

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.
★ FEB 07 2006 ★
BROOKLYN OFFICE

LEROY JONES,

Petitioner,

MEMORANDUM,
ORDER AND
JUDGMENT
02-CV-5746 (JBW)

-against-

VICTOR HERBERT,

Respondent.

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JACK B. WEINSTEIN, Senior District Judge:

I. Prior Proceedings

A. Federal

This habeas corpus petition, filed on October 30, 2002 was before another judge of this court. Petitioner appeared *pro se*. On April 29, 2003 the case was assigned to the undersigned as part of a review of 500 habeas corpus cases. At the request of petitioner the case was marked administratively closed so that petitioner could exhaust state remedies. At petitioner's request the case was reopened by order filed April 18, 2005. An amended petition was filed on May 3, 2005. The state record was received on June 27, 2005.

An attorney was appointed for petitioner on order of this court entered July 5, 2005. Counsel was relieved and new counsel appointed pursuant to an order entered September 9, 2005. After adjournments sought by counsel, an evidentiary hearing was held on January 23, 2006. Petitioner's claims pressed by his counsel are that:

- (a) defense trial counsel was ineffective;
- (b) the trial court improperly instructed the jury on the lesser included offense of Burglary in the Second Degree;

- (c) the trial court failed to conduct an adequate inquiry before permitting petitioner to waive his right to trial counsel;
- (d) defense appellate counsel was ineffective; and
- (e) the court and prosecution knew that he was innocent.

Petitioner's Brief of December 5, 2005 at p. 4.

The totality of the claims raised by petitioner are eight in number as follows:

- (a) ineffective assistance of trial counsel;
- (b) "the prosecutor and the court committed persistent egregious and overzealous behavior, knowing that petitioner was on psychiatric medication";
- (c) the court erroneously failed to instruct the jury as to the lesser-included offense of Burglary in the Second Degree;
- (d) the court failed to conduct an adequate inquiry into whether the petitioner knowingly waived his right to counsel;
- (e) the petitioner's sentence was harsh and illegal;
- (f) defense counsel failed to file a leave application to the Court of Appeals from the Appellate Division's affirmance of the judgment of conviction;
- (g) ineffective assistance of appellate counsel; and
- (h) the court and prosecutor knew that the petitioner was innocent because there was another man named Leroy Jones who actually committed the crimes.

Respondent's Brief of June 24, 2005 at 13.

B. State

By a judgment of conviction dated May 31, 2000, petitioner was convicted after a jury trial of three counts of Burglary in the Second Degree [New York Penal Law § 140.25(2)], and

one count of Attempted Burglary in the Second Degree [New York Penal Law § 140.15]. After, after being adjudicated a persistent violent felony offender, he was sentenced principally to concurrent terms of imprisonment of fifteen years to life on each burglary count, and two to four years imprisonment on the attempted burglary count. On March 8, 2001, petitioner was resentenced to concurrent terms of imprisonment totaling sixteen years to life.

On direct appeal to the Supreme Court of the State of New York, Appellate Division, petitioner alleged (a) that the trial court erred in ruling that he was fit to proceed to trial pursuant to New York Criminal Procedure Law Article 730, (b) that his sentence was illegal and excessive, (c) that the trial court erroneously admitted improper hearsay testimony, (d) that the prosecution improperly delayed the disclosure of certain discovery pursuant to *People v. Rosario*, 9 N.Y.2d (1961), and (e) the prosecutor's summation contained improper comments depriving him of a fair trial. On June 3, 2002, the Appellate Division, Second Department, affirmed petitioner's conviction. *People v. Jones*, 295 A.D.2d 369 (2d Dept. 2002).

In a motion dated July 24, 2003, petitioner, pursuant to C.P.L. §§ 440.10 and 440.20, moved to vacate the judgment of conviction and to set aside his sentence claiming that the trial court's burglary instruction was erroneous, that he was denied the effective assistance of trial counsel and that he was improperly sentenced as a persistent violent felony offender. By an order dated September 16, 2003, the Supreme Court denied petitioner's motions in their entirety. On January 5, 2004, the Appellate Division denied petitioner's application to appeal the denial of his C.P.L. §§ 440.10 and 440.20 motion.

By papers dated April 2, 2004, petitioner filed a writ of error coram nobis in the Appellate Division contending, among other things, that his appellate counsel was ineffective in

failing to argue on direct appeal (a) that his trial counsel was ineffective, and (b) that the trial court's inquiry regarding petitioner's waiver of his right to trial counsel was inadequate. He argued that his appellate counsel was also ineffective in failing to seek leave of the New York Court of Appeals. On August 23, 2004, the Appellate Division denied the petition. *People v. Jones*, 10 A.D.3d 456 (2d Dept. 2004). Petitioner's subsequent application seeking leave to appeal the denial of his writ of error coram nobis was denied. *People v. Jones*, 3 N.Y.3d 740 (2004).

By motion papers dated August 31, 2004, petitioner moved pursuant to C.P.L. § 440.20 to set aside his sentence pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On December 20, 2004, the trial court denied petitioner's C.P.L. § 440.20 motion. On March 16, 2005, the Appellate Division denied petitioner's request to appeal the denial.

II. Hearing

On direction of this court a full evidentiary hearing was conducted on January 23, 2006. The parties were directed to have the state trial attorney present. All claims of petitioner were explored with evidence produced on any issue raised by petitioner received.

The chief witness was Laurence Wright, petitioner's trial counsel, and, after he was relieved at petitioner's request, petitioner's adviser. Mr. Wright was at the time, and is, a distinguished and experienced criminal defense attorney. He was entirely credible. His testimony is found to be accurate and truthful. By contrast, the petitioner was not credible and truthful on a number of critical issues. Where petitioner's and Mr. Wright's testimony are in conflict, Mr. Wright's is found to be accurate, and petitioner's has no probative force.

Mr. Wright's representation of petitioner was highly competent. He met with petitioner numerous times before and during trial. He discussed at length with petitioner the latter's decision to conduct the trial *pro se* and strongly advised against it. Petitioner, an intelligent, articulate and well informed layman, insisted on representing himself. The rather cryptic advice by the trial court to petitioner that it would be a mistake to proceed *pro se* was sufficient in view of the extended discussion petitioner had had with Mr. Wright. Transcript Jan. 23, 2005 at 76, 91. The trial judge had already observed petitioner at the Wade hearing so that the trial judge had observed how he conducted himself.

Mr. Wright's opinion was that petitioner would have continued to insist on handling the case *pro se* no matter how detailed the advice given by the court. *Id.* at 78, 79. This court concurs and so finds. The issue of lack of sufficient advice on whether petitioner should conduct the case *pro se*, as a basis for granting the writ, has no merit.

Appellate counsel is dead so that his appearance at the hearing was inconvenient. In view of this lack of merit on this *pro se* trial advice issue, appellate counsel's failure to raise this issue on direct appeal cannot support a claim of inadequate appellate counsel. The brief of petitioner on appeal to the Appellate Division raised all the points a well trained appellate counsel would have stressed. The brief was well written. Petitioner's request to supplement his counsel's brief on the *pro se* point was denied by the court, but his argument could have had no effect since it was without merit. Failure to appeal to the Court of Appeals was not prejudicial since there was no chance leave to appeal would have been granted.

In view of the above findings on adequacy of trial and appellate counsel on the merits, the question of exhaustion, is irrelevant and will, in this court's discretion, not be decided.

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