

People v Chin

2013 NY Slip Op 30449(U)

February 20, 2013

Supreme Court, Kings County

Docket Number: 1018/2003

Judge: ShawnDya L. Simpson

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

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. ShawnDya L. Simpson

-against-

Date: February 20, 2012

DECISION & ORDER

WAYNE CHIN

Indictment No. 1018/2003

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Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10 on numerous grounds. For the following reasons, the motion is denied in its entirety.

Defendant and the deceased, Renee Aarons, were involved in a relationship for approximately eighteen years. Renee Aarons originally lived in Brooklyn but had recently relocated with her children to Trenton, New Jersey. Shortly after the move, she was badly injured in a car accident near her new home. She then returned to Brooklyn with her two sons, Rashawn and Ryan, so that she could be closer to her family. Aarons lived at 95 Linden Boulevard, as did several other members of her and defendant's family.

On June 12, 2001, defendant drove 12-year-old Rashawn Aarons from Trenton to Brooklyn in a car that Renee had purchased for defendant's use. Rashawn had known defendant all his life and called him "Daddy." Before dropping Rashawn off at his grandmother's residence at 95 Linden Boulevard, defendant stopped to pick up some dry-cleaning.

Later that day, Renee parked her car in front of 95 Linden Boulevard to pick up Rashawn. At approximately 10:30pm that night, Renee was sitting in the driver's seat and Rashawn was

sitting next to her in the front passenger seat when defendant drove up alongside Renee's car. He and Renee began arguing about Ryan, who had been arrested earlier that day. Defendant got out of the car and punched Renee in the face. He then pulled out a 9mm pistol from his waist and shot her once. Rashawn jumped out from the car and ran to defendant, holding him in a bear hug and telling him to stop. Defendant pushed Rashawn off, walked away, and then turned back when Renee called out to Rashawn. Defendant shot Renee two more times, causing her death.

Renee's niece, Alisha White, also witnessed the shooting from the sidewalk in front of 95 Linden Boulevard, approximately ten to twenty feet from the car in which Renee was sitting. She recognized defendant right away, having known him for approximately seventeen years, and testified to her observations at trial. White was also familiar with members of defendant's family who lived at 95 Linden Boulevard.

Immediately after the shooting defendant fled in his car, which he abandoned about two blocks from the murder scene. A K-9 unit bloodhound tracked defendant's scent from the vehicle to a nearby bus stop but lost the trail from that point. The dry-cleaning that defendant had picked up earlier that day was still inside the vehicle.

For his acts, defendant was charged with two counts of murder in the second degree (PL §§ 125.25[1], [2]), criminal possession of a weapon in the second degree (PL § 260.10[1]), criminal possession of a weapon in the third degree (PL § 265.02[4]), and endangering the welfare of a child (PL § 165.05).

Defendant evaded apprehension for several years. During that time the police employed media coverage in their search for him, including "America's Most Wanted." Defendant was finally apprehended on unrelated drug charges in Arizona on November 17, 2005, having

remained at liberty for over four years. Although a warrant for his arrest for the murder of Renee Aarons was lodged with the state of Arizona, Arizona authorities chose to detain defendant until the conclusion of its case. Defendant was convicted on October 24, 2007 and sentenced on November 27, 2007. After defendant had served his sentence in Arizona, the People filed an Interstate Agreement on Retainer, which defendant signed and thereby waived extradition as a part of his request for the final disposition of the charges pending against him in New York. He was taken into custody by New York authorities in February 2008.

When proceedings commenced against defendant in New York, Harold Baker, Esq. was originally assigned to represent him. At defendant's motion for substitution of counsel, Baker was replaced by Alan Stutman, Esq. and later by Philip Smallman, Esq., who represented defendant at trial. Defendant's motion to replace Smallman was denied before his case was sent out for trial. Defendant considered proceeding pro se but ultimately elected to retain Smallman after speaking with the trial judge and counsel. Jay Cohen, Esq. was subsequently appointed to represent defendant at sentencing.

