

People v Umoja

2014 NY Slip Op 32220(U)

August 15, 2014

Supreme Court, Kings County

Docket Number: 107/2005

Judge: Evelyn J. Laporte

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 38

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THE PEOPLE OF THE STATE OF NEW YORK,	:	
	:	Ind. No.: 107/2005
	:	By: Hon. Evelyn Laporte
-against-	:	
	:	Date: August 15, 2014
	:	
PIRU UMOJA,	:	
Defendant	:	
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The defendant was charged with thirteen counts of Robbery in the First Degree (P.L. §160.15[4]), under two consolidated indictments. The robberies at issue were committed between August 13 and August 31, 2004, and occurred in several hair salons located in Brooklyn. The allegations were that the defendant and his brother used a variety of methods to gain entry into the stores and once inside, the defendant displayed a handgun and took money from cash registers while also taking cash, jewelry, cell phones, and purses from individuals inside the salons. On December 15, 2005, following a jury trial, the defendant was convicted of nine counts of Robbery in the First Degree (P.L. §160.15[4]). On February 2, 2006, the defendant was adjudicated a second violent felony offender and was sentenced to a total period of incarceration of thirty years to cover the nine robbery counts for which he was convicted.

Defendant has filed a fourth motion pursuant to C.P.L. §440.10 to vacate his judgment of conviction on the following grounds: 1) That he did not receive a fair trial because the prosecutor entered into the record, subject to connection, fingerprint evidence from two of the robberies, and then failed to connect that evidence with testimony from the eyewitnesses of those

robberies who were not called to testify at the trial; 2) that the prosecutor failed to turn over *Brady* material consisting of two police reports which establish that a fingerprint recovered from one of the robbery sites did not belong to the defendant; 3) that the prosecutor violated her obligation to preserve and disclose *Rosario* material when the People were unable to locate the 911 recordings related to these robberies; and 4) the trial court erred when it refused to grant defendant's request at trial to reopen the *Wade* hearing. In a supplemental filing, defendant added a claim that there was a further *Brady* violation because the People failed to disclose three sprint reports, which the defendant characterizes as "newly discovered evidence."

The People oppose this motion on the following grounds: (1) that the claims pertaining to the failure to connect the fingerprint evidence recovered at two of the alleged robbery scenes with testimony from the relevant eyewitnesses as well as the denial of defendant's request during the course of the trial to reopen the *Wade* hearing were already decided on direct appeal from the judgment, and are therefore mandatorily barred from collateral review pursuant to C.P.L. §440.10(2)(a); (2) that the claimed *Rosario* violation for failure to preserve the 911 tapes is mandatorily barred from collateral review pursuant to C.P.L. §440.10(2)(c) because defendant could have raised this claim on direct appeal, but he failed to do so; (3) that defendant's claim of a *Brady* violation based on the failure to disclose two police reports which established the recovery of a fingerprint at one of the robbery sites which did not belong to defendant is barred from collateral review because this claim was decided in Defendant's third motion pursuant to C.P.L. §440.10; and (4) that the Sprint reports are not newly discovered evidence, but were, in fact, turned over to defense counsel prior to trial as part of the discovery process.

Beginning in June 2006, just four months after sentence was imposed, defendant has persistently litigated a series of issues through direct appeal, three motions pursuant to C.P.L.

§440.10 (as well as an additional motion to reargue), and a federal *habeas corpus* petition in the Eastern District of New York. The Court has reviewed the voluminous post-trial litigation in this case including briefs submitted by counsel, *pro se* supplemental briefs submitted by defendant, and prior motions submitted by the defendant, and has read each decision previously issued, including three by Justice Hall, one by Justice Gary, the decision issued by the Appellate Division, Second Department on the direct appeal taken from the conviction (*People v. Umoja*, 70 AD3d 867 [2nd Dept 2010]), and the recent decision issued by the United States District Court for the Eastern District of New York on defendant's petition for *habeas corpus*. (*Umoja v. Griffin*, 2014 WL2453620 [ED NY 2014]). Every appeal, petition, or motion has been denied. In fact, each of the issues raised in this motion were dealt with thoroughly and decisively in the twenty-two page decision issued by the District Court, which denied defendant's petition in all respects. However, since a *habeas corpus* petition filed in federal court is subject to limitations established by 28 U.S.C. §2254(a), this Court will evaluate the merits of defendant's present motion.

