

People v Umoja

2010 NY Slip Op 33414(U)

December 3, 2010

Supreme Court, Kings County

Docket Number: 107-2005

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER

PIRU UMOJA :
: IND. NO. 107-2005

Defendant :

-----X
MICHAEL A. GARY, J.¹

Defendant moves *pro se*, to vacate the judgment of conviction pursuant to CPL § 440.10. The People have opposed this motion in a written response, and Mr. Umoja subsequently filed reply papers.

The defendant was convicted after trial on December 15, 2005 of nine counts of Robbery in the first degree (Penal Law § 160.15), stemming from several robberies of hair salons in 2004. Defendant was sentenced in February 2006 as a second felony offender to 3 consecutive prison terms of 10 years.

The defendant appealed his case and the Appellate Division affirmed his conviction at 70 AD3d 867 (2d Dept., 2010). Leave to appeal to the Court of Appeals was denied at, 15 NY3d 779 (Table) (July 2010). He has now filed the instant motion seeking to vacate the judgment.

As recounted in the People's response to the instant motion, many post conviction motions were filed. (See Addendum)

CPL § 440.10 governs the court's decision making capacity in regards to the motion

¹
This motion was transferred to this court via the Miscellaneous Motion rotation. Justice Priscilla Hall is no longer presiding in Supreme Court.

to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . .

2.(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, . . .

(b) the judgment is at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

3. Notwithstanding the provision of subdivision one the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .

(c) upon a previous motion made pursuant to this section , the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

The defendant raises one issue in this motion that is couched in terms of ineffective assistance of counsel. He alleges that the failure of defense counsel to make a record which would have preserved several issues for appellate review, constitutes ineffective assistance of counsel. Had the attorney preserved the issues, the Appellate Division would have, in his estimation, reversed the conviction..

It appears to this court that, indeed, the issue concerning the ineffective assistance of his attorney at trial could have been litigated and resolved by appellate court before this motion was brought, and accordingly this court should deny the defendant's motion on that

basis alone. CPL § 440 is quite clear in its mandate that if an issue could have or should have been raised on direct appeal, the court cannot grant the motion to vacate the judgment. The attorney's alleged failure to object was clearly part of the court record and should have been raised on appeal. The defendant had all this information available to him at the time of his appeal, and moreover, they are claims that are based on the record before the court. These issues were discoverable and available to the defendant as early as the appeal to the Appellate Division, and they should have been raised at that time. The People have thoroughly outlined the procedural history of the defendant's litigation in this regard. For this reason, the defendant's motion must be denied. Defendant's failure to raise these issues at an earlier instant is fatal to the consideration of the instant claim. *See People v. Cooks*, 67 NY2d 100.

Most importantly, the Appellate Division in its decision cited to the fact that it specifically reviewed the conviction on its merits and was satisfied that the verdict was supported by the weight of the evidence. And as the People point out, the Appellate Division specifically cited each of the claims they say were not preserved, and analyzed them to see if they had any merit. In each claim, the Appellate Division found them to be without merit. Counsel cannot be said to have acted ineffectively for failing to object in a situation that had no merit; in fact, the opposite may be true. Competent counsel rightly limited his statements to those arguments that had a basis for objection. *See People v. Caban*, 5 NY 3d 143 (2005) (no ineffective assistance of trial counsel arising from failure to make a motion or argument that has little or no chance of success.)

Were this court to consider the merits on its own, the court finds that the defendant's claims as to the issue of ineffective assistance of counsel unpersuasive. Counsel apparently

made appropriate motions, argued at the suppression hearing, and mounted a vigorous defense. By all considerations, the attorney's representation was meaningful and in the totality of the circumstances, more than effective. *People v. Baldi*, 54 NY2d 137.

The second prong of the defendant's motion relates to the papers attached as Exhibit number 1A and 1B, both police reports from the Latent Print Section. One report is dated September 13, 2004, filled out by Police Officer Gilligan of the Latent Print Section. It states that a fingerprint of value was recovered from Miriam's Beauty Salon. The second report, dated June 2005, reflects that the print recovered from Miriam's Beauty Salon was compared to defendant's latent print and it was a "negative result". Both have the same case number listed. # 1871K/04. Defendant claims that he did not have these two documents at trial—they were newly discovered, and he was therefore not able to cross-examine the police officers who recovered the prints or his supervisor. More importantly, the defendant alleges that the People committed a *Brady* violation, as they withheld this highly relevant evidence from the defendant, that would probably have changed the result at trial.

The People have opposed this aspect of the defendant's motion. They have outlined their review of the case file including the receipt indicating that at least one of the reports was definitely turned over to the defendant attorney, and quite possibly the second as well. They further argue that the defendant has not satisfied the requirements of the statute (CPL § 440.10[1][g]) in order for the court to vacate a conviction on the ground of newly discovered evidence.

