

**People v Grayton**

2014 NY Slip Op 33162(U)

August 19, 2014

Supreme Court, Kings County

Docket Number: 179/2002

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART CV19

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

-against-

Date: August 19, 2014

DECISION & ORDER

NATHANIEL GRAYTON

Indictment No. 179/2002

-----X

Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he received ineffective assistance of counsel. For the following reasons, the motion is denied.

***Facts and Procedural History***

On the evening of November 27, 2001, Isaiah Rodriguez drove to 72 Aberdeen Street in Brooklyn to visit a friend. Defendant, who was standing outside the building with friends and neighbors, began arguing with Rodriguez because defendant believed that Rodriguez had been driving too fast. After a brief physical altercation defendant pulled a handgun from his pocket and shot Rodriguez fatally in the back. Under Indictment No. 179/2002, defendant was charged with two counts of murder in the second degree (PL §§ 125.25[1], [2]) and one count each of criminal possession of a weapon in the second and third degrees (PL § 265.03[2], 265.02[4]). Jessica Osario, one of the two eyewitnesses called by the prosecution, identified defendant as the shooter before the Grand Jury.

At trial, Osario was brought to court involuntarily pursuant to a material witness order.

She was provided counsel and the court questioned her outside the presence of defendant and his attorney about her reluctance to testify. Osario's counsel explained that she was in extreme fear because she and her family had received threats from third parties on behalf of defendant.

Defendant and his attorney were brought back into the courtroom when the court offered to hear an application about the possibility of closing the courtroom for Osario's testimony. Osario's counsel repeated that his client was extremely fearful but Osario refused to provide details about the threats, saying only that she would absolutely refuse to testify and that they could "take [her] in" if necessary. The court found her in contempt and she was held in custody overnight. The following day defense counsel appeared without his client and the court conducted a hearing pursuant to *People v Geraci*, 85 NY2d 359 (1995) and *People v Sirois*, 92 AD2d 618 (2d Dept 1983). At the conclusion of the hearing, the court found that Osario had been made unavailable by defendant's conduct and that her grand jury testimony would be admissible in lieu of her live testimony at trial.

After trial defendant was convicted of murder in the second degree (PL § 125.25[1]). He was sentenced to a term of imprisonment of twenty-five years to life on February 6, 2003.

Defendant appealed from his judgment of conviction to the Appellate Division, Second Department, primarily contending that he had been improperly excluded from the *Geraci* hearing and that Osario's grand jury testimony should not have been admitted at trial. The Appellate Division unanimously affirmed the judgment of conviction on October 11, 2005, holding that defendant had not been deprived of his constitutional right to be present at a material stage of the trial and that Osario's testimony was properly admitted (*People v Grayton*, 22 AD3d 598 [2d Dept 2005]). Leave to appeal to the Court of Appeals was denied (*People v Grayton*, 6 NY3d

754 [2005]).

Defendant next petitioned to the United States District Court for the Eastern District of New York for a writ of *habeas corpus*, raising several of the same claims that he had raised on direct appeal. In this instance defendant argued that his constitutional rights were violated when he was excluded from the courtroom during the *Geraci* hearing, that the grand jury testimony of Osario was improperly admitted at trial, and that the prosecutor made improper remarks in her opening statement and summation. By Report and Recommendation dated August 13, 2007, the magistrate judge recommended that defendant's petition be dismissed on the grounds that defendant had waived his right to be present at the *Geraci* hearing by failing to object to his absence. It was also determined that the Appellate Division's decision rejecting defendant's claim as to the right to be present was not unreasonable. Finally, defendant's absence from the hearing was found to be harmless error. The District Court accepted these findings by decision and order dated September 3, 2009 (*Grayton v Ercole*, 2009 U.S. Dist. LEXIS 81169 [E.D.N.Y. 2009]).

