

**SUPREME COURT - STATE OF NEW YORK**  
**CRIMINAL TERM - PART K-8 - QUEENS COUNTY**  
**125-01 Queens Boulevard**  
**Kew Gardens, New York 11415**

PRESENT :

**HON. ROBERT C. KOHM**

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THE PEOPLE OF THE STATE OF NEW YORK, : Indictment No. 2924/1988  
:  
-against- : Motion: Motion for Leave to  
Renew Motion to Vacate  
DEREK RAWLINGS, :  
Defendant. : Submitted: September 13, 2004  
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By this instant motion, the defendant pro se, and thereafter, by Counsel, seeks renewal of the previously denied<sup>1</sup> CPL§440.10 motion pursuant to CPLR §2221. In support thereof, the defendant argues that due to the People’s failure to fully comply with an order of the court, a decision was rendered by the court which was premature and which resulted in a violation of his due process rights. The People oppose this motion in its entirety. The following constitutes the decision and the opinion of the Court:

**PROCEDURAL HISTORY OF THE CASE**

In 1988, the defendant was indicted for two counts of murder in the second degree and related offenses arising from an incident in which the defendant shot his weapon at one Clarence Adams, who was standing in a crowded courtyard, but instead mortally wounded a bystander, Joel Jones. At trial<sup>2</sup>, three eyewitnesses, including Clarence Adams, testified that the defendant was the only person in the courtyard with a gun and that he fired his gun several times in the direction of Clarence Adams. Although the Defense did not put on a case, their position at trial was that the

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<sup>1</sup>Justice Steven W. Fisher decided the original motion but his his appointment to the Appellate Division, Second Department, in April, 2004, resulted in this matter being transferred into this Court’s Part.

<sup>2</sup>Justice William Friedmann, presiding.

actual shooter was Adams<sup>3</sup>. The jury, crediting the testimony of the People's witnesses, convicted the defendant of intentional murder and related counts and on June 8, 1989, he was sentenced.

In November 1990, prior to appeal, the Criminal Appeals Bureau of the Legal Aid Society<sup>4</sup> contacted the District Attorney's Office requesting information regarding a ballistics comparison test between the bullet recovered from Jones' body, which had been shot from a .380 caliber weapon, and a bullet from a .380 caliber weapon recovered from a gunshot wound to one Herbie Williamson, who had been shot in 1990, two years subsequent to Joel Jones' murder. Although it appears that this request may have gone unanswered, Appellate Counsel perfected the defendant's appeal in the Appellate Division, Second Department, and in December 1991, the defendant's judgment of conviction was reversed due to errors committed by the trial judge (*People v. Rawlings*, 178 A.D. 2d 619).

At the defendant's retrial<sup>5</sup> and after the close of the People's case, the defendant testified in his own behalf. He admitted that he possessed and fired a .22 caliber weapon<sup>6</sup> into the courtyard on the date in question, but only after Clarence Adams had approached him with a gun in his pocket. The jury, rejecting the defendant's version of events, again credited the testimony of the People's witnesses and convicted the defendant of murder and related counts.

On August 31, 1993, and prior to imposition of sentence, the defendant moved pro se to set aside the verdict pursuant to CPL §330 contending that the People's failure to conduct ballistics comparison tests regarding the bullet recovered from Jones' body and the bullet recovered from the 1990 gunshot wound to Herbie Williamson, warranted vacatur. The Court denied the motion stating that such claims were on-the-record matters, not properly brought within the context of a CPL §330 motion<sup>7</sup> and sentenced the defendant accordingly. The defendant's conviction was affirmed on appeal (*People v. Rawlings*, 220 A.D. 2d 541 [2d Dept. 1995]). Leave to appeal to the Court of Appeals was denied (*People v. Rawlings*, 87 N.Y. 2d 1024 [1996]).

In 1997, the defendant filed a pro se writ of habeas corpus in the United States District Court for the Eastern District of New York. That Court dismissed the defendant's petition on the merits and denied a certificate of appealability. The defendant then sought a certificate of appealability to the United States Court of Appeals for the Second Circuit and in 1998, that request was denied.

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<sup>3</sup>Trial Record, May 10th-16th, 1989, p. 242.

<sup>4</sup> Letter of Lynn W.L. Fahey, Assistant Attorney-in-Charge, dated November 26, 1990, to Spiros A. Tsimbinos, Chief, Appeals Bureau, Queens County District Attorney's Office.

<sup>5</sup>Justice Steven W. Fisher, presiding.

<sup>6</sup>Trial Record, June-July, 1993, pp. 661-662.

<sup>7</sup>Sentencing minutes, August 31, 1993, p.5-8.

By motion dated December 2, 2002, defendant moved pro se for vacatur of judgment pursuant to CPL§440.10 claiming, inter alia, that one of the People's witnesses, Clarence Adams, gave perjured testimony and that trial counsel failed to object to the People's failure to produce an exculpatory ballistics report. The People's Response was limited to the mandatory procedural bars of the defendant's claims, and the Court directed them to expand their Response to encompass the merits of the defendant's claims. After doing so, a hearing was held to determine the issues and on May 28, 2003, the Court issued an order denying the defendant's CPL§440 motion holding that the defendant did not demonstrate that potentially exculpatory evidence existed.

The defendant sought leave to appeal to the Appellate Division, Second Department, the denial of the CPL§440 motion, and on December 9, 2003, leave was denied. Thereafter, defendant sought to reargue the Appellate Division's denial and that application was denied on March 10, 2004. By this motion to renew pursuant to CPLR§2221, the defendant, joined thereafter by counsel, returns to the Supreme Court for relief. The defendant argues that information contained within the People's Opposition papers to his leave to appeal the denial of his CPL§440 motion to the Appellate Division, Second Department, disclosed the People's failure to fully comply with the order of the court, thereby resulting in a premature decision and a violation of his due process rights.

