

People v Melendez

2010 NY Slip Op 33617(U)

July 9, 2010

Sup Ct, Kings County

Docket Number: 819-2004

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
Pro Se CPL 440 Motion

JOSE MELENDEZ :
: IND. NO. 819-2004
Defendant :

-----X
MICHAEL A. GARY, J.

Defendant moves *pro se* by way of a written motion filed on January 19, 2010, supplemented by an addendum dated February 28, 2010 to vacate his conviction and sentence pursuant to CPL §§ 440.10 and 440.20. The People, after having been granted an extension of time to respond, opposed this motion in a written response dated April 23, 2010. The defendant submitted an affirmation in reply which was received by this court on May 11, 2010.

This case, as found by the jury, arose when the defendant at approximately 12:30 AM on January 9, 2004 with the use of an accelerant set fire to 407 Wilson Avenue. As a result of that fire, Rubin Torres, Sr. and his son Gilbert Torres died. Millagros Torres was in a rehabilitation facility due to injuries she sustained in the fire. The defendant was arrested and eventually indicted for four counts of Murder in the second degree, two counts of Assault in the first degree, and three counts of Arson in the first degree. A jury found the

defendant guilty of two counts of Murder in the second degree (Penal Law § 125.25[1]), and one count of Arson in the first degree. Before the defendant was sentenced, he requested that his attorney file a motion to set aside the verdict. The court denied that motion.

The defendant was sentenced on January 5, 2006, to an indeterminate term of incarceration of a minimum of 25 years to a maximum of Life.¹

The defendant appealed and the Appellate Division Second Department affirmed his conviction in *People v. Melendez*, 51 AD3d 1040 (2nd Dept., 2008). Leave to appeal to the Court of Appeals was denied at 10 NY3d 962 (2008, Table). A motion for reconsideration was denied at 11 NY3d834 (2008, Table). Mr. Melendez has filed a writ of habeas corpus with the Federal Circuit, but apparently has requested that consideration be held in abeyance pending the outcome of the instant motion. He now moves to vacate the conviction based on an allegation of constitutional violations, ineffective assistance of counsel at trial, and actual innocence. The People have responded to the defendant's papers and have asserted that the motion should be denied.

The defendant alleges that there was a change in the law that requires the court to consider the motion to dismiss, namely the US Supreme Court case of *Melendez-Diaz v.*

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Defendant was improperly sentenced on the Arson count with the imposition of a determinate sentence. That sentence was modified by this court on April 7, 2006 to a concurrent term of imprisonment of an indeterminate sentence of 25 years to Life.

Mass, 129 S. Ct. 2527 (2009) . Because it represents a change in existing law, the defendant argues, not only could he not have known about it, but it clearly must apply retroactively to his case. Defendant, alleges that the testimony of the Medical Examiner (ME) who was not the investigating ME, violated *Melendez-Diaz*, and therefore his constitutional right to confront the witnesses against him were violated.

The defendant alleges the court violated the rule in *Crawford v. Washington*, 541 US 36 (2004), by allowing in testimony about of a photograph that was shown to a witness several weeks before the lineup identification procedure. The defendant complains that the person who showed the photo was not called to testify by the prosecution and therefore he was deprived of his right to confront that witness in violation of *Crawford*.

The defendant also claims that his defense attorney was ineffective because he failed to investigate information in a DD-5, and failed to call the person named therein, Joshua Baez, as a witness. Joshua Baez stated to the police that on the night of the arson he did not see the face of the person exiting the building. Since that is inconsistent with Mr. Gonzalez's testimony that he recognized Mr. Melendez's face, the defense was compromised.

Finally, defendant argues that he is actually innocent of the arson and offers an "affidavit" in Spanish, with a "translation" by a legal clerk, of someone who claims to have heard from Jose Ramos, aka "Chewy" (a witness for the People), that he himself had

committed the arson.

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

A court is mandated to deny a motion to vacate a judgment of conviction when the issues raised therein could have been or were already raised in previously filed post-verdict/post-conviction proceedings. Most of the issues raised here in defendant's pro se motion concern trial based activity which were 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 largely claims that are based on the record before the court. These issues were discoverable and available to the defendant as early as the first appeal to the Appellate Division, thus not properly cognizable under the motion to vacate the judgment.

Were it to consider some of the issues, the court agrees with the People's argument that there was no *Crawford* violation relating to the alleged fire department employee who showed the witness a photo. This was record-based and thus, should have been raised on appeal. *Crawford* was decided in 2004 and the defendant's appeal was decided in 2008, thus pursuant to CPL § 440.10 (2), this issue is improperly before the court. Even if it were to be considered, *Crawford* is not applicable on collateral review (*See Whorton v. Bockting*, 549 US 406, 2007). Further, it was the defense who introduced the testimony about this photo, not the prosecution.

