SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs -

HON. JOEL M. GOLDBERG

IND. NO. 1260/03

DATE: NOVEMBER 13, 2012

JOSEPH GRAJALES,

DEFENDANT.

The defendant's *pro se* motion to vacate the May 27, 2004 judgment of conviction in the above case, dated June 14, 2012, upon consideration of the People's Answer, dated and filed September 19, 2012, and the defendant's Reply, dated October 18, 2012, is denied.

The defendant was convicted after a jury trial of Robbery in the First Degree and sentenced on May 27, 2004 to a prison term of 15 years and 5 years post-release supervision.

The Defendant's Contentions

The defendant contends he received constitutionally ineffective assistance from trial counsel, alleging that trial counsel: failed to investigate the crime scene; failed to interview the owner of a restaurant who may have been able to provide exculpatory information; failed to interview other (unnamed) potential witnesses in the area of the crime; failed "to conduct the necessary investigation pertaining to [the circumstances surrounding the] defendant's arrest" which the defendant contends was illegal; and also failed to obtain copies of the 911 tapes and radio runs "that were very important element of the case."

The Pre-Trial Suppression Hearing and Trial

The details of the pre-trial suppression hearing and the trial are accurately summarized in the People's Answer at 4-23. The following is an even briefer summary of the relevant proceedings.

Overview

The complaining witness, Alex Negron, in the presence of his teenage step-daughter, was robbed at gunpoint of his necklace and money on February 4, 2003 at about 1:00 p.m. inside a restaurant in Brooklyn allegedly by the defendant, who displayed a pistol, and a co-defendant, James Whiting (who was tried separately and also convicted). Later that day, Negron identified the defendant's photograph to the police from a photographic array. A week later, on February 11, 2003, Negron saw the defendant and Whiting together on the street and called the police. Both men were arrested, and the police allegedly recovered a loaded 9 millimeter pistol from the defendant. (The defendant at the trial was acquitted of possessing this weapon.)

Because the arresting officer was apparently unaware that Negron had previously identified a photograph of the defendant, and, therefore, did not communicate this fact to the District Attorney's Office, the People did not serve CPL 710.30 (1) (b) notice of this prior photographic identification but only of the street point-out. Nevertheless, the trial court, after hearing argument on the issue, did not, based on this failure to serve notice, preclude an in-court identification of the defendant. That decision was ultimately affirmed on the defendant's direct appeal of the judgment by the Court of Appeals. *People v. Grajales,* 8 NY3d 861 (2007). The defendant's subsequent collateral challenges to his conviction in state and federal court have all been unsuccessful. *See* People's Answer, at 26-27.

The Suppression Hearing

Detective Erik Parks, on February 4, 2003, interviewed Alex Negron and showed him some photographic books and two photographic arrays. Negron told the detective he had previously seen the gunman in the robbery "on occasion," and that he had seen the other robber quite often at the nearby housing projects where Negron lived. Negron looked at books of photographs, containing 120 to 400 pictures which may have included the defendant's photograph, but he did not recognize anyone.

Based on an "anonymous tip" received by another police officer and passed on to Detective Parks, the detective subsequently showed Negron a photographic array containing the defendant's photograph who then identified the defendant as the gunman.

This information was unknown to Police Sgt. Gregory S. Green who on February 11, 2003, at about 7:40 p.m. received a radio message to meet Negron on the corner of Stone and Sutter, because Negron had telephoned 911 stating he recognized two men from a past robbery. Negron met the Sergeant, and after a short drive in the police car with the Sergeant pointed out the defendant and Whiting who were together on the street. Both men were arrested by other police officers at the scene after a radio communication from Sergeant Green.

The hearing court found that neither the photographic identification nor the on-the-street point out of the defendant was unnecessarily suggestive and that the defendant was lawfully arrested based on his positive identification of the defendant to Sergeant Green.

