People v Medina
2018 NY Slip Op 34086(U)
September 21, 2018
Supreme Court, New York County
Docket Number: Ind. No. 3166/2014
Judge: Robert M. Mandelbaum

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 75

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER

ARTURO MEDINA, : Ind. No. 3166/2014

Defendant. :

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ROBERT M. MANDELBAUM, J.:

Defendant was convicted by a jury of multiple counts of robbery in the first and second degrees. That his co-defendant was acquitted at a separate trial of robbery, but convicted of grand larceny, does not establish defendant's actual innocence.[1] Nor do the affidavits of three witnesses submitted by him warrant a new trial on that ground.

Defendant proffers affidavits from his codefendant, Carlos Ventura, and two eyewitnesses, Anderson Almonte and Martin Padilla, all of whom testified at the codefendant's trial. Almonte's affidavit is consistent with the testimony he gave at defendant's own trial, and Padilla's affidavit is similar. Their version of events, denying that any theft occurred or that a gun was used,[2] was, through Almonte's testimony, already placed before defendant's jury, which rejected it. Further, much of these witnesses' testimony corroborated the People's evidence,

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[1] While it is impossible to know the basis for the verdict rendered by the codefendant's jury, including whether the jury was simply exercising its mercy function (see People v Muhammad, 17 NY3d 532, 539 [2011]; People v Tucker, 55 NY2d 1, 8 [1981]), the People's evidence established that after defendant pistol-whipped one of the victims, the codefendant prevented him from doing it a second time. On these facts, it is conceivable that the jurors believed the codefendant to be less culpable than defendant or not to share his mens rea.

[2] In fact, Almonte testified that the incident occurred behind him and that he therefore did not see what happened, whereas Padilla claims in his affidavit only that he "never saw [defendant] with a gun." In his trial testimony, Padilla admitted that inasmuch as he was standing outside the room where the incident occurred, he could not see everything; specifically, he never saw the blood that all parties concede spilled from the victim after defendant struck him. Both witnesses further state that all the parties involved knew each other, "so there was no need for a gun" – an assumption that is neither admissible nor probative.

including that defendant struck the victim. Nor does the self-serving testimony of codefendant Ventura, who was himself convicted of certain charges arising from the same incident, rise to the level of reliable evidence necessitating "a fuller exploration" (People v Jimenez (142 AD3d 149 [1st Dept 2016] [internal quotation marks and citation omitted]).

Considered either alone or together, these affidavits do not provide clear and convincing evidence that defendant is innocent (see People v Hamilton, 115 AD3d 12 [2d Dept 2014]). In Jimenez, the Appellate Division made clear that "mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty" (142 AD3d at 157 [internal quotation marks and citation omitted]). Therefore, "even if true, the [proffered] statements do nothing to negate the competing evidence that a jury has already heard, weighed, and relied on to convict defendant" (id.).

Defendant further moves to vacate the judgment on the ground of newly discovered evidence, based on these same affidavits. In order to warrant vacatur, newly discovered evidence must, among other factors, be such as will probably change the result if a new trial is granted; have been discovered since the trial; be such as could have not been discovered before the trial by the exercise of due diligence; not be cumulative to the issue; and not be merely impeaching or contradicting the former evidence (see People v Salemi, 309 NY 208, 216 [1955] [citations omitted]). Inasmuch as Almonte's version of events, supported by Padilla, was already considered and rejected by the jury, their proffered testimony, which merely "contradict[s] the former evidence" (id.), would neither probably change the result at a retrial nor "create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]). Nor would the self-serving

testimony of the codefendant, offered at his own trial, which resulted in his conviction for crimes arising from the same incident.[3]

Further, none of this evidence has been discovered since the trial or could not have been discovered before the trial by the exercise of due diligence. Almonte, of course, did testify at defendant's trial. And, according to his own affidavit, Padilla was present in court and willing to testify at defendant's trial, although defendant's counsel ultimately decided not to call him. Moreover, codefendant Ventura's testimony, given at his own trial, was consistent with the statement he had made to police at the time of his arrest, a statement long known and provided to defendant.[4]

In any event, when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not newly discovered (see e.g. United States v Reyes-Alvarado, 963 F2d 1184, 1188 [9th Cir 1992]; United States v Dale, 991 F2d 819 [DC Cir 1993] [requirement that evidence be newly discovered "is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial"]; see also United States v Jacobs, 475 F2d 270, 286 n 33 [2d Cir 1973] [court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify"]). After all, "[i]t would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be

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[3] Ventura's credibility is further undermined by the sworn statement in his affidavit claiming that he was "acquitted of all charges," when, in fact, he was convicted of grand larceny.

