People v Harrison
2014 NY Slip Op 32597(U)
October 7, 2014
Supreme Court, Kings County
Docket Number: 12017/95
Judge: James P. Sullivan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 3

THE PEOPLE OF THE STATE OF NEW YORK	:	**DECISION AND ORDER**
	:	
-against-	:	**Indictment No. 12017/95**
	:	
	:	**Dated: October 7, 2014**
TONY HARRISON,	:	
Defendant	:	

JAMES P. SULLIVAN, J.

The defendant has moved, *pro se,* to vacate his February 7, 1997 judgment of conviction pursuant to CPL § 440.10. The court notes that this is defendant's fourth motion to vacate his conviction. Defendant has also filed several motions to reargue and reconsider the court's previous rulings. As he has in previous motions, defendant challenges the admission at trial of the New York Police Laboratory Analysis Report signed by the police chemist, Samia Basilious. Defendant argues that his conviction was procured in violation of his Sixth Amendment rights, citing *Crawford v. Washington,* 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). Defendant further claims that his trial counsel was ineffective for failing to object to the admission of the report. The People have submitted an affirmation in opposition. The defendant submitted a reply to the People's affirmation. For the reasons stated below, the motion is denied.

On January 27, 1997, defendant was convicted of two counts of rape in the first degree (P.L. § 130.35 [1]), two counts of sodomy in the first degree (P.L § 130.50 [1]), and harassment in the first degree (P.L. §240.25). On February 7, 1997, defendant was adjudicated a mandatory persistent violent felony offender pursuant to P.L. § 70.08 (1) (a). Defendant was sentenced on that day to four consecutive terms of twenty-five years to life imprisonment for the rape and sodomy counts, and one year on the harassment count (Feldman, J., at hearings, trial, and sentence).[1] On November 2, 1998, the Appellate Division, Second Department, unanimously affirmed defendant's judgment of conviction. *People v. Harrison,* 255 A.D.2d 335 (2d Dept. 1998), *leave denied,* 93 N.Y.2d 853 (1999) (Wesley, J.).

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[1] Defendant was convicted of multiple counts of first-degree rape and sodomy for a similar incident in Manhattan on April 7, 1995, following a DNA match made as part of a DNA backlog project. *See, People v. Harrison,* 22 A.D.3d 236 (1st Dep't 2005); *Harrison v. Walsh,* 2007 U.S. Dist. LEXIS 39616 (S.D.N.Y. June 1, 2007); *habeas dismissed,* 2007 U.S. Dist. LEXIS 72509 (S.D.N.Y. Sept. 27, 2007).

Between 1999 and 2006, defendant filed two motions to vacate his judgment of conviction pursuant to CPL § 440.10, and one motion to set aside his sentence pursuant to CPL §440.20. Both motions were denied, including the motion raising a claim of ineffective assistance of counsel which the court described as apparently "fabricated out of whole cloth" (March 13, 2000 Decision and Order) (Feldman, J.) The court determined that defendant's trial counsel's "level of representation far exceeded the minimum standards required by law." The Appellate Division, Second Department, denied leave to appeal the decisions denying defendant's two motions to vacate judgment.

On April 21, 2009, this court denied defendant's third motion to vacate his judgment of conviction pursuant to CPL § 440.10, and defendant's second motion to set aside his sentence pursuant to CPL § 440.20. This court also denied defendant's motion to reargue or renew his previous motions. On October 1, 2009, the Appellate Division, Second Department, denied defendant's application for leave to appeal (Prudenti, J.)

In a motion dated October 27, 2009, the defendant again moved to reargue or renew his previous post-conviction motions, and for reconsideration of the prior motion to vacate his sentence. Here, defendant made the additional argument that his right to confront the police chemist Samia Basilious at trial had been violated, citing *Crawford v. Washington,* 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). In a decision and order dated February 26, 2010, this court denied defendant's motion to reargue or renew his previous post-conviction motions.

