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

PRESENT:
HON. SEYMOUR ROTKER
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: 167-77, 305-77

JOHN MURRAY,

Motion: VACATE JUDGEMENT
CPL 440.10

Defendant.
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DEFENDANT, PRO SE
For the Motion

RICHARD A BROWN, DA

BY: ELLEN C. ABBOT, ADA
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: August 22, 2002

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SEYMOUR ROTKER, Acting J.S.C.

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

-against- Indictment No. 167-77, 305-77

MEMORANDUM DECISION

JAMES MURRAY,

Defendant.

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PROCEDURAL HISTORY

By separate indictments the defendant was charged with two different robbery homicides. The first of these crimes occurred on January 5, 1977 and was indicted under Indictment 305-77. The second offense occurred on January 19, 1977 and was indicted under Indictment 167-77. Each indictment was tried separately and the defendant was convicted of both crimes. On May 19, 1978, the defendant was sentenced to two concurrent prison term of from twenty five years to life.

Both convictions were appealed. On January 12, 1981 both cases were remitted to the lower court for a reopened Huntley hearings, People v. Murray, 79 AD2d 993 (2nd Dept., 1981). Reopened hearings were conducted in the trial court which resulted in the denial of the defendant's motion to suppress. Following the denial, the cases were again heard by the Appellate Division. In May 1987 the Appellate Division affirmed the conviction on indictment for the January 5, 1977 homicide (Ind. 305-77) and, due to an error in the court's charge, reversed the conviction for the January 19, 1977 crime (Ind. 167-77), People v. Murray, 130 AD2d 773 (2nd Dept., 1987)[1] The defendant sought leave to appeal to the Court of Appeals which denied his request, People v. Murray, 70 NY2d 753 (1987).

[1] The delay in the Appellate Division decision was caused by the defendant's delay in filing a pro se supplemental brief.

Indictment 167-77 was remanded to the trial court where, on July 21, 1988 the defendant plead guilty and was sentenced to a term of from fifteen years to life in prison. The defendant appealed this conviction to the Appellate Division which affirmed the action of the lower court, People v. Murray, 167 AD2d 488 (2nd Dept., 1990). The defendant sought leave to appeal to the Court of Appeals which denied his request, People v. Murray, 77 NY 2d 841 (1991).

In July of 1994 the defendant filed a writ of error in the Appellate Division alleging ineffective assistance of appellate counsel. In October of 1994 the Appellate Division denied this application, People v. Murray 208 AD2d 654 (2nd Dept., 1994).

In May of 1996 the defendant filed a motion in the trial court under CPL 440.10 seeking to vacate both convictions on the grounds that his confessions had been illegally obtained. This application was denied in September of 1996. The defendant sought leave to appeal to the Appellate Division which denied his application.

In December of 1997 the defendant filed a writ of Habeas Corpus in the United States District Court for the Eastern District of New York. It appears that this petition is still unresolved.

By motion dated February 6, 2002 the defendant now moves for the second time to vacate these convictions. This motion is based upon the defendant's discovery via a Freedom of Information Act request filed with the New York City Police Department on May 17, 2001 of a police report which appears to indicate that an eye witness to the January 19, 1977 homicide viewed a photo array containing the defendant's photograph and failed to identify him as the perpetrator. The defendant claims that this report constitutes Brady and/or Rosario material and that it was not disclosed to him prior to his plea of guilty.

The People have filed affirmations in opposition dated June 7, 2002 and August 12, 2002.

DECISION

At the outset the Court notes that nothing in the defendant's motion in any way effects the conviction and life sentence entered under indictment 305-77. The police report recently discovered by the defendant relates only to the charges under Indictment 167-77.

CPL 440.30(2) provides that "if it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 ... the court may in its discretion either (a) summarily deny the motion (to vacate) or (b) proceed to consider the merits thereof".

CPL 440.10(3)(c) provides that the court may deny a motion to vacate judgment when "upon a previous motion made pursuant to this section. The defendant was in a position to adequately raise the ground or issue underlying the current motion but did not do so".

