

People v Robinson

2014 NY Slip Op 32197(U)

May 5, 2014

Sup Ct, Kings County

Docket Number: 2765/2006

Judge: John G. Ingram

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 21

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

-against-

Indictment No. 2765/2006

STERLING ROBINSON,
Defendant.

-----X

INGRAM, J.

Defendant was convicted, in Supreme Court, Kings County on June 27, 2007 of one count of Criminal Possession of a Weapon in the Third Degree and Operating a Motor Vehicle While Under the Influence of Alcohol. On July 19, 2007, the Court sentenced Defendant to concurrent prison terms of two years on the weapon possession count and one year on driving under the influence count and to three years of post-release supervision. (Chambers, J., at trial and sentence)

On November 18, 2009, Defendant filed a brief in the Appellate Division, Second Department, appealing his judgment of conviction. Defendant claimed that he was denied his right to a fair trial by the illegal introduction of his refusal to submit to a chemical blood test more than two hours after his arrest and Defendant claimed that the prosecutor committed misconduct during summation, requiring a new trial. By pro se letter dated February 25, 2010, Defendant moved the Appellate Division to relieve assigned appellate counsel. By order dated May 11, 2010, the Appellate Division denied Defendant's motion, but granted Defendant permission to file a pro se supplemental brief by September 1, 2010. On August 31, 2010, Defendant filed a pro se supplemental brief in the Appellate Division.

By pro se motion dated June 30, 2010, Defendant moved, in the Supreme Court, Kings County to vacate his judgment of conviction pursuant to CPL 440.10. In his motion Defendant raised the following claims: (1) that the hearing court erroneously denied Defendant's motion to suppress physical evidence recovered by police during an alleged invalid inventory search; (2) that a Mapp hearing was not conducted and that the prosecutor incorrectly stated to the trial court that a Mapp hearing had been conducted; (3) that he had been "violently restrained" by police officers in the emergency room while a doctor took blood from him without his consent and without a court order; and (4) that there was no expert testimony at trial to explain the blood samples in the medical records which were submitted to the jury. By decision and order dated November 12, 2010, this Court denied Defendant's motion to vacate his judgment of conviction. This Court held that three of Defendant's claims were procedurally barred pursuant to CPL 440.10(2)(b) and the remaining allegation was unsubstantiated, made solely by Defendant, and under the circumstances there was no reasonable possibility that the allegation was true.

In a decision and order dated March 29, 2011, the Second Department affirmed Defendant's judgment of conviction. People v. Robinson, 82 A.D.3d 1269 (2d Dept. 2011). The Second Department held that Defendant's refusal to submit to a chemical blood test was not improperly admitted into evidence. The Second Department also concluded that Defendant was not deprived of effective assistance of counsel. Id., 82 A.D.3d at 1270. On June 27, 2011, the Court of Appeals denied leave to appeal. People v. Robinson, 17 N.Y.3d 800(2011)(Ciparick, J.).

On September 8, 2011, Defendant sought writ of habeas corpus in United States District Court for the Eastern District of New York ("EDNY"). Defendant then asked the federal court to

stay the habeas proceeding while Defendant exhausted his state remedies. By order dated January 27, 2014, the district court granted Defendant's request. (Chen, U.S.D.J.).

Defendant has served his prison sentence.

The Motion Before the Court

By pro se motion dated October 1, 2013, Defendant now moves, for the second time, to vacate his judgment of conviction. In his motion, Defendant claims: (1) Defendant is actually innocent; (2) the police lacked probable cause to arrest Defendant; (3) the police did not advise Defendant of his Miranda rights before asking Defendant whether he would submit to a chemical blood test; (4) People violated Defendant's Confrontation Clause rights; (5) the trial court improperly admitted photographs of Defendant's car; (6) the police unlawfully searched Defendant's car; (7) the police assaulted Defendant in order to obtain a blood sample from Defendant; (8) the People's witnesses perjured themselves at trial; and (9) Defendant received ineffective assistance of counsel.

In papers dated April 7, 2014, the People opposed. In deciding the instant motion, this Court considered Defendant's moving papers, the People's papers in opposition, the court file and applicable law.

