

People v Figueroa

2012 NY Slip Op 30464(U)

January 20, 2012

Sup Ct, Kings County

Docket Number: 12706/89

Judge: Ruth Shillingford

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 38

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
INDICTMENT NO.: 12706/89

WILLIAM FIGUEROA,

Defendant.

-----X
RUTH SHILLINGFORD, J.:

By *Pro Se* Motion dated January 8, 2011, defendant, an inmate at the Five Points Correctional Facility, moves pursuant to CPL §§ 440.10(1)(g) and (h), to vacate his judgment of conviction, entered on or about March 13, 1991, following a jury trial, convicting him of Murder in the Second Degree, Reckless Endangerment in the First Degree, Criminal Possession of a Weapon in the Second Degree (2 counts), and Criminal Possession of a Weapon in the Third Degree (2 counts), respectively, and sentencing him, as a second felony offender, to consecutive terms of 25 years to life, 3 ½ to 7 years, 7 ½ to 15 years, and 3 ½ to 7 years . For the reasons that follow, this Court denies defendant’s motion.¹

PROCEDURAL HISTORY

On August 8, 1989, at 4 o’clock in the morning, defendant and co-defendant, Harry Santiago, fired gunshots into the home of Maria and Carlos Hernandez, killing Mrs. Hernandez. His conviction was affirmed (213 AD2d 669 [2d Dept. 1995]) and the Court of Appeals denied his appeal (85 NY2d 972 [1995]). Defendant’s petition for a writ of error coram nobis and

¹Defendant has filed numerous “motions” or replies related to his initial motion since its January 8, 2011 filing.

appeal from its denial were unsuccessful. His further attempts to challenge his conviction on both the state and federal levels have also been unsuccessful.

DISCUSSION

Relying on CPL §§ 440.10(1)(g) and (h), defendant claims, *inter alia*, that his judgment of conviction should be vacated based upon actual innocence and newly discovered evidence. For his “new evidence” claim, defendant relies upon affidavits from two individuals, namely, Rafael Rodriguez (“R. Rodriguez”) and Osvaldo Rodriguez (“O. Rodriguez”). In his January 6, 2011 affidavit, R. Rodriguez avers, in sum and substance, that Carlos Hernandez and/or Manuel Crespo killed Maria Hernandez. For his part, by affidavit dated December 16, 2010, O. Rodriguez states, in sum and substance, that in June 2009, Manuel Crespo confessed to him that he killed Maria Hernandez. Defendant also reiterates his previously submitted claim that his confession was obtained in violation of his *Miranda* rights, citing to “new” authority under the Supreme Court decision in *Missouri v. Seibert*, 542 US 600 (2004) (Defendant’s Supplemental Motion dated 7/6/11).

The People contend that defendant’s motion should be denied because, *inter alia*, R. Rodriguez was incarcerated at the time that he claims to have observed Manuel Crespo kill Maria Hernandez. Thus, his affidavit is contradicted by evidence appearing within the record. They further argue that, *inter alia*, the facts as averred in the affidavit of each purported witness are incredible and do not meet the criteria for newly discovered evidence under CPL § 440.10(1)(g). This Court agrees.

CPL §§ 440.10(1)(g) and (h) provide that:

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(g) New evidence has been discovered since the entry of a judgment 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; or

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States...

(*id.*).

For “new evidence” to suffice it must meet the following criteria: “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 have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. it must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting former evidence (*People v. Tankleff*, 49 AD3d 160 [2nd Dept 2007] *citing People v. Salemi* 309 NY 208, 215-216 [1955] [internal quotation marks omitted]). This court shall examine each affidavit *seriatim*.

