SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL, TERM PART 24

----------x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DANIEL FEQUIERI

----------x

By: Hon. Thomas J. Carroll

Date: September 20, 2012

DECISION & ORDER

Indictment No.: 2477/2005

Defendant filed a pro se motion in December 2011 to set aside his sentence pursuant to CPL § 440.20 claiming ineffective assistance of counsel. Defendant also filed a pro se motion in March 2012 to vacate his judgment of conviction pursuant to CPL § 440.10, again, claiming ineffective assistance of counsel.

According to the People, on the night of January 25, 2005, defendant and another man approached Jason Cruz from behind. When Cruz turned around, defendant shot him once in the abdomen and then twice in the back. Though two bullets were left in his back, Cruz recovered from his wounds. In a separate incident on February 23, 2005, defendant became engaged in an argument over a dice game. Defendant shot Ronald Johnson in the face and in the back. Defendant pointed a gun at Treven Betts and shot him in the buttocks and thigh as he ran up a staircase. Both Johnson and Betts survived their injuries.

Defendant was subsequently arrested on April 6, 2005. That evening, Ronald Johnson, Treven Betts, and Ashmean Aytch, who witnessed the dice game shooting, identified defendant in a lineup as the shooter. The following day, Jason Cruz identified the defendant in a lineup as the man

who had shot him. During his time in custody defendant made oral and written admissions about both incidents as well as a videotaped statement about the February 23, 2005, shooting incident.

For these acts, defendant was charged with three counts of attempted murder in the second degree (PL §§ 110.00/125.25[1]), three counts of assault in the first degree (PL § 120.10[1]), three counts of assault in the second degree (PL § 120.05[2]), two counts of criminal possession of a weapon in the second degree (PL § 265.03[2]), two counts of criminal possession of a weapon in the third degree (PL § 265.02), and one count of reckless endangerment in the first degree (PL § 120.25).

On November 17 and 18, 2005, the court conducted a *Huntley/Wade* hearing, at the conclusion of which the defendant's motion to suppress evidence was denied (Marrus, J.).

On December 5, 2005, defendant pleaded guilty to one count of attempted murder in the second degree. Defendant was sentenced on January 5, 2006, to a promised term of imprisonment of fifteen years and five years post-release supervision (Carroll, J. at plea and sentence).

In a 2010 motion, defendant moved to set aside his sentence pursuant to CPL § 440.20, claiming only "inefficient counsel" as grounds for vacatur. This court denied defendant's motion in an order dated October 22, 2010.

In his current motion to set aside his sentence, defendant claims ineffective assistance of plea counsel asserting that defense counsel: advised him to plead guilty when an investigation would have shown that the prosecution had "no case"; failed to conduct an adequate investigation of a possible defense of extreme emotional disturbance; and "failed to object to evidence that defendant's parent believed him to be guilty." Defendant's assertions, as set forth in his CPL § 440.20 motion, are not properly brought under CPL § 440.20 as they do not relate to the propriety of defendant's sentence. CPL §§ 440.20(1) and 440.30(4)(a).

In his current motion to vacate his judgment of conviction pursuant to CPL § 440.10, defendant claims that plea counsel was ineffective. Specifically, defendant asserts that his plea of guilty was coerced by plea counsel. Defendant also contends that he did not understand the terms of the plea agreement. Defendant further contends that his attorney should not have advised him to plead guilty when the "prosecution had no case." According to defendant, because Betts and Johnson were in stable condition after being shot, defendant should have been charged with assault instead of attempted murder "cause you can not die/be murdered from a gunshot wound to the butt, maybe the face depending on the caliber of the gun... ." Defendant also criticizes counsel's failure to investigate a defense of extreme emotional disturbance.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington,* 466 U.S. 668 [1984]; *People v Linares*, 2 NY3d 507, 510 [2004]; *see* U.S. Const., 6th Amend.; N.Y. Const., art. 1, §6). Under the federal standard, to prevail on an ineffective assistance of counsel claim the defendant must first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on "prevailing professional norms (*Strickland* at 687-88). It is his burden to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*" (*id.* at 687). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions (*Strickland* at 690).

