

People v Hayes

2009 NY Slip Op 31777(U)

July 15, 2009

Supreme Court, Queens County

Docket Number: 3982/00

Judge: Gregory L. Lasak

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SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-23

P R E S E N T: HON. GREGORY L. LASAK,
Justice.

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

- against-

Indictment No.:3982/00
Motion: CPL § 440.10 (1)(b, c, f- h)

RONALD HAYES,

Defendant.
-----X

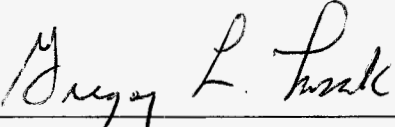
RONALD HAYES,
Pro Se

RICHARD A. BROWN, D.A.

BY: MERRI TURK LASKY, ADA
Opposed

Upon the foregoing papers, and due deliberation had, defendant's motion to vacate the judgment is denied.

Kew Gardens, New York
Dated: July 15, 2009



GREGORY L. LASAK
JUSTICE SUPREME COURT

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The following constitutes the opinion, decision and order of the Court.

By motion dated March 17, 2009, defendant moves pursuant to CPL § 440.10 (1)(b, c, f-h) to have the sentences on the all the counts of the Indictment vacated.

In response, the People have filed an affirmation in opposition dated May 20, 2009, whereby they assert that defendant’s motion should be denied in its entirety.

For the reasons stated herein, defendant’s motion is denied.

Facts

On November 26, 2000, defendant, acting in concert with another person who was armed with a gun, robbed a Waldbaums Supermarket, taking a sum of United States currency.

For these acts, defendant was subsequently charged with two counts Robbery in the First Degree (PL § 160.15 (3), (4)) and two counts of Robbery in the Second Degree (PL § 160.10 (1), (2B)) (Queens County Indictment Number 480/01).

In the early morning hours of December 18, 2000, defendant, armed with a gun, and co-defendant Michael Sanders, entered a Pathmark Supermarket, accosted the manager, and stole over \$4,000. Defendant and co-defendant were apprehended by the police inside the store, and over \$4,000 and a gun were recovered from defendant.

On the day of the robbery, not all of the cameras in Pathmark were working; there were generally problems with the camera near the case registers (Richards: 285, 337; Lisa: 406).

On the day of the robbery, Police Officer Norris vouchered the nine original tapes removed from the VCRs. Each of these tapes showed numerous camera angles (Fernandez: 304-05, 341, 345; Norris: 374; Richards: 296-98). The nine original tapes were admitted into evidence at trial as People's Exhibit 1 (Fernandez: 306; Richards: 336).

Defendant and co-defendant were thereafter charged, under Queens County Indictment Number 3982/00, with two counts of Robbery in the First Degree (PL § 160.15 (2), (4)), Robbery in the Second Degree (PL § 160.10 (1), (2B)), Criminal Possession of a Weapon in the Second Degree (PL § 254.03 (2)), two counts of Criminal Possession of a Weapon in the Third Degree (PL § 265.02 (3), (4)), and Criminal Possession of Stolen Property in the Third Degree (PL § 165.50).

On July 25, 2001, Police Officer Fernandez went to Pathmark with A.D.A. Eckhardt to view the nine tapes. Only four of the tapes showed the robbery. The officer copied the relevant portions of the nine tapes onto four other tapes which were admitted into evidence at trial as People's Exhibit 2-5 (Fernandez: 304-06, 326, 341; Richards: 301).

Prior to trial, the People provided defendant with copies of all nine original videotapes as well as copies of the four videotapes made by Officer Fernandez (Proceedings: 12; Rosario/Discovery List (People's Ex. A)).

Under Queens County Indictment Number 3982/00, defendant proceeded to trial before the Honorable Mark H. Spires, Supreme Court, Queens County, and a jury.¹ During the trial, defendant moved to strike the tapes from the record, claiming that defendant had not been provided with copies of the actual tapes. Defendant argued that the videotapes he was given did not depict multiple camera angles and that he, therefore, had not been given copies of the original tapes.

¹ Co-defendant Sanders pled guilty to Robbery in the First Degree and Criminal Possession of a Weapon in the Second Degree, and, on May 8, 2002, was sentenced to a term of ten years' incarceration. Co-defendant Sanders did not file a Notice of Appeal.

However, the prosecutor explained that the multiple camera angles recorded on the original tapes could only be viewed on the VCRs at Pathmark and reiterated that defendant had been provided with copies of the original tapes (Proceedings: 373-75).

At the end of the People's case, defendant again claimed that he did not receive copies of videotapes that depicted multiple camera angles. The prosecutor reiterated that defendant had been provided with copies of the nine original tapes as well as the four tapes that were made by Officer Fernandez, but that defendant could not view the original nine tapes on a regular VCR and that defendant could have viewed those tapes on the machine at Pathmark. (Proceedings: 465-78).

