

**People v Andrews**

2007 NY Slip Op 31836(U)

June 25, 2007

Supreme Court, Queens County

Docket Number: 0000121/2002

Judge: Barry Kron

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Motion

Short Form Order

SUPREME COURT STATE OF NEW YORK  
CRIMINAL TERM - PART K-8 QUEENS COUNTY  
125-01 QUEENS BLVD., KEW GARDENS, N.Y. 11415

P R E S E N T:

HON. BARRY KRON, A.J.S.C.  
Acting Justice

_____	:	
THE PEOPLE OF THE STATE OF NEW YORK	:	Ind. No.:121/02
	:	
-against-	:	<u>Motion To Vacate</u>
	:	<u>Judgment</u>
	:	
JOSHUA ANDREWS,	:	
	:	
Defendant.	:	
_____	:	

The following papers numbered  
1 to 2 submitted in this motion.

By: Kenneth Deane, Esq.  
For The Motion

HON. RICHARD A. BROWN, D.A.  
By: Jill Gross-Marks, ADA  
Opposed

	<u>Papers Numbered</u>
Notice of Motion/Affidavits/Exhibits .....	1
Answering & Reply Affidavits/Exhibits .....	2,3

Upon the foregoing papers, defendant's motion to vacate the judgment of conviction is denied in accordance with the accompanying memorandum.

Date: June 25, 2007

  
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BARRY KRON, A.J.S.C.

DECISION and ORDER

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-8

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THE PEOPLE OF THE STATE OF NEW YORK

BY: BARRY KRON, AJSC

-against-

DATED: JUNE 25, 2007

JOSHUA ANDREWS,

Defendant.

-----X

The defendant has moved for an order pursuant to CPL § 440.10 vacating his judgment of conviction and sentence upon the grounds that his guilty plea was obtained in violation of his Constitutional rights because the People failed to disclose Brady material.

Specifically, defendant states that the People failed to provide him with a tape-recorded interview conducted by two detectives from Virginia in the presence of a New York City detective regarding his involvement in murders that occurred in Virginia several days prior to the Queens County robbery and shooting for which defendant was in custody. During that interview, which occurred before two of defendant's statements to the police about the Queens crimes, defendant stated that he wanted to speak to an attorney.<sup>1</sup> Defendant claims that had the suppression court been aware of this interview by the Virginia authorities,

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<sup>1</sup> Defendant had already made three written statements before asking for an attorney. Two of these statements involved the Queens County incidents and the other detailed the Virginia homicides.

suppression would have been granted as to those two subsequent statements.

Defendant further argues that had suppression of those two statements been granted, he would not have pled guilty to this indictment and would have proceeded to trial.

The People oppose the motion, arguing that defendant's motion is procedurally barred because although he could have, with due diligence, made this claim appear on the record, he failed to do so. Additionally, the People assert that defendant's motion is procedurally barred since his claim that his plea was unconstitutionally obtained is unsupported by any other evidence or affidavit and there is no reasonable possibility that the allegation is true.

The People argue that defendant's Brady claim is also meritless because the defendant knew of the existence of his taped interview by the Virginia detectives; the conversation involved Virginia crimes and did not exculpate him of the Queens incident; the prosecutor was not aware of the tape prior to the instant motion; and in light of the other evidence of the defendant's guilt, there is no reasonable possibility the defendant would not have accepted the advantageous plea offer even if the two statements had been suppressed as a result of the taped interview.

Indictment 121-02 was filed against defendant and co-defendant Jamel Crawford, charging them with two counts of Attempted Murder in the Second Degree (PL §110/125.25[1]); four counts of Assault in the First Degree (PL §§120.10[1][3]); Criminal Possession of a

Weapon in the Second Degree (PL §265.03[2]); three counts of Attempted Robbery in the First Degree (PL §§110/160.15[2][4][1]); Attempted Robbery in the Second Degree (PL §110/160.10[1]); Criminal Possession of a Weapon in the Third Degree (PL §265.02[4]); and Conspiracy in the Fourth Degree (PL §105.10[1]) for incidents which occurred in Queens County on January 7, 2002. Specifically, defendant and co-defendant were charged with the shooting of an employee during an attempted robbery at a store in Queens County and the shooting of an off-duty traffic agent during the flight from the crime scene.

