People v Edwards
2007 NY Slip Op 34584(U)
December 18, 2007
Supreme Court, Westchester County
Docket Number: 07-0106
Judge: James W. Hubert

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FILED
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ON
12/19/07
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

KEITH EDWARDS
Defendant.

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DECISION & ORDER

Indictment No.: 07-0106

FILED
DEC 19 2007
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Hubert, J.

The defendant was convicted on October 4, 2007, following a jury trial, of three counts of Robbery in the First Degree, two counts of Assault in the First Degree, Criminal Use of a Firearm in the First Degree, and various other related crimes.[1]

The Defendant moves to set aside the verdict pursuant to CPL § 330.30 on three grounds: (1) there is newly discovered evidence, as set forth in five affidavits submitted to the Court; (2) the conviction was obtained in violation of his constitutional rights under *Brady v. Maryland*; and (3) the trial evidence was not legally sufficient to establish the defendant's guilt. For the reasons set forth below, the defendant' s motion is denied.[2]

I. THE EVIDENCE AT TRIAL

On March 27, 2006, at approximately 8:30 p.m., Carlos Romero was "hanging out" in the

[1]The jury returned a not guilty verdict on the top count of attempted murder.
[2]The defendant simultaneously moves in his motion papers to vacate judgment pursuant to CPL § 440.10. Because the defendant has not yet been sentenced, and therefore no judgment has been entered, the Court will treat the instant motion as invoking only the applicable provisions of CPL § 330.30.

stairwell of an apartment building at 47 Riverdale Avenue in Yonkers with a friend by the name of James Morris. Romero heard a door on another floor open and close, and found himself confronted by the defendant, who was armed with a handgun. The defendant pointed the gun inches away from Romero's face and demanded his property. Romero pushed the gun away, and the two men began to struggle. The gun discharged during the course of the struggle, and a bullet struck Romero in the hip. The defendant, as well as Romero's friend Morris, fled the scene.

Romero limped to a store in front of the building for help. At the store, he realized that $340 in cash was missing from his pocket. He collapsed, the police were called, and Romero was taken by ambulance to the hospital.

The police recovered a shell casing and other evidence from the stairwell of 47 Riverdale Avenue. Although Romero initially told the police that he didn't know who had shot him, he later informed them that the defendant was the perpetrator and that he knew the defendant from the "Getty Square" area of Yonkers. The detective assigned to the case, Anthony Amodeo, also spoke to James Morris the day after the crime. Morris–who was 15 years old at the time–did not want to cooperate, nor did his mother want him involved.

Several months later, on June 15, 2006, the Yonkers Police Department executed a search warrant at an apartment at 57 Cliff Avenue where the defendant rented a bedroom. The police recovered a black nine millimeter handgun from a closet inside of the defendant's bedroom. Ballistics tests matched the shell casing recovered on March 27, 2006 from the scene of the crime with the handgun found inside of the defendant's bedroom.

The trial evidence also showed that on several occasions in July 2007, while Romero was serving 21 days in county jail on marijuana charges, other inmates approached him and pressured

him to recant what he had told the police and to exonerate the defendant. Romero testified that on July 18, 2007, he signed such a statement "for his safety." Romero further testified that after the trial had commenced, and shortly before he was scheduled to testify, he was approached at night by several individuals who warned him, at gunpoint, to "keep his mouth shut."

The defendant called his girlfriend and two of his mother's friends to testify that on the date and time of the crime, he was at a birthday party for his mother at their home in Peekskill. The defendant also presented evidence through his girlfriend and two other witnesses that at times the defendant's bedroom at 57 Cliff Avenue had been used as a gathering place for approximately ten of the defendant's friends.

II. THE DEFENDANT'S "NEWLY DISCOVERED" EVIDENCE

The defendant has submitted notarized statements from five individuals that purportedly represent "newly discovered evidence" in whole or in part. These individuals include James Morris, the alleged eyewitness who was present during the commission of the crime but whose whereabouts were unknown during trial and who did not testify; Jason Roper, a purported eyewitness who did not see the robbery but saw the complainant moments after it had occurred; Gigzell Willis, the defendant's mother who was present in the courtroom throughout the trial; Betsy Jose, the complainant's mother; and Carlos Romero, the complaining witness. The defendant also submitted an affidavit to the Court.