On October 15, 2009, defendant was convicted by a jury of murder in the second degree (Konviser, J.). Immediately following his conviction he filed a pro se motion pursuant to CPL § 330.30 to set aside the verdict, raising a litany of claims against the court, the People, and trial counsel. The motion was denied in its entirety on November 17, 2009. That same day defendant was sentenced to a prison term of twenty-five years to life (Konviser, J.).

Defendant filed a notice to appeal on November 18, 2009 but has not yet perfected his appeal.

Defendant now moves to vacate his judgment of conviction pursuant to CPL § 440.10.

His list of allegations numbers approximately fifty, ranging from complaints about the extradition process to counsel's performance on his post-conviction motion to set aside the verdict. These allegations can be grouped and characterized as the following: 1) trial counsel provided ineffective assistance of counsel, depriving defendant of due process and a fair trial; 2) sentencing counsel was ineffective; 3) improper conduct by the court deprived defendant of his right to due process and a fair trial; 4) improper and prejudicial conduct and fraud by the prosecutor deprived defendant of his right to due process and a fair trial; and 5) evidence at trial was obtained in violation in violation of his rights under the New York state constitution. In reviewing defendant's voluminous submissions, it appears that, as the People note, defendant has "scoured the trial record to arrive at a multitude of claims, which all appear to be derived from defendant's conclusions, based almost entirely on the record, about what the Court, the prosecutor, and his counsel could or should have done or failed to do."

Every claim of impropriety by the court and the prosecutor and nearly all of the allegations of ineffective assistance of counsel are record-based. Accordingly, the court must reject them because the judgment is now pending on appeal and sufficient facts appear on the record with respect to the grounds raised in the instant motion to permit adequate review thereof on appeal (CPL § 440.10[2][b]). While defendant has filed a notice of appeal, he has not yet perfected an appeal to the Appellate Division. Moreover, a motion to vacate the judgment of conviction should not be employed as a substitute for an appeal (*People v Cooks*, 67 NY2d 100, 500 [1986]).

The remainder of defendant's claims of ineffective assistance of counsel, which are based on matters outside the record, are both procedurally barred and lack merit. Defendant argues

that: 1) counsel failed to investigate the trajectory of the bullet in order to advance defendant's assertion that the murder was committed by two people; 2) counsel failed to obtain the records from defendant's cellular telephone, thus prejudicing defendant's ability to mount a defense of actual innocence; 3) counsel failed to pursue available defenses; 4) counsel failed to prepare a witness list or follow up on a witness list prepared by defendant; and 5) counsel ignored defendant's request to question jurors during *voir dire* about media publicity and uncharged criminal conduct. All of these claims, made only by defendant and unsupported by any other affidavit or evidence, are wholly unsubstantiated and there is no reasonable possibility that they are true (CPL § 440.30[4][b], [d]).

Defendant's claims of ineffectiveness also lack merit. Under the federal standard for ineffective assistance of counsel, the court must engage in a two-prong analysis of the defendant's claim (*Strickland v Washington*, 466 US 668 [1984]). 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, 688). Second, the 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). 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]).

Under New York law, counsel's representation is adequate "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" (*People v Baldi*, 54

NY2d 137, 147 [1981]; *People v Benevento*, 91 NY2d 708 [1998]). With respect to prejudice under state law, “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” (*Benevento* at 714). 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 [1994]). Accordingly, the reviewing court must separate ineffectiveness from “mere losing tactics” and the defendant must “demonstrate the absence of strategic or other legitimate explanation” for counsel’s conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Hindsight cannot elevate counsel’s trial strategies, even if ultimately unsuccessful, into ineffective assistance of counsel (*People v Benevento* at 712; *People v Satterfield*, 66 NY2d 796 [1985]; *People v Baldi*, *supra*). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

Defendant’s first two claims pertaining to counsel’s investigation of the case are without merit because defendant has failed to allege any facts that would have been revealed by such investigation and that would have possibly led to his acquittal. With respect to the victim’s bullet wounds, counsel had access to the medical examiner’s report that became part of the trial record. There is no indication from the report itself that further investigation was warranted. Nor does any of the evidence support defendant’s claim that there were two shooters. Here, defendant has not established that counsel’s investigation denied him meaningful representation or that deeper inquiry would have yielded a different outcome at trial (*see People v Henry*, 95 NY2d 563 [2000]; *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]).

