People v Santiago
2010 NY Slip Op 33168(U)
November 5, 2010
Supreme Court, Kings County
Docket Number: 11351/1989
Judge: Thomas J. Carroll
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, MISC. MOTIONS

--x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

HARRY SANTIAGO

--x

By: Hon. Thomas Carroll

Date: November 5, 2010

DECISION & ORDER

Indictment No. 11351/1989

Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds that newly discovered evidence establishes that he is actually innocent of the crimes for which he was convicted. For the following reasons, the motion is denied.

On August 8, 1989, defendant and co-defendant William Figueroa drove in defendant's car to an apartment building at 105 Starr Street in Brooklyn. Both armed with handguns, the defendants fired multiple shots from the car into the first-floor bedroom of Carlos and Maria Hernandez, neighborhood anti-drug activists. Ms. Hernandez was getting ready for work while Mr. Hernandez and their three-year-old son were in bed. Maria Hernandez was killed by one of the bullets as she stood in the bedroom drying her hair. Investigators found bullet holes in the apartment and recovered several bullets.

On March 12, 1991, defendant was convicted by a jury of murder in the second degree (depraved indifference), reckless endangerment in the first degree and criminal possession of a weapon in the second and third degrees. He was sentenced to consecutive prison terms of

twenty-five years to life on the murder count, three and one-half to seven years on the reckless endangerment count, and seven and one-half to fifteen years on the second degree weapons count. He was also sentenced to three and one-half to seven years on the third degree weapons count, concurrent with the sentence on the second degree weapons count.

In August 1991, defendant and his co-defendant filed separate CPL § 440.10 motions raising similar grounds relating to the alleged recantation of a trial witness, Antonio Duran, who was in the car at the time of the shooting. Both motions were denied following an evidentiary hearing in which the court found that the recantation was not credible and did not constitute newly discovered evidence. The Appellate Division, Second Department, affirmed defendant's trial conviction as well as the Supreme Court's denial of defendant's CPL § 440.10 motion (*People v Santiago*, 228 AD2d 706 [2d Dept 1996], *lv denied* 88 NY2d 994 [1996], *error coram nobis denied* 244 AD2d 438 [1997]). Defendant's two applications for federal writs of *habeas corpus* were also denied on July 11, 1997 and June 28, 1999.

Defendant filed a second motion to vacate the judgment on March 2, 2006, claiming that the prosecutor inappropriately argued that defendant was guilty of both depraved indifference and intentional murder, that the court improperly charged both theories of murder, and that the evidence was legally insufficient. The court denied the motion on May 25, 2006.

In the present motion, defendant claims that his judgment of conviction should be vacated pursuant to CPL § 440.10(1)(g) and (h) on the basis of newly discovered evidence that proves he is innocent. Defendant relies on an affidavit of his co-defendant's brother, Julio Figueroa, who states that he is a friend of defendant. In the affidavit, Julio Figueroa alleges that in June 2009 in prison a prison inmate, Osvaldo Rodriguez, told him and his brother, William Figueroa, the co-

defendant, that two men, Manuel Crespo and Julio Enriquez Martinez, admitted to Rodriguez that they had killed Maria Hernandez. Defendant's arguments are unsubstantiated and do not warrant vacatur of the judgment.

Defendant's claim relies on the court's statutory power to grant a new trial on the ground of newly discovered evidence (CPL §440.10[1][g]; *People v Salemi,* 309 NY 208, 215 [1955]). The court may exercise its discretion to use this power only if all the requirements of the statute have been met (*Id.*; *People v Taylor,* 246 AD2d 410, 411 [1998]). For all newly discovered evidence claims, the moving party must establish each of the following:

> (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 have not 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 (*Salemi* at 215-216).

