

People v Reaves

2014 NY Slip Op 30841(U)

March 18, 2014

Supreme Court, Kings County

Docket Number: 1409/09

Judge: Joel M. Goldberg

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**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. 1409/09

DATE: MARCH 18, 2014

KEVIN REAVES,

DEFENDANT.

The defendant's *pro se* motion, dated November 12, 2013 (supporting affidavit dated August 14, 2013), to vacate his February 15, 2011 judgment of conviction, upon consideration of the People's Answer, dated February 1, 2014, is denied.

The defendant was convicted after a jury trial of Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. On February 15, 2011, the defendant was sentenced on these charges to concurrent terms of 21 years and 15 years, respectively, and five years of post-release supervision on each charge.

The defendant's conviction was affirmed on direct appeal. *People v. Reaves*, 112 AD3d 746 (2nd Dept. 2013). (*Leave application pending*)

The Suppression Hearing and Trial

A detailed account of the pre-trial suppression hearing and the trial may be found in the People's Answer, at 2-22.

The case involved a one-witness shooting on November 13, 2008 of Iesa Britt, who was shot on Parkside Avenue. Britt initially gave the police only a clothing description of the shooter.

On January 26, 2009, while at a police precinct on an unrelated matter, a police detective showed Britt a book containing approximately 50 to 100 photographs of people in the neighborhood who had been arrested. Britt, who had previously been uncooperative in furnishing information about the shooting, identified the defendant's photograph as the shooter. Britt told the police he had previously seen the person he identified as the shooter. Britt also identified another person's photograph as someone who "hung out" with the shooter.

The defendant was arrested on the street by the investigating detectives on February 10, 2009. He was not told at that time why he was placed under arrest. While being escorted from a precinct cell to stand in a lineup, the defendant was told by a detective that the lineups involved a shooting in November. The defendant then made certain statements which the hearing court found to be spontaneous and not the result of police interrogation. The defendant was subsequently placed in a lineup, and Britt identified him as the shooter.

The defendant's motion to suppress his statements and Britt's lineup identification was denied.

Britt testified at the trial and revealed his past criminal record and gang involvement which he said ended when he was in prison. Britt testified he was shot at approximately mid-afternoon while walking on the street. He had been speaking with the defendant after going to a store to buy marijuana. The defendant had told Britt words to the effect that Britt had been spending too much time lately in that location. Britt testified he said he did not want any problems, shook hands with the defendant, and walked away. Britt testified he was shot about five minutes later by the defendant who walked towards him and pulled out a gun. Britt suffered two gunshot wounds to the abdomen as well as two bullet holes in his hand.

Britt testified that he did not tell the police he knew the shooter and was originally uncooperative with the police, because he, his mother, and his girlfriend lived in the area and that he had planned to retaliate himself and kill the defendant.

On January 23, 2009, about two months after the shooting, Britt was living in his girlfriend's apartment. He found pictures of himself posted on the apartment doors of the building stating that a sex offender was living in the building. Britt also saw the defendant on the street near the scene of the shooting.

Britt testified he changed his mind about killing the defendant himself, and on January 26, 2009, Britt went to the 71st Precinct to discuss the sex offender posters. (This was also when Britt identified the defendant's photograph, but testimony concerning that photographic identification, pursuant to New York evidentiary rules, was not disclosed to the jury.)

At the trial, the jury heard testimony about the lineup identification of the defendant and the defendant's statements: (1) that he was not "standing in a lineup for no robbery", that he was "a 'G' (the meaning of this term was not explained at the trial) and a drug dealer"; (2) when told the lineup was for a shooting, not a robbery, the defendant said, "which one, the one on Parkside?" and that he saw the "guy yesterday and everyone's saying I shot him. I'm a drug dealer. You know how that block is. He came from out of town and was trying to hustle," and "guys are not going to go for that"; and (3) "let's get this over with, this guy is street. He won't pick me."

The Defendant's Motion

The defendant's motion and supporting affidavit raise several claims of ineffective assistance of counsel:

Failure to object or move for a mistrial on the basis of prosecutorial misconduct in summation;

Inadequate attempts to suppress the photo identification;

Failure to move to call complaining witness at the pretrial *Wade* hearing and to move to reopen the *Wade* hearing during the trial;

Failure to investigate (a) an eyewitness account given to the police and (b) a surveillance video possessed by the prosecution;

Failure to move to preclude pursuant to CPL 710.30 (3) the unnoticed portions of the defendant's alleged statements.