James Morris states by affidavit that he was in the stairway with Romero when the shooting occurred but that he did not see the perpetrator take any property from Romero. Morris confirms that he previously told the police that he was not a witness and would not cooperate.

He claims that this was because he was afraid and because "his mother would be very upset." Morris further claims that the police found him sometime later and showed him a photograph of the defendant. Morris alleges that he told the police that the defendant was not the person who had shot Romero.[3]

Jason Roper states that he was on the first floor of 47 Riverdale Avenue talking on his phone when he heard a noise from the staircase.[4] He saw his friend James run out of the stairwell screaming for help. He and James ran back into the staircase and asked "Carlos" (the complainant) who had shot him. Carlos responded that he didn't know. Carlos then reached into his coat pocket, pulled out ten bags of marijuana and $300 dollars, and handed it to Roper so the police "wouldn't get it." This alleged encounter is not reflected in the affidavits of Morris or Romero.

The defendant's mother, Gigzell Willis, details the efforts she made to try to locate James Morris, chiefly by speaking with the defendant's friends and asking them to canvass Riverdale Avenue. She reportedly learned from these "friends" that Morris may have moved away to live with his father, but they did not know his last name or where he lived. After the trial, Morris "found" Ms. Willis. Willis went to Morris' mother's apartment and purportedly obtained Morris' statement which is annexed to the instant motion.

Carlos Romero's mother, Betsy Jose, states in substance that the detectives assigned to the case made false promises to the family and threatened her son, and that her son told the

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[3]At trial, Detective Amodeo denied that he had any further contact with Morris after their initial discussion at his mother's residence.

[4]The Court notes that the October 18, 2007 statement of Jason Roper and the July 18, 2007 recantation of Carlos Romero bear the same notary public stamp, but the notary's signature on each document is completely different.

detectives that Keith Edwards was not the person who had shot him.

Finally, in an affidavit dated December 6, 2007, Carlos Romero again recants his trial testimony concerning his identification of the defendant. He claims that his prior jail recantation was not the product of threats by inmates, but rather out of guilt for falsely identifying the defendant to the police. Romero states that he identified the defendant at trial because he was afraid of the detectives, and now re-asserts that the defendant was not the person who shot him in the stairwell. As indicated above, he makes no reference to Roper.

III. DISCUSSION

A. Newly Discovered Evidence

Pursuant to CPL §330.30 (3), a court may set aside a verdict of conviction on the ground that "new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant."

It is well established that a defendant seeking a new trial on the basis of "newly discovered evidence" has the burden to demonstrate that: (1) the new evidence was discovered since the trial; (2) it was undiscoverable before or during the trial by the exercise of due diligence; (3) it is material to the issue; (4) it is not cumulative; (5) it does not merely impeach or contradict the trial evidence; and (6) it is of such character as to create a probability the verdict would be more favorable to the defendant if a new trial were granted. *Salemi v. New York*, 350 U.S. 950, 76 S. Ct. 325, 100 L. Ed. 827 (1956), *citing People v. Eng Hing*, 212 N.Y. 373, 392, 106 N.E. 96, 31 N.Y. Cr. 429 (1914), and *People v. Priori*, 164 N.Y. 459, 472, 58 N.E. 668, 15

N.Y. Cr. 194 (1900). The defendant's burden must be met by a fair preponderance of the evidence. *People v. Latella*, 112 A.D.2d 321, 491 N.Y.S.2d 771 (2d Dep't 1985).

