

**People v Williams**

2014 NY Slip Op 32596(U)

October 6, 2014

Supreme Court, Kings County

Docket Number: 5522/00

Judge: Lawrence S. Knipel

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**M E M O R A N D U M**

SUPREME COURT : KINGS COUNTY (Criminal Term, Misc. Part)

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PEOPLE OF THE STATE OF NEW YORK,

By: KNIPEL, J.

- against -

Dated: October 6, 2014

SEAN WILLIAMS,

Indictment No. 5522/00

Defendant.

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Defendant, pro se, moves, pursuant to CPL440.10 (1) (h), for an order vacating the judgment on the ground that he was denied effective assistance of counsel under the state and federal constitutions based on his counsel's: (1) decision not to request that manslaughter be charged as a lesser included offense; (2) failure to advise and consult with defendant regarding the decision not to request manslaughter as a lesser included offense; (3) conceding the murder charge during closing arguments; (4) failure to investigate defendant's desire to plead guilty to a lesser included charge.

In deciding this motion, the court has considered defendant's motion papers and exhibits, defendant's addendum to the motion and exhibits, the People's affirmation in opposition and exhibits, the briefs on appeal before the Appellate Division,<sup>1</sup> Second Department, and the trial minutes.

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<sup>1</sup> The briefs on appeal before the Appellate Division, Second Department are part of the record on appeal (Fiche ID 2-04-0337).

### Background

In the evening of June 21, 2000, Aubrey Lee Jr. was shot and killed near the corner of Williams and Riverdale Avenues in Brooklyn, NY. The police arrested defendant for this shooting approximately four hours after it occurred. Defendant was thereafter indicted for one count of intentional murder in the second degree (Penal Law § 125.25 [1]), one count of depraved indifference murder in the second degree (Penal Law § 125.25 [2]), criminal possession of a weapon in the second degree (formerly Penal Law § 265.03 [2]) and criminal possession of a weapon in the third degree (formerly Penal Law § 265.02 [4]).

At the trial, the primary evidence against defendant was the testimony of Ricky Sooknandan, Lee's brother, and Phillip Hunte, Sooknandan and Lee's cousin. Sooknandan, who had once before seen defendant in the neighborhood, and Hunte, who had previously seen defendant seven or eight times, both testified that they saw defendant standing on the sidewalk near Lee talking to him. The heard defendant tell Lee that he would be back and then observed defendant walk away from Lee and ultimately make a turn in the direction of Hinsdale Street. Later that evening, Hunte and Sooknandan observed a verbal dispute between Lee, who was sitting on a bike, and defendant. Sooknandan noted that, at that time, defendant and Lee were standing approximately five feet from each other and Hunte, in demonstrating the Lee and defendant's positions, placed them approximately three to four feet from each other. Both Sooknandan and Hunte testified that defendant then pulled out a gun, pointed it at Lee and fired it at Lee. Hunte added that this first shot knocked Lee off

of the bike and to the ground and that once Lee was on the ground, defendant leaned over him and fired the gun two more times at him before running away. Of note, Sooknandan testified that Hunte was not present at the time of the shooting.

Colin Austin, an off-duty New York City Police Officer, while driving home from work, observed a man on a bicycle and three other men involved in some sort of exchange. After he had driven past, Officer Austin heard three gunshots. Through his rear view mirror, Officer Austin observed the man on the bicycle lying on the ground, two of the men running away on Riverdale Avenue and the another, who appeared to have a gun, running down Williams Avenue. Officer Austin followed this man, observed him drop what appeared to be a gun in a garbage can, and continue on to building at 553 Hinsdale Street. When Officer Austin got out of his car and approached this man, who was with a group of people in front of 553 Hinsdale, the man ran into 553 Hinsdale, and others in the group barred the officer from following the man into the building. Officer Austin returned to the garbage can and, before retrieving the gun from the garbage can, he briefly detained another person who was approaching the garbage can. Around this time, a group of people, including Hunte, approached Officer Austin and informed him that the person he had in custody was not the shooter.

