

**People v Houston**

2013 NY Slip Op 31367(U)

April 26, 2013

Supreme Court, Kings County

Docket Number: 7919/2009

Judge: William E. Garnett

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

THE PEOPLE OF THE STATE OF NEW YORK  
  
-against-  
  
TYRONE HOUSTON,  
  
Defendant.

DECISION AND ORDER  
  
Ind. #7919/2009  
  
Date: April 26, 2013  
  
By: Hon. William E. Garnett

The defendant moves, pro se, to vacate his judgment of conviction, pursuant to CPL §§440.10(1)(a), (c), (d), (f) and (h), on the principal ground that he was denied the effective assistance of counsel.

Background

On July 8, 2010, the defendant was convicted, after a jury trial, of Robbery in the First Degree and Criminal Possession of a Weapon in the Second Degree.

On August 25, 2009, at approximately 3:40 p.m., a male black, wearing a tan suit and holding a black bag, entered a store located at 377 Flatbush Avenue in Brooklyn. After speaking with Mr. Rambabu Tumala, an employee, and bringing two adult magazines to the counter, the man displayed a silver handgun and demanded that Mr. Tumala give him money. The man placed \$500, two adult magazines and several packs of Newport cigarettes into the black bag and left the store.

Ms. Patrice John, an eyewitness, had entered the store during the robbery. She saw the male black and Mr. Tumala who mouthed the words: "He's got a gun". The male black and Ms. John exited the store. Mr. Tumala left shortly thereafter. Mr. Tumala pointed out the male black to the police at the scene.

After a foot chase, the defendant, who was wearing a beige suit, was stopped at gunpoint. The police recovered a silver .380 caliber handgun from his pocket. Inside a black bag that the defendant was carrying were \$500, two adult magazines and several packs of Newport cigarettes.

Mr. Tumala was unable to identify the defendant at trial. He identified a person in the audience as the robber. Mr. Tumala was permitted to testify, pursuant to CPL §60.25, that he was sure that the person he had pointed out to the police at the scene was the person who had robbed him.

Ms. John did identify the defendant in court. However, when defense counsel showed her a newspaper photograph of another individual, not the defendant, she indicated that the person in the picture could have been the robber.

Prior to sentencing, the defendant moved, pro se, to set aside the verdict pursuant to CPL §330.30. Thereafter, the court, sua sponte, appointed Patrick Hayes, Esq. to review the trial transcript. He subsequently made a motion to set aside the verdict based on a claim of ineffective assistance of trial counsel.

By decision and order dated June 24, 2011, the defendant's motion to set aside the verdict was denied in its entirety.

The court explained that:

"[W]hile the identifying witnesses each had a problem at trial, there was a great deal of corroborating evidence from the police as well as recovery of the described gun along with a specific and unusual list of stolen items, when the defendant was apprehended a very brief time after the robbery was committed. Even the clothing worn by the defendant during the robbery and at his subsequent arrest was distinctive and particularly described by the witnesses. The fact is, the quality and quantity of the evidence at trial reasonably overcame the identification issues that arose.... While another attorney might have used different tactics, or might have emphasized weaknesses in the prosecution case differently, trial counsel did mount a zealous and cogent defense. Viewed objectively, counsel's trial strategy in this case 'might well have been pursued by a reasonably competent attorney.'" CPL §330.30 decision and order, pp. 4-5.

The defendant's motion to reargue was denied in a decision and order dated October 18, 2011.

The defendant's motion to vacate the judgment of conviction is bottomed on his belief that his judgment of conviction:

"... was based on fraud, perjury and discriminatory enforcement of the laws, in retaliation for Defendant's [then] pending Federal Lawsuit against these 'same Transit Police #32, ADA Kim Sexton and others ... seeking redress for Police and Prosecutorial Falsifications of known Robberies, as a Kings County Policy, custom and/or practice of deliberate indifference to violations by Kings County Assistant District Attorneys of Constitutional Rights of Defendant and other Blacks, who were illegally arrested, investigated and criminally

prosecuted in Kings County under known falsified evidence." Defendant's Affidavit in Support of the motion, p. 2.

#### Law

A judgment of conviction is presumed valid. People v. Sessions, 34 N.Y.2d 254, 255 (1974). On a motion to vacate a judgment, the defendant has the "burden of coming forward with sufficient allegations to create an issue of fact". People v. Sessions, supra at 255-256.

"If the motion [to vacate the judgment] is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations ... based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds for such belief." CPL §440.30(1).

CPL §440.30(4)(b) permits a court to deny a motion to vacate a judgment of conviction without a hearing if "the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts". The sworn allegations must be from a person having actual or personal knowledge of the facts at issue. People v. Pan, 245 A.D.2d 149, 150 (1<sup>st</sup> Dept. 1997); People v. Kirkland, 1 Misc.3d 904[A] (Sup. Ct., Kings Co. 2003). Conclusory allegations, even in the form of an affidavit, do not constitute sworn allegations of fact. They are just claims. People v. Hickey, 277 A.D.2d 511, 512 (3<sup>rd</sup> Dept. 2000); People v. Smith,

251 A.D.2d 226, 227-228 (1<sup>st</sup> Dept. 1998). "Evidentiary facts must be supplied". People v. Sessions, supra at 256.

CPL §440.30(4)(d) permits a court to deny a motion to vacate a judgment of conviction without a hearing "if an allegation of fact essential to support the motion ... is made solely by the defendant and is unsupported by any other affidavit or evidence, and ... there is no reasonable possibility that such allegation is true."

