

**People v Griffin**

2013 NY Slip Op 30077(U)

January 3, 2013

Sup Ct, Kings County

Docket Number: 12973-97

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 12

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

-against- : DECISION AND ORDER  
440 Motion  
GERALD GRIFFIN :  
: IND. NO. 12973-97  
Defendant :  
-----X  
MICHAEL A. GARY, J.

Defendant moves once again to vacate his conviction and sentence pursuant to CPL § 440.10. The People have opposed this motion, and the defendant has filed reply papers.

This motion follows previously filed papers<sup>1</sup> and a decision rendered by the court denying the defendant's motion to vacate. Those motions included statements filed some years after the conviction and were determined by this court not to be newly discovered evidence.

In the present motion, defense counsel once again has proffered affidavits from the originally filed 440 motion as well as from two other persons who allegedly witnessed the murder for which defendant was convicted. Also, for the first time, the defendant argues that those same affidavits support a claim that he is actually innocent of the crimes committed.

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<sup>1</sup> A history of the post-conviction motions was outlined in the decision of this court dated April 2006. A list of ensuing post-conviction activity follows this decision.

In order for the court to consider newly discovered evidence, the evidence must satisfy the following requirements: 1) the evidence must have been discovered since the trial; 2) the evidence must be such that it could not have been discovered before or during the trial even with due diligence; 3) the evidence must be material to the issue at trial; 4) the evidence must not be cumulative to the evidence that was introduced at trial; 5) the evidence must not merely impeach or contradict evidence that was introduced at trial; 6) the evidence must be such that if it had been introduced at trial, it would probably have resulted in a verdict more favorable to the defendant, and 7) the motion to vacate based upon such evidence must be made with due diligence after its alleged discovery. *See People v. Salemi*, 309 NY 208, *cert. denied*, 350 US 950 (1956).

Darrel Morse in his affidavit claims that he originally identified Mr. Griffin as the shooter “because he overheard the police and figured that he could help his case”. He claims that he was at the party along with Mr. Griffin, whom he had known since 1995, and that a fight broke out and he saw someone named “Preston” standing over the body of the victim; it was “Preston” who was the shooter and not Mr. Griffin. He stated further that he is incarcerated for a murder he committed and recently (in 2011) “found God” and that’s the reason he is now recanting his statement to the police. Kimblin Hunter, the second affiant, claims to have been with Gerald Griffin the night of the shooting, and knew him since they were children. She is the girlfriend of Darrel Morse. She claims that she only recently

learned during a visit to Mr. Morse in prison that Mr. Griffin was arrested and convicted of the murder, as she had left Brownsville (but not Brooklyn) a short time after the shooting.

Shamel Bey's affidavit is included again for consideration by the court, but Mr. Bey by his own admission had been available as a witness at the time of trial and thus, can not be considered "newly" discovered. The affidavits belonging to those already considered in the previously filed 440 motion have already been analyzed and found not to be newly discovered evidence pursuant to the *Salemi* factors and CPL § 440.10(1)(g).

The People argue and the court agrees that the affidavits do not satisfy the factors as listed in *Salemi*. Each affidavit is from someone who claims to have been with the defendant the night of the shooting; the defendant himself could have, with due diligence, located them. Thus, defendant's failure to include these statements for consideration at the time of the filing of his first 440 motion, contradicts his due diligence. Similarly, the People further assert that the failure to include these affidavits in the previous motion acts as a procedural bar to consideration of the instant motion under CPL § 440.10 (3); the statute requires that the defendant who was in a position to raise a claim must have done so or the claim is barred, unless the defendant shows good cause for the failure to include it. The court finds no such good cause.

The defendant has also argued that these same affidavits support a claim of actual innocence which should be considered by this court separate from the statutory restrictions

of 440 motions. The People oppose this, asserting that no appellate court in New York State has held that such a claim is cognizable under the NY State Constitution (citing to *People v. Deacon*, 96 AD3d 965[2d Dept.]; *lv. granted*, 19 NY3d 1025 [Sept. 2012]). The instant motion re-fashions the already considered claim that the defendant's attorney was ineffective for failing to call several of the affiants as witnesses at the trial. Several courts have reviewed these claims and have found them unpersuasive or unsubstantiated. Relabeling them as a claim that the defendant is innocent of the charges when they were previously considered to be without merit by various appellate courts should not be countenanced.

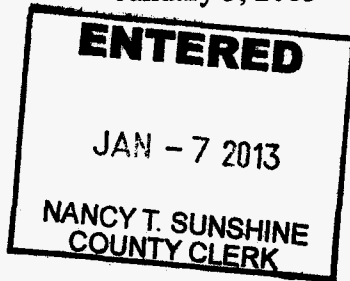
For all the reasons outlined above, the defendant's motion to set aside the judgment of conviction is denied in all respects. As the defendant has not proffered a cognizable ground under CPL § 440.10 to persuade the court that any violation of his rights under the constitution occurred, the court hereby denies this motion to vacate the judgment in its entirety.

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  
January 3, 2013



  
MICHAEL A. GARY, J. S. C.

Post- Conviction Activity

- May 16, 2006 Leave to appeal the denial of the 440 motion denied by the Second Department on *pro-se* application.
- May 17, 2006 Counsel files application for leave to appeal the denial of the 440 motion.
- Nov. 29, 2006 Leave to appeal denied by the Appellate Division, Decision No. 2006-02941
- Jan. 11, 2007 Leave to appeal denied by the Court of Appeals, 8 NY3d 846
- Mar. 12, 2007 Leave to appeal to Appellate Division denied again, Decision No. 2006-04789
- Jan. 8, 2008 Counsel seeks federal writ of habeas corpus Eastern District of New York
- Oct. 29, 2008 Dist. Court denies habeas petition, *Griffin v. Woods*, No. 08- CV-106 2008 WL 477572
- May 18, 2009 Second Circuit denies a motion by counsel for a certificate of appealability *Griffin v. Woods* , No. 08- 5687 -pr
- Mar. 17, 2010 Eastern Dist. Court denied previously-filed *pro se* FRCP 60(b) motion to vacate and denied a certificate of appealability. *Griffin v. Woods*, 08-CV-106; 2010 WL 986581

Aug. 5, 2010     Dist. Court denied *pro se* motion for reconsideration of the FRCP  
60(b) motion; 2010 WL 3123283

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