The Trial

Alex Negron testified he was with his 13 year-old step-daughter, Crystal, on February 4, 2003 at about 1:00 p.m. He had been shopping with her, and they were walking to a restaurant on Belmont Avenue. While on a corner waiting for the light to change, the defendant and another man called Negron over to them. When Negron went

over, one of the men asked for "a couple of dollars." Negron said he had nothing and noticed that the men were looking at his neck chain.

Negron and Crystal then entered the well-lit restaurant. As Negron waited to order, he saw the defendant standing outside, this time with Whiting. After Negron placed his order, the two men entered. The defendant pointed a silver gun at Negron's chest and demanded Negron's chain which he then yanked from Negron's neck, breaking it.

Crystal (who had made no pre-trial identifications) initially testified she could not recognize anyone, but subsequently in her testimony identified the defendant as the gunman.

As Negron's chain was being taken, Whiting went through Negron's pockets and took some money but did not take $2,000 that Negron threw over the restaurant counter which apparently the robbers did not see happen.

The robbers fled. Negron retrieved the $2,000 and called the police after he went home. He canvassed the neighborhood with the police but did not see the perpetrators. (No mention was made at trial about Negron's photographic identification.)

On February 11, 2003, at about 7:30 p.m., Negron was riding in a cab with a friend. At the corner of Mother Gaston Boulevard and Sutter Avenue, the friend directed Negron's attention to a person standing at a brightly lit gas station. Negron had previously described the robbers to this friend. The friend said, "Ain't that the guy who robbed you?" Negron recognized the man as the person who took his money, who was co-defendant Whiting. Negron then saw the defendant walk out of the back of the gas station. Negron called 911 and told the operator he had just seen two men who had previously robbed him.

Police responded as a result of the 911 call and both the defendant and Whiting were taken into custody as they were standing together within blocks of the gas station. Negron observed the apprehension from Sergeant Green's police car.

The defendant was patted down at the scene of arrest by Police Officer Joseph Parisi. No weapon was recovered at that time. At the precinct, the defendant was more thoroughly searched by Officer Parisi. A loaded and operable 9 millimeter pistol was recovered from the defendant in a bag worn in the middle of his back underneath thermal sweat clothing. Negron identified this gun as the one used in the robbery.

The Verdict and Sentences

The defendant was found guilty of Robbery in the First Degree and acquitted of the charges relating to possession of the gun on the date of his arrest.

Discussion

I.

The defendant brought a prior *pro se* CPL 440.10 motion to vacate judgment, dated December 27, 2007. In that motion, the defendant contended the People violated the notice provisions of CPL 710.30 with respect to the photographic identification by Negron and that the evidence adduced at the suppression hearing was insufficient to support the police stop of the defendant. This motion was denied in a decision and order dated March 4, 2008. Leave to appeal was denied by the Appellate Division, Second Department on July 24, 2008 (Dillon, J.) (Motion No. 2008-02973).

Because the claims made in this motion are raised over four years after the defendant's prior CPL 440.10 motion and could have been raised in that prior motion, and such claims are not supported by any Facts alleged to have been discovered subsequent to that prior motion, other than the defendant's claim that trial counsel did not sufficiently investigate the case, the present motion is denied as a matter of discretion. CPL 440.10 (3) (c).

The defendant's current claims concerning ineffective assistance of counsel, the existence of potential exculpatory witnesses, and the illegality of the police stop of the

defendant are conclusory and factually unsupported. *People v. Graves,* 62 AD3d 900 (2d Dept. 2009); *People v. Cochrane,* 27 AD3d 659, 660 (2d Dept. 2006); *People v. Brown,* 24 AD3d 271 (1st Dept. 2005); *People v. Dover,* 294 AD2d 594, 596 (2d Dept. 2002); *People v. Pugh,* 288 AD2d 634, 635 (3rd Dept. 2001); *People v. Sanchez,* 212 AD2d 487 (1st Dept. 1995); *People v. Thomas,* 147 AD2d 510, 512 (2d Dept. 1989). *See* also, *People v. Degondea,* 3 AD3d 148, 160 (1st Dept. 2003) (the defendant's unexplained delay in bringing a motion to vacate judgment and the consequent difficulties this delay presents to the People in establishing the facts needed for a hearing on the motion, or for a re-trial of the case if the motion is successful, may be considered by the Court in exercising its discretion to deny the motion on procedural grounds).

