

**People v Manning**

2007 NY Slip Op 30223(U)

March 13, 2007

Supreme Court, Kings County

Docket Number: 0004783

Judge: John M. Leventhal

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM: PART DV

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,

- against -

EDWARD MANNING

Defendant.

DECISION AND ORDER  
Indictment No. 4783/1999  
Ruth Ross, Esq.  
Assistant District Attorney  
For the People

Edward Manning, *pro se*

By: LEVENTHAL, J.  
Dated: March 13, 2007

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Defendant moves pursuant to CPL §440.10 to vacate the judgment of conviction entered against him on January 16, 2001 (J. Leventhal) for Manslaughter in the First Degree. Defendant contends that the People failed to disclose certain documents generated by the Office of the Chief Medical Examiner, and that this failure constitutes a violation of *People v. Rosario*, 9 N.Y.2d 286 (1961). In deciding this motion, the Court has considered the defendant's motion and the People's answer. For the reasons set forth below, defendant's motion is denied.

**BACKGROUND**

Defendant was charged with murdering his girlfriend, Thelma McWilliams, by stabbing her in the back of the head. On January 16, 2001, after a jury trial, defendant was convicted of Manslaughter in the First Degree and Criminal Possession of a Weapon in the Fourth Degree (J. Leventhal). On February 5, 2001, he was sentenced to seventeen and one half years in prison.

In December, 2002, defendant appealed his conviction. His sole contention on appeal was that the warrantless search of his apartment was not justified by the emergency doctrine. The Appellate Division affirmed defendant's judgment of conviction on January 27, 2003. (301

A.D.2d 661 [2003]). On April 8, 2003, defendant's application for leave to appeal to the Court of Appeals was denied. (99 N.Y.2d 656 [2003]).

In October, 2006, defendant filed the instant motion to vacate the judgment entered against him pursuant to CPL §440.10.

### DISCUSSION

Defendant's main contention is that the prosecutor failed to disclose an audiotape and other written statements made by the Office of the Chief Medical Examiner (OCME) and that such disclosure was required by *People v. Rosario*, 9 N.Y.2d 286 (1961).

A court must deny a motion to vacate judgment if sufficient facts appear on the record to permit adequate appellate review of the issue and defendant has unjustifiably failed to raise such issue upon an appeal that he or she actually perfected. (CPL §440.10[2][c]). Even if sufficient facts do not appear on the record to permit adequate appellate review of the issue, a court may deny a motion if defendant, with due diligence, could have made the facts appear on the record and defendant unjustifiably failed to do so. (CPL §440.10[3][a]).

At trial, Dr. Marie Macajoux, Acting Deputy Chief Medical Examiner, testified that she performed the autopsy of Thelma McWilliams and she described her findings. At that time, the People offered into evidence as People's Exhibit 3 a diagram that was prepared at the time of the autopsy. Defendant cross-examined Dr. Macajoux and even asked questions on re-cross twice. However, at no point did defendant ask Dr. Macajoux about the existence of any additional statements or recordings made during the course of her examination of the victim. Had he done so, he would have made a factual record upon which to base an appeal from the judgment on the basis asserted in the instant motion. Due to this unjustifiable failure to make a sufficient factual

record for appeal, defendant's motion is denied. (CPL 440.10[3][a]).

Even if this motion were not procedurally barred, it would fail on the merits. Defendant does not identify any specific materials the People failed to turn over. Rather, he merely speculates that such material was "almost certainly" generated during the medical examiner's investigation of the death of Thelma McWilliams.

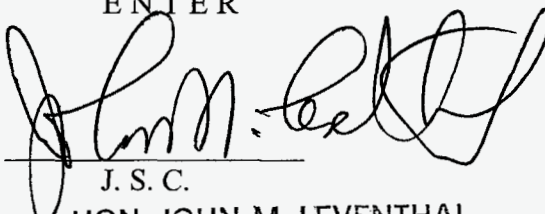
Even if the Court assumes that these materials were, in fact, produced during the course of the Medical Examiner's investigation, the Court of Appeals made clear in *People v. Washington*, 86 N.Y. 2d 189, 192 (1995), that "the duties of OCME are, by law, independent of and not subject to the control of the office of the prosecutor, and that OCME is not a law enforcement agency." Therefore, the duty to disclose materials imposed upon the prosecutor by *Rosario* did not extend to any audiotape and memorialized statements purportedly prepared by the Medical Examiner who testified at trial.

The Court notes that, on the top of the final page of his motion, defendant lists "ineffective assistance of counsel." However, nowhere else in his papers does he mention or explain this contention. Without more, the Court cannot consider this claim.

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

This constitutes the Decision and Order of the Court.



ENTER  
  
J. S. C.  
HON. JOHN M. LEVENTHAL  
Justice of the Supreme Court