

People v McDonald

2008 NY Slip Op 33548(U)

December 1, 2008

Supreme Court, Kings County

Docket Number: 8894/86

Judge: Jill Konviser

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

----- X
THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

Ind. No. 8894/86

THOMAS McDONALD, :

Defendant. :

----- X

JILL KONVISER, JUSTICE:

During the spring of 1985, the defendant concocted a scheme to murder his wife, Delores McDonald. To effectuate this scheme, the defendant hired Wilson Rodriguez, the co-defendant, to kill her. Co-defendant Rodriguez made efforts to obtain the assistance of a third person to commit the murder. On June 26, 1985, Delores McDonald was murdered in the Brooklyn home she shared with the defendant. In May of 1988, the defendant, after a jury trial, was convicted of his wife's murder. The jury found that the defendant, acting together with co-defendant Rodriguez, committed the crimes of murder in the second degree and conspiracy in the second degree.¹ On June 7, 1988, the defendant was sentenced to consecutive indeterminate prison terms of twenty-five years to life on the murder count and eight and one-third to twenty-five years on the conspiracy count. On direct appeal, the defendant's conviction was unanimously affirmed. People v. McDonald, 231 A.D.2d 647 (2d Dept.), lv. denied, 89 N.Y.2d 926 (2001).

The defendant has now filed a pro se motion under Criminal Procedure Law §440.30 (1-a) to obtain DNA testing of the hairs recovered from the murder victim.² This is the second such

¹The co-defendant, who was tried separately, was convicted in November of 1988 of murder in the second degree and conspiracy in the second degree.

²C.P.L. §440.30(1-a) requires a trial court to grant a motion for DNA testing only where the movant demonstrates that if a DNA test had been conducted and such test had been admitted

motion for DNA testing of the hair recovered from the murder victim that the defendant has filed.³ The defendant's first pro se motion under C.P.L. §440.30(1-a) for DNA testing of the hair recovered from the murder victim was rejected, on the merits, by the trial court. See People v. Thomas McDonald, Slip Op. No. 8894/86 (Sup. Ct. Kings Co. June 29, 1998) (Martin, J.). In rejecting the defendant's motion, the trial court ruled, inter alia:

[I]n the case at bar, even if the hair samples in question do not match that of the Defendant or his co-conspirator, it can not be determined when the hair samples were deposited on the deceased. Further, the witnesses' testimony identifying and implicating the Defendant and co-conspirator are uncontroverted. The DNA test results will not seriously impeach such testimony.

* * * *

Under the totality of the circumstances, the Court concludes that there is not a reasonable probability that the verdict would have been more favorable to the defendant if DNA testing results had been admitted at trial. Accordingly, Defendant's motion for DNA testing is denied.

Id.

The trial court's rejection of the defendant's pro se motion for DNA testing was explicitly affirmed by the Appellate Division, Second Department. See People v. McDonald, 298 A.D.2d 466, 466-67 (2d Dept.), lv. denied, 99 N.Y.2d 561 (2002). In its ruling, the Appellate Division held:

into evidence at trial that there is a "reasonable probability that the verdict would have been more favorable to the defendant." C.P.L. §440.30(1-a); see People v. Williams, 47 A.D.3d 648 (2d Dept. 2008).

³Four hairs were recovered from the victim's body by the Office of the Chief Medical Examiner. The hair analysis performed on the four hairs that were recovered revealed: (1) one hair was an animal hair; (2) one hair was a pubic hair similar to the defendant's pubic hair; (3) one hair was too short for an analysis to be conducted; and, (4) one hair was not similar either to the defendant's or the deceased's hair. As the hair sample taken from co-defendant Rodriguez was too short to make a comparison, Rodriguez's hair could not be compared to the hairs recovered from the victim's body.

Under the circumstances of this case, the Supreme Court properly denied without a hearing, the defendant's motion pursuant to CPL 440.30(1-a) for forensic DNA testing on certain evidence recovered by the police.

