

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK

: BY: STEPHEN A. KNOPF  
:  
: DATED: July 7, 2006

-against-

: INDICTMENT NO. 1667/94

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CEDRIC TAM,

Defendant :

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The Defendant, Cedric Tam, seeks an order from the court to vacate the judgment of conviction pursuant to CPL 440.10 (1)(g) upon the ground that it was obtained in violation of his rights under the U.S. Constitution in light of the U.S. Supreme Court's decision in Crawford v. Washington, 541 US 36 (2004).

FACTUAL BACKGROUND

This case involves a robbery incident that occurred on April 14,1994. The defendant was charged with robbery in the first degree (PL 160.15-4); attempted robbery in the first degree (PL 110/160.15-(4); robbery in the second degree (PL 160.10-1); attempted robbery in the second degree (PL

110/160.10-1); criminal possession of a weapon in the second degree(PL 205.03); criminal possession of a weapon in the third degree(PL265.02-3); criminal possession of a weapon in the third degree (PL 265.02-4) and criminal possession of stolen property in the fifth degree. (PL 165.40) under Indictment Number 1667/94.

On May 3, 1995, the defendant was convicted after a jury trial of robbery in the first degree, two counts of attempted robbery in the first degree; robbery in the second degree, two counts of attempted robbery in the second degree, criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree and criminal possession of stolen property in the fifth degree. On June 19, 1995, the Court sentenced the defendant to an indeterminate prison term of seven to twenty one years on the top robbery count, and lesser concurrent terms for the remaining convictions.

On January 21, 1998, the defendant appealed his conviction to the Appellate Division, Second Department, arguing that it was an error for the trial court to permit the prosecutor to

dismiss two counts of the indictment after the jury indicated that it reached a partial verdict, thereby circumventing CPL 310.70 preventing the jury from continuing deliberations; that the trial court refused to grant defendant's adverse inference charge regarding the destruction of evidence was prejudicial error, that the People's CPL 710.30(1)(b) notice was defective and lastly that the imposed sentence was excessive. The People opposed this motion. The defendant filed a pro se supplemental brief in which he claimed the prosecutor became an unsworn witness by demonstrating to the jury how the defendant pointed his gun and improperly vouched for the credibility of the People's witness among other arguments. Nevertheless, on January 7, 1999, the defendant's conviction was affirmed People v. Tam, 256 AD2d 600(2d Dept 1998). On June 25, 1999, leave to appeal to the Court of Appeals was denied. People v Tam 93 NY2d 979 (1999).

On June 7, 2000, the defendant moved pro se to vacate his judgment of conviction pursuant to CPL 440.10 (1)(f) and (g) on the grounds of off the record improper and prejudicial conduct and newly discovered evidence. The People opposed this motion.

On August 16, 2000, the Court denied the defendant's motion. The defendant sought to appeal that decision to the Appellate Division, Second Division. On November 20, 2000 the Appellate Division denied that motion to appeal.

On November 3, 2000, the defendant filed a writ of error coram nobis with the Appellate Division Second Department. The People opposed this application. On January 8, 2001, the Appellate Division, Second Department, denied the defendant's motion. People v Tam, 279 AD2d 487 (2d Dept 2001). The defendant has filed several more petitions in the federal court. Each and every one of these petitions have been ultimately denied.

#### LEGAL ARGUMENTS

In the defendant's present motion before this Court, he moves pursuant to CPL 440.10 (1)(g) to set aside the judgment of conviction on the ground that his right of confrontation under the Sixth Amendment has been violated because of the decision of the Supreme Court in Crawford v Washington 541 US36 (2004). Specifically, the defendant argues that during the prosecutor's summation she spontaneously performed a demonstration with the gun that was in evidence, drawing it at the jurors while stating

" He's looking at that - the perpetrator's face". The defendant claims this is demonstrative evidence, and that under Crawford, he would have been permitted to cross-examine as to this evidence, but that he was not afforded the opportunity to do so at his trial.

In response, the People assert that the defendant's motion should be denied in it's entirely for the following reasons (1) the motion is procedurally barred as the issue was already addressed on appeal; (2) the defendant's allegations do not establish a legal basis for relief in that Crawford does not apply retroactively and (3) the defendant's claim lacks merit as Crawford does not apply to the specific conduct that the defendant claims is improper in this case.

#### LEGAL DISCUSSION

The defendant's claim is barred by CPL § 440.10 (2)(a), which states in pertinent part:

"The court must deny a motion to vacate judgment when the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has

been a retroactively effective charge in the law controlling such issue."

