People v Carrington
2010 NY Slip Op 32834(U)
October 6, 2010
Supreme Court, Kings County
Docket Number: 6909/95
Judge: Thomas J. Carroll
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, MISC. MOTIONS

The People of the State of New York	:	By: Hon. Thomas J. Carroll
-against-	:	Date: October 6, 2010
STEVEN CARRINGTON	:	DECISION & ORDER
	:	Indictment No. 6909/95

Defendant moves for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of newly discovered evidence. Specifically, defendant contends that information contained in affidavits from his brother and from his co-defendant constitutes newly discovered evidence. Defendant further claims that this new evidence proves his innocence. For the following reasons, the motion is denied.

On January 2, 1995, defendant's brother, Mark Carrington, walked into Lumber Headquarters, a store located at 4212 Church Avenue, Brooklyn, New York, and walked out again. Shortly thereafter, defendant and co-defendant, Shannon France, walked together into Lumber Headquarters. France produced a .25 caliber pistol and demanded money from the clerk, Lloyd Campbell. He ordered a customer, Hugh Keizs, to leave immediately. Defendant, however, blocked Keisz's way, revealed a sawed-off shotgun, and directed Keizs to the back of the store. While defendant and Keizs were making their way to the back of the store, Keizs

heard France repeatedly demand money from Campbell. After a brief struggle, France shot Campbell in the head and back, killing him. Defendant then demanded Keizs' gold watch and ring, which Keizs gave him. France located and looted a strong box of its cash before both men fled.

Defendant and France were charged under a theory of acting in concert with murder in the second degree (Penal Law § 125.25[3], felony murder), six counts of robbery in the first degree (PL § 160.15[1], [2], [4]), two counts of robbery in the second degree (PL § 160.10[1]), criminal possession of a weapon in the second degree (PL § 265.03) and criminal possession of a weapon in the third degree (PL § 265.02[4]). After a jury trial, defendant was found guilty of murder in the second degree, of Lloyd Campbell, and of robbery in the first degree of Hugh Keizs.

Defendant was identified at trial by Keizs and by the assistant manager, Patrick Dieudonne, who was outside the store in the lumberyard at the time of the incident. Dieudonne recognized defendant as one of two men he saw entering the store. After hearing two shots, he observed the same two men leave. Keizs testified that while he was being robbed of his ring and watch he stared directly at defendant's face. He also recognized defendant on the video surveillance tape that was admitted at trial.

On January 1, 1997, the defendant moved under CPL § 330.30 to set aside the verdict claiming "newly discovered evidence" showing that the defendant did not commit the crime. The defendant submitted an affidavit from Lydia Broughton

stating that co-defendant France informed her that the defendant was not involved in the crimes. The court denied this motion.

On January 14, 1997, the defendant was sentenced to consecutive prison terms of fifteen years to life for the murder and eight to sixteen years for the robbery (Feldman, J., at trial and sentence).

Defendant appealed his judgment of conviction, raising the following claims: the court's discharge of a sworn juror was improper; defendant's right to be present was violated when he was absent during portions of jury selection; he was denied a fair trial when the prosecutor cross-examined him on his pre-trial silence; and the court's preclusion of Mark Carrington as a rebuttal witness was improper. The Appellate Division affirmed defendant's judgment of conviction (*People v Carrington*, 265 AD2d 420 [2d Dept 1999], lv denied, 94 NY2d 860 [1999]).

Defendant then made a series of unsuccessful motions. He moved for a writ of error *coram nobis*, claiming ineffective assistance of appellate counsel, which was denied (*People v Carrington*, 282 AD2d 542 [2d Dept 2001]). A motion to vacate the judgment of conviction pursuant to CPL § 440.10 followed on the grounds, inter alia, of ineffective assistance of trial counsel and also preclusion of defendant's brother as a witness. Defendant's motion was denied by the trial court on January 9, 2002. The Appellate Division denied leave to appeal that decision (*People v Carrington*, No. 2002-02157 [2d Dept 2002]). In addition, defendant petitioned the United States District Court for the Eastern District of New York for a federal writ

of *habeas corpus* raising, *inter alia,* the preclusion of his brother's testimony again. On September 22, 2003, the Eastern District dismissed defendant's petition for writ of *habeas corpus* as time-barred, and denied a certificate of appealability to the United States Court of Appeals for the Second Circuit. Defendant's request for a certificate of appealability was denied by the Second Circuit on August 12, 2004.

In the present motion defendant submits two alleged affidavits in support of his claim of newly discovered evidence. The first source is an unsworn and undated statement by co-defendant Shannon France who claims that defendant was not involved in the crime. The second is from Mark Carrington in which he suggests that an individual named Trevor Samuel[1] actually committed the crime with France, and that defendant was not physically present when the crime was committed.

