

People v Jones

2014 NY Slip Op 30128(U)

January 6, 2014

Supreme Court, Kings County

Docket Number: 8949/01

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. 8949/01

DATE: JANUARY 6, 2014

MARK JONES,

DEFENDANT.

The defendant's *pro se* motion, dated September 6, 2013, pursuant to CPL 440.10, to vacate the October 24, 2002 judgment convicting him after a jury trial of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree, upon consideration of the People's Answer, dated December 5, 2013, is denied.

The judgment of conviction was affirmed by the Appellate Division. *People v. Mark Jones*, 23 AD3d 496 (2d Dept. 2005). Among other issues, the Appellate Division found that the defendant was not denied the effective assistance of trial counsel and noted there was "overwhelming evidence of the defendant's guilt." Leave to appeal to the Court of Appeals was denied. 6 NY3d 849 (2006) (Read, J.).

The defendant's *pro se* application, filed February 14, 2007, in the United States Court for the Eastern District of New York for a writ of *habeas corpus* which included a claim of ineffective assistance of trial counsel was denied. *Jones v. Poole*, 2007 WL 2667456 (EDNY, September 6, 2007 No. 1: 07-CV-951-ENV).

A Summary of the Trial

The defendant and his brother, Tariq Jones, along with Divine Sawyer were jointly indicted for felony murder during the course of a street robbery. Tariq Jones had been

separately indicted for a prior shooting. Ballistics evidence showed the gun used in that shooting was also fired during the subsequent felony murder. Because the ballistics evidence tended to show that Tariq Jones was also involved in the felony murder, this evidence tended to rebut his proposed alibi defense to the felony murder. Accordingly, the two indictments against Tariq Jones were consolidated for trial.

Divine Sawyer, who was also charged with intentional murder, was alleged to have fired the fatal shot during the felony murder, and the Jones brothers were alleged to have been present and acting in concert in the underlying robbery by verbally intimidating the robbery victim and the people who were with him. During this incident, Tariq Jones allegedly passed a gun to Sawyer, which Sawyer fired at several people, killing one of them. Divine Sawyer's case was severed and tried simultaneously with the Jones brothers before a separate jury.

At the trial, three eyewitnesses who knew the Jones brothers from the neighborhood identified them as participants in the robbery. The defendant testified that although he was present during an argument on the street between Sawyer and one of the People's eyewitnesses, he left the area prior to any shooting. The defendant's brother, Tariq Jones, presented an alibi defense. All three defendants were convicted of felony murder and other related charges.

The Defendant's Present Claims

The defendant's present motion contends he did not receive effective assistance of his trial counsel, Howard Kirsch, Esq., based on an alleged "conflict of interest" operating on Mr. Kirsch. This conflict, the defendant contends, resulted from Mr. Kirsch being "legal partners," a "co-worker" and "associated with" his brother's trial attorney, Michael Sheinberg, Esq. Mr. Sheinberg had originally been retained to represent Tariq Jones in the earlier shooting, and then after both Jones brothers were indicted for the subsequent felony murder, Mr. Sheinberg represented both of them at their arraignment. However,

because neither Jones brother waived the potential conflict of interest resulting from Mr. Sheinberg's joint representation, the Court assigned Howard Kirsch from the 18B Homicide Panel to represent the defendant. Mr. Sheinberg remained as the attorney for Tariq Jones.

The defendant's present motion does not even allege, no less establish, that Mr. Kirsch and Mr. Sheinberg were associated either in any legally recognized form of partnership or employment relationship. They, according to the People's Answer at 2, shared the same law office suite with six other independent lawyers but were not otherwise anything but sole practitioners.

Nevertheless, despite the absence of any actual economic connection between Mr. Kirsch and Mr. Sheinberg, the defendant contends that their relationship as tenants in the same law office suite operated on Mr. Kirsch to deprive the defendant of effective assistance of counsel – notwithstanding the fact that the on-the-record performance of Mr. Kirsch has withstood both State appellate and Federal *habeas corpus* scrutiny.

It is the defendant's contention that from the outset of the case both he and his brother, Tariq, wished to plead guilty to a lesser charge of manslaughter in return for a 15-year sentence, and that their desire was communicated to Mr. Sheinberg when he was representing both brothers. The defendant's motion does not state if the defendant ever subsequently discussed this desire to plead guilty to a lesser charge with Mr. Kirsch, and, if not, why not. Evidently, as noted in the People's Answer, there were no plea offers being made to the defendant. People's Answer at par. 6

The Defendant's Affidavit at par. 16 alleges that it was in the economic interest of Mr. Sheinberg to take Tariq Jones' case to trial rather than to dispose of the case by a guilty plea, because "he was already paid" to do so. *See* Defendant's Memorandum of Law at 11. From this premise, the defendant argues that Mr. Kirsch refrained from attempting to negotiate a guilty plea for the defendant, because to do so might have also resulted in Tariq Jones receiving a plea offer which would have been against the

economic interest of Mr. Sheinberg, the alleged “partner” of Mr. Kirsch. *See* Defendant’s Affidavit at par.’s 15-16.

