

**People v Fuentes**

2011 NY Slip Op 31885(U)

June 2, 2011

Sup Ct, Kings County

Docket Number: 2465/2004

Judge: Miriam Cyrulnik

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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: Part 38

PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE FUENTES,

DECISION AND ORDER  
Indictment No: 2465/2004

Miriam Cyrulnik, J:

The defendant moves pro se to vacate his judgment of conviction, pursuant to Criminal Procedure Law (“CPL”) 440.10, and to set aside his sentence, pursuant to CPL 440.20. The People filed a affirmation in opposition. The defendant then submitted a sur-reply in response.

On November 3, 2005, the defendant was convicted after a jury trial of Rape in the First Degree and Sodomy in the First Degree. On February 28, 2006, he was sentenced to a period of 25 years incarceration on both counts, to run concurrently, followed by five years’ post-release supervision.

Prior to sentencing, defense counsel made a motion to set aside the verdict, which was denied on February 28, 2006, when the defendant was sentenced. On April 20, 2006, the defendant made a pro se CPL 440 motion, which was denied as procedurally barred, on May 25, 2006. The defendant subsequently appealed his case to the Second Department, Appellate Division, which unanimously affirmed his conviction on February 5, 2008. People v. Fuentes, 48 AD 3d 479 (2d Dept 2008). The defendant’s motion to reargue this decision was denied.

The Court of Appeals granted the defendant leave to appeal the Second Department’s decision, and on April 7, 2009, they affirmed his conviction as well. People v. Fuentes, 12 NY 3d 259 (2009). The defendant’s motion to reargue this decision was likewise denied. People v. Fuentes, 13 NY 3d 766 (2009). Finally, the defendant filed a pro se motion for a writ of error coram

nobis alleging the ineffective assistance of appellate counsel, which was denied by the Second Department, Appellate Division on May 18, 2010. People v. Fuentes, 2010 NY Slip Op 4406 (2d Dept 2010).

The defendant now alleges that the People failed to disclose a specific hospital record of the complainant, violating Brady and Rosario requirements, and hindering his ability to properly question the complainant on cross-examination, and to investigate the complainant's psychiatric history, if any. The defendant also claims that the People made improper remarks during summation, and the trial court improperly accepted the People's expert witnesses. He argues that he was ineffectively assisted by trial counsel, who failed to object to the People's remarks or the lack of a pre-sentence report, the alleged absence of which constituted another error on the part of the court. Finally, he contends that he was denied the right of allocution at sentencing.

The People respond that all of the defendant's arguments are procedurally barred, as they have either already been raised on appeal or through a CPL 440 motion, or should have been. In any event, the People contend that all of the defendant's claims are substantively without merit. The court agrees with the People.

#### DEFENDANT'S ARGUMENTS ARE PROCEDURALLY BARRED

First, the defendant's claims pertaining to the People's failure to disclose the complainant's "record of consultation" as Brady material have already been addressed and decided by both the Appellate Division, Second Department and the Court of Appeals, and are therefore procedurally barred from being addressed by this court pursuant to CPL 440.10(2)(a). See People v. Fuentes, supra. See also Pamela Cullington, Annual New York State Constitutional Issue: Brady Violations: Court of Appeals of New York, 26 Touro L Rev 925 (2010).

Additionally, the claims regarding the allegedly improper remarks made by the People during summation were already raised in a prior CPL 440 motion made by the defendant, and denied by the Supreme Court, in 2006. As such, this claim is procedurally barred pursuant to CPL 440.10(3)(b). See People v. Graves, 2009 NY Slip Op 4083 (2d Dept 2009), lv denied 13 NY 3d 939 (2010) (finding that defendant's "contention was either raised, or could have been raised, in the context of a first, unsuccessful motion pursuant to CPL 440.10," thus "it was within the Supreme Court's discretion to deny, without a hearing, that branch of the defendant's current motion").

