

**People v Wilson**

2003 NY Slip Op 30252(U)

November 19, 2003

Supreme Court, New York County

Docket Number: 0099/01

Judge: Charles J. Tejada

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CRIMINAL TERM PART 58

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

INDICTMENT #0099/01  
OPINION AND DECISION

-v-  
SHAMEL WILSON  
-----X  
CHARLES J. TEJADA, J. S. C.

INTRODUCTION

Defendant filed the instant Criminal Procedure Law (CPL) 440.10 motion, contending that he was deprived of his right to the effective assistance of counsel, in violation of the 6<sup>th</sup> Amendment of the United States Constitution, as well as Article 1 Section 6 of the New York State Constitution. In sum, all of defendant’s allegations concerning his attorney’s performance centers on counsel’s decision not to call Jeffrey Schwartz, Esq., as a witness, not to challenge the trial court’s determination to hold an independent source hearing and counsel’s alleged failure to advance an attenuation argument.

The People oppose defendant’s motion on the basis that defendant failed to raise these issues in a direct appeal in violation of CPL 440.10(2)(c), that trial counsel presented strong arguments on defendant’s behalf and made reasonable strategic decisions based on the witnesses and the evidence presented by the People and that the Court’s decision to hold an independent source hearing was proper in all respects.

BACKGROUND

On July 21, 2002, David Haughey and Patrick Machir were robbed at gunpoint on 43<sup>rd</sup> Street between 9<sup>th</sup> and 10<sup>th</sup> Avenues. Almost immediately, the police investigation of this

incident focused on the defendant who had been given a traffic ticket by another police officer that same morning in the same area.

On July 24, 2000, Mr. Haughey identified the defendant in a “photo” array.

Detective McPartlan spent months attempting to locate the defendant including leaving his business card with defendant’s mother. In August 2000, defendant contacted Detective McPartlan but the Detective was unsuccessful in getting defendant to voluntarily come to the Precinct.

On January 8, 2001, Detective McPartlan received a telephone call from Jeffrey Schwartz, Esq. Detective McPartlan testified that Mr. Schwartz, asked him whether a line up was going to be conducted with the defendant, who was not in police custody at that point. Detective McPartlan testified that he informed Mr. Schwartz that a line up was not intended.

On January 9, 2001, Detective McPartlan arrested defendant when he appeared in Brooklyn Criminal Court on an unrelated case and placed him in a lineup, which Mr. Haughey viewed. However, immediately before the lineup, an unidentified detective showed Mr. Haughey the same photograph that Mr. Haughey had picked from the July 24, 2000 “photo” array. Consequently, an independent source hearing was held.

After the independent source hearing, this Court denied defendant’s motion to suppress finding that the right to counsel at the pre-trial investigatory lineup had not attached and that Mr. Haughey’s identification of the defendant was based on the robbery which occurred in July 2000 and not on being shown the single photograph of the defendant, which Mr. Haughey had selected from the “photo” array.

Defendant proceeded to a jury trial and was convicted of two counts of Robbery in the First Degree in violation of Penal Law (PL) §160.15(4), and two counts of Robbery in the Second Degree (PL § 160.10(1)). This Court sentenced him, as first felony offender, to four concurrent terms of eight years incarceration.

On August 27, 2001, defendant filed the instant CPL 440.10 motion with this Court.

### DISCUSSION

Defendant moves this Court pursuant to CPL 440.10(1)(h), which in relevant part provides:

“At any time after the entry of judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.”

(See McKinney’s Cons Laws of New York, Book 11A, CPL §440.10(1)(h)).

The People assert that a direct appeal is the only proper method for challenging the trial results complained of herein and that the defendant’s unjustifiable failure to raise such ground or issue on direct appeal, mandates this Court’s denial of defendant’s instant CPL 440.10 motion.

However, “violation of defendant’s right to effective assistance of counsel is normally asserted in the context of a CPL 440.10 motion because, in the usual case, ‘ineffectiveness of counsel is not demonstrable on the main record.’” (*People v. Brown*, 45 NY2d 852 (1978)).

Thus, a determination of whether trial counsel was so incompetent that defendant was deprived of effective representation must be made and determined in the court in which the record is made. (*People v. Brown*, 28 NY2d 282, 287 (1978)).

Therefore, defendant’s CPL 440.10 (1)(h) motion is proper.

It is well settled that in evaluating ineffective assistance claims, a “flexible” approach should be followed. (*People v. Benevento*, 91 NY2d 708,712). “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,” a defendant’s constitutional right to the effective assistance of counsel will have been met.” (*People v. Henry*, 95 NY2d 563, 565 citing *People v. Baldi*, 54 NY2d 137, 147; see also *People v. Wiggins*, 89 NYS2d 872, 873 (1996)). “Thus, the standard in New York has long been whether the defendant was afforded “meaningful representation.” (*People v. Henry*, 95 NY2d 563, 565 [citations omitted]).