In a motion dated March 12, 2010, defendant filed a third motion for the court to reconsider its previous orders denying defendant's motion to reargue or renew his prior motions, again arguing that his conviction was procured in violation of *Crawford v. Washington,* 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). On September 28, 2010, this court denied defendant's motion for reconsideration of its April 21, 2009 order, and defendant's motion for leave to reargue or renew his previous motions.

From 2001 to 2011, defendant unsuccessfully raised numerous claims in federal court.[2] On July 18, 2011, defendant filed a second motion in federal court to vacate the District Court's order denying his *habeas* petition based on the alleged violation of his confrontation rights at trial based upon his inability to confront the police chemist Samia Basilious. In an order dated January 27, 2012, the District Court, without ruling on the merits of the claim, denied defendant's motion which it deemed to be a second or successive *habeas* petition, requiring prior authorization from the Second

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[2]Those raised between 2001 and 2008 are outlined in *Harrison v. Senkowski,* 247 F.R.D. 402, 409-419 (E.D.N.Y. 2008).

Circuit before filing. On April 3, 2012, the Second Circuit denied defendant's motion to file a successive petition.

In defendant's current motion to vacate judgment, he again argues that his confrontation rights were violated as he was unable to cross-examine the police chemist Samia Basilious on her forensic testing of a condom tested for the presence of spermatozoa, which was later analyzed for a DNA match by a testifying witness (*Crawford* v. *Washington,* 541 U.S. 36 [2004]; *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 [2009]). Defendant also claims that his trial counsel was ineffective for not objecting to the admission of the report signed by Ms. Basilious. The court finds that defendant's claims are procedurally barred, and also determines that defendant's claims are without merit.

Initially, as the court has previously determined, a review of the record reveals that defendant never objected, on any grounds, to the admission of the Laboratory Analysis Report. Defendant unjustifiably failed to raise on direct appeal either of these claims. The Appellate Division has held that a defendant does not preserve his claim when he fails to object to the introduction of such evidence on constitutional grounds (*People v. Hamilton,* 66 A.D.3d 921 [2d Dept. 2009]). "Although the defendant's trial occurred before the decision of the United States Supreme Court in *Crawford v. Washington,* 541 U.S. 36 [2004], that circumstance does not affect defendant's obligation to make a proper constitutional claim, as opposed to a claim grounded in state evidentiary law" (*People v. Lopez,* 25 A.D.3d 385, 386 [1st Dept. 2006]). Here, defendant's claim that his counsel was ineffective was apparent in the record and could have been raised on direct appeal. Thus, defendant's claim is procedurally barred pursuant to CPL § 440.10 (2) (C). (*See also, People v. Pachay,* 185 A.D.2d 287 [2d Dept. 1992]; *People v. Hernandez,* 191 A.D.2d 511 [2d Dept. 1993]).

Additionally, defendant's confrontation claim and ineffectiveness claims are procedurally barred pursuant to CPL § 440.10 (3) (c). Defendant's second motion pursuant to CPL § 440.10 was dated March 7, 2006, two years after the holding in *Crawford v. Washington,* 541 U.S. 36 (2004). Thus, defendant could have, but did not, include his current claims in his 2006 motion to vacate.[3]

Turning first to the issue of whether *Crawford* applies retroactively to cases on collateral review, this court holds that it does not. As of this date, no state appellate court has specifically addressed the issue of whether *Crawford* must be applied retroactively on collateral review. In

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[3] Defendant first raised a claim pursuant *Crawford v. Washington* in his motion for reconsideration of the court's order, dated April 21, 2009, summarily denying defendant's motion to vacate judgement, set aside his sentence, and reargue or renew his earlier post conviction motions.

