People v Harvey
2014 NY Slip Op 33038(U)
November 3, 2014
Supreme Court, Kings County
Docket Number: 1801/91
Judge: Evelyn J. Laporte
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 38

THE PEOPLE OF THE STATE OF NEW YORK,	:	Ind. No.: 1801/91
	:	By: Hon. Evelyn Laporte
-against-	:	Date: November 3, 2014
	:	
UMAR HARVEY,		
Defendant	:	

The defendant has filed a motion *pro se* pursuant to C.P.L. §440.10 to vacate his judgment of conviction on the grounds that he received ineffective assistance of counsel. He claims that his attorney failed to advise him whether to accept a plea offer, and as a result, he was convicted after trial and was sentenced to the maximum period of incarceration. He argues that under *Strickland v. Washington*, 466 US 688 (1984), made applicable to representation by counsel on guilty pleas in *Hill v. Lockart*, 474 US 52 (1995), he received ineffective assistance. The People oppose defendant's motion arguing that it should be dismissed because it is meritless and procedurally barred, since defendant failed to raise this issue in a prior motion he filed pursuant to C.P.L. §440.10.

In May 1994, defendant filed a *pro se* motion with Justice Eggito, who had presided over his trial, to vacate the judgment pursuant to CPL §440.10. In that motion, defendant argued that the People had withheld portions of the criminal record of one of the prosecution witnesses. Defendant did not raise any issue related to ineffective assistance of counsel. The motion was denied. The judge found it to be without merit because the alleged convictions belonged to

another individual with the same name as the witness who testified at defendant's trial, and the judge therefore found that the People had not withheld any information in that regard.

Throughout the late 1990s up until 2012, defendant filed several motions including an application for leave to appeal to the Court of Appeals, leave to appeal to the Appellate Division from the denial of his first 440 motion, two motions for a writ of error *coram nobis*, and a federal writ of *habeas corpus*. Every motion was denied.

Now defendant has filed an additional motion pursuant to CPL §440.10. In support of his claim that he received ineffective assistance, he states that he had been unhappy with the services provided by defense counsel and had so informed the trial judge on several occasions. (Defendant's brief, p.2-3). He alleges that he requested that new counsel be assigned because he hadn't had enough of an opportunity to confer with his attorney, Mr. Canonico, however, the judge refused to assign new counsel.

Defendant argues that Mr. Canonico also failed to provide advice about whether defendant should have accepted the plea offer which was extended to him as *voir dire* for his trial was being conducted. Prior to *voir dire*, he had previously rejected a plea to Manslaughter in the 1st Degree with a promise of an indeterminate term of incarceration of ten to thirty years. The Judge acknowledged on the record that defense counsel had conveyed that offer to the defendant. As *voir dire* proceeded, the People made an amended plea offer of Manslaughter in the First Degree and an indeterminate period of incarceration for eight and one third years to twenty-five years. The minutes of the proceeding where the offer was conveyed by the judge to the defendant have been provided. (January 22, 1992, p.27). When the judge communicated this offer, he stated the following:

> "You think about it. If you want it, let me know. If you don't want it, let me know, because I want it on the record that you were aware of it and that you are the one who didn't want it, okay? If you get a chance, you can discuss it with Mr. Canonico. [defense attorney]. Mr. Canonico knows what this case is all about. He will tell you what you are facing. But he is not going to recommend one thing or another. It's for you to make the decision only."

Prior to the start of testimony, the judge questioned the defendant on the record and asked him if he wanted to accept the plea offer. The defendant refused the offer. (January 22, 1992, p.59). Significantly, defendant made no record about whether or not he had consulted with his attorney before he rejected the offer, although previously, he allegedly had been so vocal about this very issue. Defendant did not request more time to consider the offer, nor did he request an opportunity to confer further with his attorney, although he now claims that his attorney did not tell him what his exposure would be after trial, nor did he review the strengths and weaknesses of the People's case. Defendant argues that these failures constitute ineffective assistance of counsel, especially since defendant argues that he was so young and inexperienced.

