

**Smith v Perez**

2006 NY Slip Op 30167(U)

October 24, 2006

Wayne County Ct

Docket Number: 0000104/1998

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
COUNTY COURT                      COUNTY OF WAYNE

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POLLY SMITH

Plaintiff

vs.

DECISION  
AND  
ORDER

AIDA PEREZ, Superintendent,  
In Her Official Capacity Only, and Hon.  
ELIOT L. SPITZER, etc.

Ind. No. 98-104

Defendant

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Polly Smith, Pro Se  
Plaintiff

Wayne County District Attorney  
Melvin Bressler, Esq.,  
For the People

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The Plaintiff, Polly Smith, has filed a *pro se* Petition seeking a “Writ of Coram Nobis” or in the alternative, relief in the nature of habeas corpus. In connection with a prior application, the Plaintiff was previously advised that, pursuant to CPLR §7002, a petition for a writ of habeas corpus cannot be brought in Wayne County, as it is jurisdictionally defective. However, in the interest of justice, the Court will treat the petition of the Plaintiff (hereinafter referred to as the Defendant) as a motion to vacate her

conviction, pursuant to CPL §440.10.

(Parenthetically, the Court notes that the Defendant's petition makes reference to exhibits and to a Memorandum of Law. These documents were not attached to the petition. Correspondence was forwarded to the Defendant requesting that she submit to the Court any additional papers which she wished the Court to consider in determining her motion. No additional documents have been received, and the Court will therefore decide the motion as originally submitted.)

The Defendant was convicted in Wayne County of Manslaughter in the First Degree and a related traffic offense. Her conviction was affirmed [286 AD2d 878], reargument was denied [Feb. 1, 2002] and permission to appeal to the Court of Appeals was also denied [98 NY2d 641].

The Defendant's papers essentially raise two issues: that there exists newly discovered evidence, which entitles her to a new trial; and that the prosecution failed to provide the defense with exculpatory evidence at the time of trial. Both claims are based on the Defendant's assertion that the prosecution was aware of the existence of an alleged eye-witness, who if called, would have testified that the victim walked in front of the Defendant's vehicle, and that the collision was an accident. The

Defendant further maintains that the existence of this person, who was allegedly related to a member of the District Attorney's staff, was known to the People, and that the prosecution failed in its duty under Brady to advise the defense of her identity.

However, the prosecution maintains that the Defendant has failed to make a sufficient evidentiary showing as to either claim. Initially, the People argue that the allegation that the alleged eye-witness referred to the collision as an accident is hearsay, based on the unsworn statement of another individual. Therefore, since the Defendant has failed to produce documentary evidence in affidavit form, the People maintain that the motion is inadequate under CPL §440.30(4)(b). The Court agrees.

Moreover, New York courts have held that, in order to warrant a new trial, the alleged newly discovered evidence must not be merely impeaching or contradictory of other evidence (see, e.g. People v. Hayes, 295 AD2d 751 (3<sup>rd</sup> Dept, 2002)). In the instant case, several witnesses testified at trial that the Defendant had threatened to hit the victim with her vehicle, and that, in fact, the Defendant struck the victim with her vehicle twice. The Court finds that the double hearsay statement offered by the Defendant is not of such a nature that a different verdict probably would

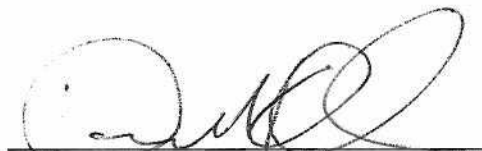
have occurred. (Hayes, supra.)

As to the Defendant's allegation that the prosecution was aware of the statement by the alleged witness, there is no evidence presented by the Defendant that the statement, if made, was made prior to trial, or that the People were aware of such a statement. Therefore, the Defendant has failed to present sufficient proof of any Brady violation on the part of the People.

Therefore, the Court finds that a hearing is not required pursuant to CPL §440.30(4) , and the Defendant's motion is denied in its entirety.

This Decision constitutes the Order of the Court.

Dated:       October 24, 2006  
              Lyons, New York



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Honorable Dennis M. Kehoe  
County Court Judge