According to Sooknandan, later that night, while he was standing near a group of police officers in front of a building on Hinsdale Street, two men came out of the building, and someone he knew as "Rump" went up to one of these men, who was defendant, and

asked why he had shot Lee.<sup>2</sup> Sooknandan recognized defendant, who had been approached by Rump, as the shooter, although he was wearing different clothes than before. After Sooknandan pointed out defendant to his father and identified him as the shooter, Sooknandan's father chased him down, and he was thereafter apprehended by the police. Based on the testimony of several witnesses, it appears that from the time defendant exited the building with the other man, the scene on Hinsdale was chaotic. Indeed, one of the police officers present described the scene of the arrest as a "mini riot." At trial, both Sooknandan and Hunte pointed at defendant, who was sitting in the courtroom, and identified him as the person who shoot Lee. In addition, Hunte testified that he identified defendant as the shooter at a police lineup conducted at some point later in the night of the shooting. While Officer Austin stated that the person in spot 3 in the lineup (defendant's spot) had a build and complexion that most closely matched defendant, he was unable to definitively identify this person as the man he saw running from the scene of the shooting to 553 Hinsdale.

The autopsy showed that Lee had three gunshot wounds, two of which were most likely caused by the same bullet. There was an "in and out" wound of the right arm, and another hole into the right chest that was most likely an entrance wound from the same bullet that hit the right arm. There was also an additional shot to the right side of the abdomen that went through Lee's internal organs. Lee's body showed no evidence of stippling, suggesting that the shots were fired from a distance greater than 12 to 18 inches. The two bullets

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<sup>2</sup> In other testimony, Sooknandan stated that Rump was not present at the time of the shooting.

removed from Lee's body were turned over the police ballistics unit, which determined that they had been fired from this gun retrieved from the garbage can by Officer Austin.

After the People rested, the defendant choose not to present a case. During the charge conference, the court, in defendant's presence, asked defense counsel, Barry Krinsky,<sup>3</sup> if he wanted the lesser included manslaughter and counsel stated that he was not requesting such a charge.

During summations, Krinsky argued that the jury should reject the identification testimony of Hunte and Sooknandan and find the testimony of Austin irrelevant to connecting defendant to the shooting. In particular, Krinsky emphasized: (1) that Sooknandan really only had a few seconds to identify defendant, (2) that Sooknandan's testimony showed that Hunte wasn't at the scene of the crime, (3) that Sooknandan's identification of defendant at 553 Hinsdale was suggested by Rump, who was not present at the time of the shooting and who didn't testify at the trial; (4) that the identification of defendant was also affected by the mob atmosphere at the time of his arrest; and (5) that Austin was only able to say that the person in spot number 3 had a similar build to defendant and that he did not definitively identify defendant as the shooter at the lineup. According to Krinsky, these factors, as well as other inconsistencies he identified in the People's case demonstrated the existence of a reasonable doubt with respect to defendant's guilt.

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<sup>3</sup> All references to Krinsky without a first name relate to Barry Krinsky.

On December 4, 2001, the jury found defendant guilty of one count of intentional murder in the second degree and criminal possession of a weapon in the second degree.<sup>4</sup> At sentencing, defendant appeared with new counsel, and the court, on January 7, 2002, sentenced defendant to a term of imprisonment of 25 years to life for the murder in the second degree and a concurrent term of 10 years for the criminal possession of a weapon in the second degree. Defendant, again represented by new counsel, appealed the conviction on the ground that trial court improperly granted the People's reverse-Batson challenge, that the People committed prosecutorial misconduct during summations and that there was an insufficient chain of custody to warrant admitting the handgun into evidence. The Appellate Division, Second Department, rejected these arguments, and affirmed the conviction (*People v Williams*, 5 AD3d 705 [2d Dept 2004]), and the Court of Appeals thereafter denied defendant leave to appeal (*People v Williams*, 2 NY3d 809 [2004]). Defendant also filed a Federal habeas petition that was denied. According to the People, defendant's habeas petition raised the same issues as he had raised on his appeal.

#### CPL 440.10 Motions

A criminal judgment is presumed to be regular (*People v Session*, 34 NY2d 254, 255 [1974]; *People v Smyth*, 3 NY2d 184, 187 [1957]). This presumption is only eliminated upon the production of substantial evidence contradicting the regularity of the proceeding (*People*

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<sup>4</sup> The only charges submitted to the jury were intentional murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

*v Session*, 34 NY2d at 256; *People v Smyth*, 3 NY2d at 187; *People v Robinson*, 191 AD2d 523, 523 [2d Dept 1993], *lv denied* 81 NY2d 1018 [1993]). Bare conclusory allegations are insufficient to rebut the presumption of regularity (*People v Brown*, 56 NY2d 242, 246-247 [1982]; *People v Session*, 34 NY2d at 256).