Defendant must also "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different (*Strickland* at 693). A reasonable probability in this context is a "probability sufficient to undermine confidence in the outcome" (*id.* at 694). Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not

just conceivable" (*Harrington v Richter*, __ U.S.__, 131 S.Ct. 770, 792 [2011]). Thus, the *Strickland* standard is "highly demanding" (*Kimmelman v Morrison*, 477 U.S. 365, 382 [1986]) and "rigorous" (*Lindstadt v Keane*, 239 F3d 191, 199 [2d Cir. 2001]). Where a defendant enters his plea upon the advice of counsel, he must show that, but for counsel's errors, he would not have pleaded guilty and instead insisted on going to trial (*Hill v Lockhart*, 474 U.S. 52, 59 [1985]).

In New York, a defendant's right to the effective assistance of counsel is violated when "defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure" (*People v Turner*, 5 NY3d 476, 479 [2005]). To meet this standard, defendant "must overcome the strong presumption" that he was represented competently (*People v Ivanitsky,* 81 AD3d 976 [2d Dept 2011]; *People v Myers*, 220 AD2d 461 [2d Dept 1995]. "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, the constitutional requirement will have been met" (*People v Baldi,* 54 NY2d 137, 147 [1981]). In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v Ford*, 86 NY2d 397, 404 [1995]; *People v Hawkins*, 94 AD3d 1439, 1440 [4th Dept 2012]; *People v Caruso*, 88 AD3d 809, 810 [2d Dept 2011]).

While the deficiency prong under State law is identical to that of *Strickland*, the prejudice prong in New York is "somewhat more favorable to defendants" (*People v Turner* at 480). Thus a defendant need not strictly adhere to the "but for" prejudice prong of *Strickland* to show that he was prejudiced by counsel's performance (*id.*). Instead, "the 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" (*People v Benevento*, 91 NY2d 708, 714 [1998]). The "question is whether

the attorney's conduct constituted 'egregious and prejudicial' error such that defendant did not receive a fair trial" (*id.* at 713, quoting *People v Flores,* 84 NY2d 184, 188-189 [1994]). Thus, a defendant's showing of prejudice is a "significant but not indispensable element in assessing meaningful representation" (*People v Stulz*, 2 NY3d 277, 284 [2004]).

In this instance, defendant has not demonstrated that counsel gave less than an effective performance overall. Counsel negotiated a very favorable plea bargain of fifteen years imprisonment and five years post release supervision whereas defendant faced a maximum potential prison term of three consecutive twenty-five year sentences for each of the three attempted murder counts. Counsel's competent plea negotiation is further highlighted by the overwhelming evidence against defendant, which included admissions as to both shootings and positive lineup identifications of defendant by the three victims. An additional eyewitness to the February 23, 2005, shooting also identified the defendant. Here, where nothing in the record casts doubt on the apparent effectiveness of counsel, defendant has received effective representation (*Ford* at 404).

Defendant has also failed to establish that counsel "forced" him to plead guilty. According to defendant, counsel, apparently during the hearing, advised him to accept the plea offer because "the judge made up his mind" and that the People were not going to make a lower offer. Defendant further states that when he said "lets go to trial," his attorney "stated don't do it. Just take the 15 years . . . ." Even assuming, arguendo, that these allegations are true, counsel's advice was sensible and reasonable under the circumstances and does not, in itself, suggest that defendant was coerced. Nor does defendant allege that he insisted on going to trial and that counsel prevented him from doing so. Furthermore, in front of the plea court, "[t]he defendant expressed no dissatisfaction with his counsel at the time of the plea, after the court had fully apprised him of the consequences of pleading guilty" (*People v Hall*, 195 AD2d 521, 522 [2d Dept 1993]).

