

People v Cross

2011 NY Slip Op 33489(U)

October 20, 2011

Supreme Court, Kings County

Docket Number: 8476/94

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 3

-----X		
THE PEOPLE OF THE STATE OF NEW YORK	:	DECISION AND ORDER
	:	
-against-	:	
	:	
MARK CROSS,	:	
	:	
Defendant.	:	Indictment No. 8476/94
-----X		

JAMES P. SULLIVAN, J.

The defendant has moved, *pro se*, for an order pursuant to C.P.L. § 440.10, vacating the judgment of the Supreme Court, Kings County, convicting him, after a jury trial, of one count of depraved indifference murder in the second degree (P.L. § 125.25 [2]) for the killing of Derrick Green, two counts of attempted murder in the second degree (Penal Law § 110/ 125.25[1]) for the shootings of Willie Green and Nelson Sepulveda; and criminal possession of a weapon in the second degree (Penal Law § 265.03). In his third motion to vacate judgment, defendant alleges that newly discovered evidence establishes that he actually innocent of the crimes for which he is convicted. The People have filed an answer in opposition. For the reasons stated below, the motion is denied.

Procedural History

On July 4, 1994, several young men, including Derrick Green and his cousins, Willie Green and Nelson Sepulveda, were walking in the area of Van Siclen Avenue in Kings County. As they approached Vermont Street in Brooklyn, New York, they were attacked by the defendant and two unapprehended others who fired shots at them from behind. Derrick Green, Nelson Sepulveda, and two other men who were not part of their group, Dennis Nyenkan and Oscar Spells were struck by bullets fired by either the defendant or the two unapprehended others. Derrick Green died from his injuries, while the other shooting victims survived. After being convicted after a jury trial, defendant was sentenced, as a second violent felony offender, to consecutive prison terms totaling forty-five years to life on the murder and attempted murder convictions, and to a concurrent term of seven and one-half to fifteen years on the weapon possession conviction (Juviler, J., at trial and sentence).

The defendant's conviction, and sentence, was upheld by the Appellate Division, Second Judicial Department. (*People v. Cross*, 2248 A.D.2d 398 [2d Dept. 1998]). Leave to appeal to the Court of Appeals was denied (*People v. Cross*, 92 N.Y.2d 850 [1998]).

In defendant's first motion pursuant to C.P.L. § 440.10, he alleged that the People failed to disclose a cooperation agreement with prosecution witness, Emma Fonville. On February 10, 1999, the defendant's motion was denied. (Juviler, J.) The court held that the defendant's motion was unsupported by any sworn allegations of fact, and in the alternative that defendant was not entitled to a hearing on his claim because there was no reasonable possibility that his allegation was true.

Defendant's application for leave to appeal the Supreme Court's denial of his motion to vacate his judgment of conviction was denied on April 13, 1999. (Luciano, J.)

Defendant filed a petition for a writ of *habeas corpus*, dated January 21, 2000, in the United States District Court for the Eastern District of New York. Defendant, who was represented by counsel, sought relief solely on the claim he had raised in his C.P.L. § 440.10 motion. In a decision dated September 28, 2001, the United States District Court denied the defendant's *habeas* petition. (*Cross v. Walsh*, No. Cv-00-0507 (cps) [E.D. N.Y. September 28, 2001] [Sifton, J.]). The District Court denied the defendant permission to appeal to the Second Circuit Court of Appeals, and the Second Circuit also denied the defendant permission to appeal. On October 7, the United States Supreme Court denied the defendant's petition for a writ of *certiorari* (*Cross v. Walsh*, 537 U.S. 924 [2002]).

Thereafter, by papers dated January 26, 2004, the defendant filed his second motion pursuant to C.P.L. § 440.10, claiming that his depraved indifference murder conviction had to be vacated because the depraved indifference murder was unconstitutional. The motion was denied on March 1, 2004 (Silverman, J.). Subsequently, by papers dated June 5, 2007, the defendant moved pursuant to C.P.L.R. § 2221 (d) (2) and/or C.P.L.R. § 2221 (e) (2) to have his judgment of conviction vacated and the indictment dismissed, claiming that the indictment was jurisdictionally defective. On August 30, 2007, the defendant's motion was denied (Dowling, J.).

