

**People v Collins**

2007 NY Slip Op 30373(U)

March 26, 2007

Supreme Court, Kings County

Docket Number: 0005227

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM – PART 9

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

DECISION AND ORDER  
Indictment #5227/92

-against-

JEFFREY COLLINS,

Defendant.

-----X  
RAYMOND GUZMAN, J.S.C.

On April 27, 1993, following a jury trial, the defendant was found guilty of murder in the 2nd degree (PL §125.25[1]), and reckless endangerment in the 1st degree (PL §120.25), in the shooting death of Darryl Smith. On June 4, 1993, the court rendered judgment and sentenced the defendant to concurrent terms of imprisonment of 25 years to life for the murder conviction and 2-1/3 to 7 years for the reckless endangerment conviction (Rappaport, J., at trial and sentence).

The defendant appealed from his judgment of conviction directly to the Appellate Division, claiming (1) the trial court erred in refusing to charge manslaughter as a lesser included offense; (2) the People failed to prove the defendant's guilt beyond a reasonable doubt in that their witnesses were not credible; and (3) the sentence imposed was excessive. The Appellate Division affirmed the defendant's conviction (*People v Collins*, 217 AD2d 635 [2d Dept. 1995]), and the Court of Appeals denied leave to appeal (*People v Collins*, 87 NY2d 845 [1998]). On April 8, 1997, according to the People, the defendant filed a petition in the United States District Court for the Eastern District of New York for a writ of *habeas corpus* asserting the same claims.

On November 21, 1997, the defendant moved the trial court to vacate his judgment of conviction under CPL §440.10, contending that he had been denied effective assistance of

counsel. The defendant based this claim on his counsel's failure to call certain witnesses who, according to police reports, had telephoned police to report that a man named "Nubbs" had shot Darryl Smith. On April 8, 1998, the court denied the defendant's *vacatur* motion on the ground that the defendant had not submitted affidavits from these putative witnesses, stating whether they would have been available to testify or what their testimony would have been (Rappaport, J.). The Appellate Division denied the defendant's application to appeal.

On August 20, 1998, according to the People, the defendant moved to amend his federal *habeas corpus* petition to include the same ineffective assistance of counsel claim. On July 20, 2000, after conducting a hearing on the "ineffective assistance" issue, a federal magistrate found that the defendant's counsel had not been ineffective (Chrein, J.).<sup>1</sup> On September 8, 2000, according to the People, a District Court judge accepted the magistrate's recommendation and denied the defendant's *habeas corpus* petition (Raggi, J.).

In papers dated October 8, 2006, and received by this court on December 7, 2006, the defendant *pro se* moves again to vacate judgment under CPL §440.10, now claiming that the People intentionally withheld a detective's notes recording a statement made at the crime scene by a person who later testified for the People at trial.

On February 7, 2007, the People filed reply papers opposing the defendant's motion, and the defendant then filed papers, dated February 20, 2007, in response to the People's reply.

This court has reviewed the Supreme Court case file and the papers filed by the parties, including the documents appended as exhibits thereto, and for the reasons set forth below, summarily denies the defendant's motion.

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<sup>1</sup> The People have submitted the transcript of the federal magistrate's July 20, 2000 report and recommendation (rendered orally from the bench at the end of the hearing) with their reply papers.

### Background Facts

On the afternoon of December 19, 1991, Darryl Smith and two male companions walked into a grocery store at the corner of Blake and Sheffield Avenues in Brooklyn. Rothman Tejada, who was acquainted with both Darryl Smith and the defendant, was at the store at the time.

According to Mr. Tejada's testimony at trial, Mr. Smith bought a soda and was leaving the store with his companions, when the defendant walked into the store carrying a handgun. Smith's companions ran toward the back of the store, as the defendant began to shoot at the unarmed Smith. When Mr. Smith, who was later found to be wearing a bullet-proof vest, did not "go down" right away, the defendant began to shoot him in the face; the defendant shot Smith seven times before he fell to the floor. The defendant then backed out of the store and fled.

John Cabrera testified at trial that he had been watching television in an apartment about 40 feet away from the front of the store when he heard the shots. When the shooting stopped, he looked out of the apartment window and observed the defendant, holding what appeared to be a 9mm. automatic handgun, back out of the store and then run down Blake toward Pennsylvania Avenue. Mr. Cabrera recognized the defendant from having seen him around the neighborhood.

Mr. Tejada, who was still at the store when police responded to the scene, did not tell the police he had seen the shooting; instead, he told a detective that he had gone to the store to get a soda, and had seen a guy lying on the ground. Mr. Cabrera did not speak to police at the scene. Over the next few days, Cabrera told a friend to tell the victim's family that he [Cabrera] had seen the defendant leave the store, and Tejada told the victim's brother, Larry Smith, that the defendant had killed Darryl; Larry replied that he "knew." Cabrera and Tejada also spoke to each other about what they had seen, but police never asked either of them to come to the precinct for an interview, and neither of them volunteered to do so until four months after the murder.