In order for the court to consider newly discovered evidence, the evidence must satisfy the following requirements: 1) the evidence must have been discovered since the trial; 2) the evidence must be such that it could not have been discovered before or during

the trial even with due diligence; 3) the evidence must be material to the issue at trial; 4) the evidence must not be cumulative to the evidence that was introduced at trial; 5) the evidence must not merely impeach or contradict evidence that was introduced at trial; 6) the evidence must be such that if it had been introduced at trial, it would probably have resulted in a verdict more favorable to the defendant, and 7) the motion to vacate based upon such evidence must be made with due diligence after its alleged discovery. *See People v. Salemi*, 309 NY 208, *cert. denied*, 350 US 950 (1956).

This court finds that the defendant failed to meet several of the criteria listed above. The defendant has failed to demonstrate how and from whom and when he received these reports. It is defendant's burden to demonstrate how and when he received the reports, and further that with due diligence he could not have obtained them any sooner. The court can not be left to speculate as to how and when the defendant received these reports. He did not state so in his motion nor did he include an affirmation from his attorney stating that either or both of the reports had not been disclosed.

Defendant must also demonstrate that the evidence must be such that if it had been introduced at trial, it would probably have resulted in a verdict more favorable to him. In his motion, the defendant outlines what he says was a weak case presented by the People to show that he was guilty of robbing two victims at Miriam's Beauty Salon, Mr. Elias Encarnacion, the cashier (money) and Ms. Maria Tavares, a patron (chain necklace). He claims that only two of six witnesses who were at Miriam's testified regarding the robbery at the salon, and that only Mr. Encarnacion was able to positively identify him. He posits that the fact that the fingerprint recovered at Miriam's did not match the latent print of defendant, would have lead to the inescapable conclusion that he was not guilty of the robbery there.

The People counter that a negative fingerprint result means only that the defendant didn't leave a fingerprint at the scene. Had the report been introduced, and/or the officer cross examined about it, the People would have (as they assert they did for some of the other robbery scenes) introduced evidence from a fingerprint expert to explain the lack of prints. (For example, the absence of a match could have been explained by the fact that the defendant had not touched the surface where the print was recovered, or had touched a surface that did not retain any prints.) The trial adduced strong testimony that both victims had ample time and opportunity to view the defendant, and in fact had each had made a positive identification - Mr. Encarnacion in a double blind line-up and a photographic array, and Ms. Tavares in a double-blind line-up- before the trial. Introduction of the fingerprints results would have likely been strongly refuted by other testimony. The court agrees with the People's argument. The lack of a match to a single fingerprint taken at the scene, which would have been easily accounted for, would not have created a probability of a more favorable verdict.

The defendant has also accused the People of a *Brady* violation because of the alleged non-disclosure of (either of) the fingerprint reports. Assuming for purposes of this motion that the fingerprint report showing a "negative result" was the one not-disclosed, the defendant must still demonstrate that the evidence was 1) favorable to the defendant because it is either exculpatory or impeaching in nature; 2) the evidence was suppressed by the prosecution; and 3) prejudice arose because the suppressed evidence was material. *See People v. Fuentes*, 12 NY3d 259 (2009) and cases cited therein. Focusing on whether or not the evidence was material, a court need determine whether there is a reasonable probability that it would have changed the outcome of the proceedings. As discussed above, the

inclusion of this one page report would not have been likely to counterbalance the very strong identification evidence proffered by the People.

The defendant has failed to raise any ground cognizable under CPL § 440.10 to warrant vacatur of the judgment and therefore, this court denies the motion in all respects.

The People's motion for re-sentencing pursuant to Penal Law § 70.45 is granted to the extent that the defendant will be produced in Kings County Supreme Court, with assigned counsel, for further proceedings.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
December 3, 2010



MICHAEL A. GARY, J. S. C.

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ENTERED
DEC - 7 2010
NANCY T. SUNSHINE
COUNTY CLERK

ADDENDUM

Post-judgment Proceedings

1. CPL § 440.10 motion filed in June, 2006.
2. CPL § 440 motion denied by J. Hall November, 2006.
3. Motion to reargue denial of CPL § 440 motion filed December, 2006.
4. Denial of motion to reargue by J. Hall, March, 2007.
5. CPL § 440 motion filed November, 2008.
6. CPL § 440 Motion denied by J. Hall, March, 2009.
7. Brief filed with the Appellate Division Second Department appealing the judgment of conviction, February 2009.
8. Leave to appeal denial of the 440 motion to the Appellate Division, March, 2009.
9. Supplemental brief filed in Appellate Division, September, 2009.
10. Conviction affirmed by the Second Department, 70 AD3d 867, February, 2010.
11. Appeal denied by *People v. Umoja* , 15 NY3d 779 (July, 2010)
12. Present CPL § 440 motion filed by defendant.