The power to grant a new trial on the grounds of newly discovered evidence is purely statutory and may be exercised only when the requirements of the statute have been met. *People v. Salemi*, 309 N.Y. at 215. Moreover, the determination of whether a defendant has satisfied the statutory criteria in order to set aside a verdict and grant a new trial rests with the sound discretion of the trial court. *People v. Baxley*, 84 N.Y.2d 208, 212, 616 N.Y.S.2d 7 (1994); *People v. Bryce*, 88 N.Y.2d 124, 128, 643 N.Y.S.2d 516 (1996); *People v. Crimmins*, 38 N.Y.2d 407, 415-17, 381 N.Y.S.2d 1 (1975). If a defendant fails to demonstrate any one of the six factors, the motion for a new trial should be denied.

i. **Affidavit of James Morris**

Morris' affidavit is problematic on many levels. Morris was known to be a potential witness from the outset of the trial, so he cannot truly be said to be "newly discovered." Through his affidavit, and contrary to statements he previously made to the police, Morris now states that he was present when Romero was shot. Morris re-affirms that he told the police, when interviewed, that he had seen nothing. He now claims to have said that out of fear. His present statement is therefore merely a recantation of his prior denial which is insufficient to sustain the defendant's burden with respect to newly discovered evidence. At most, it would serve only as impeachment testimony against evidence linking the defendant to the crime which, again, is insufficient for purposes of the present motion. The defendant would seek to have this Court turn a blind eye to all but that which aids the defendant's case. This Court will not do that.

Moreover, the October 19, 2007, affidavit of James Morris does not satisfy the due

diligence factor under CPL § 330.30. Prior to conducting hearings in this case, the defendant was provided with copies of *Rosario* material, which included Morris' full name and address. Although the People redacted Morris' last name and address from the police reports, the defendant never requested an un-redacted copy of these materials, nor did he seek a court order directing the People to otherwise disclose the witness' name and address. It is well-settled that a trial court has the discretion to grant a pre-trial defense request for the names and addresses of prosecution witnesses upon demonstrating a material need or other special circumstances. *People v Rivera*, 119 A.D.2d 517, 519 (1st Dep't 1986); *Aspland v. Judges of Suffolk County,* 42 A.D.2d 930 (2d Dep't 1973); *People v Arrellano*, 150 Misc. 2d 574, 575 (Crim. Ct. Kings Co. 1991), *citing Vergari v Kendall*, 76 Misc. 2d 848 (Sup. Ct. Westchester Co.) *aff'd* 46 A.D.2d 679 (2d Dep't 1974).

Nor was such application made at trial, assuming his full name and address could not have been ascertained previously. When a defendant becomes aware of evidence early in a trial, as happened in this case, it is incumbent upon him to seek a continuance or demonstrate efforts to obtain the evidence before it will be considered newly discovered. *People v. Copeland*, 185 A.D.2d 280, 585 N.Y.S.2d 794 (2d Dep't 1992); *People v. Zambrana*, 142 A.D.2d 744 (2d Dep't 1988); *People v. Hughes*, 136 A.D.2d 916, 525 N.Y.S.2d 88 (4th Dep't 1988).

It is speculative at best whether Morris would have cooperated, since he had already told the police that he did not have any information and did not want to cooperate. In any event, the Morris affidavit does not constitute evidence sufficient to meet the defendant's burden on the instant motion.

ii. Statement of Jason Roper

With respect to the October 18, 2007 statement provided by Jason Roper, the motion papers are devoid of any facts showing that the evidence evidence could not have been discovered with due diligence or that Roper was unknown to the defendant prior to trial. *People v. Fielder*, 154 A.D. 2d 388, 545 N.Y.S.2d 777 (2d Dep't 1989)(motion properly denied without a hearing where motion papers do not allege sufficient facts to show that the evidence could not have been discovered with due diligence by the defense); *also see People v Brown*, 79 A.D.2d 659, 436 N.Y.S.2d 992 (2d Dep't 1980), *aff'd* 56 N.Y.2d 242 (1982); *People v Malave*, 104 A.D.2d 828, 480 N.Y.S.2d 150 (2d Dep't 1984). Other than the defendant's statement that he did not know Jason Roper prior to March 2006, there is no indication as to how Roper came to the attention of the defense.