The defendant in this case filed a previous motion pursuant to CPL 440.10 in May of 1996. As basis for that motion the defendant relied upon information regarding the alleged existence of an arrest warrant which he had received pursuant to a Freedom of Information Act request. Although it is undisputed that the defendant did not receive the information which provides the basis for this motion until November of 2001, there is no reason why the defendant did not make a FOIA request in connection with his prior CPL 440 motion. As the People correctly point out they are seriously prejudiced by the extensive delay in bringing this motion. Some twenty four years have passed since the conviction in this case and five years have passed since the defendant's last motion to vacate. Based upon the foregoing the instant motion could clearly be denied on procedural grounds.

CPL 440.30(4)(a) provides that upon considering the merits of a motion pursuant to this section the court may deny it without a hearing if "the moving papers do not allege any ground constituting a legal basis for the motion". Defendant's claim here is that the information contained in the police reports which he received through FOIA constitutes Brady and/or Rosario material

which the People were required to turn over to him prior to his plea. He further claims that he did not receive these reports. Assuming that the defendant's allegation regarding receipt of the report is correct[2], the Court must consider whether the facts as alleged by the defendant constitute a Rosario violation.

The so called Rosario rule, People v. Rosario, 9 NY2d 286 (1961), requires that the prosecutor turn over to the defense any prior statement of a trial witness which relates to the subject of his trial testimony. The purpose of the rule is to facilitate cross examination by defense counsel. Since this matter was resolved by a plea of guilty rather that by a trial the defendant cannot establish any prejudice to his case based upon the alleged failure to disclose the material and there is no Rosario violation.

Even if it were assumed that the circumstances of this case constituted a Rosario violation, the defendant would still be required to show that there was a reasonable possibility that the violation effected the verdict, People v. Jackson, 78 NY2d 638(1991), People v. Vilardi, 76 NY2d 67(1990). In this case the fact that a witness may have failed to identify the defendant's picture in a photo array would do little to outweigh the defendant's full confession and the testimony of his codefendant which overwhelmingly establish his guilt.

Turning to the Brady issue, this rule of law requires that the People disclose to the defendant any exculpatory evidence in their possession, Brady v. Maryland, 373 US 83 (1963). The information at issue here, namely the witness's alleged failure to identify the defendant's picture in a photo array, while it may be helpful to the defense case, is not exculpatory in the sense that it affirmatively establishes his innocence. The Second Department has specifically so ruled in the case of People v. Barbera, 220 AD2d 601 (2nd Dept., 1995)[3].

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[2] Since this motion is being made some twenty four years after the alleged violation it is difficult to see how anyone would recall what material was or was not turned over to the defense.

[3] The allegation here is that the witness viewed a photo array containing the defendant's picture and failed to make an identification. This situation differs markedly from a situation where the witness identifies someone other than the defendant. Such a misidentification would constitute Brady material since it goes not just to the strength of the People's case but rather to the issue of guilt or innocence..

Moreover, even if the evidence were viewed as exculpatory, the defendant, in order to establish a Brady violation, is required to show that the withheld evidence is of such a nature that "but for the failure to produce such information the defendant would not have entered the plea, but instead would have insisted ongoing to trial, United States v. Avellino, 1997, US Dist. LEXIS 289(E.D.N.Y. January 8, 1997), People v. Drossos, 291 AD2d 723 (3rd Dept., 2002). The defendant does not and cannot argue that the fact that an eye witness failed to identify his picture in a photo array is such powerful evidence of innocence that it would motivate him to go to trial despite a full confession and in the face of direct testimony of an accomplice in the crime.

Finally, as pointed out by the People in their responsive affirmation, both Brady and Rosario are designed to prevent the unjust conviction of factually innocent defendants. The defendant in this case plead guilty. There are numerous cases that hold that a guilty plea waives the right to assert these alleged errors, see, People v. Thompson, 174 AD2d 702 (2nd Dept., 1991), People v. Day, 150 AD2d 595 (2nd Dept., 1989), United States v. Ruiz, ___ US ___, 122 Sup. Ct. 2450 (2002).

Thus, for all of the above reasons, the defendant's allegations fail to establish a legal basis for the relief sought and the motion is denied.

Kew Gardens, New York
Dated: August 22, 2002

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SEYMOUR ROTKER, Acting J.S.C.