

**People v Martin**

2007 NY Slip Op 34036(U)

November 29, 2007

Supreme Court, Kings County

Docket Number: 0005088/1981

Judge: Raymond Guzman

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**MEMORANDUM**

**SUPREME COURT - KINGS COUNTY - CRIMINAL TERM - PART 9**

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**THE PEOPLE OF THE STATE OF  
NEW YORK,**

**: By: Raymond Guzman, J.S.C**

**: Dated: November 29, 2007**

**-vs-**

**RICKY MARTIN,**

**: Indictment #5088/81**

**Defendant.**

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**:**

Defendant was convicted of two counts of Murder in the Second Degree (PL §§ 125.25[1], [3]) and Criminal Possession of a Weapon in the Second and Third Degrees (PL former §§ 265.03, 265.02[4]). The Appellate Division subsequently affirmed his conviction. (*People v Martin*, 108 AD2d 928 [1985]). Defendant moves pro se pursuant to CPL §440.10 for an order vacating his judgment of conviction on the grounds that he was denied *Brady* material and that he received ineffective assistance of counsel. Specifically, defendant alleges that the People withheld information concerning potential suspects, trial witnesses and a purported cooperation agreement with one of the those witnesses. Furthermore, defendant claims that his attorney was ineffective for failing to investigate the alleged *Brady* material. Defendant also seeks relief on the grounds that he is actually innocent. For the following reasons, the motion is denied in its entirety.

Background

On October 22, 1981, Harold McKnight and his friend, Keith Levy, were leaving a

grocery store in Brooklyn when Albert Prestia, a Canada Dry deliveryman, entered the store to make a delivery. McKnight and Levy unsuccessfully tried to break into the back of the delivery truck while Prestia was inside the store, with Levy standing as a lookout. Levy took a coat from the cab of the truck, but he tossed it to the ground when he ran around the corner to avoid being caught by Prestia when Prestia returned to the truck. McKnight remained nearby on the sidewalk.

Independently of the attempt to break into the delivery truck, two different men appeared, armed with guns, and surrounded Prestia in a second attempt to rob him. Prestia hit one of them and tried to run back to the store, but a third perpetrator appeared and knocked him into the delivery truck. As Prestia again tried to escape, one of the first two perpetrators fired and shot him twice in the back. McKnight, who had witnessed the robbery and shooting from the sidewalk, later identified defendant as the shooter in a photographic lineup. Another eyewitness to the shooting, Raymond Woodson, also recognized defendant and identified him to the police.

McKnight and Levy cooperated with the police investigation and testified in court, but neither were prosecuted for their attempted robbery. At defendant's trial, Levy testified that he was promised leniency on an unrelated matter in return for his cooperation; McKnight testified that no deal had been made between him and the prosecution.

Following his conviction on July 22, 1982, defendant was sentenced on September 8, 1982 as a second violent felony offender to concurrent prison terms of twenty-five years to life on each of the murder counts, and four to eight years and two and one-half to five years on the weapon counts. The Appellate Division subsequently affirmed the conviction. This is the sixth motion defendant has brought under CPL §440.10 in addition to his appeal, a writ of *coram nobis*

and a writ of *habeas corpus*. Defendant now alleges (1) that the People failed to name all suspects and potential witnesses, (2) that the People failed to disclose an alleged cooperation agreement with Harold McKnight, (3) that he received ineffective assistance of counsel, and (4) that he is actually innocent of the charges brought against him. Defendant failed to raise claims 1, 3 and 4 in his prior motions, and his second claim was previously determined on the merits on appeal. Defendant's instant motion is denied procedurally and on the merits.

### Conclusions of Law

Defendant first claims that the People violated *Brady v Maryland* by failing to disclose that the police considered McKnight and Levy as murder suspects and that two other people were present at the scene of the crime (*Brady v Maryland*, 373 US 83 [1963]). This claim is procedurally barred because defendant failed to raise it either on appeal or in one of his five prior motions to vacate his conviction (CPL §440.10[2][c]). Defendant also failed to substantiate it with sworn allegations, as required by statute (CPL §440.30[1]). In any event, defendant's claim is meritless because the information at issue is not *Brady* material.

A *Brady* violation occurs when the prosecution withholds from the defense exculpatory evidence that is favorable to the defendant or where the evidence is material to defendant's guilt or punishment (*Brady v Maryland* at 87). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different (*People v Bagley*, 473 US 667, 682 [1985]). A "reasonable probability" is "sufficient to undermine confidence in the outcome" of the trial (*Strickland v Washington*, 466 US 668, 694 [1984]).

In this instance, the names of suspects and potential witnesses are not material under *Brady v Maryland*. That the police, at some point, considered other suspects does not exculpate defendant (*People v Pepe*, 259 AD2d 949 [4th Dept. 1999]). Furthermore, defendant has not alleged what exculpatory information the purported witnesses may have provided. Speculative theories involving other suspects do not constitute exculpatory evidence, especially where, as here, the investigation did not yield a connection between the suspects and the crime (*see People v Snow*, 237 AD 2d 118 [1st Dept. 1997]; *People v Pack*, 189 AD2d 787 [2d Dept. 1993], lv. denied 81 NY2d 975 [1993]). Any evidence tending to show that someone else committed the crime charged must raise more than a mere suspicion. Under *Brady*, the People were not required to disclose such “preliminary, challenged, or speculative information” (*United States v Diaz*, 922 F2d 998,1006 [2d Cir. 1990]).