The defendant's motion also claims (1) a denial of his right to be present at all material stages of the proceeding when a sitting juror was interviewed and excused, and (2) a "mode of proceedings" error when in response to the deliberating jury's request to see "all three pieces of evidence," the Court, pursuant to a prior agreement with counsel that exhibits requested by the jury could be sent to them without the need to first discuss the request with counsel, sent the jury the three exhibits that had been introduced in evidence.

Discussion

The defendant's claims based on the prosecutor's summation, trial counsel's inadequate attempts to suppress the photographic identification, trial counsel's failure to move to call Britt as a witness at the *Wade* hearing and to move to re-open the *Wade* hearing, failure to view a surveillance video, failure to move to preclude the unnoticed portion of the defendant's alleged statements, the denial of his purported right to be present when a sitting juror was interviewed and excused, and the purported mode of proceedings error in responding to the jury's note requesting to see "all three pieces of evidence," all must be denied, because although sufficient facts appear on the record as to each of these claims to have permitted their review on the defendant's appeal, such claims were not raised. CPL.440.10 (2) (c); *People v. Cooks*, 67 NY2d 100, 103 (1986) (a motion to vacate judgment is not a substitute for a direct appeal when a defendant is in a position to raise an issue on appeal).

The prosecutor's summation was, of course, entirely on the record and the issue of whether defense counsel was ineffective for failing either to object or move for a mistrial during the prosecutor's summation could have been raised on the defendant's direct appeal.

Similarly, whether defense counsel was ineffective for not seeking to call Britt at the *Wade* hearing and for not moving to re-open the *Wade* hearing during the trial could have been reviewed on the defendant's direct appeal based on the record.

The fairness of the pre-trial identification procedures was raised on the defendant's direct appeal. Both the photographic identification procedures and the subsequent lineup identification of the defendant by Britt were found by the Appellate Division in its decision to have been fairly conducted. All of the defendant's present arguments to the contrary are based on the record of the proceedings and, thus, also could have been raised on appeal.

Defense counsel's alleged ineffectiveness for not viewing a surveillance video prior to trial and relying on the prosecutor's representation that there was nothing exculpatory in the video also could have been raised on direct appeal if the claim of ineffective assistance of counsel were based simply on defense counsel's failure to personally view the video prior to trial. The record contains this information as well as information, not heard by the jury, that, in fact, defense counsel had an opportunity to view the video prior to sentencing and, in fact, determined that the surveillance video contained no exculpatory material.

In fact, the issue of the video was raised on the defendant's direct appeal in the context of the defendant's argument that the Court should have granted defense counsel's request for a mistrial when the surveillance video was mentioned by a prosecution witness after the prosecutor had told defense counsel that the People would not be introducing the video into evidence. The Appellate Division in its decision determined that "any prejudice [from the witness' mention of the surveillance video] was alleviated by the Supreme Court's actions in immediately striking the testimony from the record and providing a curative instruction to the jury." *People v. Reaves* at 747-748.

Thus, the record on this subject was sufficient to have made the present argument that defense counsel was ineffective for not viewing that surveillance video prior to trial, and, therefore, this argument cannot be a basis to vacate the judgment.

The defendant's claim that defense counsel was ineffective for not moving to preclude certain statements was also capable of being raised on appeal. The record of the *Huntley* hearing and the People's CPL 710.30 (1) (a) notice were sufficient for an

appellate court to determine whether the notice sufficiently apprised the defense of the substance of the defendant's statements and whether defense counsel was ineffective for failing to move to preclude the unnoticed portion of these statements rather than move to suppress them. *See* CPL 710.30 (3); *People v. Kirkland*, 89 NY2d 903 (1996). When the detective's trial testimony as to the substance of the defendant's statements allegedly differed from the substance of the statements adduced at the *Huntley* hearing, this issue was specifically discussed on the record and ruled upon by the Court. Thus, the record contained sufficient information to raise this claim on appeal.

The defendant also claims that his constitutional right to be present at a material stage of the proceeding was violated when the Court excused a sitting juror after speaking with the juror on the record in the presence of counsel but in the defendant's absence. The record reflects that after speaking with the defendant about the conversation, defense counsel consented to excuse the juror.

