People v Ortiz

2008 NY Slip Op 32414(U)

May 29, 2008

Supreme Court, Kings County

Docket Number: 0004176/2002

Judge: James P. Sullivan

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 3

THE PEOPLE OF THE STATE OF NEW YORK	:	**DECISION AND ORDER**
-against-	:	
ANIBAL ORTIZ,	:	
Defendant.	:	**Indictment No. 4176/2002**

JAMES P. SULLIVAN, J.

The defendant has moved, pursuant to CPL § 440.10 (1) (c) and (1) (g), for an order vacating the judgment of the Supreme Court, Kings County, convicting him, after a jury trial, of sodomy in the second degree, sodomy in the third degree, sexual abuse in the second degree and endangering the welfare of a child. He was acquitted of a second count of sexual abuse in the second degree. In a motion dated October 29, 2007, the defendant alleges that: (1) the People failed to disclose exculpatory evidence, namely, the denial by the complainant's grandmother, Juanita Rodriguez, that the complainant had visited her on January 18, 19, or 20 of 2002, and that the grandmother had lent her a pair of underpants; (2) that the conviction was obtained using material evidence that the prosecution knew or should have known was false; (3) that newly-discovered evidence exists that would have resulted in a verdict more favorable to the defendant if it had been presented to the jury; (4) that his trial counsel provided ineffective assistance of counsel; and (5) that the trial judge should not have admitted into evidence the underpants which the complainant wore at the time of the incident in question. For the reasons stated below, the motion is denied.

Procedural History

The defendant was charged under Indictment Number 4176/2002 with sodomy in the second degree, sodomy in the third degree, sexual misconduct, two counts of sexual abuse in the second degree, and endangering the welfare of a child. These charges involved an incident which allegedly occurred on January 20, 2002, between the defendant, who was then 39 years old, and Danielle Conde, who was then 13 years old. The complainant was visiting was visiting the home of her sister and the defendant over that weekend in Kings County, NY. The defendant was the fiancé of the complainant's sister at the time. The defendant was arraigned on the above-referenced Indictment

on August 1, 2002, in Kings County Supreme Court. The case went to trial on June 7, 2004, and the defendant was convicted on June 17, 2004, after a trial by jury. The defendant was convicted of sodomy in the second degree, sodomy in the third degree, sexual abuse in the second degree, and endangering the welfare of a child. The defendant was sentenced on September 16, 2004, to two (2) to six (6) years' jail.

The defendant filed a motion pursuant to CPL § 330.30 soon after his conviction, to set aside the verdict, alleging, among other things, that his right to a fair trial was violated by the admission into evidence of the panties which the complainant wore at the time of the incident. On September 16, 2004, the defendant's motion was denied. As indicated above, the defendant was sentenced, on that date, to two to six years imprisonment for sodomy in the second degree, one year imprisonment for sodomy in the third degree, one year imprisonment for the sexual abuse in the second degree, and one year imprisonment for endangering the welfare. All sentences were to be served concurrently.

The Current Motion to Vacate the Judgment of Conviction

The defendant argues that the people failed to disclose exculpatory evidence. The denial by the complainant's grandmother, Juanita Rodriguez, to defendant's investigator, Harry Glemser, Jr., on April 23, 2007, that the complainant had visited her on January 18, 19, or 20 of 2002, and that the grandmother had lent the complainant a pair of underpants, are not supported by a sworn affidavit from the grandmother. The defendant provided a sworn affidavit from the Harry Glemser, Jr., that he spoke to Juanita Rodriguez, the complainant's grandmother, on April 23, 2007, and a transcript of the tape recording that he made during the interview.

CPL §440.30(4)(b) provides that a Court may deny a motion to vacate the judgment of conviction without a hearing when"[t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts[.]" Thus courts have held that a motion to vacate the judgment of conviction may be denied when a claim raised therein is based solely on conclusory and unsupported allegations. *People v. Session*, 34 N.Y.2d 254, 256 (1974); *People v. Lake,* 213 A.D.2d 494 (2d Dept.), *lv. denied,* 86 N.Y.2d 737 (1995); *People v. Lawson,* 191 A.D.2d 514, 515 (2d Dept.) *lv. denied,* 81 N.Y.2d 1075 (1993); *People v. LaPella,* 185 A.D.2d 861, 862 (2d Dept. 1992), *lv. denied,* 81 N.Y.2d 842 (1993).

Here, the defendant's claims regarding any statement by the complainant's grandmother are

not supported by sworn allegations from the grandmother herself, but merely by hearsay allegations about what the grandmother said to the defendant's investigator. *See,* CPL §440.30 (4)(b), (d). Additionally, even if the allegations by the complainant's grandmother were properly sworn, the facts alleged do not state a legal basis for relief. *See,* CPL § 440.30 (4) (a). Here, the prosecution had never gained this information, and is not required to disclose evidence potentially favorable to the defense if it does not possess such evidence. *See, People v Broxton,* 34 A.D3d 491 (2d Dep't 2006); *People v. Hearns,* 33 A.D.3d 722 (2 Dep't 2006); *People v. Carnett,* 19 A.D. 3d 703 (2d Dep't 2005). Thus, the People were not under a duty to obtain or create this evidence for defendant's benefit. *See, People v. Alvarez*, 70 N.Y.2d 375, 380-81 (1987). Moreover, the grandmother's statement in 2007, does not demonstrate that the complainant's testimony at trial lacked veracity. Moreover, the grandmother's claim that she may have spent the weekend of January 18, 2002 through January 20, 2002 in the hospital is contradicted by the record, where the complainant, the complainant's sister, and the defendant all testified that they had dinner with the grandmother in New Jersey on the night of January 19, 2002. Based on defendant's failure to submit sufficient sworn allegations to support his claim, as well as the contradiction from record evidence, the court denies the motion to vacate the judgment on this claim.

