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MEMORANDUM

SUPREME COURT KINGS COUNTY CRIMINAL TERM PART 32

THE PEOPLE OF THE STATE OF NEW YORK	)	**By** LEWIS **J.**
	)	
	)	
vs.	)	**Dated:** March 26, 2010
	)	
	)	
LAMONTE JOHNSON,	)	INDICTMENT #4319/86
DEFENDANT.	)	
	)	

The defendant, Lamonte Johnson, moves pro se by a notice of motion for this Court pursuant to C.P.L. § 440.30 , subdivision (1-a), for an Order directing DNA analysis , typing and testing of crime scene evidence which was utilized by the King's County District Attorney's Office in the prosecution of his case. Specifically, the defendant requests DNA testing of the "vehicle, the vehicle interior and exterior, blood and blood stains and blood stain patterns, and scientific evidence performed on the same, including but not limited to PCR, RFLP, Kodachromes of any blood evidence testing or its duplicative equivalent." Mr. Johnson argues that the testing of the above would vindicate him of the deaths of Lance Gonzales and Damon Rodriguez and contradict the testimony of the prosecution's witness. In addition, Mr. Johnson requests DNA testing on the shell casing that was found in the car and compared with the bullet fragments found in the bodies of Mr. Gonzalez and Mr. Rodriguez. He asserts that the testing would establish that the shooting occurred inside the vehicle and not outside as stated by the prosecution's only witness to the shooting. The defendant also requests that the prosecution

provide the log book entries detailing the chain of custody for all records provided them by the O.C.M.E. office from June 1986 up to the date of the instant motion which is April 15, 2009.

The prosecution in its affirmation in opposition to the DNA testing , argues that the request for DNA testing should be denied for the following reasons: the car is no longer in police custody and its whereabouts are unknown (The prosecution provided a copy of The Property Clerk's Motor Vehicle/Boat Invoice dated 6/24/86 and a copy of a Verification of Vehicle Storage dated 9/9/09); the defendant has not shown that if the DNA test results were admitted at trial that there would have been a reasonable probability that the verdict would have been more favorable to the defendant. See C.P.L. § 440.30 (1-a) (a). The prosecution refer to the Courts August 6, 1997 order denying the defendant's motion to vacate the judgment of conviction, where the court stated that the defendant had failed to establish that there was blood in the car, and that the existence of blood or its exculpatory value was "purely speculative." The Court in its 1997 decision stated that the defendant failed to show that the existence of blood in the car would have created a reasonable probability that the verdict would have been different.

In his reply to the prosecution's affirmation in opposition, the defendant, Lamonte Johnson argues that although the prosecution have submitted a letter from The New York City Police Department that the car is no longer in the custody of the New York City Police Department, the information is insufficient as a matter of law under C.P.L. 440.30 (1) a, to establish that the vehicle does not exist and is unavailable for testing. *People v. Barnwell*, 4. N.Y. 3d 308, 312 . In addition, he argues that the prosecution have failed to show that the evidence no longer exists or is unavailable for testing. He also raises two new issues that were not in his original motion dated April 15, 2009. The defendant states that there is newly

discovered evidence in the form of an eye witness, Dwayne Brown, also known as Jerry Brown, who was a witness to the shooting and places the victims in the car at the time the initial shots were fired. He relies on the Court's denial of his previous motion to dismiss by citing the court's reasoning for the defendant's failure to establish that there was blood in the car and that no witness has testified as to the position of the victims at the time that the shots were fired. Mr. Johnson asserts that Mr. Dwayne Brown was a witness who saw the victims in the car and contrary to Selvin Spencer, the prosecution's witness, Mr. Spencer was not with Mr. Brown or at the scene of the crime. Mr. Johnson provides a sworn affidavit of Mr. Brown that one initial shot was fired in the vehicle and a resuscitation of the facts that contradict Selvin Spencer. He states that he has known Mr. Brown for approximately 30 years. Had Mr. Brown testified at trial it is reasonable that the outcome would have been different and more favorable to the defendant. He also renews an old argument for ineffective assistance of counsel stating that his trial counsel failed to call Mr. Brown as an alibi witness at trial. His counsel had the information and had interviewed Mr. Brown. Mr. Brown, according to his sworn affidavit, was prepared to testify and never received a call. Mr. Brown's mother testified as an alibi instead. The defendant also requests that counsel be assigned to assist him in the instant matter.