Defendant's claim that he did not receive a fair trial due to fingerprint evidence which was submitted subject to connection and then stricken from the record when the eyewitnesses to those crimes did not testify was litigated in defendant's direct appeal. Defense counsel argued this specific point on pages 27-29 of his brief to the Appellate Division. The claim was part of an argument detailing the prejudice suffered from the multiple references made by the prosecution to the expected testimony of these witnesses and the subsequent failure to call them. While the court did not directly address this aspect of the argument in its decision, it found that there was no bad faith on the part of the prosecution in failing to produce the witnesses and that the

defendant’s remaining contentions were without merit. The court noted that there was overwhelming evidence against the defendant. (*People v. Umoja, supra* at 868).

Similarly, defense counsel argued in his brief on pages 21-22 that the failure to reopen the *Wade* hearing based on contradictions between testimony at the hearing compared to the testimony adduced at trial was prejudicial error, however, the court did not agree, finding that the challenge was improperly based upon trial testimony. (*Id.* at 868).¹ The Court is unaware of any retroactive change in the law on these issues. Therefore, these two claims which were argued on direct appeal are mandatorily barred from collateral review pursuant to C.P.L. §440.10 (2) (a), which states:

“...the court must deny a motion to vacate a judgment when... the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.”

Next, the Court will address the claimed *Rosario* violation for failure to preserve the 911 tapes. The record reflects that prior to trial, defense counsel informed the court that the recordings had not been disclosed and that he had subsequently been informed by the prosecution that the recordings had disappeared. The prosecutor agreed that the tapes were missing and that he would not be able to argue against an adverse inference jury instruction as to the missing tapes. During the charge conference, the parties conferred about the drafting of that instruction, which was later delivered by the court in the final instructions to the jury. No other remedy was requested by defense counsel.

¹ For a thorough discussion of the facts and law related to this claim, see page 18 of the above-cited District Court decision denying defendant’s *habeas corpus* petition and for a discussion of the fingerprint evidence which was later stricken from the record, see footnote 18 of the same opinion.

The defense requested and accepted the remedy of an adverse inference charge to cure the *Rosario* violation here, and cannot successfully argue now that a different sanction should have been imposed. (*People v. Johnson*, 257 AD2d 439 [1st Dept 1999.]) In addition, all of the related arguments and conferences were conducted on the record, which this Court has thoroughly reviewed. The record provides a clear basis for review by an appellate court, yet the defendant did not raise the claim on his direct appeal. This Court is therefore mandatorily barred from considering the claim pursuant to C.P.L. §440.10(2)(c) which states, in pertinent part:

“The court must deny a motion to vacate a judgment when... although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant’s unjustifiable failure... to raise such ground or issue upon an appeal actually perfected by him.”

As to defendant’s claim of a *Brady* violation based on the failure to disclose two police reports which established the recovery of a fingerprint at one of the robbery sites that did not belong to defendant, this claim is barred from collateral review because it was decided in the third motion filed by the Defendant pursuant to C.P.L. §440.10. In a decision dated December 3, 2010, Justice Gary addressed this issue specifically and stated the following, on page six:

The defendant has also accused the People of a *Brady* violation because of the alleged non-disclosure of (either of) the fingerprint reports. Assuming for purposes of this motion that the fingerprint report showing a “negative result” was the one not-disclosed, the defendant must still demonstrate that the evidence was 1) favorable to the defendant because it is either exculpatory or impeaching in nature; 2) the evidence was suppressed by the prosecution; and 3) prejudice arose because the suppressed evidence was material. *See People v. Fuentes*, 12 NY3d 259 (2009) and cases cited therein. Focusing on whether or not the evidence was material, a court need determine whether there is a reasonable probability that it would have changed the outcome of the proceedings. As discussed above, the inclusion of this one page report would not have been likely to counterbalance the very strong identification evidence proffered by the People.

