

People v Small

2014 NY Slip Op 30126(U)

January 6, 2014

Supreme Court, Kings County

Docket Number: 3093-2008

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER
Pro Se CPL § 440 Motion
OMAR SMALL :
IND. NO. 3093-2008
Defendant :
-----X
MICHAEL A. GARY, J.

Defendant moves *pro se*, to vacate the judgment of conviction pursuant to CPL § 440.10. The People have opposed this motion in a written response. Defendant subsequently filed reply papers, disputing the People’s arguments.

This case arose when Mr. Small approached the victim, Natasha Barnes, punched her several times knocking her to the ground, pulled off her backpack and walked out of the Ralph Avenue subway station. Ms. Barnes followed the defendant and called for assistance from two police officers who were at the station. Though they chased the defendant, they did not apprehend him until they received an anonymous tip a few weeks later as to his whereabouts. Mr. Small was subsequently arrested and charged in the above-mentioned indictment. With a panel waiting outside the courtroom, the defendant waived his right to a trial by jury. The defendant was convicted after a bench trial on March 31, 2010 of one count each of Robbery in the third degree (Penal Law § 160.05) and Petit larceny (Penal Law § 155.25). Defendant was acquitted of Robbery in the second degree, the top count of the indictment, as well as of Assault in the third degree (Penal Law § 120.00).

Following his conviction, the defendant was sentenced on April 27, 2010 as a second felony offender to an indeterminate term of a minimum of 3½ years and a maximum

of 7 years on the Robbery conviction, concurrent with one year on the Larceny count.

The defendant, through assigned counsel appealed his case to the Appellate Division Second Department, which denied his request to supplement his attorney's brief with a *pro se* filing (see People's exhibit, attached [last page], letter dated January 23, 2013 from the Appellate Division). The People filed opposition papers to the appeal. In a written decision, the Appellate Division affirmed Mr. Small's conviction at 110 AD3d 1106 (2d Dept., October, 2013). A call to the clerk's office of the Appellate Division indicated that as of the date of this decision no motion seeking leave to the Court of Appeals was filed. He has now filed the instant motion seeking to vacate the judgment.

CPL § 440.10 governs the court's decision making capacity in regards to the motion to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . .

2.(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, . . .

(b) the judgment is at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

3. Notwithstanding the provision of subdivision one the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .

(c) upon a previous motion made pursuant to this section , the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

The issues raised in this motion are couched in terms of ineffective assistance of counsel. The defendant alleges that he received ineffective assistance of counsel and therefore the judgment of conviction should be vacated. He alleges that his attorney failed to make pre-trial motions, failed to prepare for pre-trial hearings and did not argue the unconstitutionality of Mr. Small's arrest and subsequent identification. In addition, defendant argues his attorney failed in his cross examination of witnesses, failed to object to testimony during the trial, and failed to call an expert to testify about the "facial recognition test".

The People argue that the above issues concerning the ineffective assistance of defendant's attorney at trial could have been litigated and resolved by the appellate court before this motion was brought, and accordingly this court should deny the defendant's motion on that basis alone. CPL § 440 is quite clear in its mandate that if an issue could have or should have been raised on direct appeal, the court cannot grant the motion to vacate the judgment. They posit that the attorney's alleged failure to file pre-trial motions or to cross-examine one of the witnesses concerning an alleged inconsistent statement as reflected in a police document, constitute part of the court record and should have been raised on appeal. The People also point out that the defendant's appellate counsel chose only to raise the trial court's independent source determination, and did not affirmatively join in the defendant's *pro se* request to address the issue of an alleged Sixth Amendment violation of his right to counsel as well as the suppression of the videotaped surveillance evidence. The People argue that since these are issues that could have been raised, and as they were not, this

motion to vacate must be denied. *See People v. Cooks*, 67 NY2d 100 (1986).

The court agrees with the People: the defendant could have raised most of these issues in his appeal as they are record-based. However, the question of ineffective assistance of counsel concerns on and off-the-record conduct and thus, this court will consider the issues raised by the defendant. *People v Freeman*, 93AD3d 805 (2nd Dept., 2012); lv. denied, 19 NY3d 960 (Table).