The defendant's second claim, that his conviction was based on material evidence at his trial that was false and the prosecution knew that the evidence was false, must also be denied without a hearing. The defendant's claim, also based on the complainant's grandmother's statement to the defendant's investigator on April 23, 2007, is unsupported by sufficient sworn allegations and additionally does not state a legal basis for relief. *See*, CPL §440.30 (4) (a) (b). Moreover, any statement that the grandmother may have made to the defendant's investigator in 2007 would be irrelevant as to whether the People knew or should have known that the complainant was allegedly lying when she testified in 2004. Accordingly, this claim is denied.

The defendant's third claim, that the complainant's grandmother's statements made to the defendant's investigator constituted newly-discovered evidence, is also denied without a hearing. As indicated above, these statements are not supported by sufficient sworn allegations. In addition, the factual allegations in support of the motion do not provide a legal basis for relief. CPL § 440.30 (4) (a) (b). Furthermore, it cannot reasonably be said that the evidence adduced has satisfied the statute and case law as having been newly-discovered. To prevail on this claim, the evidence: 1) must have been discovered since the trial; 2) must be such that could not have been produced by the defendant at trial even with the exercise of due diligence; 3) must be such as to create a probability that had such evidence been received at the trial, the verdict would have been more favorable to the

defendant; 4) must be material to the issue; 5) must not be cumulative; and 6) must not be merely impeaching or contradictory to the former evidence. CPL §440.10 (1) (g). *See, People v. Salemi,* 309 N.Y. 208 (1955), *cert. denied,* 350 U.S. 950 (1956); *People v. Pineda,* 207 A.D.2d 915 (2d Dep't 1994); *People v. Lavrick,* 146 A.D.2d 648, 648-49 (2d Dep't 1989) *cert. denied,* 493 U.S. 1029 (1990); *People v. Latella,* 112 A.D.2d 321 (2d Dep't 1985).

In this case, it certainly cannot be said that this information could not have been obtained by the defendant before the trial by the exercise of due diligence, as the defendant knew the complainant's grandmother and knew where she lived. Additionally, this evidence is merely arguably impeaching and contradicting the former evidence, and cannot said to be material. The sworn affidavit of Harpreet Singh, the forensic scientist, who worked on the case in 2002, does not demonstrate that the information from the grandmother is material as it does not alter the conclusion that DNA consistent with defendant's profile was present on the underpants worn by the complainant. Furthermore, this claim that the underpants could have belonged to the complainant's sister is unsupported by any evidence, and is based merely on hearsay allegations from the defendant's investigator. Accordingly, this claim is denied.

The defendant's fourth claim is based on an assertion of ineffective assistance of counsel. Defendant claims, first, that his trial counsel failed to conduct any research relating to any possible contamination of the complainant's underpants. Additionally, defendant contends that said counsel failed to call an expert to explain how the underpants may have been contaminated, as well as to explain the effects moisture, resulting from the underpants remaining in a hamper for 37 days after the incident. However, both the DNA expert called by trial counsel, as well as the People's expert, addressed this issue, and testified that DNA could have been transferred onto the underpants from other fabrics with which they came in contact. Furthermore, the allegations that the underpants were contaminated, or may have been exposed to moisture sufficient to affect the results of the DNA testing is not supported by evidence adduced at trial , or by Harpreet Singh's affidavit. Moreover, Mr. Singh's affidavit says nothing about the effects of moisture, nor that he was prepared to testify that the effects to moisture would have yielded false results. Additionally, testimony at trial by the People's expert, Marie Samples, assistant director at the Department of Forensic Biology, Office of the New York City Chief Medical Examiner, was to the effect that if the DNA on the underpants had been degraded, it would not have been possible to extract the defendant's DNA profile, nor the profile of anyone else. The defendant's claim that defense counsel should have called a further expert is unsupported by the record evidence, or by any affidavits from potential witnesses that would have supported this claim. *See,* CPL § 440.30 (4) (b); *People v. Session*, 34 N.Y.2d 254, 256 (1974);

People v. Lapella, 185 A.D.2d 861, 862 (2d Dep't), *lv. denied,* 81 N.Y.2d 842 (1993). Accordingly, this claim must be denied.