Defendant next applied to the District Court for a certificate of appealability, which was granted in part. The District Court certified two issues for appeal: 1) whether defendant's exclusion from the *Geraci* hearing warrants habeas relief; and 2) whether defense counsel could effectively waive defendant's right to be present at the hearing, assuming such a right exists (*Grayton v Ercole*, 2010 U.S. Dist. LEXIS 26108 [E.D.N.Y. 2009]). On August 15, 2012, the United States Court of Appeals affirmed the judgment of the District Court denying defendant's habeas petition (*Grayton v Ercole*, 691 F.3d 165 [2d Cir 2012]). The Second Circuit held that even though the United States Supreme Court has never expressly extended the right to be

present to a *Geraci* hearing, such a right exists under established federal law because a defendant's loss at a *Geraci* hearing would eliminate his fundamental right to cross-examine a witness. Nevertheless, the Second Circuit concluded that because the state court's decision was consistent with a finding of waiver, that decision was not an unreasonable application of federal law. The circuit court further held that while defendant's waiver was not express in this case, defendant's counsel was permitted to, and did in fact, waive the right on defendant's behalf by failing to object to and acquiescing to defendant's exclusion. Defendant's implicit waiver could also have been reasonably gleaned from defendant's failing to object when he returned to the courtroom and the court gave a detailed summary of its findings regarding defendant's misconduct. By order dated January 8, 2013, the Second Circuit denied defendant's petition for a panel rehearing of for a rehearing *en banc*. Defendant's petition for a writ of certiorari to the United States Supreme Court was denied on October 7, 2013 (*Grayton v Lee*, 134 S.Ct. 79 [2013]).

Now, defendant challenges the performance of his attorney in a motion to vacate the judgment of conviction. Defendant argues that he was prejudiced by counsel's failure to effectuate his presence at the *Geraci* hearing. Specifically, he claims that counsel never informed him that the hearing was taking place and that he did not question any of the witnesses at the hearing. He again challenges the validity of the waiver, arguing that neither he nor counsel waived his right to be present at the hearing.

### ***Legal Analysis***

Defendant's claims concerning counsel's failure to inform him about the hearing and the

failure to cross-examine witnesses are procedurally barred. These claims rely on facts contained in the record and could have been raised on appeal, yet defendant unjustifiably failed to do so on his direct appeal. Accordingly, where defendant failed to raise his claims on appeal he is now barred from doing so in a collateral motion (CPL § 440.10[2][c]; *see People v Cooks*, 67 NY2d 100, 103 [1986] [CPL § 440.10 should not be employed as a substitute for direct appeal when defendant was in a position to raise an issue but failed to do so]; *see also People v Cuadrado*, 9 NY3d 362, 365 [2007]).

Moreover, the defendant's assertions underlying counsel's alleged errors were already rejected by the Appellate Division on direct appeal and by the federal courts in addressing defendant's application for habeas corpus relief. Both the state and federal courts have extensively considered and repeatedly rejected the claims that defendant's right to be present was violated, that he and his counsel did not waive that right, and that Osario's Grand Jury testimony was improperly admitted. Thus, these arguments do not warrant further consideration in the instant collateral motion (CPL 440.10[2][a], [3][b]).

The claim that counsel was ineffective for failing to inform him that the *Geraci* hearing was taking place is unsupported by the record and thus procedurally barred from review. The District Court likewise rejected defendant's claim that he did not know about the hearing, noting that "[w]hile Petitioner was not in the courtroom as the trial judge received testimony and arguments in the *Geraci* hearing, he was present at both the events leading up to the *Geraci* hearing and the conclusion of the hearing sufficient to establish his awareness of the proceeding" (*Grayton v Ercole*, 2010 U.S. Dist. LEXIS 26108 \*7). The facts appearing on the record, alongside the fact that defendant never objected to his absence after learning the outcome of the

hearing, indicate that defendant's latest allegation is simply not credible (CPL § 440.30[4][d]).

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668 [1984]; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on "prevailing professional norms" (*Strickland* at 687-88). It is his burden to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*id.* at 687). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions (*Strickland* at 690).

