

People v Woods

2011 NY Slip Op 32049(U)

June 30, 2011

Supreme Court, Kings County

Docket Number: 5906-04

Judge: Joseph Kevin McKay

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SUPREME COURT - STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM : PART 33

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THE PEOPLE OF THE STATE OF NEW YORK

v

BY: McKay, J.
DATE: JUNE 30, 2011
IND. NO.: 5906-04

ROGER WOODS,

DECISION AND ORDER

DEFENDANT

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Defendant Roger Woods has submitted a second pro se CPL 440.10 motion dated April 20, 2011 seeking to set aside his 2005 judgment of conviction in the above-captioned case or, in the alternative, he is requesting a 440 evidentiary hearing. Defendant alleges that his trial counsel was ineffective for failing to present ballistics evidence to the jury which would have allegedly established that defendant was innocent of depraved murder. The People have submitted an Affirmation in Opposition to defendant's motion dated June 7, 2011 accompanied by a Memorandum of Law.

This is now defendant's third attempt¹ to argue that the gun which killed a young teenager was not the same one as the recovered weapon which defendant admitted shooting repeatedly on a street filled with pedestrians. For reasons to be addressed infra defendant's motion is summarily DENIED in its entirety.

The factual and procedural history of this case is set forth in detail in a written

¹ Twice in CPL 440.10 motions, including the instant one, and once in an application for a writ of error coram nobis before the Appellate Division - Second Department, to be discussed infra.

Decision and Order of this Court dated November 5, 2009 denying defendant's earlier pro se CPL 440.10. That Decision and Order is incorporated herein by reference.

On September 6, 2004 defendant repeatedly shot a recovered .380 caliber weapon on a very busy Brooklyn street at the close of the West Indian Day Parade. Three innocent bystanders were struck. Christopher Jaggon was shot in the lower right leg, Donald Williams in the lower back and left ankle, and fifteen year old Eric Johnson, who was sitting on a chair, was shot in the head and killed. Defendant testified at trial that he felt threatened by several males and shot in the direction of their lower legs to frighten them off. Defendant also admitted possessing the .380 automatic pistol recovered at the scene where seven shell casings and two deformed bullets were also recovered. There was expert testimony that the .380 shell casings were fired from the recovered gun. A bullet was also recovered from decedent Johnson's brain but it was too deformed for the ballistics expert, Detective James Valenti, to compare it to other recovered ballistics evidence. According to numerous testifying eyewitnesses, including defendant's friends and girlfriend, no one else was seen firing a weapon at the time of the incident in question.

Defendant was convicted on September 20, 2005 after a jury trial conducted by now retired Justice Anne Feldman of depraved indifference murder in the second degree (Penal Law § 125.25-2) for the death of Eric Johnson, depraved indifference assault in the first degree (Penal Law § 125.10-3) for the injuries to Donald Williams and intentional assault in the second degree (Penal Law § 120.05-4) for the shooting of Christopher Jaggon.

In his earlier 2009 CPL 440 motion defendant contended that the People withheld evidence which they knew to be false - that defendant's gun could allegedly hold only seven rounds of ammunition, but an "eight" (sic) bullet was found in decedent Johnson's brain, leading to the

conclusion that defendant's gun was not the murder weapon. This Court rejected defendant's contentions and summarily denied the motion.

Subsequently, defendant made a second attempt to challenge his connection with the actual murder weapon by filing an application for a writ of error coram nobis with the Appellate Division - Second Department, which was denied. See People v Woods, 79 AD3d 1155 (2d Dept 2010), lv denied 16 NY3d 838 (2011). Although the Appellate Division did not set forth the issues presented in defendant's application, the People's answer in the case at bar indicates that defendant claimed that appellate counsel was ineffective for failing to raise inter alia the claim that the prosecutor engaged in misconduct, in that he did not disclose to the jury that evidence in a ballistics report allegedly established that defendant's gun was not the murder weapon (People's response at 5).

