

People v Jones

2021 NY Slip Op 33614(U)

June 21, 2021

Supreme Court, Kings County

Docket Number: Ind. No. 5146/2012

Judge: Vincent M. Del Giudice

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PEOPLE OF THE STATE OF NEW YORK,

vs.

LAWRENCE JONES,

Defendant.

IND. # 5146/2012

DECISION
AND ORDER

----- X
VINCENT M. DEL GIUDICE, J.

PROCEDURAL HISTORY

After a trial by jury, on February 5, 2015, the defendant was convicted of Murder in the Second Degree (Penal Law [hereinafter: P.L.] § 125.25[1]) and Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[1][b]). On February 10, 2015 the defendant was sentenced to an indeterminate term of incarceration of twenty-years to life in prison, on the Murder in the Second Degree conviction, and fifteen-years incarceration with five-years post-release supervision, on the Criminal Possession of a Weapon in the Second Degree conviction. All sentences to run concurrently. (Gary, J., at trial and sentence).

In February of 2019, the defendant appealed his conviction and sentence to the Appellate Division, Second Department, on the grounds that: (1) The trial court erred in (a) failing to Order the disclosure of DNA raw data, and (b) admitting DNA testimony through a witness who did not review said raw data; (2) the defendant was denied his right to a fair trial through the admission of (a) testimony concerning his gang affiliation, (b) testimony concerning his role in planning a robbery, and (c) the trial court's refusal to instruct the jury with a missing witness charge; and (3) the defendant's sentence was excessive. On January 22, 2020, the defendant's conviction was affirmed by the Appellate Division (*People v Jones*, 179 AD3d 948 [2d Dep't 2020]).

The defendant applied for leave to appeal to the Court of Appeals, and on March 18, 2020, said application was denied (*People v Jones*, 35 NY3d 942 [2020]) (Garcia, J.).

Subsequently, the defendant sought leave to reargue the Court's denial of his application for leave to appeal to the Court of Appeals and on June 29, 2020, leave to reargue was also denied (*People v Jones*, 35 NY3d 1027 [2020]) (Garcia, J.).

Now, the defendant moves this Court, pursuant to Criminal Procedure Law (hereinafter: C.P.L.) 440.10(1)(c), (d), and (h), to vacate his judgment of conviction. Defendant argues (1) the People failed to satisfy their burden that the defendant's arrest was based upon Probable Cause; (2) the introduction of perjured testimony; (3) failure to disclose *Rosario* and *Brady* material; (4) denial of compulsory process or in the alternative admit prior recorded statements of a witness not appearing at trial; (5) ineffective assistance of counsel; (6) "newly discovered evidence"; (7) actual innocence; (8) a *Crawford* violation; (9) improper admission of evidence concerning gang affiliation; (10) denial of the right to perfect an appeal; and (11) decedent's inability to make a dying declaration. The People have filed opposition to the defendant's CPL § 440.10 motion.

This Court has carefully reviewed all of the submissions of the parties and for the reasons stated below, the defendant's instant motion pursuant to C.P.L. § 440.10 is hereby DENIED, in its entirety.

STATEMENT OF LAW

Pursuant to C.P.L. § 440.10, "At any time after entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, vacate such judgment upon the ground that: ... (c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known to the prosecutor or by the court to be false; or (d) Material evidence adduced by the People at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or... (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States..."

Notwithstanding the claims raised by the defendant in his motion, pursuant to C.P.L. § 440.10(2), "the court must deny a motion to vacate a judgment when: (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, on 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 take or perfect an appeal during the proscribed period or to his **unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him...**" (*emphasis added*). Moreover, C.P.L. § 440.10 motions are not "a substitute for direct appeal." *People v Cooks*, 67 NY2d 100, 103 (1986).

Pursuant to C.P.L. § 440.30(4) "Upon consideration of the merits of the motion, the court may deny it without conducting a hearing if:... (b) The motion is based upon the existence or

occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts... or;... (d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all other circumstances attending the case, there is no reasonable possibility that such allegation is true.”

In addition, C.P.L. § 440.30(4) mandates that “Upon consideration of the merits of the motion, the court may deny it without conducting a hearing if:... (b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts... or;... (d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all other circumstances attending the case, there is no reasonable possibility that such allegation is true.”