On direct appeal, the defendant specifically raised the issue that the Court committed reversible error by not discharging that same juror five days earlier when the Court, after speaking with the juror on the record in the presence of all parties, first became aware of the juror's connections to the vicinity of the crime scene and the juror's concern that she might recognize people who would be attending the trial. As to that issue, the Appellate Division in its decision found that "the defendant failed to preserve for appellate review his contention that he was deprived of a fair trial by the Supreme Court's delay in discharging a juror who expressed concerns that may have affected her ability to be fair and impartial." *People v. Reaves* at 748.

Thus, the appellate record was sufficient for the defendant to raise the manner in which the juror was ultimately discharged, particularly in conjunction with the issue raised concerning the Court's decision not to immediately discharge the juror.

The defendant's argument that the Court erred (and presumably denied the defendant a fair trial so as to come within the ambit of CPL 440.10 [1] [h]), in responding to the deliberating jury's request to see "all three pieces of evidence" by sending into the

jury the three exhibits that were received in evidence during the trial without consulting with counsel based on counsels' prior consent that such a consultation would not be necessary if the jury requested to see the exhibits, was also sufficiently on record so as to preclude its review on this motion.

The defendant's motion also claims that trial counsel was ineffective for "failure to investigate" information in a detective's report, dated November 18, 2008, provided to the defense containing a statement from a witness whose name was redacted from the report. The report stated, in part, that this witness "was walking behind an unknown male black" who met two other male black[s] and stated to them, "I'll hit you up tonight." (The defendant's motion at par. 15 on page 8 erroneously claims the report states that the witness heard the men "arguing.") The witness continued walking and she did not know "what they were doing." She heard numerous gunshots coming from behind her. "She did not get a good look at the victim or suspects."

However, the defendant's motion contains no factual allegations or otherwise indicates the basis for the assertion that trial counsel, in fact, did not "investigate" this matter. Because this assertion 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," to support the claim of a failure to investigate, the motion to vacate the judgment on this ground is denied. CPL 440.30 (4) (b).

Further, the police report reflected that the witness did not see who fired the shots or even whether the shots were fired by more than one person. The report stated she did not get a "good look" at the victim or suspects. Thus, there is nothing in this account that would establish that the defendant was prejudiced by the absence of this person as a defense witness at trial (*Strickland v. Washington*, 466 US668 [1984]) or that the purported failure of trial counsel to attempt to locate and speak with this witness deprived the defendant of "meaningful representation." *People v. Baldi*, 54 NY2d 137, 147 (1981). Compare, *People v. Canales*, 110 AD3d 731, 734 (2nd Dept. 2013) (motion to vacate judgment granted based on denial of "meaningful representation" under New York State law due to a "litany of failures by defense counsel," even without a showing of the

prejudice required by the Federal Constitutional standard for ineffective assistance); *People v. Clermont*, 22 NY3d 931, 934 (2013).

Accordingly, even assuming trial counsel did not attempt to ascertain what this witness actually did or did not see, such conduct does not rise to the level of ineffective representation warranting vacating the judgment. This is not a situation involving a total failure either to investigate or to review pertinent records for which there can be no legitimate explanation. *People v. Oliveras*, 21 NY3d 339, 348 (2013). Indeed, in this case, the witness' account of what she saw in the police report was not significantly inconsistent with Britt's account of what happened, and there was nothing in the report to indicate she had a sufficient view of the parties so as to be able to testify with any degree of certainty that the defendant was not one of the people she saw.

Defense counsel could have reasonably determined that this witness would not have provided exculpatory information, and, in fact, could corroborate Britt's account at trial that shortly before the shooting he was in conversation with the person who shot him – an important detail omitted by Britt in his original statement to the police. Although the witness stated she saw the victim meet two people on the street in contrast to Britt's account which did not mention a second person, this discrepancy alone is not sufficient to find defense counsel had an absolute duty to attempt to find the witness, given the other circumstances of this case. Therefore, assuming defense counsel did not attempt to locate and interview this person, the failure to do so did not establish ineffective assistance of counsel under either the Federal or State Constitutions.

Accordingly, the defendant's motion is in all respects denied.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

MAR 18 2011