Curiously, neither Morris nor Romero make any mention of Roper in their respective affidavits. All that is known about Roper comes from the People's affirmation in opposition, disclosing that he and the defendant were incarcerated at the Westchester County Jail from July 26, 2007 until November 2, 2007.

On its face, Roper's proposed testimony simply creates a conflict in the evidence with respect to the disposition of the $340 belonging to the complainant. Newly discovered evidence which serves merely to impeach or contradict trial evidence is not enough to set aside a judgment of conviction. *People v. Sides*, 242 A.D.2d 750, 661 N.Y.S.2d 863 (3rd Dep't 1997), *lv denied* 91 N.Y.2d 836 (1997); *People v. Pineda*, 207 A.D.2d 915, 916, 616 N.Y.S.2d 660, 661 (2d Dep't 1994); *People v. Bugman*, 254 A.D.2d 796, 797, 679 N.Y.S.2d 491, 492 (4th Dep't 1998) (denying without a hearing a motion to set aside the verdict based on newly discovered evidence

impeaching the credibility of a prosecution witness); *People v. Walker*, 116 A.D.2d 948, 952, 498 N.Y.S.2d 521, 525 (3rd Dep't 1986)(upholding trial court's discretion to deny without a hearing motion for new trial based on evidence that only impeached or discredited prior testimony). Here, the assertion that Carlos Romero allegedly gave his money and the marijuana to Roper after the crime is, at most, contradictory to the trial evidence, thus tending to impeach the testimony of Romero. *Id; People v. Richards*, 266 A.D.2d 714, 715 (3rd Dep't 1999). For these reasons, Roper's statement cannot be considered newly discovered evidence.

Finally, even if the statements of Morris and Roper met the initial criteria for newly discovered evidence, this Court does not find that Roper's statement is of such character or weight that the verdict would have been more favorable to the defendant had it been received at trial.

First, there was other substantial, direct evidence in this case tying the defendant to the crime. Ballistics evidence matched the shell casing recovered from the scene of the crime with the handgun recovered from the defendant's bedroom in Yonkers.[5] Second, the reliability of the complainant's in-court identification of the defendant was already called into question by prior statements of the complainant and by the defendant's alibi, which the jury rejected. Third, the statement of Roper is not corroborated by the affidavit submitted by Morris or Romero. Neither Romero nor Morris mention Roper's alleged presence at the scene or that Romero gave Roper his property before leaving the scene for help.

[5] The defendant's moving papers state that shortly after the incident, the police brought Carlos Romero to the police headquarters to view a photo array, and that he identified the defendant as the person who shot him in the stairwell. The People's submission confirms that the photo array occurred on or about April 20, 2006, prior to the date that the police applied for and executed the search warrant at the Yonkers apartment where the defendant had a bedroom.

A defendant must persuade the court that the new evidence he submits will probably result in a different verdict at a new trial. It is not sufficient for him to bring in new evidence from which a jury *could* find him not guilty; it must be evidence which persuades the judge that a jury *would* find him not guilty (or render a more favorable verdict). Having presided over the trial and having had the opportunity to observe Romero's demeanor and assess his credibility, and in view of the evidence corroborating the complainant's testimony, the Court is of the opinion that there is no probability that the "newly discovered evidence" would result in a more favorable verdict for the defendant if a new trial were granted.

The defendant has failed to establish that Roper and Morris could not have been produced by the defendant at the trial even with due diligence on his part. Furthermore, Roper and Morris' testimony would not be of such weight and character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant. Because the Court can make this determination on the basis of the motion papers, no hearing is warranted. "To grant. . . a hearing where the court is able to reach its conclusion on the papers alone would serve no end of justice but would only protract futile litigation." *People v. Crimmins*, 38 N.Y.2d 407, 417, 381 N.Y.S.2d 1 (1975); *also see People v. Mossop* 191 A.D.2d 715, 596 N.Y.S.2d 719 (2d Dep't 1993), *lv. denied*, 81 N.Y.2d 1017, 600 N.Y.S.2d 205 (1993); *People v Fielder*, 154 A.D.2d 388; *People v. Wise*, 194 Misc. 2d 481, 483-84, 752 N.Y.S.2d 837 (Sup. Ct. New York Co. 2002)(decision to hold hearing to resolve questions of fact on motion to vacate judgment upon grounds of newly discovered evidence is discretionary with the court).

