SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, MISC.MOTIONS

PEOPLE OF THE STATE OF NEW YORK

against

Mark Polite,

Defendant

Indictment No.: 2771 /99

By: Hon. Thomas J. Carroll

Dated: August 4 , 2009

Defendant filed a pro se motion pursuant to CPL 440.10 to vacate judgment. In deciding this motion, the court has considered the motion papers, the People's response, the defendant's reply and the court file.

Background

On October 6, 1999, the defendant was found guilty of one count of attempted murder in the second degree.

On October 18, 1999, the court sentenced the defendant to twenty years to life as a persistent felony offender (Carroll, J., at trial and sentence).

In February, 2001, appellate counsel for the defendant filed a brief in the Appellate Division, Second Department, containing the following issues:

1. Whether the defendant should have been present at a sidebar conference at which the parties discussed whether to allow the prosecutor to cross-examine a defense witness about whether he knew appellant in an Elmira prison and

2. Whether the trial court abused its discretion and denied the defendant his constitutional right to confront witnesses against him when it refused to re-open cross-examination of the complainant as a "penalty" for alleged witness intimidation.

The appellant's brief, citing the trial transcript, stated that the complainant, Tyrone

Bowman, ". . . had been convicted of many crimes, including the following felonies: . . . ." It then referred to a weapon case and two drug cases. Appellant's Brief, page 4.

In July 2001, the defendant filed a pro se supplemental brief claiming errors regarding identification issues and ineffective assistance of counsel.

On February 19, 2002, the defendant's judgment of conviction was affirmed. People v. Polite, 291 AD2d 511 (2d Dep't).

On June 14, 2002, the defendant's application for leave to appeal to the Court of Appeals was denied. People v. Polite, 98 NY2d 679 (2002).

The defendant petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of New York raising the same claims as he had on direct appeal. On April 8, 2004, the petition was denied and the defendant was denied a certificate of appealability. Polite v. Duncan, No. 03–CV-2405 (ARR) (EDNY, 2004) (Ross, J.).[1]

In August, 2004, the United States Court of Appeals for the Second Circuit denied the defendant's application for a certificate of appealability. Polite v. Duncan, No. 04-3864-pr (2d Cir. 2004).[2]

In the defendant's current pro se motion to vacate judgment, the defendant makes the following claims:

" (1). By virtue of the People's misrepresentation of CPL § 440.10(1)(b); knowing use of faulty and misleading evidence CPL § 440.10(1)(c); and improper and prejudicial conduct not appearing on the record, CPL § 440.10(1)(f) violation of the constitution of the United States.

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[1] People's Affirmation in Opposition, para. 11 and 12.

[2] Id., para. 13

(2). And for such other and further relief as the court deem just and proper."

The essence of the defendant's claim is that the complaining witness, Mr. Bowman, committed perjury when he testified that he was not "still" selling drugs; denied hiring people to sell drugs; the prosecutor knew, or should have known, it was perjury. To establish that Mr. Bowman was selling drugs, the defendant has attached three exhibits: Det. Michael Zeller's arrest report related to the August 28, 2002, arrest of Mr. Bowman; a New York Post article dated August 29, 2002, reporting that arrest; a Federal Bureau of Prisons Inmate Locator.

Mr. Bowman was indicted by a federal grand jury, Eastern District of New York, for, among other things, conspiracy to distribute a controlled substance. On March 28, 2003, Mr. Bowman pled guilty and on July 10, 2003, was sentenced to a prison term of twenty years.[3]

The defendant also claims the police were aware that the defendant was not the shooter because another patient in the hospital, Mr. L. Barrows, overheard Mr. Bowman tell the police that he did not know who shot him.

The People oppose the defendant's motion and have submitted, among other things, an affirmation signed by ADA Bennett, the trial assistant. ADA Bennett affirmed that she did not know that Mr. Bowman was still selling drugs when she presented Mr. Bowman's testimony. ADA Bennett also set forth the steps she took to determine if Mr. Bowman was still selling drugs. This court credits ADA Bennett's affirmation and believes she took reasonable steps to reach her determination.

In his reply, defendant claims perjury was committed at trial and the prosecutor had a duty to correct it. He refers to: (1) Mr. Bowman's assertion that he changed his lifestyle; (2) the

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[3] People's Affirmation, para. 19, 20, 21 and 22.

description testimony of three of the People's witnesses, Bravo, Rodriguez and Logan; (3) the inconsistency in the testimony of the complaining witness and Indira Rodriguez regarding where the complaining witness lived.

