

**People v Johnson**

2019 NY Slip Op 33985(U)

August 29, 2019

County Court, Dutchess County

Docket Number: 142/2016

Judge: Peter M. Forman

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2017/0027

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STATE OF NEW YORK: COUNTY OF DUTCHESS 2019 AUG 30 AM 11: 48  
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

- against -

KASHIF GIOVANNI JOHNSON,

Defendant.

DECISION AND ORDER

Ind. Nos: 142/2016  
24/2017

William V. Grady,  
District Attorney  
By: Kirsten Rappleyea, Esq.

Defendant, *pro se*

HON. PETER M. FORMAN, County Court Judge

The following papers were read and considered in deciding Defendant's motion to vacate his judgments of conviction pursuant to CPL §440.10:

	<u>PAPERS NUMBERED</u>
NOTICE OF MOTION.....	1
AFFIRMATION IN SUPPORT .....	2
MEMORANDUM OF LAW .....	3
AFFIRMATION IN OPPOSITION .....	4
EXHIBITS (1-20) .....	5-24

Defendant was charged by Indictment 142/2016 with four counts of Aggravated Family Offense, a Class E Felony, in violation of Penal Law §240.75. The indictment alleged that on or about June 16, 2016, in the Town of Fishkill, Defendant placed his hands over the nose and mouth of his girlfriend Jennifer Olshan, impeding her ability to breath. When Ms. Olshan (who was six months pregnant at the time of the incident) attempted to call 911, Defendant grabbed her phone and threw it to the ground in an attempt to prevent her from communicating with police. The indictment further alleged that on or about September 25, 2016, Defendant entered Ms. Olshan's room at Vassar Brothers Hospital in violation of an order of protection issued by Judge Harold Epstein of the Town of Fishkill Justice Court.

After his arrest in the Town of Fishkill on June 16, 2016, Defendant made several appearances in the Town of Fishkill Justice Court with assigned counsel from the Public Defender's Office. During a court appearance in the Town of Fishkill Justice Court on November 19, 2016, defense counsel [Nancy Garo], in the presence of Defendant, waived the matter to the Grand Jury. On or about December 5, 2016, the People served notice on defense counsel of their intention to present the Family Offense charges to the Grand Jury on December 13, 2016. Defendant did not exercise his right to testify in the Grand Jury, despite being provided a reasonable opportunity to do so, and a true bill was voted on December 22, 2016.

While the Aggravated Family Offense charges were pending, Defendant was arrested in the Village of Fishkill on January 4, 2017 for driving while intoxicated and related offenses. On February 23, 2017, Defendant was indicted by the Grand Jury of Dutchess County for two counts of Operating a Motor Vehicle While Under the Influence of Alcohol, Class D Felonies, in violation of Vehicle and Traffic Law §§1192(2); 1193(1)(c)(ii); 1192(3); and 1193(1)(c)(ii) [see Indictment 24/2017].

On June 29, 2017, Defendant entered a plea of guilty to Count Four of Indictment 142/2016 [Aggravated Family Offense] and one count of Indictment 24/2017 in full satisfaction of both indictments and in exchange for an indeterminate sentence of one and one-half to three years on Indictment 142/2016 and an indeterminate sentence of one to three years on Indictment 24/2017, to run concurrently with each other. The Court issued a full order of protection but advised Defendant that the order could be subject to modification to a limited order if Defendant successfully completed Domestic Abuse Awareness Classes (DAAC).

On August 10, 2017, the Court sentenced Defendant as a second felony offender to the agreed-upon sentence of one and one-half to three years on Indictment 142/2016 and one to three years on Indictment 24/2017, to run concurrently with each other. The Court issued a full order of protection on behalf of Jennifer Olshan, over Defendant's objection. Defendant argued that he would not have time to complete DAAC in the Dutchess County Jail and that the State prison system did not offer DAAC.

On or about August 22, 2017, Defendant filed a notice of appeal with regard to his convictions on the above-referenced indictments. The Public Defender's Office filed an Appellant's Brief on or about February 21, 2019. The Office of the District Attorney had not submitted a Respondent's Brief as of the date it submitted opposition to the instant motion.

On or about November 21, 2017, Defendant wrote to the Court and advised that he had completed the Aggression Replacement Training Program in state prison and requesting that the order of protection be modified. On March 22, 2018, Defendant was produced in this Court and a new, limited order of protection was issued which permitted Defendant to communicate with Ms. Olshan.

At all times relevant to the proceedings on the indictments in County Court, including the March 22, 2018, modification of the order of protection, Defendant was represented by the Public Defender's Office [Jennifer Burton on Indictment 142/2016 and Kara Gerry on Indictment 24/2017].

Defendant now seeks an order vacating his judgments of conviction on the ground that they were obtained in violation of his constitutional rights, based upon alleged ineffective assistance of counsel [CPL §440.10(1)(h)]. Specifically, Defendant alleges that his attorneys were ineffective because they: (1) did not communicate with him; (2) failed to put on a defense; (3) failed to file a

[\* 4]

motion to consolidate the two indictments in order to obtain a more favorable sentence; (4) failed to facilitate his right to testify before the Grand Jury (on the presentation that led to the charges under Indictment 24/2017); (5) failed to file a motion to dismiss Indictment 24/2017 pursuant to CPL §190.50(5)(b); and (6) failed to file a writ of habeas corpus on his behalf in June of 2017 based upon excessive bail.

