SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV76

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

EARL BROWN

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By: Hon. Michael Pesce

Date: August 8, 2008

DECISION & ORDER

Indictment No. 1756/1986

Background

Defendant moves, *pro se*, for an order pursuant to CPL §440.10 vacating his 1986 judgment of conviction on the grounds of newly discovered evidence and a *Brady* violation. The conviction arises from defendant's participation in the March 1, 1986 burglary of a Brooklyn apartment where two people were robbed. Defendant was arrested with his two co-defendants, James Mason and Keren Jenkins, in Manhattan on March 3, 1986. That same night, Mason made a videotaped statement to the police in which he confessed his involvement in a string of Manhattan robberies and in the March 1, 1986 incident in Brooklyn. He also implicated defendant in an abandoned plan to commit another robbery. Defendant was released at that time. The following week, he was arrested again after the complaining witness, Calvin Thompson, identified him from police photographs on March 11, 1986 and also in a lineup on March 19, 1986. Thompson successfully identified Mason and Jenkins as well.

At trial, the jury found defendant guilty of burglary in the first degree (PL §140.30), robbery in the first and second degrees (PL §§160.15, 160.10) and two counts of unlawful imprisonment (PL §135). He was sentenced on May 28, 1987 as a persistent felony offender to

concurrent prison terms of twenty years to life on the burglary and first-degree robbery counts, and to other, lesser sentences on the remaining counts. Mason and Jenkins each pleaded guilty to robbery in the first degree. Mason identified defendant as a co-perpetrator in his plea allocution and Jenkins testified at defendant's trial as a prosecution witness.

Defendant's judgment of conviction was subsequently affirmed on appeal (*People v Brown,* 152 AD2d 701 [2 Dept. 1989]) and the Court of Appeals denied leave to appeal (*People v Brown,* 74 NY2d 894 [1989]). On July 3, 2001, defendant moved, *pro se*, to set aside his sentence pursuant to CPL §440.20 on the grounds that he was improperly sentenced as a persistent violent felony offender and that he was denied his right to the effective assistance of counsel. This court denied his motion in an order dated November 26, 2001 and the Appellate Division denied his application to appeal from that order (*People v Brown,* 289 AD2d 414 [2001]).

In support of the instant motion, defendant has submitted copious documentation including a sworn affidavit from James Mason stating that defendant is actually innocent and that, as a condition of his own favorable plea agreement, he was coerced to lie about defendant's participation in the burglary. Mason made this same statement to this Court in letter dated November 20, 1989. In his affidavit proclaiming defendant's innocence, Mason states that he identified a person named Benny Johnson, not Earl Brown, to detectives as the third person involved in the robbery. Mason alleges that he described in detail Johnson's role in several robberies and provided police with his address and street name, "BJ." Mason also claims that he identified Johnson to police in a photographic array. Defendant now asks the court to consider Mason's statements as newly discovered evidence pursuant to CPL §440.10(1)(g).

Defendant further argues that the People violated *Brady v Maryland,* 373 US 83 [1963], by failing to turn over information about Benny Johnson's possible involvement in the burglary. He claims that Mason's statements, along with the People's failure to provide the defense with exculpatory evidence, warrant vacatur of his judgment of conviction. For the following reasons, the motion is denied.

Due Diligence

As a procedural matter, defendant has failed to use due diligence in bringing his motion after the discovery of the alleged new evidence (CPL §440.10[1][g]). The correspondence defendant submitted in support of his motion reveals that defendant was aware of Mason's exculpatory statements at least as early as January 2, 1990, when trial counsel, Seth Levinson, wrote to defendant discussing Mason's letter to the court. Defendant has thus waited eighteen years to bring the instant motion.

"[T]he due diligence requirement is measured against the defendant's available resources and the practicalities of the particular situation" (34B N.Y. Jur. 2d, Criminal Law §3064 at 866). In defendant's situation, the supporting documentation demonstrates some effort to further investigate Mason's claims but does not excuse defendant's lengthy delay in filing the instant motion. Indeed, Levinson and an investigator were appointed to investigate the matter and defendant corresponded regularly with his attorney concerning the investigation from 1989 through 1992.[1] The attorney-client relationship ended abruptly after defendant filed a grievance

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[1]Levinson informed defendant in his letters that despite his efforts to corroborate Mason's story, he and the investigator were unable to find any supporting evidence to aid defendant in bringing a motion before the court.

against Levinson, later dismissed as without merit, for allegedly failing to investigate defendant's case.

