SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 25

Decision and Order

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Ind.#: 1570-1985

PEOPLE OF THE STATE OF NEW YORK

-against-

Hon. Vincent Del Giudice
Dated: May 18, 2012[1]

TERRELL ELEBY

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On January 9, 1986, a Kings County petit jury found the defendant guilty of five counts of Murder in the Second Degree, two counts of Attempted Murder in the Second Degree and assorted other charges. On January 30, 1986, the defendant was sentenced to three consecutive terms of twenty-five years to life, one for each of the felony murder convictions, and consecutive terms of imprisonment for his Attempted Murder in the Second Degree and Assault in the Second Degree convictions. The defendant's direct appeal was denied but his sentence was modified to vacate sentences imposed for charges for which he was acquitted (*People v Eleby*, 137 AD2d 707).[2] Leave

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[1]This decision supercedes the order of this court dated May 11, 2012.

[2]The Appellate Division, Second Department, determined, in the defendant's appeal, that the photo array and lineup were not unnecessarily suggestive, but modified

to appeal was denied (*People v Eleby*, 71 NY2d 1026).

By moving papers dated December 7, 2011, the defendant has filed, *pro se*, a motion to vacate his judgment of conviction and to set aside his sentence. The People have filed an answer in opposition, dated May 3, 2012.

Defendant claims his judgment of conviction must be vacated as the result of the ineffective assistance of trail counsel and that his sentence must be set aside because it is invalid as a matter of law.

Pursuant to CPL 440.10 (1), the court in which judgment was entered may vacate a judgment of conviction upon certain specific enumerated grounds.[3]

To overcome the presumption of regularity which attaches to a judgment of conviction, a defendant is required to come forward with sworn allegations of fact sufficient to demonstrate that the nonrecord facts sought to be established would entitle him to the relief requested (*People v Satterfield*, 66 NY2d 796, 799 [1985]; *People v Crippen*, 196 AD2d 548, 549 [2nd Dept 1993], *lv denied* 82 NY2d 848).

Initially, defendant objects to the court's charge regarding the burden of proof. By quoting certain portions of the trial transcript out of context, defendant alleges the court's charge failed to convey the appropriate standard

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the defendant's sentence by setting aside sentences for charges for which the defendant had been acquitted. In *People v Elerby*, (137 AD2d 708), the Appellate Division, Second Department, upheld the co-defendant, Vincent Eleby's, conviction, finding that the prosecution's failure to disclose a ballistic report did not require preclusion of the witness's testimony and ruling that the imposition of consecutive sentences was within the court's discretion because no two crimes were committed through a single act or commission.

[3]Defendant bases his current claim on CPL 440.10 (1)(h) which requires the judgment be vacated if it was obtained in violation of a right of the defendant under either the federal or state constitution.

to the jury. This aspect of the defendant's motion must be summarily denied, pursuant to CPL 440.10(2)(c), because sufficient facts appear on the record to have permitted adequate review upon appeal but no such appellate review occurred owing to the defendant's unjustifiable failure to raise such ground upon his appeal.

In addition, defendant claims his judgment must be vacated because he received ineffective assistance of trial counsel. Defendant claims his trial attorney erred by not calling two potential alibi witnesses to testify before the grand jury. Defendant asserts he testified before the grand jury that he had an alibi for the time of the crime but his attorney never called his two potential alibi witnesses before the grand jury, even though both had been previously interviewed by an assistant district attorney.

It is well recognized that the attorney for a target of a grand jury investigation has no right to call witnesses before the grand jury (CPL 190.50 [1]). Only the grand jury may call as a witness any person they believe possesses relevant information and knowledge (CPL 190.50 [3]). The defendant's attorney can only request the grand jury subpoena a person designated by the defense as a witness, but the grand jury has complete discretion as to whether to grant such request (CPL 190.50 [6]).

Accordingly, this portion of defendant's motion must be denied because the moving papers do not allege any ground constituting a legal basis for the motion (CPL 440.30 [4][a]).

