People v Little
2015 NY Slip Op 32572(U)
September 3, 2015
Supreme Court, Bronx County
Docket Number: 0309/12
Judge: Denis J. Boyle

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: CRIMINAL TERM: PART H94

----------X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

Indictment Number: 0309/12

CHARLES LITTLE,

Defendant.

----------X

Denis J. Boyle, J.:

The defendant stands convicted, after a jury trial before me of one count of Robbery in the First Degree (Penal Law section 160.15(4)). On January 17, 2014, he was sentenced by this court upon that conviction to a determinate term of twelve years in prison to be followed by five years post-release supervision as a second felony offender. The defendant has now moved pro-se, pursuant to CPL section 440.10(1)(h), to vacate that conviction on the ground that he was denied the effective assistance of counsel.[1] The gravamen of defendant's motion to vacate judgment is his contention that trial counsel's failure to move to dismiss the instant indictment on speedy trial grounds pursuant to CPL section 30.30(1)(a) constitutes ineffective assistance of counsel (Defense Affirmation in Support of Motion to Vacate Judgment, pg.5). In opposition, the People argue, in substance, that defendant's claims are record based and therefore, must be raised on direct appeal pursuant to CPL section 440.10(2)(b). Alternatively, the People further contend that the defendant's failure to submit minutes of court proceedings for certain adjourn dates which he puts in issue, is a failure to substantiate his factual allegations and warrants denial

---

[1]Upon consideration of defendant's motion to vacate judgment, I have before me, the defendant's initial moving papers, the People's response and the defendant's affirmation in reply as well as the defendant's separately filed affidavit in support of his motion to proceed as a poor person.

of his motion under CPL section 440.30(4)(b) (People's Affirmation in Opposition, Argument, see, pgs. 3 and 6).

Upon consideration of the respective positions of the People and the defendant, I note, as the People maintain, that the arguments which defendant forwards regarding the adjourn dates that he puts in issue concern matters of record relating to those court proceedings. As such, I am denying defendant's post-judgment motion on that ground (see, CPL section 440.10(2)(b)).

However, to the extent that defendant's allegations and arguments may implicate matters that are not record based, I will address the merits of the defendant's motion to vacate judgment (see, People v. Sweet, 79 AD3d 1772 [4th Dept. 2010]; see also, Massaro v. United States, 538 US 500 [2003]; People v.Obert, 1 AD3d 631 [3rd Dept. 2003] lv. denied 2 NY3d 764; People v. Darnell,146 AD2d 583 [2d Dept.1989] app. denied 73 NY2d 976). In doing so, I recognize that "where a defendant would have had a meritorious statutory speedy trial claim, the failure of counsel to make such a motion is sufficiently egregious to constitute a denial of meaningful representation" (People v. White, 229 AD2d 610 [3rd Dept. 1996]; see, People v. Johnson, 288 AD2d 501at pg. 502 [3rd Dept. 2001]). For purposes of disposition of the instant motion, however, the operative word in the foregoing legal principle is "meritorious". "The mere fact that pretrial motions were not made does not indicate ineffective assistance of counsel (citations omitted)" (People v. Torrence, 135 AD2d 1075 at pg. 1076 [4th Dept. 1987]app.denied 70 NY2d1011).

Here, a review of the allegations which defendant forwards in support of the instant motion, in conjunction with the record of the case itself reveals that "a dismissal motion on speedy trial grounds, if made, would not have been successful (citations omitted)" (People v. Torrence, supra at pg. 1076). In reaching this conclusion, I note first, as defendant contends, that he was arrested in this case on January 3, 2012 and arraigned in criminal court on January 4, 2012. For speedy trial purposes, therefore, the case against the defendant was commenced on January 4, 2012 (People v. Smietana, 98 NY2d 336 [2002]; People v. Ali, 209 AD2d 227 [1st Dept 1995] app. denied 85 NY2d 905). The defendant correctly contends that the People had six calendar months (182 days) from the commencement of the case to answer ready for trial (Defense Affirmation, pg. 8, paragraphs 1-3); People v. Pierre, 8 AD3d 201 [1st Dept. 2004] lv.

