

People v Beltran
2014 NY Slip Op 33163(U)
November 25, 2014
Supreme Court, Kings County
Docket Number: 880/09
Judge: Joel M. Goldberg
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs -

HON. JOEL M. GOLDBERG

IND. NO. 880/09

DATE: NOVEMBER 25, 2014

RUBEN BELTRAN,

DEFENDANT.

The defendant's *pro se* motion, dated September 3, 2014, pursuant to CPL 440.10 (1) (b) and (d), to vacate the June 23, 2010 judgment convicting him after a jury trial of two counts of Course of Sexual Conduct Against a Child in the First Degree (one of which was subsequently vacated) and one count of Sexual Abuse in the First Degree and sentencing the defendant to concurrent prison terms of 25 years plus 20 years post-release supervision on the two counts of Course of Sexual Conduct and a consecutive sentence of seven years on the count of Sexual Abuse and ten years post-release supervision upon consideration of the People's answer, dated November 19, 2014, is denied (Gerges, J. at trial and sentence).

Background

The defendant was convicted of acts of rape and sexual abuse against his niece, Vanessa Flores, during the periods from June 1, 1998 through January 21, 2001 and from February 1, 2001 through August 31, 2001, when she was between five and eight years-old. The defendant was additionally convicted at that same trial of touching the vagina of five year-old Susan Rodriguez on March 12, 2008.

Prior to sentencing, the defendant moved *pro se* to set aside the verdict based on ineffective assistance of counsel. The Court, at the request of trial counsel, Edward Friedman, relieved trial counsel and assigned Harold C. Baker to represent the defendant.

The Court subsequently denied the motion to set aside the verdict with the exception of vacating the defendant's conviction of two counts of Endangering the Welfare of a Child based on the expiration of the "Statute of Limitations" as to those charges. (See Sentencing Minutes of June 23, 2010 at 3-6).

Following the imposition of sentence, the defendant, represented by Mr. Baker, on December 3, 2010 filed a CPL 440.10 motion dated October 19, 2010 to vacate the judgment based on ineffective assistance of trial counsel. Included in this claim was an assertion virtually duplicating the basis for this motion: that trial counsel did not call at trial medical experts in the field of sexual assault injuries to challenge the conclusion given in the testimony of Dr. Lorna Nayan who was called as an expert witness at trial by the People.

Specifically, the defendant's prior motion, at unnumbered pages 2-3 of a supporting Memorandum of Law, argued that, "[h]ad counsel consulted with appropriate experts, he could have effectively challenged the basis of Dr. Nayan's conclusion regarding the injuries to the child's vagina and hymen. Dr. Nayan testified that upon examination on March 26, 2008, he discovered *"tears to the child's hymen that he opined were caused by repeated forcible sexual intercourse with the child by an adult"* (Trial transcript at 301-304). [emphasis supplied]. ... Counsel's decision not to consult with or call an expert precluded counsel from offering a potentially persuasive affirmative argument that the alleged victim's condition was not indicative or consistent with repeated forced sexual penetration."

Because the trial judge had retired, the prior CPL 440.10 motion was administratively assigned to the Hon. Desmond Greene who granted a hearing on the motion. Because Justice Greene subsequently was not available to hold the hearing, the

matter was administratively assigned to this Court. A hearing was held on November 4, 2011 where the defendant was represented by counsel, Mr. Baker.

Following a hearing on the motion and additional evidentiary submissions by the defendant, the motion was denied in a decision and order dated March 16, 2012.

Insofar as relevant to this motion, on the prior motion, the defendant did not produce at the hearing any witness to support the assertion in the motion that an expert witness, if called at trial by the defense, would either have refuted Dr. Nayan's assertion that the tears on the child's vagina were consistent with repeated forcible sexual intercourse or have demonstrated that trial counsel's cross-examination of Dr. Nayan was inadequate (See Decision of March 16, 2012 at 7).

In a post-hearing submission, defense counsel submitted an affidavit from Dr. Christina Guillen asserting that the tears observed in the child's hymen by Dr. Nayan would not be expected to be the result of an event "nine years" after the event because the hymen "heals quickly." (The examination by Dr. Nayan was approximately nine years after the first reported incident in 1998 and six years after the last reported incident in 2001.) However, as noted in the Court's decision, at 12, trial counsel's cross-examination of Dr. Nayan elicited the concession that the tears could have been as recent as one week prior to the examination.

On June 11, 2012, the Appellate Division denied the defendant's application, made by assigned appellate counsel, for leave to appeal from this decision. On August 14, 2013, the Appellate Division on the defendant's direct appeal modified the judgment by vacating the conviction and sentence on the second count of Course of Sexual Conduct Against a Child in the First Degree and dismissed that count, finding that it was multiplicitous with the first count in that both counts covered the same course of conduct. The judgment was otherwise affirmed. *People v. Beltran*, 110 AD3d 153 (2nd Dept. 2013). Leave to appeal to The Court of Appeals was denied. *People v. Beltran*, 23 NY3d 1018 (2014) (Lippman, C.J.).

