SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 27

THE PEOPLE OF THE STATE OF NEW YORK,

Indictment No.: 8090/99

By: Hon. G. Reichbach

-against-

Dated: September 5, 2009

KEVIN THURMOND,

Defendant

The defendant moves *pro se* pursuant to C.P.L. §§440.10 and 440.20 to vacate his judgment of conviction and to set aside his sentence. This is the third such motion defendant has filed with this Court. The defendant was charged with ten counts including Attempted Rape in the 1st Degree, Sexual Abuse In the 1st Degree, Attempted Sexual Abuse in the 1st Degree, Assault in the 2nd and 3rd Degrees and Unlawful Imprisonment in the 2nd Degree, in connection with an incident that occurred in a subway station on October 5, 1999. The jury convicted the defendant of Attempted Rape in the 1st Degree and Assault in the 2nd Degree. On September 13, 2000, defendant was sentenced as a persistent violent felony offender to concurrent terms of imprisonment of 18 years to life for Attempted Rape in the 1st Degree and 15 years to life for the Assault in the 2nd Degree.

In October of 2004, Defendant moved this Court to set aside his sentence claiming that his adjudication as a persistent violent felony offender was based on prior convictions obtained in violation of his constitutional rights and that his trial counsel was ineffective for failing to obtain

the minutes of his prior plea and sentencing proceedings. The Court directly addressed this claim finding that the defendant had been given a full and fair opportunity to raise this contention at his sentencing and the claim that he had been granted Youthful Offender status on one of his prior convictions was belied by the Certificates of Disposition provided to the Court at sentencing. The defendant now offers, as newly discovered evidence, a letter from a court reporter to whom he wrote requesting copies of the minutes of the pleas and sentences in question. The letter, dated November 25, 2008 and signed by the Chief Court Reporter of County Court, Nassau County states the following:

> "I have received your recent letter wherein you request minutes under several indictment numbers. Please be advised that I cannot find any of these numbers in my computer, so I cannot determine when the minutes were done. Please send me some further information. Also please be advised that we had a fire in our archives in 1981, and most of the stenographic notes were destroyed. It may be a good possibility that these notes are not available."

Defendant argues that this letter somehow establishes that his trial counsel was ineffective since he did not try to or actually obtain the minutes of his prior sentences which were used as a basis for his predicate felon adjudication in this case. He claims that those sentences were either Youthful Offender adjudications or illegally obtained, and further, that the letter establishes that the prosecution committed fraud when it provided the Court with the predicate statement and Certificates of Disposition. He concludes that if his attorney had been diligent in obtaining the transcripts, he would have been able to testify at trial without fear of cross-examination about prior convictions, and based on his own testimony, would have been acquitted.

This is the third time that defendant has raised the issue of ineffective assistance of counsel in this Court, and the second time he is attempting to litigate the issue of his persistent

felony offender status. These issues were addressed both procedurally and substantively in prior decisions issued by this Court on April 24, 2001 and March 21, 2005 and found to be without merit and procedurally barred. While the defendant may not like or agree with this Court's decision, he cannot relitigate the issue with precisely the same arguments and expect a different outcome. This portion of his motion is denied once again pursuant to C.P.L.§440.10 (3)(c). His related contention that he should have been given an adjournment at sentencing so that he could obtain the transcripts of the prior convictions is similarly without merit, since no such request was made by defendant or his counsel, and defendant unjustifiably failed to raise this claim, which appears on the record, in his direct appeal. *People v. Byrdsong*, 234 AD2d 468 (2d Dept 1996.) This portion of defendant's motion is denied pursuant to C.P.L. §440.10(2)(c).

The letter he has provided from the court reporter does not offer support for his claims; it asks for further information. If such information were forthcoming, there is no way to predict whether or not the minutes would be located. The Court can state with certainty, however, that this letter in no way supports an allegation that the Prosecution committed fraud when it provided the Court with Certificates of Disposition and the predicate statement.

As to the issue of whether this letter actually constitutes newly discovered evidence which would enable this Court to vacate the judgment of conviction, it fails to comply with the statutory requirements of such evidence, and therefore fails to support the defendant's claims.

Pursuant to C.P.L. §440.10(1)(g), the following six requirements must be met before a party may establish that evidence is newly discovered:

1. It must be such as will probably change the result if a new trial is granted;
2. It must have been discovered since the trial;

3. It must be such that it could not have been discovered before the trial by the exercise of due diligence;

4. It must be material to the issue;

5. It must not be cumulative to the former issue; and,

6. It must not be merely impeaching or contradicting the former evidence.

People v. Lavrick, 146 A.D.2d 648, 648-49 (2d Dept 1989). The evidence must also be admissible at trial. *People v. Fields*, 66 NY2d 876 (1985). Defendant has failed to show how this letter would probably change the result of a new trial, or how it is in any way material to the issues in the trial. While defendant has discovered the letter since the trial, he has failed to show how it could not have been discovered before the trial by exercising due diligence. And finally, the letter would clearly be inadmissible at trial. It certainly does not establish the contentions for which he offers it.

Finally, defendant's claim that he would have been acquitted had he testified at trial, relates back to his argument that his counsel was ineffective for failing to obtain the minutes of his prior pleas and sentencing proceedings. As previously noted, he has already litigated the issue of ineffective assistance of counsel twice, however, he has never raised this issue. Both this court and the Appellate Division, Second Department have reviewed the sufficiency of evidence in this case, in a motion filed pursuant to C.P.L. §330.30 and on direct appeal, and have found the evidence sufficient to prove the defendant's guilt beyond a reasonable doubt. The complainant's testimony was supported by that of an independent eyewitness, and defendant has failed to delineate how his testimony alone would have created a likelihood of an acquittal. This portion of defendant's motion is denied pursuant to C.P.L.§440.10(3)(c).

Based on the foregoing, defendant's motion to vacate his judgment and set aside his conviction is denied in its entirety. This Court will not entertain further motions on these issues from defendant.

This constitutes the decision and order of the Court.

HON. GUSTIN L. REICHBACH
N.Y.S. SUPREME COURT

Gustin L. Reichbach
J.S.C.