denied 3 NY3d 710) . However, the defense contention that the People did not answer ready for trial within six months of the commencement of the action is not supported in the record. Indeed, the court file for the instant indictment includes two notices of readiness; the first of which was dated and filed on January 23, 2012 and the second of which was dated and filed on January 27, 2012. To be distinguished from the instant case is People v. Manning (52 AD3d 1295 [4th Dept. 2008]), wherein the defendant made a prima facie showing on appeal, in support of his argument that he had been denied his right to a speedy trial, where the record reflected that the felony complaint in that case had been filed on March 3, 2004 and yet the People had not announced their readiness until September 20, 2004. Similarly, in People v. Sweet, supra, the defendant submitted evidence in support of his argument that he had been denied his right to a speedy trial, that the felony complaint in that case had been filed on December 5, 2001 and that the People had not announced their readiness until June 17, 2002. In this case, as indicated, there is no such showing of a failure to timely announce readiness on the part of the People. This Court further notes that each of these above-referenced statements of readiness were properly served on defense counsel from the Legal Aid Society, who had been assigned at the Criminal Court arraignment, and filed with the Clerk of the Court (People v. Kendzia, 64 NY2d 331[1985]).

The defendant also contends the time after an indictment was voted and filed (January 10, 2012) until he was arraigned on the indictment on February 9, 2012 is includable. However based on the People's previously filed- off the record- initial notice of readiness effective January 23, 2012, the record does not support his claim of includable time. The People may answer ready before arraignment on an indictment (People v. Carter, 91 NY2d 795 [1988]).

As best can be ascertained from the record before this court, a motion schedule was set by the court presiding in Part-B at the defendant's February 9th Supreme Court arraignment and the matter adjourned until April 27, 2012 for the court's decision[2]. The record further indicates

---

[2] In his instant 440 motion defendant has not provided the court with the calendar minutes of any of the court proceedings which he places in issue in support of his conclusory allegations that 503 days of includable speedy trial time have elapsed in this matter (see defendant's memorandum, para. 27). Defendant merely alleges as to numerous calendar dates during this 16 month period that the specific adjournments at issue were "not consented to" by the defense, were in fact objected to by the defense, or the People did not make the record sufficiently clear.

that the defense counsel assigned to appear on defendant's behalf in this matter filed an omnibus motion on April 9,2012 and the People filed a response with the clerk's office on April 26,2012. Moreover, the court's notes in Part H-94 indicate that defense counsel would be adopting a separate pro-se motion brought by defendant to dismiss the indictment as to several alleged violations in the grand jury process including the defendant's right to testify in the grand jury pursuant to CPL §190.50 (see defendant's pro-se motion dated March 16, 2012). Defendant brought another pro-se motion dated May 15, 2012 alleging a violation of his rights under CPL §180.80. Adjournments for pre-trial defense motions are excludable including the time for the People's response (CPL §30.30 (4) (a); People v. Kramer, 181 AD2d 449 [1st Dept. 1992] app. denied.79 NY2d 949). The court notes defendant's allegation that the People filed a delayed response causing a further adjournment beyond April 27th is entirely meritless. On the following adjourned date, May 25, 2012, the record is not clear whether defendant was produced, however defense counsel previously submitted an affidavit of engagement requesting an adjournment. This time is excludable as an adjournment requested by defense counsel pursuant to CPL §30.30(4)(b); (People v. Cambridge, 230 AD2d 649 [1st Dept 1996]) as well as for motion practice CPL 30.30 [4] [a]). Thereafter, on the next adjourned date, June 15, 2012, defense counsel requested that his client's CPL §180.80 motion be resolved and thus the court requested further documentation from the People with respect to the grand jury proceedings. This delay was attributable to motion practice and speedy trial time is excludable (CPL 30.30 [4] [a]).

