People v Reyes
2014 NY Slip Op 32575(U)
September 26, 2014
Supreme Court, Kings County
Docket Number: 6094/2005
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. 6094/2005

WILLIAM REYES,

Defendant.

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INGRAM, J.

Defendant stands convicted, following a jury trial in Supreme Court, Kings County, of two counts of Robbery in the First Degree and one count of Robbery in the Third Degree. On August 17, 2006, this Court sentenced Defendant as a persistent violent felony offender to consecutive prison terms of twenty years to life on each count of Robbery in the First Degree and three and a half to seven years on the one count of Robbery in the Third Degree. (Ingram, J., at trial and sentence).

On or about November 23, 2007, Defendant appealed to the Appellate Division, alleging five claims: (1) the pretrial lineups were unduly suggestive; (2) Defendant was denied his right to counsel at the lineups; (3) the court's denial of Defendant's motion to sever the charges was an abuse of discretion; (4) the evidence was legally insufficient and the conviction was against the weight of the evidence; and (5) the consecutive sentences were cruel and unusual and unduly harsh and excessive. The People filed a response on January 29, 2008.

On February 29, 2008, the Appellate Division granted Defendant's request to file a pro se supplemental brief. On September 3, 2008, Defendant filed his brief alleging three errors: (1) Defendant was denied his right to counsel at the lineups; (2) Defendant's Brady and Rosario rights

were violated when the People withheld evidence establishing that the complaining witness in one of the robberies had failed to identify Defendant in a show-up conducted shortly after the robbery; and (3) Defendant was denied effective assistance of counsel. The People filed supplemental brief on October 30, 2008. The Appellate Division affirmed the judgment on March 17, 2009. People v. Reyes, 60 A.D.3d 873 (2d Dept. 2009). On June 4, 2009, the Court of Appeals denied leave to appeal. People v. Reyes, 12 N.Y.3d 920 (2009)(Read, J.).

In pro se motion dated October 6, 2008, Defendant moved in Supreme Court, Kings County, to vacate the judgment pursuant to C.P.L. § 440.10. Defendant claimed that this Court lacked subject matter jurisdiction over one of the counts of Robbery in the First Degree and that the People withheld exculpatory evidence pertaining to the lineups. The People opposed Defendant's motion by papers dated November 25, 2008. This Court denied the motion by decision and order dated February 3, 2009. The Appellate Division denied Defendant's application for leave to appeal on November 17, 2009.

On May 25, 2010, Defendant petitioned the United States District Court for the Eastern District of New York for habeas corpus relief, raising numerous claims, including ineffective assistance of counsel, harsh and excessive sentence, and that the lineups were suggestive. The People opposed Defendant's habeas corpus petition by papers dated August 9, 2010. On September 10, 2013, U.S. District Court Judge Kiyo A. Matsumoto denied Defendant's motion for writ of habeas corpus.

In pro se motion dated August 23, 2010, Defendant moved to vacate his judgment of conviction pursuant to C.P.L.§ 440.10. Defendant claimed that he was not arraigned on the indictment in accordance with C.P.L. § 210.15 and that the attorney who represented him at the

arraignment rendered ineffective assistance of counsel. The People opposed Defendant's motion by papers dated October 12, 2010. By decision and order dated December 2, 2010, this Court denied Defendant's motion in its entirety. The Appellate Division denied leave to appeal.

On March 20, 2012, Defendant made a motion for a writ of error coram nobis in the Appellate Division, Second Department. Defendant claimed that his appellate counsel rendered ineffective assistance by failing to raise the claim that he had not been properly arraigned on the indictment. The People opposed the motion by papers dated June 21, 2012. The Appellate Division denied the motion on September 26, 2012. People v. Reyes, 98 A.D.3d 1141(2d Dept. 2012). The Court of Appeals denied leave to appeal on January 15, 2013. People v. Reyes, 20 N.Y.3d 1014(2013)(Smith, J.)

The Motion Before the Court

In a pro se motion dated May 13, 2014, Defendant now moves to vacate his judgment of conviction pursuant to C.P.L.§ 440.10. Defendant claims that his trial attorney, Leon Schrage, Esq., rendered ineffective assistance by failing to adequately advise Defendant on whether to accept a plea bargain offered by the People. Defendant also claims prosecutorial misconduct. The People argue that Defendant's present claim is barred procedurally from this Court's review and is entirely meritless. In deciding the instant motion, this Court considered Defendant's moving papers, the People's papers in opposition, Defendant's reply papers, the court file, transcripts and applicable law.

The Court's Decision

C.P.L. § 440.10(3)(c) authorizes the Court to deny a 440.10 motion when "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." See People v. Cochrane, 27 A.D.3d 659 (2d Dept. 2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv denied, 2 N.Y.3d 742 (2004). Based on the minutes, Defendant was aware of the prior offer of the People and knew of the advice, or lack of advice, that his counsel provided him with respect to the plea offer when he filed his two prior 440 motions. Therefore, this Court may deny the motion because this issue could have been raised in Defendant's two previous 440.10 motions.