By papers dated October 19, 2007, the defendant moved in the Appellate Division for a writ of error *coram nobis*, on the ground that he had received the ineffective assistance of appellate counsel. The Appellate Division denied defendant's motion on March 11, 2008 (*People v. Cross*, 49 A.D.3d 662 [2d Dept. 2008]). On June 25, 2008, a judge of the Court of Appeals denied the defendant's application for leave to appeal from this Court's order denying his first *coram nobis* motion (*People v. Cross*, 10 N.Y.3d 933 [2008] [Pigott, J.]). Defendant again moved in the Appellate Division for a writ of error *coram nobis*. This second motion was also denied (*People v. Cross*, 72 A.D.3d 1108 [2d Dept.], *lv. denied*, 15 N.Y.3d 803 [2010] [Pigott, J.]).

The Current Motion to Vacate the Judgment of Conviction

In his third motion to vacate his judgment of conviction, defendant claims that his judgment of conviction should be vacated pursuant to C.P.L. § 440.10 (1) (g) and (h) on the basis of newly discovered evidence that proves that he is innocent. The defendant claims that he has discovered new evidence, namely that prosecution witness, Emma Fonville, gave false testimony at his trial. He further claims that this newly discovered evidence establishes that he is actually innocent of the crimes for which he was convicted. In support of his claim, defendant originally included unsworn affirmations from Christopher E. Reese and Chavon Greene. Subsequently, the defendant included a sworn affidavit from Christopher E. Reese dated August 9, 2011. (*See*, C.P.L. § 440.30 [1]). Christopher E. Reese, a senior Legal Assistant Specialist, claims that he had a telephone

conversation with whom he believes was Emma Fonville. Mr. Reese further claims the Ms. Fonville further informed him, contrary to her trial testimony, that she had not seen the defendant in the days or hours preceding the shooting death of Derrick Greene, and had not overheard a conversation between the defendant and Chavon Greene. Emma Fonville further advised Mr. Reese that she would not sign a sworn affidavit. The defendant does not provide any sworn statements from Chavon Greene or from Emma Fonville as required by C.P.L. §440.30.

Initially, the court holds that the affidavit submitted by the defendant contains only hearsay allegations concerning the conversations between Christopher E. Reese and the person alleged to be Emma Fonville and is therefore insufficient to support the motion (*see, People v. West*, 237 A.D.2d 470 [2d Dept. 1997]; *People v. Giuca*, 78 A.D.3d 729 [2d Dept. 2010]; *People v. Stevens*, 275 A.D.2d 902 [4th Dept. 2000]; *People v. Ford*, 46 N.Y.2d 1021 [1979]). Additionally, the unsworn affirmation of Chavon Greene does not support defendant's motion pursuant to C.P.L. § 440.30 (1). Further, the court notes that according to the affidavit of Christopher E. Reese, Emma Fonville refused to sign a sworn affidavit, and no explanation is given why Chavon Green did not sign a sworn affidavit after allegedly signing an affirmation.

Defendant's claim relies on the court's statutory power to grant a new trial on the ground of newly discovered evidence (C.P.L. § 440.10 [1] [g]; *People v. Salemi*, 309 N.Y. 208, 215 [1955]). The court may exercise its discretion to use this power only if all requirements of the statute have been met (*People v. Taylor*, 246 A.D.2d 410 [1998]). For all newly discovered evidence claims, the moving party must establish the following six requirements:

- 1) It must be such as will probably change the result if a new trial is granted;
- 2) It must have been discovered since the trial;
- 3) It must be such as could not have been discovered before the trial by exercise of due diligence;
- 4) It must be material to the issue;
- 5) It must not be merely impeaching or contradicting the former testimony (*Salemi* at 215-216; *People v. Lavrick*, 146 A.D.2d 648, 648-49 [2d Dept. 1989]).

Here, the Christopher E. Reese affidavit and the unsworn affirmation of Chavon Greene do not satisfy the *Salemi* requirements as they fail to establish a reasonable probability that had such evidence been received at trial, the verdict would have been more favorable to the defendant (*see*, C.P.L. § 440.10 [1] [g]). Initially, after reviewing the history of this case and assuming the credibility of Christopher E. Reese, this court determines that it cannot be certain of the accuracy of Mr. Reese's belief that he actually spoke to Emma Fonville. First, any alleged statements by Emma Fonville to either Christopher Reese, or Chavon Greene constitute hearsay and do not support the allegations set forth in defendant's motion (*People v. Giuca, supra*). Additionally, a review of the record demonstrates a clear history of attempts by the defendant to intimidate the People's witnesses and several attempts to get Ms. Fonville not to testify. The record provides numerous references by the trial court with respect to defendant's attempts to prevent the prosecution witnesses from testifying. Moreover, even if the court were to accept that Ms. Fonville made these alleged statements to Mr. Reese and Chavon Greene recanting her trial testimony, the court holds that they

are merely impeaching of her trial testimony and do not create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant.