A court has the discretion to deny a post-judgment motion when the facts raised in the motion could have been placed on the record prior to sentence and defendant unjustifiably failed to do so (CPL 440.10[3][a]; *People v Friedgood*, 58 NY2d 467, 471 [1983]). When considering the sufficiency of CPL 440.10 motion papers, a court may deny a motion without a hearing if there is no legal basis for granting the motion (*People v Elliott*, 187 AD2d 666, 667 [2d Dept 1992]; CPL 440.30 [4] [a]), the papers do not contain sworn non-hearsay allegations based on personal knowledge which substantiate the essential facts (*People v Taylor*, 211 AD2d 603, 603 [2d Dept 1995]; *People v Salaam*, 187 AD2d 363, 364-365 [1<sup>st</sup> Dept 1992], *affd* 83 NY2d 51 1993]; *see also People v Session*, 34 NY2d at 256; CPL 440.30[4][b]), or essential allegations of fact are refuted by a court record, or made solely by defendant, and under all the circumstances, there is no reasonable possibility that the allegations are true (*People v Santana*, 101 AD3d 1664, 1664-1665 [4<sup>th</sup> Dept 2012], *lv denied* 20 NY3d 1103 [2013]; *People v Hoffler*, 74 AD3d 1632, 1635-1636 [3d Dept 2010], *lv denied* 17 NY3d 859 [2011]; CPL 440.30 [4] [d]). A hearing is only required when the sworn allegations create an issue of fact as to a matter not appearing on the record (*People*

*v Crippen*, 196 AD2d 548, 549 [2d Dept 1993], *lv denied* 82 NY2d 848 [1993]; CPL 440.30 [2], [3], [4] and [5]).

### Ineffective Assistance of Counsel

In New York, counsel is effective where “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 Baldi*, 54 NY2d 137, 147 [1981]; *see also People v Oatout*, 21 NY3d 127, 128-129 [2013]; *People v Benevento*, 91 NY2d 708, 712 [1998]). A defendant must “demonstrate the absence of strategic or other legitimate explanations for counsel's failure . . . Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment” (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see also People v Barboni*, 21 NY3d 393, 405-406 [2013]). Counsel’s actual, subjective reasons for acting or failing to act are irrelevant (*People v Satterfield*, 66 NY2d 796, 799 [1985]). Rather, the court looks to whether the selected strategy may have been chosen by a reasonably competent attorney (*id*; *see also People v Barboni*, 21 NY3d at 406; *People v Benevento*, 91 NY2d at 712; *People v Rivera*, 71 NY2d at 709). A court must also examine whether the representation was prejudicial to the defense or deprived defendant of a fair trial (*People v Benevento*, 91 NY2d at 713-714).

The Federal standard for claims of ineffective assistance based upon a counsel's performance was set forth by the Supreme Court in *Strickland v Washington* (466 US 668 [1984]). The two-part *Strickland* test requires a showing that “counsel's performance was

deficient and that the deficiency in performance prejudiced defendant” (*People v Ford*, 86 NY2d 397, 405 [1995]). As to the “prejudice” aspect, “defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome” (*Strickland*, 466 US at 694).

Defendant’s primary contention in moving to vacate the judgment is that Krinsky was ineffective in failing to request that the court charge manslaughter as a lesser included offense of murder in the second degree and, further that Krinsky failed to consult with him in making the decision. The court notes that trial record might not have allowed for review of these issues on direct appeal given that the reasons for Krinsky’s tactical decision do not appear on the record (*see People v Morusma*, 45 AD3d 253, 254 [1<sup>st</sup> Dept 2007], *lv denied* 9 NY3d 1036 [2008]). Nevertheless, the motion with respect to this ground is denied because defendant has failed to submit any explanation as to why he could not have created a record with respect to the issue when he appeared for sentencing with new counsel (CPL 440.10 [3] [a]; *People v Degondea*, 3 AD3d 148, 156-157 [1<sup>st</sup> Dept 2003], *lv denied* 2 NY3d 798 [2004]; *People v Donovan*, 107 AD2d 433, 443-444 [2d Dept 1985], *lv denied* 65 NY2d 694 [1985]; *cf. People v Hoffler*, 74 AD3d at 1633-1634).