The defendant claims that the court lacked jurisdiction and that the judgment of conviction was obtained in violation of the Constitution of this State and the United States, to wit: "no probable cause to arrest". These claims are procedurally barred as sufficient facts appear on the record to permit an adequate review upon the defendant's direct appeal. CPL §440.10(2).

In any event, the Supreme Court acquired jurisdiction over the defendant upon his indictment by a Grand Jury. Moreover, the court, after an in camera review of the Grand Jury minutes, ruled that the evidence adduced before the Grand Jury was legally sufficient to sustain all of the counts except one.

In addition, after conducting a pre-trial suppression hearing, the court concluded that the police had probable cause to arrest the defendant, that the prospective identification of the defendant was admissible and that the physical evidence was also admissible.

The defendant also claims that physical evidence, i.e., the

gun, the money, the magazines and the cigarettes, was procured in violation of his constitutional rights. This claim is also summarily denied as sufficient facts appear in the record to permit adequate review upon the defendant's direct appeal. CPL §440.10(2).

The defendant's contention that the prosecutor elicited perjured testimony is also summarily denied. CPL 440.30(4)(b); People v. Brown, 56 N.Y.2d 242 (1982); People v. Stern, 226 A.D.238 (1<sup>st</sup> Dept. 1996).

The only evidence submitted by the defendant, i.e., a police arrest worksheet and the People's Grand Jury Synopsis Sheet<sup>1</sup>, does not "substantiate or tend to substantiate" his claim. A box on the arrest worksheet is checked indicating that Mr. Tumala could not identify the robber. This is precisely what happened at the trial. The facts contained in the Grand Jury Synopsis Sheet are consistent with the trial testimony.

The defendant apparently commenced a federal lawsuit against members of Transit District 32 prior to the robbery. He has not provided any evidence to support his claim that because of this lawsuit police witnesses perjured themselves, that he was arrested in retaliation for filing the federal lawsuit or that there was

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<sup>1</sup> The one page arrest worksheet submitted by the defendant is part of a three page NYPD Online Booking System Arrest Worksheet that was turned over by the People on December 4, 2009 along with the Grand Jury Synopsis Sheet. See People's Affirmation in Opposition, Exhibit B.

prosecutorial or judicial misconduct.

Thus, these claims are summarily denied. The defendant's assertions of police, prosecutorial and judicial misconduct concerning fabricated evidence, perjury and conspiracy are not supported by any credible evidence that "substantiate or tends to substantiate" his claims. CPL §440.30(4)(b). Further, these assertions are made only by the defendant are unsupported by any other evidence and, in light of the overwhelming evidence of guilt, there is no reasonable possibility that they are true. CPL §440.30(4)(d).

The defendant's contentions that his trial attorney was ineffective for (1) failing to call his court-appointed investigator to testify that a videotape from the adjacent store which, allegedly showed the robber in a light-colored suit, leaving the store and entering the 7<sup>th</sup> Avenue subway station was turned over to Det. Victoria Denza of Transit District 32 and ADA Kim Sexton and (2) for failing to call his parole officer and medical provider to testify that he could not run or walk fast at the time of this crime because of a recent hernia operation, gout in his feet and knees and high blood pressure are also summarily denied. CPL §440.30(3)(b).

The motion papers do not contain "sworn allegations substantiating or tending to substantiate all essential facts". CPL §440.30(4)(b). The defendant did not submit an affidavit from the

investigator, the parole officer or the "medical provider" to show that they would have testified in support of the defendant's claims nor did the defendant explain his failure to include these affidavits in his motion papers. People v. Ozuna, 7 N.Y.3d 913, 915 (2006) (alibi witness). Likewise, the defendant has not supported his claims of physical infirmity with medical records.

Contrary to the defendant's contention, trial counsel had informed the court that he did intend to call the investigator to testify on the defendant's behalf. Trial counsel did not call this witness.

There is no evidence that a videotape ever existed. If it did so and it showed a person in a light-colored suit leaving the store and entering the 7<sup>th</sup> Avenue subway station, the tape would have supported the People's case. Thus, clearly trial counsel would have had a legitimate strategic reason not to bring these corroborative facts to the attention of the jury.

Finally, the defendant maintains that the judgment of conviction should be vacated because he is actually innocent. Whether or not a free standing claim of actual innocence is cognizable under CPL §440.10(1)(h)<sup>2</sup>, the defendant has utterly failed to establish, by clear and convincing evidence, that he is actually innocent.

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<sup>2</sup>Compare, People v. Deacon, 96 A.D.3d 965 (2d Dept. 2012); People v. Tankleff, 49 A.D.3d 160 (2d Dept. 2007) with People v. Wheeler-Whichard, 25 Misc.3d 690 (Sup. Ct. Kings Co. 2009).

The defendant's remaining contentions are either procedurally barred, pursuant to CPL §440.30(4)(b), CPL §440.30(4)(d) or without merit.

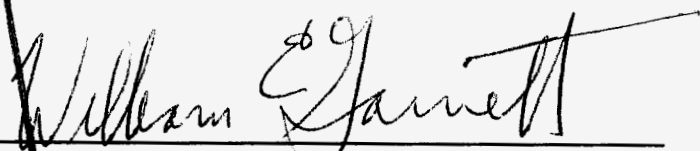
In light of the overwhelming evidence of guilt, the defendant's motion, pursuant to CPL §440.10(1)(a), (c), (d), (f) and (h), to vacate his judgment of conviction, is denied in its entirety.

This opinion shall constitute the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of 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 certificate granting leave to appeal is granted [22 NYCRR 671.5].

Dated: April 26, 2013  
Brooklyn, New York

**ENTERED**  
APR 29 2013  
NANCY T. SUNSHINE  
COUNTY CLERK



William E. Garnett  
A.J.S.C.