

**People v McDay**

2008 NY Slip Op 32413(U)

June 16, 2008

Supreme Court, Kings County

Docket Number: 0000148/2003

Judge: Jill Konviser

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 26**

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

**-against- :**

**Ind. No. 148/03**

**KEITH McDAY, :**

**Defendant. :**

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**JILL KONVISER, JUSTICE:**

On July 14, 2004, the defendant was convicted, after a jury trial, of burglary in the second degree and criminal possession of stolen property in the fifth degree. On August 12, 2004, he was sentenced, as a persistent violent felony offender, to concurrent prison terms of twenty years to life and one year, respectively. On direct appeal, the defendant’s conviction was unanimously affirmed.

People v. McDay, 40 A.D.3d 781 (2d Dept.), lv. denied, 9 N.Y.3d 878 (2007).

The defendant has now filed a pro se motion to vacate the judgment of conviction under C.P.L. §440.10 on the grounds that: (1) he proceeded to trial pro se without knowingly and intelligently waiving his right to counsel; (2) New York County Law §722-c is unconstitutional as it does not provide funds for pro se defendants to hire investigators; and, (3) he was provided with ineffective representation by the two attorneys who represented him prior to the time he decided to proceed pro se. The People oppose the defendant’s motion. For the reasons that follow, the motion to vacate the judgment of conviction is denied without a hearing.<sup>1</sup>

**Procedural History**

The defendant, through counsel, filed a direct appeal of his conviction with the Appellate

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<sup>1</sup>The defendant’s request for the assignment of counsel in connection with this collateral motion is denied. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); People v. Leonard Ramsey, 2001 N.Y. Slip. Op. 50142(U), 2001 WL 1875965 (Sup. Ct. Bronx Co. Feb. 9, 2001) (Hunter, J.); People v. Richardson, 159 Misc.2d 167, 168 (Sup. Ct. Kings Co. 1993).

Division, Second Department, in which he alleged that the trial court erred by failing to provide the jury with an expanded identification charge. The defendant also filed a pro se supplemental brief in which he alleged that the trial court: (1) violated his right to a fair trial by failing to grant his application to hire an investigator in connection with his pro se representation; (2) improperly denied his discovery demands; and, (3) erred by admitting a 911 tape into evidence, denying his speedy trial motion and refusing to dismiss the indictment on the ground that the grand jury proceedings were defective.

On May 8, 2007, the Appellate Division, Second Department, unanimously affirmed the defendant's conviction. People v. McDay, 40 A.D.3d 781 (2d Dept. 2007). The Court held that the trial court did not err "in declining to give an 'expanded charge' on identification." Id. In addition, the Court held that the defendant's pro se supplemental claim that the trial court erred by admitting a 911 tape into evidence was unpreserved and without merit. Id. Finally, the Court held that the remaining contentions raised by the defendant in his pro se supplemental brief were without merit. Leave to appeal to the New York Court of Appeals was denied on August 1, 2007. People v. McDay, 9 N.Y.3d 878 (2007) (Read, J.). The defendant's motion requesting that the Court of Appeals reconsider its decision was denied on October 19, 2007. People v. McDay, 9 N.Y.3d 963 (2007).

### **The Motion Before this Court**

The defendant has raised three claims in support of his motion to vacate the judgment of conviction pursuant to C.P.L. §440.10. Each of these claims has been considered and rejected.

**Defendant's Claim that he did not Knowingly and Intelligently Waive his Right to Assigned Counsel and, thus, Should Not Have Been Allowed to Proceed Pro Se.**

The defendant claims that the judgment should be vacated as his decision to represent himself at trial was not based on a knowing and intelligent waiver of his right to assigned counsel. As this claim could have been raised on direct appeal to the Appellate Division, it is mandatorily barred under C.P.L. §440.10(2)(c).

C.P.L. §440.10(2)(c) provides that a court must deny a defendant's motion to vacate a judgment of conviction when sufficient facts appear on the record to permit appellate review of the issue raised but unjustifiably failed to do so on direct appeal to the Appellate Division. People v. Cochrane, 27 A.D.3d 659 (2d Dept.), lv. denied, 7 N.Y.3d 787, cert. denied, 127 S. Ct. 436 (2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv. denied, 2 N.Y.3d 742 (2004); see People v. Cooks, 67 N.Y.2d 100, 103 (1986) (a motion to vacate a judgment of conviction cannot be “employed as a substitute for direct appeal when defendant. . . could readily have raised it on appeal but failed to do so (C.P.L. §440.10[2][c]).”).