Likewise, defendant has failed to allege any facts that would have warranted further examination of defendant's cell phone records. Defendant contends that counsel could have "substantiate[d] an alibi through the phone global positioning system, 'GPS', that [he] was not at the scene of the crime." On June 13, 2001, Detective Guinane applied for and was granted a pen register and trap and trace device on a phone that defendant had used to call Renee. The police intended to use the pen register and trap and trace device in order to locate and apprehend defendant, who had since fled. To the extent defendant is claiming that counsel should have obtained these records from the police, they would not have been relevant because they would have been generated after the shooting. In addition, counsel had little basis to pursue an alibi defense because he was faced with two strong eyewitness accounts of the shooting that unequivocally identified defendant as the shooter. In the instant motion defendant does not elaborate upon his proposed alibi beyond the bare allegation that he "was not at the scene of the crime." Where defendant's alibi was far-fetched at best, counsel's decision not to pursue the cell phone records was sound under the circumstances (*Strickland*, 466 U.S. at 691 [a particular decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."])).

Defendant's remaining allegations involving an available defense, witness lists and the jury voir dire are unavailing attempts to challenge legitimate, strategic decisions made by counsel. First, in order to raise third-party culpability defense, as defendant argues his attorney

should have done, defense counsel must “make an offer of proof outside the presence of the jury to explain how it would introduce evidence of third-party culpability. The court will then hear any counter-arguments from the prosecutor, weigh the considerations, and make its determination followed by clear directives as to what it will and will not allow” (*People v Primo*, 96 NY2d 351, 359 [2001]). The proffered evidence must show a direct connection to the crime itself and its admission “may not rest on mere suspicion or surmise” (*id.*). Here, defendant offers no credible evidence of third-party culpability, instead offering vague and speculative assertions about an unnamed perpetrator and unfounded claims of innocence. Where counsel had no basis to make an offer of proof to the court, he cannot be faulted in hindsight for choosing not to pursue such a defense (*see People v Mathieu*, 19 AD3d 219 [1st Dept 2005] [“Even if we were to conclude that trial counsel should have introduced additional evidence in support of a theory of third-party culpability, we would find that the omitted evidence was exceedingly weak”]). As many practitioners realize, employing this strategy can be risky because a failure to produce credible evidence to support a third-party culpability defense could lead the jury to view the defense as consciousness of guilt on the part of the defendant. Thus, “[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to ‘make a motion or argument that has little or no chance of success’” particularly where, as in the instant case, such an argument may have been detrimental to the defense (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stulz*, *supra* at 287).

The record also contradicts defendant’s claims concerning the witness lists and reveals strategic reasons for counsel’s decision not to call witnesses whose testimony would not have been admissible or benefitted the defense. Counsel did in fact submit to the court, after private

consultation with defendant, a list of police officers whom defendant wanted to call in his direct case. The court ruled that the proposed testimony of Officer Guinane would be irrelevant to any issues in the case and that Detective Crick's testimony did not fall under any exception to the hearsay rule. Because Detective Sherman, who defendant wanted to testify about the crime scene investigation, had since retired, the parties agreed that defendant would instead call Detective Steiner of the Police Department Crime Scene Unit. Defendant also claims to have given counsel a list of eighteen proposed witnesses, including Guinane, Crick and Sherman, but there is no indication that these additional witnesses would have been able to offer relevant, beneficial, or otherwise admissible testimony. Counsel's decision not to call a witness whose testimony he or she assesses as weak is a strategic legal decision that does not amount to ineffective assistance of counsel (*People v Smith*, 82 NY2d 731 [1993]; *People v Peters*, 28 AD3d 686 [2d Dept 2006]). Moreover, disagreement over trial strategy alone is not a basis for a determination of ineffective assistance of counsel (*see People v Benevento*, 91 NY2d at 712–713; *People v Baldi*, 54 NY2d 137 at 146).