On April 11, 2002, pursuant to a cooperation agreement, Kalim Morgan, an unindicted co-conspirator, pled guilty to Robbery in the First and Third degrees with a promise of a dismissal of the first degree robbery count and a sentence of five years probation for third degree robbery conditioned upon his cooperation in the prosecution of this indictment.

On October 22, 2003, pursuant to a Cooperation Agreement, co-defendant Crawford pled guilty to two counts of Attempted Murder in the Second Degree with a promise of a ten year concurrent sentence conditioned upon his cooperation in the prosecution of this indictment.

A hearing to determine the admissibility of six statements and identification testimony was conducted on seven separate dates between December 15, 2003 and August 11, 2004, before the Honorable

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<sup>2</sup>Copies of the Cooperation Agreements were submitted with the People's response to this motion.

Sean O'Dwyer (JHO).

At the hearing, the People called five police officer witnesses: Sergeant Sbarra<sup>3</sup>, Detective Solomon, Lieutenant Branchers, Detective Heidrich and Detective Lynam<sup>4</sup>.

At the hearing, Detective Heidrich testified that pursuant to his investigation of the Queens shooting, he met defendant at the 40 Precinct on January 8, 2002. The New York City Police Department had been notified that defendant and co-defendant Crawford were also wanted by Virginia authorities in connection with shootings that had occurred in that state.

At approximately 2:15 PM, the detective advised defendant of his Miranda warnings and defendant proceeded to make a written statement. In the statement, defendant admitted to going to the store in Queens County to do a robbery with two other individuals, but stated that he had stayed in the car during the robbery. He also acknowledged that he was in the car when they fled from the robbery scene and that the car went into the yard of a policeman. Defendant stated that one of the other individuals in the car shot the man.

At approximately 3:30 PM, Detective Heidrich administered the

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<sup>3</sup>Sergeant Sbarra testified to the stop of the vehicle driven by co-defendant Jamal Crawford. in which defendant was the front seat passenger.

<sup>4</sup>According to the testimony of Detective Solomon, the owner of the grocery store, Mr. Moonab, gave a description of the two perpetrators and then later identified defendant in a line-up as the person who had shot his employee, Mr. Atanda, during the attempted robbery. Detective Lynam testified that Mr. Atanda identified defendant in a photographic array. A witness of the subsequent shooting did not identify defendant in the line-up, but stated that he looked like the person who had shot the off duty traffic agent, James Celestine.

Miranda warnings again and defendant made another written statement which involved the Virginia murders.

At approximately 6:00 PM, defendant made a third statement regarding the Queens robbery wherein he admitted to participating in the robbery, but stated that another participant shot the two individuals.

Detective Solomon testified that he was present at the 40<sup>th</sup> precinct when defendant made the second written statement to Detective Heidrich. Thereafter, while on the way to the 113<sup>th</sup> Precinct, defendant told the detectives that one of the guns from the crimes was thrown in the river and the other gun was at a location in the Bronx.

While at the 113<sup>th</sup> Precinct, on January 9 at approximately 1:25 AM, after again being advised of his Miranda rights, defendant made another written statement to Detective Heidrich regarding his involvement in the Queens shootings. In this statement, defendant admitted to being the shooter of the grocery store employee and the man on the street.

Thereafter, at approximately 3:50 AM, defendant made a video-taped statement regarding his involvement in the robbery and shootings.

Detective Solomon also testified that on January 9, 2007, while on the way to Central Booking after the the line-up procedures, defendant stated that he was the person who did the actual shooting.

At the conclusion of the hearing, defendant's motion to

suppress the identification evidence and the statements was denied. Specifically, the Court held that the oral, written and video-taped statements made by defendant on January 8, and January 9, 2002 at the 49<sup>th</sup> and 113<sup>th</sup> Precincts were made by defendant with a knowing, intelligent and voluntary waiver of his constitutional rights.

On May 23, 2005, defendant appeared before this Court (Kron, J.) and pled guilty to two counts of Attempted Murder in the Second Degree with a promise of concurrent determinate 13 year sentences, respectively, with five years post-release supervision. As part of the plea agreement, defendant waived his right to appeal the conviction and the rulings with regard to any and all pre-trial applications, motions, hearings, and proceedings. Defendant indicated to the Court that he understood the Waiver of his Right to Appeal and then signed the document, along with his attorney.

