People v Hardy
2006 NY Slip Op 30159(U)
June 26, 2006
Suffolk County Ct
Docket Number: 0002646/1998
Judge: James F.X. Doyle
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[* 1]

COUNTY COURT, SUFFOLK COUNTY
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

VENSEL HARDY,

Defendant.

JAMES F.X. DOYLE, J.C.C.

Indictment No. 2646A-1998
Dated: June 26, 2006

HON. THOMAS J. SPOTA
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VENSEL HARDY
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Upon the following papers numbered 1 to 2 read on this motion for an order vacating the judgment of conviction; Notice of Motion and supporting papers 1 ; Affidavit in Opposition and Memorandum of Law 2 ; the application is determined as follows:

Defendant, *pro se,* has filed a motion pursuant to CPL§§ 440.10(1)(b); 440.10 (1)(c) and 440.10(1)(h) seeking an order vacating the judgment of conviction imposed upon him following a jury trial. The District Attorney opposes the motion and has submitted an affirmation and memorandum of law.

Defendant was convicted on August 19, 1999 under Indictment Number 2646A-1998 of Robbery in the First Degree, Robbery in the Second Degree and Possession of a Weapon in the Third Degree (Weber, J.). The defendant subsequently challenged his conviction based upon the trial court's denial of an application to reopen the Wade hearing on direct appeal. The Appellate Division, Second Department, in disputing defendant's contention, reasoned that the grand jury testimony of the complainant did not constitute *Brady* material. "Even assuming that the testimony was *Brady* material, the failure to timely disclose does not warrant reversal since the testimony was disclosed during the voir dire, and the defendant had use of it for cross-examiantion." (*People v. Hardy,* 295 AD2d 365, 743 NYS2d 287 [2d Dept., June 3, 2002]. On August 19, 2002, the New York Court of Appeals denied defendant's application for permission to appeal to that court (98 NY2d 710).

Defendant now contends: (a) that the surveillance video of the crime should have been suppressed because the person in the video had the same color shoes as the defendant (Defendant's Ground 1); (b) that the su[s]pects clo[th]ing may hav[e] the same bearing on issues of suggestiveness were the su[spect]'s clo[th]ing singles him out from the rest of the people in the lineup (Defendant's Paragraph #26); (c) that the victim continued to say originally he was not able to positively identify the defendant (Defendant's Paragraph #28) (d) that the defendant should have taken the stand on his own behalf and that "...i did not sig[n] the confe[ssion] in the

way the detective said i readed it to him and signed it was not correct i can't read it to him to understanding what i was signing and he knew that ..." (Defendant's Paragraphs #29-30).

DEFENDANT'S "GROUND I"
DEFENDANT'S APPLICATION PURSUANT TO CRIMINAL PROCEDURE LAW §§ 440.10(1)(b), 440.10(1)(c) and 440.10(1)(h)

Criminal Procedure Law §440.10, the section upon which the defendant relies, addresses post-judgment motions to set aside sentences. CPL §440.10 provides, in pertinent part, that at any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment on any one or more grounds set forth in the statute. However, before defendant's motion can be addressed on the merits, it must conform to the procedural requirements of Article 440. Subdivision 2(b) of the statute requires the court to deny a motion to vacate a judgment when, *inter alia:*

> "[t]he judgment is at the time of the motion, appealable . . . and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal."

Even if the motion to vacate is not barred by CPL §440.10 (2)(b) or (3)(c) (or any of the other grounds set forth in subdivisions two and three), a court must consider the motion on the merits. (CPL § 440.30[2]). Upon reaching the merits, the court must grant the motion without conducting a hearing, if the moving papers allege a ground constituting a legal basis for the motion and are supported by uncontroverted facts. (CPL § 440.30[3]). The court may nevertheless, deny the motion without a hearing if the moving papers fail to allege either a ground constituting a legal basis for the motion or sufficient facts to support the legal ground asserted. (CPL § 440.30[4][a], [b]. The statute thus permits summary denial of the moving papers, if the moving papers, *inter alia,* fail to allege a ground constituting a legal basis for the motion (CPL § 440.30 [4][a]), or do not contain sworn allegations substantiating or tending to substantiate all the essential facts (CPL § 440.30 [4][b]).

