

**People v Jackson**

2010 NY Slip Op 31322(U)

May 18, 2010

Supreme Court, Kings County

Docket Number: 5925/1987

Judge: John G. Ingram

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 21

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. John G. Ingram

Date: May 18, 2010

-against-

DECISION & ORDER

BERNARD JACKSON,  
A.K.A. HAMILCAR BARCA

Indictment No. 5925/1987

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Defendant moves, *pro se*, to renew his previous motion to vacate his judgment of conviction on the grounds that the law has changed since the court rendered its original decision. For the following reasons, the motion is denied.

At trial the People introduced evidence establishing that defendant, acting in concert with codefendant Elder Bedouin, shot and killed Ronald Townsend and wounded Randolph Cullum. Defendant admitted that he shot the two victims. Following a jury trial he was convicted of murder in the second degree (PL § 125.25[1]) on June 8, 1989 and was thereafter sentenced to a term of imprisonment of twenty-five years to life.

In addition to his direct appeal, defendant has made a series of unsuccessful post-judgment motions and subsequent appeals. On March 9, 1992, defendant's conviction was affirmed (*People v Jackson*, 181 AD2d 745 [2d Dept 1992]). The Appellate Division denied his motion to reargue the appeal, and leave to appeal to the Court of Appeals was denied (*People v Jackson*, 79 NY2d 1050 [1992]). Defendant also made two motions to vacate the judgment of conviction pursuant to CPL § 440.10, both of which were denied. This court denied the first

motion on March 31, 2000 as well as defendant's resulting motion to reargue, decided May 8, 2000. Defendant's two applications for leave to appeal to the Court of Appeals were denied (*People v Jackson*, No. 2000-07080 [2d Dept 2000]) and *People v Jackson*, 2001-06020 [2d Dept 2001]). The court also denied defendant's second motion to vacate on March 15, 2006; leave to appeal from that determination was denied (*People v Jackson*, No. 2007-01063 [2d Dept 2007]). Defendant's petition for a writ of *habeas corpus*, filed in the Eastern District on May 23, 2007, is still pending.

On July 28, 2005, defendant submitted a third post-judgment motion in which he raised a *Brady* claim. That motion, which was denied on March 15, 2006, is the subject of the instant motion to renew. In the underlying motion, defendant argued that the prosecution had failed to disclose a search warrant indicating that Carl Davis, a prosecution witness, was an informant working for the police, and that Davis had an undisclosed agreement with Detective Hall whereby he received lenient treatment and benefits in exchange for his testimony against defendant. Defendant included an affidavit of Craig Ragland along with a copy of the search warrant. Ragland stated that he spoke to Davis on the subway in 2000 and that Davis told him about an "off the record" deal with Detective Hall, that the detective told Davis he would not go to prison as long as he testified at trial, and that Davis had received money from the detective.

This court denied defendant's motion, finding that defendant had failed to provide any credible evidence establishing that Davis was actually a paid informant or that he received any benefit for providing information to police (*lv denied, People v Jackson*, No. 2007-01063 [2d Dept 2007]). The court also found that Ragland's statement, being unsworn, was of little to no evidentiary value, and that defendant had failed to establish that the search warrant was not

disclosed to him at trial. Though the court did not discuss a claim of actual innocence, defendant now refers to his previous motion as a Brady/Giglio Actual Innocence claim.

Defendant contends that there is growing precedent for his application for this court to reconsider its denial of his actual innocence claim (*see People v Wheeler-Whichard*, 25 Misc.3d 690 [Sup. Ct. Kings County 2009], *People v Bermudez*, No. 8759/91, 242 NYLJ, Aug. 11, 2009, and *People v Cole*, 1 Misc3d 531 [Sup.Ct. Kings County 2003]). According to defendant, the failure to present these arguments is justified because *Wheeler-Whichard* supposedly changed the standard of review for actual innocence claims after the original motion was decided in 2006. The court also notes that while defendant asserts his innocence in his present motion to renew, he contradicts himself in his reply papers by concurring with the People's statements of fact with respect to defendant's role in the shooting. Moreover, while defendant focused on the alleged *Brady* violation in his underlying motion, he now concentrates on a claim of actual innocence derived from the idea that the *Brady* material would have damaged the credibility of Davis to such an extent that the jury could not have possibly found defendant guilty.

Pursuant to CPLR § 2221(e)(2), the court may grant a motion for leave to renew "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." The moving papers must also state the "justification for the failure to present such facts on the prior motion" (CPLR § 2221[e][3]). A motion to renew is not designed to give an unsuccessful party successive opportunities to re-litigate issues previously decided or to present arguments different from those originally presented (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]). Nor may such a motion be used as a "second chance freely given to parties who have not

exercised due diligence in making their first factual presentation” (*Sobin v Tylutki*, 59 AD3d 701, 702 [2d Dept 2009]).

The court rejects defendant’s contention that the cases he cites would change the court’s determination of his previous CPL § 440.10 motion. *People v Cole* was decided in 2003, more than three years before the court denied his motion to vacate the judgment. Defendant could have applied *Cole* to his argument then, just as the court was able to consider the case in rendering its decision. Accordingly, *Cole* does not represent a change in the law.

Furthermore, *Wheeler-Whichard* and *Bermudez* are unavailing with respect to defendant’s actual innocence claim. Those decisions do not represent a change in the law that would alter this court’s prior determination of defendant’s motion to vacate the judgment. In *Wheeler-Whichard*, in which the court granted a CPL § 440.10 motion on the grounds of actual innocence, the court stated:

This court acknowledges that as of yet no New York appellate court has expressly recognized “actual innocence” as a ground under CPL 440.10 (1)(h). However, I am now prepared to rule that, at least under the circumstances of this case, such a claim of actual innocence may be brought and the standard of proof for determining it is “by clear and convincing evidence” (*Wheeler-Whichard* at 702, citing *People v Cole* at 543).

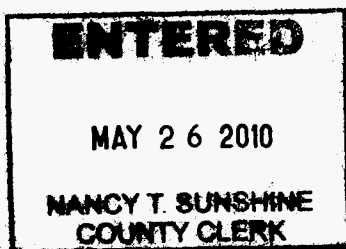
The court’s decision to grant the defendant’s actual innocence claim in *Wheeler-Whichard* was based upon new evidence that the court found established defendant’s innocence, and clearly applied only to the unique factual circumstances of that case. *Bermudez* was likewise decided upon new evidence. These decisions, rendered by a court of concurrent jurisdiction, are limited to the narrow confines of the facts of those cases. The fact that a defendant in an unrelated case was found to be actually innocent has no bearing on the instant defendant’s own guilt or innocence.

Accordingly, and pursuant to the statutory provisions set forth in CPLR § 2221, the defendant's motion for leave to renew the denial of his CPL § 440.10 motion is denied. The court finds no basis to disturb its previous decision denying defendant's *Brady* claim and accompanying actual innocence claim. There is nothing presented to this court that would have altered the outcome of the underlying motion had it considered those facts in its original decision (*see Ford v Lasky*, 300 AD2d 536 [2d Dept.2002]; *see also Kraeling v Leading Edge Electric*, 2 AD3d 789 [2d Dept 2003]). Defendant's attempts to re-litigate his claim and present new arguments is thus rejected.

Accordingly, the motion is denied in its entirety.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 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 his 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 certification granting leave to appeal is granted.



ENTER:

  
JOHN G. INGRAM, J.S.C.