After Levinson was relieved as counsel, defendant attempted to find new counsel to represent him in the matter, to no avail. In 2005 he finally contacted the Second Look Project at Brooklyn Law School for assistance in investigating and potentially raising an appeal, but the clinic informed him in June of 2007 that it could not assist him. Although defendant has documented good faith efforts to bring his motion during the time of Levinson's investigation and while the clinic was reviewing his case, he has failed to explain why he could not bring the motion *pro se*, as he has done here, at any point from 1992 through 2005. Defendant also failed to gather any additional evidence corroborating Mason's statements during that period. Thus, defendant did not bring the instant motion with due diligence after the discovery of the alleged new evidence (*see People v Kandekore,* 300 AD2d 318 [2d Dept. 2002]; *People v Boyette*, 201 AD2d 490, 491 [2d Dept. 1994]; *People v Stuart,* 123 AD2d 46 [2d Dept. 1986]).

Newly Discovered Evidence

Defendant's claim relies on the court's statutory power to grant a new trial on the ground of newly discovered evidence (CPL §440.10[1][g]; *People v Salemi,* 309 NY2d 208, 215 [1995]). The court may exercise its discretion to use this power only if all the requirements of the statute have been met (*Id.*; *People v Taylor,* 206 AD2d 410, 411 [1998]). For all newly discovered evidence claims, the moving party must establish each of the following:

> (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).

In this instance, Mason's letter and affidavit do not meet the six *Salemi* requirements. Mason's statements are incredible and would not change the result if a new trial were granted. At the 1986 trial, defense counsel chose not to call Mason to testify at trial because his credibility was so poor. The prosecution would have surely impeached him with his prior felony convictions and with his own plea allocution inculpating defendant, and it is highly unlikely that he would have contradicted the testimony of Jenkins, his common-law wife, thereby jeopardizing her plea deal. The jury would also have been instructed, as it was with regard to Jenkins' testimony, "to view the inherent trustworthiness of [defendant's] accomplice's testimony with suspicion" and "that corroboration by a credible source was necessary" (*Brown,* 152 AD2d 701).

Nor are Mason's statements exculpatory. Defendant claims that in his videotaped statement Mason did not identify him as a participant in the March 1, 1986 robbery. While this is true, the transcript indicates that the Assistant District Attorney did not ask Mason who else participated in that crime. Mason also identified defendant as his accomplice to commit a robbery on March 3, 1986, the night he, defendant and Jenkins were arrested.[2]

Finally, the evidence against defendant at trial was overwhelming and Mason's statements would not change the result in a new trial. The complaining witness saw defendant as the crime took place and subsequently identified him in a photographic array, a corporeal lineup and in court. His accurate identifications of Mason and Jenkins would lead the jury to surmise

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[2]Mason told the ADA that he, Jenkins and defendant (to whom he refers as "Shoe") had decided not to commit a robbery that night but were apprehended with burglar's tools as they were going home to Brooklyn.

that the identifications of defendant were also correct. Furthermore, Jenkins testified at trial that defendant participated in the robbery with her and Mason. Based on defendant's failure to establish that the alleged new evidence would "probably change the result if a new trial is granted", this court finds no basis to grant a new trial on the grounds defendant raises (*Salemi* at 215).

The *Brady* Claim

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* 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 support of his *Brady* claim defendant argues that the People withheld Mason's alleged statements to police that Benny Johnson, not defendant, was the third perpetrator in the robbery at issue. However, defendant has not established that Mason actually made such statements to the police or that the prosecution ever had such exculpatory evidence. To the extent that defendant is referring to Mason's videotaped statement to the prosecutor, Mason stated that he acted with "BG"[3] in robberies other than the instant one. That Johnson may have participated

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[3]The court assumes that "BG" refers to Benny Johnson, whom Jenkins called by the street name "BJ" in her statement to prosecutors.

with Mason in an unrelated robbery does not exculpate defendant.

Even if the police actually did investigate Johnson as a suspect, that information is not material as required by *Brady*. That the police, at some point, may have considered other suspects does not exculpate defendant (*People v Pepe*, 259 AD2d 949 [4th Dept. 1999]). Speculative theories involving other suspects do not constitute exculpatory evidence, especially where, as here, the investigation did not yield a connection between the suspect 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, and here defendant has provided no other evidence to corroborate Johnson's participation in the robbery. According to *Brady*, the People were not required to disclose such "preliminary, challenged, or speculative information" if they did indeed possess it (*United States v Diaz*, 922 F2d 998,1006 [2d Cir. 1990]).

As defendant's claims are meritless, the motion is denied.

This decision shall constitute the 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:

MICHAEL L. PESCE, J.S.C.