Defendant has failed to meet his burden of establishing prejudice because he has not shown that, but for counsel's alleged deficiency, he would have insisted on going to trial. As discussed, defendant received a favorable plea offer and the evidence against him was strong (*Hill* at 59; *People v McDonald*, 1 NY3d 109, 114). Defendant fails to provide specific facts in support of his claim of prejudice and, as a result, it is rejected for lack of substantiation (CPL § 440.30[4][b]).

To the extent that defendant also contends that the court coerced him to plead guilty, this court rejects such a claim because it is refuted by the minutes of the pretrial hearing (CPL § 440.30(4)(d). At the hearing, the court informed defendant and his mother that the decision of whether to plead guilty was up to the defendant. The court advised the defendant's mother, who was also present in the courtroom, that the defendant faced a potential prison term of up to seventy-five years upon conviction after trial, and that there was strong evidence of guilt. The court repeated to defendant's mother that the decision to plead guilty rested with the defendant. The court stated:

> That's it, if he wants to go to hearing, we'll finish the hearing and go to trial and that's it. I just want to make sure he makes an informed decision and gets all the advice from people who care about him. This way my conscience will be clear.

Defendant was also given an opportunity to confer with counsel and his mother. When the court then asked defendant whether he wished to plead guilty, defendant stated that he wanted to proceed with the hearing and trial. In this instance, it is evident from the record that the court encouraged defendant to discuss the guilty plea with his mother and with counsel. Defendant has thus failed to provide evidence of coercion.

Defendant's contention that he did not "understand nothing that was being arranged" at sentencing is also belied by the record. The plea court had asked defendant:

THE COURT: You understand that the promised sentence here is 15 years incarceration,

> with five years post-release supervision and varying surcharges which the clerk will set forth. Do you understand all that?
>
> THE DEFENDANT: No. Can you repeat that for me please?
>
> THE COURT: Yes. You will be sentenced to a period of incarceration of 15 years. Once you get out of jail, it will be subject to five years of supervision. It is commonly called post-release supervision. Do you understand that?
>
> THE DEFENDANT: Yes.

Defendant clearly indicated on the record that he understood the meaning of post-release supervision. In addition, the plea court informed him of the rights he was giving up by pleading guilty and defendant indicated in response to every question that he understood. In his claim that he did not understand the proceedings is not credible and is therefore rejected.

Defendant is mistaken with respect to his claim that the prosecution had "no case" against him for attempted murder because the victims survived their gunshot wounds. The People properly made out the elements of attempted murder to so charge defendant (PL §§ 110.00/125.25[1]). Furthermore, as noted above, there was strong evidence of guilt. Accordingly, defense counsel's advice to plead guilty was prudent in light of the evidence and the charges defendant faced. Defendant's claim of legal insufficiency is also procedurally barred because it is based on matters appearing on the record and is a matter properly raised on appeal (CPL § 440.10[2][c]; *see People v Williams*, 5 AD3d 407 [2d Dept 2004]; *People v Cooks,* 67 NY2d 100, 103 [1986]).

Finally, defendant provides no substantiation for his claim that counsel failed to investigate a claim of extreme emotional disturbance. Defendant has not set forth any allegations to substantiate the claim that he actually had a viable defense of extreme emotional disturbance and the facts on record do not support such a defense. His claim is procedurally barred as a result (CPL § 440.30[4][b]). Given the absence of any facts to support defendant's proposed defense, counsel's

decision not to pursue that defense was a matter of sound strategy (*People v Rivera,* 71 NY2d 705, 709 [1988]; *see People v Bussey*, 6 AD3d 621 [2d Dept 2004]).

Accordingly, the motion is denied in its entirety.

This decision shall constitute the order of the court.

ENTER:

HON. THOMAS J. CARROLL
THOMAS J. CARROLL
J.S.C.

ENTERED
SEP 24 2012
NANCY T. SUNSHINE
COUNTY CLERK

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