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MEMORANDUM

SUPREME COURT : KINGS COUNTY (Criminal Term, Part 37)

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PEOPLE of the STATE of NEW YORK,

By: LOTT, J.

- against - Dated: February 24, 2005

OSWALDO SANCHEZ, Indictment No. 7998/98

Defendant.

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The defendant moves to vacate the judgment on the ground that his right to effective assistance of counsel was violated, in that counsel failed to call Ms. Candice Johnson as a witness, and failed to cross-examine the sole eyewitness to the crime about a statement in a police document that "they then heard a shot" rather than the fact that the witness actually saw the crime being committed.

In deciding this motion, the court has considered the motion papers, the affirmation in opposition, the supplemental affirmation in opposition, the trial minutes and the court file.

Background

On July 31, 1998 at approximately 11:37 P.M. at 298 Montgomery Street, Brooklyn, New York, the defendant shot and killed another person (victim).

On August 7, 1998, an indictment charging the defendant with intentional and depraved indifference murder and related charges were filed. On August 25, 1998, the defendant was arraigned and pleaded not guilty.

On April 26, 1999, the trial was commenced. At trial, the People presented a single eyewitness (witness 1) who testified that she was the owner of the location where the incident occurred. As a result of information from her daughter that there was a verbal

dispute in the hallway between the victim and the defendant, witness 1 went through the kitchen into the hallway where she observed the defendant walk away from the victim and then turn and shoot the victim. At no time did defense counsel cross-examine this witness about an alleged statement contained in a police report prepared by Sergeant Pinello.

The People also called another witness (witness 2) who did not see the shooting, but related facts regarding a verbal dispute. During cross-examination of witness 2, defense counsel tried to impeach the witness with her Grand Jury testimony. The Grand Jury testimony indicated that witness2 had testified that witness 1 was in the kitchen when the fatal shots were fired, and therefore could not have seen the shooting. Witness 2 denied that this was what she stated to the Grand Jury, and interpreted the testimony differently.

The defense counsel called a witness who was at the location at the time of the incident. The witness testified that witness 1 was in the kitchen for a period of time. From this, defense counsel unsuccessfully attempted to show that witness 1 left the kitchen only after the shooting.

The defendant testified and claimed that during the argument, the victim lifted his shirt up and revealed a gun. There was then a struggle for the gun and the gun accidentally discharged a single shot. The defendant also testified that while he was in the kitchen one of his girlfriend's nieces was also in the kitchen.

During summation, defense counsel read the Grand Jury testimony of witness 2, indicating that witness 1 was in the kitchen at the time of the shooting, and argued to the jury that it should believe the defense witness that witness 1 was in the kitchen during the dispute.

On May 4, 1999, the jury acquitted the defendant of intentional murder, but convicted him of depraved indifference murder.

The defendant appealed his conviction and the Appellate Division affirmed the conviction.[1] The Court of Appeals in a 4-3 decision also affirmed the defendant's conviction.[2]

Adequacy of Counsel

"The Court of Appeals has time and time again advised that ineffective assistance of counsel is generally not demonstrable on the main record."[3] A motion to vacate the judgment is the appropriate vehicle to raise ineffective assistance, rather than a motion to set aside the verdict[4] or by direct appeal.[5] This is true because, even when the facts are on the record, the attorney's motivations are usually not reflected on the record.[6] Further, where there are both record and non record claims, a CPL 440 motion is the appropriate method by which to raise both claims.[7]

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[1] 281 AD2d 645 (2001).

[2] 98 NY2d 373 (2002).

[3] *People v Harris*, 109 AD2d 351, 360 (1985).

[4] *People v Bagarozy*, 182 AD2d 565, 566 (1992).

[5] *Massaro v United States*, 538 US 500, 504-505 (2003); *People v Garcia*, 187 AD2d 868 (1992); *People v Jiggetts*, 178 AD2d 332 (1991); *People v Williams*, 178 AD2d 163, 165 (1991).

[6] *Massaro*, 538 US at 505; *People v McNair*, 294 AD2d 952, 952-953 (2002); *People v Zeh*, 289 AD2d 692, 695 (2002); *People v Brown*, 232 AD2d 193 (1996); *see also People v Love*, 57 NY2d 998, 999-1000 (1982); *People v Castricone*, 224 AD2d 1019, 1020 (1996).

[7] *Massaro*, 538 US 500; *People v Hoyte*, 273 AD2d 48 (2000).

Both the United States Constitution [8] and the New York State Constitution[9] give a defendant in a criminal proceeding the right to the assistance of counsel. This includes the right to "effective" assistance of counsel.[10]

Counsel renders effective assistance when "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 ."[11] What constitutes effective assistance, moreover, is not susceptible to precise measurement.[12] "To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice."[13] This standard is designed to provide the defendant with a fair trial in contrast to a perfect one.[14]

Isolated errors in defense counsel's representation ordinarily do not constitute ineffective assistance of counsel.[15] A single error, if it affects the fairness of the trial, may rise to the level of ineffective assistance of counsel.[16]

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[8] *Gideon v Wainwright*, 372 US 335 (1963).

