SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER
Kings County
Indictment Number 883/87

VICTOR SOWELL,

Defendant.

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CHERYL E. CHAMBERS, J.S.C.

Pursuant to CPL 440.10, defendant moves pro se to vacate the judgment of conviction entered against him on March 16, 1988 upon a jury verdict.

FINDINGS OF FACT

Defendant was charged, along with James Royall, by Kings County Indictment Number 883/87 with murder in the second degree and two counts of criminal possession of a weapon in the third degree for shooting and killing Alejandro Welch at approximately 1:00 a.m. on January 23, 1987 on Mermaid Avenue, in front of the Surfside Garden Housing Project in Coney Island, Brooklyn.

At his trial, the People presented testimony from Lonnie Jones under a cooperation agreement that conferred use immunity. Jones testified that he gave defendant two shotguns, and talked with him about robbing Welch. Welch died of shotgun wounds. Other witnesses described the killing and placed defendant at the scene.

The jury found defendant guilty on all three counts. On March 16, 1988, he was sentenced to concurrent terms of 25 years to life in prison on the murder count, and two-and-one-third to seven years on each weapon possession count. The judgment of conviction was affirmed

(*People v Royall and Sowell,* 172 AD2d 703 [2d Dept 1991]), and leave to appeal to the Court of Appeals was denied (*People v Sowell*, 78 NY2d 975 [1991]).

By his present motion defendant seeks an order vacating the judgment of conviction on three grounds: 1) newly discovered evidence, in the form of an affidavit from Jones recanting his trial testimony and claiming that he perjured himself in order to obtain favorable treatment on a drug case; 2) the prosecutor, aided by Detective Sergeant Murnane, knowingly adduced perjured testimony at the trial; and 3) the People failed to disclose *Brady* material, i.e., an agreement to give Jones favorable treatment on his drug case in exchange for his testimony.

The Jones affidavit submitted in support of defendant's motion alleges that Sergeant Murnane and Detective Casey told him to testify as he did at trial, and that his testimony was false. He also alleges that he testified falsely in return for a promise that he would not serve any time in prison as a result of being "caught" with 20 vials of crack cocaine in April of 1987.

CONCLUSIONS OF LAW

Newly Discovered Evidence

The power to grant a new trial on the ground of newly discovered evidence is purely statutory (*People v Pugh*, 236 AD2d 810, 811 [4th Dept 1997], *lv denied* 89 NY2d 1099 [1997]; *People v Latella*, 112 AD2d 321, 322 [2d Dept 1985], *lv denied* 65 NY2d 983 [1985]). This power cannot be exercised unless all the requirements of the statute have been met (*People v Balan*, 107 AD2d 811, 815 [2d Dept 1985], *lv denied* 64 NY2d 1131 [1985]). Determination of whether the criteria have been met rests in the sound discretion of the court (*People v Balan*, 107 AD2d 811).

CPL 440.10 (1) (g) authorizes the court to vacate a judgment when:

> New evidence has been discovered since the entry of judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

In order to constitute newly discovered evidence within the meaning of the statute the proffered evidence must satisfy the following criteria:

> 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could not have been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence

(*People v Salemi* [309 NY 208, 215-16], *cert denied* 350 US 950 [1956], *quoting People v Priori*, 164 NY 459, 472 [1900]). The burden is on the defendant to prove by a preponderance of the evidence every fact essential to the claim of newly discovered evidence (*Latella*, 112 AD2d at 322).

In this case, defendant has not met his burden. Jones' affidavit merely impeaches the testimony of Detective Sergeant Murnane and contradicts his own testimony. Recantation or impeachment does not constitute newly discovered evidence (*People v Cassels,* 260 AD2d 392 [2d Dept 1999], *lv denied* 93 NY2d 1043 [199]); *see People v Saunders,* 301 AD2d 869, 872 [3d Dept 2003], *lv denied* 100 NY2d 542 [2003]). That the recantation also includes allegations of police and prosecutorial misconduct does not alter its nature as recanted evidence (*People v Rodriguez,* 201 AD2d 683 [2d Dept 1994], *lv denied* 83 NY2d 914 [1994]); *People v Dukes*, 106AD2d 904 [4th Dept 1984], *lv denied,* 64 NY2d 1018 [1985]).

Knowing Use of Perjured Testimony

The court is authorized to deny a motion to vacate judgment without a hearing if "the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30 [4] [b]).

Defendant's allegation that the assistant district attorney who tried the case, Kenneth Taub, suborned Jones's perjury, is based on Jones's affidavit. However, Jones does not name Taub or any other assistant district attorney in his affidavit. Defendant's allegation is therefore insufficient to warrant a hearing because it does not substantiate the "essential facts" upon which the motion is based, i.e., that the trial assistant, Kenneth Taub, knowingly adduced perjured testimony (CPL 440.30 [4] [b]). Defendant's allegation is unsupported by any evidence; therefore, the motion, to the extent it is based on this allegation, warrants summary denial (*People v Brown*, 56 NY2d 242 [1982]; *People v Stern*, 226 AD2d 238 [1st Dept 1996] *lv denied* 88 NY2d 1072 [1996]; *People v Gates*, 168 AD2d 995 [4th Dept 1990], *lv denied* 77 NY2d 906 [1991]).

Undisclosed Cooperation Agreement

"A defendant has the right, guaranteed by the Due Process Clauses of the Federal and State Constitutions, to discover favorable evidence in the People's possession which is material to guilt or punishment" (*People v Scott* 88 NY2d 888, 890 [1996]).The People are required to disclose any cooperation agreement with a witness given in exchange for testimony against a defendant (*People v Steadman*, 82 NY2d 1 [1993]; *People v Novoa*, 70 NY2d 490 [1987]).

Defendant alleges, based on Jones's affidavit, that Assistant District Attorney Taub and Detective Sergeant Murnane suborned Jones's perjury by promising him, in exchange for his

testimony, that he would not serve any time in prison for possession of the 20 vials of crack cocaine found in his possession in April of 1987. Such an agreement, if it existed, was not disclosed to defendant, as would have been required.

However, Jones did not name Assistant District Attorney Taub in his affidavit. Jones alleged that it was Detective Sergeant Murnane and Detective Casey who offered him the agreement in exchange for his testimony. Defendant's allegation that Assistant District Attorney Taub entered into the undisclosed cooperation agreement with Jones is therefore unsupported by any evidence; therefore, the motion, to the extent it is based on this allegation, warrants summary denial (CPL 440.30 [4] [b]; *People v Brown*, 56 NY2d 242 [1982]).

The People have submitted an affidavit from Detective Sergeant Murnane denying defendant's allegations. The parties' allegations concerning the existence of a cooperation agreement entered into between Jones and Detective Sergeant Murnane thus conflict. The court is therefore unable to determine the motion without a conducting a hearing.

The testimony of Lonnie Jones and Detective Sergeant Murnane on this issue will be required at the hearing. If defendant wishes to attend the hearing, when scheduled, the court will order his production. The court will also assign counsel to represent him at the hearing. At the hearing defendant will have the "burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 440.30 [6]).

This constitutes the decision and order of the court.

Dated: April 9, 2007

ENTER

J.S.C.