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; *see* U.S. Const., 6th Amend.; N.Y. Const., art. 1, § 6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must show that counsel's representation was deficient and fell below "an objective standard of reasonableness" based on "prevailing professional norms" (*Strickland* at 687-88). It is his burden to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*id.* at 687). Moreover, counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions (*id.* at 690). Defendant must also "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 (*id.* at 693, 694). A reasonable probability in this context is "probability sufficient to undermine the outcome" (*id.* at 694). Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable" (*Harrington v Richter*, __ U.S. __, 131 S.Ct. 770, 792 [2011]).

In New York, the constitutional framework guaranteeing a defendant effective

assistance of counsel is violated when “defendant’s counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure” (*People v Turner*, 5 NY3d 476, 479 [2005]; *People v Baldi*, 54 NY2d 137 [1981]). In order to meet this standard, defendant “must overcome the strong presumption” that he was represented competently (*People v Ivanitsky*, 81 AD3d 976 [2d Dept 2011]; *lv. to appeal denied*, 18 NY3d 925, Feb. 2012, [Table]); *People v Myers*, 220 AD2d 461 [2d Dept]; *appeal denied*, 87 NY2d 905, Dec. 1995, [Table]). “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 the constitutional requirement will have been met” (*People v Baldi*, at 147). “[T]he 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” (*People v Benevento*, at 714).

Initially, defendant complains that his attorney failed to file pre-trial motions. However, a review of the court file indicates that in lieu of motions, defense counsel stipulated to receiving Open File Discovery. With his consent, the court conducted a review of the Grand Jury minutes, and ordered a *Dunaway/Payton/Wade* hearing on the admissibility of the identification evidence. In fact, it was due to the arguments of defense counsel that the victim’s identification testimony was eventually suppressed, thereby compelling the court to then proceed with an independent source hearing. Thus, defendant cannot support his contention that counsel was ineffective based on this argument.

Defendant next argues counsel’s ineffectiveness in that he failed to object to the admissibility of testimony regarding the anonymous “tip” that helped the police locate the defendant leading to his eventual arrest. He argues that by failing to call the “tipster”, by

failing to object to the admission of the police report about the tip, and further by failing to challenge the police officer's discovery of the defendant's address, counsel did not challenge the probable cause for defendant's arrest. The People argue and the court agrees, that the probable cause for the defendant's arrest did not stem from the anonymous tip, but rather from the complainant's identification of the defendant in a photo array. Defense counsel's argument at the hearing regarding the suggestiveness of the line-up and the propriety of the arrest at defendant's home were strategically sound and does not support a claim of ineffectiveness.

Similarly, counsel cannot be said to have acted ineffectively for failing to object to the admission of photos taken from a surveillance video as well as the videotape itself. Contrary to defendant's position, there is no legal basis upon which to have objected. In fact, the People point out, the defendant himself stipulated on the record to the authenticity of the videotape. It was eminently reasonable for defense counsel to concentrate on the content of the tape, not on its admissibility: because of an alleged discrepancy in the time-stamp, defense counsel vigorously questioned the complainant about the image on the tape purporting to be the defendant. Defense counsel rightly limited his arguments to those that had a basis for objection. *See People v. Caban*, 5 NY 3d 143 (2005). Defendant likewise argues that defense counsel should have hired an expert to testify about "the facial recognition test". However, as the People aptly point out, the choice to vigorously pursue through cross-examination the reliability of the identification by the complainant, was a legitimate trial tactic and should not be second-guessed. *See People v. Feeley* 23 AD3d 1130 (4th Dept, 2005) *lv. denied*, 6 NY3d 775 (2006, Table).

Last, defendant complains that counsel did not zealously represent him because, as he

informed the court at the beginning of the trial proceedings, the defendant no longer wished to be represented by him. However, this court finds that the record contradicts the defendant's argument; not only did defense counsel actively advocate for the defendant in all proceedings, including mounting a vigorous cross examination relating to the "misidentification" by the complainant, focusing on the ambiguities of the surveillance videotape, and calling the defendant to testify to establish an alibi, but also, successfully gained an acquittal of the most serious count of Robbery in the second degree, a violent felony.

Therefore, by all considerations, this court finds that the attorney's representation was meaningful and in the totality of the circumstances, more than effective. *People v. Baldi*, 54 NY2d 137 (1981). Accordingly, as the defendant has failed to raise any ground cognizable under CPL § 440.10 to warrant vacatur of the conviction, this court denies the motion in all respects.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
January 6, 2014



MICHAEL A. GARY, J. S. C.

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