Even if this Court were to determine Defendant's claim that his trial attorney rendered ineffective assistance by failing to adequately advise Defendant on whether to accept the plea offer, this Court would still deny Defendant's claim. Under New York law, the constitutional requirement of effective assistance of counsel is satisfied when "...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..." People v. Benevento, 91 N.Y.2d 708. 712 (1998). "Meaningful representation by counsel includes the conveyance of accurate information regarding plea negotiations, including relaying all plea offers made by the prosecution...". People v. Rogers, 8 A.D.3d 888, 890 (3rd Dept. 2004). It is settled law that "... to prevail on his claim that he was denied effective assistance of counsel, defendant had the burden to demonstrate that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer." People v. Fernandez, 5 N.Y.3d 813, 814 (2005).

The federal standard for establishing that a defendant was provided with less than meaningful representation is somewhat different from the law of New York. See Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court decided two cases that specifically addressed the importance of effective assistance of counsel in plea negotiations. Lafler v. Cooper, 132 S.Ct. 1376 (2012; Missouri v. Frye,132 S.Ct. 1399 (2012). In Lafler, the Court stated that "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." 132 S.Ct. at 1384. Likewise, in Frye, the Supreme Court emphasized the fact that a criminal defendant must have effective assistance of counsel during the critical stage of plea negotiations under the Sixth Amendment and that "claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test in Strickland...". Frye, 132 S.Ct. at 1407-08. A defendant's federal constitutional rights are violated if trial counsel fails to meet a minimum standard of effectiveness and that failure causes defendant to suffer prejudice. Strickland, 466 U.S. 668. According to the Supreme Court's holding in Strickland, prejudice occurs "when there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694.

Defendant has not established that he was denied his constitutional right to effective assistance of counsel. Defendant has provided nothing besides a self-serving affidavit to support his allegations that counsel provided inadequate advice on whether Defendant should have accepted the plea offer. In the instant case, it is undisputed that on March 20, 2006, the People made an offer of a plea agreement involving Defendant pleading guilty to two counts of third-degree robbery in return for consecutive sentences of two to four years on each count and Defendant was present in court when said offer was conveyed on the record. Defendant claims that counsel did not confer with him

"in order to discuss the advisability of either accepting the offer or proceeding to trial." Defendant's allegtaions are not supported by any independent evidence and are contradicted by defense counsel's affirmation and by the transcripts. Mr. Schrage affirms that he advised Defendant that the People's case was very strong and Defendant should have accepted the People's offer. On March 20, 2006, Mr. Schrage stated on the record that he spoke with Defendant, that he discussed the offer with him and that Defendant told him that he was not interested. Defendant confirmed this on the record. Since this Court finds that Defendant has not established that defense counsel failed to convey the plea offer to him, it finds that Defendant failed to establish the first prong of Strickland as set forth in Missouri v. Frye.

Even if this Court were to find that Defendant established the first prong of Strickland, this Court would find that Defendant failed to establish the second prong because Defendant has not asserted that he would have even accepted the plea offer. The holding of Missouri v. Frye, requires not only a finding of counsel's failure to convey a plea, but also finding that if it had been conveyed, there is a reasonable probability the defendant would have accepted it. 132 S.Ct. 1399 (2012). Defendant stated in his motion that there was a strong likelihood that he would have accepted the offer and that it was "more than likely" that he would have accepted it. The transcripts demonstrated that Defendant knew he was facing serious felony charges and jail time. Defendant's claim that he would have taken the plea if he was informed of it is belied by the record. The plea was conveyed in open court and Defendant offered no rational explanation as to why he would stand silent while his attorney did not accept the offer conveyed by the People. In addition, this Court spoke, at length, to Defendant, on the record, about the consequences of going to trial and Defendant never expressed any confusion over anything that was said. Furthermore, this was not Defendant's

first contact with the criminal justice system. Defendant has had approximately five prior convictions and had plead guilty in prior cases. He is familiar with court proceedings and the plea bargaining process. It is difficult for this Court to believe that if Defendant wanted this plea, he would have remained silent.

In addition, in order for Defendant to have accepted this plea, Defendant would have had to accept responsibility for his crimes. It is clear, based on Defendant's motion and conversations with the Department of Probation, that Defendant never accepted responsibility for the crimes. During his interview with the Department of Probation after he was convicted, Defendant denied his guilt and stated he did not commit this offense. While Defendant claims in his motion that he would have plead guilty, it is clear that Defendant was not ready to accept responsibility for this crime, a requirement in this case for entering in to a plea of guilty.

Finally, Defendant claims prosecutorial misconduct based on the People's failure to offer again the plea that was offered on March 20, 2006, a plea agreement involving sentences of two to four years on each count of robbery, immediately before trial. The offer of a plea is not a constitutional right but a matter of prosecutorial discretion. Weatherford v. Bursey, 429 U.S. 545, 561(1977); People v. Cohen, 186 A.D.2d 843(3d Dept. 1992). Therefore, the refusal of the People to offer the plea again does not constitute prosecutorial misconduct.

Accordingly, Defendant's motion is denied in its entirety. This is Defendant's third CPL 440 motion and Defendant is cautioned regarding making additional frivolous motions which are a burden on this very busy Court.

This opinion constitutes the Decision and Order of this Court.

Dated: September 26, 2014
Brooklyn, New York

JOHN G. INGRAM
J.S.C.