The defendant's current *Wade* and *Huntley* violation claims, namely: (a) that the surveillance video of the crime should have been suppressed because the person in the video had the same color shoes as the defendant (Defendant's Ground 1); (b) that the su[s]pects clo[th]ing may hav[e] the same bearing on issues of suggestiveness were the su[spect]'s clo[th]ing singles him out from the rest of the people in the lineup (Defendant's Paragraph #26); (c) that the victim continued to say originally he was not able to positively identify the defendant (Defendant's Paragraph #28) (d) "...i did not sig[n] the confe[ssion] in the way the detective said i readed it to him and signed it was not correct i can't read it to him to understanding what i was signing and he knew that ..." (Defendant's Paragraphs #29-30) were previously raised at the pre-trial hearings and the trial of this matter. These issues, which are apparent from the record, could have been raised on direct appeal however, the defendant inexplicabley failed to do so (*People v. Jossiah,* 2 AD3d 877, 769 NYS2d 743 [2d Dept., December 2003]. The same record, previously presented to the Appellate Division in his appeal, would have presented sufficient facts from

which the defendant could have raised his present claims. Since these issues could have been raised on direct appeal, they cannot be raised in a motion to vacate judgment (CPL §440.10(2)(c) and are therefore procedurally barred.

The defendant in his motion also suggests that he was not afforded effective assistance of counsel as he "believe[s] the verdict would have been different with reasonable probability if counsel performance not been deficient" (Defendant's Paragraph 34-35). Because most of the actions or inactions complained of are all on the face of the record, this issue could also have been raised upon direct appeal and is procedurally barred from this court's review pursuant to CPL §440.10(2)(c). Even if the claims that are part of the record were not procedurally barred, those claims, including those that are not part of the record, are without merit. To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate that he was deprived of a fair trial by less than meaningful representation (*People v. Benevuto,* 91 NY2d 708, 674 NYS2d 629 [June 1998]). Mere disagreement with trial strategies or tactics will not suffice (*People v. Delarosa,* 287 AD2d 735, 732 NYS2d 108 [2d Dept., Oct. 2001]).

Further, were the court to consider the merits of the defendant's argument as a whole, and it is not, this court would nonetheless be constrained to find that there are no grounds to set aside the sentence of the defendant as his motion does not contain the requisite sworn allegations substantiating or tending to substantiate all the essential facts for the legal ground asserted (CPL § 440.30 [4][b]). Here, the defendant's motion is entirely void of any credible evidence or proof to support his claims. CPL § 440.30(4)(d) unequivocally states that a hearing is not necessary in cases where allegations of fact essential to support the motion are "made solely by the defendant and is unsupported by any other affidavit or evidence..."

DEFENDANT'S "GROUND II"

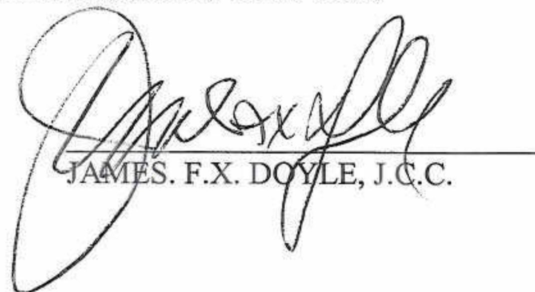
Defendant seeks an order requiring trial counsel and the people to provide affidavits responding to the allegations of the motion and in the alternative, that an attorney and/or investigator be assigned to locate and obtain affidavits from trial counsel.

Discovery in a criminal proceeding is entirely governed by the statute. There is no statutory basis for post-conviction discovery (*In the Matter of Samuel Washpon v. New York State District Attorney, Kings County,* 164 Misc. 2d 991, 625 NYS2d 874 [Sup. Ct. Kings Co., May 1995]); CPL Art. 240. Accordingly, defendant's application in this regard is denied.

Finally, as to the defendant's allegations which parrot the language contained in CPL §440.10, specifically: (1) "that the judgment was procured by duress, misrepresentation or fraud on the part of the Court or prosecutor or person action for or in behalf of a Court or prosecutor"; (2) "material evidence adduced at the trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the Court to be false" and (3) the judgment was obtained in violation of the defendant's rights under the constitution of this State or of the United States" are all based on the defendant's self-serving and conclusory assertions which are totally unsupported by any credible evidence.

In light of the foregoing, defendant's motion is denied in its entirety without a hearing.

The foregoing constitutes the opinion, decision and order of the court.



JAMES. F.X. DOYLE, J.C.C.