Defendant claims that the court's admission of the testimony of the medical examiner who testified about the autopsy violated his constitutional rights under the confrontation clause under *Crawford* as the autopsy was performed by a physician other than the one who was on the stand, and was not available for cross examination by the defense. Further, the defendant claims that the autopsy report itself should not have been admitted into evidence as it violated the rule enunciated in *Melendez-Diaz*, above. The

People counter that autopsy reports are not considered testimonial under the *Crawford* rule (*i.e.*, the investigation is not prepared in anticipation of a criminal prosecution, but rather its purpose is in fixing a cause of death). Further, case law holds that autopsy reports generated by a medical examiner are generated by an independent agency, and not considered an arm of law enforcement for purposes of *Crawford* and *Melendez-Diaz*. See *People v. Washington*, 86 NY2d 189 (1995); and also *People v. Frycinet*, 11 NY3d 38 (2008). The court agrees with the People's position as the autopsy report did not link the defendant to the crime; it only pinpointed the cause of the victims' demise. As the report did not violate the rule in *Crawford*, or in *Melendez-Diaz*, this aspect of the defendant's motion is denied.

Defendant uses the above argument to bolster his claim that he received ineffective assistance of counsel at his trial. Along with the failure of the defense attorney to object to the admission of the testimony as outlined above, the defendant further asserts that he failed to investigate the information in a police report (DD-5, Exhibit B). He states that the information included therein: that a witness named Joshua Baez did not see the faces of the three people as they were exiting the building- is inconsistent with the testimony of the prosecution witness Hector Gonzalez. Mr. Gonzalez testified that he could see the faces of the perpetrators of the arson that night, and that he recognized the defendant. Defendant argues that the defense attorney's failure to call Mr. Baez as a witness, which would have called into question Mr. Gonzalez's credibility demonstrates his ineffectiveness. He also, as

he already argued in his appeal, stresses that discussion of Gonzalez's ability to identify who the person was that he saw, was bolstered by the admission of his testimony in the grand jury; defendant claims that it was ineffective assistance of the trial attorney to have allowed this to happen.

The People point out that the defendant had argued as his defense that he was elsewhere that night and that he could not have been the perpetrator of the arson. This explains why the defense attorney, properly, did not question the admission of the medical evidence. There was no dispute as to how the victims died that night; the question was who started the fire that caused the deaths. Since Mr. Melendez's attorney chose to pursue the defense of misidentification, putting someone on the stand who could not identify anyone who was there does not call into question what Hector Gonzalez, an eyewitness, saw. Procedurally, the People assert that the defendant raised the issue of the admission of the grand jury testimony in his appeal. Additionally, the People point out again, that this issue is record-based and is not properly before the court in this motion.

The court agrees with the People's argument regarding the fact the issue of the DD-5 relates to the trial record. However, motions alleging ineffective assistance of counsel encompass both record-based allegations and those not found on the record, and thus, are properly considered under CPL § 440. Insofar as an allegation of the effectiveness of counsel is concerned the court is mandated to view the representation defendant received in the

totality of the circumstances and whether the defendant received meaningful representation *People v. Baldi*, 54 NY2d 137. Defense counsel vigorously conducted cross examination at trial and presented a viable defense. More importantly, under the standard enunciated in *People v. Satterfield*, 66 NY2d 796, it is precisely the kind of speculation that is attempted here that is anathema to a review of these type of claims.

... [C]ounsel's subjective reasons for his choice of [this] strategy in this case were immaterial. Viewed objectively, the transcript and the submissions reveal the existence of a trial strategy that might have been pursued by a reasonably competent attorney ...it is not for the court to second guess whether a course chosen by defense counsel was the best trial strategy or even a good one, so long as defendant was afforded meaningful representation. At p. 799
As the court finds that the defendant received meaningful representation by his attorney, the notion to vacate the judgment based on ineffective assistance of counsel is denied. *See People v. Benevento*, 91 NY2d 708.

The defendant has proffered an unsworn "affidavit" by a person named Milton Rivas, along with what purports to be a translation of the Spanish- language document. In it, according to the English language "translation", Milton Rivas in 2008 heard from Chewy, Jose Ramos, the People s witness at trial, that he himself was responsible for the arson and not Jose Melendez. The handwritten document shows a date of August 2008. Offering this as proof of his actual innocence, the defendant asserts that the court must vacate his conviction or at least hold a hearing.

The People assert that this document should be discounted for several reasons. First as

the document is dated August 2008, it is curious that the defendant did not raise it in his habeas petition which was filed in September 2009. If it is likened to newly discovered evidence the defendant has a duty to bring it to the attention of the court with the utmost diligence as soon as practicable. It is approximately one and a half years later that this document was referred to! Further, the People assert that it is inherently unreliable hearsay.

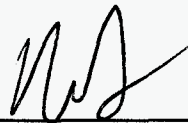
The court agrees with the People's characterization of the document attached to the defendant's motion as unreliable hearsay : someone named Milton Rivas hand-wrote a document that someone purporting to be Jose Ramos told him that he was responsible for an arson. Not only is the statement unsworn, it is unofficially translated. The court cannot guess as to its contents. As the defendant has failed to support this claim of innocence with sworn allegations of fact, the motion to vacate on this basis is denied.

Accordingly, the defendant's motion to set aside the judgment of conviction is denied in all respects.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
July 9, 2010

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MICHAEL A. GARY, J. S. C.