During jury deliberations, the Court explained that it was closing the courtroom to everyone, including the judge, defendant, the prosecutor, and defense counsel while the jury viewed the videotapes converting the courtroom into a temporary jury room. (Proceedings: 600-10). The courtroom re-opened after the jury finished viewing the videotapes, the Court received no further communications from the jury that day. The only further proceedings conducted that day were the taking of defendant's pedigree and the court instructing the jury to cease deliberations until the following day (Proceedings: 611-14). When a jury reached a verdict the following day, the defendant's wife was in the courtroom. (Proceedings: 615-22).

At the conclusion of trial, defendant was found guilty of Robbery in the First Degree (PL § 160.15 (2)), Robbery in the Second Degree (PL § 160.10 (1)), Criminal Possession of a Weapon in the Second Degree (PL § 265.03 (2)), two counts of Criminal Possession of a Weapon in the Third Degree (PL § 265.02 (3), (4)), and Criminal Possession of Stolen Property in the Third Degree (PL § 160.50).²

Defendant subsequently brought an action against the City of New York and the Police Department in the United States District Court for the Eastern District of New York. Ronald Hayes v. City of New York, 03-CV-3755 (E.D.N.Y. 2006). As part of the discovery process, defendant was given copies of the original nine videotapes as well as an additional five or six tapes. Moreover, because the original videotapes were not viewable on a regular VCR, the New York City Law Department sent the tapes to a professional video editing service to have viewable copies made for defendant and the Court (See People's Ex. B; People's Ex. C).

² The People dismissed count three of the indictment, Robbery in the Second Degree (PL § 160.10 (2B)), prior to opening statements (Proceedings: 265).

When defendant subsequently complained that he did not receive a copy of the videotape played at defendant's criminal trial, Mr. Eichenholtz, Counsel for the City of New York, spoke to the District Attorney's Office and learned that there were several videotapes that were not sent to Mr. Eichenholtz. Those tapes were then copied and sent to Mr. Eichenholtz (See August 23, 2004 letter from Mr. Eichenholtz to Justice Lois Bloom).

In October 2004, Mr. Eichenholtz sent defendant copies of fifteen videotapes, some which were duplicates of the tapes defendant had already received (See People's Ex. D; Minutes of September 22, 2004, pp.79-90).

Decision

The defendant's motion to vacate the judgment is denied.

Defendant's first claim is that he received new evidence during the discovery process of his civil action which would create a probability that had such evidence been received at trial, it would have been more favorable to the defendant. Defendant's claim fails for two reasons.

First, the evidence received by defendant is not considered new evidence. This evidence was made available to defendant during his criminal trial and defendant has failed to avail himself of the opportunity to view the tapes at Pathmark to get a better view of the camera angles. Moreover, the only conflict in the tapes was an additional tape which the DA's office had and corporate counsel did not have. In other words, they were actually more tapes used in the criminal trial than in the civil proceedings at the time of corporate counsel's request.

Secondly, defendant has not filed his motion in a timely fashion. Section (g) of CPL § 440.10 states that a motion based on alleged new evidence must be made "...with due diligence after the discovery of such alleged new evidence." CPL § 440.10 (1) (g) (emphasis added). Defendant received all fifteen tapes on approximately October 5, 2004 as the letter by corporate counsel indicates. (See People's Ex. D). Defendant fails to mention the specific date of discovery of the alleged new evidence. (See Def's Mot.1). Nonetheless, from the time of discovery in October of 2004 to the time this motion was sworn on March 17th, 2009, four years and five months have passed. The defendant has failed to use due diligence when he filed his motion to vacate the

judgment four years and five months after the discovery of new evidence. See People v. Friedgood, 58 N.Y.2d 467, 448 N.E.2d 1317 (1983).

During deliberations the jury asked the Court to view the video tapes in evidence. The jury was then taken to the courtroom to view the video tapes for convenience purposes. Defendant claims that his family was improperly excluded from the courtroom during jury deliberations and that such conduct was in violation of his rights under the United States Constitution. Defendant's claim also fails for two reasons.

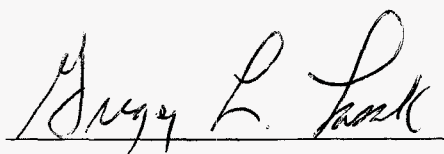
First, there was no improper or prejudicial conduct that "...would have required a reversal of the judgment..." (See CPL § 440.10 (1) (f)). The jury was already in the process of deliberation and they remained in the courtroom to view the videotapes out of convenience. There were no court personnel in court room at the time of viewing. There is no right to public viewing of jury deliberations and the temporary location for the deliberations in the courtroom does not infringe on the defendant's constitutional right to have a public trial.

Furthermore, the jury deliberated until they were finished viewing the video tapes and the Court subsequently concluded the deliberations for the day. The defendant's wife appeared in the court room the following day for the final day of deliberations. Defendant was given the right to a public trial and the failure of his step father to recognize a reopening of the court does not violate that constitutional right.

Additionally, defendant has failed to show that his judgment should be vacated based on CPL § 440.10 (1)(b)(c).

Accordingly, defendant's motion to vacate the judgment is denied in it's entirety.

Kew Gardens, New York
Dated: July 15, 2009



GREGORY L. LASAK
JUSTICE SUPREME COURT