#### CONCLUSIONS OF LAW

Preliminarily, a motion which affects a prior court order is governed by procedures and time limitations set forth in CPLR §2221. With regard to the defendant's motion for leave to renew<sup>8</sup>, the statute specifically provides that such motion be based upon *new facts not offered on the prior motion that would change the prior determination* or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion (emphasis supplied)(CPLR §2221[e]).

In its Decision and Order dated May 28, 2003, the Court denied the defendant's CPL§440 motion finding that the defendant had failed to make a showing that potentially exculpatory evidence existed. The defendant now contends that the People's Affirmation in Opposition to his leave to appeal that decision, dated January 27, 2004, contained new facts not offered on the prior motion and such new facts demonstrate that potentially exculpatory evidence did exist and had they been offered on the prior motion, it would have changed that determination. The defendant is

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<sup>8</sup>In the 1999 Amendment Codifying Procedure on the Motion to Renew, David Siegal notes that although the actual description in subdivision (e) is a "motion for leave to renew" and that the word "leave" might suggest that two motions are necessary, but all can be contained in one motion ( 2003 Supplemental Practice Commentaries, McKinneys, Bk 7B, CPLR §2221, p. 48-49, supp.)

mistaken in his analysis of the law.

As to information contained within the People's responding papers concerning a comparison between ballistics recovered from the 1988 fatal shooting of Joel Jones and ballistics recovered from the 1990 shooting of Herbie Williamson, the defendant fails to articulate in other than conclusory terms how such ballistics testing could have been potentially exculpatory. The intervening two year period between the shootings provides grist for any number of possibilities as to who was, was not, or had been, in possession of the .380 caliber weapon-----but it certainly does not demonstrate that the defendant was not in possession of the .380 caliber weapon at the time Joel Jones was fatally shot. Nor does the defendant demonstrate by anything other than bald assertions and conjecture that on the date of Joel Jones' murder, Clarence Adams was in possession of the .380 caliber weapon. At his second trial, the defendant testified that at the time of Joel Jones' death, he, the defendant, was in possession of a .22 caliber gun, not a .380 caliber gun. The jury, as fact-finders, rejected his testimony and chose to credit the People's eyewitnesses.

Since November, 1990, the date that the letter was sent from the Criminal Appeals Bureau of the Legal Aid Society, to the District Attorney's Office, the issue of ballistics comparison between the 1988 shooting and the 1990 shooting has been part of the court record underpinning this proceeding. Indeed, the Sentencing Court, in denying the defendant's pro se CPL§330 motion on August 31, 1993, specifically stated that this ballistics comparison issue was an on-the-record issue, "...clearly reviewable by the Appellate Division and perhaps by the Court of Appeals, and thus not properly before the court in the context of a CPL§330 motion."<sup>9</sup> Although the People have been unable to locate such report, it appears from the transcript of the sentencing minutes<sup>10</sup> that a comparison was in fact made and there was no match between the ballistics recovered from the body of the Joel Jones and the body of Herbie Williamson.

CPL§440.10 (2)(c) provides that "[A]lthough sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon an appeal from such judgment, an adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing the defendant's unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him". Since the defendant's retrial in 1993, indeed throughout the entire appellate process, the ballistics comparison report was an on-the-record issue and could have been raised by appellate counsel, but was not.

Furthermore, the defendant's contention that these "so called" new facts, originally

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<sup>9</sup>Sentencing minutes, August 31, 1993, p 5.

<sup>10</sup>Sentencing minutes, August 31, 1993, p 7.

contained within the People's Affirmation in Opposition to the defendant's leave to appeal application, would affect the prior determination, is nothing more than a specious argument. By the defendant's own admission, the Appellate Division, Second Department, at the time of the defendant's leave application, had these very new facts before them. They were, and continue to be, unavailing.

Defense Counsel, in his Reply Affirmation, contends that the defendant's due process rights were violated by the People's bad faith failure to perform potentially exculpatory ballistics testing, to fully disclose exculpatory evidence concerning the violent criminal history of Clarence Adams and to correct the perjurious statements of Adams at trial. In support of these arguments, Defense recites violations of the defendant's rights pursuant to principles articulated in *Arizona v. Youngblood*, 488 U.S. 51(1988), *Brady v. Maryland*, 373 U.S. 83(1963) and *People v. Savvides*, 1 N.Y. 2d 554 (1956). However, each of Defense Counsel's contentions could have been raised on appeal, but were not, and therefore are procedurally barred from being raised at this juncture (CPL§440.10 [2][c]).

Accordingly, and pursuant to the statutory provisions set forth in CPLR§2221, the defendant's motion for leave to renew the denial of his CPL§440.10 motion is denied. This Court finds that the information provided in the People's Responding papers does not demonstrate that potentially exculpatory evidence existed. Therefore, there is nothing presented to this Court that would have altered the outcome of the underlying motion had the Supreme Court considered those facts in its original decision (see, *Ford v. Lasky*, 300 A.D. 2d 536 [2d Dept. 2002]; see also, *Kraeling v. Leading Edge Electric*, 2 A.D.3d 789 [2d Dept. 2003]).

The foregoing constitutes the decision of the Court.

Order entered accordingly.

Copy of this decision and order forwarded to the District Attorney, to the defendant at his place of incarceration and to the Defense Counsel.

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J.S.C.