In this case, the trial court held on-the-record discussions with the defendant concerning his request to proceed pro se and the waiver of his right to counsel. Thus, any claim with respect to the adequacy of the trial court's decision to permit the defendant to proceed pro se was part of the record and could have been raised by the defendant on direct appeal. The defendant, however, unjustifiably failed to raise this claim on direct appeal. As such, his motion to vacate the judgment on this ground is mandatorily barred. C.P.L. §440.10(2)(c); People v. Byrdsong, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997).

**Constitutional Challenge to New York County Law §722-C**

The defendant, in his pro se supplemental brief filed with the Appellate Division, Second

Department, argued that his constitutional rights were violated as a result of the trial court's failure to grant his application to hire an investigator in connection with his pro se representation. The Appellate Division ruled this claim to be without merit. See People v. McDay, 40 A.D.3d at 781. As the Appellate Division has already determined that the trial court appropriately denied the defendant's request to hire an investigator, he is mandatorily barred from again challenging the propriety of that decision by way of a motion to vacate the judgment under C.P.L. §440.10. See C.P.L. §440.10(2)(b) (a motion to vacate a judgment under C.P.L. §440.10 must be denied when "[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal[.]").

The defendant claims, however, that the statute which authorizes a trial court to provide an indigent defendant with funds to hire an investigator, New York County Law §722-c, is itself unconstitutional as it violates due process, and abrogated his right to self-representation, thereby requiring vacatur of his conviction.

As a threshold matter, the defendant's claim is mandatorily barred from this Court's consideration under C.P.L. §440.10(2)(c). The Court of Appeals has held that when a defendant raises a claim premised upon an alleged "constitutional infirmity" and such claim "does not involve factual matters beyond the scope of the record or legal issues which could not have been asserted before the final judgment of conviction," such claim is "not the proper subject of a CPL 440.10 motion." People v. Mower, 97 N.Y.2d 239, 245 (2002) (holding that claim was barred by C.P.L. §440.10(2)(c); see People v. Keebler, 15 A.D.3d 724, 727 (3d Dept.), lv. denied, 4 N.Y.3d 454 (2005).

In this case, the trial court's decision with respect to the appointment of an investigator was part of the trial record and any "constitutional infirmity" with respect to the statutory procedure that

the trial court used to decline such an appointment could have been asserted by the defendant prior to the final judgment of conviction. See New York County Law §722-c. As such, his current challenge to the constitutionality of New York County Law §722-c is “not the proper subject of a CPL 440.10 motion” and is mandatorily barred under C.P.L. §440.10(2)(c). See People v. Mower, 97 N.Y.2d at 245; People v. Keebler, 15 A.D.3d at 727.

In any event, the defendant’s constitutional challenge to the statute is wholly without merit. New York County Law §722-c provides, in pertinent part, that a trial court may authorize the payment for “investigative, expert or other services” for a defendant if the court finds that such services are “necessary” and the defendant “is financially unable to obtain them.” See New York County Law §722-c. The law is well-settled that a decision to allocate funds under both New York County Law §722-c and its substantially similar federal counterpart, 18 U.S.C. §3006(A)(e), is left to the sound discretion of the trial court and requires a showing by the defense that the services requested are both necessary and relevant to the defense. Johnson v. Harris, 682 F.2d 49, 50 cert. denied, 459 U.S. 1051 (1982); United States v. Oliver, 626 F.2d 254, 259-60 (2d Cir. 1980); People v. Rockwell, 18 A.D.3d 969 (3d Dept. 2005), lv. denied, 5 N.Y.3d 768 (2005); People v. Burgess, 270 A.D.2d 158 (1<sup>st</sup> Dept.), lv. denied, 95 N.Y.2d 794 (2000); People v. Drumgoole, 234 A.D.2d 888 (4<sup>th</sup> Dept. 1996), lv. denied, 89 N.Y.2d 1011 (1997); People v. Barber, 154 A.D.2d 882 (4<sup>th</sup> Dept. 1989), lv. denied, 75 N.Y.2d 810 (1990); People v. Filomeno, 138 A.D.2d 734, 735 (2d Dept.), lv. denied, 71 N.Y.2d 1026 (1988); People v. Moore, 125 A.D.2d 501 (2d Dept. 1986), lv. denied, 69 N.Y.2d 884 (1987).

A defendant’s due process rights are not denied if a trial court, pursuant to the dictates of New York County Law §722-c, rejects a defendant’s request to hire an investigator at public expense

on the ground that the defendant failed to demonstrate a need for such services.<sup>2</sup> See People v. Rockwell, 18 A.D.3d at 971 (no due process violation where trial court rejected the defendant's request for an investigator pursuant to New York County Law §722-c on the ground that the defendant had failed to demonstrate that the investigator's services were "necessary."). Accordingly, where, as here, the Appellate Division, Second Department, has rejected the defendant's claim that the trial court erred by denying his request to hire an investigator, the defendant cannot be heard to argue that the trial court's decision to deny an investigator at public expense violated his due process rights. Id.