This Court finds Justice Gary's reasoning persuasive and agrees with his application of the law. The Court therefore denies this aspect of the motion pursuant to C.P.L. §440.10(3)(b), which states that a court may deny a motion to vacate a judgment when:

“The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment...”

Finally, the defendant argues that there was a further *Brady* violation because the People failed to disclose three Sprint reports, which the defendant characterizes as “newly discovered evidence.” In a supplemental affirmation in opposition to the defendant's motion to vacate the judgment filed by the People on August 28, 2013, the People attached a copy of the list of open file discovery provided to defense counsel on May 4, 2005, prior to defendant's trial. Defense counsel signed the document when he received it. Numbers 115-117 on the list of discovery materials provided are the three Sprint reports referenced by the defendant. The Court finds this to be persuasive evidence that the Sprint reports in question were disclosed to defense counsel in a timely manner, and there is no possibility of a *Brady* violation related to these reports, nor, under these circumstances, could they be considered to be newly discovered evidence. The Court denies defendant's motion based on this ground pursuant to C.P.L. §440.30(4)(d), since 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 under the circumstances of this case, there is no reasonable possibility that the allegation is true.

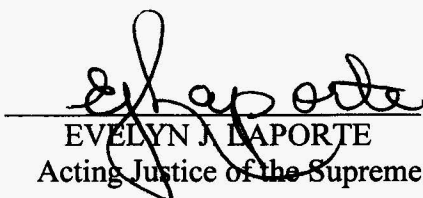
This fourth motion filed pursuant to C.P.L. §440.10 is denied in its entirety. The defendant has repeatedly raised, over the last eight years, the same issues couched in different terms and has had a full opportunity to litigate his claims both in state and federal courts and via every possible permutation of a post-conviction motion. His arguments have been found to be

repetitious and without legal basis. At this time, there is no relief which the defendant might move for in good faith, which has not already been requested. A court is “not without authority to curtail the waste of resources” resulting from frivolous *pro se* motions. (See *People v. Rivera*, 159 Misc 2d 556, 561 [Sup Ct, Bronx County 1993]; *People v. Moore*, 17 Misc 3d 228 [Sup Ct, Kings County 2007]). This authority extends to the discretion to curtail further frivolous motions. (See *Robert v. O’Meara*, 28 AD3d 567, 568 [2nd Dept 2006]; *People v. Moore, supra* at 232; *People v. Brown*, 14 Misc 3d 1237(A) [Sup Ct, Kings County 2007]).

Therefore, the defendant is hereby directed to seek permission in writing, either from this Court or from the Administrative Judge of this District, before filing future post-conviction motions. The defendant’s submission seeking permission to file a motion must be no more than one page in length, which outlines the issues sought to be raised, and must indicate either that the claim is novel and has not been asserted in a prior motion or appeal, or that there has been a change in the law, allowing consideration of the claim. The Court’s written approval must be affixed to the cover page of any future motion papers before they will be accepted for calendaring in this court. All motions filed in violation of this directive will be returned to the defendant.

This constitutes the decision and order of the Court.

ENTERED
 AUG 19 2014
 NANCY T. SUNSHINE
 COUNTY CLERK


 EVELYN J. LAPORTE
 Acting Justice of the Supreme Court

HON. EVELYN J. LAPORTE

Right to appeal:

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under C.P.L. §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. 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. Do NOT send notice of appeal to the Supreme Court Justice who decided this motion.

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 question 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.