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MOTION

Short Form Order

SUPREME COURT STATE OF NEW YORK
CRIMINAL TERM - PART K-16 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.:2919/98
-against-	Motion: To Vacate Judgment
WILLIAM WILSON,	
Defendant.	

The following papers numbered
1 to 3 submitted in this motion.

By: Defendant, Pro Se
For The Motion

HON. RICHARD A. BROWN, D.A.
By: Merri Turk Lasky, ADA
Opposed

	Papers Numbered
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: November 1, 2007

Barry Kron
BARRY KRON, A.J.S.C.

D E C I S I O N a n d O R D E R

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-16

THE PEOPLE OF THE STATE OF NEW YORK	BY: BARRY KRON, AJSC
-against-	DATED: November 1, 2007
WILLIAM WILSON,	
Defendant.	IND. NO.: 2918/98

The defendant has moved for an order pursuant to CPL § 440.10 vacating the judgment of conviction and sentence on the ground that the court denied his "right to call an expert in eye-witness testimony".

The People oppose the motion, arguing that defendant's claims are procedurally barred, facially defective or fail to state any basis for relief.

Following a jury trial, defendant was convicted on June 10, 2001, of Robbery in the First Degree and Robbery in the Second Degree. Defendant was sentenced as a second felony offender to concurrent determinate terms of imprisonment of ten and one half years and seven years, respectively (Rosenzweig, J.). On appeal, the Appellate Division unanimously affirmed the judgment of

conviction(293 A.D.2d 767(2d Dept. 2002)).In his appeal, defendant raised the issue that the court committed error when it, after hearing the testimony of the two eyewitness victims, reversed a prior ruling and did not allow the defense to call an expert on eyewitness identification.[1] The Appellate Division determined that the issue was unpreserved for appellate review or without merit. Currently, defendant is incarcerated pursuant to this judgment.

On December 3, 2003, defendant moved for an order vacating his sentence pursuant to CPL 440.20, claiming that his attorney was ineffective. On April 5, 2004, the Court denied defendant's motion(Rosenzweig,J.).

Criminal Procedure Law 440.10(2)(a)states that a court must deny a motion to vacate judgment where the issue was previously determined on the merits upon an appeal from the judgment unless there has been a retroactive change in the law.

Here, the issue regarding the expert eyewitness identification evidence was raised and rejected by the Appellate Division. For this reason, the motion must be denied.

Defendants's claim the Court of Appeals decision in People v. LeGrand (8 N.Y.3d 449(2007))represents a retroactive change in the law that would change the result of the appeal is incorrect. In LeGrand, the Court of Appeals stated that the admissibility of expert eyewitness testimony continues to rest in the sound

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[1] The Court had conducted a Frye hearing and determined an expert on eyewitness testimony could testify regarding the effect of identification after numerous viewings of the subject and the correlation between level of confidence and accuracy.

discretion of the trial court, and its admissibility would also depend on the existence of sufficient corroborating evidence to link the defendant to the crime (Supra at 456,458). Specifically, the Court held there may be cases where it would be an abuse of discretion to exclude such expert testimony because the evidence consists of an uncorroborated eyewitness identification. Where sufficient corroborating evidence is found to exist, however, an exercise of discretion excluding the eyewitness expert testimony would not be fatal to a jury verdict convicting the defendant (Supra, at 458).The Court also stated that the trial court would be obligated to exercise its discretion with regard to the relevance and scope of the expert testimony(Supra, at 458).

Here, the evidence of defendant's identification consisted of two separate victim eyewitnesses from the robbery. Each of these witnesses testified that they had an unobstructed view of defendant during the robbery of the store, and each independently identified defendant at trial as one of the perpetrators of the crime. Thus, under the standards of LeGrand, there was no abuse of discretion by the court in excluding the expert testimony.

It was also a proper exercise of discretion for the trial court to determine, after hearing the eyewitnesses testimony, that there was not an evidentiary basis for the expert to testify regarding the effect of numerous viewings and the correlation between level of confidence and accuracy. Under these circumstances, there is no retroactive change in the law warranting the requested relief.

Based upon the foregoing, defendant's motion to vacate the judgment is denied.

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

BARRY KRON, A.J.S.C.