Whorton v. Bockting, 549 U.S. 406 (2007), the United States Supreme Court held that *Crawford* should not be applied retroactively on collateral review (*see also, Mungo v. Duncan,* 393 F.3d 327 [2d Cir. 2004]) (*Crawford* should not be applied retroactively on collateral review of pre-*Crawford* decisions). The majority of recent decisions of other courts of coordinate jurisdiction have found the *Crawford* rule not to be retroactive (*People v. Headley-Ombler,* 2010 WL 5648312 [Sup. Ct., Kings County July 2, 2010]; *People v. Vasquesz,* 7 Misc. 3d 762 [Sup. Ct. N.Y. County 2005]; *People v. Tam,* 12 Misc.3d 1179 (A), 824 N.Y.S. 2d 765 [Sup. Ct. Queens County 2006]; *People v. Jackson,* 12 Misc.3d 1178 (A), 824 N.Y.S. 2d 765 [Sup. Ct. Queens County 2006]; *People v. Soto,* 8 Misc.3d 350 [Sup. Ct. Bronx County 2005]; *People v. Wahedi,* 2008 WL 1999509 [Sup. Ct. Suffolk County 2008]; *People v. Ayrhart,* 8 Misc.3d 1014 (A), 801 N.Y.S.2d 779 [County Ct. Niagra County 2005]; *but see, People v. Watson,* 14 Misc.3d 942, 2007 NY Slip Op. 27003 [Sup. Ct. NY County 2007]; *People v. Encarnacion,* 6 Misc.3d 1027 [A], 2005 N.Y.Slip Op. 50203 [U] [Sup. Ct. NY County 2005]; *People v. Dobbin,* 6 Misc. 3d. 892, 2004 NY Slip Op. 24534 [Sup. Ct. NY county 2004]).

In any event, the court finds that defendant's claims are without merit. Defendant's constitutional right to confrontation was not violated by the admission into evidence of the report which was generated by the New York City Police Department laboratory and signed by the police chemist Samia Basilious on June 13, 1995. Ms. Basilious no longer worked for the police laboratory and therefore did not testify at defendant's trial. In her absence, Ms. Mary Quigg, a chemist and serology laboratory supervisor for the New York Police Department, testified at trial. Ms. Quigg was the direct supervisor of Ms. Basilious, who tested the items in the rape kit, including the condom in this case. Ms. Quigg oversaw this chemist's work and checked her report. Ms. Quigg who supervised Ms. Basilious' work and checked her report, testified that the report was made in the ordinary course of business of the police laboratory and it was the business of the police laboratory to prepare such reports after testing.

On February 22, 1996 and March 27, 1996, Ms. Quigg gave Donna Goldstein, a paralegal with the Brooklyn District Attorney's Office, a sealed package containing cuttings from the shirt, the condom, and blood samples from the first victim and from the defendant. Ms. Goldstein sent this evidence to Laboratory Corporation of America, a private laboratory. Meghan Clement, the assistant director of Lab Corp. and an expert in the field of forensic DNA analysis tested these items and determined that defendant's DNA profile matched the DNA profile recovered from the sperm in the condom and the sperm and non-sperm fraction on the shirt. Ms. Clement testified at the trial that with respect to the sperm fraction of the condom, the probability of randomly selecting an unrelated individual with a DNA profile consistent with the nine areas of DNA tested was one in 2,710, 000

million African -Americans. She further testified that with respect to the match on the non-sperm fraction on the shirt, the probability of randomly selecting an unrelated individual with this DNA profile was one in greater than five billion five hundred million, greater than the population of the world.

Here, the report of the non-testifying chemist, Ms. Basilious was not "testimonial" because it did not inculpate defendant; it did not bear testimony against defendant [*see, Crawford,* 541 U.S. at 51]. The report merely noted that "the condom tested positive for the presence of spermatoza." The report, introduced into evidence by Ms. Quigg, contained "no conclusions, interpretations, comparisons, or subjective analyses," and in no way linked the defendant to the crime (*People v. Brown,* 13 N.Y.3d 332, 340 [2009]; *see, People v. Sanders,* 118 A.D.3d 1029 [2d Dept. 2014]; *People v. Fucito,* 108 A.D.3d 777 [2d Dept. 2013]; *People v. Dail,* 69 A.D.3d 873 [2d Dept. 2010]).

