SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, PART 5

	:	**Decision and Order**
THE PEOPLE OF THE STATE OF NEW YORK,	:	**Indictment: # 10930/06**
-vs-		
	:	
RAFAEL PEREZ,		
Defendant.	:	

JUSTICE SHERYL L. PARKER

Defendant moves to vacate his conviction pursuant to C.P.L. §440.10(1)(f) & (h). Based on the defendant's *pro se* motion dated September 14, 2009, defense counsel's motion dated September 20, 2010, the People's response to both motions and the court records, the following is the Court's decision.

On September 27, 2007, defendant was found guilty after trial of one count of burglary in the second degree, P.L. §140.25. It was alleged that the defendant knowingly entered a dwelling and removed a television from the premises. At the trial, the complainant, Anna Kariotakis, testified that she returned home to 90 Moore Street, Brooklyn, New York, with her small child at approximately seven-fifteen or seven-thirty in the evening on December 11, 2006, and observed the defendant in the hallway of her apartment building carrying a television. She stated that the area was well lit and that she and the defendant looked each other in the eyes. She testified that she then went upstairs to her apartment and observed her door open and her television missing. At that moment, she realized that she had just observed the defendant walking out the door with her television. Ms. Kariotakis phoned her landlord and then notified the police. She testified

that she told the police upon their arrival that she thought that she passed someone carrying her television as she was coming into the building. She described the person as a sickly, short, Hispanic male, wearing a grey sweatshirt. On December 12, 2006, the complainant chose the defendant out of a lineup. On December 15, 2006 she testified before the grand jury that she had seen a Hispanic, short, very thin man wearing a shaved head and grey sweatshirt, attempting to exit her building with a television set. The complainant subsequently identified the defendant at trial.

Police Officer Daniel Marussich testified at trial that he arrived at the complainant's home at approximately eight in the evening on December 11, 2006 after receiving a radio transmission. The officer observed that the door to the complainant's apartment appeared as if it had been forced open. The officer testified that he was at the location for approximately 51 minutes and completed a complaint report and lost/stolen property sheet. The officer did not have the handwritten complaint report at trial and had not provided the People nor the defendant with it. A typewritten copy was provided. The officer testified that he recalled the description given by the complainant as being a "male Hispanic". Requests for the complaint report made by Police Officer Marrussich had been made by the defendant. Upon the prosecution's inability to produce such document, the Court granted the defendant's request for an adverse inference charge.[1]

Sergeant Benjamin Benson testified that on December 12, 2006, the defendant was

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[1] "You have heard testimony from Police Officer Marrusich that he filled out a complaint report regarding the conversation he had with the complainant, Anna Kariotakis. The actual report has not been disclosed to the defense attorney. Under the law, such report is required to be disclosed to the defense attorney. In light of the missing paperwork, you are permitted, but not required to, infer that information contained in the report would have contradicted the witness's accounts at this trial."

arrested when he and Police Officer Ferruzola entered 101 Humboldt Street in Brooklyn, New York, after being flagged down by a civilian complaining of a disorderly group. Inside the apartment building the officers encountered the defendant and two other men in a hallway with a large flat panel television. Later that day, the complainant identified the television as that which was taken from her home.

C.P.L. §440(1) states that "[a]t any time after the entry of a judgement, the court in which it was entered may, upon motion of the defendant, vacate the judgement upon the ground that:

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgement which conduct, if it had appeared on the record, would have required a reversal of the judgement upon an appeal therefrom; or

(h) The verdict was obtained in violation of the defendant under the constitution of this state or of the United States.

Upon conviction after trial, defendant filed a motion to set aside his conviction pursuant to C.P.L. §330.30. The motion was denied. (Parker J., November 29, 2007). After his sentence to a period of ten years incarceration plus five years post release supervision, defendant appealed. The defendant's conviction and sentence were affirmed. (*People v. Perez*, 77 AD3d 974 [2nd Dept. 2010]).

