

People v Miller

2014 NY Slip Op 31971(U)

June 18, 2014

Supreme Court, Kings County

Docket Number: 5367/2000

Judge: Albert Tomei

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This opinion is uncorrected and not selected for official publication.

Rodriguez at the hospital. The interview was conducted by Detective Guzman in Spanish with English translation and recorded in a DD-5 prepared by Detective Murnane. In the interview, Rodriguez was shown two photo arrays and photo book of members of the crime family gang. Jefferys had testified that he was a member of the crime family, but that the defendant was not a member. Rodriguez stated that he could identify the man who shot him but that neither the shooter's nor the lookout's photographs were in the two arrays or in the crime family book. Prior to trial, the defendant took a lie detector test arranged by his attorney and the examiner found that the defendant was truthful when he denied participating in the robbery, shooting a man inside the store, or being present when the robbery and shooting occurred.¹

The defendant now moves to vacate judgment pursuant to CPL § 440.10, on the grounds of actual innocence, that the interview report constitutes newly discovered evidence, which the People intentionally suppressed in violation of *Brady v. Maryland* and his constitutional rights to present a defense and to the effective assistance of counsel. He also claims that if counsel did have the interview report, counsel was ineffective for failing to use it to support the claim of innocence and for failing to call Detective Guzman to testify about the victims "dying declaration" exonerating the defendant, and for failing to present a defense.

The People have shown that the interview report was turned over to counsel as part of the *Rosario* material prior to trial. Therefore the defendant's newly discovered evidence, *Brady*, and governmental interference with his constitutional rights claims are all denied, as they are based

¹In his motion papers, the defendant claims that this lie detector test was conducted by the District Attorney's Office or by their polygraph expert. However, the report itself demonstrates that it was prepared by a defense expert, as the examiner was a designated polygraph expert under the Assigned Counsel Program, and submitted his report only to defense counsel.

solely upon an allegation of the defendant which is refuted by the People's records, and there is no reasonable possibility that the defendant's allegations that the interview report was withheld from the defense is true. See CPL § 440.30 (4) (c), (d).

Defendant's ineffective assistance of counsel claims are all based on the trial record and could have been raised on direct appeal, but defendant failed to raise them. Therefore, they are denied. See CPL § 440.10(2)(c). In any event these claims are without merit.

The claim that counsel was ineffective for failing to use the report to support the defense of innocence and for failing to call Detective Guzman to testify about the dying declaration exonerating the defendant and for otherwise failing to present a defense is without merit. The report was not admissible as a dying declaration because it was not taken when the victim was in extremis or feared that he would die. See *People v. Nieves*, 67 N.Y. 2d 125, 132-133 (1986); *People v. Figueroa*, 37 A.D.3d 246 (1st Dept., 2007). Rather, it was taken six days after the shooting, which the victim was recovering from his gunshot wound and four days before he ultimately died of pneumonia. Therefore, counsel was not ineffective for failing to cross-examine Detective Murnane at trial about the victim's statements regarding the photographs as a dying declaration, or for not calling Detective Guzman to testify about the same statements. See CPL § 440.30 (4) (a).

The claim that counsel generally failed to present a defense is without merit as the defendant has not established what admissible defense counsel should have raised and the record shows that counsel cross-examined the witnesses and raised a coherent defense challenging the credibility of Jefferys and Juarbes, who he argued was an accomplice in the robbery and not a mere bystander, and pointing out the inconsistencies and weaknesses in the People's case. He also argued that the People had failed to establish a causal relationship between the pneumonia which killed

Rodriguez and the gunshot wound. Under these circumstances, counsel provided meaningful assistance. *See People v. Benevento*, 91 N.Y.2d 708, 712 (1998); *People v. Satterfield*, 66 N.Y.2d 796, 798-799 (1985); *People v. Brown*, 300 A.D.2d 314 (2d Dept., 2002).

Finally, the actual innocence claim is based on the fact that defendant passed a lie detector test prior to trial and that Rodriguez did not identify him in either of the photo arrays or the crime family book. The lie detector was conducted prior to trial but defense counsel was unable to use it at trial in any way as lie detector tests are inadmissible as evidence due to their inherent unreliability. *See United States v. Scheffer*, 523 U.S. 303, 309 (1988); *People v. Calabria*, 3 N.Y.3d 80, 82 n.1 (2004). Moreover, a lie detector test, standing alone, is not the type of reliable evidence which would support a claim of actual innocence. *See People v. Stevens*, 95 A.D.3d 1451, 1454 n.2 (3d Dept., 2012) (rejecting actual innocence claim based on a lie detector examination because such examinations are inherently unreliable). Rodriguez' failure to make an identification from the photo arrays or the crime family book would only support a claim of actual innocence if the defendant's photograph was among the photos Rodriguez viewed. The defendant has offered no evidence to support a finding that his photograph was among those shown to Rodriguez.² Therefore, he has failed to establish a fact critical to his claim. *See CPL* § 440.30(4)(b).

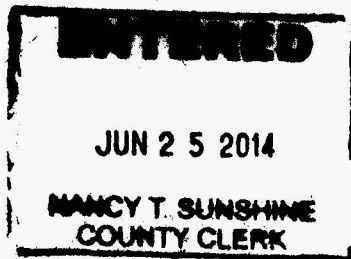
Moreover, it is unlikely that defendant's photograph appeared in the crime family book, as the defendant was not a member of that gang. Also, because the photo arrays were prepared at a very early stage in the investigation, before any one of the three co-defendant's had been arrested, it is quite possible that the defendant was not the target of either array. Particularly where,

²The People have been unable to contact Detective Murnane, who is now retired and do not possess the two photo arrays or have a record of who the targets were.

two weeks after the Rodriguez interview, when the detectives first spoke with co-defendant Jefferys, they had him identify the photographs of defendant, co-defendant Johnson, and two others. Under these circumstances, it cannot just be assumed that defendant was the subject of one of the two photo arrays shown to Rodriguez two weeks before Jefferys' arrest. Without proof that his photograph was ever viewed by Rodriguez, defendant's claim of exoneration by the victim, which is the heart of his innocence claim, is purely speculative and not supported by the evidence. Therefore, the motion is denied. See CPL 440.30(4)(b), (d)..

Therefore, and for the foregoing reasons, the motion is denied.

This constitutes the decision and order of the court.



Albert Tomei
 HON. ALBERT TOMEI, J.S.C.
HON. ALBERT TOMEI

RIGHT TO APPEAL: You are advised that your right to an appeal from the order determining your motion is not automatic except 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. **THE APPLICATION MUST BE SENT TO THE APPELLATE DIVISION, SECOND DEPARTMENT, 45 MONROE PLACE, BROOKLYN, NY 11201.** In addition, you must serve a copy of your application on the Kings County District Attorney, Renaissance Plaza, 350 Jay Street, Brooklyn, NY 11201.