However, the defendant’s motion does not provide anything more than baseless speculation that Mr. Kirsch believed that obtaining a plea offer for the defendant would work to the mutual economic disadvantage of both Mr. Kirsch and his alleged “partner,” Mr. Sheinberg.

The defendant contends, with supporting affidavits by family members (Defendant’s Exhibits A and B), that upon being retained by both brothers, Mr. Sheinberg stated he would speak to the District Attorney’s Office after the defendant’s arraignment about obtaining a guilty plea to a lesser charge. Although such a plea offer was not forthcoming, the defendant’s motion again only offers baseless speculations that this was the result of Mr. Kirsch being assigned to represent the defendant.

In fact, with different attorneys representing each brother, this created the legal possibility that each of their separate attorneys could attempt to negotiate a plea offer in return for their respective client agreeing to cooperate and testify against the other brother. As unlikely as this possibility might have been, such a result would have been even less likely, if not, impossible, as long as both brothers were being represented by Mr. Sheinberg, one of whom was the defendant’s brother who allegedly supplied the murder weapon to Divine Sawyer. Thus, to some extent, the assignment of Mr. Kirsch in place of Mr. Sheinberg actually increased the possibility of the defendant negotiating a plea offer.

Discussion

The defendant’s factual allegation, which is essential to this motion, that his assigned trial attorney, Mr. Kirsch, and his brother’s retained attorney, Mr. Sheinberg, were law partners, or otherwise financially associated, is made solely by the defendant and is unsupported by other affidavit or evidence, and, under the circumstances attending to the case (i.e., if the allegation were true each attorney would be subject to disciplinary

proceedings for not disclosing this alleged professional relationship), there is no reasonable possibility that such allegation is true. Accordingly, this motion is denied without a hearing. CPL 440.30 (4) (d).

In addition, the defendant's motion does not contain sworn allegations substantiating or tending to substantiate the defendant's allegation, which is the basis of this motion, that his trial attorney, Mr. Kirsch, did not seek to obtain a plea offer from the District Attorney's Office because Mr. Kirsch was concerned that to do so would have been against the economic interests of either himself, Mr. Sheinberg, or both of them. Accordingly, in addition the motion is denied for this reason. CPL 440.30 (4) (b).

The Defendant's Memorandum of Law at 9 makes specific allegations concerning Mr. Kirsch all of which are unsworn in that Mr. Kirsch allegedly failed to: (1) pursue plea negotiations; (2) urge the defendant to testify against "the principle shooter" in exchange for a plea agreement; (3) "discover the availability of the prosecution's key witnesses prior to trial;" (4) advise the defendant "prior to trial with respect to the 'consequence of' said availability upon the wisdom of proceeding to trial in a joint trial and joint defense" (sic.).

Because the defendant's motion does not contain sworn allegations tending to substantiate these claims and, in fact, provides no details concerning any discussions the defendant may have had with Mr. Kirsch concerning his claimed desire to plead guilty to a lesser charge, these claims do not warrant a hearing. CPL 440.30 (4) (b).

Even if Mr. Kirsch, the defendant's trial attorney, had a conflict of interest based on some assumed relationship with Mr. Sheinberg, the defendant would not be entitled to vacatur of the judgment based on ineffective assistance of counsel unless it could also be demonstrated that "the conduct of his defense was in fact affected by the operation of the conflict interest," or that the conflict "operated on" Mr. Kirsch's representation. *People v. Ortiz*, 76 NY2d 652 at 657, citing *People v. Recupero*, 73 NY2d 877, 879 (1988). See also *People v. Alicea*, 61 NY2d 23 (1983) (actual prejudice from joint representation need not be shown but only that the potential conflict actually operated on the defense).

Such a conflict may exist where actual law partners represent two co-defendants and one defendant agrees to plead guilty and testify against the other. *People v. Mattison*, 67 NY2d 462, 470 (1986). In such a situation, when cross-examining the cooperating witness, the defendant's attorney would be in a position of having to challenge the credibility of a former client of the partnership. This scenario would present an actual conflict of interest, because each client would have opposing interests and nothing more need be shown to demonstrate the operation of the conflict on the representation. *People v. Solomon*, 20 NY2d 91, 97-98 (2012).

However, even assuming Mr. Kirsch and Mr. Sheinberg were economically connected as "partners," this case does not present an actual conflict of interest, because neither Mr. Kirsch nor Mr. Sheinberg were ever in a position of either having to challenge the veracity of, or placing a greater degree of criminal responsibility on, the other's client. Each defense counsel took the position at trial that his respective client was not present at the time of the shooting which was done by a third party, Divine Sawyer. Neither has it been established on this motion that an actual conflict of interest existed, because one defendant, in order to obtain a guilty plea, had to agree to testify against the other. Although the defendant to succeed on this motion need not establish that an attempt to obtain a plea bargain on his behalf by Mr. Kirsch would have been successful, the defendant would have to establish that (1) there was, in fact, a potential conflict of interest clouding Mr. Kirsch's representation *and* (2) that it was this conflict that operated on Mr. Kirsch resulting in him not attempting to obtain a plea bargain. The defendant offers only baseless speculation as to both of these requirements.

Accordingly, the defendant's motion is denied without a hearing.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