The People argue that the claim is procedurally barred because defendant did not raise it in his prior 440 motion, that the defendant has failed to show a reasonable probability that he would have accepted the plea offer if he had been so advised, that the defendant has not provided corroboration for his claim, and that defendant's claim lacks credibility due to the fact that he waited twenty-two years to assert it.

The charges in this case arise from a shooting which occurred on February 11, 1991. Defendant, who was then 19 years old and had seven prior arrests, got into a dispute with Anthony Mason because he believed that Mason had struck a woman who was a close friend of the defendant's. At 11:00 a.m., Mason and two of his friends, Donnell Hinton and Algee Macon, arrived at a parking lot located at 305 Livonia Avenue in Brooklyn. The defendant arrived at the

opposite end of the parking lot with two of his friends. Defendant called Mason to come over to them, but Mason sent his two friends, Hinton and Macon, as emissaries to talk to the defendant. As Hinton and Macon left the defendant to return to where Mason was standing, the defendant fired three shots at Hinton, hitting him in the head, the arm, and the thigh. Hinton died at the scene. The defendant was charged with Murder in the Second Degree, Attempted Murder in the Second Degree, Attempted Assault in the First Degree, Reckless Endangerment in the First Degree, two counts of Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree.

Defendant exercised his right to have the case tried before a jury. The defense case included calling two witnesses to testify that they had heard another person admit to committing the crime. However, the jury found that the People had proven the case beyond a reasonable doubt and convicted the defendant of one count of Murder in the 2nd Degree, two counts of Criminal Possession of a Weapon in the 2nd Degree, and one count of Criminal Possession of a Weapon in the 3rd Degree. On March 17, 1992, the defendant was sentenced to concurrent indeterminate prison terms of twenty-five years to life for the Murder count, five to fifteen years on the weapon possession in the second degree counts, and two and one third to seven years on the third degree weapon possession count.

Defendant appealed his conviction to the Appellate Division, Second Department, raising three claims: (1) that the trial court abused its discretion when it made a *Sandoval* ruling which allowed the People to inquire into two of the defendant's six prior convictions; (2) the defendant's right to be present at trial was violated when he allegedly couldn't hear the testimony of several key witnesses; (3) that the trial court erred when it allowed the People to

amend the indictment. The Appellate Division held that the *Sandoval* ruling was not an improvident exercise of discretion, the claim regarding amending the indictment was without merit because the amendment did not change the theory of the prosecution or prejudice the defendant on the merits, and that defendant's claim that he could not hear testimony of several witnesses was not reviewable on direct appeal. Defendant's judgment of conviction was affirmed. (*People v. Harvey*, 212 AD2d 730 [2nd Dept 1995]).

Regarding defendant's current motion, when a claim of ineffective assistance is made under the federal constitution, the Court must apply the two-part test enunciated in *Strickland v Washington,* 466 US 668 (1984), which requires a showing that counsel's performance was deficient and that the deficiency in performance prejudiced defendant. (*See also Aparicio v. Artuz*, 269 F.3d 78, 95 [2d Cir. 2001]). The performance of counsel is deficient if it "[falls] below an objective standard of reasonableness" under "prevailing professional norms." (*Strickland supra* at 688). The second prong, also known as the prejudice prong, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." (*Hill v. Lockhart*, 474 US 52, 59 [1985]). In asserting these claims, the defendant has the burden of overcoming the presumption that his counsel's representation was reasonable. (*Strickland supra* at 690). ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Applying the *Strickland* prejudice test to a particular case "may pose a difficulty in some cases" to determine if a particular defendant, in fact, would have taken a plea or would have proceeded to trial. (*United States v. Horne*, 987 F.2d 833, 835 [D.C.Cir.1993]).

In evaluating defendant's claim of ineffective assistance of counsel under New York law, the Court must determine whether the evidence, the law and the circumstances of this particular

case, viewed in totality and as of the time of the representation, reveal that the attorney provided "meaningful representation." (*People v. Baldi*, 54 N.Y.2d 137 [1981]; *People v. Benevento*, 91 N.Y.2d 708 [1998]). "Judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Due to the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. There are countless ways to provide effective assistance in any given case." (*Strickland, supra* at 689; *See also*, *People v. Baldi*, *supra* at 146-147; *People v. Jackson*, 52 N.Y.2d 1027 [1981]).