On July 13, 2012 a written decision was rendered by the court in Part 94 with respect to the omnibus motion made by defense counsel as well as to the defendant's additional pro-se claims pertaining to the grand jury process including allegations of CPL§ 190.50 violations. At that time further discovery was turned over by the People to the defense in court. Defendant's application to dismiss the indictment was denied in all respects and the case adjourned for hearings and trial into September. The People are not required to be ready on the date the

---

Thus, the court will consider any relevant documents contained in the court folder and notations on the face of the court folder as well as the handwritten notes-summaries on index cards taken by the respective justices presiding over the proceedings in the parts where this case has previously been calendared with respect to assessing the chargeability for the adjourned dates at issue.

decision is rendered and they are provided a reasonable time to prepare for hearings and trial (People v. Wells, 16 AD3d 174 [1st Dept. 2005] lv.denied 5 NY3d 796). This entire period is excludable.

Thereafter, on September 21, 2012, the defense attorney asked the court that he be relieved. The court granted the request and new 18-B counsel was to be assigned. In addition, the court's handwritten notes of that calendar date indicate that defendant, in the interim, filed another pro-se motion in August and the court would wait to see if defendant's prospective assigned counsel would adopt the motion (see defendant's pro-se motion to reargue and renew prior CPL 180.80 motion dated August 1, 2012). The resulting delay to October 5, 2012 occasioned by the court's relieving present 18B counsel and assigning new counsel constituted a reasonable adjournment through no fault of court and was therefore excludable (CPL 30.30 [4] [f]; People v. Rodriguez 212 AD2d 368 [1st Dept. 1995] app. denied 85 NY2d 913). On the next adjourned date, October 5, 2012, newly assigned counsel adopted the 180.80 motion and requested discovery from the People including defendant's grand jury testimony, however, Mr. Little was not satisfied with his new lawyer and counsel asked to be relieved. After an inquiry by the court as to the defendant's request to proceed pro-se, the matter was put over to October 15th. Subsequently, on October 17, 2012, a third 18-B attorney was appointed to represent defendant and advised the court that he would review the case and assess whether certain pro-se motions were viable. In this post-readiness posture, the appointment of an 18B attorney and the ensuing adjourned periods through the November 2, 2012 are similarly excludable as a reasonable adjournment(s) through no fault of the court (CPL 30.30 [4] [f]); see also People v. Horney, 103 AD2d 891 [3d Dept 1984]). On November 2, 2012 defendant's newly assigned 18-B counsel was landlocked due to a snowstorm and requested a one week adjournment to November 9th. This period was excludable as defendant was without counsel through no fault of the court and because of exceptional circumstances (CPL 30.30 [4][f] and [g]; People v. Fagan, 260 AD2d 219 [1st Dept 1999] lv. denied 93 NY2d1002).

On November 9, 2012 the defendant was not produced in court. Newly assigned 18-B defense counsel chose not to adopt defendant's CPL180.80 motion based upon defendant's previous Legal Aid attorney's purported waiver of this issue when the matter was before the

grand jury (see handwritten note signed by LAS attorney Angel Frau in court folder). The case was apparently adjourned "on consent" for further conference to November 20th. Although the matter remained in a post-readiness status and was not on for hearings and trial, the court will not make any determination as to speedy trial time with respect to this adjourned period. On November 20th, 18-B counsel asked to be relieved and the court endeavored to assign yet a fourth 18-B attorney to represent defendant and the case was adjourned to November 27th when a new attorney was assigned and filed a notice of appearance with the court (see court folder). Defendant concedes this (7) seven day period is excludable and the court agrees. (CPL 30.30 [4] [f]; People v. Rodriguez, supra) The court's handwritten summary as to the November 27th calendar date indicates that new assigned counsel appeared on defendant's behalf and defendant continued to assert that he wished to proceed without counsel. The matter was put over to December12th for further proceedings with respect to Mr. Little's oral application to proceed pro-se. There is no evidence in this record that the People did not continue to maintain their readiness and, in any event, any resulting delay was the result of defendant's own actions in requesting that the court respond to his application to proceed pro-se (CPL 30.30 [4] [a]; see also People v. Giordano, 56 NY2d 52). On December12, 2012 defendant's newly assigned 18-B counsel sought further discovery and adopted defendant's pro-se motion pursuant to CPL 180.80. The case was put on for the People to provide counsel with certain additional discovery and for the court's decision on the 180.80 motion. Defendant's pro-se motion was denied by this court on the record on the following adjourned date, January 11, 2013. This period was excludable for the court to prepare and render its decision on the motion (CPL 30.30 [4] [a]; People v. Douglas, 209 AD2d 161 [1st Dept 1994]app. denied 85 NY2d 908).