Next, the defendant's numerous allegations of ineffective assistance of trial counsel, as well as the denial of the right to allocution or a complete pre-sentence report<sup>1</sup>, the classification and testimony of the expert witness at trial, the consideration of the above-mentioned document as Rosario material, prosecutorial misconduct, and the introduction of supposedly false testimony, are all claims based on the record of trial and sentencing. Accordingly, the defendant could have raised these arguments on direct appeal, but unjustifiably failed to do so. As such, under CPL 440.10(2)(c), the defendant is procedurally barred from attempting to circumvent that designated route by filing a motion to vacate the judgment. See People v. Kwok, 2008 NY Slip Op 4536, 1 (2d Dept 2008) (holding that since "facts sufficient to have permitted adequate review of these claims on a direct appeal from the judgment appear on the record of the plea proceedings," defendant is "barred from raising them on a motion to vacate the judgment" without showing that his "failure to take an appeal and raise these claims was justifiable"); see also People v. Mackey, 2007 NY Slip Op 50477U, 2

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<sup>1</sup> The court notes briefly that a pre-sentence report was ordered and submitted into the court record as part of the defendant's sentencing. The defendant himself chose not to cooperate with the Department of Probation in their preparation of the report. Similarly, he opted not to speak at his sentencing, though afforded the opportunity to do so.

(Sup Ct, Kings County 2007).

Furthermore, any issues that might not have appeared fully as a part of the record, such as specific details pertaining to the competence of defense counsel, may not be heard now, because the defendant failed to argue those issues in his previous motions to vacate his judgment. See CPL 440.10(3)(c). See People v. Muhammad, 2009 NY Slip Op 31474U (Sup Ct, Kings County 2009) (holding that the defendant's claim that his indictment was jurisdictionally defective was barred under CPL 440.10[2][c], because he failed to raise it on direct appeal, or in any of his four previous CPL 440.10 motions, pursuant to CPL 440.10[3][c]); see also People v. Cochrane, 27 AD 3d 659, (2d Dept 2006), lv denied 7 NY 3d 787 (2006).

Even if the court were to address the substance of the defendant's motion, there would be no merit found within his arguments, a conclusion which has already been reached by the Court of Appeals, the Appellate Division, Second Department, and the Supreme Court. Nor is the court persuaded that granting the defendant's request for additional DNA testing would yield results that would lead to a different outcome than the defendant's conviction after a trial supported by a considerable weight of evidence. Furthermore, having reviewed the trial and sentencing transcripts and the court file, the court finds no evidence of ineffective assistance of counsel that would render it necessary to order the defendant's original trial attorney to submit an affidavit to the court. Therefore, that request is denied.

Indeed, though the defendant lodges a multitude of complaints against his trial counsel, ranging from a failure to convey a plea bargain offer to the defendant, to a failure to investigate mitigating factors at his sentencing, these facts are unsubstantiated by any other evidence, save the defendant's own claims, and must fail as well. There is no "reasonable possibility" that the claims

alleged by the defendant, for which he has failed to adequately demonstrate a sufficient factual basis, are true. CPL 440.30(4)(d).

Moreover, dissatisfaction with the outcome of trial, and various aspects of pre-trial and pre-sentence practice, do not lead to an automatic determination of ineffective assistance of counsel by either the applicable federal or New York standards.<sup>2</sup> As shown even by his own concessions regarding his attorney's plentiful objections and motions made on his behalf, the defendant cannot minimize his attorney's efforts throughout this lengthy and complicated case.

Accordingly, the defendant's motion to vacate his judgment of conviction and set aside his sentence on the abovementioned grounds is denied.

The defendant's right to an appeal from the order determining this motion is not automatic except in the single instance where the motion was made under CPL 440.30(1)(a) for forensic DNA testing of evidence. For all other motions under article 440, the defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after the defendant has been served by the District Attorney or the court with the court order denying this motion.

The application must contain the defendant's name and address, indictment number, the questions of law or fact which the defendant believes ought to be reviewed and a statement that no prior application for such certificate has been made. The defendant must include a copy of the court order and a copy of any opinion of the court. In addition, the defendant must serve a copy of his application on the District Attorney.

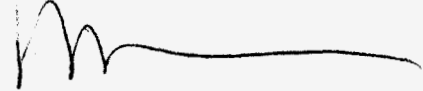
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<sup>2</sup> See generally, Strickland v. Washington, 466 US 668 (1984); People v. Caban, 5 NY 3d 143 (2005); People v. Baldi, 54 NY 2d 137 (1981); People v. Stultz, 2 NY 3d 277 (2004)

JOSE FUENTES, Indictment No. 2465/2004

This opinion constitutes the decision and order of the Court.

Dated: June 2, 2011  
Brooklyn, New York



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Miriam Cyrulnik  
A.J.S.C.

**ENTERED**  
JUN - 3 2011  
NANCY T. SUNSHINE  
COUNTY CLERK