The defendant must show that defense counsel's single alleged deficiency constituted egregious and prejudicial error such that it deprived him of meaningful representation. (*People v. Caban*, 5 NY3d 143 [2005]). To prevail on a claim of ineffective assistance of counsel based on defense counsel's failure to advise the defendant about a plea offer, a defendant must demonstrate that the 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 NY3d 813 [2005]). The defendant must proffer support to substantiate his claim that he would have accepted the plea. His own self-serving statement that he would have done so is insufficient to establish such a claim, especially when he had rejected a similar plea offer days before. (*People v. Goldberg*, 33 AD3d 1018 [2nd Dept 2006]; *People v. Fernandez, supra*.)

While defendant argues that he was young and inexperienced at the time of this case, a review of the court file reveals that defendant had disposed of three prior cases with a guilty

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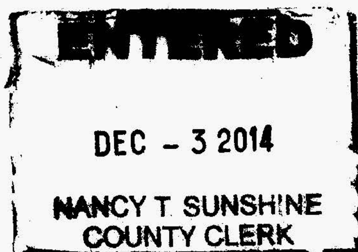
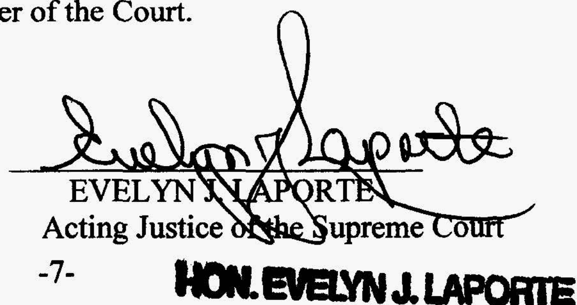
plea, and also had a youthful offender adjudication for a charge of Attempted Murder. His rap sheet shows a total of seven prior arrests. Therefore, even at a young age, defendant had a great deal of experience in the criminal justice system. While this experience does not vitiate the need to receive competent advice from counsel regarding a plea offer, the record does not support defendant's bare assertion that he did not receive such advice. For the purposes of this motion, since there is no evidence to the contrary, the Court assumes that defense counsel continued to meet his professional responsibility to the defendant regardless of the Judge's statement saying that counsel would not make a recommendation regarding the plea.

The defendant has provided no substantiation for his claim, and has waited for over two decades to assert it. He has provided no explanation for the lengthy delay in bringing this claim, which has a negative impact on the claim's credibility. (*See People v. Friedgood*, 58 NY2d 467 [1983]; *People v. Degondea*, 3 AD3d 148 [1st Dept 2003]). Additionally, defendant has provided no support for his claim that he would have accepted this plea, when he had rejected a similar offer within a day or two of the instant offer. Since defendant has failed to proffer support to substantiate any part of his claim, the Court finds that under the circumstances of this case, the record reflects that the defendant received the meaningful, effective representation to which he was entitled.

Defendant's motion is denied in its entirety pursuant to C.P.L. §440.30(4)(d) because the defendant does not allege facts essential to support the motion, and the facts he does allege are unsupported by any other evidence, so that under all the circumstances attending the case, there is no reasonable probability that the allegations are true.

This constitutes the decision and order of the Court.





EVELYN J. LAPORTE
Acting Justice of the Supreme Court

HON. EVELYN J. LAPORTE

Right to appeal:

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under C.P.L. §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. THE APPLICATION MUST BE SENT TO THE APPELLATE DIVISION, SECOND DEPARTMENT, 45 MONROE PLACE, BROOKLYN, NY 11201. In addition, you must serve a copy of your application on the Kings County District Attorney, Renaissance Plaza, 350 Jay Street, Brooklyn, NY 11201. Do NOT send notice of appeal to the Supreme Court Justice who decided this motion.

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. The application must contain your name and address, indictment number, the question 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.