

People v Rodriguez

2015 NY Slip Op 30097(U)

January 9, 2015

Supreme Court, Kings County

Docket Number: 6163/10

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: January 9, 2015

Indictment No: 6163/10

CARLOS PEREZ RODRIGUEZ,
Defendant(s).
-----X

The defendant submitted the instant motion seeking an Order to vacate his conviction pursuant to Criminal Procedure Law §440.10(1)(h) or in the alternative for an evidentiary hearing pursuant to Criminal Procedure Law §440.30(5). The defendant's request for a hearing is denied as there exists sufficient facts in the record to determine the claims raised by the defendant.

The defendant contends his conviction was obtained in violation of his right to effective assistance of counsel. Specifically, the defendant argues trial counsel's failure (1) to introduce specific evidence relating to defendant's ownership of a cell phone with the number (646-938-0050); (2) trial counsel's failure to call certain witnesses to show they routinely contacted the defendant at 646-938-0500; and (3) trial counsel's failure to conduct further investigation relating to the subject cell phone during the course of his trial amounted

to ineffective assistance of counsel. The People opposed the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

PROCEDURAL HISTORY

On December 3, 2012, the defendant was convicted of two counts of Robbery in the Second Degree (PL §160.10(1) and (2)(a)). The defendant's conviction arose out of a robbery incident which occurred, on July 7, 2010, at approximately 1:30PM. The complaining witness and another individual were leaving an Associated Supermarket located, at 650 Flatbush Avenue, in Kings County, when two males approached them and stole approximately \$100,000 in cash and checks. The complaining witness owned the supermarket at the subject location and was taking proceeds from the supermarket for deposit when the robbery incident occurred. The defendant was identified as being involved in this incident and after a trial by jury was convicted for his involvement in this incident.

On January 30, 2013, the defendant was sentenced to seven (7) years incarceration on both counts of Robbery to run concurrently. The defendant then submitted the instant motion seeking to vacate his conviction.

CONCLUSIONS OF LAW

Ineffective Assistance of Counsel

The question presented is whether there exists a legal basis to vacate the defendant's judgment of conviction. However, there is no merit to the claims raised herein by the defendant. The defendant contends the federal standard of review as well as New York

State jurisprudence are applicable to evaluating his claims of ineffective assistance of counsel.

The defendant contends he has established the two prong test set forth, in *Strickland v. Washington*, 466 US 668 (1984). Namely, defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability, but for counsel's errors, the proceeding(s) would have resulted in a different outcome. *Strickland v. Washington*, 466 US 668 (1984). The *Strickland* analysis requires any judicial scrutiny brought to bear upon defense counsel's performance be highly deferential in an effort to avoid the distorting effects of hindsight. *Id.*

New York State jurisprudence dictates that 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 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).

In applying either the *Strickland* standard or New York State analysis, the defendant failed to establish entitlement to the relief requested. In the instant case, it is clear the defendant has failed to meet the two-prong test of *Strickland*. 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. The defendant contends defense counsel failed to investigate his cell phone records and interview people who could have testified that the specific number referenced during the course of the trial belonged to the defendant. The defendant also asserted trial counsel failed to present evidence regarding the location of the subject cell phone on the day and time of the robbery. According to the defendant this failure to investigate and present specific evidence was not a mere strategic decision but rather a complete failure to provide effective assistance of counsel.

However, the very issues raised by the defendant were placed before the jury for its consideration. Namely, the subject telephone number of 646-938-0050 was connected to the defendant and evidence relating to cell site records which placed the cell phone number in Bronx County at 2:00pm on the day of the robbery were placed before the jury. Additionally, defense counsel called the defendant's mother who testified to the defendant's use of the cell phone with the subject number of 646-938-0500 and the frequency with which she called the

defendant at that number. The failure to call additional witnesses regarding this issue does not amount to ineffective assistance of counsel, especially where these issues were placed before the jury. There is no requirement that trial counsel present multiple witnesses to address the same issue in order to provide effective assistance of counsel. Trial counsel raised the very issues raised herein and the jury's verdict reflects it did not find those issues persuasive in reaching its verdict. Similarly, there is no evidence that but for the conduct of trial counsel that the results in this case would have been different.

Further, trial counsel's conduct did not constitute egregious or prejudicial conduct. The evidence presented establish the defendant received a fair trial with the benefit of effective representation. Moreover, as the trial court, having viewed the evidence first hand, there is a little doubt the claims raised by the defendant would have served to change the jury's verdict. Accordingly, there is no basis to find trial counsel acted in manner which was ineffective as a matter of law.

Actual Innocence

While the defendant has not specifically asserted a claim of actual innocence, the issue is resolved herein as per *People v. Hamilton*, 979 N.Y.S.2d 97 (2nd Dept 2014). The are insufficient facts on the record to sustain a claim of actual innocence. There is a gamble inherent in choosing to proceed to a trial and in this case the gamble was not resolved in the defendant's favor. However, the blame does not lie in the quality of representation provided by defense counsel. Trial counsel challenged the identification testimony presented by the

People and also set forth issues pertaining to the location of the defendant's cell phone at a different location during the robbery.

The defendant's claim of actual hinges upon a theory of misidentification coupled with his contention that because his cell phone was at a different location when the robbery occurred he could not have committed the robbery. Interestingly enough the jury was presented with both arguments but found the identification testimony credible and sufficient to sustain a conviction. It appears the jury found the evidence against the defendant credible and in turn found the defendant guilty. Moreover, the location of the defendant's cell phone does not automatically equate to the defendant's location. It is entirely feasible that the defendant did not have his cell phone at the time of the robbery. The jury found this possibility credible and there is no evidence submitted herein which would dictate that the sanctity of the jury's verdict should be disrupted. The defendant's motion lacks merit in so far as the defendant asserts this court should contravene a duly rendered jury verdict. There is no basis to upset the jury's verdict in this case. Accordingly, 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,

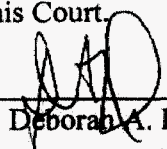
ORDERED, the application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the 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
JUSTICE SUPREME COURT

ENTERED
JAN 14 2015
NANCY T. SUNSHINE
COUNTY CLERK