The Court's Decision

Defendant's claim of actual innocence is denied. The Second Department recently held in People v. Hamilton, that a defendant may move to vacate a judgment of conviction pursuant to Criminal Procedure Law 440.10(1)(h) on the ground of innocence. Hamilton, 115 A.D.3d 12 (2d

Dept. 2014). With respect to a claim of actual innocence, a constitutional violation occurs only if there is clear and convincing evidence that the defendant is innocent. Hamilton, 115 A.D.3d at 12.

In the case at hand, Defendant has failed to establish clear and convincing evidence of his innocence. “[T]he law is well settled that “actual innocence” means factual innocence, not mere legal insufficiency of evidence of guilt and must be based on reliable evidence which was not presented at the trial.” People v. Lobban, 2014 WL 1236884 (Kings County Supreme Ct. 2014). “A prima facie showing of actual innocence is made out when there is a sufficient showing of possible merit to warrant a fuller exploration by the Court.” Hamilton, 115 A.D.3d at 12. “Mere doubt as to the defendant’s guilt, or a preponderance of conflicting evidence as to the Defendant’s guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty.” Id. In this case, Defendant’s guilt at trial was established clearly by the testimony of three witnesses who smelled alcohol on Defendant’s breath, medical records that indicated that Defendant was intoxicated and the results of a blood test, which revealed the presence of alcohol in Defendant’s bloodstream. This evidence clearly established Defendant’s conviction for driving while intoxicated. The evidence also established Defendant’s guilt for Criminal Possession of a Weapon in the Third Degree. There was testimony that during a search of Defendant’s car at the police station, Officer Lancaster found an operable gun and ammunition in the trunk of his car. In fact, during the trial, Defendant admitted that he had a gun and ammunition in the trunk of this car.

Defendant contends that he is innocent because some of the evidence introduced at his trial was allegedly obtained in violation of his constitutional rights, because of inconsistencies in the statements of the witnesses, and because he received ineffective assistance of counsel. However, none

of Defendant's assertions meets the standard set by Hamilton to merit a hearing on the claims. Therefore, Defendant's claim of actual innocence is rejected.

Defendant also alleges that his arrest was unlawful, that the People violated Defendant's Confrontation Clause, and that the trial court improperly admitted photographs of Defendant's car.

Pursuant to C.P.L. § 440.10(2)(c), 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 these claims. Since these issues could have been raised on direct appeal, they cannot properly be raised on the instant motion.

Defendant also alleges that the police did not advise Defendant of his Miranda rights before asking Defendant whether he would submit to a chemical blood test. C.P.L. § 440.10(3)(a) provides that a court may deny a motion to vacate the judgment when although facts in support of the 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 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 upon appeal. C.P.L. § 440.10(3)(a). The Court finds that Defendant could have pursued the issues now presented on appeal and, to the extent that the record contains insufficient facts to permit review of the issue, he could have made facts in support of those issues appear on the record in a manner to have provided adequate basis for review of the issues on an appeal. Defendant has failed unjustifiably to adduce such issues prior to sentence. Therefore, Defendant's claims are procedurally barred. In any event, Defendant's Miranda claim is without merit.. In South Dakota v. Neville, the United States Supreme Court held

that in the context of an arrest for driving while intoxicated a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of Miranda. 459 U.S. 553 (1983). The New York Court of Appeals has also held that a refusal to take a blood test, after a police officer has lawfully requested it, is not an act coerced by the officer, and this is not protected by the privilege against self incrimination. People v. Berg, 99 N.Y.2d 701, 703 (1999). It is well settled in New York that Miranda warnings are not required in order to admit the results of chemical analysis tests, or a defendant's refusal to take such tests. People v. Thomas, 46 N.Y.2d 584 (1978).

Defendant further alleges that the People violated the Confrontation Clause by failing to call the emergency medical technicians who responded to the scene of the accident and the medical expert and custodian of medical records and by eliciting statement made by emergency medical technicians to Officer Lancaster without calling them to the stand. However, Defendant's constitutional right to confront witnesses against him was not violated by the admission of the hospital records of Defendant, as the records at issue were not testimonial. In order to be testimonial in nature, a statement must have the primary purpose of proving facts which may be relevant to later criminal prosecution. Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). In this case, the hospital records were certified and not prepared with the primary purpose of proving facts relevant to the prosecution of a crime. The records were related to Defendant's diagnosis, prognosis and treatment and were admissible under the business records exception to the hearsay rule. See C.P.L.R. §4518 In addition, the People did not violate Defendant's Confrontation Clause rights because they never elicited any conversations between Officer Lancaster and the emergency medical technicians. In fact, it was defense counsel, during cross-examination of Officer Lancaster, that elicited that statements made by emergency medical technicians to Officer Lancaster. While Defendant claims that he was

denied the opportunity to question the emergency medical technicians, the Court stated during the suppression hearing that Defendant could call the emergency medical technicians as witnesses. He chose not to call them.