iii. Affidavit of Betsy Jose

As noted above, the defendant also submitted an affidavit dated December 7, 2007 signed

by Betsy Jose, the mother of Carlos Romero. Ms. Jose's affidavit–consisting principally of what she says her son allegedly told the detectives and what they allegedly told him–constitutes inadmissible hearsay. It is implicit in the nature of the grounds for the motion that the new evidence be admissible at trial. *People v. Boyette*, 201 A.D.2d 490, 491, 607 N.Y.S.2d 402 (2d Dep't 1994), *habeas corpus granted on other grounds sub nom. Boyette v Lefevre*, 246 F.3d 76 (2d Cir. 2001). Ms. Jose's hearsay statements do not constitute competent evidence that would be admissible at trial. Moreover, the defendant does not (and cannot) argue that Ms. Jose's proffered testimony–assuming its admissibility–could not have been produced at trial with due diligence. Thus, Ms. Jose's affidavit does not constitute newly discovered evidence within the meaning of CPL 330.30(3).

iv. Affidavit of Carlos Romero

Turning at last to the December 6, 2007 recantation purportedly signed by Carlos Romero, this Court finds that it does not warrant a new trial or evidentiary hearing on the theory of newly discovered evidence.

Regarding recantation testimony, the burden is on the defendant to overcome the presumption of regularity that attaches to judicial proceedings. *People v Williams*, 11 A.D.3d 810, 812 (2004), *lv. denied* 4 N.Y.3d 769 (2005); *see People v. Barber*, 280 A.D.2d 691, 693 (2001), *lv. denied* 96 N.Y.2d 825 (2001). Both the Federal courts and the New York courts recognize that recantations are inherently unreliable and that a motion to set aside a verdict may be denied without a hearing. *People v. Rodriguez*, 201 A.D.2d 683, 608 N.Y.S.2d 255, *quoting People v Shilitano*, 218 N.Y. 161, 170, 112 N.E. 733, 734, 34 N.Y. Cr. 358, L.R.A. (n.s.)("there is no form of proof so unreliable as recanting testimony"); *Sanders v. Sullivan*, 863 F.2d 218, 225

(2d Cir. 1988) (a recantation must be "looked at with the utmost suspicion); *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987). Where the recanting affidavits are conclusory, incredible or otherwise unreliable, a defendant's motion may be denied without a hearing. *People v. Lugo*, 225 A.D.3d 460, 807 N.Y.S.2d 94, (1st Dep't 2006); *People v. Edmonson*, 300 A.D.2d 317, 318, 751 N.Y.S.2d 280 (2d Dep't 2002), *lv. denied*, 99 N.Y.2d 614 (2003); *People v. Bermudez*, 243 A.D.2d 367 (1st Dep't 1997); *People v. Legette*, 153 A.D.2d 760, 545 N.Y.S.2d 296 (2d Dep't 1989). Where recantation evidence does no more than merely impeach or contradict evidence introduced at trial, a motion to set aside the verdict is also properly denied. *People v. Serrata*, 261 A.D.2d 490, 690 N.Y.S. 2d 273 (2d Dep't 1999)(no error in denying defendant's motion to set aside verdict based upon recantation evidence, which was inherently unreliable and merely impeached or contradicted trial evidence; *also see People v. Cintron*, 306 A.D.2d 151, 763 N.Y.S.2d 11 (1st Dep't 2003); *People v. Donald*, 107 A.D.2d 818, 819, 484 N.Y.S.2d 651, 652 (2d Dep't 1985).