DEFENDANT’S CLAIM THAT HE WAS ARRESTED WITHOUT PROBABLE CAUSE

The defendant unjustifiably failed to raise his instant arguments in his direct appeal, despite being aptly positioned to do so at that time. In fact, the defendant raised other issues related to the admission of insufficient and improper evidence in his appeal, yet failed to address this particular claim of deficient credible evidence pertaining to probable cause. As such, pursuant to C.P.L. § 440.10(2)(c), defendant’s motion to vacate his judgment of conviction, based upon an unlawful arrest without Probable Cause is hereby DENIED.

However, if this Court were to consider the defendant’s contentions on the merits, the defendant’s motion still fails. The witness in question, _____ hereinafter: Witness _____), was an identified or known civilian informant. It is well established that informants whose identity is not anonymous are generally deemed to be credible informants. *See People v Devine*, 147 AD3d 1082, 1082 (2d Dept, 2017); *People v Parris*, 83 NY2d 342, 350 (1994). In addition, the statements of eyewitnesses to criminal conduct are sufficient to establish the existence of Probable Cause. *See People v Holmes*, 115 AD3d 1179, 1180-1181 (4th Dept, 2014), leave denied (*People v Holmes*, 23 NY3d 1038 [2014]). Moreover, based upon the record, Witness _____ statements, as presented at the pre-trial hearing and testimony at trial, satisfied scrutiny pursuant to *Spinelli v US*, 393 US 410 (1969) and *Aguilar v Texas*, 378 US 108 (1964). Nevertheless, this Court accords

great deference to the trier-of-fact's opportunity to view the witness, hear the testimony and observe the witness' demeanor in direct support of their credibility determination (*People v Mateo*, 2 NY3d 383, 410 [2004]) .

Defendant's claim regarding the hearing and trial court's failure to conduct a hearing pursuant to *People v Darden*, 34 NY2d 177 (1974) is misplaced and without merit, as the identity of Witness [redacted] was known. Likewise, defendant was not entitled to a competency hearing prior to said witness' testimony, as the record is devoid of evidence calling into question the witness's ability to understand the oath or to give an accurate account. See *People v Rensing*, 14 NY2d 210 (1964).

DEFENDANT'S CLAIM THAT WITNESSES PURJURED THEMSELVES

The defendant advances unsupported, baseless claims that witnesses [redacted] (hereinafter: Witness [redacted]) and [redacted] (hereinafter: Witness [redacted]), committed perjury when testifying against the defendant at trial, despite the People and Court's knowledge that perjury was being committed. This claim is also procedurally barred pursuant to C.P.L. § 440.10(2)(c), as the defendant unjustifiably failed to raise this issue on his direct appeal, and C.P.L. § 440.10(3). As such, defendant's motion to vacate his judgement of conviction based upon his unsupported claim of perjured testimony is DENIED.

Yet, if this claim were to be determined on the merits it also fails pursuant to C.P.L. § 440.30(4). Primarily, the defendant claims that for Witness [redacted] to receive the benefit of her cooperation agreement with the People, the defendant had to be convicted. However, the cooperation agreement plainly lists the terms of the agree and conviction of the defendant is not listed among them¹. In addition, the defendant's lacks standing to argue that Witness [redacted] right against self-incrimination was violated as a result of the government's compulsion of her testimony is also without merit, based upon the contents of the cooperation agreement and trial record. Moreover, defendant's claim that the lack of Witness [redacted] DNA on the murder weapon supports the defendant's spurious accusation of perjury is, at best, unsupported by competent evidence. Finally, the defendant argues inconsistencies in the testimony of Witness [redacted] testimony that plainly are not there.

¹ See People's Affirmation in Opposition to Motion to Vacate Judgement, dated March 31, 2021, Exhibit 3: Written Cooperation Agreement for [redacted], dated February 2, 2015.

Simply put, just because the defendant would like Witness _____ and Witness _____ testimony to be perjured testimony, his desire does not make it such. The defendant's baseless claim that the witnesses were part of some conspiracy to wrongfully convict the defendant is mere conjecture, without a scintilla of evidence in support and is directly contradicted by documentary evidence.

DEFENDANT'S CLAIM THAT THE PEOPLE FAILED TO DISCLOSE ROSARIO
AND BRADY MATERIAL

Again, the defendant attempts to advance additional arguments that are unsupported by the official record and are, in fact, contradicted by documentary evidence. The defendant claims that the People failed to disclose the prior recorded statements of _____ and said failure constituted a violation of the *Rosario* and *Brady Doctrines*. However, the Discovery Cover Sheet, dated January 21, 2015, signed by the assistant district attorney and the defendant's trial counsel, documents the service of a transcript of _____ audiotaped statement upon defense counsel². As such, defendant's claim of a *Rosario* and *Brady* violation is belied by the documentary evidence (C.P.L. § 440.30[4][d]) and the defendant's application on his basis is hereby DENIED.

