

People v Kirkland

2018 NY Slip Op 34601(U)

November 7, 2018

County Court, Westchester County

Docket Number: Indictment No. 15-0868

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 11-8 2018
WESTCHESTER
COUNTY CLERK

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

- against -

DECISION & ORDER
Indictment No.: 15-0868

TARENCE KIRKLAND,

Defendant.

FILED ↑

-----X
MINIHAN, J.

NOV - 8 2018

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 through 3 were considered in the motion, brought by defendant TARENCE KIRKLAND, pursuant to Criminal Procedure Law § 440.16 to vacate the judgment of the Supreme Court, Westchester County (Minihan, J.), convicting him, upon a jury verdict, of two counts of criminal sale of a controlled substance in the third degree, a class B felony pursuant to Penal Law § 220.39 (1) on July 13, 2016 and the imposition of sentence on September 1, 2017 to determinate terms of imprisonment of six years with one and one-half years of post-release supervision for each count of criminal sale of a controlled substance, to run concurrent with each other:

- | | |
|--|---|
| Notice of Motion ¹ | 1 |
| Affidavit in Support/Memo of Law | 2 |
| People's Affirmation in Opposition/Memo of Law | 3 |

Upon the foregoing papers and proceedings in this case, for the reasons articulated hereinafter, it is ORDERED that defendant's motion is summarily denied.

Procedural History and Facts

By indictment filed on October 8, 2015, the defendant was charged with four counts of Criminal Possession of a Controlled Substance in the Third Degree [Penal Law § 220.16] and two counts of Criminal Possession of a Controlled Substance in the Seventh Degree [Penal Law § 220.03]. At the commencement of the trial, the People withdrew all but two of the Criminal Possession of a Controlled Substance in the Third Degree (counts 1 and 2) pursuant to Penal Law § 220.39 (01).

On June 23, 2016, prior to the commencement of trial, the People sought to elicit testimony from the undercover detective, for the purposes of identification of the defendant which testimony would include that the he had previously witnessed defendant (on February 3 and 4, 2015) before the charged sales; the duration of those observations; the nature of the interaction between the officer and the defendant as well as the description of the vehicle used by

¹The Notice of Motion moves to vacate the judgment of conviction entered on September 25, 2007, since there was no judgment entered on that date, this court deems the typographical error to move to vacate the judgment entered in September 2017.

defendant on those occasions. The People argued that this testimony was uniquely probative to the extent that the undercover officer had a prior familiarity with defendant which demonstrated that his identification as the seller was reliable. Defendant's trial counsel opposed the application arguing that to permit such testimony would prejudice him as it suggests to the jury that criminal activity could have occurred on those occasions.

The court permitted the testimony only allowing general descriptions of the detective's prior encounters with defendant, i.e., place, vehicle, duration and proximity, as probative on the question of identity and the court did not permit evidence of any uncharged crime to be elicited through the testimony of the undercover officer (Detective Bonilla). The court noted that "since any prejudice that might otherwise inure to the defendant would be minimized by the sanitized testimony which does not go into the particular events occurring during these encounters, such testimony will be permitted" (Tr. P. 27-28).

On July 13, 2016, following a jury trial (Minihan, J.), defendant was convicted after the evidence showed that on February 10, 2015, at approximately 7:03 P.M., near the intersection of Bronx and High Streets, in the City of Mount Vernon, County of Westchester, as part of a narcotics investigation, two undercover detectives approached defendant's green Acura, spoke briefly with defendant and, after he entered the car he purchased two clear knotted plastic bags containing a substance, later identified to be cocaine, from the defendant in exchange for eighty (\$ 80.00) dollars . On February 18, 2015, at approximately 6:49 P.M., at the same location, an undercover detective approached the same car spoke briefly to the defendant and while in his car purchased two bags containing cocaine in exchange for eighty (\$80.00) dollars.