The defendant's second claim for ineffective assistance of counsel must also be denied without a hearing. Defendant claims that trial counsel failed to adequately prepare for cross-examination of the prosecution's witness, Dr. Lewittes, an expert on child sex abuse syndrome. Defendant alleges that counsel failed to request copies of underlying studies relied on by Dr. Lewittes, and did not call a defense expert of his own to rebut the opinions and conclusions asserted by this expert. The defendant's motion papers are not supported by sworn affidavits, thus the allegation that his attorney failed to adequately prepare for cross-examination is unsupported. Additionally, neither the defendant, nor the record evidence shows any evidence that Dr. Lewittes relied upon any particular studies in rendering his opinion. Furthermore, the defendant has offered no affidavits from any experts whom defense counsel should have called to rebut Dr. Lewittes's testimony, nor any evidence that there were studies that contradicted Dr. Lewittes's views. CPL §440.30 (4) (a) (b).

The case of *Lindstadt v. Keane,* 239 F.3d 191 (2d Circ. 2001), relied upon by the defendant must be distinguished from the present case. Although in *Lindstadt,* the defense counsel's representation was found to be ineffective, that finding had nothing to do with the examination of Dr. Lewittes, and pertained to the examination of another witness who did testify that he relied upon specific studies to render his opinion. In the present case, Dr. Lewittes's testimony does not indicate that he was relying on any particular study when forming his opinion. Rather, the record evidence indicates that Dr. Lewittes based his opinion upon his experience, as well as his education, in the area of child sex abuse syndrome. Thus, based on defendant's failure to submit sufficient sworn allegations to support his claim, as well his failure to demonstrate that his attorney failed to provide meaningful representation, the court denies the motion to vacate judgment on this claim. *See, People v. Benevento,* 91 N.Y.2d 708 (1998); *People v. Caban,* 5 N.Y.3d 143 (2005).

The defendant's final claim of ineffective assistance of counsel must also be denied without a hearing. Defendant claims that his trial counsel failed to move to dismiss the sodomy charges in the indictment, pursuant to changes in the 2003 amendments to the Sexual Reform Act of 2000 which now defined the crime of sodomy to "criminal sexual act." McKinney's Consolidated Laws of New York, volume 39, p215. CPL § 440.10 (2) (b) provides that a court *must* deny a motion to vacate judgment when sufficient facts appear on the record, and the judgment is appealable or pending on appeal. The trial counsel's failure to dismiss the sodomy charges, or request curative

instructions are set out in the record, and are, therefore, procedurally barred.

The defendant's final claim is that the court erroneously admitted into evidence the underpants that the complainant, Danielle Conde wore on the day that the crime was committed. The defendant alleges that the People failed to demonstrate a sufficient chain of custody indicating that the item had not been altered or replaced. CPL § 440.10 (3) (b) provides that a Court may deny a motion to vacate the judgment of conviction without a hearing when "the ground or issue raised upon the motion was previously determined on the merits upon a prior motion[.]" This claim was previously determined on the merits upon a motion pursuant to CPL §330.30 to set aside the jury verdict, thus the court may deny the motion to vacate the judgment.

In any event, the evidentiary foundation for real evidence alleged to be an actual object associated with a crime requires the offering party to establish "first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with". (*People v. Julian,* 41 NY2d 340, 342-343). In determining admissibility, then, the basic inquiry is whether there are "reasonable assurances of the identity and unchanged condition' of the evidence" (*Id.* At 343, citing *Amaro v. City of New York,* 40 NY2d 30, 35). Of course, when the evidence is not patently identifiable or is capable of being replaced or altered, admissibility generally relies on establishing the chain of custody, to wit, that all persons who handled the item identify it and testify to its custody and unchanged condition (*see, People v. Connelly,* 35 NY2d 171 [1974]).

Here, the testimony the testimony at trial that the underwear contained in the evidence bag was the same as the panties the complainant wore on the date of the incident and appeared to be in essentially the same condition as when turned over to the police satisfied the People's burden that the evidence was identical to that involved in the crime and had not been tampered with. The issue of possible contamination of the evidence by commingling with other dirty clothes prior to its retrieval by the police, was fully explored upon the cross-examination of the People's expert witness. Thus, the evidence provided sufficient proof of authenticity to warrant admission of the panties, and any gap in the chain of custody affected the weight to be accorded the item, not its admissibility. *See, People v. Julian,* 41 N.Y.2d at 344. Furthermore, any allegation that the underpants "could have belonged to Ruth Conde, the complainant's older sister and then girlfriend" of the defendant, is unsupported by the trial record, or by any affidavits from potential witnesses that would have supported this claim. Thus, this claim is based solely on conclusory and unsupported allegations. *See,* CPL § 440.30 (4) (b); *People v. Session,* 34 N.Y. 254 (1974); *People v. La Pella,* 185 A.D.2d 861 (2d Dep't 1992). Accordingly, this claim is denied without a hearing.

Accordingly, the defendant's motion to vacate the judgment of conviction is denied. This constitutes the decision and order of the Court.

Dated: May 29, 2008

E N T E R,

JPS

James P. Sullivan, J.S.C.

HON. JAMES P. SULLIVAN
Justice N.Y.S. Supreme Court

ENTERED

JUN 2 0 2008

NANCY T. SUNSHINE
COUNTY CLERK