SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 19

THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	
-against-	:	DECISION AND ORDER
	:	
DANA ROHLEHR,	:	IND. NO. 9975/2007
	:	
Defendant.	:	
	:	

DANNY K. CHUN, J.

Defendant moves to vacate his judgment pursuant to Criminal Procedure Law § 440.10 arguing that (1) his attorney was ineffective in representing him; and (2) the cell phone call records and cell phone tower records discovered after the defendant's trial constitutes newly discovered evidence sufficient to vacate his judgment. The People oppose the defendant's motion.

The defendant was charged, under Kings County indictment number 9975/2007, with Burglary in the Second Degree (PL § 140.25[2]), Burglary in the Third Degree (PL § 140.20), Trespass in the Second Degree (PL § 140.15), Trespass in the Third Degree (PL § 140.10[e]), Petit Larceny (PL § 155.25); and Grand Larceny in the Fourth Degree (PL § 155.30[1]).

On December 11, 2008, following a jury trial, the defendant was convicted of Burglary in the Second Degree. After the verdict, but before sentencing, defendant's trial counsel was relieved and defendant retained new counsel. The new counsel filed a motion to set aside the verdict pursuant to Criminal Procedure Law § 330.30 arguing that (1) the trial counsel failed to introduce into evidence defendant's cell phone records, which confirm the alibi witnesses' trial testimony; and (2) the trial counsel failed to introduce into evidence the fact that one of the

complainants originally had failed to identify the defendant in a photo array as the individual who committed the alleged crimes. On April 8, 2009, this court denied that motion. On April 22, 2009, defendant was sentenced to a prison term of six years followed by a five-year-term of post-release supervision.

Defendant appealed his judgment of conviction to the Appellate Division, Second Department, arguing:

(1) he received ineffective assistance of counsel because his counsel failed to: (a) elicit the fact that one of the complainants had viewed a photo array with defendant's picture in it, but had not identified anyone in the array; (b) subpoena and introduce into evidence defendant's cell phone records, which corroborated aspects of the alibi witnesses' testimony; and (c) subpoena and introduce into evidence cell phone tower site records which allegedly would have established defendant's exact location during the burglary; and

(2) there is the following newly discovered evidence: (a) one of the complainant's non-identification of defendant in a photo array; (b) the discrepancy between the witnesses' description of the burglar's height; (c) defendant's cell phone records; and (d) the cell phone tower site records.

On August 9, 2011, the Appellate Division affirmed defendant's judgment of conviction. People v. Rohlehr, 87 A.D.3d 603 (2d Dep't 2011).

Defendant now moves to vacate the judgment of his conviction on similar grounds raised on his appeal. Specifically, defendant argues that:

(1) his due process rights to effective representation of a counsel was violated because: (a) his counsel failed to inform the jury of the complainant's failure to initially identify the defendant as the perpetrator; and (b) his counsel failed to subpoena and introduce at trial the

defendant's cell phone call records and cell phone tower site records; (c) his counsel failed to proffer expert testimony with respect to the lack of reliability of eyewitness identification, which arguably was the most salient issue in this case; and

(2) there is the following newly discovered evidence: (a) one of the complainant's non-identification of defendant in a photo array; and (b) defendant's cell phone call records and cell phone tower site records.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. Strickland v. Washington, 466 US 668 (1984); People v. Linares, 2 N.Y.3d 507, 510 (2004); see U.S. Const., 6th Amend.; N.Y. Const., art. 1 § 6. Under the two-prong test of the federal standard, a court must decide (1) whether the counsel's performance fell below an objective standard of reasonableness and (2) whether the defendant suffered actual prejudice as a result. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Strickland v. Washington, 466 U.S. at 687 (1984). In New York, "[s]o 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." People v. Baldi, 54 N.Y.2d 137, 147 (1981). "A contention of ineffective assistance of trial counsel requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics." People v. Rivera, 71 N.Y.2d 705, 708-09 (1988); See People v. Benn, 68 N.Y.2d 941 (1986).

In contrast to the federal standard, which looks to the outcome of the case, in New York, a court must consider "prejudice... [,] a component which focuses on the fairness of the process as a whole rather than any particular impact on the outcome of the case." People v. Yagudayev, 91 A.D.3d 888, 890 (2d Dep't 2012) quoting People v. Colville, 79 A.D.3d 189, 197 (2d Dep't

2010). Defendant bears the burden of overcoming the strong presumption that defense counsel rendered effective assistance by demonstrating the absence of strategic or other legitimate explanations for counsel's alleged errors. People v. Colville, 79 A.D.3d at 197.

In this case, upon examining all of the circumstances, the court finds that defendant was not deprived of effective assistance of counsel. Here, the defense counsel made opening and closing statements, cross-examined the People's witnesses, and put on an alibi defense by calling two witnesses. When viewed in light of the trial as a whole, the actions of defense counsel of which defendant now complains could be attributed to tactical trial decisions. People v. Ryan, 90 N.Y. 2d 822, 823 (1997). Therefore, defendant failed to establish that he was denied his constitutional right to effective assistance of counsel.

Furthermore, the court denies the defendant's motion regarding the "newly discovered evidence" as procedurally barred pursuant to CPL § 440.10(2)(a). Section 440.10(2)(a) of Criminal Procedure Law provides that a court must deny a motion to vacate a judgment when "[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment..." Here, the Appellate Division rejected defendant's newly discovered evidence argument on its merits, holding that "[t]he defendant failed to demonstrate in his motion papers that this new evidence could not have been produced at trial with due diligence." People v. Rohlehr, 87 A.D.3d 603, 604. As the issue has been previously decided on its merits upon an appeal, this court must deny the motion regarding this issue. C.P.L § 440.10(2)(a).

However, even if this court was not procedurally barred, the court finds defendant's argument without merit. In order to constitute newly discovered evidence pursuant to CPL § 440.10(1)(g), a defendant must establish that the evidence in question is of such character that it would probably change the results if a new trial were held; that it was discovered since the trial;

that it would not have been produced at trial with the exercise of due diligence; that it is not cumulative; that it is material to the issues; and that it must not merely contradict the former evidence. People v. Salemi, 309 N.Y. 209, 215-216 (1955), cert denied 350 U.S. 950; People v. Gurley, 197 A.D.2d 534, 535 (2d Dep't 1993).

Here, the defendant failed to show that the evidence could not have been produced at trial with the exercise of due diligence. The fact that one of the complainants did not identify the defendant in a photo array was provided to defendant prior to the trial as part of the Rosario/Brady material. In addition, defense counsel could have obtained the cell phone call records and cell phone tower records prior to the trial if counsel had chosen to do so.

In addition, although the cell phone record, which is under the name of Lena Rohlehr and not the defendant's name, does corroborate parts of the alibi witnesses' testimony, the court does not find that it would probably change the results if a new trial were held. It is the People's theory that the burglary happened between 7:30 p.m. and 7:45 p.m. The complainant's first 911 call was placed at 7:46 p.m. Defendant's cell phone record shows he made three calls near this time at 7:28 p.m., 7:47 p.m. and 7:58 p.m., which are all not during the time the alleged burglary occurred. The court cannot evaluate the cell phone tower site records as the defense counsel did not provide a copy. Therefore, the court is not convinced that these are new evidence as defined in CPL § 440.10(1)(g).

Wherefore, the defendant's motion to vacate his judgment is denied. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
May 9, 2012

DANNY K. CHUN, J. S.C.

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201