Finally, it is within the strategic province of counsel to question jurors and raise appropriate challenges (*see People v Turner*, 37 AD3d 874 [3d Dept 2007]). Defendant believes that counsel should have acceded to his request to question the jurors about “allegations of uncharged criminal conducts and media publicity.” According to defendant, counsel did not “see the necessity for such inquiry.” The record indicates that counsel made adequate inquiries during voir dire. There is no evidence that any of the jurors were biased by defendant's appearance on “America's Most Wanted” and the media's reference to uncharged criminal conduct. In this way, defendant has failed to establish that counsel's strategy affected the outcome of trial or

otherwise undermined the fairness of the proceedings (*Strickland* at 693; *Stulz*, 2 NY3d at 284).

Trial counsel proficiently advocated for his client even when faced with significant evidence of guilt. In this case, the People presented an overwhelmingly strong case supported by reliable eyewitness testimony and ballistics evidence. Rashawn, who had a close relationship with defendant, testified that he had looked on from the passenger's seat as defendant shot his mother to death. The other direct eyewitness, Alicia White, was only a short distance away from defendant when he shot Renee. She immediately recognized defendant based upon her longtime familial relationship with him. Both witnesses saw defendant driving a car that was known to belong to him. In addition, ballistics evidence confirmed the testimony that there was only one shooter, contrary to defendant's claim that there were two perpetrators.

Throughout the trial, counsel strategically mounted an effective defense of his client. Trial counsel gave an opening statement in which he cautioned the jury to be careful in listening to the evidence to determine whether it supported the claims made by the People. He effectively cross-examined the People's witnesses and highlighted inconsistencies between their trial testimony, grand jury testimony and statements to the police. He also raised questions about a large financial settlement that the victim had recently received, which may have provided a motive for someone other than defendant to kill the victim. For instance, he suggested through cross-examination that the victim's brother, who managed her money, may have had a motive to commit the murder. Counsel thoroughly cross-examined the police witnesses to highlight inconsistencies between their testimony and the police paperwork, as well as any questionable practices in the police investigation and the handling of evidence. Counsel successfully used the testimony of a crime scene unit detective to bolster defendant's theory that the police

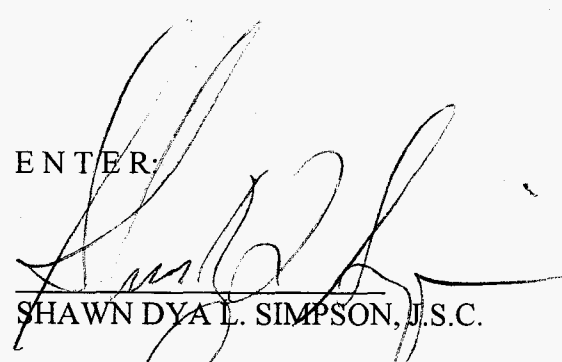
investigation was sloppy and that the evidence was mishandled. Finally, trial counsel gave a compelling summation in which he tried to cast doubt upon the eyewitness testimony by arguing that although Alicia White knew defendant well, she did not name him in her 911 call. On the whole, the record demonstrates that defendant received meaningful representation (*People v Baldi*, supra; *People v Benevento*, supra).

Finally, there is no merit to defendant's claim that sentencing counsel was ineffective for failing to assist him in preparing his CPL § 330.30 motion. Defendant filed, pro se, an exhaustive 11-point motion which the court considered in depth and rejected as entirely meritless. The court reviewed every claim, finding each speculative, unpreserved and lacking in evidence. Even if counsel had adopted defendant's motion it would have failed. Thus, counsel cannot be found ineffective for failing to make a motion that had no chance of success (*People v Caban*, supra; *People v Stulz*, supra).

Accordingly, the motion is denied in its entirety.

This decision shall constitute the order of the court.

ENTER:


SHAWN DYAL L. SIMPSON, J.S.C.



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.

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