STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

Jeffrey Everett,

Defendant.

DECISION AND ORDER
Indictment Number
21-2961
DA 83-10

APPEARANCES:

For the People:

HON. P. David Soares
Albany County District Attorney
Albany County Judicial Center
6 Lodge Street
Albany, New York 12207-1019

OF COUNSEL:

Vincent A. Stark
Assistant District Attorney

For the Defendant:

Jeffrey Everett, pro se
DIN # 11A1518
Bare Hill Correctional Facility
PO Box 20
Malone, NY 12953

THOMAS A. BRESLIN, J.

Defendant was convicted of criminal possession of a controlled substance in the fourth degree and was sentenced to a determinate term of imprisonment. The conviction was affirmed on appeal (People v Everett, 96 AD3d 1105 [2012], lv denied 10 NY3d

996). Defendant has now made a postjudgment motion pursuant to CPL article 440 seeking to vacate the conviction. The People have opposed the motion.

Defendant contends that he received ineffective assistance of counsel. The gravamen of his motion is that counsel's performance was deficient in that counsel "opened the door" such that evidence which had been suppressed was then able to be admitted and such was damaging to his case. He also asserts that other items should have been made available as evidence and counsel was remiss for failing to request sanctions for the failure of the police to take the sneakers and the "blunt" into evidence.

A postjudgment motion is not a substitute for an appeal (People v Berezansky, 229 AD2d 768 [1996], lv denied 89 NY2d 919). A matter is not appropriately raised in a CPL 440 motion if it can be raised in the context of a defendant's direct appeal from the conviction or could have been raised, but was not, in an appeal that was filed (see, CPL 440.10[2][b][c]; People v Cuadrado, 9 NY3d 362 [2007]; People v Lagas, 49 AD3d 1025 [2008], lvs denied 10 NY3d 859, 866; People v Hickey, 277 AD2d 511 [2000], lv denied 95 NY2d 964). It is not a vehicle for an additional appeal (People v Berezansky, supra, at 771, quoting

People v Donovon, 107 AD2d 433, 443 [1985], lv denied 67 NY2d 694 [1985]). Claims which are appropriate for review on a postjudgment motion are matters which require evidence to be considered which is not in the record. It is only in the unusual situation in which sufficient facts with regard to the claimed error do not appear on the record that this postjudgment motion is available as a means of relief (People v Cooks, 67 NY2d 100 [1986]; People v Lagas, supra; People v Jackson, 172 Misc2d 587, 590 [1997], affd 266 AD2d 163 [1999], lv denied 94 NY2d 921 [2000]).

These issues related to ineffective assistance of counsel could have been raised on the appeal which was decided and therefore this motion must be denied (see, CPL 440.10[2][a],[c]). The record is adequate to review these claims and, indeed, defendant has not even submitted any documents or affidavits which are outside the record of the earlier proceedings. In fact, he submits portions of the transcript in support of his motion.

To the extent that it can be said that any part of these allegations are appropriate for review in a post-judgment motion, this court concludes that defendant was not deprived of the effective assistance of counsel.

On a claim as to ineffective assistance of counsel a defendant must establish that the defense attorney failed to provide meaningful representation and that there is no strategic or other legitimate explanation for counsel's alleged failings (People v Caban, 5 NY3d 143, 152 [2005]). The material submitted in support of the motion as well as the record of the underlying proceeding is sufficient to decide this motion and thus no hearing is required (see, People v Robetoy, 48 AD3d 881 [2008]).

It is significant that defendant has not submitted an affidavit from defense counsel nor has he explained the absence thereof. Such an affidavit might explain what conversations were had and offer more details about the defense strategy. This court is not determining that such an affidavit is always required (see, People v Stevens, 64 AD3d 1051 fn 1 [2001], lv denied 13 NY3d 839; see also, Jenkins v Greene, __ F3d __ 2010 WL 5186019, 2nd Circuit Dec 23, 2010D), but defendant has not provided anything in support from any other source.

The fact that defense counsel opened the door to evidence which had been suppressed by asserting in his opening statement that there was no evidence which ties defendant to the sneakers does not in itself indicate a lack of appropriate trial strategy or ineffectiveness of counsel (People v Trovato, 68 AD3d

1023, 1024 [2009], lv denied 14 NY3d 806; People v Hannah, 59 Ad3d 307 [2009], lv denied 12 NY3d 854 [2009]; People v Gomez, 52 AD3d 395 [2008], lv denied 11 NY3d 736 [2008]). The record indicates that counsel sought to emphasize that there was no link between defendant and the sneakers and that counsel took the risk that the court would rule that he had not opened the door to the suppressed evidence. Perhaps counsel even hoped that the prosecutor would not object to such statement in the opening address to the jury. Furthermore, counsel attempted to obfuscate the issue by asserting that the court was biased and clearly hoped that the court would change the ruling. Thus it is clear that counsel took the calculated risk that his remarks would not be found to have "opened the door".

Defense counsel is a seasoned and experienced criminal trial attorney who vigorously advocated on behalf of defendant. He made appropriate motions, participated in a suppression hearing and obtained suppression of defendant's statement. At trial he thoroughly cross-examined witnesses, made requests concerning jury instructions and made cogent arguments. He presented a defense that the sneaker did not belong to defendant, pointed out weaknesses in the People's case, and he called one witness as well as defendant. Counsel's attempt to point out that evidence connecting defendant to the drugs was lacking without opening the

door to the suppressed statement was unsuccessful but unsuccessful tactics do not necessarily constitute ineffective assistance (see People v Trovato, supra). Overall, defendant received meaningful representation and he was not deprived of a fair trial (see People v Hannah, supra).

Defendant's motion is denied. This shall constitute the decision and order of this court.

Dated: Albany, New York

August 27, 2013

Thomas A. Breslin

Supreme Court Justice

8-29-13

Notice pursuant to 22 NYCRR 671.5

The defendant is hereby advised of his right to apply to the Appellate Division, Third Department, P.O. Box 7288, Capitol Station, Albany, NY 12224, for a certificate granting leave to appeal from this determination. This application must

be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for leave to prosecute the appeal as a poor person.