Defendant has obtained three documents via a FOIL request to the New York City Police Department. All three documents were created on December 31, 2006, by Detective Kenneth Giallanza. They will be referred to as Complaint Follow Up ("CFU") numbers one, two and three ("1,2,3").

CFU-1

On December 11, 2006, at approximately 2030 hours, I along with Det

Wernersbach responded [REDACTED] regarding a Burglary investigation and spoke to c/v Anne (*sic*) Kariotakis [REDACTED] who stated that her husband Joseph [REDACTED] Dob-7/01/70 left the apartment secured at 1500 hours, [REDACTED] returned at approximately 1920 hours and found the apartment door unlocked and damage to the door lock, once inside the c/v found a crow bar on the floor and the listed property missing, the c/v also stated that the super who lives in the church on the 1st floor, who she only knows as James, last day was today and he was inside her apartment approximately 2 weeks ago fixing a leak. The c/v suspects that he may be involved.

CFU-2

1. On December 11, 2006 at approximately 2045 hours, I along with Det Wernersbach, while at 90 Moore Street regarding a Burglary investigation conducted a canvass for witnesses and spoke to the following individuals:
-Andrew Miller [REDACTED] stated that he did not see anything but heard a bang in or around apartment 4F approximately 1600 hours and never followed up on the noise.
-Chelsa Skees [REDACTED] stated she was in and out of her apartment all day and did not see anything suspicious.
-No Answer [REDACTED]
-Peter Waldeck [REDACTED] stated that he was at work all day.
-No answer [REDACTED]
-Santana Cepeda from [REDACTED] stated he did not see anything and the business is not equipped with any cameras.
-Therus Lefkowitz, owner of [REDACTED] stated he does not live here and just passed by a few minutes ago.
2. On 12/11/2006 at approximately 2100, I canvassed for any security cameras, none were observed at this location or any surrounding buildings.
3. Case Status-Active

CFU-3

1. On December 12, 2006, at approximately 0754 hours, PO Ferruzola from the 90 Pct B.A.T. Team apprehended Rafael Perez Dob- [REDACTED] inside 101 Humboldt Street, after receiving information from anonymous individual the above perp was placed under arrest and charged with Burglary for the above case.
2. On 12/12/2006 at approximately 1200 hours, I did debrief Rafael Perez regarding the above Burglary arrest who at this time has nothing to report in connection with this case or any other Burglaries.
3. I request that the above case be marked closed to the arrest by the 90 Pct B.A.T Team and the Enhancement from the debriefing of the above perp.
4. Case Status-Closed B-8, no existing patterns, no outstanding perps.

Rosario

Defendant has raised a violation of Criminal Procedure Law §240.45(1)(a) in that the People failed to provide previous statements made by a witness whom the People called at trial. Specifically, the defendant has provided the Court with the three New York City Police Department ("NYPD") complaint reports which were produced during the investigation of the burglary of Ms. Kariotakis's home.

C.P.L. §240.45(1) states that "after the jury has been sworn and before the prosecutor's opening address...the prosecutor shall, subject to a protective order, make available to the defendant: (a) Any written or recorded statement...made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony." (*People v. Rosario*, 9 NY2d 286 [1961]).

With respect to CFU-2 and CFU-3, neither Detective Giallanza nor Detective Wernersbach testified at trial. Accordingly, CFU-2 and CFU-3 do not contain statements made by a prosecution witness and are not *Rosario* material. Additionally, these reports contain nothing inconsistent with any trial testimony.

With respect to CFU-1, Ms. Kariotakis did testify at trial and, therefore, her statements made to Officer Giallanza, as the People concede, constitute *Rosario* material. However, whether a violation of C.P.L. §240.45 and *People v. Rosario* constitutes an error so grave requiring a vacation of judgement depends on the level of prejudice caused to the defendant. A defendant must show that "there is a reasonable possibility that the non-disclosure materially contributed" to the conviction. (C.P.L. §240.75; *People v. Jackson*, 78 NY2d 638 [1991]).