[9] *People v Linares*, 2 NY3d 507, 510 (2004).

[10] *Strickland v Washington*, 466 US 668 (1984); *Linares*, 2 NY3d at 510.

[11] *People v Baldi*, 54 NY2d 137, 147 (1981).

[12] *id.* at 146-147.

[13] *People v Flores*, 84 NY2d 184, 187 (1994); *People v Benn*, 68 NY2d 941, 942 (1986).

[14] *Yarborough v Gentry*, 540 US 1, 8 (2003); *Flores*, 84 NY2d at 187.

[15] *Yarborough*, 124 S Ct at 6, 157 L Ed 2d at 9; *People v Henry*, 95 NY2d 563 (2000).

[16] *id.*; *Flores*, 84 NY2d at 188-189.

A court should take care "to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis."[17] If transcripts and submissions reveal a trial strategy that might well have been pursued by a reasonably competent attorney, then assistance is effective, even if trial counsel disavows the tactic.[18] Courts will not second guess whether defense counsel's trial strategy "was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation."[19] The choice of trial tactics is viewed objectively.[20] Trial strategies that might well have been pursued by a reasonably competent attorney and are objectively reasonable are within the constitutional parameters, even if trial counsel disavows or eschews the tactic and claims that such was not his or her tactic and would not have been his or her tactic.[21] A defendant must also "demonstrate the absence of strategic or other legitimate explanations for counsel's failure . . . Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment."[22]

Generally, "[a] simple disagreement with . . . the scope of possible cross-examination,

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[17] *Baldi*, 54 NY2d at 146.

[18] *People v Satterfield*, 66 NY2d 796, 799 (1985).

[19] *Satterfield*, 66 NY2d at 799-800; *Yarborough*, 540 US 1.

[20] *Strickland*, 466 US at 688; *People v Angelakos*, 70 NY2d 670, 673-670 (1987); *Satterfield*, 66 NY2d at 799; *People v Butler*, 273 AD2d 613, 615 (2000); *People v Castellano*, 203 AD2d 116, 117 (1994).

[21] *Satterfield*, 66 NY2d at 799; *People v Nichols*, 289 AD2d 605, 606 (2001).

[22] *People v Rivera*, 71 NY2d 705, 709 (1988).

weighed long after the trial, does not suffice" to establish ineffective assistance of counsel.[23] This is true because cross-examination is largely categorized as "trial strategy."[24] Further, in New York, a witness cannot be cross-examined about the failure to relay information to another unless the witness was specifically asked about the missing or omitted facts or was under a duty to report the fact and failed to do so.[25]

In order to show that defendant's Federal constitutional right to effective assistance of counsel was violated, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors , the result of the proceeding would have been different."[26] Reasonable probability means a probability that undermines the fact finder's confidence in the outcome of the trial.[27]

Under New York, law prejudice is examined in terms of errors that deprive the defendant of a fair trial.[28] Prejudice is a significant factor, but not an "indispensable element in assessing meaningful representation."[29]

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[23] *Flores*, 84 NY2d at 187.

[24] *People v Schlageter*, 238 AD2d 891, 892 (1977); *Cannon v Mullin*, 383 F3d 1152, 1163-1164 [2004]).

[25] *People v Bornholdt*, 33 NY2d 75, 88 (1973); *People v Savastano*, 280 AD2d 498, 498 (2001); *People v Gonzalez*, 244 AD2d 422, 422-423 (1997); *People v Jones*, 136 AD2d 740, 741 (1988).

[26] *Strickland*, 466 US at 694; *see also Benevento*, 91 NY2d at 713.

[27] *id.*

[28] *Benevento*, 91 NY2d at 713.

[29] *People v Stultz*, 2 NY3d 277, 284 (2004).

Failure to call Candice Johnson

The defendant submitted an affidavit from Ms. Johnson, the defendant's girlfriend, in which she swears that from the time the defendant arrived at the apartment until the time of the shooting ***no person*** other than she and the defendant were in the kitchen.[30] Ms. Johnson averred that she told defense counsel and the police about the fact that no person entered the kitchen during the period between the defendant's arrival at the location and the shooting. From this, the defendant argues that witness 1 must have been untruthful when she testified that she went through the kitchen to the hallway and saw the incident, and that the failure to attack witness 1's credibility on this issue constitutes ineffective assistance of counsel.

The People submit an affirmation from former defense counsel denying that he was told by Ms. Johnson that no one entered the kitchen during the relevant time period. The People further make extensive arguments attacking the credibility of Ms. Johnson. The People also argue that Ms. Johnson's testimony would have been inadmissible under the collateral evidence rule.

Initially, the court disagrees with the prosecution that the evidence would have been inadmissible under the collateral evidence rule. The untruthfulness of the People's sole eyewitness is exculpatory evidence[31] and not collateral.

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[30] The court finds it of interest that Ms. Johnson's name printed below her signature misspells her first name.