The evidence at trial revealed that on two prior occasions (February 3rd and 4th, 2015), at the same location, the undercover detective approached defendant's green Acura, spoke briefly with defendant and left the location. On February 18, 2015, at approximately 6:54 P.M., at the Mount Vernon Police Department, the defendant was identified by the undercover detective from the single photograph as the person who he previously met and later purchased the cocaine from (on February 10th and February 18th). The testimony at trial revealed that six undercover officers were supervised during the investigation, and they knew the defendant by his nickname, "Stix", and knew the defendant to drive the green Acura. The supervising detective was present at the time the charged sales occurred and conducted a confirmatory identification procedure (which was the subject of a *Wade* hearing, after which the court denied suppression).

During the trial, the People called a forensic chemist from the Westchester County Department of Laboratory and Research who testified that cocaine was present in the substance sold to the undercover detective by the defendant. The People called a representative from the New York State Department of Motor Vehicles and submitted documentary evidence showing that defendant owned the green Acura (with license plate number GDM4161).

On November 9, 2016, after the verdict, the defendant appeared personally with counsel in this court (Minihan, J.) and trial counsel was relieved of representing defendant and Mark Fitzmaurice, Esq., was assigned to represent defendant.

On June 27, 2017, defendant filed a motion pursuant to CPL 330.30 to set aside the verdict and made the very same arguments that he makes in the instant motion, arguing that several errors occurred especially when the court allowed the People to introduce evidence of police interaction with defendant prior to the charged crimes. Defendant previously argued, as he does here, that this court erred when it permitted the testimony that on the February 3 and 4, 2015, as part of an on-going narcotics investigation, the undercover narcotics officer met defendant and briefly spoke with him.

On August 31, 2017, defendant appeared personally with Mr. Fitzmaurice, and new counsel, Max DiFabio, Esq. where Mr. Fitzmaurice was relieved. New counsel did not adopt previous counsel's CPL 330.30 motion and the motion was withdrawn.

On September 18, 2017, defendant filed his notice of appeal which appeal has yet to be perfected (*see People v Tarence Kirkland*, Appellate Division Number 17-10699 [2d Dept 2017]).

By notice of motion pursuant to CPL 440.10, defendant claims that his judgment of conviction should be set aside since the People were improperly allowed to offer evidence of uncharged drug sales during their direct case amounting to prosecutorial misconduct and a claim of ineffective assistance of counsel.

The People oppose the motion on the basis that the claims are procedurally barred. The People argue defendant's claims of ineffective assistance of counsel, deprivation of a fair trial and prosecutorial misconduct, all relate to the introduction of evidence by the People at trial that on February 3 and 4, 2015, as part of an on-going narcotics investigation, an undercover officer approached defendant's car and briefly spoke with defendant. The People are firm that they never requested to admit into evidence at trial defendant's prior uncharged crimes and that in fact, no *Molineux* evidence was admitted at trial. As such, the People claim that defendant's claim is factually refuted by the record, and his motion must be denied on this ground. The People contend that since his new counsel on this motion did not represent him and since he failed to set forth facts under the penalties of perjury in support of his motion, the motion must be denied.

Conclusions of Law

Defendant's claims are procedurally barred. In determining a CPL 440.10 motion to vacate, this court must deny a claim which is record based, in that sufficient facts appear on the record for that claim to be adequately reviewed on appeal (*see* CPL 440.10[2][c]). The fundamental purpose of CPL 440.10 is to provide an outlet to raise facts not reflected in the record and not known at the time of judgment, that could, as matter of law, undermine the judgment on one of the enumerated grounds set forth in the statute (*Pirro v Cirigliano*, 226 AD2d 465 [2d Dept 1996]). A judgment of conviction is presumed valid and the party challenging its validity has the burden of coming forward with a prima facie showing sufficient to overcome that presumption in order to avoid summary denial of the motion as facially insufficient (CPL 440.30 [4] [b], [d]). Defendant relies on much of the trial record citing to the People's opening statement, as well as the trial testimony of Detective Antonini and colloquy

between the court and trial. Since defendant's claims are record based they are procedurally barred (CPL 440.10[2][c]) and denied without a hearing since most of defendant's allegations are conclusively refuted by the record (CPL 440.30 [4][c]) and are not supported by sworn allegations of fact (CPL 440.30 [1][a], [4][b]).