The connection of the defendant to the crime was made by the testimony of Ms. Megan Clement, the assistant director at Laboratory Corporation of America, a private laboratory. Thus, it was the testimony of Ms. Clement, who was available for cross-examination, which inculpated defendant, proving his identity as the perpetrator. The original report itself, authored by Ms. Basilious and introduced into evidence by Ms. Quigg, shed no light on the issue of defendant's guilt in the absence of Ms. Clement's testimony. This report provided raw data that, standing alone, did not link the defendant to the crime. Accordingly, the report authored by Ms. Basilious was not testimonial in nature, and defendant's right of confrontation was not violated by the admission of this non-inculpatory report (*see, People v. Brown, supra; People v. Rawlins,* 10 N.Y.3d 136 [2008]; *People v. Fernandez,* 115 A.D.3d 977 [2d Dept. 2014]; *People v. Washington,* 108 A.D.3d 576 [2d Dept. 2013]; *People v. Sanders, supra*) (*see, Williams v. Illinois,* ___U.S.___, 132 S. Ct. 2221 [2012] [plurality op.] [The Supreme Court, Justice Alito, held that the expert's testimony referring to DNA profile as having been produced from semen found on the victim did not violate the Confrontation Clause.).

Further, the People were not required to present testimony of each analyst who contributed to the process and who developed the reports (*People v. Saunders, supra).* Indeed, not everyone "whose testimony may be relevant in establishing chain of custody, authenticity of the sample or accuracy of the testing device, must appear in person as part of the prosecution's case (*Melendez-Diaz v. Massachusetts,* 557 U.S. at 311).

Moreover, defendant has failed to establish ineffective assistance of trial. The Court of Appeals has held that under the New York State constitution "as long as the evidence, the law, and the circumstances of a particular case, viewed in the totality and as of the time of the representation, reveal that the attorney provided a meaningful representation, the constitutional requirements will have been met" (*People v. Baldi,* 54 N.Y.2d 137 [1981]). Under federal law, defendant must first show that attorney's action or advice fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's deficiency the result of the case would be different (*Strickland v. Washington*, 466 U.S. 608 [1984]). As the admission into evidence of the Police Laboratory Analysis Report did not violate defendant's right of confrontation, defendant's claim that counsel was ineffective for failing to object on confrontation grounds to the admission of this document into evidence is without merit. "There can be no denial of effective assistance of trial arising from counsel's failure 'to make a motion or argument that has little or no chance of success'" *(People v. Kurth,* 82 A.D.3d 905, 906 [2d Dept. 2011], *citing People v. Caban,* 5 N.Y.3d 143, 152 [2005], *quoting People v. Stultz,* 2 N.Y.3d 277, 287 [2004]).

Further, a review of the record reveals that defendant received "meaningful representation" from his trial counsel (*see, People v. Rivera,* 71 N.Y.2d 705, 708 [1988], *quoting People v. Baldi,* 54 N.Y.2d 137, 146-47 [1981]). Trial counsel extensively cross-examined the prosecution's witnesses. Specifically, counsel's cross-examination of Mary Clement, the prosecutor's forensic DNA expert, demonstrated a sophisticated grasp of the subject matter, and spanned fifty-five pages of trial transcript. Defense further presented contrary testimony of a defense expert in popular genetics, and arranged for Dr. Lawrence Koblinsky, a recognized DNA expert, to assist defense by sitting a counsel's table during Clement's testimony. The DNA match evidence was further challenged by counsel's summation arguments.

As the trial court previously held in its decision and order dated March 13, 2000 (Feldman, J.), trial counsel's "level of representation far exceeded the minimum standards required by law. In the face of overwhelming evidence at trial and at the side of a difficult client, counsel exhibited ingenuity, a high level of competence and the appropriate degree of zealousness."

For the foregoing reasons, defendant's motion is denied in its entirety without a hearing.

This constitutes the opinion, 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.

ENTER,

James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.

ENTERED
OCT - 9 2014
NANCY T. SUNSHINE
COUNTY CLERK