

People v Sorbello

2010 NY Slip Op 32905(U)

June 1, 2010

Sup Ct, Kings County

Docket Number: 5597/98

Judge: Raymond Guzman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER

Indictment # 5597/98

-against-

ANTHONY SORBELLO,

Defendant,

----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On February 11, 1996, defendant, acting with his brother Joseph Sorbello, went to the home of Paul Salatino, a drug dealer known to the two men. Upon being allowed into the home, defendant and his brother attacked Salatino. While Joseph Sorbello held Salatino in a choke hold, defendant repeatedly kicked Salatino in the head. The Sorbello brothers then attacked Salatino with a knife, cutting him fourteen times and inflicting a fatal wound to Salatino's heart. Defendant and his brother also stole drugs and money from Salatino's home before fleeing. Salatino was found dead in his home the next day.

Within a week of the commission of the crime, defendant confessed his role in the murder to his girlfriend, Judith Irizarry. Defendant was arrested in connection with the murder of Salatino and the jacket he wore the night of the crime was eventually turned over to the police. An analysis of stains found on the sleeve of the jacket revealed blood containing the DNA of Salatino.

For these crimes, defendant and his brother were charged by Kings County Indictment Number 5579/98, with three counts of Murder in the Second Degree (Penal Law §§ 125.25[1],[2],

and [3]); two counts of Robbery in the First Degree (Penal Law §§ 160.15[1], [3]); and one count of Robbery in the Second Degree (Penal Law § 160.10[1]).

At trial, the People presented the testimony of Dr. Charles Cantanese, a medical examiner employed by the Office of the Chief Medical Examiner. Dr. Cantanese was not the medical examiner who had prepared the autopsy report of Paul Salatino. Dr. V. Jordan Greenbaum, a medical examiner no longer employed by the OCME at the time of trial, was the medical examiner who had actually prepared Salatino's autopsy report. Following the jury trial, defendant was convicted of Murder in the Second Degree and Robbery in the Second Degree. On March 9, 1999, the trial court sentenced defendant to consecutive terms of imprisonment of twenty-five years to life on the Murder in the Second Degree conviction, and fifteen years to life on the Robbery in the Second Degree conviction, for an aggregate sentence of forty years to life.

Defendant filed an appeal in September 2000, alleging that the People's failure to disclose certain taped materials were a violation of CPL § 240.75 and People v Rosario, 9 NY2d 286 (1961). By Decision and Order dated August 27, 2001, the Second Department affirmed defendant's conviction. People v Sorbello, 285 AD2d 88 (2d Dept 2001).

By papers dated October 11, 2009, defendant moves this Court, *pro se*, for an order vacating his judgment of conviction pursuant to Criminal Procedure Law § 440.10, on the grounds that his Sixth Amendment confrontation rights were violated when the People introduced the victim's autopsy report at trial through the testimony of a medical examiner that did not perform the autopsy. Defendant avers that this was impermissible based on the United States Supreme Court's holding in Crawford v Washington, 541 US 36 (2004) and the more recent decision in Melendez-Diaz v Massachusetts, 557 US ----, 129 S Ct 2527 (2009). The People filed opposition to defendant's

motion on January 4, 2010. Defendant filed a reply memorandum to the People's opposition papers on February 1, 2010.

For the following reasons defendant's motion is denied.

LEGAL ANALYSIS

The People urge this court to deny defendant's motion on the grounds that he is procedurally barred from raising the Confrontation Clause issue by CPL § 440.10(2)© because he failed to raise this claim on his direct appeal even though there were sufficient facts on the record regarding the Sixth Amendment violation. Defendant's judgment in the instant matter became final on November 26, 2001. The United States Supreme Court issued its ruling in Crawford v Washington, 541 US 36 (2004), three years after defendant's judgment of conviction had become final. There was no way defendant could have raised his current claim on his direct appeal. Therefore, the Court will review defendant's motion to vacate on the merits.

Defendant argues that he was denied his Sixth Amendment right to confront the actual medical examiner who prepared the autopsy report of Paul Salatino, and that his conviction is thus constitutionally invalid pursuant to Crawford v Washington, *supra*. In support of this contention defendant relies on the recent holding of the United States Supreme Court in Melendez-Diaz v Massachusetts, 557 US ----, 129 S Ct 2527 (2009). In Melendez-Diaz, the Supreme Court in applying the Crawford holding, found the introduction of sworn affidavits filed by fingerprint analysts, absent the testimony of those analysts, to be a Confrontation Clause violation.

The People, citing to People v Dowling, 50 AD3d 698 (2d Dept 2008), and People v Freycinet, 41 AD3d 731 (2d Dept 2007), aver that the autopsy report in this case was properly admitted under the business records exception to the hearsay rule. Further, the testimony regarding

the autopsy report was properly limited to the non-opinion portions of that document, thus there was no Confrontation Clause issue arising from the testimony because the defendant was able to cross examine the medical examiner who offered his expert opinion to the jury based on the properly admitted report.

The Second Department has more recently dealt with the Confrontation Clause issue in People v Dail, 69 AD3d 873 (2d Dept 2010).¹ In that case, the Appellate Division held that defendant's Sixth Amendment right to confront his accusers was not violated by the admission of lab reports prepared by the Nassau County Medical Examiner's Office where a foundation for the admission of the reports as business records was established through the testimony of a forensic geneticist employed by the Medical Examiner's Office. Id. at 874.

"Moreover, business records 'are generally admissible absent confrontation ... because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.'" Id. at 875 (*quoting* Melendez-Diaz v Massachusetts, 557 US ----, 129 S Ct 2527, 2539-2540 (2009); *citing* Crawford v Washington, 541 US 36, 56 (2004)).

In Dail, the Appellate Division found that the reports were merely contemporaneously recorded facts that standing alone did not link the defendant to the crime. Id. The Court further explained:

Rather, the critical determination linking the defendant to the crimes was made by the forensic geneticist who testified, based upon her analysis of data in the lab reports, that defendant's DNA was present on items recovered from

¹ Unlike the holdings in Dowling and Freycinet, the Second Department reached this conclusion after the United States Supreme Court had decided Melendez-Diaz v Massachusetts, 557 US ----, 129 S Ct 2527 (2009)

the burglarized residences. Accordingly the lab reports were not testimonial in nature, and their admission through the forensic geneticist's testimony did not violate the defendant's right to confrontation. *Id.* at 875 (citations omitted).

This Court finds the facts underlying People v Dail, *supra*, to be squarely on point with the facts of the instant motion. In the instant action, the autopsy report was properly admitted as a business record. The testimony of the medical examiner at trial, Dr. Cantanese, was based on the autopsy report which was prepared in the ordinary course of business by the Office of the Chief Medical Examiner, and omitted the opinion of Dr. Greenbaum. Insofar as Dr. Cantanese testified at defendant's trial based on his own findings, and was subject to cross-examination, there was no violation of defendant's confrontation rights. Accordingly, defendant's motion is denied.

Since this Court finds that defendant's Sixth Amendment confrontation rights were not violated it does not need to reach the question of retroactivity argued by the parties in their submissions.

CONCLUSION

For the foregoing reasons, defendant's motion pursuant to CPL § 440.20(1) to set aside his sentence is denied.

This opinion shall constitute the decision and order of this Court.

Dated: June 1, 2010
Brooklyn, New York

RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED
JUN - 2 2010
NANCY T. SUNSHINE
COUNTY CLERK