People v Ludwigsen
2012 NY Slip Op 31054(U)
April 4, 2012
Supreme Court, Kings County
Docket Number: 6440/2003
Judge: Albert Tomei
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DECISION AND ORDER

SUPREME COURT KINGS COUNTY (CRIMINAL TERM, PART 2)

THE PEOPLE OF THE STATE OF NEW YORK

BY: TOMEI, J.

v.

DATED: APRIL 4, 2012

LEONARD LUDWIGSEN,
Defendant.

INDICTMENT NO. 6440/2003

Under Kings County Indictment Number 6440/2003, the defendant was convicted, after a jury trial, of murder in the second degree and sentenced to a term of imprisonment of twenty-five years to life. (Tomei, J.). At defense counsel's request, first made during the charge conference, and over the People's objection to its timeliness, the court submitted the affirmative defense of extreme emotional disturbance (EED) to the jury. The defense had not provided notice of the EED defense prior to trial and did not introduce any medical records or expert psychiatric testimony in support of the defense, but argued it based on one witness' testimony that the defendant stated that he had acted out of rage. The jury rejected the EED defense and convicted the defendant of murder in the second degree.

On direct appeal, the defendant argued that the rejection of the EED defense was against the weight of the evidence. In a pro-se supplemental brief, the defendant also argued that counsel was ineffective for failing to file notice of the EED defense, and to offer documentary and psychiatric evidence in support of it, and for failing to raise the defense of mistaken identity. He also asserted that the court's jury charge on EED was erroneous. The Appellate Division, Second Department, found each of these claims to be "without merit." *People v. Ludwigsen*, 48 AD3d 484 (2d Dept. 2008). Leave to appeal to the Court of Appeals was denied. *People v. Ludwigsen*, 10 NY3d 866 (2008). In a federal *habeas corpus* petition, defendant asserted, *inter alia*, that his counsel was ineffective for failing to present a convincing EED defense by failing to introduce

documentary evidence and testimony in support of it. The motion was also denied. *Ludwigsen v. Conway*, 2011 WL 3423342 (E.D.N.Y.).

The defendant now moves to vacate judgment, pursuant to C.P.L. § 440.10, alleging that his counsel was ineffective for failing to give proper notice of the EED defense, failing to introduce his psychiatric records and expert testimony in support of the defense, and for failing to object to the lack of an expanded charge on intent, the jury instructions with regard to the charge of manslaughter in the first degree as a lesser-included charge of murder in the second degree, and the inclusion of statutory elements on the verdict sheet to differentiate between the various counts of murder and manslaughter and the lack of an instruction on the purpose of the these inclusions.

All of the claims relating to counsel's failure to object to jury instructions and the verdict sheet are based entirely upon facts contained in the record and, therefore, may only be raised on direct appeal. *See* C.P.L. §440.10(2)(c); *People v. Cuadrado*, 9 NY3d 362, 365 (2007). The EED claims appear to have been largely raised in the defendant's pro se supplemental brief and rejected on the merits on direct appeal. As such, they cannot be raised in a motion to vacate judgment. *See* C.P.L. §440.10(2)(a). However, to the extent that the defendant is now asserting a new claim regarding counsel's handling of the EED defense, the claim is denied.

The defendant has established that counsel was, prior to trial, in possession of the defendant's medical records relating to his extensive psychiatric history, but elected not to use them at trial, to call any psychiatric expert to testify, or to file notice of an intent to assert the EED defense. While these records establish that the defendant had a history of mental illness, they do not show that he was acting under an extreme emotional disturbance, as opposed to anger, when he bludgeoned his girlfriend with a pipe wrench and then strangled her to death after she refused to drop

a pending assault charge against him. As such, the medical records do not support the asserted defense. Moreover, the medical records contain several instances in which the defendant acted in anger and violence against psychiatric staff when he did not get his way on particular matters. The medical records also show that the defendant had a history of violence towards his ex-wife and toward other girlfriends, all of which would have come out if the defense had offered either the records or expert psychiatric testimony on EED. Certainly, had such evidence been offered, or even if the defense had provided notice of his intent to offer an EED defense, this information would have been explored by the People's psychiatric expert. Evidence of the defendant's anger and violent response to the thwarting of his will would only have undermined any attempt to assert that he was suffering from EED when he strangled his girl friend for refusing to drop prior domestic violence charges.

Further, the defendant was arrested several hours after the murder and made both oral and videotaped statements in which he asserted that he had argued with the victim over the prior charges, then struck her in the head and choked her until she fell asleep. He claimed that she was drunk and high on cocaine and/or heroin and that he left her to sleep it off in his bed, padlocking the door from the outside so that she would not be disturbed. Nothing in this statement or in the medical records points to any active psychosis on the part of the defendant or indeed, of any lack of control.

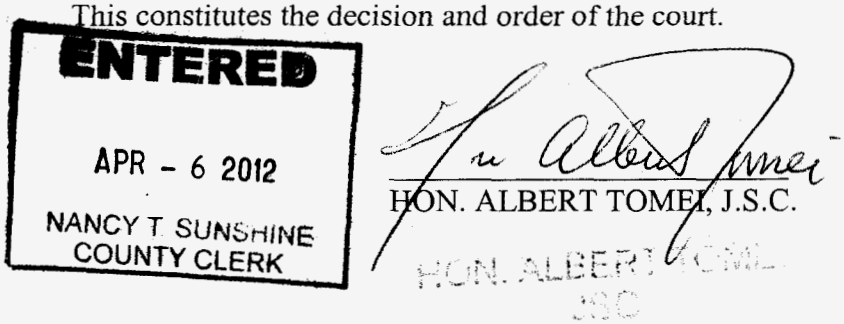
Therefore, it is clear that counsel made a reasoned decision not to assert the affirmative defense of EED prior to trial, when the People would have had the right to conduct their own psychiatric examination of the defendant and examine his prior violent domestic conduct, then made a second reasoned decision to assert it after a witness offered up some evidence that the defendant acted out of an uncontrolled rage, rather than mere anger and frustration at not getting the

victim to agree to drop the prior charges. This belated attempt to assert the EED defense was successful, in that the court granted permission to assert the claim and charged the jury on the relevant law, despite its clear untimeliness and the People's lack of ability to prepare to counter it.

"Where the evidence, the law and the circumstance of a particular case, viewed together and as of the time of the representation, reveal that meaningful representation was provided", the defendant has received the affective assistance of counsel. *People v. Satterfield*, 66 N.Y.2d 796, 798-799 (1985); *accord People v. Benevento*, 91 N.Y.2d 708, 712 (1998); *People v. Brown*, 300 A.D.2d 314 (2d Dept., 2002). The reviewing courts "focus is on the fairness of the proceedings as a whole", which includes an assessment of whether the defendant was prejudiced by his counsel's conduct. *People v. Stultz*, 2 N.Y.3d 277, 284 (2004); *see People v. Henry*, 95 N.Y.2d 564, 566 (2000); *People v. Brown*, 300 A.D.2d at 314. On this record, counsel decision was not an abuse of discretion, but a reasoned strategy which did not prejudice the defendant in any way, but permitted counsel to advance the EED defense without risking disclosure of the negative information contained in the defendant's medical records.

Therefore, and for the foregoing reasons, the motion is denied.

This constitutes the decision and order of the court.



HON. ALBERT TOMEI, J.S.C.

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J.S.C.

Right to appeal:

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. The application must be sent to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201

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.