

People v Miller

2015 NY Slip Op 30105(U)

January 8, 2015

Supreme Court, Kings County

Docket Number: 4792/09

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

-against-

DECISION & ORDER
Ind No.: 4792/09

JAMES MILLER,

Defendant.

----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On March 31, 2009, Jacqueline Jean returned to her residence located at 590 Ocean Avenue, Apartment 2E, at 7:30 p.m., in Kings County. Ms. Jean resided at the apartment with her husband Lionel Jean and her son Patrick Jean. Both Ms. Jean and Patrick Jean had left for work in the morning on March 31, 2009. Lionel Jean was the last to leave the apartment for work at 2:30 p.m., on March 31, 2009.

When Ms. Jean returned to her residence she noticed that her bedroom had been ransacked and that there was property in the form of jewelry and \$2,300 cash missing from the bedroom. The police were called and two fingerprints were lifted from an armoire in the bedroom. Lionel Jean testified that the missing \$2,300 had been kept in the armoire from which the fingerprints were lifted.

The fingerprint evidence collected in the Jean’s apartment was sent to the lab for analysis. Rosemarie Simonetti of the New York City Police Department latent fingerprint unit analyzed the fingerprint evidence collected at the Jean’s apartment. Based upon Ms. Simonetti’s analysis, defendant was arrested and charged with burglary and related charges for the incident which occurred at the Jean’s residence.

Ms. Simonetti testified at trial and was qualified as an expert in latent fingerprint examination and comparison. Ms. Simonetti testified that after she determined the fingerprint evidence was of

value, she submitted the two prints through a computer system to a database located in Albany, NY. The database search yielded a list of possible candidates based on the fingerprints that had been submitted by Ms. Simonetti. Using the list of candidates, Ms. Simonetti compared “live scan” prints from the archives of the possible candidates to the two prints from the armoire. Based on her manual comparison of the “live scan” prints to the two fingerprints from the armoire, Ms. Simonetti obtained a hard copy of defendant’s latent fingerprints to make a final comparison. After this procedure, Ms. Simonetti formed the opinion that the latent fingerprints recovered from the Jean’s apartment were those of the defendant. This information was forwarded to the 70th Precinct, who later placed defendant under arrest.

On March 29, 2010, the Court submitted two counts to the jury; Burglary in the Second Degree (Penal Law § 140.25[2]), and Grand Larceny in the Fourth Degree (Penal Law § 155.30[1]). On March 30, 2010, the jury returned a guilty verdict on both counts. Defendant was sentenced on April 20, 2010, as a persistent violent felony offender to sixteen years to life for the burglary conviction, and a concurrent term of one and one-half to three years for the grand larceny conviction.

Defendant filed a timely appeal, arguing that: (1) his right to counsel was denied based on his motion for reassignment of counsel being denied without inquiry; and (2) the admission of hearsay testimony regarding determinations of two non-testifying fingerprint experts violated defendant’s right to confront witnesses. The Second Department affirmed defendant’s judgment of conviction by Decision and Order dated January 16, 2013. People v Miller, 102 AD3d 813 (2d Dept 2013) *lv denied* 21 NY3d 1017 (2013).

Defendant now moves this Court, pursuant to CPL § 440.10, for an order vacating his judgment of conviction on the grounds that: (1) trial counsel was ineffective for failing to object and explore the People’s withholding of exculpatory Brady material regarding the other possible

candidates initially developed by the fingerprint database search; and (2) that the admission of hearsay testimony regarding determinations of two non-testifying fingerprint experts violated defendant's right to confront witnesses.

The People oppose defendant's application arguing that defendant's ineffective assistance of counsel claim is not properly supported and is without merit, and further that his confrontation claim is both without merit and procedurally barred.

For the following reasons, defendant's application is denied.

LEGAL ANALYSIS

Defendant's first claim is that his trial counsel was ineffective because he failed to properly object to, or to investigate the fingerprint evidence used at trial. Defendant's claim that his trial counsel failed to properly investigate the fingerprint evidence is belied by the record. Trial counsel employed and consulted with a fingerprint expert, and informed the Court that the expert may be called as a witness at trial. As detailed in the People's papers, trial counsel chose not to call the fingerprint expert he had consulted with as a matter of trial strategy. There is nothing in defendant's papers to support the allegation that the People withheld Brady material as it related to the any aspect of the trial, or specifically the fingerprint evidence.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel Strickland v Washington, 466 US 668 (1984); People v Linares, 2 NY3d 507, 510 (2004); *see also*, US Const, 6th Amend; NY Const, art 1, §6. To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance." Strickland v Washington, 466 at 690. Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different. Id. at 694.