In this case, the CFU- 1 report taken by Detective Giallanza does not contradict the complainant's testimony at trial. (*People v. Avery*, 80 AD3d 92 [3d Dept. 2011]). The statement to Detective Giallanza was not that she saw someone other than the defendant, rather she suspected that the defendant may have had inside help. The crux of the witness's testimony that she saw the defendant in the hallway with her television is not contradicted by CFU-1. The defendant has not provided any affirmation from the complainant stating that she suspected the superintendent *as opposed to the defendant*. Moreover, on cross examination, the complainant stated that when she encountered the defendant in the hallway, she did not recognize him (Trial Transcript pg. 69) thereby clearly excluding the building superintendent. Also on cross examination she again confirmed that she called her landlord before calling the police. (Trial Transcript, pg 83) The defendant has failed to demonstrate that the document withheld by the People contained information that could be reasonably seen to produce a different outcome at trial had the defendant possessed it. (*Jackson, Supra;* C.P.L. §440.30 [4][a]; §240.75).

Brady

Defendant's second claim relating to the three Complaint Follow-Ups obtained *via* FOIL request, is that they contained suppressed information favorable to the accused which was material to the innocence of the defendant. (*Brady v. Maryland*, 373 US 82 [1963]).

In order to prevail on an allegation of a *Brady* violation a defendant must meet a three pronged test: (1) The evidence is 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 is material. (*People v. Fuentes*, 12 NY3d 259 [2009], citing *Stickler v. Greene*, 527 US 263 [1999]).

People's failure to provide favorable evidence to the defense only requires reversal if that evidence was material. (*People v. Vilardi,* 76 NY2d 67; *People v. Chin*, 66 NY2d 22).

People v. Chin sets forth the standard for materiality when no specific request is made as requiring a reasonable probability that the outcome would be different. *People v. Vilardi* sets forth standard for materiality when specific request is made as requiring defense show reasonable possibility that the outcome would be different.

In this case, the defendant specifically requested the hand written complaint report prepared by Police Officer Marrussich and generally requested all discovery which is statutorily required by C.P.L. §240.20 including anything required to be disclosed to the defendant pursuant to the New York State Constitution or the Constitution of the United States (C.P.L. §240.20[1][h]).[2]

In light of the general request pursuant to C.P.L. §240.20, defendant has the burden of showing that the Complaint Follow-Ups were material in that had they been disclosed there is a reasonable probability that the outcome of the trial would have been different.

First, CFU-2 and CFU-3 do not mention the defendant or Ms. Kariotakis. They merely recount Detective Giallanza's actions while investigating this burglary. The reports neither inculpate nor exculpate the defendant.

While impeachment evidence falls within the *Brady* rule (*US v. Bagley*, 473 US 667 [1985], *citing, Giglio v. US,* 405 US 150 [1972]), the omission of reference to the defendant in the CFU-1 did not rise to the level of material which created a reasonable probability that the outcome of the trial would have been different. Whether the complainant suspected that a

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[2] This case proceeded through Open File Discovery ("OFD") as opposed to motion practice.

second person may have been involved is not relevant to the defendant's identification and conviction as the person who was seen carrying the television out of the building, nor is it inconsistent with the trial testimony. The evidence shows that the defendant was arrested less than a block and one half (Trial Transcript P. 206) from the complainant's home while in possession of the stolen television. That, combined with the identification of the defendant within 24 hours of the burglary and subsequent identification of the defendant at trial was overwhelming evidence of the defendant's guilt. There was not a reasonable probability that had the defendant been provided CFU-1 which stated that the complainant suspected that her superintendent may have been "involved" would have change the outcome of the trial.

Accordingly, defendant's motion is denied without hearing.

Dated: Brooklyn, New York
March 23, 2011

J.S.C.