Defendant further claims trial counsel was ineffective due to her failure to object to portions of the court's final charge to the jury. That claim must be denied because sufficient facts appear on the record to have permitted adequate review of said claim upon defendant's direct appeal (CPL

440.10[2][c]).

In support of his claim that trail attorney failed to provide effective assistance of counsel, based upon her failure to call two potential alibi witnesses at trial, defendant has provided what are purported to be affidavits from two individuals. Yvette Hayes's statement was signed and dated before a notary public.[4] Rosa Buie's statement is not a sworn affidavit, nor is her signature notarized, or dated.[5] The court will not consider Rosa Buie's statement since it is not a sworn allegation of fact and in order to meet his burden of proof, defendant's moving papers must contain "sworn allegations" of fact "based upon personal knowledge of the affiant" (CPL 440.30[1]). The defendant has also attached a copy of what is purported to be the transcripts of conversations these individuals had with Assistant District Attorney Todd Steckler on March 1, 1985.

In opposition to defendant's motion, the People have supplied an affidavit from defendant's trail counsel, Mary Bednar.[6] Counsel's affirmation states that on October 21, 1985, she interviewed Rosa Buie with respect to the defendant's potential alibi defense. Ms. Buie informed counsel that at the time of the crimes committed herein, the defendant, his brother (co-defendant Vincent Eleby), a neighbor (Joann Cromwell) and herself were playing cards at Ms. Buie's sister's house in Coney Island. Counsel then hired an investigator in an attempt to locate additional witnesses to support this potential defense. On November 15, 1985, counsel filed a notice of alibi with the Kings County District attorney, informing the prosecution that her client intended to

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[4]This individual is the defendant's sister.

[5]This individual was the defendant's girlfriend at the time of the crimes in question.

[6]Defendant's trail counsel has been a Family Court Judge, in New York County, for the past sixteen years.

call Rosa Buie as an alibi witness.[7]

At trial, Joann Crawford testified that she went to the Coney Island location with the defendant at approximately 2 AM, after the homicides had already been committed.[8] After hearing her trial testimony and assessing the credibility of Ms. Crawford, counsel consulted with her client. The defendant agreed to forego the alibi defense in order to focus on his mistaken identity defense.

In order to establish ineffective assistance of counsel, under the federal standard, a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's conduct and a showing of prejudice (*see Strickland v Washington,* 466 US 668 [1984]). The relevant tests are whether counsel's representation fell "below an objective standard of reasonableness" (*Strickland,* 466 US at 688) as judged by the prevailing norms of practice and whether, "but for counsel's unprofessional errors, the result of the proceedings would have been different" (*id.* at 694).

According to New York's more flexible standard, a defendant need not demonstrate prejudice; he may prevail in establishing that his attorney failed

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[7]Counsel stated that notwithstanding her filing of the notice, she had reservations about the viability of defendant's alibi defense based upon her review of various police reports.

[8] Joann Crawford testified that she lived in a basement apartment with the defendant, his brother, Vincent Eleby, defendant's mother, sisters Valerie Cox and Yvette Eleby, Rosa Buie and another male. On February 27, 1985, Ms. Cromwell testified she was home with defendant's two sisters and Rosa Buie. The defendant and the other males were not in the apartment. Prior to midnight, Ms. Cromwell and Ms. Cox left the apartment to purchase beer. When they returned, at approximately midnight, Vincent Eleby opened the entrance door. The defendant was also inside the apartment with other males. At approximately 1:00 AM, Ms. Cromwell entered defendant's bedroom and observed defendant, and the other males who were subsequently arrested, with four guns, a quantity of cocaine and cash. At approximately 2:00 AM, everyone in the apartment went to the Coney Island apartment of Rosa Buie's sister to play cards.

to provide meaningful representation by demonstrating "the absence of strategic or other legitimate explanations" for counsel's allegedly deficient representation (*People v Caban*, 5 NY3d 143, 152 [2005], *quoting People v Rivera*, 71 NY2d 705, 709 [1988]).