Defendant’s allegations are also insufficient to prove that the police actually considered McKnight as a suspect in the homicide, as defendant alleges. To the contrary, defendant acknowledges that, during the suppression hearing, the detective denied suspecting McKnight. Nor has defendant established that any of this information was actually withheld from the defense (CPL §440.30[1], [4][b]). He has not provided a sworn affidavit from his attorney stating what information the prosecution provided.

In any event, defendant was not denied a fair trial because he still had a “meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case” (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *see also People v Myron*, 28 AD3d 681 [2006]; *People v Brims*, 19 AD3d 433 [2005]). Defendant’s allegations are based on testimony given during the pretrial suppression hearing, in which the defense cross-

examined the detective about his alleged investigation of McKnight and Levy. Accordingly, defendant was able to use this material during trial. McKnight and Levy also testified at trial and the defense had ample opportunity to cross-examine them. Defendant has thus failed to establish this element of his *Brady* claim.

In his second *Brady* claim, defendant alleges that the prosecution failed to disclose a cooperation agreement between McKnight and the People. This claim is procedurally barred because it was previously determined on the merits in a prior CPL §440.10 motion (Sept. 20, 2000, D'Emic, J.), and denied in a federal habeas corpus petition (Nov 20, 2001, E.D.N.Y) (CPL §440.10[3][b]). Defendant has also failed to substantiate it with sworn allegations of fact and it is contradicted by the record (CPL §440.30[1], [4][d][i]).

At trial, McKnight testified that he had not made a deal with the People and the Assistant District Attorney testified that he did not recall entering into such an agreement. Defendant's claim is even less likely given that the People properly fulfilled their *Brady* obligations by disclosing a cooperation agreement with Levy, another prosecution witness. In view of the circumstances, there is no reasonable possibility that this allegation is true (CPL §440.30[4][d][ii]). Like defendant's first *Brady* claim, defendant has not established that such information was actually withheld or that he was denied a fair trial.

Defendant further claims that he received ineffective assistance of counsel because his attorney did not investigate the purported *Brady* material when he became aware of it at the suppression hearing. This claim is procedurally barred because defendant failed to raise it in any of his five prior CPL §440.10 motions (CPL §440.30[3][c]). Defendant's claim of ineffective assistance of counsel is also without merit.

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1, §6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was outside the "wide range of professionally competent assistance" (*Strickland v Washington* at 690). Defendant also must be able to show that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

In New York, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). "This protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187 [1994]). Accordingly, the reviewing court must separate ineffectiveness from "mere losing tactics" and the defendant must "demonstrate the absence of strategic or other legitimate explanation" for counsel's conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel's choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by his attorney's performance (*id.*).

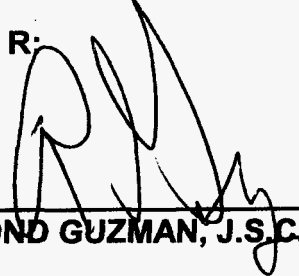
In this instance, defendant has not made out a claim for ineffective assistance of counsel under either the federal or state standard. Defendant's claim rests on counsel's failure to investigate the purported *Brady* material, yet defendant has not asserted what exculpatory information the alleged witnesses would have provided, if any. "[C]ounsel's obligation to pursue

a particular contention or avenue of defense contemplates that the claim be 'colorable' and that the advocate's failure to pursue a particular course of conduct may be legitimately based on a justifiable belief that there is no 'colorable' basis to do so" (*People v DeFreitas*, 213 AD2d 96, 101 [1<sup>st</sup> Dept. 1995]). Accordingly, counsel cannot be faulted for "failing to pursue a potentially futile endeavor" when he legitimately believed the material at issue was not exculpatory. (*People v Vecchio*, 228 AD2d 820, 831 [3d Dept 1996]). Counsel pursued a legitimate strategy that was reasonable under the circumstances, and defendant has not proven that pursuing the alleged *Brady* material would have changed the outcome of the trial.

Fourth, defendant's claim that he is actually innocent is procedurally barred. CPL §440.10(2)(a) is a mandatory bar to this claim because it was already raised on appeal. A CPL § 440.10 motion is not a substitute for a an appeal, and defendant already had a chance to raise the instant claim before the appellate court (*People v Cooks*, 67 NY2d 100, 500 [1986]).

Accordingly, defendant's four claims are denied both procedurally and on the merits. This decision shall constitute the order of the court.

**ENTERED**  
 DEC - 3 2007  
 NANCY T. SUNSHINE  
 COUNTY CLERK

ENTER:  
  
 RAYMOND GUZMAN, J.S.C.