

People v Bonhomme
2012 NY Slip Op 33783(U)
July 12, 2012
Supreme Court, Westchester County
Docket Number: 2009-00522
Judge: John P. Colangelo
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

-against-

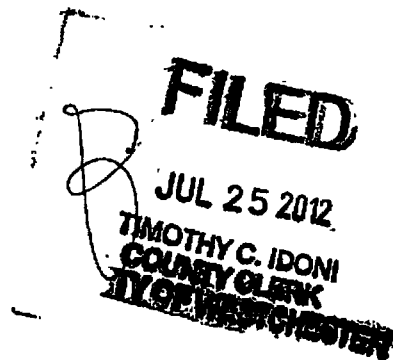
Indictment No. 2009-00522

VETAL BONHOMME,

Defendant.

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COLANGELO, J.,



Defendant Vetal Bonhomme ("Defendant") moves for an order vacating his judgment of conviction pursuant to Criminal Procedure Law §440.10 on the ground of ineffective assistance of counsel.

By way of background, Defendant was convicted after a jury trial on January 26, 2010 of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. Defendant was sentenced by this Court (Wetzel, J.) To a term of twenty years to life for the conviction of second degree murder, and a determinate sentence of fifteen years incarceration with five years post-release supervision for the conviction of Criminal Possession of a Weapon in the second degree, both sentences to run concurrently. The Appellate Division, Second Department affirmed the conviction (People v. Bonhomme, 85 A.D.3d 939 [2d Dept. 2011]). The basis of Defendant's claim is that defense counsel was ineffective in his assistance of him by virtue of his failure to obtain a witness for trial, Andrea Smith, who had selected (from a six-

person photo array), someone other than the defendant as the shooter in the homicide. At the time of trial, Ms. Smith was confined as an in-patient to a psychiatric institution.

“The purpose of a CPL article 440 motion is ‘to inform a court of facts not reflected in the record and unknown at the time of judgment’ . . . ‘By its very nature, the procedure cannot be used as a vehicle for an additional appeal’” (People v. Saunders, 301 A.D.2d 869, 870 [3d Dept. 2003], citing People v. Berezansky, 229 A.D.2d 768, 771 [3d Dept. 1996], *lv. denied* 89 B.Y.2d 919 [1996], quoting People v. Donovan, 107 A.D.2d 433, 445 [2d dept. 1985], *lv. denied* 65 N.Y.2d 694 [1985]).

A claim of ineffective assistance of counsel based upon the facts *de hors* the record is appropriate for CPL 440.10 relief. However, where, as here, such claim is based upon the record or capable of having been raised on appeal upon the record, it is barred by CPL 440.10(2)(c). (See, e.g. People v. Pacheco, 50 A.D.3d 1063 [2d Dept. 2008], *lv. denied* 10 N.Y.3d 962 [2008]; People v. King, 56 A.D.3d 1193, 1193-94 [4th Dept. 2008], *lv. denied* 11 N.Y.3d 926 [2009]; People v. Baxter, 262 A.D.2d 1068 [4th Dept. 1999], *lv. denied* 93 N.Y.2d 1014 [1999]; People v. Wong, 256 A.D.2d 724 [3d Dept. 1998], *lv. denied* 93 N.Y.2d 903 [1999]; People v. Orr, 240 A.D.2d 213, 214 [1st Dept. 1997], *lv. denied* 90 N.Y.2d 942 [1997]; People v. Pachay, 185 A.D.2d 287 [2d Dept. 1993], *lv. denied* 82 N.Y.2d 757 [1993]; People Diaz, 14 Misc.3d 1211(A), *2, 836 N.Y.S.2d 488 [Supreme Court, New York 2006]; *see also*, Sweet v. Bennett, 353 F3d 135, 139-40 [2nd Cir. 2003]; Smith v. Ercole, 2010 WL 6595338, *18 [NDNY., 2010, No. 9:08-CV-351 (GLS)(ATB), June 16, 2010]; Alston v. Donnelly, 461 FSupp2d 112, 123-24 [WDNY.2006]; Powers v. Lord, 462 FSupp2d 371, 378 [WDNY.2006]; D’Alessandro v. Fischer, 2005 WL 3159674, *19 [SDNY, No. 01 Civ. 2551 LTS/DF, November 28, 2005]).

The trial record is replete with discussion concerning the missing witness. Specifically, on January 25, 2010, during the trial, defense counsel outlined on the record the procedure he undertook to interview and produce Andrea Smith. Defense counsel also explained his strategy to seek the maximum benefit for his client from the situation. As defense counsel, Mr. Skwiersky, stated on the record to the trial judge, "They would not give me access to her . . . they told me visiting is not allowed. They would not accept process from me. I had to Subpoena them. The Court had to sign . . . as my only recourse at this point would be to have her locked up on the material witness application. That would be extremely prejudicial to my client . . . Judge, as I think I stated just previously, I think it would be prejudicial to my client's position for me to have this witness brought in, locked up under a material witness order. I have made the determination that we will not seek the application. We will, instead, ask at the appropriate time for missing witness charge as to her. If the Court denies that application, the case law still permits me to comment on her absence, and the jury can make of it what they wish." Defense counsel sought the missing witness charge and the Court denied the motion. Defense counsel commented on Andrea Smith's absence in his summation on January 26, 2010.

As the foregoing demonstrates, the record indicates that counsel made reasonable efforts to locate Andrea Smith and interview her with an eye toward possibly calling her to testify at trial. Mr. Skwiersky went to both St. Vincent's and St. John's Hospitals in an attempt to speak to Ms. Smith in order to determine whether putting her on the stand would benefit his client. Further, defense counsel prepared and submitted to the Court for signature, trial subpoenas so the hospital could confirm her whereabouts. Counsel's advocacy resulted in the Court offering to issue a material witness order to secure Ms. Smith's appearance at the trial. Thus, the record displays a

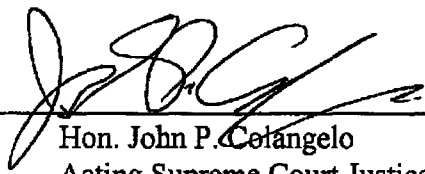
strategic decision made to reject the material witness order so as to avoid the prejudice to the Defendant if the witness appeared to be jailed, for possible adverse testimony from a witness who was compelled to appear. It is reasonable to conclude that dragging Ms. Smith out of the psychiatric institution, where she was a confined inpatient, might well be prejudicial to the Defendant.

The record contains sufficient facts of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised in the instant motion. Accordingly, the motion asserting that ground must be denied pursuant to CPL 440.10(2).

The Court considered the following papers on this application: 1) Notice of Motion with Affirmation, Affidavit, and Exhibits dated August 16, 2011; 2) Memorandum of Law in Support of Defendant's Motion to Vacate Judgment of Conviction pursuant to CPL 440 dated August 16, 2011; 3) the People's Affirmation in Opposition with Memorandum of Law (Exhibits 1 & 2 attached) dated September 30, 2011; 4) Defendant's Reply Affirmation in Support of Motion pursuant to CPL 440.10 dated October 31, 2011; 5) Defendant's Reply Memorandum of Law in Support of Motion pursuant to CPL 440.10 dated October 31, 2011.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 12, 2012
White Plains, New York



Hon. John P. Colangelo
Acting Supreme Court Justice

JANET DIFIORE, DISTRICT ATTORNEY
Office of the District Attorney Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, NY 10601
BY: John J. Sergi, Esq.

CHRISTINE MOCCIA, ESQ.
P.O. Box 93
Chappaqua, NY 10514