

People v Morrow

2011 NY Slip Op 32053(U)

June 28, 2011

Supreme Court, Kings County

Docket Number: 9552/09

Judge: Joel M. Goldberg

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs -

HON. JOEL M. GOLDBERG

IND. NO. 9552/09

DATE: June 28, 2011

NEB MORROW,

DEFENDANT.

The defendant's *pro se* motion pursuant to CPL 440.10 to vacate the December 13, 2010 judgment convicting him of Robbery in the First Degree and sentencing him as a persistent violent felony offender to a term of 21 years to life (to run consecutively to a previously imposed robbery sentence in federal court), upon consideration of the People's Answer, dated May 11, 2011, and supplementary response, dated May 26, 2011, the defendant's two replies, dated May 23, 2011 and June 22, 2011, is denied.

The Trial

The defendant, as he had done in his prior trial in federal court for robbery, represented himself at the trial. His court-appointed attorney, David Jacobs, Esq., who represented the defendant during pre-trial proceedings, was present in court as stand-by counsel, but he did not actively participate in the trial.

At the trial the People presented evidence, in the form of a store surveillance video and eyewitness identification testimony, that on October 13, 2009 at approximately 9:00 pm, the defendant entered a McDonald's restaurant on Fourth Avenue in Brooklyn as the store was closing carrying a black messenger bag. Still photographs from the surveillance video clearly showed the face, messenger bag, and clothing of the individual

alleged to be the defendant. This person, as shown in the surveillance video, approached the counter and at gun point demanded money from the store manager, Pablo Analusia, who put, according to cash register records, approximately \$1,526 in a plastic McDonald's bag and gave it to the defendant. Analusia identified the defendant in court as the robber.

After the defendant walked out of the store, Analusia and an employee, Marcus Row, informed a third employee, Patrick Knowles, that a robbery had just occurred and that the perpetrator had just left. Analusia and Row pointed out the defendant to Knowles as the defendant was walking north on Fourth Avenue. Row, Knowles, and another store employee, James Ortega, followed the defendant on Fourth Avenue. Knowles testified that he never lost sight of the defendant from the time he was pointed out until the police arrested him a few blocks further up the street.

As the defendant was walking up Fourth Avenue, Analusia was following in a police car that had quickly responded to the McDonald's after Analusia had pressed a silent alarm and other employees called 911. Analusia saw the defendant walking and pointed him out to the two officers in the car. As the uniformed officers got out, the defendant looked in their direction and ran. The defendant was apprehended around the corner after he fell. He was carrying a messenger bag just like the one seen in the surveillance video. A short distance away under a car the police found a plastic McDonald's bag containing \$1,526.58 and a loaded gun.

The defendant was wearing clothing matching the clothing worn by the robber depicted in the surveillance video.

The defendant placed great emphasis at the trial as to whether witnesses had described the robber's jacket as a "black" or "gray" "hoodie" and whether or not what the defendant was wearing when arrested was a "hoodie" or a "jacket with a hood."

The defendant testified that he was wearing a "black" jacket, not the gray garment described by some of the witnesses, and that after he was arrested the police had turned his black jacket inside out and photographed him wearing it so that its gray lining would match the description given by those witnesses. (These photographs were introduced into

evidence at the trial as People's Exhibits 7A and 7B.)

The defendant additionally testified that just before he was apprehended, another person had placed the McDonald's bag and a gun under a nearby car where it was recovered by the police.

Also introduced in evidence was a recording of Row's 911 call made as he followed the perpetrator up Fourth Avenue in which he described the perpetrator as a light-skinned black male, wearing glasses, a black or brown hoodie, dress pants, and carrying a black duffel bag. Row's 911 call contemporaneously described his seeing the police chasing and catching the perpetrator.

The Defendant's Motion

The defendant's motion claims:

1. The prosecutor deliberately did not disclose the defendant's official arrest photograph which would have proved the arresting officers falsely testified about the color of the jacket he was wearing when arrested;
2. The prosecutor knew the police testimony about the defendant's clothing was false;
3. The arrest photograph was illegally obtained in violation of his constitutional and statutory rights against illegal searches and seizures and that counsel (presumably not himself) was ineffective for failing to raise this issue at trial, or alternatively, the trial court unjustifiably refused to grant the defendant a continuance so that he could research the appropriate legal issues prior to trial;
4. The People did not turn over "exculpatory evidence" consisting of the statements of the McDonald's employees who were in the store in sufficient time for the defendant to have used those statements to decide whether to testify before the Grand Jury and to prepare for trial;
5. The defendant was not provided with sufficient opportunity to bring a motion to suppress the identification testimony of the arresting officers pursuant to CPL 710.30 (1) (b); and

6. The failure of the People to turn over the statements of four of the store employees who testified at trial (Knowles, Analusia, Kielbowska, and Hyppolite) constituted *Rosario* violations which prejudiced the defense.

Discussion

1. The Jacket Issue

There are two different sets of photographs of the defendant wearing the jacket he wore when he was arrested. One set is People's Exhibit 7A and 7B introduced in evidence which are color photographs showing front and back views of the defendant wearing a dark jacket that appears to have a lining (apparently black) that is darker than the exterior (apparently gray). The defendant claims that these photographs were taken after the police turned the jacket inside out. The arresting officers testified these photographs were taken at the precinct after the arrest to document the defendant's actual appearance when arrested.