Defendant now moves to vacate his judgment of conviction pursuant to CPL 440.10(1)(h) on the nearly identical ground that he was denied effective assistance of trial counsel and his right to due process because his attorney did not disclose to the jury that evidence in a ballistics report allegedly established that defendant's gun was not the murder weapon. In effect, the underlying basis of defendant's claim remains the same as that in his coram nobis application but now rather than focusing on the prosecution's action and appellate counsel defendant attributes similar fault to trial counsel.

It is clear that the common thread or theme of defendant's first 440 motion, his application for a writ of error coram nobis and now this instant motion is that the weapon used to

kill teenager Eric Johnson was not defendant's .380 semi-automatic pistol.² Specifically, defendant contends that a ballistics report by non-testifying ballistics analyst, Bruno Valenti, establishes that Eric Johnson was killed by a ".38 caliber bullet." Defendant contends that he was denied effective assistance of counsel and his right to due process because his trial attorney did not attempt to introduce the Valenti report or disclose this evidence to the jury.

CPL 440.10(3)(c) provides that a court may deny a 440.10 motion to vacate a judgment when: "Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issues underlying the present motion but did not do so." See People v Graves, 62 AD3d 900 (2d Dept 2009), lv denied 13 NY3d 939 (2010); People v Cochrane, 27 AD3d 659 (2d Dept 2006), lv denied 7 NY3d 787 (2006), cert denied 549 US 976 (2006). This Court now finds it appropriate to apply the permissive procedural bar to this, defendant's second 440 motion, especially in light of the fact that the issue now being raised is so closely related to the claims defendant raised in his first 440 motion. Moreover, although defendant does not claim the ballistics report in question is newly discovered evidence, he has failed to explain why he could not have raised the present issue concerning trial counsel's alleged ineffectiveness in his 2009 CPL 440 motion. Nor has defendant explained why it took him four years after his 2005 conviction to begin his challenges concerning the murder weapon. See People v Friedgood, 58 NY2d 467 (1983).

This Court will not now speculate about why the Bruno Valenti report refers to the

² Defendant does not appear to be challenging his assault convictions but only his conviction for depraved murder.

bullet recovered at the morgue from decedent Eric Johnson's brain as being a .38 caliber bullet.³ The testimony of the Medical Examiner and ballistics expert Det. James Valenti clearly indicate that the recovered bullet was too badly deformed to be conclusively matched to other recovered ballistics evidence. The evidence of defendant's guilt on all counts appears to have been overwhelming. Moreover, the alleged single omission of trial counsel by not introducing the Bruno Valenti report, (even if it could be considered an omission) would not require a finding of ineffective assistance of trial counsel. See People v Brunner, 16 NY3d 830 (2011); People v Evans, 16 NY3d 571 (2011). Defendant has failed to show that, based on defense attorney's overall performance, he did not receive effective assistance of counsel under either the two-pronged federal Strickland test [Strickland v Washington, 466 US 668 (1984)], or the New York meaningful representation standard. See People v Feliciano, __ NY2d __ (May 5, 2011); People v Caban, 5 NY3d 143 (2005); People v Benevento, 91 NY2d 708 (1998); People v Baldi, 54 NY2d 137 (1981).

Accordingly, defendant's pro se motion is hereby summarily DENIED in its entirety for all the reasons addressed herein.

The defendant is hereby advised 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 the denial of defendant's CPL 440.10 motion. This application must be made within 30 days of service of this Decision and Order. Upon proof of 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


³ The simplest answer may just be that Bruno Valenti was describing the diameter of the bullet; a .38 caliber and a .380 caliber bullet have approximately the same diameter, although the cartridges have different dimensions designed for different firearms.

printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

The Clerk is directed to mail a copy of this Decision and Order to defendant Roger Woods, DIN No. 05-A-6090, Attica Correctional Facility, P.O. Box 149, Attica, New York 14011 and to Assistant District Attorney Adam M. Koelsch, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201.

IT IS SO ORDERED.

ENTER,



J.S.C.
HON. JOSEPH KEVIN McKAY
J.S.C.