The Court finds that Romero's December 6, 2007 recantation annexed to the defendant's motion is inherently unreliable. This latest recantation must be viewed in the context of his prior, pre-trial recantation. Romero, while incarcerated on a marijuana charge, was approached by inmates and presented with a typed statement exonerating the defendant, and claiming ignorance as to the identity of his assailant. Under pressure, Romero signed the statement. When confronted at trial with this signed and notarized statement, which was entered into evidence by the defense, Romero reaffirmed his identification of the defendant and explained that he had signed the statement out of fear for his own safety.

Having heard and seen all of this evidence, the jury nevertheless convicted the defendant.

This Court will not now re-consider the issue and overturn the jury's decision. The instant recantation is no different in character than the recantation that the jury considered. It is inherently unreliable. *See People v. Cintron*, 306 A.D.2d 151, 152, 763 N.Y.S.2d 11 (1st Dept. 2003), *lv. denied*, 100 N.Y.2d 641, 769 N.Y.S.2d 207 (2003)(totality of the parties' submissions, along with trial record, warrant the factual finding that recantation is unreliable where witness' affidavit was made ten years after defendant's conviction, after the witness had become an inmate of the same prison system where defendant was incarcerated; affidavits alleging that authorities pressured affiant to give false testimony against defendant was incredible, as the court record clearly established that the witness declined to testify out of fear of defendant.) Romero's post-trial recantation must be evaluated in the light of what were clearly multiple pre-trial efforts to coerce testimony favorable to the defendant.

It must also be evaluated in light of the physical evidence linking the defendant to the crime, particularly the ballistics evidence that matched the shell casing found at the crime scene with the handgun found inside of the defendant's bedroom. That evidence established the defendant's involvement independent of Romero's testimony. Accordingly, Romero's most recent recantation cannot satisfy the defendant's burden in the context of the instant motion.

B. FAILURE TO DISCLOSE *BRADY* EVIDENCE

The defendant also claims that the People withheld exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). According to Morris' affidavit, sometime after Detective Amodeo initially met with James Morris, the police located him again in order to show him a photograph of the defendant. Morris states that he told the Police that the defendant was not the perpetrator. The defendant asserts that this identification

procedure was withheld from the defense. The People affirm in their opposition papers that no second meeting or identification procedure occurred.

To the extent that this creates an issue of fact, this Court resolves the issue in favor of the People. Morris' credibility is highly suspect given his initial denial of his presence at the time and place of this incident. To the extent that this disputed identification procedure can be said to raise a *Brady* issue, the claim is procedurally defective. Clearly, it is based on matters outside the record. *People v. Dukes*, 284 A.D.2d 236 (1st Dep't 2001)(defendant's claim that People failed disclose *Rosario* and Brady material not properly before Court because claim based on allegations dehors the record). Brady claims that depend, in part on "off the record" material are not properly heard under CPL § 330.30. The defendant's *Brady* claim is therefore denied.

C. SUFFICIENCY OF THE EVIDENCE

Defendant also makes a generalized claim that the trial evidence was legally insufficient to establish the defendant's guilt. CPL § 330.30(1) authorizes a trial court to modify or set aside a verdict prior to sentencing on "any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." CPL § 330.30 therefore permits affirmative relief only under circumstances in which an appellate court may reverse or modify as a matter of law. *People v. Carter*, 63 N.Y.2d 530, 483 N.Y.S.2d 654 (1984).

The term "legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof. CPL § 70.10(1). Viewing the facts most favorably to the prosecution, *People v.*

Montanez, 41 N.Y.2d 53, 390 N.Y.S.2d 861 (1976), the trial evidence in this case was legally sufficient to warrant the verdict convicting the defendant of the crimes charged. The complainant's testimony, coupled with the ballistics evidence matching the shell casing recovered from the crime scene with the gun found in the defendant's bedroom, was overwhelming. The evidence was therefore legally sufficient to support all counts of the Defendant's conviction.

This decision constitutes the Order of the Court.

Dated: December 18, 2007
White Plains, New York

James W. Hubert
County Court Judge

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