The prosecution responded by its affirmation in Opposition and Sur Reply and Memorandum of Law to the defendant's motion to vacate the conviction on newly discovered evidence and ineffective assistance of counsel, and provided a more detailed account of her conversations with Sergeant Peter Viola, Administrative Sergeant at the NYPD College Point Auto Pound, with respect to the search he conducted in order to locate the vehicle, a 1978 Oldsmobile. The prosecution asserts that the defendant is procedurally barred, pursuant to C.P.L.

§ 440.10 (2) (c) because he failed to raise the claims in one of his previous motions to vacate the judgment; that Brown's affidavit is not newly discovered evidence pursuant to C.P.L. §440.10 (1) (g) and did not meet the six criteria as stated in the statute: (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 as 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. Salemi*, 309 N.Y. 208, 215-216 (1955), cert. denied, 350 U.S. 950 (1956) (quoting *People v. Priori*, 164 N.Y. 459, 472 (1900) ; See *People v. Clerkin*, 144 A.D. 2d 684, 685 (2D Dept. 1988).

In addition, the prosecution argued that Mr. Johnson has no credibility with the court with respect to his witnesses, referring to the court's February 15, 2008 decision denying the defendant's motion to vacate the judgment finding that the defendant's witnesses collusively engaged in testifying falsely for the defendant. The witness Dwayne Brown's affidavit directly contradicts the statement that he initially gave to Detective Michael Cavuto. The prosecution argues that Jerry Brown also known as Dwayne Brown, told Detective Cavuto "that he had seen a car stop, that both passengers got out and approached a group of men sitting on cars, and that the two groups had an argument and started shooting." The prosecution argues that this is in direct conflict with the recent affidavit of Dwayne Brown which states "that he saw an apparent gunshot come from the rear seat of the car, the car doors opened, and only then did he see "several guys jump [] out of the car." (See defendant's Exhibit A) The prosecution also argue that Brown told Detective Cavuto that the victim ran across Myrtle Avenue and fell, someboy picked up the victim's gun, and four men from the group chased the second victim around

Sumner toward Vernon: Trial Transcripts 59,60,83,85, 91-92). According to the prosecution, these inconsistencies would not have been credited by the Jury and the defendant was in no way prejudiced by not calling Brown.

The prosecution also requests that the Court deny the defendant's request for assignment of counsel in this matter because the defendant's claims are without merit.

The defendant's request for an Order directing DNA analysis pursuant to C.P.L. section 440.30 1-a of the vehicle's interior and exterior, blood and blood stains and blood stain patterns, and scientific evidence performed on the same, including but not limited to PCR, RFLP, Kodachromes of any blood evidence testing or its duplicative equivalent , DNA testing of the shell casing found in the car, and a comparison made with the bullet and fragments found in the bodies of Mr. Gonzalez and Mr. Rodriguez is hereby denied. Section 440 1-a (b) of the C.P.L. states that,

> "the court may direct the prosecution to provide the defendant with information in the possession of the prosecution concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the prosecution concerning the last known physical location of such specified evidence. If there is a finding by the Court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the prosecution may be drawn by the court in deciding the motion."