On January 11th, defendant advised the court that he wished to go forward with his new 18-B counsel and the case was put on for conference at defense counsel's request. In defendant's motion papers he concedes the period through the following adjourned date as delay for motion practice by virtue of his pro-se habeas application on the same 180.80 issue, however this writ appears to have been brought several months thereafter in May of 2013. (see People's Aff. in Opp., para. 9). In any event, the court notes reflect the adjournment to have been with the consent of counsel. On February 1st, counsel served on the People a specific written request for certain

items of discovery and the matter was adjourned for hearings and trial to March 22, 2013.(see letter from defense counsel to ADA Zortman dated 1/31/13) The People were entitled to a reasonable period to provide discovery sought by counsel. Nor did this ostensible delay for discovery impact upon the People's readiness. This period is excludable.(People v. Anderson, 66 NY2d 529 [1985]; People v. Holden, 260 AD2d 233 [1st Dept 1999] lv. denied 93 NY2d 1003; People v. Heller 120 AD2d 612 [2nd Dept. 1986] app. denied 68 NY2d 757).

The People did not answer ready on March 22, 2013 and requested April 5th for hearings and trial. Thereafter, the People requested further adjournments to April 15th, April 25th, May 9th, May 17th and May 20th when hearings were commenced. When a case is in a post-readiness posture, for CPL§ 30.30 purposes, specific adjournments requested by the People are chargeable as includable time. Moreover, the failure of the People to produce defendant in Court on April 15,2013 is also includable as delay which was manifestly the result of defendant's non-production, and not due to the absence of counsel.(People v. Brewer, 63 AD3d 402 [1st Dept 2009]) Thus, a total of 59 days of the above-referenced specific requests by the People for adjournments would be includable in speedy trial calculations (People v. Bruno, 300 AD2d 93 [1st Dept 2002] lv. denied 100 NY2d 641).

Accordingly, based on the record before it, the Court finds the People to be chargeable with the periods of January 4, 2012 through January 23,2012 (when the People declared their readiness for trial) [19 days] and March 22, 2013 to May 20, 2013 [59 days]. Moreover, even assuming arguendo that the period from November 9, 2012 to November 20, 2012 were to be determined to be includable [11 days], the total speedy trial time which has elapsed [87 days] is well within the allowable 182 day period. Thus, on the existing record, defendant cannot show that a CPL 30.30 motion would have been meritorious and thus he is unable to demonstrate that his attorney was ineffective for failing to move to dismiss the indictment on speedy trial grounds.

A judgment of conviction enjoys presumptive regularity, and a defendant moving to vacate it pursuant to CPL§ 440.10 bears the "burden of coming forward with sufficient allegations to create an issue of fact." (People v. Session, 34 NY2d 254,255-56 ; People v. Stewart, 295 AD2d 249 [1st Dept. 2000] lv denied 99 NY2d 540,Certiorari Denied 538 US 1003,

Habeas Corpus Denied 2009 WL 4030833). Indeed, upon consideration of the merits of defendant's motion, the court is of the opinion that the defendant has failed to substantiate his contention that his speedy trial rights have been violated with sworn factual allegations as required by CPL § 440.30 (4)(b); People v. Ozuna, 7 NY3d 913 [2006]; People v. Faulkner, 40 AD3d 1207 [3d Dept 2007]lv. denied 9 NY3d 961). The defendant's essential factual assertions as to the reasons for a significant number of adjournments which he has placed in issue in his moving papers are not supported by the minutes of the proceedings of the calendar dates or any other relevant documentary evidence. (see People v. Roman 222 AD2d 269 [1st Dept. 1995]). It was defendant's obligation to provide this court with a more expanded record upon which to evaluate his claim of ineffective assistance (see People v. Clendinen, 173 AD2d 366 [1st Dept 1991] app. denied 80 NY2d 895 ; People v. Gooden, 34 Misc.3d 1210(A) [Sup Ct Bx Cty 2012]).