A review of the trial evidence indicates that even without the trial testimony of Emma Fonville, there was overwhelming evidence against the defendant. First, Ms. Fonville only witnessed the subsequent shooting of her son, Willie Green, and was not present during the earlier shootings of Derrick Greene and Nelson Sepulveda. Wholly independent of Ms. Fonville's testimony, the People presented two eyewitnesses to the earlier shooting, Randolph King and Willie Green, who observed the defendant firing his gun in their direction. Willie Green testified at trial that he observed the defendant firing at them, and observed his cousin, Derrick Green fall to the ground. Finally, the eyewitnesses were acquainted with the defendant prior to this incident and were reliable identification witnesses. Further, several other witnesses testified corroborating the testimony of the identifying witnesses.

The court further notes that defendant's own statements show an effort to intimidate the People's witnesses. Detective Mark Brooks testified at trial that on July 13, 1994, after being picked out of a lineup the defendant told him: "So I got picked out. Indict me. Do you honestly think these people are going to testify against me?" Further evidence of defendant's attempts to prevent the People's witnesses from testifying were established by the testimony of Don Juan Britt, who was incarcerated at Riker's Island at the same time as the defendant, and had known the defendant since 1989. Mr. Britt testified at trial that he heard the defendant say if he were not incarcerated, he would take care of the witnesses himself. Finally, Don Juan Britt stated that defendant asked him to get an incarcerated member of the Green family moved to the defendant's cell block so that the defendant could pressure his family not to cooperate with the prosecution. Thus, based on all of the above, this court finds that the defendant does not satisfy the stringent requirements of C.P.L. § 440.10 (1) (g).

Moreover, recantation evidence is treated by the courts with a high degree of skepticism. "It is well settled that '[t]here is no form of proof so unreliable as recanting testimony'" (*see, People v. Lawrence*, 247 A.D.2d 635 [2d Dept. 1998], *quoting, People v. Shilitano*, 218 N.Y. 161 [1916]). Here, given the evidence that emerged at trial of the defendant's attempts to prevent Ms. Fonville from testifying against him, her alleged unsworn statements to both Christopher Reese and Chevon Greene are unreliable and cannot be considered credible. Further, Ms. Fonville's alleged statement to Chavon Green claiming that she was not present at the scene of the shooting is contradicted not only by her own trial testimony, but by the trial testimony of her son, Willie Greene, who stated that as he ran from the defendant who was firing shots, he encountered his mother, Ms. Fonville. Additionally, the record reveals that there were efforts to intimidate Chavon Green and her family at the time of the trial, and that she subsequently became unavailable by leaving her neighborhood and refusing to testify. Thus, even if the court were to consider her unsworn affirmation in this matter, this court must reject it as being unreliable and incredible.

Defendant's claim of actual innocence is unfounded. First, he has failed to bring forth sufficient evidence to support a claim of innocence (C.P.L. § 440.30 [4] [b], [d]). As previously discussed, even crediting Christopher Reese's belief that he spoke to Emma Fonville, this court holds

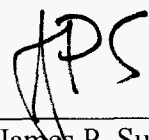
that any statements allegedly made by her is unsworn hearsay. Additionally, based on the record, the court does not credit any recantation alleged to be made by her. Further, the court finds that the unsworn statement by Chavon Greene is unreliable and incredible. Based upon these and all other circumstances attending the case, there is no reasonable possibility that defendant's allegations are true (C.P.L. § 440.30 [d] [ii]). Thus, this court finds that the defendant has failed to provide any credible evidence supporting his claim or otherwise challenge the overwhelming evidence that established his guilt at trial. Based on these considerations, defendant's claim of actual innocence is meritless.

Accordingly, the motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: October 20, 2011

HON. JAMES P. SULLIVAN
Justice N.Y.S. Supreme Court



James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.

