

**People v Allah**

2008 NY Slip Op 31989(U)

June 5, 2008

Supreme Court, Kings County

Docket Number: 0001426/2008

Judge: Carolyn E. Demarest

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART CV19

-----X

THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

-against-

Date: June 5, 2008

DECISION & ORDER

ASIATIC ALLAH

Indictment No. 1426/2000

-----X

Defendant moves, pro se, for an order pursuant to CPL §440.10(1)(g) vacating his judgement of conviction on the ground of newly discovered evidence. Defendant was convicted by a jury of felony murder (PL §125.25[3]) and sentenced on January 17, 2001 to a prison term of twenty-two years to life. Defendant appealed his conviction based on an alleged *Brady* violation and the Appellate Division affirmed his judgment of conviction (*People v Allah*, 302 AD2d 535 [2d Dept 2003]). His application for leave to appeal to the Court of Appeals was denied (*People v Allah*, 99 NY2d 652 [2003]).

At trial the jury heard how on February 4, 2000, defendant persuaded Levar Davis to help him rob a grocery store on Ralph Avenue in Brooklyn. Davis testified that he and defendant had visited the store earlier in the day to ascertain that the owner, Khalil Hussein, was alone, and then returned to defendant's apartment where defendant gave Davis a handgun. Davis and defendant went back to the grocery store where defendant stood in the doorway while Davis pointed the gun at Hussein and announced a robbery. Instead of handing over money, Hussein ducked behind the counter. Defendant and Davis both heard a clicking sound and assumed it was Hussein readying a gun for firing. Defendant shouted to Davis, "hit the nigger", which Davis

understood to mean that he should shoot Hussein. Davis then reached over the counter and shot Hussein to death. A witness, Jamal Alleyne, observed defendant and Davis fleeing the store and then went inside to find Hussein bleeding on the floor.

Other evidence at trial included the post-arrest statements of the defendant in which he admitted his presence at the scene of the robbery and informed police that the murder weapon had been sold to a person known as "White Mike." That person, Michael Fontanez, testified for the prosecution that defendant had sold him the gun and that defendant admitted to having gone to rob Hussein. Despite defendant's assurances that the gun was not the same one used in the robbery, Fontanez became concerned and sold it to someone else. He reacquired it at the insistence of the police. Ballistics evidence subsequently proved that the gun defendant had sold to Fontanez was the same gun used to shoot Hussein.

In 2005 defendant moved to vacate his judgment of conviction based on newly discovered evidence in the form of an affidavit by Davis recanting his trial testimony against defendant and claiming that he acted alone in killing Hussein. This court denied the motion without a hearing by decision and order dated July 15, 2005. Defendant had failed to meet the due diligence requirement of CPL §440.10(1)(g) and Davis's affidavit was incredible because it was inconsistent with the other evidence at trial. Davis's testimony, to the contrary, was consistent with the trial evidence, which was overwhelming in favor of defendant's guilt.

In the instant motion defendant presents a second claim of newly discovered evidence in the form of a signed affidavit by Jamel Tate. Tate claims to have been in the store and to have witnessed Davis shoot Hussein while defendant was in the doorway. Defendant argues that had this evidence been admitted at trial, the outcome would have been more favorable to him. For

the following reasons, the motion is denied.

CPL §440.10(1)(g) provides that the court may vacate a judgment upon the ground that:

“New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial event with due diligence on his part of 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; provided that a motion based upon such ground must be made with due diligence after the discover of such alleged new evidence.”

The court may exercise its discretion to set aside a verdict based on newly discovered evidence only if all the requirements of the statute have been met (*People v Salemi*, 309 NY2d 208; *People v Taylor*, 206 AD2d 410, 411 [1998]). The defendant must establish by a preponderance of the evidence that the evidence is newly discovered within the meaning of CPL §440.10(1)(g) by meeting the following six requirements:

(1) It must be such as will probably change the result if a new trial is granted; (2) It must have been discovered since the trial; (3) It must be such as could have not been discovered before the trial by the exercise of due diligence; (4) It must be material to the issue; (5) It must not be cumulative to the former issue; and, (6) It must not be merely impeaching or contradicting the former evidence” (*Salemi* at 215-216; *People v Lavrick*, 146 AD2d 648 [2d Dept 1989]).

The statute requires that a motion based on new evidence be made with due diligence after the discovery of such evidence (CPL §440.10[1][g]). Defendant has not indicated in his motion when the new evidence was discovered and it is unclear when defendant became aware that Tate witnessed the shooting and that he wished to testify on defendant’s behalf. Although defendant filed his motion within a short time of the affidavit’s signing, there is no basis for this court to conclude whether this motion was made with due diligence after the discovery of the alleged new evidence.

In his affidavit Tate asserts that he was in the back of the grocery store when he saw whom he later learned to be Little Sean (Levar Davis) in front of the counter holding a silver gun. He knelt down behind a rack and saw “someone standing in front of the store leaning against the door, who I found out it was Asiatic. From the way of his body language I could tell he was talking to someone and just as he entered the store I heard a loud gun shot.” Davis ran from the store, bumping into defendant who had just entered, and told defendant to run as well. According to Tate, the two ran from the store leaving him to find Hussein bleeding behind the counter.

Tate’s affidavit fails to meet the requirements of newly discovered evidence because it lacks credibility and would not change the result if a new trial were granted. It neither negates Davis’s testimony nor tends to disprove defendant’s guilt. First, the affidavit places defendant in the doorway of the store just as Davis did in his testimony. Secondly, it merely confirms the witness Alleyne’s testimony that defendant and Davis ran from the store together after the shooting. Moreover, Tate’s credibility is undermined not only by his failure to tell the police of his observations but also by the fact that Alleyne made no mention of seeing him as Alleyne was arriving in time to see defendant and Davis flee.

Because defendant was convicted on a felony murder theory, it is irrelevant that he was not the shooter.<sup>1</sup> Rather, defendant’s conviction was based on his participation in the robbery with Davis and Tate’s affidavit does not negate Davis’s testimony that he and defendant planned to rob the store together. In sum, the affidavit is not exculpatory because it merely corroborates

---

<sup>1</sup>Tate appears to presume that his affidavit exculpates defendant because defendant was standing in the doorway and did not shoot Hussein: he states, “I was scared to say anything with the fear of being arrested for something I had nothing to do with like Asiatic was.”

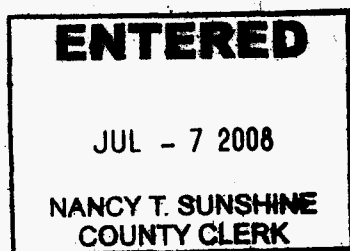
the other evidence and would not lead to a more favorable verdict if a new trial were granted.

Therefore, it does not qualify as newly discovered evidence.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

The defendant is hereby advised pursuant to 22 NYCRR §671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.



ENTER:

CAROLYN E. DEMAREST, J.S.C.