The Current Motion

The defendant's current *pro se* motion focuses on the trial testimony of Dr. Nayan. Whereas the prior CPL 440.10 motion asserted trial counsel was ineffective in challenging Dr. Nayan's testimony that the tears observed on the complainant's vagina could have been the result of repeated acts of forcible sexual intercourse occurring as long as nine years prior to the examination (while also stating that the tears could have been as recent as one week prior to the examination, and, if so, would not support a conviction), the defendant's current motion asserts that the prosecutor engaged in misconduct of reversible magnitude by arguing that Dr. Nayan's testimony supported a conclusion that the defendant committed the crimes charged.

The defendant argues that Dr. Nayan's conclusions were not reliable, because the trial record does not show that a "colposcope" was used in the examination (Defendant's Memorandum, "DM" at 1).

The defendant next argues, in an effort to undermine the validity of Dr. Nayan's testimony, that Dr. Nayan's testimony, "seems to have avoided the subject of multiple separate incidents. [And] the fact that after allegedly being penetrated by an adult, from the age of 5 until the age of 8, the complainant still had a hymen that could be seen by the naked eye" (DM at 2).

The defendant further argues that Dr. Nayan's conclusions were unreliable and "obsolete," because at the time of the examination, Dr. Nayan had not been informed that the complainant would later claim to have been raped multiple times by the defendant rather than only once (DM at 3). (However, the motion does not demonstrate that Dr. Nayan at the time of the trial testimony was unaware of the allegations of multiple rapes.)

The defendant argues that Dr. Nayan did not know that the defendant was charged with multiple acts of raping the complaining witness over a span of three years, and the prosecutor took advantage of Dr. Nayan's purported ignorance of this allegation when asking Dr. Nayan if the tears observed were consistent with "repeated" insertions of a penis into the vagina. Thus, the defendant argues, Dr. Nayan's affirmative answer

erroneously supported the prosecutor's subsequent argument in summation that multiple acts occurred at separate times rather than a conclusion that all the tears occurred during a single incident (DM at 4).

The defendant finally argues that the prosecutor's misrepresentation of Dr. Nayan's testimony regarding the rape allegations of Vanessa Flores had a prejudicial impact on the jury's consideration of the sexual abuse allegations of Susan Rodriguez requiring that the judgment regarding those charges should also be vacated (DM at 5).

Discussion

The People's answer raises three separate grounds for denying the motion all of which are valid.

First, the defendant's claims are entirely based on the trial record and, thus, the unjustifiable failure to raise them on direct appeal precludes their review on this motion. CPL 440.10 (2) (c).

Dr. Nayan's testimony and conclusions, as well as the prosecutor's purportedly improper comments thereon, were all part of the trial record. Thus, they cannot now be reviewed as a substitute for direct appeal. *People v. Cudrado*, 9 NY3d 362, 364-65 (2007); *People v. Cooks*, 67 NY2d 100, 103 (1986); *People v. Mobley*, 59 AD3d 741, 742 (2nd Dept. 2009).

The present claim, unlike the claim on the prior motion, is not based on a claim of ineffective assistance of trial counsel for failing to properly cross-examine Dr. Nayan, or failing to properly investigate the medical issues involved, or failing to call expert witnesses who could have refuted Dr. Nayan's conclusions. Those claims were based on matters *dehors* the record and were found to be without merit after a hearing held on the defendant's prior CPL 440.10 motion. Rather, the present claim is based purely on the trial testimony and the prosecutor's on-the-record comments and not on any evidence introduced at the hearing on the defendant's prior CPL 440.10 motion.

Second, the defendant's current claims could have been raised on his prior CPL

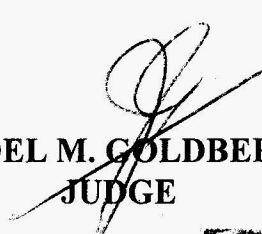
440.10 motion (where he was represented by counsel). Because the defendant was in a position to raise his current claim within the context of that prior motion – which included claims that Dr. Nayan’s testimony was not adequately clarified due to ineffective assistance of trial counsel – but the defendant did not do so even after being afforded a hearing regarding Dr. Nayan’s testimony, the current claims are denied. CPL 440.10 (3) (c); *People v. Graves*, 62 AD3d 900, 901 (2nd Dept. 2009), *People v. Cochrane*, 27 AD3d 659, 660 (2nd Dept. 2006).

Finally, the defendant’s claims are without merit. The jury, based on trial counsel’s cross-examination, was fully aware of the limited scope of Dr. Nayan’s conclusions insofar as they could not distinguish whether the vaginal tears had existed weeks or years prior to the examination or whether they were the result of consensual or forcible intercourse. The prosecutor’s arguments asserting these injuries were consistent with the People’s theory of the case, although clearly not the only conclusion that could be drawn, was within proper bounds and did not misrepresent the evidence. It was for the jury to determine based on all the evidence in the case whether those arguments had any merit.

Because the prosecutor’s arguments concerning Dr. Nayan’s testimony were not improper, there was no unduly prejudicial spillover affecting the jury’s consideration of the sexual abuse charge involving Susan Rodriguez.

Accordingly, the defendant’s motion is in all respects denied.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

