SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 51

THE PEOPLE OF THE STATE OF NEW YORK,

- against - DECISION AND ORDER

JESUS AGUILERA, Ind. No. 1070/82

Defendant.

MICHAEL OBUS, J.:

Defendant's pro se motion to vacate judgment pursuant to CPL 440.10 is denied.

Defendant was convicted of murder in the second degree after a jury trial before Justice Dennis Edwards. On October 10, 1985, Justice Edwards sentenced defendant to a prison term of 25 years to life, to run consecutively to a 20 years to life term imposed on defendant upon his Bronx County conviction of another second degree murder. On appeal from the New York County judgment, the Court of Appeals remitted that case for a Huntley hearing, concluding that in denying defendant such a hearing, the New York County trial court improperly applied the doctrine of collateral estoppel to the Bronx Supreme Court's findings regarding the voluntariness of defendant's statements to the police and prosecutors concerning both cases. People v. Aguilera, 82 NY2d 23 (1993). This Court conducted that hearing, and denied defendant's motion to suppress by written decision dated February 21, 1997. That determination, like the Bronx County judgment of conviction, was affirmed on appeal. People v. Aguilera, 276 AD2d 404 (1st Dept. 2000), lv. den. 96 NY2d 731 (2001)(affirmance following remittitur and Huntley hearing); People v. Aguilera, 172 AD2d 234 (1st Dept.), lv. den. 78 NY2d 1073 (1991)(affirmance of Bronx County judgment).

On December 9, 1993, shortly after the Court of Appeals' ruling ordering a separate Huntley hearing, appellate counsel on the New York County case filed a CPL 440.10

motion to vacate judgment before Justice Brenda Soloff on the ground that the People's failure to disclose an audiotape and certain written records likely created by the Medical Examiner's office in the course of their autopsy of the homicide victim violated the rule of People v. Rosario, 9 NY2d 286, cert. den. 368 US 866 (1961). Appellate counsel and the District Attorney's office thereafter filed a number of responses and supplemental papers, the trial prosecutor affirming that she never actually possessed materials from the Medical Examiner. While the court file does not reflect the precise resolution of that motion, a handwritten note in the file in connection with an early 1996 adjournment indicates that during the pendency of defendant's 440.10 motion, the Court of Appeals decided People v. Washington, 86 NY2d 189 (1995), in which it ruled that materials in the possession of the Medical Examiner's office did not constitute Rosario material because of the People's lack of control over documents possessed by that independent institution. Thus, it appears that after Washington, defendant's CPL 440 motion was either denied by Justice Soloff or abandoned by the defendant.

In his current pro se CPL 440.10 motion, defendant raises the identical Rosario claim of counsel's prior 440 motion. He also repeats the argument from his first direct appeal from the New York County judgment, that he was entitled to a separate Huntley hearing on his New York County case. In doing so, defendant has simply re-typed more than 30 pages of the previous 440 motion, and what appears to be a large portion of his Appellate Division or Court of Appeals briefs.

Defendant's motion is denied. If Justice Soloff actually denied defendant's prior CPL 440.10 motion raising the same Rosario issue, defendant is procedurally barred from attempting to re-litigate the matter. CPL 440.10(3)(b). Whether the previous motion was

denied or abandoned, however, the Rosario claim lacks merit. As stated, the Court of Appeals decided this exact issue in People v. Washington, supra, 86 NY2d 189 – a case never mentioned in defendant's current motion – holding that materials in the sole possession of the Medical Examiner do not constitute Rosario material because they are not in the People's "control."

Defendant's motion fails to recognize not only an adverse change in decisional law, but in the governing statutes. Pursuant to CPL 240.75, effective February 1, 2001, "[t]he failure of the prosecutor. . . to disclose statements that are required to be disclosed under. . . subdivision one of section 240.45 of this article [the Rosario provision] shall not constitute grounds for any court to. . . vacate a judgment of conviction in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial. . . ." In fact, as early as 1991, before the conclusion of this defendant's direct appeals, the Court of Appeals applied the same prejudice standard to Rosario claims brought by CPL 440.10 after the exhaustion of the direct appeals process – now the status of defendant's case. People v. Jackson, 78 NY2d 638 (1991). Therefore, even had any Medical Examiner materials constituted Rosario material, defendant's failure to establish any prejudice arising from non-disclosure provides an independent ground for denial of his motion.*

Defendant's claim regarding the trial court's denial of a separate New York County Huntley hearing is also misplaced. As stated, appellate counsel successfully raised this issue in the Court of Appeals, leading to a second Huntley hearing in this county and a

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* While defendant's motion mentions in passing that the purported Rosario violation also constituted violations of due process, equal protection and Brady v. Maryland, 383 US 83 (1963), he likewise fails to suggest how those rights applied to this issue.

second direct appeal. Having won this argument, defendant may not raise it again as a basis on which to vacate judgment.

Accordingly, defendant's motion to vacate judgment is denied.

This opinion is the decision and order of the Court.

Dated: New York, New York
May 10, 2007

J.S.C.

HON. MICHAEL J. OBUS