

**People v Simpson**

2017 NY Slip Op 32836(U)

March 31, 2017

County Court, Westchester County

Docket Number: 12-0993

Judge: Barbara G. Zambelli

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FILED

MAR 31 2017

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

- against -

DANE SIMPSON,

Defendant.

-----X  
ZAMBELLI, J.

DECISION & ORDER

Indictment No.: 12-0993

The following papers numbered 1 to 7 read on this pro se motion pursuant to CPL

§440.10:

PAPERS NUMBERED

Motion to Vacate Judgment, Memorandum of Law & Exhibits A-F	1-3
Affirmation in Opposition, Memorandum of Law & Exhibits 1-7	4-6
Defendant's Reply Affirmation	7

Upon the foregoing papers it is ordered that defendant's motion is denied.

On March 21, 2013, the defendant was convicted upon his plea of guilty in this Court (Adler, J.) to criminal possession of a weapon in the second degree in full satisfaction of the indictment pending against him. On July 3, 2013, defendant was sentenced in this Court (Adler, J.) as a second violent felony offender to a determinate term of imprisonment of seven years imprisonment plus five years post release supervision. Defendant's appeal remains pending.

In the instant motion, defendant seeks to have his judgment of conviction vacated on the ground that his conviction was obtained by materially false evidence in violation of

defendant's constitutional rights and also on the ground that he allegedly received ineffective assistance of counsel. Specifically, defendant argues that he and his van were the subject of an illegal search and seizure by former Yonkers Detective Christian Koch, and Detective Dennis Molina. Defendant submits that the allegations made against him by Koch's police report, and presumably reported to the grand jury, are false. According to his police report, Koch observed defendant walking on Woodworth Avenue while playing with his wasteband and reaching down his pants prior to entering a Astrovan, where he was further observed sitting in the driver's seat looking at and fondling an object in his lap, and upon Koch's approach, was observed holding a black handled handgun protruding from a sock, which he was attempting to shove down his pants (Defendant's Exhibit A). Defendant disputes the veracity of this account and submits that he was sitting in his van, talking on his phone when he was approached by Koch and Molina, who asked why he was parked there and informed him of numerous burglaries in the building. Defendant alleges that he was asked to step out of the vehicle for a search, but because he submitted he did not do anything wrong, he did not consent, but was pulled from the van anyway, and his person searched, but nothing was found. Defendant contends that the van was then searched, and he was subsequently arrested for criminal possession of a weapon, for a gun which was recovered from the van. He further alleges that, at the precinct, he was asked to make a statement and initially refused, but was told that because the van was registered in his mother's name, the police could charge her, so defendant agreed to sign the statement. Defendant further alleges that he provided all of this information regarding his version of events to his attorney. Defendant submits that the police account of their interaction cannot be believed because Koch was subsequently convicted of perjury

relating to a falsified information in an unrelated case and that Molina was also found to have "lied", and further refers the court to an unrelated case wherein another individual's ("JS") conviction was vacated due to the false testimony of these individuals.

The People oppose the motion. They argue that defendant fails to set forth any legal or factual grounds for relief. The People argue that as a result of defendant's guilty plea, he waived any challenge to the search and seizure. They argue that no Brady claim exists herein, as defendant's case was prosecuted in 2013 and the underlying facts which resulted in Koch's eventual prosecution, for which he ultimately pleaded guilty to perjury in the second degree on April 23, 2015, did not occur until 2014 and were entirely unrelated to defendant's case. As to Molina, his only known malfeasance was that he testified along with Koch in the JS case, which was also discovered by the People in April, 2015 (People's Exhibit 7). The People argue that, in any event, to the extent that defendant is alleging a Brady violation, such claims do not survive his guilty plea herein. As to defendant's allegation that his counsel was ineffective, the People argue that the facts as alleged by defendant fail to state a claim for relief and that in any event, his guilty plea forfeited any claim of ineffective assistance not bearing directly on the plea process.

In reply, defendant argues the indictment against him was undermined by Koch's "known history" of providing false testimony and that his testimony in this matter was "identical" to the false testimony in the JS case, and thus submits that his conviction should be vacated.

Defendant's motion is without merit and is summarily denied in its entirety. As an initial matter, as defendant was convicted based upon his plea as opposed to after a trial, he does not set forth a basis of relief on this motion (CPL §440.10(1)(c), (d)). In any event,

as to defendant's claim that his judgment of conviction should be vacated based upon his allegation that his van was illegally searched, having pleaded guilty, defendant waived his challenge to the search (People v. Fernandez, 67 N.Y.2d 686, 688 (1986) ("[a] guilty plea generally results in a forfeiture of the right to appellate review of any non-jurisdictional defects in the proceedings"); People v. Lleras, 140 A.D.3d 985 (2d Dept. 2016)). It is also noted that defendant's allegations made on this motion are in contradiction to his sworn statements made during the course of his plea, including, inter alia, that he was pleading guilty freely and voluntarily and was not coerced into doing so (People's Exhibit 5). Of course, due to the fact that defendant's case occurred in 2013, and the incident which gave rise to the subsequent investigation and prosecution of Koch did not occur until 2014, it cannot be said that any Brady violation was committed by the People herein. In any event, defendant's guilty plea forfeited any claims pursuant to Brady (People v. Knickerbocker, 230 A.D.2d 753, 754 (2d Dept. 1996), lv. denied, 89 N.Y.2d 943 (1997)). To the extent that defendant submits that his learning about Koch's conviction in 2015 is newly discovered evidence, his claim must fail as a matter of law as defendant pleaded guilty and was not convicted after a jury trial, as required to obtain relief on that ground (CPL §440.10(1)(g); People v. Latella, 112 A.D.2d 321 (2d Dept. 2016), lv. denied, 66 N.Y.2d 616 (1985)). In any event, the evidence does not meet the test for newly discovered evidence (see People v. Salemi, 309 N.Y. 208, 215-216 (1955), cert. denied, 350 U.S. 950 (1956); People v. Tankleff, 49 A.D.3d 160, 179 (2d Dept. 2007)).

As to defendant's claim of that his counsel was ineffective, this claim is also without merit. Defendant alleges that his counsel failed to make any investigation of defendant's version of the facts as related herein and submits that an investigation of the officers' work

histories would have supported defendant's allegations. However, defendant fails to allege exactly how his counsel would have been able to foresee events which had not yet occurred at the time of his prosecution. Moreover, defendant's allegations that the police illegally searched his van are allegations made solely by him and which are supported by no other affidavits or evidence, and given that they directly contradict statements made during the course of defendant's plea, there is no reasonable possibility they are true (CPL §440.30(4)(c), (d)).

Accordingly, defendant's motion to vacate his judgment of conviction is denied in its entirety.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
March 31, 2017

  
BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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