In any event, aside from the discretionary procedural bar of CPL 440.10 (3) (a), defendant has also failed to demonstrate that a hearing is warranted on the issue (*see People v Williams*, 24 AD3d 575, 575-576 [2d Dept 2005], *lv denied* 6 NY3d 782 [2006]). Initially,

in this respect, the trial record shows that as a whole, counsel mounted a vigorous defense by, among other things, making appropriate pre-trial motions, ably arguing a *Sandoval* application, actively participating in the jury voir dire, making a cogent opening statement, cross-examining the People's witnesses, making appropriate objections and presenting a closing argument that marshaled the evidence and pointed out the weaknesses in the People's case (see *People v McGee*, 20 NY3d 513, 518 [2013]). However, despite generally competent representation, the Court of Appeals has recognized that an isolated error by counsel "may, in a rare case, result in a finding of constitutionally deficient representation, despite an attorney's otherwise adequate performance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v McGee*, 20 NY3d at 518 [internal quotation marks omitted]).

Turning to the alleged error here, it would appear that a reasonable view of the evidence would arguably support charging manslaughter in the first degree as a lesser included offense of murder in the second degree (CPL 125.20 [1] [causes death with only intent to cause serious physical injury to another]; *People v Sanchez*, 226 AD2d 562, 563 [2d Dept 1996]; *People v Martin*, 182 AD2d 834, 834 [2d Dept 1992]; but see *People v Sostre*, 70 AD3d 865, 865 [2d Dept 2010], *lv denied* 14 NY3d 844 [2010]).<sup>5</sup> Defendant's papers,

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<sup>5</sup> Nothing in the record, however, suggests that defendant did not intend to fire the gun to cause at least serious injury or otherwise suggests that he acted recklessly as is required to charge manslaughter in the second degree (CPL 125.15 [1] [recklessly causes death]; see *People v Lora*, 85 AD3d 487, 491-494 [1<sup>st</sup> Dept 2011], *lv denied* 18 NY3d 829 [2011]; *Rice v Hoke*, 846 F2d 160, 166 [2d Cir 1988]; cf. *People v Rivera*, 70 AD3d 1177, 1183 [3d Dept 2010], *lv denied* 14 NY3d 891 [2010] and 15 NY3d 855 [2010]).

however, fail to demonstrate that the decision to forego the lesser included was not part of a legitimate trial strategy. While the record may support charging manslaughter in the first degree as a lesser included offense, the evidence that defendant shot at Lee three times while standing three to five feet from Lee, and that he fired two of these shoots while leaning over Lee while Lee was already lying on the ground, would appear to make any argument to the jury that defendant did not intend to kill Lee somewhat of a hard sell (*see People v Roberts*, 75 AD3d 564, 565 [2d Dept 2010], *lv denied* 15 NY3d 895 [2010]; *People v Sostre*, 70 AD3d at 865; *People v Seabrooks*, 27 AD3d 494, 494 [2d Dept 2006], *lv denied* 6 NY3d 838 [2006]).

In addition, there were weaknesses with the identification evidence that allowed Krinsky to make legitimate arguments that the People had failed to demonstrate, beyond a reasonable doubt, that defendant was the shooter. Namely, Officer Austin, at the lineup, was unable to identify defendant as the shooter. Krinsky also seized on Sooknandan's testimony that he did not see Hunte at the time of the shooting in order to argue in closing arguments that Hunte was not present. Further, Krinsky attacked Sooknandan's ability to recognize defendant based on his brief observations of defendant during the shooting, and asserted that Sooknandan's identification of defendant was more likely based on Rump's accusations when defendant walked out of 553 Hinsdale and the "lynch mob" atmosphere at that location than Sooknandan's ability to recall defendant's appearance from the time of the shooting. Under these circumstances, defendant has failed to demonstrate that Krinsky's "go for broke"

strategy was unreasonable and constituted illegitimate strategic choice (*see People v McGee*, 20 NY3d at 519-520; *People v Casseus*, 120 AD3d 828, 829-830 [2d Dept 2014]; *People v Illescas*, 87 AD3d 699, 699-700 [2d Dept 2011], *lv denied* 17 NY3d 953 [2011]; *People v Clarke*, 55 AD3d 370, 370 [1<sup>st</sup> Dept 2008], *lv denied* 11 NY3d 923 [2009]; *cf. People v Nesbitt*, 20 NY3d 1080, 1082 [2013]; *People v Turner*, 5 NY3d 476, 483-484 [2005]).