The second set of photographs, taken at some point after the defendant's arrest, are contained in the defendant's official Mugshot Pedigree form (see People's May 31, 2011 Supplementary Affirmation, Exhibit B) which, in addition to pedigree information concerning the defendant, shows the defendant wearing what is agreed by the parties to be the same jacket as the one in Exhibits 7A and 7B. However, the two color photographs on this form show the lining of the jacket to be gray and the exterior to be black. One photograph on this form is a close-up of the defendant's face and shows the jacket only from the defendant's mid-chest; the second photograph shows the defendant wearing the jacket while standing facing the camera.

The defendant contends that the official Mugshot photographs depict how the jacket appeared when he was arrested, and, therefore, the photographs on this form would support his testimony that the police turned his jacket inside out to make its exterior color correspond to the descriptions given of a gray jacket or hoodie.

The defendant's motion claims that the Mugshot Pedigree form was not disclosed to him by the People (even though the mid-chest photograph was introduced into

evidence as Exhibit 9 by the People at trial), and that the photographs shown on that form were not available for him to use at trial to support his testimony that the photographs in People's Exhibits 7A and 7B were taken after the police had turned the jacket inside out. However, the defendant's factual assertion that this Mugshot Pedigree form was not turned over as part of pre-trial discovery is supported solely by his own allegation and is refuted by the March 11, 2010 receipt signed by the defendant's then attorney, and subsequent legal advisor at trial, David Jacobs (See People's May 11, 2011 Answer, Exhibit 1, item 7). Thus, the defendant's claim is refuted by unquestionable documentary proof and, under all the other circumstances attending the case, there is no reasonable possibility that it was not turned over. CPL 440.30 (4) (c) and (4) (d).

Even if the Mugshot Pedigree form that was disclosed to the defense by the People prior to trial was photocopied in black and white and, therefore, did not have color versions of the jacket, the black and white versions of the photographs in the Mugshot Pedigree form attached to the defendant's own motion (which photographs the defendant claims to have been contained in the Mugshot Pedigree form he received from the federal prosecutor prior to his federal trial, which took place prior to his state trial), show that the exterior color of the jacket is clearly lighter than the inside color. Furthermore, the color photograph from this form which the People introduced into evidence as Exhibit 9 (see People's May 11, 2001 Answer, Exhibit 4) was available for the defendant to use at trial to compare with the color photographs in People's Exhibit 7A and 7B.

Further, assuming the Mugshot Pedigree photographs constituted *Brady* material, the defendant's own motion concedes that these photographs were available to him prior to trial as a result of the disclosure made by the federal prosecutors. Because the defendant himself claims to have been aware of the police having turned his jacket inside out when taking his picture, the significance of the photographs in the Mugshot Pedigree form turned over by the federal prosecutors allegedly showing the "true colors" of the jacket he was wearing when arrested should have been immediately apparent to the defendant, even if the Mugshot Pedigree form did not necessarily show what the defendant was wearing at the time of his federal crimes. Thus, because the defendant was

actually in possession of the photographs shown on that form, there would be no *Brady* violation assuming the People did not also disclose it. *Stickler v Greene*, 527 US 263, 281-282 (1999); *People v LaValle*, 3 NY3d 88, 110-11 (2004).

Even if the Mugshot Pedigree photographs had been introduced at the trial, they would not have had exculpatory value. The police claimed photographs 7A and 7B were taken shortly after the defendant's arrest and showed the jacket as it was worn at the time. The defendant's motion asserts the Mugshot Pedigree photographs were taken "immediately upon entering" the precinct (defendant's motion, par. 16). If, as the defendant claims, the Mugshot Pedigree photographs were taken first, the arresting officers knowing that official Mugshot Pedigree photographs had already been taken, would, nevertheless, have had to have then turned the defendant's jacket inside out and taken their own photographs showing the jacket in a different condition. Obviously, with the Mugshot photographs existing as documentation, this attempted deception would make no sense, and such an argument defies credulity. The far more likely explanation is that after the first photographs were taken documenting the defendant's appearance when arrested, the defendant himself during the booking process prior to the Mugshot Pedigree photographs being taken turned the jacket inside out for his own purposes. This switch went unnoticed not only by the police, but also by the prosecutor who, according to her affidavit of May 26, 2011, par. 3, "did not realize that the [Mugshot Pedigree] photograph depicted defendant wearing a jacket with a black exterior."

Accordingly, the defendant's motion that the judgment should be vacated on the grounds that the People withheld *Brady* material and presented false evidence regarding the color of the jacket worn by the defendant is denied without a hearing for failure to allege facts tending to substantiate these allegations. CPL 440.30 (4) (b).

The Other Claims

The defendant's claim that the photographs introduced into evidence at trial were obtained in violation of his constitutional rights and that certain identification testimony should have been suppressed cannot be raised on this motion, because there are either


sufficient facts in the record to raise such claims in direct appeal (CPL 440.10 [2] [b]) or such facts could with due diligence have been made to appear on the record (CPL 440.10 [3] [a]).

The defendant's claims that the People withheld statements of certain witnesses which prevented him from locating two store employees who did not testify and who purportedly had exculpatory testimony, Marcus Row and James Ortega, are not supported with sufficient sworn factual allegations to warrant a hearing. CPL 440.30 (4) (b).

The defendant also claims the prosecutor falsely asserted that she had not questioned a store employee, James Ortega and that not only was Ortega interviewed, but also that notes of this interview were improperly withheld. However, the defendant's allegation is supported only by his own speculation not only that this interview took place, but also that notes of that interview would support the defendant's claims about the type and color of jacket he was wearing. Because there is no basis to believe exculpatory evidence of this interview was withheld, no hearing is required on this allegation. CPL 440.30 (4) (b) and (4) (d).

Accordingly, the defendant's motion is denied.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

ENTERED
JUN 29 2011
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COURT CLERK