The People rely on *Strickland v. Washington*, 466 US 668,688 (1984). They argue that the Federal standard, which requires that an attorney’s performance fail to meet a requisite level of competence and that “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” is applicable.

However, the Court of Appeals has previously recognized the differences between the Federal and State tests for ineffectiveness, and has consistently adhered to the “meaningful representation” test as set out in *People v. Benevento*, 91 NY2d 708 and *People v. Claudio*, 83 NY2d 76, 79-80, *rearg dismissed*, 88 NY2d 1007.

Upon examining all of the circumstances of this case, “viewed in totality and as of the time of representation,” this Court concludes that defendant was not deprived of meaningful representation (*People v. Baldi*, 54 NY2d 137).

The record in this case revealed that defense counsel’s theory of misidentification was legitimate and well thought out. Additionally, counsel made clear and cogent opening and

closing statements, conducted meaningfully cross examination of the People's witness, made objections consistent with defense theory, highlighted inconsistencies, and moved for suppression. (*People v. Mondelus*, 233 AD2d 408).

Defense counsel cross-examined Detective McPartlan at length about his January 8, 2001, conversation with Mr. Jeffrey Schwartz, Esq. Detective McPartlan acknowledged having had a conversation with Mr. Schwartz and further testified that based on this conversation, he understood that defendant was represented by Mr. Schwartz.

However, defendant contends that counsel was ineffective for failing to call Mr. Schwartz as a witness or to otherwise illicit testimony from Detective McPartlan that Mr. Schwartz specifically told him that he wanted to be contacted if a lineup was to be conducted with the defendant. However, "a simple disagreement with strategies, tactics or the scope of possible cross examination" will not establish an ineffective assistance claim. (*People v. Benevento*, 91 NY2d 708; *People v. Rivera*, 71 NY2d 705, 708-09)).

Furthermore, at closing argument, counsel cited *People v. LaClere*, 76 NY2d 670, and *People v. Wilson*, 89 NY2d 754, in support of his contention that although a defendant does not have a right to counsel under the Sixth and Fourteenth Amendments of the US Constitution at a lineup that occurs prior to the initiation of formal prosecutorial proceedings, when counsel enters into a proceeding and there is a line-up held, counsel has a right to be notified as to that lineup.

Thus, this Court finds that counsel made well reasoned and thoughtful arguments concerning whether the right to counsel had attached.

Next, defendant contends that counsel was deficient because "counsel should have

objected to this Court's application of independent source analysis without any attenuation analysis in determining the admissibility of the lineup." Specifically, defendant argues that "with only a few minutes between and no intervening events between the flagrantly unlawful show up and the line up, insufficient attenuation was present to dispel the taint."

However, it is undisputed that the events leading up to defendant's arrest and ultimate conviction occurred in the early morning hours of July 21, 2000 and that on July 24, 2000, three days after the robbery, Mr. Haughey identified the defendant in a "photo" array as the person who robbed him at gun point.

Thus, any attenuation argument that counsel could have advanced would have been seriously weakened by the fact that Mr. Haughey had identified the defendant six months before the lineup and the photograph shown to Mr. Haughey before the lineup was the same photograph which he selected from the "photo" array, three days after the robbery occurred. An attenuation argument in light of the foregoing would have been meritless. (*People v. Reynoso*, 182 A.D.2d 546).

When defense counsel pursues one defense over another, a defendant must demonstrate the necessary absence of strategic or other legitimate explanations for that conduct. (*People v. Benevento*, 91 NY2d 708). "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance." (*People v. Benevento*, 91 NY2d 708, at 713). Here, the circumstances concerning the lineup bolstered the defense theory of misidentification and reflected "a reasonable and legitimate strategy under the circumstances and evidence presented." (*People v. Benevento*, 91 NY2d 708, at 713).

Lastly, a defendant must show that his attorney's conduct constituted "egregious and prejudicial error such that defendant did not receive a fair trial." (*People v. Benevento*, 91 NY2d 708, 708, *People v. Flores*, 84 NY2d 184, 188-89; see also, *People v. Hobot*, 84 NY2d 1021, 1022).

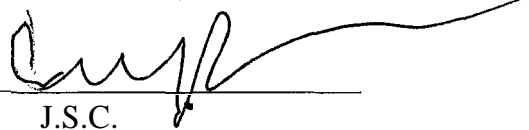
In this case, defendant has not made a showing that any of his allegations constitute a substantial error which seriously compromised his right to a fair trial. Thus, defendant has failed to establish that he was denied his constitutional right to effective assistance of counsel. (*People v. Rivera*, 71 NY2d 705, 709; *People v. Baldi*, 54 NY2d 137).

Based on the foregoing, this Court concludes, on the record before it, that defendant's representation was meaningful under the totality of the circumstances.

Consequently, defendant's motion is denied.

The foregoing constitutes the opinion and decision of this Court.

Dated: November 19, 2003  
New York City, New York



J.S.C.

**HON. CHARLES J. TEJADA**