440.10(1) and alleged perjury

Delay

In this case, the defendant delayed in making his motion to vacate a judgment for more than five years after Mr. Bowman pled guilty in federal court. In *People v Nixon,*[4] the Court stated:

> "Quite important too, as revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are; albeit, if they are made out, justice requires that they be explored in a hearing (cf. *People v Chait*, 7 AD2d, 399, 401, *affd.* 6 NY 2d 855)."

A delay in making a claim can be considered in evaluating the seriousness and validity of a claim and may undermine the legitimacy of the claim.[5]

A lengthy delay in making a motion to vacate a criminal judgment can also be considered when the court determines whether to exercise its discretion in applying permissive procedural bars under CPL 440.10 and CPL 440.30.[6]

Knowledge

Defendant's claims under both 440.10 (1)(b) and (c) require knowledge on the part of

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[4] 21 NY2d 338, 352 (1967)

[5] *People v Melio*, 304 AD2d 247, 252 (2003); *People v Hanley*, 255 AD2d 837, 838 (1998).

[6] *People v Degondea*, 3 AD3d 148, 160-161 (2003).

the prosecutor. CPL § 440.10 (1)(b) (". . . on the part of . . . a prosecutor . . . ;") and CPL § 440.10(1)(c) (". . . known by the prosecutor . . . ;"). This court finds that ADA Bennett did not know at the time of the trial that the complaining witness, Mr. Bowman, may have been involved in the sale of drugs. Thus, the defendant's claims under para. (b) and (c) are denied.

This court further finds the defendant has not submitted a sworn allegation stating his source and grounds for believing ADA Bennett had knowledge of any alleged perjury on this subject. The defendant has not complied with CPL § 440.30(1). Thus, the defendant's claims under para. (b) and (c) are also denied under 440.30 (4)(b).

The court further notes that the federal indictment, Count One, reads "In or about and between January 1995 and January 2000, both dates being approximate and inclusive . . . ." This trial, as even the defendant noted in his Notice, para. 5, was held in the end of September and early October, 1999, just some three to four months before January 2000, the "approximate" terminal point of the time frame in Count One.

440.10(1)(f)and (h)

This court can not conclude that if Mr. Bowman was still selling drugs at the time of the trial and if it appeared on the record that it would have required a reversal upon appeal. CPL § 440.10(1)(f). As noted above, the time frame in Count One was "approximate" and this trial took place in the last three to four months of that five year time frame. Even if the claim was on the record, it would not have required a reversal.

The defendant has not established that the judgment was obtained in violation of the constitution of this state or the United States. CPL § 440.10(1)(h).

Decision regarding alleged perjury

Consequently, for the above reasons, the defendant's 440 motion based on Mr. Bowman's alleged perjury regarding his still selling drugs is denied.

Mr. L. Barrows

The defendant has not submitted a sworn affidavit from Mr. L. Barrows regarding this claim. Nor has the defendant submitted an explanation for not submitting such an affidavit. The court also notes that Mr. Barrows alleged statement is hearsay.

This evidence, if admissible at all, would only have been admissible on the issue of credibility and it probably would have been of limited, if any, value, since both the defendant and Mr. Bowman knew each other and they both put themselves at the place of the shooting. Thus, this court can not conclude the evidence is "of such character as to create a probability that . . . the verdict would have been more favorable to the defendant; . . . ." CPL § 440.10(1)(g).

The defendant's claim predicated on Mr. Barrow's alleged hearsay is denied. CPL § 440.30 (4)(a) and (b).

Other Claims

The claim regarding Mr. Bowman's changed lifestyle is a restatement of the defendant's claim that Mr. Bowman committed perjury.

Accordingly, the court denies that claim

The defendant's claim regarding the descriptions provided by three witnesses is apparently predicated on information in the record and thus barred under CPL § 440.10(2)(c).

The defendant's claim regarding inconsistencies about where the defendant lived is predicated upon information on the record and thus barred under CPL § 440.10(2)(c).

Decision Regarding All Claims

The defendant's 440 motion is denied in all respects.

Right to Apply to Appeal

The defendant is hereby advised 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 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 certificate granting leave to appeal is granted.[7]

This shall constitute the decision and order of the Court.

E N T E R,

J. S. C.
HON. THOMAS J. CARROLL

[7] 22 NYCRR § 671.5.