Equally without merit is the defendant's claim that New York County Law §722-c is unconstitutional as it violated his right to represent himself at trial. Regardless of whether a defendant is represented by counsel or proceeds to trial pro se, he or she is not entitled to an investigator at public expense unless the requirements of New York County Law §722-c are satisfied. See New York County Law §722-c. Thus, to the extent that the defendant is claiming that, as a pro se litigant, he was held to a different standard than a defendant represented by counsel with respect to the criteria used to determine whether an investigator should be provided at public expense, such claim is rejected.

As the defendant's constitutional challenge to New York County Law §722-c is both mandatorily barred and without merit, his motion to vacate the judgment of conviction on this ground is denied.

### **Ineffective Assistance of Counsel Claim**

The defendant claims that he was deprived of the effective assistance of counsel as the two

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<sup>2</sup>In this case, the trial court denied the defendant's request for an investigator on the ground that he failed to demonstrate the need for the services of an investigator.

attorneys who represented him at separate times prior to his decision to proceed pro se failed to investigate adequately the burglary and possession of stolen property of which he was later convicted. Specifically, the defendant asserts that his prior attorneys were ineffective in that they failed to obtain evidence and contact witnesses to support his claim that he “had purchased the stolen items . . . [he] was apprehended with and that there were witnesses to that purchase.” Defendant’s Affidavit at 2.

To prevail upon a claim of ineffective assistance of counsel, a defendant must overcome the strong presumption that trial counsel rendered effective assistance. Strickland v. Washington, 466 U.S. 668, 689 (1984); People v. Louissant, 8 A.D.3d 407 (2d Dept.), lv. denied, 3 N.Y.3d 677 (2004); People v. Myers, 220 A.D.2d 461 (2d Dept.), lv. denied, 87 N.Y.2d 905 (1995). To establish ineffective assistance of counsel under the Federal standard, a defendant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.” Strickland v. Washington, 466 U.S. at 694. Under the New York State standard, the defendant bears the “high burden” of demonstrating that he was provided with “less than meaningful representation.” People v. Hobot, 84 N.Y.2d 1021, 1022 (1995); People v. Finley, 27 A.D.3d 763 (2d Dept.), lv. denied, 7 N.Y.3d 788 (2006). Meaningful representation includes a “prejudice component which focuses on the ‘fairness of the process as a whole rather than [any] particular impact on the outcome of the case[.]’” People v. Henry, 95 N.Y.2d 563, 566 (2000), quoting People v. Benevento, 91 N.Y.2d 708, 714 (1998). The defendant has failed to meet his burden under both the Federal and New York State standards.

The defendant’s bare assertion that neither of his attorneys adequately investigated his claim that he purchased the stolen items that the police found in his possession just minutes after the burglary had taken place, is insufficient to show that he was provided with ineffective representation.

C.P.L §440.30(4)(d) provides that a motion to vacate the judgment of conviction may be summarily denied without a hearing when an “allegation of fact essential to support the motion . . . is made solely by the defendant and is unsupported by any other affidavit or evidence, and . . . under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.”

In the case, the defendant’s claim that his prior attorneys failed to investigate his assertion that he had purchased the stolen items the police recovered from him and that there were witnesses to such purchase is based solely on the defendant’s own self-serving allegations and is unsupported by any other evidence. Indeed, the defendant has not provided this Court with any affidavits from the witnesses who allegedly saw him purchase the stolen items or any other evidence tending to substantiate the claim that he purchased the property the police recovered from him at the time of his arrest. See People v. Ozuna, 7 N.Y.3d 913, 915 (2006); People v. Rosario, 309 A.D.2d 537, 538 (1<sup>st</sup> Dept.), lv. denied, 1 N.Y.3d 579 (2003); People v. Mark Ochoa, 10 Misc.3d 1060A, 2005 WL 3454327 at \*12 (Sup. Ct. Bronx Co. Dec. 16, 2005) (Massaro, J.).

Moreover, the defendant’s current claim that he purchased the property the police recovered from him at the time of his arrest is contradicted by his own grand jury testimony, which was given on January 9, 2003, just six days after the crime, in which he testified that at the time of his arrest he did not have any property in his possession.

The Prosecutor: Mr. McDay, weren’t you carrying some bags with you when you were arrested?

The Defendant: No, Ma’am.

The Prosecutor: You did not have any plastic bags with you?

