

**People v Jones**

2015 NY Slip Op 30934(U)

May 4, 2015

Supreme Court, Kings County

Docket Number: 7305/10

Judge: Bruce M. Balter

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.



Defendant was tried before this Court, with a jury; the trial commenced on February 8, 2012 and concluded on February 16, 2012. At trial, the Defendant was represented by Herman Walz, Esq. The complainant testified at trial. During direct examination the prosecutor elicited testimony from the complainant that she was still in love with the defendant and had called the defendant after the alleged altercation. During cross examination, defense counsel elicited testimony from the complainant that she had contacted the defendant via email and “phone messages” immediately after the alleged incident and up to, and including, the day of her trial testimony.

At trial, the Defendant testified. The Defendant admitted hitting the complainant, but claimed that he did so because the complainant first hit the Defendant and was then going to hit his then pregnant girlfriend.

On February 16, 2012, the jury found the Defendant guilty of Assault in the Second Degree and Menacing in the Third Degree. On March 13, 2012, the Court sentenced the Defendant to a prison term of seven years.

Defendant seeks to vacate his judgment of conviction based upon a claim of ineffective assistance of counsel by Herman Walz, Esq. In support of his motion, Defendant has submitted printed copies of purported text messages allegedly sent by the complainant to the Defendant during the course of the trial. The Defendant alleges that Mr. Walz possessed the text messages during the trial and provided ineffective assistance of counsel by failing to cross-examine the complainant regarding the substance of these text messages.

In opposition, the prosecution submits an affirmation of Simone Manigo, Esq. who served as the prosecutor during the trial of the Defendant.

### APPLICABLE CASE LAW

C.P.L. §440.10 (1) (f) provides that “at any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that ... improper and prejudicial conduct, not appearing in the record occurred during a trial resulting in a judgment, which conduct, if it had appeared in the record would have required a reversal of the judgment upon an appeal therefrom”.

Under the New York State Constitution, a defendant’s right to effective assistance of counsel is satisfied when, under the totality of the circumstances existing at the time of representation, counsel provided defendant with “meaningful representation. *See People v. Beneveto, 91 N.Y.2d 708 (1998)*. To prevail on a claim of ineffective assistance of counsel under the State Constitution, a defendant must demonstrate that he was denied “meaningful representation”. *See People v. Stultz, 2 N.Y.3d 277, 283 (2004)*; *See also People v. Baldi, 54 N.Y.2d 147, 147 (1981)*. Meaningful representation means ‘reasonable competence’, not perfect representation”. *People v. Modica, 64 N.Y. 2d 828 (1985)*.

Under the state standard, a reviewing Court should consider whether an attorney’s alleged errors prejudiced the defendant. A showing of prejudice is a “significant” element in assessing meaningful representation. *See People v. Stultz, 2 N.Y.3d at 284*.

Similarly, under the United States Constitution, a defendant is entitled to “reasonably effective assistance, which in light of all the circumstances, does not fall “outside the wide range of professionally competent assistance”. *See Strickland v. Washington*, 466 U.S. 668 (1984). Under the Federal Constitution, a defendant must establish that counsel’s conduct fell outside the “wide range of professionally competent assistance”. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment”. *Id* at 690. In addition, the defendant must show that there is a “reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different”. *Id* at 694.

A thorough review of the trial transcripts show that defense counsel opposed Sandoval and Molinoux applications proffered by the People, thoroughly questioned all witnesses presented by the prosecution, raised evidentiary objections and at the conclusion of the People’s case moved to dismiss the charges against the defendant. During the defense case, defense counsel thoroughly question the Defendant and raised a claim of justification. Accordingly, the Court finds that defense counsel provided Defendant with meaningful representation. *See People v. Charles*, 309 A.D. 2d 873 (2<sup>nd</sup> Dept. 2003).

C.P.L. §440.30 (4) (b) states that for a motion to vacate judgment and set aside sentence, upon considering the merits of the motion, the court may deny it without conducting a hearing if “the motion is based upon the existence or occurrence of facts

and the moving papers do not contain sworn allegations substantiating or tending to substantiate all essential facts ”.

In his motion, Defendant fails to provide the Court with an affidavit from either himself or trial counsel stating that counsel possessed or had knowledge of the subject text messages at any time, during the trial. Where a defendant fails to submit sworn allegations substantiating or tending to substantiate all essential facts necessary to support his claim that he did not receive the effective assistance of counsel, the Court may deny defendant’s motion without conducting hearing. *See People v. Hayes, 120 A.D. 3d 711 (2<sup>nd</sup> Dept. 2014).*

C.P.L. §440.30 (4) (c) permits a court to summarily deny a motion to vacate a judgment of conviction if the allegations of fact are conclusively refuted by “unquestionable documentary proof”. Furthermore, C.P.L. §440.30 (4) (d) permits a court to summarily deny a motion to vacate a judgment of conviction if the essential facts are contradicted by a “court record or official documents” and there is “no reasonable possibility” that the allegations are true. Trial minutes constitute both “unquestionable documentary proof” and ‘court records”. *See People v. Webb, 3 Misc. 3d 1105A (Sup Ct. Kings Cty 2004).* *See also People v. Harris, 2011 N.Y. Slip Op. 30144 (Sup. Ct. Kings Cty. 2011).* *See further People v. George, 2008 N.Y. Slip Op. 30584 (Sup Ct. Kings Cty. 2008).*


In the matter at Bar, a review of defendant’s trial testimony is clear that he committed the charged crime by hitting the complainant. This testimony refutes the substance of the purported text messages.

Accordingly, after a careful review of the entire Court file and procedural history, the Court finds defendant's claim of ineffective assistance of counsel to be meritless, as the defendant has failed to establish that his counsel did not provide him with meaningful representation at trial and did not commit an error that prejudiced the defendant.

Accordingly, Defendant's motion is denied in full.

The foregoing constitutes the Decision and Order of the Court.

May 4, 2015

  
**HON. BRUCE M. BALTER**  
Justice of the Supreme Court  
Bruce M. Balter,  
J.S.C.

**ENTERED**  
MAY 15 2015  
NANCY T. SUNSHINE  
COUNTY CLERK