

**People v Hai Guang Zheng**

2007 NY Slip Op 33009(U)

September 21, 2007

Supreme Court, Queens County

Docket Number: 0003282/1995

Judge: Robert C. Kohm

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Short Form Order

SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM - PART K-7- QUEENS COUNTY  
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM, J.S.C.  
Justice

_____	:	
THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	Ind. No. 3282/95
-against-	:	
	:	Motion Vacate Judgment
HAI GUANG ZHENG,	:	
Defendant.	:	
_____	:	

The following papers numbered  
1 to 5 submitted in this motion.

HAI GUANG ZHENG, PRO SE  
For the Motion


Hon. RICHARD A. BROWN, D.A.  
BY: USHIR PANDIT, ESQ.  
Opposed

	Papers Numbered
Notice of Motion and Affidavit _____	1-2
Affirmation in Opposition _____	3
Supplemental Affirmation in Opposition _____	4
Reply _____	5

Upon the foregoing papers, defendant's motion is denied in all respects. See accompanying memorandum.

GLORIA D'AMICO  
Clerk

Date: September 21, 2007



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ROBERT CHARLES KOHM, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS : CRIMINAL TERM : PART K-7

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THE PEOPLE OF THE STATE OF NEW YORK	:	BY: ROBERT CHARLES KOHM, J.
	:	
-against-	:	DATE: SEPTEMBER 21, 2007
	:	
HAI GUANG ZHENG,	:	IND. NO. 3282/95
Defendant.	:	
	:	

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Defendant, pro se, makes this motion for an order directing that forensic Deoxyribonucleic Acid (DNA) testing be performed on specific evidence; for an order vacating the judgment of conviction, and to have defendant produced at any hearing.

Defendant was indicted by a Queens Grand Jury for kidnapping in the first (eight counts) and second degrees, rape in the first degree (two counts), sexual abuse in the first degree (two counts), and criminal possession of a weapon in the second degree.

After a jury trial defendant was convicted of kidnapping in the first degree (four counts), rape in the first degree (two counts), kidnapping in the second degree, sexual abuse in the first degree (two counts), and criminal possession of a weapon in the second degree. On August 15, 1996, defendant was sentenced.

The judgment of conviction was appealed and defendant argued that the Court erred by refusing to charge the jury as to the defense of duress and his sentence was excessive.

The Appellate Division, Second Department modified the judgment by vacating the conviction of one count of sexual abuse,

finding that no evidence pertaining to that count was adduced at trial. Other than that the Appellate Division affirmed the judgment (see, People v Zheng, 268 AD2d 443). Defendant sought leave to appeal to the Court of Appeals and the application for leave was denied (see, People v Zheng, 95 NY2d 835).

Defendant then moved to vacate his judgment of conviction and argued that he was denied effective assistance of counsel, inter alia, because his trial counsel failed to have the serological evidence tested for DNA after defendant denied any involvement in the rape. On June 18, 2001, Justice Katz denied defendant's motion and found that defendant's claims were procedurally barred pursuant to CPL § 440.10 based on the fact that the allegations were in the record, and could have been reviewed on defendant's direct appeal. Also, defendant's claims are without merit.

Defendant sought leave to appeal the denial of his motion to vacate judgment and sought a writ of error coram nobis claiming that appellate counsel was ineffective because counsel failed to raise on appeal the claims defendant raised in his motion to vacate. The Appellate Division denied both defendant's application for leave to appeal and his application for a writ of error coram nobis.

In support of the current motion for an order granting post-conviction DNA testing, defendant argues that identity was the main issue in this case. He admitted to the kidnapping,

however, he denied raping either of the two victims. Because the rape kits of the two victims indicated presence of sperm cells and had a DNA test been conducted of this evidence, his innocence would have been established.

The People argue that the motion should be denied because defendant cannot establish that DNA testing could have produced a verdict more favorable to him, and also, the current whereabouts of the rape kits are not known.

There is no merit to defendant's argument.

Criminal Procedure Law § 440.30 (1-a) provides that a court is authorized to grant the application for forensic DNA testing if the court determines that "if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant."

In conjunction with the filing of a motion for post-conviction DNA testing, the court may direct the People to provide the defendant with information in their possession concerning the current physical location of specified evidence. If the evidence no longer exists or the physical location is unknown, the court may direct that the People make a representation to that effect, and provide information and documentary evidence concerning the last known location of the evidence (CPL § 440.30[1-a][b]).

The court must determine if the DNA evidence exists. In

order to do this, the court should take steps to obtain reliable information from the People as to whether or not the evidence sought exists and the source of such information. It is sufficient for the People to submit an affidavit from an individual with direct knowledge of the status of the evidence or an official record indicating its existence or nonexistence (People v Pitts, 4 NY3d 303).

According to the Police Department representatives and Police Department records, neither of the rape kits was ever returned to the warehouse where such evidence is stored. The items were transported to the court from the District Attorney's office. The rape kits were marked for identification at the trial and were returned to the trial prosecutor Scott Kessler. A search of the District Attorney's office was of no avail. In support of the above, the People submitted the Bridge Sheet from the court, and affidavits from Scott Kessler, ADA and Kathleen Moran, a paralegal assigned to the Special Victims Bureau.<sup>1</sup>

The People also submitted an affidavit from Property Control Specialist Geraldine Kiely, stating that she searched the records and inventory of the Pearsons Place Warehouse for the two rape kits and the kits are not there.<sup>2</sup>

The evidence at the trial established that the incident started with a kidnapping of the two victims on March 31, 2007,

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<sup>1</sup>People's Affirmation in Opposition dated 6/25/07

<sup>2</sup>People's Supplemental Affirmation dated 8/22/07

and lasted until early morning of April 2, 2007; both victims were raped, and defendant admitted to the kidnapping. If a DNA test resulted in identifying the defendant as the source of the sperm, it would conclusively establish his guilt. However, if the DNA test did not result in identifying the defendant as the source of the sperm, it could establish that the victim had intercourse with the codefendant. Even if the rape kits were located and tested, it would not establish that defendant is innocent of the rape. The defendant has not shown that if the results of a DNA test were admitted in the trial, there is a reasonable probability that the verdict would have been more favorable to the defendant (see, People v Smith, 245 AD2d 79; People v De Oliveira, 223 AD2d 766; People v Kellar, 218 AD2d 410).

Based on the foregoing, the motion to vacate the judgment of conviction is denied in all respects.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this memorandum and order to the attorney for defendant and to the District Attorney.

  
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ROBERT CHARLES KOHM, J.S.C.