

**People v Smith**

2012 NY Slip Op 32297(U)

August 24, 2012

Supreme Court, Kings County

Docket Number: 11365/1991

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM, PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Thomas J. Carroll

Date: August 24, 2012

-against-

DECISION & ORDER

KEVIN SMITH,

Indictment No.: 11365/1991

Defendant.

-----X

Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he is actually innocent. Specifically, defendant contends that the People and the New York City Police Department fabricated evidence regarding a witness (Wendall Ceasar) and also asked leading questions of another witness (Leonardo Rodriguez). On these assertions, defendant claims he was improperly convicted. For the following reasons, the motion is denied.

On the night of September 7, 1991, Mr. Ali Fazil and Ms. Annette Claudio were driving home near Prospect Park West in a gray 1983 Chevrolet. As they stopped at an intersection, defendant and co-defendant John Rose approached the vehicle and held up guns to the occupants. The defendants entered the backseat of the car and ordered Fazil to drive into Prospect Park. Once inside the park, defendant ordered Fazil out of the car at gunpoint and took property from him while Rose took jewelry from Claudio. The two defendants brought the victims down to the lake and defendant kicked and hit Fazil. Defendant and Rose pointed their guns at both victims for several minutes. They then left the scene in the grey Chevrolet.

On September 10, 1991, defendant entered a grocery store where Leonardo Rodriguez was working behind the counter. Defendant asked Rodriguez for change and left the store. A moment later, defendant returned to the store with John Rose, Edward LeCount and Roberto Gordon. LeCount pointed a gun at Rodriguez and the other workers, ordered them to get down on the floor and took money from the register. Defendant took money from Rodriguez's shirt pocket and LeCount took a chain from his neck. Gordon took a watch from the wrist of Angel Colloelo, another store employee.

Defendant, Rose and Gordon were arrested in flight from the scene of the robbery. While they were in custody, the police conducted lineups viewed by Fazil, Claudio and Rodriguez. Both Claudio and Rodriguez identified defendant in a lineup as one of the perpetrators in the two respective incidents. Fazil did not make an identification. Defendant also made a statement to the police that he was present at the bodega when the robbery took place but that he had not participated. Defendant further admitted that he took \$1.25 from the cash register and stated that the robbers, who he knew from the neighborhood, threw him a wristwatch as they left the bodega.

For these acts, defendant was charged under Indictment No. 11365/91 with numerous crimes, including twelve counts of robbery in the first degree (PL § 160.15[2], [4]). On October 8, 1992, the court conducted suppression hearings and found defendant's inculpatory statement properly admissible as trial evidence. Defendant testified at trial as the only witness for the defense and generally denied his involvement in either crime. He testified that he was at a party on the night of the crime involving Fazil and Claudio, and that he was visiting a friend in the hospital on the night of the bodega robbery. Defendant also denied having possessed a yellow

metal ring and having made a statement to the police.

On November 5, 1992, defendant was convicted by a jury of four counts of robbery in the first degree (PL § 160.15), one count of petit larceny (PL § 155.25), one count of unauthorized use of a vehicle in the first degree (PL § 165.08), one count of criminal possession of stolen property in the fifth degree (PL § 165.40), and one count each of criminal possession of a weapon in the second and third degrees (PL §§ 265.03; 265.02)]. On November 24, 1992, defendant was adjudicated a second felony offender and was sentenced to four prison terms of twelve and one-half to twenty-five years on each of the first degree-robbery counts. The court imposed concurrent sentences for each of the two separate incidents; those two sets of concurrent sentences were then imposed consecutively to each other for a total prison term of twenty-five to fifty years (Koch, J. at hearing, trial and sentence).

Defendant appealed from his judgment of conviction on July 8, 1994, claiming that the hearing court erred in finding his oral statements admissible and that his sentence was harsh and excessive. The Appellate Division affirmed the judgment on October 23, 1995, upholding the hearing court's denial of defendant's motion to suppress his statement to the police and holding that his remaining contention was without merit (*People v Smith*, 220 AD2d 704 [2d Dept 1995]). By order dated January 19, 1996, defendant's motion for a certificate granting leave to appeal to the Court of Appeals was denied.

In March 1998, defendant brought a pro se motion to vacate his judgment of conviction pursuant to CPL § 440.10. Defendant claimed that the People failed to disclose *Brady* material and used false material evidence, and that he was denied the effective assistance of counsel. By decision and order dated June 23, 1999, the court denied defendant's motion as without merit

(Hall, J.).

Defendant moved by pro se motion on September 27, 2005, to renew his 1998 motion to vacate pursuant to CPL § 440.10. He raised the same arguments based on alleged “new evidence,” which the court again rejected on March 13, 2006 (Hall, J.).

In the instant motion, defendant alleges that the police officers involved in the investigation gave false testimony about an eyewitness that the defendant believes may not have existed. Defendant claims that the police created a witness named Wendell Ceasar, whose alleged assistance they relied upon to effectuate defendant’s arrest. He bases this claim on an investigator’s computer search for a Wendell Ceasar. He contends that the investigator found only a single address for a Wendell Ceasar and that no one by that name lived at that address. The investigator concluded from the paucity of information about such a person that Ceasar’s existence is “highly questionable.” On that basis defendant asserts his innocence. Defendant also claims that the People used leading questions at trial in an attempt to elicit testimony from Rodriguez that defendant possessed a firearm.


Pursuant to CPL § 440.10(2) (c), the court must deny a motion to vacate judgment when sufficient facts appear on the record to have provided adequate review of this claim upon appeal, but no such review has occurred owing to the defendant’s unjustifiable failure to raise the issue on appeal (*People v Cooks*, 67 NY2d 100, 103 [1986]; *People v Williams*, 5 AD3d 407 [2d Dept 2004];). The testimony of Rodriguez, along with the People’s questioning of him, appears on the record. Here, defendant perfected an appeal and brought two prior motions to vacate the judgment, and never raised the instant claim even though the record would have permitted him to do so. Thus, this claim is mandatorily procedurally barred.

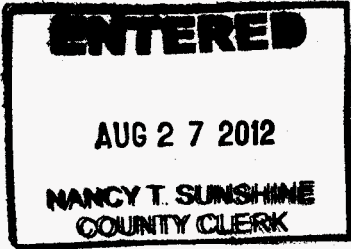
Defendant's allegations as to the existence of Ceasar and the fabrication of testimony do not go directly to the matter of defendant's guilt or innocence. Moreover, it is not affirmative evidence that the defendant is actually innocent. The evidence against defendant included his contemporaneous arrest in flight from the grocery store robbery, positive lineup identifications as to each robbery, direct eyewitness testimony as to each robbery and a self-inculpatory statement. In sum, defendant's attack on the credibility of the People's witnesses does not warrant vacatur of the conviction and fails to demonstrate how this attack satisfies the high standard required to prove actual innocence (*Schlup v Delo*, 513 US 298, 327 [1995] [petitioner "must show that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence . . . ."]; *Bousley v US*, 523 US 614, 623 [1998] [" 'actual innocence' means factual innocence, not mere legal insufficiency"])).

Accordingly, the motion is denied in its entirety.

This decision shall constitute the order of the court.

ENTER:

  
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 THOMAS J. CARROLL  
 J.S.C.  
 HON. THOMAS J. CARROLL



You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL § 440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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