Defendant additionally contends that he was not consulted regarding the decision to charge the lesser included offense. Moreover, in light of defendant's professed desire to plead to any charge less than murder in the second degree that he asserts Krinsky knew about, and in light of his off the record admission to Melvin Krinsky, Krinsky's brother and legal associate, that "I was followed to the corner and surrounded by four guys, I didn't mean to kill that kid, I got paranoid" (Defendant's Affidavit at 4), defendant, in essence, argues that Krinsky should have known that he would have desired that the lesser included manslaughter charge be presented to the jury. The supporting affidavit from defendant, however, is the only evidence supporting the assertions that Krinsky pursued a "go for broke" strategy and declined to request a lesser included offense charge without consulting defendant. Given that it appears highly unlikely that counsel would have pursued such a strategy without consulting with defendant, this portion of the motion is denied without a hearing because there is no reasonable possibility that the allegation is true (*see People v Santana*, 101 AD3d at 1664-1665; *People v Hoffler*, 74 AD3d at 1634-1635; CPL 440.30 [4] [d]).<sup>6</sup> Of note, in this

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<sup>6</sup> Although defendant has submitted an affidavit from Charles Holman, who represents that he communicated to Krinsky defendant's desire to plead guilty to "anything less than

respect, defendant waited over 12 years to raise this claim (*see People v Hanley*, 255 AD2d 837, 838 [2d Dept 1998], *lv denied* 92 NY2d 898 [1998]), the trial record shows that counsel consulted with defendant regarding his decision on whether he should testify on his own behalf, and that defendant was present in the courtroom during the discussion when Krinsky was asked about charging manslaughter as a lesser included charge, yet defendant said nothing on the record that he disagreed with the strategy at that time or at the time he appeared at sentencing with new counsel.

Moreover, even if defendant had shown that he was not consulted, the decision regarding the charging of lesser included offenses is a strategic decision for counsel, and is not a fundamental decision reserved for the defendant (*see People v Colville*, 20 NY3d 20, 29-33 [2012]; *People v Taylor*, 2 AD3d 1306, 1308 [4<sup>th</sup> Dept 2003], *lv denied* 2 NY3d 746 [2004]; *see also People v Garrick*, 11 AD3d 395, 396 [1<sup>st</sup> Dept 2004], *lv denied* 4 NY3d 744 [2004], *and* 4 NY3d 745 [2004]). As such, any failure by Krinsky to consult with defendant regarding the decision not to request the lesser included offense does not constitute ineffective assistance of counsel (*see People v Taylor*, 2 AD3d at 1308; *People v Ford*, 205 AD2d 310, 310 [1<sup>st</sup> Dept 1994], *lv denied* 84 NY2d 1011 [1994]; *see also State v Eckert*, 203 Wis2d 497, 508-509, 553 NW2d 539, 544 [Wis App 1996], *review denied* 207 Wis2d 285, 560 NW2d 274 [1996]; *Mathre v State*, 2000 ND 201, ¶¶ 1, 6, 619 NW2d 627, 628, 630

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murder,” nothing in Holman’s affidavit suggests that Krinsky failed to consult with defendant regarding the trial strategy and the charging of lesser included offenses.

[2000]; *Abney v State*, 408 SC 41, 50-51, 757 SE2d 544, 548-549 [SC App 2014]; *People v Newmiller*, \_\_\_ P3d \_\_\_, 2014 WL 2981043 \* 4 [Colo App 2014]).

To the extent that defendant suggests that counsel was ineffective relating to his handling of plaintiff's desire to plead guilty to a charge lesser charge than murder in the second degree, defendant has failed to meet his burden because he has failed to submit any evidence that the People made a plea offer to a lesser charge - a necessary component of such an ineffective assistance claim (*see People v Fernandez*, 5 NY3d 813, 814 [2005]; *People v Rogers*, 8 AD3d 888, 890-891 [3d Dept 2004]). Moreover, the notations on the copy of the trial folder submitted by the People support their contention that no plea offer was made.

Finally, defendant's argument that Krinsky, during his closing argument, conceded defendant's guilt and accepted that Sooknandan was an eyewitness is rejected as this assertion is refuted by the trial record (*see CPL 440.30 [4] [d]*; *People v Lindsey*, 179 AD2d 915, 915 [3d Dept 1992]; *see also People v Hoffler*, 74 AD3d at 1635-1636).

Accordingly, defendant has failed his burden of demonstrating that he was denied the effective assistance of counsel under both the state and Federal standards, and, as such, the motion is denied without a hearing.

This constitutes the decision and order of the court.

Defendant is advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this

decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, 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 certificate granting leave to appeal is granted (22 NYCRR 671.5).

J. S. C.  
**Hon. Lawrence Knipel**