The prosecution provided the court with a New York City Police Department memo to the Brooklyn District Attorney's office regarding Verification of vehicle storage form, dated 9/9/09 regarding a 1978 Oldsmobile, signed by the supervisor of the College Point auto pound stating that the vehicle is no longer in the custody of the police department. Also provided is the Property Clerk's Motor Vehicle/Boat invoice, for storage # 86w8488. ADA Slevin in her opposition papers stated that she spoke to Sergeant Peter Viola, the Administrative Sargeant at the NYPD College Point Auto Pound, who stated to her that in September 2009, he searched records for the vehicle in question and conducted searches of the Property Clerk's computerized data base, the computerized state-wide NYSPIN system, and the computerized nation-wide Car Facts system and there was no information regarding the 1978 Oldsmobile. In addition, there was no paper information in any of the files in the College Point Facility in Queens or the Erie Basin Facility in Brooklyn. The car is no longer in NYPD custody and he is unable to determine how and when the car was disposed. The record also shows that the car was available to the defense for viewing and testing at the time of trial.

This court finds that the 1978 vehicle is unavailable and its whereabouts are unknown. Consequently there is no opportunity to test the vehicle for a possibility that blood exists in the car. In this court's August 6, 1997 decision, the court noted that , "with regard to the existence of blood, the defendant has failed to establish that there was blood in the car. The Police Department's admission that the list of items found in the car was destroyed by flood is not an admission that blood was found in the car. The defendant's conclusory allegation does not establish the existence of blood (*People v. Brown*, supra, 56 NY2d at 247a) Its possible existence or exculpatory value is purely speculative(See, *People v. Buxton*, supra, 189 AD2d, at

997; *People v. Scattareggia*, 152 AD2d 679,680)" (See August 16, 1997 decision at p.9.) The court also noted in its August 16, 1997 decision that, "assuming arguendo , that it(the blood) did exist, the defendant has failed to show how it would have created a reasonable probability that the verdict would have been different." (See August 16, 1997 decision at p. 10.) In addition, the defendant has failed to show that the testing of the bullet found in the car with fragments from the deceased body if they were able to be located would change the result of the trial had the evidence been available. Therefore, the motion for DNA testing is denied.

With respect to the defendant's motion to vacate his conviction on newly discovered evidence and ineffective assistance of counsel, the court finds it to be without merit.
The defendant has proffered an affidavit from Dwayne Brown, also known as Jerry Brown an individual that he has know for over 30 years. Mr. Brown's affidavit dated October 21, 2009 states that at the time of the trial he knew the defendant, Lamonte Johnson and he was residing in Brooklyn, New York. He stated that he spoke to Detective Cavuto and the defendant's attorney and told them both that the defendant was not present. Mr. Brown was standing with his girlfriend at a bus stop not only was Selvin Spencer not present, but the incident did not occur the way Mr. Spencer testified that it did. Mr. Brown was present with his mother when the lawyer spoke to his mother prior to testifying at trial. Dwayne Brown in his affidavit stated "Lamonte's lawyer only called my mother to testify at trial and I was never informed of the reason why he didn't call me to testify."(Affidavit of Dwayne Brown at p. 2). Just as he is willing to testify in 1986, he is willing to testify today if there should be a new trial or hearing. The defendant asserts that Brown's alibi testimony that he was not present coupled with Brown's mother's testimony creates a reasonable probability that the trial would have had a different result. In addition,

Brown's testimony would establish the relevancy of the shell casing found in the car and bolster a witness , Alvin McKoy's testimony that this court previously, in its February 15, 2008 decision, found incredible; testimony that the prosecution's witnesses, Selvin Spencer and McCoy were getting high on drugs and that the incident was over before Mr. Spencer arrived at the scene. Hence, the failure to call Mr. Dwayne Brown, also known as Jerry Brown, was ineffective assistance of counsel.

The defendant's motion to vacate the conviction based upon newly discovered evidence must meet all the criteria as set forth in C.P.L. § 440.10 g as follows: a) the evidence must be such as will probably change the result if a new trial is granted; b) it must have been discovered since the trial; c) it must be such as could have not been discovered before the trial by the exercise of due diligence; d) it must be material to the issue; e) it must not be cumulative to the former issue, and f) it must not be merely impeaching or contradicting the former evidence. *People v. Salemi* 309 N.Y. 208,128 N.E. 2d 377.