Under New York's interpretation of its state constitution, success of an ineffective assistance of counsel claim rests upon whether "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" (*People v Henry*, 95 NY2d 563, 565 [2000], *quoting People v Baldi*, 54 NY2d 137, 147 [1981]).

Effective assistance of counsel, therefore, is "meaningful representation" not "perfect representation" (*People v Ford*, 86 NY2d 397, 404 [1995]). Hindsight does not transform tactical errors into ineffective assistance of counsel (*Baldi*, 54 NY2d at 151). Only errors that seriously compromise a defendant's right to a fair trial warrant a finding of ineffectiveness (*People v Hobot*, 84 NY2d 1021, 1022 [1995]). In the end, a "claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*Caban*, 5 NY3d at 156; *People v Benevento*, 91 NY2d 708, 714 [1998]).

The court has considered these judicial precedents in reviewing the subject motion. "Viewed objectively, the transcript and submissions reveal the existence of a trial strategy that might well have been pursued by a reasonably competent attorney" (*People v Satterfield*, 66 NY2d 796, 799 [1985]; *see People v Evans*, 16 NY3d 571, 575-576 [2011], *cert denied* 132 S. Ct. 325; *People v Aguirre*, 92 AD3d 951, 951 [2nd Dept 2012]). A reasonably competent

attorney could have decided to abandon a previously noticed alibi defense after hearing unimpeachable trial testimony from a civilian witness that negates the underlying defense.

Since this court can determine, from the submissions, that the defendant was not deprived the effective assistance of counsel, his motion to vacate judgment is summarily denied, without an evidentiary hearing (CPL 440.30 [4][b]; *Satterfield*, 66 NY2d at 799-800; *People v Canty*, 32 AD3d 1043, 1044 [2nd Dept 2006], *lv denied* 7 NY3d 924; *Aguirre*, 92 AD3d at 951-952).

With respect to the defendant's motion to set aside his sentence, pursuant to CPL 440.20 (1), defendant claims the sentence imposed is invalid because it inflicts multiple punishment for the same criminal transaction, in violation of the Federal Constitution's prohibition against double jeopardy (US Const, Fifth Amend).

Defendant was convicted of five counts of Murder in the Second Degree. Three of those counts were under the felony murder statute (PL 125.25 [3]). The other two counts were for intentionally murdering two of the victims named in the felony murder counts (PL 125.25 [1]).

Defendant's motion to set aside his sentence must be summarily denied, pursuant to CPL 440.10(2)(c), because sufficient facts appear on the record to have permitted, upon appeal from the judgment, adequate review of the ground or issue raised upon the motion. Although the record before this court is clear that the Appellate Division reviewed, and modified, the defendant's sentence, the decision on appeal does not directly address whether consecutive sentences were warranted under the facts of the case.

The co-defendant's decision on appeal, however, clearly addressed this issue and ruled squarely against the appellant:

> [T]he sentencing court did not err in providing that the sentences imposed upon the defendant for each of the three felony murder

counts, each of the three attempted murder counts, and each of the assault counts shall run consecutively. Although the offenses may be said to have occurred in the course of a single extended transaction, no two or more of them were committed through a single act or omission, or through an act or omission which itself constituted one of the offenses and also was a material element of another.

(*Elerby*, 137 AD2d 708, 709)(*citations omitted*).

The double jeopardy sentencing issue was the same in both appeals. The Appellate Division clearly ruled against the co-defendant with respect to this specific issue. From the court's failure to address this issue in the defendant's appeal, one can reasonably infer that defendant's appellate counsel did not raise this issue for appellate review. Pursuant to CPL 440.10 (2)(c), the court must deny a motion to set aside a sentence when sufficient facts appear on the record to have permitted , upon appeal from the judgment, adequate review of the issue raised upon the motion but no appellate review occurred owing to defendant's unjustifiable failure to raise such ground or issue upon his perfected appeal.

Accordingly, defendant's motion to set aside the sentence must also be summarily denied (CPL 440.30[2]).

This constitutes the decision and order of the court (CPL 440.30 [7]).

Hon. Vincent M. Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

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Dated: May 18, 2012
Brooklyn, New York