Defendant's motion can be determined on the basis of the court transcripts, other official documents and unquestionable documentary proof, and Defendant's submissions on the motion. Therefore, no hearing is required. *People v. Satterfield*, 66 NY2d 796 (1985). For the reasons stated herein, Defendant's motion is denied in its entirety.

#### DISCUSSION

It is well-settled that the "right to the effective assistance of counsel is guaranteed by both the Federal and State Constitutions." *People v. Baldi*, 54 NY2d 137, 146 (1981). "What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation." *Id.* at 146; *see also People v. Berroa*, 99 NY2d 134, 138-39 (2002). In New York, the standard for effective assistance of counsel "has long been whether the defendant was afforded meaningful representation." *People v. Henry*, 95 NY2d 563, 565 (2000). "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." *Baldi, supra* at 147; *see also People v. Oliveras*, 21 NY3d 339 (2013); *People v. Koki*, 74 AD3d 987, 987-88 (2d Dept. 2010).

"A defendant advancing an ineffective assistance claim must 'demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.'" *People v. Hogan*, 26 NY3d 779, 785 (quoting *People v. Benevento*, 91 NY2d 708, 712 [1988]). "In the context of a

guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel.” *People v. Ford*, 86 NY2d 397, 404 (1995); *see also People v. Ingram*, 80 AD3d 713, 714 (2d Dept. 2011); *People v. Carr*, 89 AD3d 1033, 1034 (2d Dept. 2011). Here, defense counsel successfully negotiated a plea bargain that allowed Defendant to enter a guilty plea to one count on each indictment in return for a sentence that was substantially less than the sentence that could have been imposed if Defendant had been convicted after trial. Moreover, defense counsel negotiated that the terms of incarceration on each count run concurrently when, given that Defendant’s acts underlying the crimes in each indictment were “separate and distinct” [*see, e.g., People v. Smith*, 167 AD3d 944 (2d Dept. 2018)], the Court would have been entitled to impose consecutive sentences if Defendant had been convicted after trial.

Although Defendant complains that defense counsel should have visited him at the Dutchess County Jail more frequently prior to the entry of this plea, the absence of more frequent jail visits does not detract from the favorable plea bargain that defense counsel negotiated on Defendant’s behalf. *People v. Adams*, 151 AD2d 921, 922-23 (3d Dept. 1989) (“while assigned counsel was somewhat remiss in the frequency of his visits to defendant while he was incarcerated, given the favorable sentences he negotiated on defendant’s behalf in exchange for guilty pleas to very serious crimes, we cannot conclude on this record that counsel was guilty of ineffective assistance of counsel”). Based upon the foregoing, the Court finds that Defendant was afforded meaningful representation when he received the benefit of the advantageous plea bargain that was negotiated by his attorneys.

Defendants’ claims that his attorneys were ineffective for failing to effectuate his testimony in the Grand Jury and for not filing a motion to dismiss Indictment 24/2017 pursuant to CPL

[\* 6]

§190.50 are without merit. *Hogan, supra* at 787 (“...whether to have a defendant testify before a grand jury is a strategic decision within counsel’s authority to make ... while the better practice may be for counsel to confer with his or her client, defendant cannot establish ineffective assistance of counsel based on counsel’s decision that defendant would not testify before the grand jury”); *see also People v. Wiggins*, 89 NY2d 872 (1996). On the record before the Court, there was no legal or factual basis for filing a 190.50 motion to dismiss Indictment 24/2017. “A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success.” *People v. Stultz*, 2 NY3d 277, 287 (2004); *see also People v. Harrison*, 304 AD2d 376 (1st Dept. 2003) (counsel’s failure to file 190.50 motion, standing alone, does not constitute ineffective assistance of counsel), *lv app denied*, 100 NY2d 621 (2003).

There is also no merit to Defendant’s claim that defense counsel should have filed a motion to consolidate the two indictments. The charges contained in the two indictments were not joinable offenses pursuant to CPL §200.20 and thus there was no legal basis for counsel to have moved for consolidation. Counsel’s failure to file a motion “that has little or no chance of success” does not constitute ineffective assistance. *Stultz, supra*.

Finally, Defendant’s motion is denied because it relies on conclusory allegations that fail to substantiate or tend to substantiate all of the essential facts; it is not supported by other evidence and is contradicted by court records; and there is no reasonable possibility that Defendant’s allegations are true. CPL §440.30(4); *People v. Allen*, 174 AD3d 815 (2d Dept. 2019) (defendant’s 440 motion claiming ineffective assistance of counsel, largely based upon unsubstantiated and self-serving allegations, denied without a hearing); *People v. Pabon*, 157 AD3d 1057, 1058-1059 (3d Dept. 2018) (CPL 440 motion denied without hearing where defendant’s allegations were

[\*7]  
“conclusory in nature ... not corroborated by the documentation submitted in support of the motion and ... to some extent, contradicted by the record”), *lv app denied*, 31 NY3d 986 (2018); *People v. Khalapov*, 133 AD3d 618 (2d Dept. 2015). Because Defendant’s remaining arguments are also without merit, it is hereby

ORDERED, that Defendant’s motion to vacate his judgments of conviction is denied.

Dated: Poughkeepsie, New York  
August 29, 2019

  
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HON. PETER M. FORMAN  
COUNTY COURT JUDGE

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