The defendant has failed to show that the presentment of the affidavit of Dwayne Brown as an alibi witness at the time of the alleged incident in this matter is newly discovered evidence. Dwayne Brown has known the defendant for 30 years, was a person who was interviewed by the police one day after the incident and as stated in his affidavit was in the attorney's office with his mother prior to the trial of the defendant, and was willing to testify. The defendant prior to the trial knew that he was a witness. His testimony has not just been discovered since trial nor is it testimony that was not discovered before trial by the exercise of due diligence.

The defendant, Johnson has come before this Court on several occasions to vacate the judgment and has now just proffered a witness that he has known about since the time of the

incident back in 1986. He is now barred from asserting that claim pursuant to C.P.L. § 440.10 (2) (c).

On the issue of whether failure of defendant's counsel to call Dwayne Brown as a witness was ineffective assistance of counsel, it is a fundamental rule of law that a defendant in a criminal proceeding is entitled to effective assistance of counsel. see. *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.3d 763 (1970). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) the Supreme Court of the United States set forth two components in determining whether counsel's representation of a criminal defendant is ineffective : (1) the defendant must show that counsel's performance was deficient, so that errors made by counsel were so serious that counsel was not functioning as counsel as guaranteed by the sixth amendment of the United States Constitution and (2) the defendant must show that counsel's performance prejudiced the defendant, specifically that the errors of the defendant's counsel were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Where trial tactics do not end successfully does not automatically mean that ineffective assistance of counsel has occurred. The constitutional guarantee will have been met when the court determines after looking at the totality of the circumstances, the law and the evidence at the time of the trial that the defendant received "meaningful representation." *People v. Baldi*, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S. 2d 893.

In the instant matter, the court finds that counsel's representation of the defendant was meaningful, did not deprive him of a right to a fair trial and was not deficient. The decision of the defendant's counsel not to call Dwayne Brown, as an alibi witness at trial does not mean that Mr. Johnson received ineffective assistance of counsel. The failure to call Dwayne Brown as an

alibi witness may have been due to legitimate trial strategy. The defendant's counsel did not fail to call any alibi witnesses. In fact, counsel called two alibi witnesses on behalf of the defense at trial. Counsel called Rochelle Brown, a co-worker of the defendant, Johnson's mother, Linda Bradley and LaShaun Grant, a friend of the defendant's sister. Mrs. Brown also happens to be the mother of Dwayne Brown. Mrs. Brown basically testified that she dropped his mother off from work and entered into the apartment after being invited by the defendant's mother to watch movies on the VCR. She testified the defendant, Johnson came in the apartment between 2:00a.m and 2:20 a.m. with another woman. That when she left the apartment at 4:30pm she did not see the defendant leave the apartment. (TT pp 435-439). Lashaun Grant testified that she was a friend of the defendant, Johnson's sister Tanya Johnson. They had been friends for about a month. She had been to the apartment 4-5 times. She worked at Empire Technical College as a phone representative and prior to that she worked at Alexander's in sales and cashiering. She was not a friend of the defendant. She went to the defendant's home to pick up some videos that she had let Mr. Johnson borrow. She arrived at 2:15 am. at the same time the defendant Johnson was coming into the building. She was let in by Mrs. Bradley and she went back to Mr. Johnson's room with Tanya and they all listened to Mr. Magic on the radio. She stayed in the room until 4:00a.m. and spent the night in Tanya's room. (T.T. pp. 454-463). Both alibi witnesses were employed, appeared to have no record and were not friends of the defendant, as to be biased. Dwayne Brown's testimony that the defendant was not at the scene would have been cumulative. The failure to call Dwayne Brown, a friend of the defendant, and who had previously spoken to the police, was not serious, as to deprive the defendant of a fair trial, a trial whose result is reliable.

The court declines to appoint counsel for the defendant.

Wherefore, on the basis of all the foregoing the defendant, Johnson's motion to vacate the conviction is denied.

ENTER

yvonne lewis, J.S.C.