

People v Murphy
2018 NY Slip Op 33509(U)
January 16, 2018
Supreme Court, New York County
Docket Number: 5633/13
Judge: A. Kirke Bartley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

-----x
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION and ORDER
Ind. No. 5633/13

DONELLE MURPHY,

Defendant.

-----x
For the People: Raffaella Belizaire
For the Defendant: David Bernstein, esq.

JUSTICE A. KIRKE BARTLEY:

On March 5, 2015, the defendant was convicted by jury of Burglary in the Second Degree, Attempted Rape in the First Degree and Sexual Abuse in the First Degree. He was sentenced on June 18, 2015. Defendant now moves to vacate judgement pursuant to CPL §440.10(1)(h), on grounds that he was denied effective assistance of counsel.

Defendant contends that his trial attorney was ineffective at every stage in the pretrial and trial process, including that he advanced an untenable misidentification defense based on a misunderstanding of the law, failed to effectively argue at the suppression hearing, and failed to object during the People's summation. With regard to the latter two claims, counsel's failure to argue a *Dunbar* violation at the suppression hearing and to object during the People's summation did not render his representation ineffective. Trial counsel made a sound but ultimately unsuccessful argument at the suppression hearing, and his failure to object during the People's summation, when viewed in light of the trial as a whole, can, as is consistent with his affirmation, be "attributed to tactical trial decisions" (*People v. Ryan*, 90 NY2d 822, 824 [1997]; *see also*

People v. Taylor, 1 NY3d 174, 177 [2003]).

Defendant's primary argument relates to trial counsel's focus on proof of identity at trial. While counsel's arguments regarding corroboration was not an effective strategy in light of the strong evidence of identity at trial, it did not render counsel's entire representation ineffective. Defense counsel was clearly grappling with the significant evidence against the defendant, much of which had been provided by the defendant's own admissions, despite the lack of complainant and identification. Notably, at a sidebar when counsel was attempting to elicit various height descriptions given by the complainant, the court indicated that it had watched the videotaped statement and did not believe identification to be an issue. Defense counsel agreed that identification might not ultimately be an issue, but that "I need to use as much as I can" (*see* Trial Transcript, p. 236).

Pre-trial, counsel argued *in limine* motions relating to the absent complainant's out of court statements and obtained a favorable *Sandoval* ruling whereby the People were precluded from eliciting the named crimes and underlying facts of nine prior convictions. During the trial, defense counsel vigorously cross examined the People's witnesses. At the charge conference, the court agreed to submit the lesser included offenses of Burglary in the First Degree (without the sexual motivation) and Burglary in the Second Degree to the jury. Throughout summation defense counsel argued that the complainant's absence cast doubt on the quantum of proof and also challenged the proof as to the elements of the crimes charged. His arguments that there was insufficient proof of both sexual motivation in entering the building and the presence of a knife were likely persuasive in light of the not guilty verdicts on the two counts of Burglary in the First Degree.

Defendant's contention that counsel's errors deprived him of a fair trial discounts his own choice to testify against counsel's advice and to volunteer that he had a prior rape conviction

involving an underage girl. That choice left counsel with the extremely difficult task of grappling with evidence this court had precluded exactly because of the likelihood of the jury concluding that the defendant had a propensity to commit violent rape. Defendant also chose to tell the jury about other topics that would not have otherwise been before them, such as that he used a credit card to break into the building and that his other prior felony convictions were attempted robbery and attempted assault, crimes that imply prior violent behavior on the part of the defendant.

Under the circumstances, defendant has not shown that Mr. Hardy's representation was less than meaningful, nor that there was any serious likelihood that he was actually prejudiced by counsel's arguments with regard to corroboration (*see People v. Vasquez*, 20 NY3d 461 [2013]). "The question is whether the attorney's conduct constituted 'egregious and prejudicial' error such that the defendant did not receive a fair trial" (*People v. Benevento*, 91 NY2d 708, 713 [1998] [*citations omitted*]; *see also People v. Hobot*, 84 NY2d 1021 [1995] [counsel's failure to familiarize himself with medical records that were arguably favorable to the defendant did not deprive the defendant of a fair trial]). Under the circumstances, defendant has not shown that counsel's overall performance seriously impaired his right to a fair trial in this case where there was significant evidence of guilt and defendant purposefully disregarded his counsel's advice not to put before the jury evidence that this court determined pretrial would be too prejudicial for the jury to hear (*see Benevento*, 91 NY2d at 713).

The Court of Appeals has held that errors such as "overlooking a useful piece of evidence (*Hobot*), or failing to take maximum advantage of a Rosario violation (*Flores*), do not themselves render counsel constitutionally ineffective where his or her overall performance is adequate" (*People v. Turner*, 5 NY3d 476, 480 [2005]). Only under a circumstances where the error was clear cut and completely dispositive will a single error render an otherwise adequate performance

constitutionally deficient (*id.* at 481; *People v. Calderon*, 66 AD3d 314 [1st Dept. 2009]). Here, that trial counsel was ultimately unsuccessful can be attributed to the strength of the People's case, defendant's own prejudicial disclosures, and his less than credible explanations for his behavior on the day of the incident.

As the defendant has failed demonstrate that counsel's performance fell below the standard of meaningful representation (*see People v. Baldi*, 54 NY2d 137; *People v. Washington*, 184 AD2d 451), his motion is denied.

DATED: January 16, 2018
New York, NY


JUSTICE, SUPREME COURT