[31] *Gigilio v United States*, 405 US 150 (1972); *People v Steadman*, 82 NY2d 1, 7 (1993); *People v Cwikla*, 46 NY2d 434 (1979); *People v Gantt*, — AD3d —, 786 NYS2d 492, 493 (2004); *People v Sibadan*, 240 AD2d 30, 34 (1998); *People v Fernandez*, 249 AD2d 3, 5 (1998).

Ordinarily, the People's opposition to the motion to vacate the judgment would create an issue of fact requiring a hearing. However, in this case, it is clear that a reasonable attorney would not have called Ms. Johnson as a witness. As stated above, trial counsel's strategy is viewed on an objective basis, disregarding whether the strategy was actually that of defense counsel.[32] It is clear from the record in this case that part of defense counsel's strategy was to place witness 1 in the kitchen. Defense counsel cross-examined witness 2 about this fact and called a witness in an attempt to establish that the eyewitness was in the kitchen at the time of the shooting. The defendant testified that in that there was a child in the kitchen during the period that he was in the apartment. The defense counsel, during summation, read to the petit jury the Grand Jury testimony of witness 2 indicating that witness 1 was in the kitchen. The defense counsel also argued that the testimony of the witness he called indicated that witness 1 was in the kitchen.

It is clear from the above that a reasonable trial attorney would not have called Ms. Johnson to testify that no one entered the kitchen because this testimony would negate the testimony of the defendant's witnesses (himself and the other witness), counsel's cross-examination of witness 2 and defense counsel's summation to the jury. Ms. Johnson's purported testimony would undermine an important part of the defense strategy.

The defendant has failed to show that the failure to call Ms. Johnson was not part of a trial strategy that a reasonable attorney would have used, regardless of whether it was or was not the trial attorney's actual strategy.[33]

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[32] *Satterfield*, 66 NY2d at799.

[33] *id.*

The motion to vacate the judgment based on the failure of defense counsel to call Ms. Johnson is denied.

Cross-Examination of Eyewitness

The defendant claims that defense counsel was ineffective in failing to impeach the credibility of the eyewitness with a police report. The police report filled out by Sgt. Pinello indicates that the ***police officers*** interviewed witness 1 and her husband. The report then states "they then heard a shot." The report does not indicate from whom this statement was taken. All the testimony at trial indicated that witness 1 and her husband were in different locations when the shooting occurred. Other police reports indicate that Sgt. Pinello did not interview the witnesses, but that "police officers," not the sergeant interviewed witness 1.

As indicated above, the scope of cross-examination is generally part of trial strategy.[34] In this case, a defense attorney could have reasonably believed that if counsel had cross-examined the witness as proposed by the defendant, the court, in order to enable the jury to get a complete picture and under the "opening the door" theory, would have permitted the government to show that, prior to the alleged statement to Sgt. Pinello, the witness had informed other police officers that she witnessed the crime. This would have been much more damaging than not asking the witness the proposed question.

The defendant has failed to show that the failure to cross-examine witness 1 about the alleged statement to Sgt. Pinello was unreasonable.

Further, as indicated above, a witness cannot be cross-examined about the failure to relay information to another unless the witness was specifically asked about the missing or

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[34] *See* footnote 24.

omitted facts or was under a duty to report the fact and failed to do so.[35] In this case, there was no evidence that witness 1 was specifically asked by the sergeant whether she observed the crime and there is no evidence of a legal duty to inform the police. Under these circumstances, counsel cannot be faulted for complying with New York Law.

Also, since the report does not indicate whether witness 1 or her husband made the statement to the officer, there was no basis from which to impeach the witness. Indeed, as shown in the People's supplemental affirmation, defense counsel was in possession of several police reports in which the witness stated that she saw the shooting. It was reasonable for an attorney to believe that the information in the police report came from witness 1's husband, who did not see the shooting. It would thus have been improper to ask a witness about someone else's statement.

Further, the report does not indicate that the author interviewed the witnesses. In fact, the report indicates that "officers" interviewed the witnesses. The author is a sergeant in the Police Department and not an "officer." Police reports in the possession of defense counsel by the "officers" involved clearly indicated that witness 1 stated to those "officers" that she saw the shooting.

There was no good faith basis for former defense counsel to ask any questions relating to a report made by a police sergeant who apparently did not interview the witness.

The motion to vacate the judgment grounded on the failure of counsel to cross-examine a witness about an omission in the police report is denied.

This constitutes the decision and order of the court.

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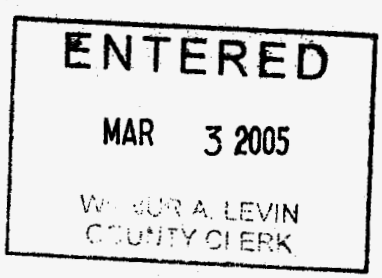
[35] *See* footnote 25.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted.[36]

E N T E R,

J. S. C.
HON. PLUMMER E. LOTT
JUSTICE OF THE SUPREME COURT



[36] 22 NYCRR § 671.5.