

**People v Jones**

2010 NY Slip Op 33588(U)

December 14, 2010

Supreme Court, Kings County

Docket Number: 4437/2003

Judge: Abraham G. Gerges

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 17

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

By: Hon. Abraham G. Gerges

Date: December 14, 2010

-against-

DECISION & ORDER

DONALD JONES

Indictment No. 4437/2003

-----X  
Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10 on the grounds of prosecutorial misconduct. Defendant also claims that the evidence was legally insufficient because the witness testimony was inconsistent and that the indictment was constitutionally defective. The motion is denied.

At approximately 1:00am on June 14, 2003, defendant received a call from his girlfriend, Anwarti Brown, who was with friends at 93 Lewis Avenue in Brooklyn. She told him that Mischael "Mischi" Benyehudah had pulled her hair and grabbed her buttocks, and that she wanted defendant to come there. Two of defendant's friends drove him to 93 Lewis Avenue, where several people were standing outside, including David Ellerby, Lamont Randolph and Nicole Brown. Defendant found Anwarti inside and she pointed out Mischi, who was wearing a partially yellow rain jacket. Defendant and Mischi were heard arguing and defendant yelled that he was going to "air this shit out." Mischi stated that defendant pointed a gun at him. When a police car passed by everyone dispersed.

About twenty minutes later, Lamont Randolph, who was wearing a partially yellow shirt and was similar in size to Mischi, was standing near the front of 93 Lewis Avenue talking with

David Ellerby and Nicole Brown. Defendant and another man approached from around the corner and defendant fired several shots, fatally wounding Randolph. Nicole Brown, who happened to be Anwarti Brown's best friend, recognized defendant. After defendant fled Nicole Brown told Ellerby that Anwarti's fiancé, Donald, had shot Randolph.

Several days later, defendant was identified in lineups as the shooter by Nicole Brown, who was standing with Randolph when he was shot, and Adriana Rodriguez, who saw the shooting from her first floor apartment at 93 Lewis Avenue. Defendant was also identified by Tammy Dixon, a 911 caller who, from her fourth floor window, saw defendant running with a gun less than a minute after the shots were fired, and by Mischi, who stated that defendant was the man who had threatened him with a gun earlier that night.

Defendant was charged with two counts of murder in the second degree, under intentional and depraved indifference theories (PL §§ 125.25[1], [2]), and one count each of criminal possession of a weapon in the second and third degrees (PL §§ 265.03[2], 265.02[4]). At trial, Nicole Brown, David Ellerby, Adriana Rodriguez and Tammy Dixon testified for the People about what they witnessed with respect to the shooting. All were cross-examined by defense counsel about prior statements that they had made to the police and to the grand jury. Defendant was ultimately convicted of intentional murder, under a theory of transferred intent, and was sentenced to twenty-five years to life in prison.

Defendant appealed from his judgment of conviction, arguing that the prosecutor conducted a hostile and manipulative cross-examination of defendant and his witnesses and thereafter made unfair and inflammatory remarks in summation. In a *pro se* supplemental brief, defendant also claimed that he was misidentified as the shooter and that the People did not prove

his guilt beyond a reasonable doubt because the eyewitnesses were inconsistent with respect to the shooter's clothing and because the eyewitnesses' pretrial statements were inconsistent with their trial testimony. Defendant also made a *Brady* claim in which he asserted that the People had withheld prior inconsistent statements made by the witnesses.

By decision dated December 18, 2007, the Appellate Division affirmed defendant's judgment of conviction (*People v Jones*, 46 AD3d 840 [2d Dept. 2007]). The Court held that defendant's claims of improper cross-examinations and summation remarks were unpreserved for appellate review, and further held that any error, if such questioning or comments were improper, was harmless. In addressing defendant's *pro se* arguments, the Court found defendant's legal insufficiency claim unpreserved and determined that the evidence was, in any event, sufficient to establish defendant's guilt beyond a reasonable doubt. Ultimately, the Court found that the verdict was not against the weight of the evidence.

Defendant now moves to vacate his judgment of conviction, claiming that (1) the witnesses made inconsistent statements in their 911 calls, interviews, police reports and trial and grand jury testimony, and that the prosecutor therefore knowingly solicited perjured testimony before the grand jury and at trial; (2) the prosecutor made improper remarks in his opening statement and summation regarding evidence that he knew to be false; (3) the inconsistencies between the various witnesses' trial testimony rendered the evidence against him legally insufficient; (4) the indictment was jurisdictionally defective because he was not personally named in every count; and (5) the People constructively altered the indictment at trial by suggesting that defendant might have acted in concert with another when defendant was indicted as the sole participant. To support his allegations of fabricated testimony defendant points out

inconsistencies in witness testimony and facts he believes renders the witnesses incredible, such as the fact that Dixon wore eyeglasses and that Brown could not have possibly recognized the shooter when shots were being fired in her direction. For the following reasons, the motion is denied.