Id.

In addition, the defendant's claim that he was entitled under C.P.L. §440.30(1-a) to DNA testing of the hair recovered from the murder victim was rejected, on the merits, by the United States District Court for the Eastern District of New York in connection with its denial of the defendant's petition for a federal writ of habeas corpus, See McDonald v. Smith, ___ F. Supp.2d ___, 2003 WL 22284131 (E.D.N.Y. Aug. 21, 2003) (Weinstein, J.), *affd.*, 134 Fed.Appx. 466, 2005 WL 1389512 (2d Cir. June 10, 2005). The Honorable Jack Weinstein, in rejecting the defendant's petition for a writ of federal habeas corpus, held:

The state court's determination that there is no reasonable probability that the verdict would have been more favorable to petitioner if one hair was from an unknown individual was a reasonable application of the law to the facts, does not constitute a constitutional violation of petitioner's rights, and does not support the granting of a writ of habeas corpus.

Both petitioner and his designated killer, Rodriguez, were looking for a third person to do the actual killing. If they were successful, as a jury could conclude, the hair, coming from an unknown third person would not prove petitioner's innocence. Given the circumstances, the value of DNA testing was almost zero. It is highly unlikely that the hypothesized unknown intruder who might have left a hair on the victim was unconnected with the petitioner's scheme. This was not like a Woody Allen's *Take the Money and Run* where two independent teams of criminals entered a bank at the same time to rob it.

Id. at *10. Judge Weinstein's rejection of the defendant's petition for a writ of federal habeas corpus was affirmed the United States Court of Appeals for the Second Circuit. McDonald v. Smith, 134 Fed.Appx. 466, 2005 WL 1389512 (2d Cir. June 10, 2005).

The defendant's motion before this Court, to obtain DNA testing of the hairs recovered from Delores McDonald's body, is denied as this identical claim has already been rejected, on the merits, by the Appellate Division, Second Department. People v. McDonald, 298 A.D.2d 466 (2d Dept. 2002). This Court is bound to follow the Appellate Division's decision. See People v. Towndrow, 187 A.D.2d 194, 195 (4th Dept.), lv. denied, 81 N.Y.2d 1021 (1993) ("It should hardly need to be stated that trial courts are bound to follow the holdings of the Appellate Division[.]"); Ross Bicycles, Inc. v. Citibank N.A., 149 A.D.2d 330 (1st Dept. 1989) ("The doctrine of stare decisis requires that courts of original jurisdiction follow the decisions and precedents of the Appellate Division, which have jurisdiction of law and fact."); Miller v. Miller, 109 Misc.2d 982, 983 (Sup. Ct. Suffolk Cty. 1981); Himes v. Stalker, 99 Misc.2d 610, 616 (Sup. Ct. Cattaraugus Co. 1979).

Contrary to the defendant's claim, the validity of the Appellate Division's ruling is not undermined by the trial court's mistaken conclusion, in its decision denying the defendant's motion for DNA testing, that the DNA hairs recovered from the victim's body were too short for DNA testing. See People v. Thomas McDonald, Slip Op. No. 8894/86 at 3 (Sup. Ct. Kings Co. June 23, 1999) (Martin, J).⁴ Prior to the issuance of its decision affirming the trial court's ruling with respect to DNA testing, the trial court's error had been brought to the Appellate Division's attention in the appellate briefs filed before that Court by the People and the defendant's appellate counsel. See People's Appellate Division Brief at 39 (People's Exhibit B); Defendant's Appellate Division Brief at 14 (People's Exhibit A). As the Appellate Division was well aware of the error made by the trial court at the time it affirmed the trial court's ruling denying the defendant's motion for DNA testing under C.P.L. §440.30(1-a), no grounds have been presented for this Court to disregard the Appellate

⁴A copy of this decision is attached to the defendant's motion papers as Exhibit A.

Division's explicit ruling.