On June 23, 2005, defendant was sentenced as promised to two concurrent determinate terms of imprisonment of thirteen years and 5 years post-release supervision.

Defendant was thereafter extradited to Virginia to face murder charges for an incident that occurred on December 21, 2001, approximately two weeks before the Queens shootings.

During the discovery proceedings in the Virginia case, an audiotape of an interview of defendant that had occurred on January 8, 2002 at 10:25 PM while he was in custody at the 113<sup>th</sup> precinct, and which was conducted by Detectives Sam Walker and Paul Masterson of the Prince William County Police Department, was given to the defense. The conversation on the tape involved the investigation of

shootings that had occurred in Virginia. New York City Det. Heidrich was also present during the interview.

At the commencement of the interview, defendant was advised of his Miranda rights by Det. Walker (Tape Transcript pp 1-3). At one point during the interview, defendant stated that he wanted to plead the "fifth" and that his statements would not be able to be used because he wanted to speak to a lawyer (Tape Transcript p 137). Defendant and the detectives also made reference to the fact that the interview was being tape recorded (Tape Transcript pp.138-139).

Defendant now claims that because this tape recording was not given to his defense counsel during the discovery proceedings of this indictment, his conviction should be vacated due to a Brady violation. He argues that had the last two statements that he made to the police been suppressed because of a violation of his right to counsel, he would not have accepted the plea offer and would have proceeded to trial.

#### DECISION

Criminal Procedure Law § 440.10 (3) (a) states that a motion to vacate a judgment of conviction may be denied where the issue could have been, with due diligence, made to appear on the record for appeal, but the defendant unjustifiably failed to do so and the ground was not subsequently determined upon appeal.

The purpose of a post-conviction motion is to inform the court of facts not reflected in the record and unknown at the time of

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<sup>5</sup>Defendant has submitted a copy of the transcript of the audio taped interview.

judgment which, as a matter of law, would undermine the basis of the judgment. The proceedings are viewed as an emergency measure to afford a defendant a remedy when no other judicial relief is, or ever was, available to him (People v. Bennett, 30 N.Y.2d 283,287-288 (1972)).

In the circumstances of this case, defendant was fully aware of his assertion of his right to counsel and the existence of the audiotape from the moment that it was made. Defendant was engaged in the conversation with the detectives, made reference to the tape recording during the interview, and was well aware, as evidenced by his remarks, that the consequence of his assertion of his right to counsel was that the statements could not be used against him.

Without question, there was ample opportunity for defendant to make these facts appear on the record by his motion to suppress the statements, during the pre-trial hearings or at any point prior to his plea and the imposition of his sentence. Defendant, nonetheless, chose not to alert the Court and apparently his attorney to the existence of the audiotape or his assertion of his right to counsel. Thus, defendant has not satisfied the due diligence requirement of the statute (CPL § 440.10 [3][a]; People v. Donovan, 107 A.D.2d 433 [2d Dept. 1985]). Accordingly, his motion to vacate the judgment is denied as procedurally barred.

Wholly aside from this procedural flaw, defendant has failed to state a viable Brady claim for the People's failure to disclose the taped interview to defense counsel.

By pleading guilty, defendant has waived his contention that

the prosecution failed to turn over the alleged Brady material to him. Because a guilty plea works as a forfeiture of nonjurisdictional defects, it forecloses a host of challenges that would otherwise be reviewable as a matter of constitutional, statutory or decisional law (People v. Heinig, 21 A.D.3d 1297 [4<sup>th</sup> Dept. 2005] [Brady claim forfeited by plea of guilt]; People v. Thompson, 174 A.D.2d 702 [2d Dept. 1991] [Brady claim waived by plea of guilt]; People v. Day, 150 A.D.2d 595 [2d Dept. 1989] [same]). Thus, defendant's current Brady claim with regard to this evidence was forfeited by his plea of guilt.

