

People v Smith
2007 NY Slip Op 31423(U)
May 29, 2007
Supreme Court, New York County
Docket Number: 0002405/1990
Judge: Edward J. McLaughlin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 93

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THE PEOPLE OF THE STATE OF NEW YORK,

— against —

**Decision On Motion
To Vacate Judgment**

DARREN SMITH,

Ind. No. 2405/90

Defendant.

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EDWARD J. McLAUGHLIN, J.:

Defendant was convicted of attempted murder in the first degree and related lesser offenses for firing a sawed-off shotgun at a police officer. He was sentenced to an indeterminate prison term of from fifteen years to life on the attempted murder count and to lesser concurrent sentences on the other counts. He moves a second time to vacate his judgment of conviction. For the reasons stated below, defendant's motion is denied.

FACTUAL BACKGROUND

At approximately 6:50 p.m. on February 22, 1990, a civilian flagged down two plainclothes police officers, James Carson and Paul Crowley, as they rode in an unmarked car on anti-crime patrol. The civilian pointed at two black males running west on 185th Street and told the officers that the men had just committed a robbery. One of the men wore a light blue leather coat and light blue sneakers. The other man wore a black jacket with white writing on the back. The men turned onto Broadway, ran south, and turned right onto 184th Street. The officers drove onto 184th Street to chase the men.

After turning the corner onto 184th Street, the officers saw the man in the black

jacket running and the man in the blue jacket standing on the sidewalk next to a building near a courtyard. Officer Carson exited the car and identified himself as a police officer and ordered the man in the blue coat not to move. The man in the blue coat took a couple of steps in the opposite direction, toward Broadway, turned around, and “opened up his jacket” and removed a sawed-off shotgun from “underneath his jacket.” The man “lifted [the shotgun] up” and used both hands to fire a shot at Carson. The shotgun blast did not strike Carson, who fell to the ground, but hit the side of a car parked next to the unmarked police car. The gunman ran back down 184th Street to Broadway.

Minutes later, responding police officers located defendant inside the basement of an apartment building on Broadway between 185th and 184th streets. Defendant was wearing light blue sneakers and a grey jacket. A blue leather coat was found a few feet from defendant. Officer Carson arrived at the basement, where he identified defendant as the gunman. A citizen passerby identified defendant as the person the citizen had seen wearing a blue coat and running into the basement moments after the shooting.

On the next day, the police found a sawed-off shotgun in a courtyard on 184th Street, not far from Broadway. The shotgun had a homemade bent coat hanger holster. Officer Carson identified the shotgun as the one used by the gunman. The police recovered a tan fiber from an unspecified location on the shotgun. The parties stipulated that a comparison of the tan fibers to the fibers of the grey overcoat worn by defendant “could not be made because of the difference in color between the two.”

In this motion, defendant's principal claim relates to trial counsel's failure to call a defense expert to testify about whether the firing of the sawed-off shotgun would have left gunshot residue on the clothing of the shooter, and whether the spray pattern of the shotgun supported an argument that the shooter lacked intent to kill. He argues that some of the expert's proposed testimony constitutes newly discovered evidence, and that trial counsel was ineffective for not calling the expert as a trial witness. Defendant raised a claim of ineffective assistance of counsel in an unsuccessful 1996 motion to vacate judgment, but that claim did not rest on the arguments that defendant makes now. He also argues that the prosecutor violated the *Rosario* rule at the pretrial *Wade* hearing.

LAW

The potential testimony of the defense expert does not meet the legal definition of newly discovered evidence because defendant had an opportunity to present that testimony at trial. During the trial, defense trial counsel consulted with the expert about possibly testifying at trial about gunshot residue and the spray pattern of the shotgun. The expert's post-judgment affidavit summarizes those discussions. The expert's testimony about those issues cannot be considered newly discovered even if, as defendant alleges, the prosecutor had denied the expert access to all of the evidence relevant to forming a opinion about those issues. If the prosecutor had improperly blocked defense access to that evidence, trial counsel should have sought redress from the trial court before the trial ended. Additionally, although defendant's appellate attorney solicited the expert's


opinion about certain trial evidence that defense trial counsel had ignored when she consulted with the expert during the trial, namely the presence of tan fibers somewhere on the shotgun and the testimony of the police ballistics expert, defense trial counsel knew about that evidence during trial and could have asked the expert or another expert to review that evidence and testimony before the trial ended. All of this evidence could have been presented at trial if defense counsel had exercised due diligence to do so (*see People v Copeland*, 185 AD2d 280, 281 [2d Dept 1992]).

Defense counsel's failure to call the expert as a trial witness did not constitute ineffective assistance of counsel. The absence of gun residue on the blue jacket would not have undermined the overwhelming proof identifying defendant as the shooter. In fact, the police testimony describing how the shooter drew the shotgun and fired it demonstrates that the front muzzle of the shotgun would not have emitted residue onto the shooter's jacket. The expert's post-judgment affidavit contains no allegation that the shotgun was fired in a way to cause gunshot residue to be deposited on the shooter's jacket. The expert's affidavit also contains no allegation that the spray pattern of either the actual shotgun or the same model of shotgun would have supported a defense of intent to injure. Nor does the expert definitively state in the affidavit that the presence of the tan fibers was inconsistent with defendant being the shooter. In any event, defense counsel did elicit evidence of the fibers at trial and the jury had the opportunity to consider that evidence in reaching a verdict. Defense counsel cannot be faulted for failing to call as a

witness an expert whose testimony had little, if any, exculpatory value.

No *Rosario* violation occurred at the *Wade* hearing. The hearing minutes show that the prosecutor disclosed the one page arrest investigation report to the defense at the start of the hearing. The record does not support defendant's claim that the memo book of a non-testifying police officer contained *Rosario* material for a hearing witness. Defendant therefore was not deprived of *Rosario* material containing information about the length of time that had elapsed between the shooting and defendant's show-up identification. In any event, the on-the-scene show-up was constitutional even if it had occurred between forty and fifty minutes after the shooting instead of five minutes afterwards as the police officer had stated at the hearing and as the hearing court had found in its decision denying the motion to suppress the show-up (*see People v Gatling*, 38 AD3d 239 [1st Dept 1995] [show up occurred 45 minutes after the crime]).

Dated: May 29, 2007

J. 
EDWARD J. McLAUGHLIN