

**People v Clay**

2012 NY Slip Op 32861(U)

November 21, 2012

Sup Ct, Kings County

Docket Number: 10361/06

Judge: Deborah A. Dowling

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# MEMORANDUM

**SUPREME COURT: KINGS COUNTY  
(Criminal Term, Part 1)**

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

**DECISION AND ORDER**  
By: Justice Deborah A. Dowling

-against-

Dated: November 21, 2012

Indictment No: 10361/06

**THOMAS CLAY,**  
Defendant(s).  
-----X

The defendant submitted the instant motion, *pro se*, seeking an Order to reargue a previous motion to vacate his conviction pursuant to Criminal Procedure Law §440(1)(b). The defendant also requests that the court conduct a hearing to adjudicate the merits of the instant motion. The People submitted opposing papers to the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

### PROCEDURAL HISTORY

The defendant was charged in the instant indictment with Murder in the Second Degree (PL §125.25(1)), Criminal Possession of a Weapon in the Second Degree (P.L. §265.03(2)) and Criminal Possession of a Weapon in the Third Degree (P.L. §265.02(4)). The charges arose out of a shooting incident wherein the defendant and co-defendant Sidor Flutcher shot and killed Igol Isaacs, Jr. The incident occurred, on August

11, 2006, at approximately 9:00 pm, in front of the premises located at Bristol Street in Kings County. The defendant was tried and convicted of Murder in the Second Degree, on November of 2007. The defendant was subsequently sentenced to twenty-five (25) years to life incarceration.

After the defendant's conviction, the defendant filed a motion seeking an Order vacating the judgment of conviction, on October 21, 2008, pursuant to Criminal Procedure Law §440.10. The defendant alleged trial counsel provided ineffective assistance of counsel. The defendant's motion was denied by this Court on February 20, 2009. The defendant appealed the Court's decision and leave to appeal was denied by the Appellate Division, Second Department on June 4, 2009.

The defendant appealed the judgement of conviction with the Appellate Division Second Department. The Appellate Division, Second Department affirmed the defendant's conviction on June 28, 2011. *See People v. Clay*, 88 A.D.3d 14 (2<sup>nd</sup> Dept). Leave to appeal was denied by the Court of Appeal on November 28, 2011. *See People v. Clay*, 17 N.Y.3d 952 (2011). The defendant presently has an application for a writ of certiorari pending at the United States Supreme Court.

The defendant then filed another motion pursuant Criminal Procedure Law §440.10, in which he again contended he was subjected to ineffective assistance of counsel. The claims raised therein were virtually identical to the claims raised in the previous motion. The Court denied the defendant's motion by decision and Order dated April 30, 2012. The

defendant, unsatisfied with the court's decision, submitted a motion to reargue/renew the court's decision. The defendant's application was denied on August 16, 2012. The defendant now moves seeking to reargue his previous motion and vacate the order of conviction in this case.

The defendant's principal claim in all motions center around what the defendant argues was fraudulent trial testimony by Yvette Clay, his estranged wife. The defendant has maintained an argument between him and Ms. Clay, which led to the dissolution of his marriage, motivated Ms. Clay to falsely accuse the defendant of committing this crime. The defendant argues after arguing with Ms. Clay, she became vengeful and decided to lie to law enforcement about his involvement in this incident. In support of his argument the defendant provided an affidavit by Ms. Clay, wherein she purportedly recanted her trial testimony. The defendant contends the court failed to look at this evidence and utilized the wrong indictment number on its previous decision. The defendant contends as a result the court should permit him to reargue his motion.

#### **CONCLUSIONS OF LAW**

The question presented is whether there exists a legal basis for re-argument under the facts of this case. The answer is a resounding no. The purpose of a motion for reargument is to afford the moving party an opportunity to establish facts that the Court either misapprehended, or overlooked. It is also an opportunity to establish how the Court may have misapplied any controlling principle of law. However, a motion for re-argument does

not serve as a vehicle for the unsuccessful moving party to argue the very questions previously decided. In reviewing the arguments raised by the defendant, this Court finds those arguments are without merit. Defendant's motion is nothing more than a thinly veiled attempt to litigate issues previously decided by this Court.

This Court's previous decisions examined ad nauseam the defendant's claim regarding Ms. Clay's recanted testimony. The Court examined whether the defendant's trial counsel rendered ineffective assistance of counsel for failure to uncover Ms. Clay's alleged motives for fabricating her testimony. The defendant's case has been reviewed in detail based upon the motions submitted by the defendant. The motions all transport the issue back to Ms. Clay's testimony, subsequent recantation and the defendant's contention, Ms. Clay was a woman scorned, who fraudulently implicated him in a heinous crime as a means to exact revenge.

However, previous court decisions have addressed this very issue. Namely, the court found, in its decision, dated February 20, 2012,

I have reviewed the notarized letter by Yvette Clay, wherein she purportedly recants her prior testimony. This Court is aware that Ms. Clay testified as one of the People's witnesses at trial and is also the wife of the defendant. During the trial it was evident that the witness retained a strong emotional connection to the defendant although they were estranged at the time, so it does not come as a surprise that Ms. Clay now seeks to recant her story.

However, the jury had an opportunity to also witness Ms. Clay's affinity for the defendant and the defense attorney appropriately placed her credibility as an issue before the jury. Despite that fact the jury convicted Mr. Clay and this Court may not now substitute its decision for that of the jury. Moreover, this Court has no way of testing the veracity of this letter. The Court has considered all of the other issues raised in Ms. Clay's letter and determines

them to be without merit.

The defendant fails to present anything new or allege any issue which was misapprehended or overlooked by the court in the instant motion. The facts have not changed since the defendant's submission of his initial motion seeking to vacate his conviction, which was duly denied by the court on February 20, 2012. The defendant is strongly encouraged to seek further appellate level review or federal review in light of the defendant's strong conviction of being wrongly convicted. However, there is nothing this court is in a position to do about the claims raised herein. The claims raised herein are identical to those set forth in previous motions by the defendant. Further, any reference to an incorrect indictment number on any orders issued by the court was a mere oversight and in no way places the defendant in a position to re-argue his previous motion. There is no evidence supporting the defendant's contentions and no basis to grant the requested relief. Accordingly, the defendant's motion is denied in its entirety. It is hereby,

**ORDERED**, the defendant's motion is denied. It is further,

**ORDERED**, the defendant's right to appeal from this order 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. It is further,

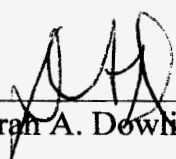
**ORDERED**, the application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of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

APPELLATE DIVISION, 2<sup>ND</sup> Department  
45 Monroe Place  
Brooklyn, NY 11201

Kings County Supreme Court  
Criminal Appeals  
320 Jay Street  
Brooklyn, NY 11201

Kings County District Attorney  
Appeals Bureau  
350 Jay Street  
Brooklyn, NY 11201

This shall constitute the decision and order of this Court.

  
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Deborah A. Dowling, J.S.C  
HON. DEBORAH A. DOWLING  
JUSTICE SUPREME COURT

**ENTERED**  
NOV 28 2012  
NANCY T. SUNSHINE  
COUNTY CLERK