ submissions are insufficient to support holding a hearing on the Salemi factors.

This Court also rejects Defendant’s claims that the failure to preserve the credit/debit card prejudiced him. Defense counsel requested an adverse inference charge to be read to the jury due to the failure of the People to produce the credit/debit card at trial. The Court granted defense counsel’s request and informed the jury that they could draw an inference that a defense inspection of the card would not have supported or would have contradicted the testimony of a witness.

This Court also rejects Defendant’s allegation that his defense counsel was ineffective for failing to file an omnibus motion and to seek preclusion of witnesses because of lost evidence. 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. This Court cannot second guess defense counsel's tactics or strategies pursued during the hearing. "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).

Defendant received all documents during open file discovery in lieu of motion practice. In addition, Defendant was not entitled to any suppression hearings. In addition, defense counsel requested the Court to preclude testimony about evidence that was not preserved. This Court denied that request, but did grant defense counsel's request for an adverse inference. 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.

Finally, Defendant claims that he should not have been sentenced as a persistent felony offender because the crime he was convicted of in this case was a misdemeanor. The jury convicted Defendant of Grand Larceny in the Fourth Degree and Criminal Possession of Stolen Property in the Fourth Degree, which are both felonies. In addition, the Second Department held that the evidence on each count was legally sufficient and that the verdict was not against the weight of the evidence. Grist, 98 A.D.3d 1061 (2d Dept. 2012). Therefore, Defendant’s sentence was legally correct.

Accordingly, Defendant’s motions to vacate the judgment of conviction and to set aside his sentence are Denied.

This opinion constitutes the Decision and Order of this Court.

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, Second Department, 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.

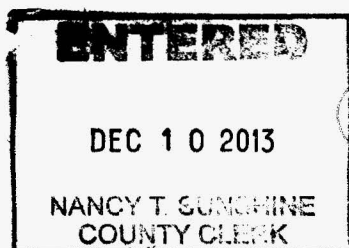
The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney of Kings County.

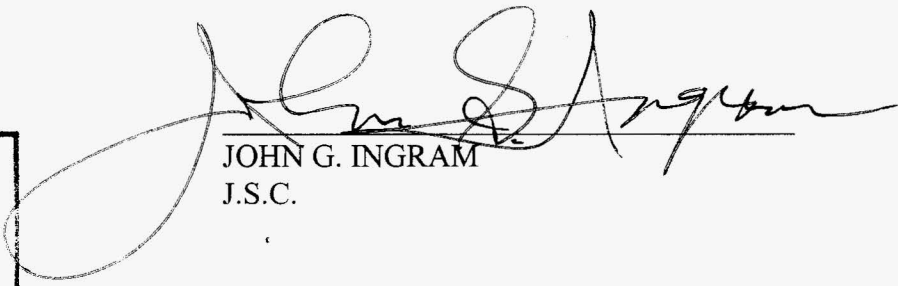
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Dated: December 3, 2013
Brooklyn, New York




JOHN G. INGRAM
J.S.C.