Notwithstanding the procedural bars, defendant's argument that the court wrongfully permitted the testimony about the interactions on February 3 and 4th is misplaced since the court's decision was made after balancing the prejudice to defendant versus its probative value. Here, the court properly permitted the undercover officer to testify about unspecified interactions between himself and the defendant with the proper legal analysis weighing the obvious probative value of the undercover officer's prior interactions with defendant on the issue of the reliability of his identity, a critical issue, and weighing the potential for prejudice, ensuring no mention of prior sales as acts were elicited (*see People v Gilbert*, 168 AD2d 567 [2d Dept 1990]; *People v Jordan*, 81 AD3d 528 [1st Dept 2011]). Even assuming that the jury might have assumed that the prior incidents on February 3rd and 4th involved criminality, they were nevertheless admissible, necessary to show that the undercover agent made a reliable identification (particularly since Detective Antonini did not identify defendant as the person who sold the drugs to Detective Bonilla). In any event, the probative value outweighed the prejudicial effect (*see e.g., People v Carter*, 77 NY2d 95, 107 [1990], *cert denied* 499 US 967 [1991]; *People v Julius*, 300 AD2d 167, 168 [1st Dept 2002], *lv denied* 99 NY2d 655 [2003]; *People v Matthews*, 276 AD2d 385 [1st Dept 2000], *lv denied* 96 NY2d 736 [2001]). Even assuming the evidence of the prior interactions was admissible for *Molineux* purposes to argue identity and it was not used at trial to argue propensity, the proof against defendant was overwhelming and there was no significant probability that the jury would have acquitted had the proscribed evidence not been introduced so that the error would be harmless (*see e.g. People v Kello*, 96 NY2d 740, 744 [2001]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Thus, this court's ruling allowing only the testimony of the location where the undercover officer interacted with defendant on the previous occasions (February 3rd and 4th), the duration and quality of those observations, the description of the vehicles used on those occasions, and other facts were relevant to the undercover officer's basis for making the subsequent identification more reliable. There was no mention of prior uncharged crimes before the jury that might have led the jury to determine defendant had a criminal propensity (*People v Frumusa*, 29 NY3d 364 [2017]; *People v Scarola*, 71 NY2d 769 [1988]).


Defendant's fails to demonstrate prosecutorial misconduct and relies on what he perceives to be prejudicial trial testimony and speciously accuses the prosecutor of vouching for his witnesses. Mere conclusory allegations of prosecutorial misconduct are alone insufficient to require a hearing (*People v Roberts*, 83 AD3d 739 [2d Dept 2011]).

Defendant's claim that his counsel was ineffective for requesting limiting instructions after the People's opening, at the beginning and/or conclusion of the testimony, and at the end of the trial to the jury is without merit. In order to make out an ineffective assistance of counsel claim, defendant must establish that counsel's performance was deficient, and that the deficient performance prejudiced defendant (*Strickland v Washington*, 466 US 668, 686 [1984]). In New York, the focus is on the fairness of the proceedings as a whole (*People v Stultz*, 2 NY3d 277, 284 [2004]) and whether the defendant was afforded meaningful representation (*People v*

Henriquez, 3 NY3d 210, 230 [2004]). To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's supposed failures. Where a defendant has not done so, it is "presumed that counsel acted in a competent manner" (see *People v Taylor*, 1 NY3d 174, 176 [2003]). The test is one of reasonable competence, not perfect representation (*People v Modica*, 64 NY2d 828, 829 [1985]). Thus, a reviewing court must avoid confusing "true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis (*People v Baldi*, 54 NY2d 137 [1981]; *People v Johnson*, 152 AD3d 620 [2d Dept 2017]). Due to the distorting effects of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance" (*Strickland v Washington*, at 689). Counsel did not request a limiting instruction as the court did not allow evidence of any criminality regarding the February 3rd and 4th interactions therefore, no *limiting instruction* was required so defendant's reliance on *People v Forbes* (203 AD2d 609 [3d Dept 1994]) is misplaced. In fact, defendant's own recitation of the record shows that his trial attorney objected to the introduction of any evidence of the February 3rd and 4th interactions between defendant and the police which undermines his claim of ineffective assistance of counsel. As such, his motion to set aside on this ground is summarily denied.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
November 7, 2018



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