

People v Stewart
2012 NY Slip Op 31621(U)
May 31, 2012
Supreme Court, Kings County
Docket Number: 5745-1996
Judge: Michael A. Gary
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM MISC. MOTIONS

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER
: *Pro Se* 440 Motion
KAREEM STEWART :
: IND. NO. 5745-1996
Defendant :
-----X
MICHAEL A. GARY, J¹.

Defendant moves *pro se* by way of a written motion dated, October 25, 2011, to vacate his conviction and sentence pursuant to CPL § 440.10. The People have opposed this motion in a written response dated February 29, 2012 and the defendant filed reply papers dated April 12, 2012.

In this case the defendant shot and killed Walter Powell in the Red Hook Houses in Brooklyn on April 6, 1996. Defendant was arrested 3 weeks later in Connecticut and eventually indicted for 2 counts of Murder in the second degree, Manslaughter in the first degree and Criminal possession of a weapon in the third degree.

After a jury found the defendant guilty of Murder in the second degree, the defendant was sentenced on September 15, 1997, to an indeterminate term of incarceration of a minimum of 20 years to a maximum of Life.

The defendant appealed and the Appellate Division Second Department affirmed his conviction in *People v. Stewart*, 265 AD2d 586(1999). The Appellate Division specifically

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This motion was transferred to this court via the Miscellaneous Motion rotation. Justice Robert S. Kreindler is no longer presiding in Supreme Court.

approved the trial judge's decision to exclude a tape recording of a 911 call in which the caller was found not to have witnessed the shooting. Leave to appeal to the Court of Appeals was denied at 94 NY2d 885 (2000).

In June, 2000 defendant filed a *habeas* petition in the Eastern District of New York, raising the same claims that he had raised in the Appellate Division, as well as the failure of the People to have provided him with a transcript of the 911 tape-recording, which the People apparently had in their possession as of 1996. (Defendant had gotten the copy of the transcript pursuant to a FOIL request, and had in fact appended it to the letter he wrote to the Court of Appeals when he asked them to consider his granting leave after the Appellate Division affirmed his conviction.)

In January 2002, the defendant asked the District Court to hold the *habeas* petition in abeyance to allow the defendant to exhaust his state claim that appellate counsel was ineffective for failing to raise the *Brady/Rosario* issue relating to the People's handling of the transcript. In February 2002, the District Court granted Mr. Stewart's request, with the instruction that he initiate state proceedings within 30 days. He did so by filing a writ of error *coram nobis*. According to the People, the defendant asserted that the attorney was ineffective in that he did not raise the claim of the non-disclosure of the transcript of the 911 audiotape, and that this failure may also prevent the District Court from considering a constitutional claim on his *habeas* petition. The People opposed the writ arguing that since the actual 911 audiotape was turned over by the People to the defendant, they had fulfilled their *Rosario* and *Brady* obligations (even if the transcript were somehow considered exculpatory). Thus, appellate counsel could not have been ineffective for failing to argue this

point.

On July 1, 2002, the Appellate Division denied defendant's writ of error *coram nobis* in a decision at 296 AD2d 429 (2d Dept., 2002).

On July 18, 2002 defendant filed papers requesting the opportunity to reargue the writ of error *coram nobis*.

On July 23, 2002 defendant moved to reopen his *habeas* petition in District Court. Sometime after that defendant moved to stay the *habeas* petition.

On September 30, 2002 , the People filed with the District Court the same answer in opposition they had filed in the Appellate Division opposing the writ of error *coram nobis*.

On October 17, 2002 the District Court granted the defendant a stay, awaiting the answer from the motion to reargue the *coram nobis* petition in the Appellate Division

On November 21, 2002 the motion to reargue was denied by the Appellate Division Second Department.

In January 2003, Mr. Stewart submitted papers in District Court arguing that the failure of the People to supply the defendant with the transcript was a *Brady* violation.

In August 2003, the District Court denied the defendant's *habeas* petition, specifically finding that even though the transcript of the tape should have been turned over, the transcript was not exculpatory since the transcript was "one person's view of what the caller said. The actual recording was much better evidence and was available to all parties. It was listened to carefully by the judge. This court is not in a position to second-guess him" (*Stewart v. Mantello*, Nos. 00-CV-3692;03-MISC-0066 [Eastern District New York , Aug 7, 2003 Weinstein, J. Memorandum, Order and Judgment , p.13]). Further, the court found that

the failure to turn over the transcript was harmless. The Court also ruled that the other claims raised (including the claim of ineffective assistance of appellate counsel) were without merit.

On October 14, 2004 Mr. Stewart's request for a certificate of appealability from the United States Court of Appeals for the Second Circuit was denied.

The current motion to vacate the judgment of conviction pursuant to CPL 440 alleges that the People's failure to turn over the transcript of the 911 call was a *Brady* violation, and because there is a "discrepancy" between the words of the transcript and the call made by the 911 caller, the conviction was based on perjured testimony and thus, the conviction was obtained in violation of defendant's constitutional rights. Further defendant argues that he is actually innocent. The People oppose, stating that the motion must be summarily denied.

CPL 440.10 subdivision 3, states in relevant part:

. the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .

(c) upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

A court should deny a motion to vacate a judgment of conviction when the issues raised therein could have been or were already raised in previously filed post-verdict/post-conviction proceedings. The procedural history of the defendant's litigation in this regard has been outlined above, and the People firmly assert, and this court finds, that the issues are identical to those already ruled upon. No matter how many times the defendant tries to raise

the issue of the transcript, all the courts which have considered it have found that there is no merit to his claim and this court will not rule on the issue again.

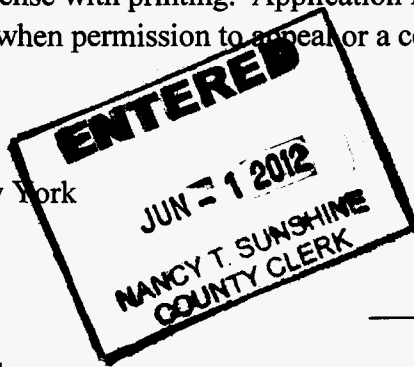
Similarly, the People argue that a claim of actual innocence is not cognizable on a motion to vacate pursuant to CPL 440, unless the court treats it as it would a claim of newly discovered evidence. In this case, the defendant merely points to the trial record (specifically one defense witness's testimony) to show that he did not commit the murder. He has quoted the witness and leaves it at that. Thus, clearly, the defendant has not offered the court any new evidence; he argues only that the jury got it wrong. As a matter that was part of the record, defendant should have argued that the verdict was against the weight of the evidence. He did not do so at any time in his long history of litigation, and thus, this court cannot consider this aspect of the motion. *See* CPL §440.10 (2)(c).

Therefore, for the reasons outlined above, the defendant's motion to set aside the judgment of conviction is denied in all respects.

The foregoing constitutes the decision and order of the court.

The 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 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, 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 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.

Dated: Brooklyn, New York
May 31, 2012




MICHAEL A. GARY, J. S. C.