Defendant also claims that the search of his car was illegal. Defendant's claim regarding the search of his car is procedurally barred pursuant to CPL 440.10(2)(a). That section provides that a court must deny a claim when the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment. In Defendant's direct appeal, he alleged that the police unlawfully searched his car. The Appellate Division rejected this claim. People v. Robinson, 82 A.D.2d 1269, 1270 (2d Dept. 2011).

Defendant also alleges that Defendant was violently restrained and a blood sample was taken from him, against his wishes and without a court order. This claim is procedurally barred because this same claim was made in a prior motion to vacate his judgment of conviction, which this Court rejected. C.P.L. § 440.10(3)(b) provides that the court may deny a motion to vacate a judgment when 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...unless since the time of such determination there has been a retroactively effective change in the law controlling such issue." In a decision dated November 12, 2010, this Court rejected Defendant's claim that he was "violently restrained" by police officers while hospital personnel were administering medication to Defendant and were drawing his blood. Since this issue was decided when this Court denied Defendant's first C.P.L. § 440 motion, and there has not been a retroactively effective change in the law controlling such issue, this alone is reason for denying Defendant's instant motion.

Defendant also argues that the prosecutor knew or should have know that prosecution witnesses testified falsely at trial. The documentation submitted by Defendant does not support his contentions that the prosecutor knowingly allowed false testimony. There were no major inconsistencies in the testimony of the witnesses and there was no evidence that the witnesses testified falsely.

Defendant's final claim is that he received ineffective assistance of counsel from his trial attorney. In order to prevail on a claim of ineffective assistance of counsel under the United States Constitution, "a defendant must show that counsel's representation fell below an objective standard of reasonableness " and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). Under the New York Constitution, a defendant must show that he was not afforded "meaningful representation". People v. Baldi, 54 N.Y.2d 137, 147 (1981). 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." Baldi, 54 N.Y.2d at 147. 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.

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. Defense counsel thoroughly cross-examined the People's witnesses. Defense counsel challenged the sufficiency of the grand jury

minutes, participated actively in voir dire and made an opening statement. Defense counsel cross examined each of the People's witnesses and delivered a sound summation. This Court cannot second guess defense counsel's tactics or strategies pursued during the hearing and trial. "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). 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.

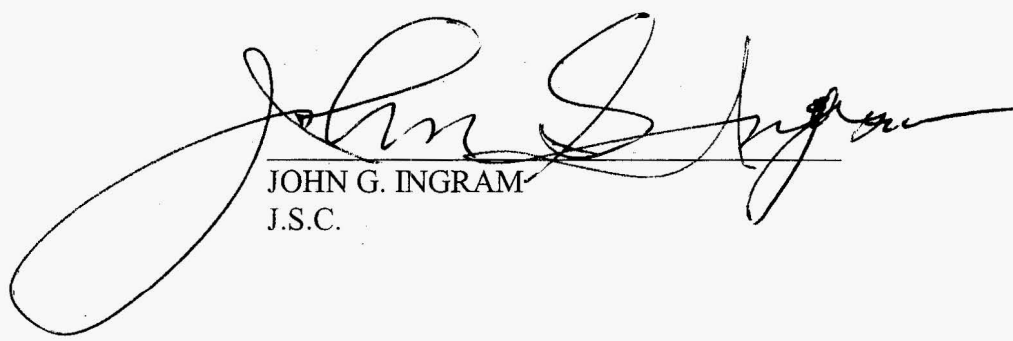
Accordingly, Defendant's motion to vacate the judgment of conviction is denied.

This opinion constitutes the Decision and Order of this Court.

Defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with

printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.

Dated: May2, 2014
Brooklyn, New York



JOHN G. INGRAM
J.S.C.

ENTERED
MAY - 5 2014
NANCY T. SUNSHINE
COUNTY CLERK