Rafael Rodriguez’s Affidavit

This January 6, 2011 affidavit provides, in pertinent part, that “On August 8, 1989 at 4:00, [I] was standing on Knickerbocker Avenues (sic) and Starr Street in Brooklyn, New York. [I] heard multiple shots, [I seen] Carlos Hernandez pull out a gun he say’s (sic) to stop the shooting and he opened fire, then I saw Maria Hernandez get shot, people were screaming she got shot...I seen Carlos Hernandez running and get into a car and leave. Manuel Crespo was

shooting and Carlos Hernandez tried to stop him but Carlos Hernandez ended up opening fire and struck Maria Hernandez, this is how she got killed.” (Rodriguez Affidavit ¶ 2-3). According to R. Rodriguez, “[He] is make[ing] this statement because [his] conscience is bothering [him]. [He has] not been offered or promised anything in exchange for this statement. [He has] not been threatened by anyone in order to convince [him] to make this statement” (Rodriguez Affidavit ¶ 4). R. Rodriguez indicates that he was willing to come to court and “state the same as stated in this affidavit that Manuel Crespo killed Maria Hernandez” (Rodriguez Affidavit ¶ 5).

Preliminarily, this affidavit is contradictory on its face since, within the same sworn document, R. Rodriguez avers that two different individuals killed Maria Hernandez (*compare* ¶ 3 of Rodriguez Affidavit with ¶ 5). The crux of this decision turns on whether R. Rodriguez actually observed what he claims to have seen in his affidavit. Notably, in his affidavit, he does not state whether this incident occurred in the afternoon or early morning at “4”. The People contend that he was incarcerated at the time that he allegedly observed Maria Hernandez’s murder. In support of their claim, they submit, for an *in camera* inspection, the original, unredacted certificate of disposition for indictment number 6993/89, along with an original certificate from John B. Lempke, Superintendent of the Five Points Correctional Facility, certifying the incarceration dates for Rafael Rodriguez, NYSID #: 0396993H, DOB 07/17/48.

Defendant challenges the People’s assertion that R. Rodriguez was incarcerated on August 8, 1989, and has submitted an additional affidavit from him, dated April 23, 2011. In this affidavit, R. Rodriguez avers that his “din numbers (sic) is 10-A-4085 and [his] date of birth is July 17, 1948” and claims that he was not incarcerated on the day that he observed the murder

(see 6/20/11 Motion, Exhibit D).² Defendant also submits an excerpt of an uncertified copy of R. Rodriguez's rap sheet, bearing NYSID #: 3969933H (see 6/20/11 Motion, Exhibit C).³ On this rap sheet, defendant has highlighted information relating to indictment number 572/88, and language indicating that the indictment was dismissed on May 30, 1989.

Contrary to the assertions of defendant and R. Rodriguez, the record is clear that R. Rodriguez was in fact incarcerated on the day that he purports to have made the observations that are the subject of his sworn affidavit. A review of the official court file relating to R. Rodriguez under indictment number 572/88 reveals that the indictment was in fact dismissed on May 30, 1989. The case, however, was resubmitted to a Grand Jury on May 31, 1989 under indictment number 6993/89. R. Rodriguez thereafter pled guilty to Conspiracy in the Second Degree on June 1, 1989 and was sentenced to 4 ½ to 9 years in jail on June 22, 1989. Furthermore, the court file reveals that although there was authorization to release R. Rodriguez on June 1, 1989

²6/20/11 Motion refers to "Defendant's Motion for Subpoena Duces Tecm (sic) Public Officer to Produce Records Pursuant to CPLR § 2307".

³R. Rodriguez appears to have used various names and dates of birth, as is reflected in his criminal history. In his first affidavit, he lists his DIN number as: 10-A-4084, however, in his second affidavit, dated April 23, 2011, he lists his DIN number as: 10-A-4085. In this same affidavit, he states that his date of birth is 7/17/48. The rap sheet contained in the official court file for indictment number 572/88 lists his date of birth as 6/17/58. The certificate of disposition provided by the People reflect R. Rodriguez's date of birth as 6/7/58. The affidavit from Superintendent John Lempke lists his date of birth, as it pertains to the period of incarceration in question, as 6/17/53. The only consistent identification information is R. Rodriguez's NYSID number, 3969933H, which is reflected on the excerpt of R. Rodriguez's rap sheet submitted by defendant, the certificate of disposition provided by the People, the affidavit from John Lempke, the Court Order for Investigation and Report contained in the official court file for indictment number 6993/89, and the rap sheet contained in the official court file for indictment number: 572/88.

under indictment 572/88, he was remanded on indictment 6993/89 on the same date.