The People contend that the Court must deny this claim pursuant to CPL § 440.10(2)(a) because the defendant has already raised this exact claim on direct appeal in his pro se brief. Additionally, the People argue the claim is barred pursuant to CPL § 440.30 (4)(a), because even if the defendant's claims are all true, they do not establish a legal basis for relief.

The defendant's claims are procedurally barred pursuant to CPL § 440.10(2)(a) as the issues the defendant raised have already been addressed. The defendant already raised this exact claim in his pro se supplemental brief where he claimed the prosecutor, during her summation, demonstrated how the defendant pointed the gun during the robbery and thus became an unsworn witness. The Appellate Division held that this claim was either unpreserved for appellate review or without merit. People v Tam, 256 AD2d 600 (1968). Therefore, pursuant to CPL § 440.10(2)(a) the defendant is barred from raising this issue for review at this juncture.

CPL § 440.30 (4)(a) states "Upon considering the merits of

the motion, the Court may deny it without conducting a hearing if:

(a)The moving papers do not allege any ground constituting legal basis for the motion."

As the People state in their argument, the defendant's claim does not establish any legal basis for relief. Assuming all the allegations the defendant makes about the Assistant District Attorney are true, it is not newly discovered evidence as the defendant claims. It is fully contained in the court record of the trial, at which he was present. The defendant could have brought it up earlier on appeal and, in fact, did bring it up on his direct appeal. Therefore it is not a basis on which to vacate the defendant's conviction.

#### THE CRAWFORD ISSUE

The defendant wants to apply the Supreme Court's 2004 decision in Crawford v Washington *supra* retroactively to his trial which took place in 1995, almost ten years earlier. The defendant's appeal was adjudicated before Crawford was decided. The lower state courts have ruled Crawford should not be applied retroactively to collateral proceedings involving judgments

which have become final on direct review. People v Dobbin 6 Misc 3d 892 (2004); People v Perfetto, 7 Misc, 3d 1031 (2005).

New York State applies the U.S. Supreme Court test to determine retroactivity. People v Eastman, 85 NY2d 265 (1995), states: "The threshold issue in determining whether to apply a constitutional rule retroactively is characterization of the rule as 'new' or 'old'...". In Teague v Lane, 489 US 288, 310 (1989) the Supreme Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced".

The Supreme Court sets out the federal test in Teague, holding that "...new rules of constitutional criminal procedure are applied retrospectively in one of two situations: (1) where the new rule places 'certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe' or (2) where the new rule alters a bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial". Teague v Lane, *supra* at 311-312.

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government; [or,] [t]o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final" Teague, *supra* at 301.

The Crawford decision broke new ground, and its bar of out-of-court testimonial statements that were not subject to prior cross-examination was not dictated by existing precedent. Thus Crawford established a new procedural rule. "Accordingly, it would be retroactively applied only if it fell within either of the two well-established exceptions to the general nonretroactivity of such rules: if it prohibited a certain category of punishment for a class of defendants because of their status or offenses, or constituted a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding..." People v Perfetto, *supra*. Clearly the first exception does not apply to the case at bar.

While Crawford may be said to have extended the scope of

the Confrontation Clause, it does not alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. Therefore, it is not entitled to the full retroactivity as enunciated under the Teague exception. As such, Crawford does not apply retroactively to the defendant's case.

#### THE PROSECUTOR'S SUMMATION

Even if Crawford was applied retroactively to the defendant's case, it would not have applied to the prosecutor's conduct during summation. Crawford applies only to "testimonial" statements. While the Supreme Court has declined to define what constitutes a "testimonial statement", it has provided a few examples. It said at a minimum "testimonial" includes testimony at a preliminary hearing, before a grand jury, a former trial and to police interrogation. Crawford supra.

The defendant claims that the act of the Assistant District Attorney picking up the gun during summation is demonstrative evidence. In actuality, it is not any type of evidence, as summation is not evidence. As the Criminal Jury Instructions (2nd Edition) state in its Pre-Summation Instructions:

"Summations provides each lawyer an opportunity to review the evidence and submit for your consideration the facts, inferences, and conclusions that they contend may be properly drawn from the evidence... nothing the lawyers say at any time is evidence... nothing the lawyers say in their summations is evidence." (Citations omitted). In this case, it's clear to this Court that nothing the prosecutor said or did in this case was evidence of any kind, demonstrative or otherwise. The District Attorney was simply commenting on the evidence. It certainly does not fall under the purview of Crawford, even if it applied retroactively to this case, which it doesn't.

Accordingly, defendant's motion to vacate the judgement of conviction is denied in all respects.

The foregoing constitutes the decision and order of this Court.

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STEPHEN A. KNOPF, J.S.C.