When a defendant raises an issue of ineffective assistance of counsel, the court must first "determine on [the] written submissions whether the motion can be decided without a hearing," and the defendant is required to show that the facts he seeks to establish are "material and would entitle him to relief." (People v. Satterfield, 66 NY2d 796,799[1985],(citing CPL §§440.30[1]; 440.30 [4] [a]). Under New York law, to prevail on a claim of ineffective assistance, a defendant must demonstrate that his attorney failed to provide meaningful representation. (People v. Benevento, 91 NY 2d 708,713 [1998]). "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 137,146-47 [1981]) (citations and internal quotations omitted). A contention of ineffective assistance of trial counsel requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics (People v. Benn, 68 NY2d 941 [1986]). Under federal law, a defendant must show, first, "that counsel's representation fell below an objective standard of reasonableness," and , second that "there is a reasonable probability that for counsel's unprofessional errors , the result of the proceeding would have been different." Strickland v. Washington,466 US 668,694 [1984].

Clearly, there could be any number of reasons that counsel in a particular case would forgo

the bringing of a pre-trial motion. Absent egregious circumstances, such a failure by counsel generally would not, by itself, be grounds to establish ineffective assistance (see People v. De Mauro, 48 NY2d 892 [1979]). Here, defendant has not provided an affidavit from his prior attorney, who would be in a position to account for why she did not bring a speedy trial motion on his behalf despite defendant's (and family members) alleged repeated requests to do so. This would have permitted counsel to respond directly to these allegations (see People v Rivera, 71 NY2d 705,709). Nor has defendant offered an explanation of his failure to at least make an attempt to secure an affidavit from counsel (People v. Ozuna, supra at 915; People v. Morales, 58 NY2d 1008 [1983]).

The court notes that it is not disputed that defendant did not request that his trial counsel be relieved upon her decision not to either file a speedy trial motion on defendant's behalf or adopt his pro-se motion. Defendant was also well aware that he would be ceding control to counsel with respect to a decision as to whether to raise that issue by way of a pre-trial motion. Nor does defendant in his moving papers contend that he was denied his right of self representation. The court further notes that appellate counsel assigned to handle defendant's direct appeal had advised this court by letter in August 2014 that her client requested that his pro-se speedy trial motion be withdrawn without prejudice. (See court folder) Defendant's instant pro-se motion was submitted several months thereafter. On the existing record, defendant cannot show that a CPL§ 30.30 motion would have been successful. And, since defendant does not take issue with any other aspect of trial counsel's performance he cannot demonstrate under both the prevailing New York and federal standards that his attorney was ineffective for failing to make a speedy trial motion. (People v. Lineberger, 19 AD3d 320 [1st Dept. 2005] lv. denied 5 NY3d 830, Habeas Corpus Denied 2007 WL 4245911; People v. Sweet, supra). Moreover, this defendant was clearly not prejudiced by counsel's failure to make such a motion. (People v. Brunner, 67 AD3d 464 [1st Dept. 2009] affd. 16 NY3d 820).

In addition, defendant's request for transcripts is hereby denied. (See People v. Sims, 227 AD2d 994 [4th Dept. 1996])

Accordingly, based on all the above, defendant's motion to vacate judgment is hereby denied without a hearing. (See CPL §§ 440.10 [2] [b]; 440.30 [4] [b]).

The foregoing constitutes the opinion and decision of this court.

DJB

DATED: September 3, 2015

Honorable Denis J. Boyle, AJSC