The defendant's Reply contends that he did not learn of his counsel's alleged "failure to investigate" until after he brought his prior CPL 440 motion, and, therefore, this should excuse his previous failure to raise this claim. However, although the defendant may not have received certain documents purporting to establish defense counsel's "failure to investigate" until well after the prior motion, this circumstance, in and of itself, does not establish that the defendant was not in a position to raise this claim of ineffective assistance of counsel in the prior motion. No exculpatory Facts have been alleged to have been discovered since the prior motion that such an investigation would have disclosed. Indeed, as discussed below, even the present motion fails to allege any exculpatory Facts that were not known at the time of the trial and on the record at the time the defendant brought his prior motion in 2007.

II.

The defendant's motion does not contain sworn factual allegations substantiating or tending to substantiate that he received ineffective assistance of counsel under either the State or Federal Constitutions and, therefore, it is also denied for this reason. CPL 440.30 (4) (b).

The defendant claims his trial counsel "failed to investigate" the circumstances of

the defendant's arrest after the defendant told trial counsel that his arrest was illegal (Defendant's motion, par. 9-11; Defendant's Reply, par. 14, #2). However, the defendant's motion does not assert any Facts to substantiate his claim of an illegal arrest other than to summarize the issues raised at the suppression hearing which found the arrest to be lawful.

The defendant also claims that trial counsel did not properly investigate the Facts surrounding the robbery and that the court-appointed investigator engaged by defense counsel investigated only the defendant's other then-pending indictment but not this case (Defendant's motion, par. 12-16). However, the defendant's motion does not assert any potential exculpatory evidence that was not discovered. The defendant's motion only offers speculation that there were customers, employees, or surveillance cameras in or about the restaurant that would have exculpated the defendant.

Simply put, the defendant has not met his burden to show that but for trial counsel's alleged failure with respect to "investigating" the legality of the arrest or the possibility of exculpatory evidence tending to show the defendant was mistakenly identified, either that the motion to suppress the defendant's identification would have been granted and/or that the defendant would have been acquitted of the robbery. *People v. Henry,* 95 NY2d 563 (2000) (defendant not denied "meaningful representation" under the State Constitution even though trial counsel called an alibi witness who could not account for the defendant's whereabouts at the time of the crime); *Henry v. Poole,* 409 F3d 48, 63 (2d Cir. 2005) (even strategic choices made after less-than complete investigation do not amount to ineffective assistance under the Federal Constitution so long as the known facts made it reasonable to believe that further investigation was unnecessary); *See*, *People v. Whiting* 21 Misc. 3d 1131 (A) at 9 (Sup. Ct. Kings Cty 2008). (CPL 440.10) (claim by the co-defendant in this case that his trial counsel was ineffective for failing to properly investigate a potential alibi was denied after a hearing based on the defendant's failure to establish that such an investigation would have led to

an exculpatory witness); *compare People v. Oliveras,* 90 AD3d 563, 566 (1st Dept. 2011) (trial counsel's failure to obtain defendant's psychiatric records found to constitute ineffective assistance where those records would have created a reasonable probability of a verdict more favorable to the defendant); *People v. Fogle,* 10 AD3d 618 (2004) (defendant's post-conviction submissions, unlike this case, revealed the existence of exculpatory witnesses; accordingly, trial counsel's failure to investigate and locate these witnesses prejudiced the defendant in that case).

