

From: Feathers, Cynthia (ILS)
Sent: Thursday, November 2, 2017 11:09 AM
To: 'ilsapp@listserve.com'
Subject: People v. Taylor
Attachments: 108690.pdf

FYI, in a lengthy opinion and order handed down today, the Appellate Division—Third Department reversed a Saratoga County Court order denying a CPL 440.10 motion without a hearing, and held that the defendant was entitled to a new trial. In *People v. Taylor*, the defendant was convicted of assault in the second degree and criminal possession of a weapon in the fourth degree. Upon appeal, his conviction was affirmed. The defendant made a CPL 440.10 motion to vacate the judgment of conviction, based on the ineffective assistance of his counsel in failing, among other things, to use impeachment evidence against the prosecution's key witness and to request that a lesser included offense be submitted to the jury. The motion was denied on the basis that all ineffectiveness claims could have been raised on direct appeal. The reviewing court disagreed. The impeachment argument was dependent on a witness statement to police that was outside the record. Further, the failure to request submission of a lesser included offense might have been based on strategic considerations—a matter which was not discernable from the face of the record.

The defendant conceded that other allegations of ineffective assistance were based on matters that appeared on the face of the record: counsel allegedly failed to object to a coercive *Allen* charge and to effectively argue for the justification defense instruction. Defendant's appellate counsel, Andrea Hirsch, contended that such allegations could be considered together with the non-record-based allegations to permit review of all aspects of the claim of ineffective assistance. The Third Department agreed, finding that a CPL 440.10 proceeding was the appropriate forum for reviewing, in its entirety, a claim of ineffective assistance and that its contrary prior authority should no longer be followed.

The reviewing court further held that the defendant was deprived of a fair trial by less than meaningful representation. Defense counsel had made no attempt to cross-examine the chief witness against defendant about statements he had made to police that were significantly at odds with the witness' trial testimony. Such lapse could have had no valid strategic rationale. Further, counsel failed to clearly and cogently articulate the request for a justification charge—to which the defendant was clearly entitled. Two dissenting justices agreed that the CPL 440.10 motion was the appropriate avenue for review of all ineffectiveness claims, but opined that vacatur of the judgment of conviction was premature and the matter should have been remitted for an evidentiary hearing.

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131