Additionally, the Sentence and Order of Commitment contained within the court's file for indictment 6993/89 bears the same NYSID number (3969333H) as that contained in the certified certificate from the Superintendent of the Five Points Correctional Facility. This latter document reveals that R. Rodriguez was incarcerated under indictment number 6993/89 from July 13, 1989 to January 20, 1994 - a span of time which is inclusive of August 8, 1989.

Defendant's contention that the affidavit of R. Rodriguez's constitutes new evidence is completely belied by the record which indicates, unequivocally, that R. Rodriguez was incarcerated at the time of his alleged observations. This Court finds this affidavit is incredible on its face, is not of such a character to create a probability that had it been produced at trial the verdict would have been more favorable to the defendant and otherwise fails to meet the *Salemi* factors (CPL § 440.10[1][g]; *People v. Salemi*, 309 NY 208 [1955]; *see also, People v. Bellamy*, 84 AD3d 1260 [2nd Dept], *lv denied* 17 NY3d 813 [2011]).

Oswaldo Rodriguez's Affidavit

The allegations contained in this affidavit, although not previously submitted by defendant, were the subject of another affidavit submitted by defendant with respect to a previous CPL § 440 motion, dated April 27, 2010. As to that motion, defendant submitted an affidavit from his brother, Julio Figueroa, wherein Julio claimed that an inmate (Oswaldo Rodriguez) told him and defendant that Manuel Crespo and Julio Enriquez Martinez had confessed to the murder of Maria Hernandez (*see* Defendant's Exhibit B to Motion to Vacate Judgment dated January 8,

2011).⁴ By Decision and Order entered November 8, 2010 (Sullivan, J), the court held, “[d]efendant raised a claim of actual innocence in his prior motion, dated August 13, 2009, however did not include his present claim, or submit the recent affidavit from his brother, although the affidavit clearly indicates that the defendant, and his brother became aware of this alleged third-party confession to Oswaldo Rodriguez in June 2009” (*id.*).

Likewise, this Court will not credit the affidavit of Oswaldo Rodriguez. Defendant could have raised this issue in any of his previously filed CPL § 440 motions. To the extent that he did raise the issue, he has failed to provide a meritorious explanation for his delay in obtaining this affidavit (*see* Defendant’s Addendum to Motion for Leave to Appeal dated January 24, 2011). Defendant is therefore barred pursuant to CPL § 440.10[3][c].

Defendant’s supplemental claims relating to the alleged violation of his *Miranda* rights is similarly barred. Since *Missouri v. Seibert* was decided in June 2004, defendant has filed three CPL 440 motions, was in a position to but failed to raise this issue, and provides no reason for his failure to do so. Accordingly defendant’s motion and all supplemental motions and requests are denied, without a hearing.

CONCLUSION

Based upon the foregoing reasons, the Court denies defendant’s motion in its entirety.

This Decision shall constitute the Order of the court.

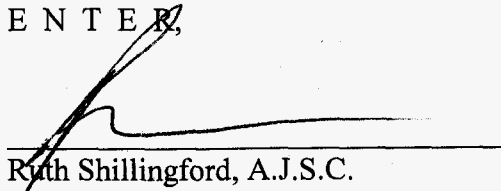
Defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a

⁴ Exhibit B of Defendant’s Motion to Vacate Judgment dated January 8, 2011 includes a copy of a Decision and Order dated November 5, 2010 (Sullivan, J).

certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, 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 printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.⁵

Dated: Brooklyn, New York
January 20, 2012

E N T E R,



Ruth Shillingford, A.J.S.C.

ENTERED
JAN 24 2012
NANCY T. SUNSHINE
COUNTY CLERK

⁵22 NYCRR § 671.5 .