SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 34

THE PEOPLE OF THE STATE OF NEW YORK

-against-

HERBERT BURGESS,
Defendant.

DECISION AND ORDER
Ind. No. 12427/92

APPEARANCES:

For the People:
Robert M. Morgenthau
District Attorney
New York County
1 Hogan Place
New York, New York 10013
By: Maureen T. O'Connor, Esq.
Assistant District Attorney
Of Counsel

For the Defendant:
Herbert Burgess DIN 93 A 3237
Attica Correctional Facility
639 Exchange Street, PO Box 149
Attica, New York 14011-0149
Pro Se

WILLIAM A. WETZEL, J.:

The defendant was indicted by a New York County grand jury on December 16, 1992 for three counts of Murder in the Second Degree, in violation of Penal Law §§125.25(1), 125.25(2), and 125.25(3). On March 23, 1993, the defendant entered a plea of guilty to the crime of Manslaughter in the First Degree, in violation of Penal Law §125.20(1). On April 13, 1993, he was adjudicated a predicate felon and sentenced as a second felony offender to a term of

incarceration of 11 years to 22 years pursuant to the terms of the plea bargain. The defendant is currently incarcerated pursuant to that sentence.

The defendant appealed his conviction to the Appellate Division, First Department. His appeal presented two issues, namely, alleged ineffective assistance of trial counsel and that his sentence was excessive and should be reduced in the interests of justice. See People's Aff. at Ex. C. The Appellate Division rejected both of those arguments and unanimously affirmed the defendant's judgment of conviction on November 29, 1994. See People v. Burgess, 209 AD2d 359 (1st Dept. 1994).

The defendant moved *pro se* on December 12, 1994, for an order pursuant to CPL §440.10 to vacate the judgment of conviction. Once again, the defendant argued that his conviction should be reversed due to ineffective assistance of counsel, raising the same factual claims raised in his brief to the Appellate Division. The Honorable Franklin Weissberg denied that motion on March 12, 1995, without written decision. The defendant did not appeal the denial of that CPL §440.10 motion.

Eleven years later, the defendant files another CPL §440.10 motion alleging a potpourri of claims. He alleges that his counsel was ineffective. Further, he asserts that his confession to the detectives was a result of "torture and coercion." He also claims newly discovered evidence. He seeks to set aside his sentence pursuant to CPL §440.20, and he asks for an order compelling DNA testing pursuant to CPL §440.30. These arguments will be addressed *seriatim*. For the reasons which follow, the defendant's motion is in all respects denied.

Ineffective Assistance Of Counsel

For the third time since his conviction, the defendant presses the issue of ineffective assistance of counsel. That issue was raised by the defendant in his direct appeal to the Appellate Division, and in that brief he made the same factual claims he makes here. See People's Aff. at Ex. C. The Appellate Division decision expressly addressed the issue of effectiveness of counsel, finding that "the record reveals that trial counsel made the appropriate pre-trial motions and negotiated a favorable plea, and does not otherwise support defendant's contention that due to ineffective representation his plea was not knowing, intelligent, and voluntary [citation omitted]." People v. Burgess, supra.

CPL § 440.10(2)(a) states in pertinent part that "the court must deny a motion to vacate a judgment when:(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment." Accordingly, since the issue of ineffective assistance of counsel was explicitly raised in defendant's direct appeal, and determined adversely to the defendant, this branch of the motion must be denied.

Allegations of Torture and Coercion

This defendant pled guilty to Manslaughter on March 23, 1993. See People's Aff. at Ex. A. He then filed a direct appeal, followed by a CPL §440.10 motion. Never did he make allegations that his confession was the product of "torture or coercion." In this motion, filed 13 years after the entry of his plea, he asserts for the first time that the confession was the product of torture and coercion.

CPL § 440.10(3)(c) provides in pertinent part that the court may deny a motion if the defendant was in a position to raise the issue in a prior motion and failed to do so. That is clearly

the case here. The defendant has never raised any issue of torture or coercion until now. Having failed to previously raise issues which could have been raised and adjudicated much earlier, the defendant has waived his right to do so now. Accordingly, this claim affords defendant no basis for relief.

Newly Discovered Evidence

Defendant's claim of newly discovered evidence is twofold; first, he claims that he has located an arrest report indicating that the perpetrator had blonde hair and second, he alleges that his counsel, Daniel Newman, was not licensed to practice law in 1992-1993. Neither of these claims have any merit.

Defendant claims that an arrest report states that the perpetrator of the murder had blonde hair. Defendant failed to produce this arrest report in his moving papers, but has included it in his Reply papers filed on March 20, 2007. The court has examined the arrest report completed by the case detective, see People's Aff. at Ex. D., and compared it to the document provided in the defendant's Reply.

Arrest reports are completed after a defendant is arrested. The descriptions contained therein are descriptions of the defendant in custody. Line 15 of the report contains a box for indication of the defendant's hair color. In his handwritten arrest report, the detective wrote "BK," an abbreviation for "black."

