

NEW YORK COURT OF APPEALS

People v. Caldavado

26 N.Y.3d 1034 (2015) · Decided November 23, 2015

SUMMARY

The New York Court of Appeals reversed and remitted the case for a hearing on the defendant’s claim that trial counsel was ineffective for failing to investigate and present expert testimony challenging the prosecution’s shaken-baby-syndrome evidence. The court held that the defendant’s submissions raised factual questions concerning counsel’s strategy and adequacy of investigation, while rejecting or declining to reach her newly discovered evidence and freestanding actual innocence claims.

CASE DETAILS

COURT	New York Court of Appeals
WRITING FOR THE COURT	Chief Judge Lippman; Judge Pigott; Judge Rivera; Judge AbdusSalaam; Judge Stein; Judge Fahey
JURISDICTION	New York
DECIDED	November 23, 2015
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Defendant appealed from an order affirming the denial, without an evidentiary hearing, of her CPL 440.10 motion to vacate her convictions based on newly discovered evidence, ineffective assistance of counsel, and actual innocence.
STANDARD OF REVIEW	Whether defendant's CPL 440.10 submissions raised a factual question requiring an evidentiary hearing on ineffective assistance of counsel.
PRECEDENTIAL VALUE	Published Court of Appeals memorandum; binding New York appellate precedent to the extent of its holdings.
PARTIES	Caldavado v. People of the State of New York

TOPICS

[ineffective assistance](#) [state post-conviction relief](#) [evidence](#) [actual innocence](#) [criminal procedure](#)

PRACTICE AREAS

[Criminal procedure](#) [Post-conviction relief](#) [Ineffective assistance of counsel](#) [Evidence](#)

QUESTIONS PRESENTED

1. Whether defendant's CPL 440.10 submissions raised a factual question requiring an evidentiary hearing on whether trial counsel provided ineffective assistance by failing to pursue available lines of cross-examination and failing to call a defense medical expert.
2. Whether defendant's submissions constituted newly discovered evidence under CPL 440.10(1)(g).
3. Whether defendant established a freestanding actual-innocence claim, assuming such a claim is cognizable.

HOLDINGS

1. An evidentiary hearing was required because defendant's submissions raised factual questions about whether counsel's failure to pursue certain defenses and call a medical expert resulted from reasonable trial strategy or inadequate investigation and representation.
2. Defendant's submissions did not constitute newly discovered evidence within the meaning of CPL 440.10(1)(g) and did not warrant further inquiry on remand.
3. The Court did not decide whether a freestanding actual-innocence claim is cognizable, but held that defendant failed to demonstrate factual innocence regardless of the applicable standard of proof.

KEY QUOTATIONS

“On this record, defendant established that “there were sufficient questions of fact as to whether [counsel] had an adequate explanation” for his failure to pursue certain lines of defense on cross-examination or for his failure to call an expert on defendant’s behalf, and defendant “is therefore entitled to an opportunity to establish that [s]he was deprived of meaningful legal representation”” (26 N.Y.3d at 1036)

“a decision that it would be futile to call an expert based solely on the volume of expert testimony presented by the People is not a legitimate or reasonable tactical choice.” (26 N.Y.3d at 1036)

“Thus, a hearing is necessary to resolve defendant’s claim of ineffective assistance of counsel” (26 N.Y.3d at 1037)

FACTUAL BACKGROUND

Defendant was convicted of assault in the first degree and endangering the welfare of a child after a trial concerning injuries to a seven-month-old infant in her care. The prosecution relied on a shaken-baby-syndrome diagnosis and presented 13 medical professionals, including nine experts. Defense counsel cross-examined the prosecution experts using a physician's brief opinion but did not call a defense expert. In her post-conviction motion, defendant submitted statements from two experts and an affidavit indicating that counsel declined to call an expert because doing so would be pointless given the number of prosecution experts.

PROCEDURAL HISTORY

Defendant was convicted in Supreme Court, Queens County, of first-degree assault and endangering the welfare of a child after a 2009 trial. The Appellate Division affirmed the convictions, and the Court of Appeals denied leave. Supreme Court later denied defendant's CPL 440.10 motion without a hearing, and the Appellate Division

affirmed. The Court of Appeals granted leave, reversed, and remitted for an evidentiary hearing on ineffective assistance of counsel.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand to Supreme Court, Queens County, for an evidentiary hearing and further proceedings concerning defendant's ineffective-assistance claim. The newly discovered evidence and actual-innocence grounds did not warrant further inquiry.

CASES CITED

- People v. Zeh, 22 N.Y.3d 1144, 1146 (2014)
- Harrington v. Richter, 562 U.S. 86, 106 (2011)
- People v. Ross, 119 A.D.3d 964, 965 (2d Dep't 2014)
- Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089 (2014)
- Strickland v. Washington, 466 U.S. 668, 690 (1984)
- People v. Baldi, 54 N.Y.2d 137, 147 (1981)
- People v. Oliveras, 21 N.Y.3d 339, 348 (2013)
- People v. Jenkins, 68 N.Y.2d 896, 898 (1986)
- People v. Hamilton, 115 A.D.3d 12 (2d Dep't 2014)
- People v. Caldavado, 78 A.D.3d 962, 963 (2d Dep't 2010)
- People v. Caldavado, 116 A.D.3d 877, 877 (2d Dep't 2014)
- People v. Caldavado, 23 N.Y.3d 1060 (2014)

OPINION

PER CURIAM.