Under New York law, the constitutional standard of effective assistance of counsel will be 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 Flores, 84 NY2d 184, 187 (1994); People v Baldi, 54 NY2d 137, 147 (1981). Moreover, “[t]his protection does not guarantee a perfect trial, but assures the defendant a fair trial.” People v Flores, at 187. Accordingly, the reviewing court must separate ineffectiveness from “mere losing tactics” and the defendant must “demonstrate the absence of strategic or other legitimate explanation” for counsel’s conduct. People v Baldi at 146; People v Rivera, 71 NY2d 705, 709 (1988). Defense counsel’s choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances. People v Benevento, 91 NY2d 708, 713 (1998). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole. People v Stulz, 2 NY3d 277, 284 (2004).

The record indicates that counsel provided a competent performance, including appropriate objections, based upon a reasonable defense strategy. Defendant was afforded meaningful representation under the circumstances. *See* People v Satterfield, 66 NY2d 796, 799-800 (1985). Counsel employed legitimate strategy in deciding when to make objections and what evidence to present. People v Benevento at 713. Defendant has also failed to establish that he was prejudiced either by counsel’s performance or by the unfairness of the proceedings as a whole. *See*, Strickland at 694; People v Stulz at 284.

Defendant has failed to establish the threshold issue of ineffective assistance of counsel because his motion papers lack sworn allegations which substantiate or tend to substantiate all of the essential facts necessary to support his motion. *See*, CPL § 440.30(4)(b). Furthermore, defendant’s allegations that trial counsel failed to properly investigate is contradicted by the record. *See*, CPL § 440.30(4)(d)(i).

Accordingly, the Court finds there are no grounds for a hearing on this matter and defendant’s application to vacate the judgment of conviction on the grounds of ineffective assistance of counsel is denied.

Defendant’s second ground for relief is that his Sixth Amendment confrontation rights were violated when hearsay testimony regarding determinations of two non-testifying fingerprint experts

was admitted during the testimony of Ms. Simonetti. This claim was previously raised, and denied, on defendant's direct appeal. People v Miller, 102 AD3d 813 (2d Dept 2013). Criminal Procedure Law, § 440.10(2) provides in pertinent part:

Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

The Court of Appeals has explained, "The purpose of [these] provisions is to prevent CPL § 440.10 from being employed as a substitute for direct appeal when defendant was in a position to raise an issue on appeal (CPL § 440.10[2][b]) or could readily have raised it on appeal but failed to do so (CPL 440.10[2][c])." People v Cooks, 67 NY2d 100, 103-104 (1986)(citing, People ex rel. Gibbs v. Vincent, 39 NY2d 918 [1976]; Bellacosa, Practice Commentaries, McKinney's Cons.Laws of NY, Book 11A, CPL § 440.10, p 320).

The law is clear in this area, a motion brought pursuant to CPL § 440.10(1) *must* be denied when the circumstances described in CPL § 440.10(2) exist. *See*, People v Cuadrado, 9 NY3d 362 (2007). Defendant's claim that his right to confront the non-testifying fingerprint experts was raised on his direct appeal, and the claim was denied. There has been no retroactively effective change in the law since defendant's conviction with respect to this issue. Pursuant to CPL § 440.10(2)(a), defendant's application is denied as procedurally barred.

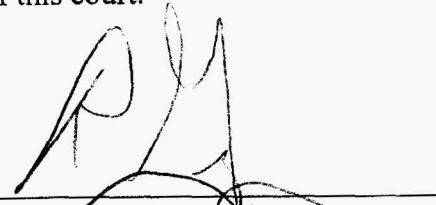
Accordingly, defendant's application to vacate his judgment of conviction is denied in its entirety.

CONCLUSION

For the foregoing reasons, defendant's application to vacate the judgment of conviction pursuant to CPL § 440.10 is denied.

This opinion shall constitute the decision and order of this court.

Dated: January 8, 2015
Brooklyn, New York



RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED
JAN - 9 2015
NANCY T. SUNSHINE
COUNTY CLERK