

People v Scott

2011 NY Slip Op 32048(U)

July 22, 2011

Supreme Court, Kings County

Docket Number: 5034-05

Judge: Deborah A. Dowling

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At Part 1 of the Supreme Court of the State of New York, held in and for the County of Kings, located at 320 Jay Street, Brooklyn, New York, on the 19th day of July, 2011.

P R E S E N T:

HON. DEBORAH A. DOWLING,

Justice.

-----X

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

ORDER

INDICTMENT NO. 5034-05

KWAME SCOTT,

-----X

The defendant moves for an order vacating his conviction entered on October 30, 2007 and setting down a new trial. The defendant submitted the instant motion pursuant to CPL 440.10(1)(g) and 440.10(1)(h). The defendant contends that new evidence exists which significantly undermine the jury's decision to find him guilty. As such the defendant contends that this Court should order a new trial based upon the newly discovered evidence. After due consideration of the papers submitted herein and all arguments asserted by the parties, it is,

ORDERED, the defendant's motion is denied in its entirety.

The defendant submitted a motion seeking to set aside his conviction pursuant to CPL §440.10(1)(g) and CPL §440.10(1)(h). CPL §440.10(1)(g) provides that the court may vacate a judgement of conviction when:

New evidence has been discovered since the entry of judgement based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such

character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant, provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

In order to be considered newly discovered evidence, the evidence submitted in support of the motion must meet the following characteristics:

the evidence must be such that it will probably change the result if a new trial is granted; (2) it must be evidence which has been discovered since the trial; (3) it must be evidence which could not have been discovered before the trial by the exercise of due diligence; (4) it must be evidence which is material to the issue; (5) it must be evidence which is not cumulative to the former issue and (6) it must not be evidence which is merely impeaching or contradicting to the former evidence. *People v. Salemi*, 309 N.Y. 208, 215-216 (1955).

Additionally, a motion to vacate a conviction based upon newly discovered evidence is within the unlimited discretion of the Court. *People v. Santos*, 1 N.Y.3d 548 (2003).

The defendant contends that he is entitled to an Order vacating his conviction based upon an affidavit submitted by Leitoya Dixon. Ms. Dixon alleges in her affidavit that she witnessed someone else commit the crime for which the defendant was charged and found guilty. Ms. Dixon contends that, on June 27, 2005, she sent her husband to the store, and when he did not return after twenty to thirty minutes, she went downstairs to see what was taking so long. She stated that when she went downstairs she saw her husband speaking with Dwight Clark, a person known to her as "Biggie" and she saw Biggie and Jerome Crump, the decedent, exchange words. Ms. Dixon further stated that she then saw Biggie reach into his pocket and remove what appeared to be a firearm and begin shooting Mr. Crump. Ms.

Dixon stated that when the shooting began her husband ran towards her and after Biggie stopped firing shots he ran down Ralph Avenue towards Atlantic Avenue in Kings County.

Ms. Dixon's affidavit further states that she was fearful to come forward with the information because after the shooting Biggie and another individual exhibited threatening behavior towards her. She stated that it was not until March of 2008 when she discovered that the defendant had been convicted of killing Mr. Crump. Ms. Dixon also contends that she is no longer fearful of coming forward to state what she knows because she does not live in the neighborhood where she previously resided in close proximity to Biggie and has since moved from the area in 2007.

The defendant contends that this newly obtained affidavit further establishes that he is innocent of the charges against him and he should be granted a new trial. However, the purpose of a motion to renew is to afford a litigant an opportunity to submit new or additional facts which existed at the time of trial, but were not known to the defendant and, consequently, unknown to the court. It is not a vehicle for a convicted defendant to challenge his conviction by submitting evidence which only contradicts or impeaches former evidence.

In reviewing the arguments raised by the defendant, this Court finds those arguments are without merit. This court reviewed the case file relating to the defendant's case, the evidence submitted by the defendant and finds that the defendant failed to establish the aforementioned factors necessary to sustain a motion pursuant to CPL §440.10(1)(g).

Namely, the veracity of the alleged newly discovered evidence by way of an affidavit submitted by Ms. Dixon is called into question by the facts purported to be true by Ms. Dixon. In her affidavit Ms. Dixon alleges that the shooting incident occurred on June 27, 2005 and she further asserts that she is certain of that date because of the significance of the date being two days after her daughter's birthday. However, all the facts presented during the course of the trial established that the shooting occurred on June 26, 2005 and not the date asserted with certainty by Ms. Dixon.

Ms. Dixon also contends that she observed a person know to her as "Biggie" commit the shooting and she was fearful of coming forward until she moved away from the neighborhood in 2007. However, there was nothing which prevented her from coming forward since 2007. Also Ms. Dixon's version of the facts surrounding the shooting is not borne out by the details presented during the course of the trial. The allegations presented by the defendant amount to nothing more than facts which only impeach or contradict the evidence at trial and therefore not the type of evidence upon which a motion to vacate a conviction can be based.

The defendant has failed to establish that the evidence submitted is in fact new credible evidence or more importantly, that it would have somehow change the ultimate outcome of the trial. Moreover, the defendant failed to show that this evidence could not have been obtained earlier. The defendant's motion amounts to nothing more than a thinly veiled attempt to re-litigate the very issues already decided by the Jury which convicted him

of Murder in the Second Degree. Accordingly, the defendant's motion is denied in its entirety.

This shall constitute the decision and order of this Court.

ENTER
[Handwritten Signature]
J.S.C

ENTERED
JUL 22 2011
NANCY T. SUNSHINE
COUNTY CLERK