In April 1992, at Larry Smith's request, Mr. Tejeda voluntarily went to the precinct and spoke to the lead investigator on the case; Mr. Cabrera did the same. The defendant was indicted on May 5, 1992, and his trial began on April 12, 1993.

On cross-examination at trial, on April 21, 1993, Mr. Tejeda indicated that a detective had interviewed him at the murder scene. Tejeda testified that he had told the detective he had seen the shooting, and that the detective had taken notes, but that he could not identify the detective other than to say he was black. The defendant's counsel asked for any police reports and memo book entries which had not yet been provided to him, and for any other information pertaining to this detective.

The People told the court that they had not previously known that Tejeda had made a statement at the scene, and the court ordered the People to undertake an inquiry. The next day, April 22, 1993, the People turned over a detective's memo book entry to the defendant, reflecting that Mr. Tejeda had been interviewed at the scene, and that he had told the detective that he [Tejeda] had "come to buy a soda and saw a guy lying on the ground," (*i.e.*, contradicting his testimony that he had told the detective he had seen the shooting).

The trial court denied the defendant's counsel's motion for a mistrial, but ordered that Tejeda be recalled for further cross-examination, and that the People produce the detective who had recorded Tejeda's statement so that he could be interviewed by the defendant's counsel. The court also offered counsel an adjournment to conduct further investigation, and added, "so the record is clear, I find no prejudice because I will give [the defendant's counsel] all the leeway and all the time he needs to do anything with these notes."<sup>2</sup>

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<sup>2</sup> See the excerpt from the Trial Transcript submitted with the People's papers, dated April 22, 2000, at page 171.

When Tejeda resumed the stand, counsel cross-examined him about his inconsistent statement at the crime scene. Tejeda testified that he had not told the detective he had witnessed the murder because he was nervous and frightened, and did not know whether other people at the scene (*i.e.*, within earshot) might be friends of the defendant's.

The Defendant's Current CPL §440.10 Motion

The defendant now contends that the People intentionally failed to disclose the detective's memo book entry recording Tejeda's inconsistent statement, and further asserts that the statement "tends to exonerate" the defendant. The defendant argues that the memo book entry constitutes both "Rosario" material (*People v Rosario*, 9 NY2d 286) and "Brady" material (*Brady v Maryland*, 373 U.S. 83 [1963]), and that the People's failure to disclose it timely requires reversal [*sic*] of the defendant's conviction. The defendant asserts that if his counsel had known about Tejeda's crime-scene statement earlier, counsel "would have more than likely investigated and exploited the fact that there was another person, named Wallace ('Nubbs') Owens, under investigation" in connection with the shooting, and counsel would have located and presented witnesses, particularly Janice Otero and Nicole Hicks, to implicate "Nubbs."

In purported support of this claim, the defendant has submitted police reports summarizing three telephone calls made to police in the hours following the shooting, and the transcript of the People's interview of Janice Otero, conducted on that same date. These documents indicate that (1) Edna Vasquez, who said she was the victim's girlfriend, called police to report that she had heard that "Stub" or "Nub" had killed her boyfriend, and that Janice Otero had seen what happened; (2) Tawana Hicks called to claim that a man named "Nubbs" shot Smith, and that her sister Nicole had seen what happened, but was afraid to talk; and (3) an

anonymous female caller also said “Nubs” was the shooter. In her interview with the People, Janice Otero said she was walking down Blake Avenue and saw a strange man outside the store, whom she described as a light-skinned black man [the defendant is reportedly light-skinned], about 5'6" tall [reportedly much shorter than the defendant], holding his hand inside his jacket -- which she said was “beige” [Cabrera testified that the defendant was wearing a tan jacket]. Ms. Otero said she had walked past the store, and was around the corner when she heard the shots (*i.e.*, she did not say she had seen the shooting, nor did she mention “Nubbs”).

#### The People’s Reply

The People note that sufficient facts appear in the record to have permitted appellate review of the defendant’s claim, and that the defendant unjustifiably failed to raise the claim on his direct appeal. Accordingly, the People assert that the defendant’s motion must be denied pursuant to CPL §440.10[2][c].

The People also argue that even if the defendant’s motion were not procedurally barred, it should be denied as meritless. The People maintain that the record shows that their failure to disclose the memo book entry earlier in the proceedings was inadvertent, and that the defendant was not prejudiced by the delay: they note that Tejeda was recalled to the stand and was impeached with his inconsistent statement; that the detective was made available to counsel; and that the court offered counsel an adjournment to conduct further investigation. The People cite *People v Cortijo*, 70 NY2d 868 [1987]; *People v Brown*, 67 NY2d 555; and *People v Jagopat*, 216 AD2d 583 [2d Dept. 1995], to assert that because the defendant was afforded a meaningful opportunity to use the allegedly exculpatory material, his right to a fair trial was not violated.