OPINION OF THE COURT Memorandum. The order of the Appellate Division should be reversed, and the case remitted to Supreme Court for further proceedings in accordance with this memorandum. In 2006, defendant was charged with assault in the first degree (Penal Law § 120.10 [3]) and endangering the welfare of a child (Penal Law § 260.10 [1]), in connection with injuries sustained by a seven-month-old infant in her care.

At defendant's trial in 2009, the People's theory was that the infant suffered from shaken baby syndrome (SBS) after defendant violently shook her. The People called 13 medical professionals in support of their case, nine of whom testified as expert witnesses. Defense counsel, relying on a 1V2-page opinion by a physician, challenged the People's witnesses through cross-

*1036examination by suggesting that the victim's injuries were caused by a "re-bleed" of an earlier trauma.

Defense counsel did not, however, present any expert testimony at trial to contradict the SBS diagnosis proffered by the People's witnesses. Following deliberations, defendant was found guilty of both charges. Upon her subsequent appeal, the Appellate Division affirmed (78 AD3d 962, 963 [2d Dept 2010], lv denied 16 NY3d 829 [2011]).

In 2012, defendant moved, pursuant to CPL 440.10 (1) (g) and (h), for an order vacating her conviction on the grounds of newly discovered evidence, ineffective assistance of counsel, and actual innocence. Supreme Court denied defendant's motion without an evidentiary hearing, and the Appellate Division affirmed (116 AD3d 877, 877 [2d Dept 2014]). A Judge of this Court granted defendant leave to appeal (23 NY3d 1060 [2014]), and we now reverse.

On this record, defendant established that "there were sufficient questions of fact as to whether [counsel] had an adequate explanation" for his failure to pursue certain lines of defense on cross-examination or for his failure to call an expert on defendant's behalf, and defendant "is therefore entitled to an opportunity to establish that [s]he was deprived of meaningful legal representation" (People v Zeh, 22 NY3d 1144, 1146 [2014]).

In this regard, we note that defendant's CPL 440.10 proffer included statements from two experts, who described additional lines of inquiry that would likely have been advantageous to the defense but were not pursued at trial.

In addition, defendant submitted an affidavit from her sister, wherein she indicated that counsel asserted that he would not call an expert at trial because it would be "pointless" to do so in light of the number of experts being called by the People.

We are mindful that it is exceedingly rare that a defense attorney's strategic decision not to present expert testimony amounts to ineffective assistance of counsel (see *Harrington v Richter*, 562 US 86, 106 [2011]; *People v Ross*, 119 AD3d 964, 965 [2d Dept 2014]; cf. *Hinton v Alabama*, 571 US —, —, 134 S Ct 1081, 1089 [2014]).

However, in a case such as this, where casting doubt on the prosecution's medical proof is the crux of the defense, a decision that it would be futile to call an expert based solely on the volume of expert testimony presented by the People is not a legitimate or reasonable tactical choice.

Accordingly, although a hearing is not invariably required on a CPL 440.10 motion, under the circumstances presented here, *1037defendant's proof raised a question — in the absence of any submissions from defense counsel — as to whether counsel's alleged deficiencies were merely the result of a reasonable, but unsuccessful, trial strategy (see generally *Strickland v Washington*, 466 US 668, 690 [1984]; *People v Baldi*, 54 NY2d 137, 147 [1981]), or whether counsel failed to

“pursue the minimal investigation required under the circumstances” (People v Oliveras, 21 NY3d 339, 348 [2013]).

Thus, a hearing is necessary to resolve defendant’s claim of ineffective assistance of counsel (see Zeh, 22 NY3d at 1146; People v Jenkins, 68 NY2d 896, 898 [1986]). The other grounds cited in connection with defendant’s CPL 440.10 motion do not warrant further inquiry upon remittal. Defendant’s proffered submissions did not constitute “newly discovered evidence” within the meaning of CPL 440.10 (1) (g).

Furthermore, to the extent defendant’s motion was based on a purported “freestanding actual innocence claim” beyond that provided by CPL 440.10 — such as that recognized by the Second Department in People v Hamilton (115 AD3d 12 [2d Dept 2014]) — we need not pass on the viability of such a claim here; even assuming it is cognizable, defendant failed to demonstrate factual innocence regardless of the applicable standard of proof.

Chief Judge Lippman and Judges Pigott, Rivera, AbdusSalaam, Stein and Fahey concur. Order reversed and case remitted to Supreme Court, Queens County, for further proceedings in accordance with the memorandum herein.