Conclusions of Law.

The power to grant a new trial on the grounds of newly discovered evidence is purely statutory and may not be exercised unless all of the requirements of the statute have been satisfied (*People v Salemi*, 309 NY 208 [1955]; *People v Taylor*, 246 AD2d 410, 411 [1st Dept 1998]; *People v Gurley*, 197 AD2d 534, 536 [2d Dept 1993]). The decision as to whether the statutory criteria has been met rests within

[1] While defendant provided no information about Trevor Samuel, the prosecution supplied information regarding an individual named Trevor Samuel, who, according to the New York State Department of Corrections, was incarcerated under two Kings County indictments from February 11, 1993, through December 15, 1997.

the sound discretion of the court (*People v Baxley*, 84 NY2d 208, 212 [1994]; *People v Tankleff*, 49 AD3d 160 [2d Dept 2007]).

CPL § 440.10(1)(g) permits a court to vacate a judgment of conviction when "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of new such alleged evidence. . . ." To constitute newly discovered evidence within the meaning of the statute, defendant must establish that the new evidence in question: (1) will probably change the result upon a new trial; (2) has been discovered since the trial; (3) could have not been discovered before trial by the exercise of due diligence; (4) is material to the issue; (5) is not cumulative to the former issue; and, (6) must not be merely impeaching or contradicting the former evidence (*People v Salemi* at 215-6). The new evidence must also be admissible at trial (*see People v Boyette*, 201 AD2d 490, 491 [2d Dept 1994]).

The affidavits submitted by defendant fall far short of satisfying this legal standard. They are lacking on two fronts: the failure to exercise due diligence and the inability to demonstrate that a more favorable verdict would have resulted.

Defendant has failed to demonstrate that he exercised due diligence in bringing the affidavits and the information they contain to the attention of the court. Defendant admits that he had possession of both statements since 2006 yet offers no excuse or explanation for the four-year delay in providing them to the court. Accordingly, the passage of so much time before defendant made the court aware of his purported new evidence undermines the seriousness with which the court views such evidence and reflects a lack of due diligence on defendant's part (*People v Friedgood*, 58 NY2d 467 [1983] [three-year delay in bringing newly discovered evidence to the court's attention did not satisfy due diligence requirement of CPL § 440.10]; *People v Stuart*, 123 AD2d 46, 54 [2d Dept 1986] [one-year delay reflects lack of due diligence]). Furthermore, defendant's assertion that he acquired his co-defendant's statement in 2006 is belied by the CPL § 330.30 motion dated January 1, 1997, in which defendant submitted an affidavit from one Lydia Broughton who asserted that co-defendant France informed her that defendant was innocent of the crimes. Defendant has thus been aware of co-defendant's statement for over thirteen years.

With regard to the affidavit of defendant's brother, it is reasonable to consider this evidence to have been available to defendant at the time of his trial. According to the record, Mark Carrington was prepared to testify. In fact, a motion was made to call defendant's brother as a rebuttal and alibi witness. Absent any explanation why this prospective testimony would not have conformed to the present affidavit of

Mark Carrington, such evidence could have been produced at trial with due diligence.

Defendant has also failed to demonstrate that the introduction of either of these statements would have resulted in a more favorable result in the event of a new trial. France's purportedly exculpatory affidavit contains nothing more than a statement that defendant is innocent. It lacks any factual or documentary support and is not of a nature that would lead to a different verdict. Moreover, France's affidavit is neither dated nor sworn and therefore presumed to be unreliable (*see* CPL §§ 440.30[1]and (4)(b)).

Mark Carrington recounts seeing defendant shortly after the commission of the murder and robbery in the family home. He also claims to have observed co-defendant France discussing the robbery with another individual both before and after its completion. Under the circumstances, neither feature of Mark Carrington's affidavit would have contributed to changing the verdict against defendant. Observation of defendant at home after the crime is irrelevant and the purported observations of the co-defendant's discussions are vague and unsubstantiated.

Any possible truth to the purported new evidence is more importantly undermined by the overwhelming evidence of defendant's guilt. Defendant was placed at the scene by a surveillance tape and he was identified by two witnesses. In the face of such evidence, defendant's claim of actual innocence is equally illusory.

Accordingly, defendant's claim is denied in its entirety.

This decision shall constitute 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 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

THOMAS J CARROLL
J.S.C.

HON. THOMAS J. CARROLL

ENTERED
OCT – 5 2010
NANCY T. SUNSHINE
COUNTY CLERK