Defendant's first claim alleging solicitation of perjured testimony by the People is procedurally barred. The court must deny a motion to vacate judgment when sufficient facts appear on the record to have provided adequate review of this claim upon appeal, but no such review has occurred owing to the defendant's unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]). "A motion to vacate a judgment of conviction pursuant to CPL 440.10(1)(h) cannot be made as a substitute for a direct appeal from the judgment when the defendant could have raised his claims on appeal, but failed to do so" (*People v Williams*, 5 AD3d 407 [2d Dept 2004]; see *People v Cooks*, 67 NY2d 100, 500 [1986]). Here, defendant's allegations rely on facts appearing on the record, including police reports and grand jury transcripts provided to the defense and utilized as impeachment material on cross-examination, which would have permitted this issue to have been reviewed on direct appeal. Defendant's failure to raise the issue that the People solicited perjury is unjustified and unsubstantiated in his moving papers.

Moreover, in viewing the various trial testimony of the witnesses and defendant's allegations there is no reason to believe that, if any witnesses were in fact lying, the People were aware of the alleged lies and knowingly elicited or failed to correct false testimony. Defendant's allegations of fact with respect to the People's presentation of the witnesses are entirely unsubstantiated (CPL § 440.30[4][b]). A review of the trial testimony reveals that all of the

People's witnesses gave largely consistent accounts of the shooting and all identified defendant, either directly as the shooter or as the person they witnessed fleeing the scene with a gun. The defense had ample opportunity to impeach the witnesses with prior inconsistent statements and conducted thorough cross-examinations that included questions about the circumstances under which each saw the defendant. As a result, the jury properly determined the credibility of each witness. The "resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses" (*People v Diaz*, 30 AD3d 436, 437 [2d Dept 2006]; see also *People v Argentina*, 27 AD3d 569 [2d Dept 2006]). In sum, where the trial testimony and the defendant's allegations fail to establish any likelihood that the People knowingly solicited perjury by the witnesses, the court must reject defendant's first claim of prosecutorial misconduct.

Defendant's second claim with respect to the propriety of the prosecutor's opening statement and summation is likewise rejected. As discussed above, there is no merit to the claim that the People presented false evidence and made false statements in their presentation to the jury. Additionally, the Appellate Division already considered and rejected the claim that the prosecutor made inflammatory remarks on appeal. Accordingly, where this issue "was previously determined upon the merits upon an appeal from the judgment", this court is now procedurally barred from reviewing it again in a collateral motion (CPL § 440.10[2][a]).

This court is also barred from again reviewing defendant's legal sufficiency claim, as the Appellate Division already rejected said claim on appeal as well (CPL § 440.10[2][a]). The Appellate Division reviewed the evidence and determined that, in spite of any inconsistencies, it was "legally sufficient to establish the defendant's guilt beyond a reasonable doubt" (*Jones*, 46

AD3d 840).

Contrary to defendant's belief, there is no requirement that a defendant, properly named in the caption of the indictment, be named in each single count within. CPL § 200.50, which lists the required elements of an indictment, does not contain any requirement that each count repeat the defendant's name. "An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime—for instance, if it fails to allege that the defendant committed acts constituting every material element of the crime charged" (*People v D'Angelo*, 98 NY2d 733, 734 [2002]). Here, "Donald Jones" is identified in the caption and is thereafter referred to as defendant in the subsequent charges listed. Thus, under CPL §210.25 there is no reason to disturb this indictment, which is facially sufficient and substantially conforms to the requirements of CPL § 200.50.

Defendant's last claim, that the People constructively amended the indictment at trial by suggesting that defendant might have acted in concert with another when defendant was indicted as the sole participant, is simply baseless. The indictment was properly drafted and no change was made thereto by consequence of any alleged reference to an accomplice. Defendant was not charged with acting in concert, nor did his conviction reflect any such charge. Even if such a constructive alteration did take place, defendant has not alleged that he was prejudiced in any way. Therefore, the court rejects this claim on the ground that it is contradicted by the record and, "under these and all the other circumstances attending the case, there is no reasonable possibility that it is true" (CPL § 440.30[4][d]).

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:

*Abraham G. Gerges*

ABRAHAM G. GERGES, J.S.C.

**ENTERED**  
DEC 16 2010  
NANCY T. SUNSHINE  
COUNTY CLERK