Finally, the People characterize as “absurd” the defendant’s claim that had the memo

book entry been timely disclosed, counsel would have presented the testimony of Janice Otero and Nicole Hicks. The People note that the defendant had raised this claim before, in the context of alleging that his counsel was ineffective for failing to call Otero and Hicks as witnesses, and that the federal magistrate who conducted the hearing in connection with the defendant's *habeas corpus* petition, opined that "all that these two witnesses were likely to establish was that the defendant had been contracted by a drug dealer named 'Nubbs' to kill Daryll Smith."<sup>3</sup> In any event, the People maintain, the defendant's claims about Otero and Hicks are entirely unrelated to the delayed disclosure of the memo book record of Tejeda's crime-scene statement.

### Decision

This court agrees with the People that the defendant's motion must be summarily denied on statutory procedural grounds. Under CPL §440.10[2][c], a court *must* deny a motion to vacate judgment when, although sufficient facts appear on the record underlying the judgment to have permitted adequate appellate review of the issue raised, no such appellate review occurred due to the defendant's unjustifiable failure to raise such issue upon his appeal. The People correctly contend that sufficient facts appear on the record to have permitted appellate review of the claim that the mid-trial disclosure of the memo book entry violated the defendant's right to a fair trial. As the People aptly point out, the defendant has relied on the record to advance his claim.

This court would add that the defendant's current CPL §440.10 motion might be summarily denied under either CPL §440.10[3][c], which permits summary denial when the issue underlying the present motion could have been raised by the defendant on a previous CPL

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<sup>3</sup> In announcing his findings after the hearing (see *fn* 1), the magistrate indicated that Cabrera and Tejeda had said the defendant worked for "Nubbs" selling narcotics, and that the brother of the decedent [Larry Smith] had said he knew that Nubbs had not pulled the trigger, but had engaged someone to do so.

§440.10 motion, and/or under CPL §440.30[4][b], for containing no sworn factual allegations to support the claim that the People's delayed disclosure of the memo book entry was deliberate.<sup>4</sup>

Moreover, even if the defendant's motion were not procedurally barred, his claim would fail on its merits. This court rejects the defendant's assertion that Tejada's statement at the crime scene "exonerates the defendant," although it is clear that the People were obliged, under CPL §240.45[1][a], to disclose the written record of that statement to the defendant prior to making their opening statement at trial. However, CPL §240.75 provides that the People's failure to disclose a statement as required under CPL §240.45, "shall not constitute grounds for any court to\*\*\*vacate a judgment in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure [or delayed disclosure, as in the case at bar] materially contributed to the result of the trial."

The defendant has utterly failed to demonstrate that the mid-trial disclosure of Tejada's recorded statement contributed to the jury's guilty verdicts. The defendant's musings about the investigation his counsel "more than likely" would have undertaken had he known of the statement earlier, are not only entirely hypothetical, they are not persuasive – even hypothetically. Tejada's crime scene statement (that he had gone to the store for a soda and saw a guy lying on the ground) implies only that he did not see the shooting – it neither exonerates nor implicates anyone, nor does it provide "leads" to other potential eyewitnesses. The reports containing

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<sup>4</sup>Indeed, while Tejada's inconsistent statements formed the centerpiece of the defendant's claim on direct appeal that the People's witnesses were not credible, the People's "Rosario" violation is mentioned only in a footnote in the defendant's appellate brief (at pg. 8, *fn.* 3), wherein the People's explanation that they were "previously unaware of the existence of the statement" is noted without contention.

“leads” implicating someone else (“Nubbs”) as the shooter, and claiming that Otero and Hicks were eyewitnesses, were timely disclosed to the defendant, as was the transcript of the People’s interview in which Otero said she had only heard the shooting and never mentioned “Nubbs.”


As the People correctly assert, “a defendant’s constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People’s witnesses” (*People v Cortijo*, 70 NY2d at 870, *supra*; *citing People v Brown*, 67 NY2d at 559, *supra*; *People v Smith*, 63 NY2d 41, 68 [1984]; *People v Stridiron*, 33 NY2d 287, 292-293[1973]). See also, *e.g.*, *People v Myron*, 28 AD3d 681, 683-684 [2d Dept. 2006]; *People v Williams*, 682 NYS2d 56 [2d Dept. 1998]; *People v Jagopat*, 216 AD2d 583, *supra*. The defendant in the case at bar was given that opportunity, and counsel used it to impeach one the People’s witnesses.

Accordingly, the defendant’s motion to vacate judgement under CPL §440.10 is summarily denied.

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

Dated: March 26, 2007  
Brooklyn, New York



  
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Raymond Guzman  
Supreme Court Justice

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of such appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted. See 22 NYCRR §671.5.

  
Justice Raymond Guzman