Defendant must also "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different (*Strickland* at 693). A reasonable probability in this context is a "probability sufficient to undermine the outcome" (*id.* at 694). Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable" (*Harrington v Richter*, \_\_ U.S. \_\_, 131 S.Ct. 770, 792 [2011]). Thus, the *Strickland* standard is "highly demanding" (*Kimmelman v Morrison*, 477 U.S. 365, 382 [1986]) and "rigorous" (*Lindstadt v Keane*, 239 F3d 191, 199 [2d Cir. 2001]).

In New York, a defendant's right to the effective assistance of counsel is violated when "defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure" (*People v Turner*, 5 NY3d 476, 479 [2005]). To meet this standard, defendant "must overcome the strong presumption" that he was represented competently (*People*

*v Ivanitsky*, 81 AD3d 976 [2d Dept 2011]; *People v Myers*, 220 AD2d 461 [2d Dept 1995]. “So 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 the constitutional requirement will have been met” (*People v Baldi*, 54 NY2d 137, 147 [1981]).

While the deficiency prong under State law is identical to that of *Strickland*, the prejudice prong in New York is “somewhat more favorable to defendants” (*People v Turner* at 480). Thus a defendant need not strictly adhere to the “but for” prejudice prong of *Strickland* to show that he was prejudiced by counsel’s performance (*id.*). Instead, “the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case” (*People v Benevento*, 91 NY2d 708, 714 [1998]). The “question is whether the attorney’s conduct constituted ‘egregious and prejudicial’ error such that defendant did not receive a fair trial” (*id.* at 713, quoting *People v Flores*, 84 NY2d 184, 188 [1994]). Thus, a defendant’s showing of prejudice is a “significant but not indispensable element in assessing meaningful representation” (*People v Stulz*, 2 NY3d 277, 284 [2004]).

Addressing the merits of defendant’s motion, this court finds no reason to depart from the conclusions of the Circuit Court, which found valid counsel’s implicit waiver of defendant’s right to be present at the *Geraci* hearing. In determining that it would have been reasonable for the Appellate Division to find an implied waiver of that right, the Circuit Court held that counsel may waive certain rights as decisions “pertaining to the conduct of the trial” (*Grayton v Ercole*, 691 F3d at 175; *New York v Hill*, 528 U.S. 110, 114 [2000]). Indeed, strategic and tactical decisions remain in the province of counsel (*United States v Plitman*, 194 F3d 59, 63 [2d Cir1999]; *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Bussey*, 6 AD3d 621 [2d Dept

2004]). Though a direct waiver by the defendant is preferable, there is no requirement that the defendant make a personal statement in court where the case law clearly establishes that the defendant's right to be present may be waived by counsel (*Clark v Stinson*, 214 F3d 315 [2d Cir 2000]). Here, counsel made a valid strategic decision to waive defendant's presence at the hearing.

In any event, defendant was not prejudiced by counsel's failure to effectuate his presence at the *Geraci* hearing, as he has failed to establish how he could have mounted a meaningful challenge to the evidence that was adduced at the hearing. It is clear from the record that both Osario and her mother made strong efforts to avoid blaming defendant for the threats they had received. Having observed the demeanor of both witnesses, the hearing court found overwhelming evidence that Osario had been "intimidated as a result of threats directed from the defendant" in spite of her refusal to provide details as to the source of her extreme fear. The court found her testimony credible, noting that she was so frightened that she was willing to serve time in jail rather than testify against defendant at trial. In light of the hearing court's findings of fact, defendant's mere speculation that his presence would have changed the outcome is insufficient to support the conclusion that he suffered prejudice.

Accordingly, the motion is denied.

This decision shall constitute the order of the court.

**ENTERED**  
SEP 15 2014  
NANCY T. SUNSHINE  
COUNTY CLERK

ENTERED  
  
CAROLYN E. DEMAREST, J.S.C.

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 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.

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 District Attorney.

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