Alternatively, the defendant's motion is denied as it is barred from this Court's consideration by C.P.L. §440.10(3)(b). The procedural bar embodied in C.P.L. §440.10(3)(b) provides that a court may deny a motion to vacate a judgment when:

The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue.

In this case the precise issue now before the court – whether the hairs recovered from the victim's body should be subjected to DNA testing under C.P.L. §440.30(1-a) -- was rejected on the merits by the New York State Supreme Court, the Appellate Division, Second Department and the United States District Court for the Eastern District of New York. Moreover, there has not been retroactive change in the law with respect to the controlling issue.⁵ As such, the defendant's claim is procedurally barred by C.P.L. §440.10(3)(b).

The procedural bar embodied in C.P.L. §440.10(3)(b) applies in this case even though the defendant has not explicitly moved in his current motion papers to vacate the judgment of conviction under C.P.L. §440.10 as he seeks only to obtain DNA testing under C.P.L. §440.30(1-a). The purpose, however, of a C.P.L. §440.30(1-a) motion is “to provide a mechanism for obtaining ‘DNA testing in support of a motion to vacate a judgment on the ground of newly discovered evidence.’” See People v. Byrdsong, 33 A.D.3d 175, 178 (2d Dept.), lv. denied, 7 N.Y.3d 900 (2006), quoting

⁵The defendant's apparent suggestion in his reply memorandum that McKithen v. Brown, 565 F.Supp.2d 440 (E.D.N.Y. 2007) represents a retroactive change in the law is incorrect as the McKithen decision is not binding on this Court. See People v. Kin Kan, 78 N.Y.2d 54, 60 (1991).

Preiser, Supplemental Practice Commentary, McKinney's Cons. Laws of NY, Book 11A, Criminal Procedure Law §440.30, 2005 Pocket Part, at 318; People v. Kellar, 218 A.D.2d 406 (3d Dept.), lv. denied, 88 N.Y.2d 937 (1996). As such, the procedural requirements set forth in C.P.L. §440.10 apply to motions for DNA testing under C.P.L. §440.30(1-a). See People v. Pugh, 288 A.D.2d 634 (3d Dept. 2001) (second motion for DNA testing under C.P.L. §440.30(1-a) procedurally barred by C.P.L. §440.10(3)(c); People v. Kellar, 218 A.D.2d at 410 (due diligence requirement of C.P.L. §440.10(1)(g) applies to motions for DNA testing filed under C.P.L. §440.30(1-a); see also People v. Hayes, 284 A.D.2d 1008 (4th Dept.), lv. denied, 97 N.Y.2d 641 (2001).


Finally, the defendant's motion for DNA testing under C.P.L. §440.30(1-a) is denied as it is without merit. C.P.L. §440.30(1-a) requires a trial court to grant a motion for DNA testing only where the movant demonstrates that had such DNA test been admitted into evidence at trial there is a "reasonable probability that the verdict would have been more favorable to the defendant." See C.P.L. §440.30(1-a). In this case, for the reasons stated in the opinions by the Honorable Judge Jack Weinstein and the State trial court judge, this Court finds that there is no reasonable probability that the verdict would have been different had the jury heard that DNA evidence showed that a hair found on the victim's body did not belong either to the defendant or to the co-defendant. See McDonald v. Smith, 2003 WL 22284131 at *10; People v. Thomas McDonald, Slip Op. No. 8894/86 at 3 (Sup. Ct. Kings Co. June 23, 1999) (Martin, J). Indeed, this Court concludes, as Judge Weinstein did, that the "value of DNA testing [in this case] was almost zero[.]" Id. Accordingly, for this additional reason, the defendant's motion for DNA testing under C.P.L. §440.30(1-a) is denied without a hearing.

Conclusion

The motion for DNA testing under C.P.L. §440.30(1-a) 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
December 1, 2008



J.S.C.

ENTERED
DEC - 2 2008
NANCY T. SUNSHINE
COUNTY CLERK