In this instance, the Julio Figueroa affidavit does not satisfy the six *Salemi* requirements. Figueroa's statements are incredible, unreliable and fail to establish a probability that the result of a new trial would be different (*see People v Robinson*, 211 AD2d 733, 734 [2d Dept 1995]). The alleged admissions of Crespo and Martinez constitute hearsay upon hearsay and would not be admissible as evidence in court. Julio Figueroa, the affiant, has no firsthand knowledge of the alleged admissions. Moreover, the trial evidence further undermines Julio Figueroa's credibility. At trial, evidence was presented establishing that defendant had a clear motive to cause harm as defendant had made previous threats to Mr. Hernandez after Mr. Hernandez had confronted

defendant about dealing drugs near the Hernandez home. Co-defendant William Figueroa also gave written and videotaped statements admitting that both he and defendant had opened fire on the victim's apartment.

The Julio Figueroa affidavit is also contradictory and incredible on its face. The affiant states that he is William Figueroa's brother and defendant's friend. Julio Figueroa asserts that he was staying with his brother in Brooklyn on the date of the crime. The affiant further claims that in June 2009 he was with his brother and Osvaldo Rodriguez at Five Points Correctional Facility when Rodriguez stated that Manuel Crespo and Julio Enriquez Martinez had confessed to the murder of Maria Hernandez. Figueroa then claims that he was in Puerto Rico during his brother's trial and that police later brought a warrant compelling his testimony at defendant's trial and told him what to say in court, but that the police and the prosecutor did not accept him as a witness. He suggests that police offered him money to testify to their own version of the events in question, and not "the real story" of what happened in the Hernandez murder. Figueroa never explains what the "real story" is and he fails to justify why, if he knew what really happened, he did not testify or come forward with his exculpatory information sooner. His statements with respect to his inability to testify at defendant's trial ultimately undermine his credibility.

That Julio Figueroa is the co-defendant's brother and defendant's friend also indicates a motive to provide an exculpatory statement (*see People v Johnson*, 208 AD2d 562 [2d Dept 1994] [motion based on newly discovered evidence denied where claim was based on affidavit of defendant's brother]). This motivation, coupled with his delay in coming forward with the alleged "real story" of his brother's role in the murder makes the tale of Rodriguez's jailhouse statement all the less credible.

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Finally, Julio Figueroa's affidavit contradicts his own previous sworn statement made to the trial prosecutor in 1989. During that interview, Julio Figueroa stated that he was in Massachusetts on the night of the murder and that co-defendant William Figueroa had admitted to him that he had gone with defendant in defendant's car to Starr Street and shots had been fired at the Hernandez home. Because Julio Figueroa's 2009 affidavit is completely contradicted by his own prior sworn statement, it is now rejected as unreliable and incredible.

Defendant's claim of actual innocence is unfounded. First, he has failed to bring forth sufficient evidence to support a claim of innocence (CPL § 440.30[4][b], [d]). As discussed above, the Figueroa affidavit is completely unreliable and cannot be credited as legitimate exculpatory evidence. Defendant has failed to corroborate Figueroa's allegations in any way or to otherwise challenge the overwhelming evidence that established his guilt at trial.

Defendant's citations to *People v Wheeler-Whichard*, 25 Misc.3d 690 (Sup. Ct. Kings County 2009) and *People v Bermudez*, No. 8759/91, 242 NYLJ, Aug. 11, 2009, are also unavailing in light of defendant's failure to bring forward any competent evidence to support his claims. In *Wheeler-Whichard,* where 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

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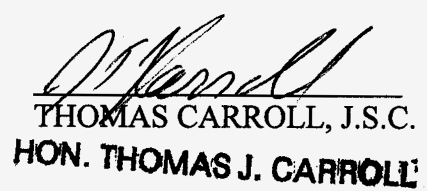
upon new evidence. These decisions, rendered by courts of concurrent jurisdiction, are limited to the narrow confines of the facts of those cases. The fact that a defendant in an unrelated case was found to be actually innocent has no bearing on the instant defendant's own guilt or innocence. Based on these considerations, defendant's claim of actual innocence is meritless.

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.

E N T E R:



THOMAS CARROLL, J.S.C.

HON. THOMAS J. CARROLL

ENTERED

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COUNTY CLERK