People v Rosario, 9 NY2d 286 (1961) requires the People to serve upon the defense any prior recorded statement by a testifying witness that is material to the subject matter of that witness' testimony. Yet, as the hearing and trial record established, _____ did not testify at either proceeding, so assuming *arguendo* that the People did fail to serve _____ prior statement on the defense, the *Rosario Doctrine* would not have been violated.

Brady v Maryland, 373 US 83 (1963), requires the People to disclose to the defendant evidence which tends to exculpate the defendant. Again, even if _____ statements constituted *Brady* material, no violation occurred here due to the People's disclosure of the above-described statements on January 21, 2015.

² See People's Affirmation in Opposition to Motion to Vacate Judgement, dated March 31, 2021, Exhibit 1: Discovery Cover Sheet, dated January 21, 2015.

DEFENDANT'S CLAIM THAT DEFENDANT WAS DENIED COMPULSORY
PROCESS, TO WIT: THE TRIAL COURT FAILED TO ISSUE A SUBPOENA AD
TESTIFICANDUM FOR _____ OR TO ADMIT _____ RECORDED
STATEMENTS

The defendant next argues that the trial court abridged his right to compulsory process, in that the court refused to issue a subpoena for the appearance of _____ who was in federal custody at the time of the defendant's trial. This is also contradicted by the official court record. Specifically, the trial court remarked, in response to the defendant's application for a missing witness charge, "you could have subpoenaed him or asked me to sign a subpoena *ad testificandum* to bring him to court, to have him testify. In addition, the record is devoid of a request to introduce recorded statements as evidence during the trial, assuming a valid basis for such admission existed. As such, defendant's application to vacate his judgment of conviction on the claim that he was denied compulsory process or the admission of witness statements in the witness' absence is hereby DENIED.

DEFENDANT'S CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL FOR
COUNSEL'S FAILURE TO SUBPOENA _____

In addition, both the New York State and the United States Constitution provide for the right to effective assistance of counsel (US Const., 6th Amend.; NY Const., Art. 1, § 6; CPL § 440.10 [1] [h]). In evaluating a matter for ineffective assistance of counsel under the federal constitutional standard, a reviewing court must engage in a two-prong analysis. The court must first determine whether counsel's performance was deficient such that it "fell below an objective standard of reasonableness", and second, whether a defendant suffered actual prejudice as a result of counsel's deficiency such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland v Washington*, 466 US 668, 688-694 [1984]; see *People v Stultz*, 2 NY3d 277, 283 [2004]).

New York constitutional law applies the same standard as is provided in the first prong of *Strickland* (*People v Turner*, 5 NY3d 476, 480 [2005]; *People v Baldi*, 54 NY2d 137 [1981]). However, New York courts have interpreted "meaningful representation" to include a prejudice component that "focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Ozuma*, 7 NY3d 913, 915 [2006], quoting *People v Caban*, 5 NY3d 143, 156 [2005]). The applicable standard for ineffective assistance of counsel in New

York is whether, under the totality of the circumstances as they existed at the time of the representation, counsel provided meaningful representation (*see Caban*, 5 NY3d at 152; *Stultz*, 2 NY3d at 283-4 [2004]). *See also People v Gross*, 28 NY3d 689 (2016) (evaluating the circumstances of a particular case, when viewed in totality, as of the time of the representation, the attorney provided meaningful representation).

Reviewing courts must presume that counsel's representation of a client was professionally reasonable and must not conflate ineffective assistance with losing trial stratagem. *People v Baldi*, 54 NY2d 137, 146 (1981). Therefore, "it is the defendant's burden to demonstrate the absence of strategic or other legitimate explanations for alleged shortcomings" *People v Mendoza*, 33 NY3d 414, 418 (2019). *See also Kimmelman v Morrison*, 477 US 365 (1986) (the burden is on the defendant to prove counsel's representation was unreasonable under prevailing professional norms and that counsel's action was not a failed trial strategy).

Said standards were simply not satisfied by the defendant in his moving papers, as such the defendant's claim is without merit. The trial record illustrates counsel's strategic decision to request a missing witness charge in regard to non-appearance as opposed to seeking a judicial Order to compel the witness' appearance at trial.

DEFENDANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE

C.P.L. § 440.10(1)(g) provides, *inter alia*, that a court may vacate a defendant's judgment of conviction upon the ground that "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant." The defendant has the burden of proving, by a preponderance of the evidence standard, every fact essential to support the motion (*see C.P.L. 440.30(6); People v Cain*, 96 AD3d 1072 [2012]; *People v Tankleff*, 49 Ad3d, 160, 179-80 [2007]), and the court must make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial (*see Cain*, at 1073; *Tankleff*, at 178-81). Moreover, the statute requires that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence (*see C.P.L. § 440.10(1)(g); People v Jimenez*, 46 Misc3d 1220(A) (Sup. Ct. Bronx Co. 2015).

Newly discovered evidence must satisfy each of the below listed elements to warrant a new trial: (1) it must be of such character as will probably change the result or verdict, if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and (6) it must not merely impeach or contradict the former evidence. *See People v Salemi*, 309 NY 208, 216 (1955), *cert. den.*, *Salemi v State of New York*, 350 US 950 (1956). In adjudicating a claim of newly discovered evidence, a court “should only construe the core elements of the statute as strict legal requirements.” *People v Hargrove*, 162 AD3d 25, 59 (2d Dept 2018).

This Court finds, that based upon the materials presented in the defendant’s instant motion to vacate his judgment of conviction, the defendant simply has failed to satisfy his burden. As such defendant’s application to vacate his judgment of conviction on the basis of newly discovered evidence is hereby DENIED.

DEFENDANT’S CLAIM OF ACTUAL INNOCENCE

The defendant argues vacature of his judgment of conviction on the basis of actual innocence. Actual innocence “means factual innocence, not mere legal insufficiency of evidence of guilt.” *People v Hamilton*, 115 AD3d 12, 23 (2d Dep’t 2014). This requires a showing, by the clear and convincing evidence standard, that the defendant is in-fact innocent. *See People v Griffin*, 120 AD3d 1257 (2d Dept 2014) (court providently exercised its discretion in rejecting, without hearing, C.P.L. § 440.10(1)(h) claim of actual innocence, where defendant “failed to make the requisite prima facie showing”). The defendant does not satisfy that standard here. The defendant relies on an argument that the evidence presented in the People’s case-in-chief was simply not corroborated, however, this too is belied by the record and lacks merit.

Defendant’s motion to vacate his judgement of conviction based upon actual innocence is hereby DENIED.

DEFENDANT’S CLAIM OF A CRAWFORD VIOLATION

The defendant’s argument that the admission of testimony of a DNA expert witness that did not personally conduct the DNA testing or review the raw data violated his right to confrontation pursuant to *Crawford v Washington*, 541 US 36 (2004), is barred as a matter of

procedural law, as well as on the merits. *See* C.P.L. § 440.10(2)(a); *see also* *People v Jones*, 179 AD3d 948, 949-950 (2d Dept 2020).

DEFENDANT'S CLAIM OF IMPROPERLY ADMITTED GANG AFFILIATION

Similarly to defendant's argument alleging the improper admission of DNA evidence, the defendant claims that evidence concerning his gang affiliation was improperly admitted by the trial court. However, this too is barred as a matter of procedural law, as well as on the merits. *See* C.P.L. § 440.10(2)(a); *see also* *People v Jones*, 179 AD3d 948, 950 (2d Dept 2020).

DEFENDANT'S CLAIM THAT DEFENDANT WAS DENIED THE RIGHT TO PERFECT HIS DIRECT APPEAL


The defendant's argument that he was deprived the right to perfect his appeal is also devoid of merit. The defendant's appeal was in fact perfected and argued before the Appellate Division, Second Department. Said appeal was decided on January 22, 2020. As such, the defendant's application to vacate his judgment of conviction on the basis of deprivation of his right to perfect an appeal is hereby DENIED. *See* *People v Jones*, 179 AD3d 948, 950 (2d Dept 2020); *see also* C.P.L. 440.30(4)(a), (c), (d).

DEFENDANT'S CLAIM THAT THE DECEDENT COULD NOT HAVE GIVEN A DYING DECLARATION

Defendant's argument that the decedent could not have made a dying declaration is without of merit, as there is absolutely no evidence in the record that would even suggest the decedent made a dying declaration, rendering this contention merely academic. As no such statement was introduced, the defendant's motion to vacate his judgement of conviction on this basis is hereby DENIED.

Based on the foregoing, the defendant's motion to set aside the defendant's judgment of conviction is hereby DENIED in its entirety.

This constitutes the decision, opinion and Order of this Court (C.P.L. § 440.30 [7]).


Vincent M. Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

Dated: June 21, 2021
Brooklyn, New York