After a detective fills out the arrest report, that report is given to a clerk to input the information into a computer to yield a "Department Arrest Report Run." That is the document included in defendant's Reply brief. The "Hair Color" section of the computerized Arrest Report

reads "BLOND." Clearly, whoever input the data from the detective's original arrest report made an error.

This document cannot meet the requirements of newly discovered evidence set forth in CPL § 440.10(1)(g). Defendant has failed to provide any explanation of why this arrest report, produced at or about the time of the defendant's arrest and provided to him as Rosario material before trial, could not have been produced at trial by the defendant with due diligence. Furthermore, such an arrest report, concededly containing an erroneous description of the defendant having blonde hair, is meaningless. Arrest reports contain a description of the person who has been arrested for the crime, not a description by an eyewitness which is intended to assist the police in arresting an unapprehended perpetrator. Such a discrepancy is a typical, inconsequential transcription error made by the individual who input the report data.

The defendant next alleges that his attorney, Daniel Newman, was not licensed to practice law in 1992-1993. In support of this proposition, the defendant submits a "Lawyer's Diary and Manual" that lists Daniel M. Newman on page 771 in the first column. The Court is at a loss to understand why the defendant thinks this document supports his theory. A "Notice of Appearance" signed by Daniel Newman of the Legal Aid Society, served when the defendant was arraigned, appears in the court file. Court records show that Daniel Newman and Richard Armstrong of the Legal Aid Society appeared as attorneys of record for the defendant, and both lawyers appear in the transcripts of the plea. There is simply no credible basis to believe that Mr. Newman was not a licensed attorney in New York in 1992-93.

Motion to Set Aside the Sentence

The defendant alleges that the procedure to determine his predicate felon status was improper, and that he was not given an opportunity to address the court at the time of sentence. The record belies that assertion.

CPL § 380.50(1) states in pertinent part:

> "At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentencing. The court must then accord counsel for the defendant an opportunity to speak on behalf of defendant. The defendant also has the right to make a statement personally in his or her own behalf and before pronouncing sentence the court must ask the defendant whether he or she wishes to make a statement."

The transcript of the defendant's sentencing, see People's Aff. at Ex. B., shows that the court asked the defendant if there was anything he would like to say, and the defendant replied, "No." People's Aff. at Ex. B., lines 16-18.

The defendant's objection to his adjudication as a second felony offender is equally unavailing. The transcript of that proceeding is found at Ex. A of the People's Affirmation, and an examination of that transcript shows, first, that both Mr. Armstrong and Mr. Newman of the Legal Aid Society were present at the time of the plea, and second, that the allocution on the predicate felony statement was complete and proper. Defendant, represented and advised by counsel, conceded that he had no objections to the predicate felony statement. Therefore, defendant's objection to his conviction on these grounds is meritless.

CPL § 440.30 Motion for DNA Testing

CPL §440.30 was amended in 2004 to eliminate the requirement of a conviction prior to January 1, 1996, as follows:

> "First, the cut-off date of January 1, 1996 was eliminated so it would appear that persons convicted prior to that date who have not previously taken advantage of the opportunity for DNA by accredited state or local laboratories during the 8 year period from the 1996 accreditation of such laboratories will now have to show failure to request testing is not caused by lack of due diligence." McKinneys Commentaries, CPL §440.30.

The defendant's motion fails to allege that his failure to seek DNA testing since 1996 is not a result of his own lack of due diligence. It is apparent that the defendant cannot explain his lack of due diligence because he has no factual basis to do so. The People's Voluntary Disclosure Form, filed and served at the time of the defendant's arraignment on the indictment, clearly informed him that bloody pants, a bloody shirt, and sneakers were recovered from the defendant's person, and a belt was recovered from the victim's neck. The defendant has known about these items since the time of his arraignment in 1992, but has unjustifiably failed to move for testing until 2006.

Moreover, CPL §440.30 mandates a finding that if DNA testing had been conducted and the results admitted at trial, there exists a reasonable probability that the verdict would have been more favorable to the defendant. Under the facts and circumstances of this case, the defendant could not possibly make such a showing. The defendant murdered his roommate in an apartment they shared. He was stopped in the hallway of their apartment building, wearing the bloody clothing and carrying a television set which had been in his apartment. Within minutes, the police found the body of the victim, Barry Whittle, with a belt around his neck. The defendant admitted fighting with Mr. Whittle and punching him in three separate written statements as well as a videotaped statement. He admitted that he fought with his roommate, punched him in the face, and stole the television set. There is no doubt that under these circumstances, the defendant's DNA would have been left at the scene, which was, in fact, his residence. The

bloody clothing which he wants to have tested was in fact the clothing he was wearing at the time of his apprehension, which was minutes after the murder.

Defendant has never claimed that a third person entered the apartment and killed Mr. Whittle, and that DNA testing would reveal the existence of this third person is DNA on his clothes and/or the belt. Under these circumstances, there is no reasonable possibility that DNA testing of these items would result in a verdict more favorable to the defendant.

In view of the foregoing, the defendant's motion is in all respects denied.

The foregoing constitutes the Decision and Order of this court.

Dated: April 16, 2007
New York, NY

William A. Wetzel