Because the defendant's motion fails to establish that trial counsel's alleged failures deprived the defendant of a fair trial whose result was reliable, the motion does not establish a violation of the Federal Constitutional standard for effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 688 (1984).

Further, the defendant's motion in the absence of supporting factual affidavits from exculpatory witnesses that trial counsel allegedly should have discovered does not establish the degree of serious deficiency in performance and actual prejudice required to establish a violation of the State standard of "meaningful representation." *People v. Ozuna,* 7 NY3d 913, 915 (2006); *People v. Turner,* 5 NY3d 476, 480 (2005) (a single error of omission by counsel may deprive a defendant of "meaningful representation," but that error must be shown to have actually adversely impacted the result); *People v. Stultz,* 2 NY3d 277, 284 (1984) (while a showing of prejudice is not "indispensable" to establishing a lack of "meaningful representation," the alleged ineffectiveness in the absence of prejudice would, nevertheless, have had to have rendered the proceedings unfair as a whole).

The defendant further argues that counsel was ineffective at the hearing during the pre-trial motion to suppress, because of lack of investigation, preparation, and familiarity with the law. Again, the defendant's motion does not establish that the results would have been any different if trial counsel had "investigated," other than to argue that the suppression motion was incorrectly decided based on the record made at the hearing.

However, the suppression motion was effectively litigated at the hearing: the central issues were all placed on the record and the ruling concerning probable cause to arrest was subject to review by the Appellate Division and the Court of Appeals, although the defendant's appellate counsel in the Court of Appeals did not raise that issue. The defendant's motion contains no additional sworn factual allegations that would change the result of that suppression ruling, the correctness of which cannot now be again reviewed on this motion. CPL 440.10 (2) (a); *See, People v. Grajales,* 28 AD3d 677 (2d Dept. 2006) (specifically affirming the hearing court's finding that the police lawfully stopped the defendant, pending the showup identification by the complainant, based on a radio transmission from a police sergeant who had spoken to the complainant). *Grajales v. Brown,* 2008 WL 2313137, * 5-7, (EDNY June 2, 2008, Gleeson, USDJ) ("Grajales did not have a meritorious federal constitutional challenge to his identification" at *5 and also had a fair opportunity to challenge the legality of his arrest despite the absence of the 911 tapes and lack of formal notice of the photographic identification procedure"), *reconsideration denied,* 2009 WL 4823363 (EDNY December 10, 2009).

The defendant's assertions that trial counsel was ineffective for not taking steps to have the police department preserve tape recordings of the 911 calls and police radio communications as well as effectively argue the legal issues at the hearing were sufficiently made clear on the record at the suppression hearing so as to have permitted adequate review of this claim on the defendant's direct appeal. Therefore, the claim based on this ground must be denied. CPL 440.10 (2) (c).

The defendant's motion is replete with unsupported assertions that had defense counsel fully investigated the case, unnamed witnesses would have been discovered to have possessed unspecified exculpatory evidence. Such assertions are insufficient to warrant a hearing on the motion. *Compare, People v. Bussey,* 6 AD3d 621, 623 (2d Dept. 2004) (trial counsel found ineffective for failure to investigate and speak with several alibi witnesses made known to him prior to trial by the defendant) with *People v.*

Blackman, 90 AD3d 1304, 1311 (3d Dept. 2011) *lv. denied* __ NY3d __, 935 NYS2d 181 (2011) (defendant's assertion that surveillance cameras claimed not to have been known to have existed prior to trial would have provided exculpatory version of events was speculative and based solely on the defendant's own assertions).

Conclusion

The defendant has failed to provide sufficient reason to excuse his failure to raise his present claims in his prior CPL 440.10 motion, and, in addition, his present claims, individually and collectively, do not establish that he received ineffective assistance of counsel in violation of his rights under the Federal or State Constitutions.

Accordingly, his motion is denied without a hearing.

SO ORDERED

JOEL M. GOLDBERG
JUDGE