[4] Indeed, Almonte testified at defendant's trial that it was codefendant Ventura who had called Almonte to testify in defendant's behalf. Plainly, defendant was aware of codefendant Ventura's position.

encouraged." (Reyes-Alvarado, 963 F2d at 1188; see also United States v Montilla–Rivera, 115 F3d 1060, 1066 [1st Cir 1997] [internal citations omitted] ["It is not unusual for the obviously guilty codefendant to try to assume the entire guilt. A convicted, sentenced codefendant has little to lose (and perhaps something to gain) by such testimony"]).

Defendant further contends that he received ineffective assistance of counsel. "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 [of effective assistance of counsel] will have been met" (People v Baldi, 54 NY2d 137, 147 [1981]; see also People v Berroa, 99 NY2d 134, 138 [2002]). "Meaningful representation" does not mean "perfect representation" (People v Modica, 64 NY2d 828, 829 [1985]). In order to prevail on a claim of ineffective assistance, defendant must "demonstrate the absence of strategic or other legitimate explanations" for counsel's allegedly deficient conduct (People v Rivera, 71 NY2d 705, 709 [1988]), as well as that "counsel's acts or omissions prejudiced the defense or defendant's right to a fair trial" (People v Benevento, 91 NY2d 708, 713-714 [1998] [internal quotation marks and citations omitted]). A "simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (People v Flores, 84 NY2d 184, 187 [1994]). Thus, a reviewing court must avoid confusing "true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (Baldi, 54 NY2d at 146).

Throughout the trial, defense counsel zealously and competently represented and advocated for his client, including in his appropriate direct-examination of Almonte. Nevertheless, defendant contends that he was deprived of constitutionally adequate representation on two grounds. First, he claims that counsel's failure to call Padilla as a witness

was ineffective, particularly in light of Padilla's affidavit attesting that he had been present in court and therefore available to testify, as he advised defendant's counsel. However, defendant does not claim that counsel failed to investigate, learn of, or speak to Padilla. Rather, he faults him for failing to put him on the stand. But defendant fails to establish the absence of strategic or other legitimate explanations for counsel's decision not to call Padilla as a witness, including potential concerns about his credibility or because much of Padilla's account (as testified to at the codefendant's trial) contradicted Almonte's.[5]

Nor was counsel ineffective for failing to object when the court, after exercising its authorized discretion to permit juror questions, asked some follow-up questions of a witness intended to clarify the witness's answers.[6] Inasmuch as the right to a fair trial does not "inhibit a Trial Judge from assuming an active role in the resolution of the truth" (People v De Jesus, 42 NY2d 519, 523 [1977] [citations omitted]), the judge may question witnesses to clarify testimony and, if necessary, to develop factual information (see People v Adams, 117 AD3d 104, 109 [1st Dept 2014] [internal quotation marks and citations omitted]), so long as it is done sparingly, impartially, and without bias (see e.g. People v Arnold, 98 NY2d 63, 67-68 [2002]). Since the court's questions fell well within this test, counsel was not ineffective for failing to object to them (see People v Stultz, 2 NY3d 277, 287 [2004] [not ineffective to fail to make "a motion or argument that has little or no chance of success"]). In any event, "[e]ven if a trial judge makes intrusive remarks that would better have been left unsaid, or questions witnesses extensively, the defendant is not thereby deprived of a fair trial so long as the jury is not

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[5] Indeed, there were inconsistencies between Almonte's own testimony as given at defendant's trial and as given at Ventura's.

[6] In fact, counsel did object to at least one of the court's questions.

prevented from arriving at an impartial judgment on the merits" (Adams, 117 AD3d at 109 [internal quotation marks and citations omitted]).

Accordingly, defendant's motion to vacate the judgment is denied.

This opinion shall constitute the decision and order of the court.

Dated: September 21, 2018
New York, New York

ROBERT M. MANDELBAUM
Acting Justice of the Supreme Court

HON. ROBERT M. MANDELBAUM
J.S.C.
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