In any event, it is well-established that Brady material consists of: material that is favorable to the defendant; that is material to guilt or punishment; is known to the prosecution; and that the defense was unaware of sufficient facts to permit it to obtain the material (see e.g. United States v. Agurs, 427 U.S. 97 [1975]; People v. LaValle, 3 N.Y.3d 88 [2004]; People v. Baxley, 84 N.Y.2d 208 [1994]). Here, defendant was well aware of the taped conversation with the Virginia detectives and his assertion of his right to counsel, in that, he was a direct participant in the dialogue. In fact, during the discussion, the detective and defendant made references to the tape recording (see Tape Transcript pp.138-139).<sup>6</sup> He cannot now, over five years later,

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<sup>6</sup>The Prosecution cannot argue that because the individual prosecutor was unaware of the existence of the taped interview, it is not Brady material. Detective Heidrich of the New York City Police Department was present for the conversation, and therefore the People are deemed to be aware of its existence (People v. Santorelli, 95 N.Y. 412 [2000]; People v. Wright, 86 N.Y.2d 591 [1995] ).

claim that he was unaware of the existence of this material (People v. LaValle, *supra*; People v. Doshi, 93 N.Y.2d 499 [199]; People v. Sedg., 18 A.D.3d 11 [3<sup>rd</sup> Dept. 2005]; People v. Singleton, 1 A.D.3d 120 [4<sup>th</sup> Dept. 2003]; People v. Sebak, 270 A.D.2d 166 [1<sup>st</sup> Dept. 2001]; People v. Quinones, 228 A.D. 2d 796 [3<sup>rd</sup> Dept. 1996]). Under these circumstances, defendant has failed to establish that the taped conversation was Brady material.

Moreover, in order for a defendant to prevail on a Brady claim where a specific request for the material has been made, he must establish a reasonable possibility that the material was exculpatory and that nondisclosure contributed to the verdict (People v. Vilardi, 76 N.Y.2d 67,77[1990]). If only a general request for the material has been made, a defendant must show that failure to disclose the material created a reasonable probability that the result of the proceeding would be different (People v. Vilardi, *supra*).<sup>7</sup>

In this case, defendant fails to establish a viable Brady claim under either standard. Even assuming the disclosure of the tape would have resulted in the suppression of defendants's last two statements to the police, the remaining evidence of defendant's guilt was formidable. Defendant had been identified by two eyewitnesses as the shooter of the employee at the store; an

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<sup>7</sup>In the Demand to Produce, counsel had requested any written, recorded or oral statement of the defendant or co-defendant made in the course of the criminal transaction to a public servant engaged in law enforcement activity or to a person acting under his direction or cooperation with him.

eyewitness to the second shooting stated that defendant looked like the perpetrator; and his codefendant and another co-conspirator were going to testify against him. Additionally, defendant had made statements at the 40<sup>th</sup> Precinct regarding his involvement in the robbery and shootings and an oral statement regarding the location of the guns from the crimes prior to arriving at the 113th Precinct. All three of these statements were inculpatory as to his participation in the robbery and the two shootings in Queens County and would not have been legally compromised by the disclosure of the taped interview.

Therefore, in light of the evidence of defendant's guilt, there is no reasonable possibility or probability that defendant would have foregone an advantageous plea and proceeded to trial simply because these last two statements were suppressed.

Although defendant was exposed to consecutive 25 year terms of imprisonment, defendant's attorney obtained a favorable plea agreement in which the defendant pled guilty to two counts of attempted murder and was sentenced to concurrent terms of 13 years incarceration with five years post-release supervision.

The record reflects that defendant was represented by counsel at the time he pled guilty. At the time of the plea, defendant acknowledged that he wished to plead guilty, that he was not being forced to plead guilty, that he had enough time to speak to his

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Defendants's argument that the first statements at the 40<sup>th</sup> Precinct were not inculpatory because defendant did not admit to being the actual shooter is not correct. In both his statements, defendant places himself at the crime scenes with the other perpetrators at the time of the attempted robbery and both shootings.

attorney, that he was giving up his right to a trial and to remain silent, and that the Court promised to impose a concurrent sentence of thirteen years with five years post-release supervision. Defendant also signed a waiver of his right to appeal and indicated that he understood that he would not be able to vacate his plea, that he could not challenge any rulings made in the case and that the case was over once he was sentenced. Based on defendant's unequivocal affirmations to the Court, he has failed to establish that his plea was not knowing, voluntary and intelligent in nature (CPL §440.30[4][d]; People v. Cobb, 19 A.D.3d 506[2d Dept. 2005]; People v. Sayles, 17 A.D.2d 924 [3d Dept. 2005]; People v. Santiago, 227 A.D.2d 657 [3d Dept. 1996]).

Accordingly, defendant's motion is denied in all respects.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for the defendant and the District Attorney.

  
BARRY KRON, A.J.S.C.