

People v Venable

2014 NY Slip Op 32223(U)

May 21, 2014

Supreme Court, Kings County

Docket Number: 6296/98

Judge: Deborah A. Dowling

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
By: Justice Deborah A. Dowling

-against-

Dated: May 21, 2014

Indictment No: 6296/98

DARRELL VENABLE,
Defendant(s).
-----X

The defendant submitted the instant motion, *pro se*, seeking an Order to vacate his conviction pursuant to Criminal Procedure Law §440.10(1)(h) after a complete Plenary hearing pursuant to Criminal Procedure Law §440.30(5)¹.

The defendant contends his conviction was obtained in violation of his right to effective assistance of counsel. Specifically, the defendant contends trial counsel's failure to convey a plea offer to him was ineffective counsel. The defendant further asserts the court should order a hearing to fully litigate the issues raised herein. The People submitted opposing papers to the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

¹The defendant's request for a hearing is denied pursuant to CPL §440.30(4)(d)(i).

PROCEDURAL HISTORY

The defendant was convicted, of Murder in the Second Degree (PL 125.25(1)) and Criminal Possession of a Weapon (PL 265.03) on April 5, 1999 after a jury trial. The defendant was charged with killing Kinsey Maurice Brooks at 35 Nostrand Avenue in Kings County, after the two got into a verbal argument. During the course of the defendant's trial, witnesses to this incident testified to having observed the defendant shoot the victim three to four times with a .380 caliber semi-automatic pistol. The defendant was sentenced to concurrent terms of imprisonment of twenty-five years to life for the murder conviction and fifteen years to life for the weapon possession conviction.

The defendant filed a motion dated April 8, 2004 seeking to vacate his conviction based on the contention that the Court erroneously submitted intentional and depraved murder charges to jury for its determination. On August 31, 2004, this motion was denied by the Court. The Appellate Division denied the defendant's leave to appeal this decision on December 15, 2004.

The defendant then perfected an appeal with the Appellate Division and his conviction was affirmed on May 10, 2004. *People v. Venable*, 7 A.D.3d 647 (2nd Dept, 2004). The defendant's application for leave to appeal to the Court of Appeals was denied in an order dated August 16, 2004. *People v. Venable*, 3 N.Y.3d 682 (2004).

In 2005, the defendant filed a writ of habeas corpus with the Federal Court and after a series of adjournments for written submissions, the writ was denied, on March 19, 2009.

The defendant then submitted a motion to this Court seeking to renew and reargue an omnibus motion decided before this Court and the motion was also denied in a decision and Order, dated September 24, 2007. The Appellate Division dismissed the defendant's appeal on that issue on December 11, 2007.

The defendant then moved to set aside his sentence before this Court and in an decision and Order, dated October 22, 2007, the court denied the defendant's application. The appellate division denied the defendant motion for leave to appeal the court's decision, in a decision and order dated February 14, 2008. The defendant again moved to set aside his conviction in yet another motion dated August 2, 2010. This court denied the defendant's application on October 28, 2010. The Appellate Division, Second Department, denied the defendant's leave to appeal on March 31, 2011. This case has been marked by numerous unsuccessful attempts by the defendant to vacate his conviction. The instant motion presents yet another thinly veiled attempt to litigate issues already determined by the court.

CONCLUSIONS OF LAW

The question presented is whether there exists a legal basis to vacate the defendant's judgment of conviction and whether a hearing is necessary to determine the merits of the defendant's motion. The answer to both questions is a resounding no. There is no merit to the claims raised herein by the defendant. The Court is empowered to deny the defendant's request for a hearing to determine the merits of the instant motion where there is no evidence

to support the defendant's motion. *See Criminal Procedure Law* § 440.30(4)(d)(i). Here, the defendant failed to present evidence establishing his claims and a determination of the claims raised by the defendant is readily discernable by the submissions and record of this case. Nor is the defendant entitled to a hearing to re-litigate the entirety of his trial, where there exists no factual or legal basis to do so.

The core inquiry on a claim of ineffective assistance of counsel is whether the defendant received meaningful representation by legal counsel. Trial tactics which terminate unsuccessfully do not automatically indicate ineffective representation. *People v. Baldi*, 54 N.Y.2d 137 (1981). "So long as the evidence, the law and the circumstances of a particular case, viewed in totality, as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met. *Id* at 147. The evaluation of ineffectiveness must take place within the scope of what occurred during the time of the representation and the court must take every measure to avoid an analysis which is distorted by the lens of hindsight.

Further, the court is required to evaluate claims of ineffectiveness without confusing real ineffectiveness with circumstances amounting to nothing more than losing tactics employed by trial counsel. The defense strategy under review upon a claim of ineffectiveness need only reflect a reasonable and legitimate strategy under the particular circumstances of the subject case. A defense theory which is ultimately a losing theory does not amount to ineffective assistance of counsel. It is only when the evidence presented, on

a motion of ineffective assistance of counsel, clearly establishes trial counsel partook in an inexplicable prejudicial course of conduct will courts deem the representation ineffective.

People v. Benevento, 91 NY2d 708 (1998).

The claims raised by the defendant do not rise to the level of an inexplicable prejudicial course of conduct on the part of trial counsel. There exists no evidence that trial counsel failed to convey a plea offer to the defendant. Nor is there any basis to believe the defendant would have accepted the alleged plea offer detailed in the defendant's papers. Moreover, as the trial court, having viewed the evidence first hand, if a plea offer had been extended it would have been discussed on the record and the Court would have inquired about any plea offer at the onset of the trial. There is no record of any offer to the defendant because none existed. Accordingly, there is no basis to find trial counsel acted in manner which was ineffective as a matter of law. The defendant initiated the instant motion as yet another attempt to re-litigate his conviction. However, there is no basis to upset a duly rendered verdict. As such, the defendant's motion is denied in its entirety. It is hereby,

ORDERED, the defendant's motion is denied. It is further,

ORDERED, the defendant's right to appeal from this order 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 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. It is further,

ORDERED, 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 following parties;

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201

This shall constitute the decision and order of this Court.



Deborah A. Dowling, J.S.C
HON. DEBORAH A. DOWLING

ENTERED

JUN 11 2014

NANCY T. SUNSHINE
COUNTY CLERK