The Defendant: I did not have anything with me.

The Prosecutor: You did not have a DVD player in a plastic bag and a computer printer?

The Defendant: I did not have anything. When I got out of the car they drove me back a few blocks down and then I was in the back of the car then the Sergeant came to the car and the police who arrested me were undercover and they asked where is the stuff. They said I don't know and they checked in the building, checked on the roof and police that was speaking to my attorney about that earlier, that maybe you have to investigate further because there was no stuff found on me. The police officer asked the Detective where the stuff was at.

The Prosecutor: You're saying you did not have?

The Defendant: No, I did not have anything in my possession. I was walking to my girlfriend's house, that's it.

Defendant's Grand Jury Testimony at 12-13.

Not only did the defendant fail to tell the grand jury that he had purchased the stolen items, no evidence has been provided to show that the defendant ever informed either of his prior attorneys of his current claim that he had purchased the stolen items and knew of witnesses who saw him purchase those items. Indeed, the undated letter that the defendant apparently wrote to one of his attorneys, a copy of which is attached as Exhibit A to his motion, is consistent with his grand jury testimony that no property was ever recovered from him by the police at the time of his arrest. Moreover, at no point in the letter does the defendant inform his prior attorney of his current claim that he had purchased the stolen property and that he knew of witnesses who saw him purchase the property.

The defendant's current claim that he purchased the items recovered by the police at the time of his arrest is also inconsistent with the overwhelming evidence introduced at trial which shows that: (1) a DVD player and other property were stolen from 820 Washington Avenue, Apartment 4A on January 3, 2003; (2) the defendant, who neither lived in that residential building nor was visiting

anyone at that location was observed by the superintendent and his wife in the early morning hours of the January 3, 2003, standing inside the doorway of Apartment 4A; (3) the superintendent confronted the defendant who falsely told him that he lived in Apartment 4A, -- the superintendent, who had worked in that building for nine years, knew that that was false; (4) the superintendent, while on his cell phone contacting the police, saw the defendant emerge from Apartment 4A and run up the stairs that led to the roof of the building, which was connected to the other buildings located on Washington Avenue; (5) when the police arrived at the building they went to the roof and saw a man on the street below pick up two bags and start walking on Lincoln Place; (6) the police, based on the descriptions provided by the eyewitnesses and the observations made from the roof of the building, canvassed the neighborhood in an effort to locate the thief; (7) about five or six minutes after the canvas began the police observed the defendant on Lincoln Avenue, approximately two blocks from 820 Washington Avenue, holding two plastic bags containing the items that the occupants of Apt. 4A confirmed were stolen from their apartment as well as a screwdriver; and, (8) the police then brought the defendant to 820 Washington Avenue where he was identified by the superintendent and his wife as the person they saw just minutes earlier inside Apartment 4A.

The timing and location of the defendant's arrest and the fact that he was identified by two eyewitnesses who had observed him inside of the burglarized apartment just minutes before his apprehension belies his current contention that he purchased the items that were stolen from Apartment 4A.

At bottom, an essential fact necessary to support the defendant's ineffective assistance of counsel claim -- that he purchased the items stolen from Apartment 4A and that individuals witnessed that purchase -- is based solely on the defendant's own allegations and is not only unsupported by any other affidavit or evidence, but is actually contradicted by the grand jury evidence, the letter he

wrote to one of his prior attorneys and the trial evidence. Under “these and all the other circumstances and all the other circumstances attending the case, there is no reasonable possibility” that the defendant’s allegation that he purchased the stolen items and that there were witnesses to such purchase were true. See C.P.L. §440.30(4)(d).

Accordingly, the defendant’s motion to vacate the judgment of conviction on the ground that he was provided with the ineffective assistance of counsel is denied without a hearing. See People v. Coleman, 37 A.D.3d 491 (2d Dept.) , lv. denied, 9 N.Y.3d 864 (2007) (ineffective assistance of counsel claim that was “largely based upon unsubstantiated, conclusory allegations” was properly denied without a hearing).<sup>3</sup>

**Conclusion**

The motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied in its entirety without a hearing.

This constitutes the Decision and Order of the Court. The Clerk of the Court is directed to mail copies of this Decision and Order to the defendant at his place of incarceration and to the Kings County District Attorney.

Dated: Brooklyn, New York  
June 16, 2008

**ENTERED**  
JUN 17 2008  
NANCY T. SUNSHINE  
COUNTY CLERK  
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J.S.C.

<sup>3</sup>The defendant’s claim that he was deprived of his federal constitutional right to counsel is rejected as he has not shown that there is a “reasonable probability” that “but for counsel’s alleged unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 694 (1984).