

People v Ellis

2021 NY Slip Op 33670(U)

July 22, 2021

Supreme Court, Nassau County

Docket Number: Ind. No. 77625N-91

Judge: Patricia A. Harrington

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SUPREME COURT - CRIMINAL TERM
NASSAU COUNTY - STATE OF NEW YORK

Trial/IAS:	Part 38
Ind. No.:	77625N-91
Motion No.:	C-004

Present: Honorable Patricia A. Harrington

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

-against-

Madeline Singas
District Attorney, Nassau County
By: Barbara Kornblau, Esq.
Assistant District Attorney

CHRISTOPHER ELLIS,

Ilann Maazel, Esq.
Scout Katovich, Esq.
Counsel for Defendant
Emery Celli Brinckerhoff Abady Ward
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600 Fifth Avenue, 10th Floor
New York, NY 10020

Defendant.

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The following papers were read in connection with this motion:

- 1. Notice of Amended Motion to Vacate Conviction, Affirmation in Support, Memorandum of Law, and Exhibits;**
- 2. Affirmation and Memorandum of Law in Opposition, and Exhibits;**
- 3. Reply Affirmation and Memorandum of Law and Exhibits.**

Defendant moves this Court pursuant to Criminal Procedure Law section 440 for an order vacating his judgment of conviction. The District Attorney opposes portions of Defendant's motion seeking vacatur of judgment and consents to a hearing with respect to various aspects of Defendant's motion.

Factual and Legal Background

On December 2, 1992, defendant was convicted after trial of one count of murder in the second degree, two counts of attempted robbery in the first degree, two counts of criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree, and one count of criminal possession of stolen property in the third degree.

On January 13, 1993, defendant was sentenced to concurrent terms of imprisonment of twenty-five years to life on the murder count, five to fifteen years on one of the two attempted robbery counts, five to fifteen years on the counts of criminal possession of a weapon in the second degree, two and one-third to seven years on the count of criminal possession of stolen property. Defendant was sentenced to an additional sentence of five to fifteen years on the second count of attempted robbery to run consecutively to the sentence on the murder count (Wexner, J.).

The charges related to two incidents – a murder outside an Arby's in Hempstead on September 29, 1990 and an attempted robbery in Freeport on February 15, 1991. Defendant's trial was severed from the codefendants for the Arby's murder. Defendant's cases related to the Arby's murder and Freeport robbery were tried together.

Defendant was arrested with codefendants David Liles and Gary Lawrence on February 15, 1991, for the Freeport attempted robbery. While in custody on that case, detectives in the Arby's murder investigation questioned him. After a waiver of defendant's *Miranda* rights, he gave a written statement – as did Liles and Lawrence – confessing to his involvement in the Arby's murder.

With regard to the murder, evidence presented at trial established that on September 29, 1990, at approximately 3:30 a.m., defendant and two codefendants shot and killed twenty-five-year-old Joseph Healy outside an Arby's in Hempstead, New York. Healy was with friends, Stephanie Scheele, Kristen Baeker, David Shephard, and Timothy Mahoney, when they ordered food at the Arby's drive-through window. Then they sat down nearby to eat. As they ate, the group was approached by two men, one who drew a gun, pointed it at the group and told them to stand up. The other man said words to the effect of "just do it," and the man with the gun fired a shot, hitting and killing Healy.

After defendant's arrest for the Freeport attempted robbery, Scheele identified defendant in a line-up as the second man, the one who said "just do it." Baecker identified Liles in the line-up as the shooter. Shephard identified Liles as the shooter. Mahoney identified Liles as the shooter and Lawrence as the other individual present. Neither Shephard, Baecker, nor Mahoney identified defendant in the line-up.

Cynthia Louissaint was nearby when the shooting occurred. She provided a statement to the police as to what she observed. She gave a description of the two suspects she observed near the Arby's at the time of the shooting. She failed to identify defendant or either codefendant in photographs as one of the individuals she observed near the scene of the murder. She did not testify at the trial.

The Court held pre-trial suppression hearings, whereupon the Court found the identifications and confessions were admissible at the trial.

During the hearing, Detective Wells testified. He testified that Louissaint did not exclude anyone during the investigation, and the prosecutor represented that none of the witnesses ever excluded the defendant when they viewed the photo arrays or the line-up.

Post-Conviction Procedural History

Defendant appealed from his conviction, arguing that: 1) the trial court improperly denied his motion to sever the charges related to the Freeport incident from those related to the Arby's incident; 2) his statements to the police should have been suppressed as involuntarily made, and he was deprived of his right to counsel; 3) the line-up was unduly suggestive; 4) the evidence was legally insufficient to establish his guilt of the Arby's murder; and 5) the sentence was harsh and excessive.

On December 11, 1995, the defendant's conviction was affirmed. The court rejected defendant's claims, finding: his statements were made voluntarily, he was not deprived of food or sleep, and there was no calculated delay of arraignment depriving him of his right to counsel; the lineup was not unduly suggestive; the evidence was legally sufficient to establish defendant's guilt and the verdict was not against the weight of the evidence; and the sentence was not excessive. *People v. Ellis*, 222 A.D.2d 519 (2nd Dept. 1995). On February 13, 1996, defendant's application for leave to appeal to the Court of Appeals was denied. *People v. Ellis*, 87 N.Y.2d 972 (1996)

On or about October 23, 2019, defendant filed his first motion to vacate his judgment of conviction. This motion was based on statements made by Cynthia Louissaint in a 2018 affidavit, wherein she stated that at the time of the murder investigation she affirmatively excluded defendant as a perpetrator of the crime, and this exclusion evidence was never turned over to the defense as required under *Brady v. Maryland*, 373 U.S. 83 (1963). As a result of claims made in the motion, the Nassau District Attorney's Conviction Integrity Division (CID) conducted integrity reviews of defendant's conviction and those of his codefendants. In furtherance of this investigation, CID uncovered various memo pad notes made by Detective Wells pertaining to the Healy murder investigation that had not been turned over to defendant prior to his trial. These notes were then turned over to the defense. Defendant posed questions related to those disclosures, and written responses were provided. Thereafter, on October 30, 2020, defense counsel filed an amended motion to vacate defendant's conviction.

Defendant now moves in his amended motion pursuant to Criminal Procedure Law sections 440.10(1)(h) and 440.10(1)(g). First, defendant moves pursuant to CPL §440.10(1)(h) arguing that vacatur is required as the judgment of conviction was "obtained in violation of a right of the defendant under the constitution..." based on the *Brady* violations. Those *Brady* violations relate to the notes of Detective Wells and recently made statements by Cynthia Louissaint. Defendant also moves pursuant to CPL §440.10(1)(g) arguing that the notes of Detective Wells and the statements made by Louissaint in her affidavit dated May 16, 2018 consist of newly discovered evidence that require vacatur of the conviction. Next, defendant claims ineffective assistance of counsel in that had trial counsel known about the information contained in Louissaint's affidavit, but failed to call her as a witness at trial, his representation was ineffective. Finally, defendant argues he is actually innocent of the murder, thus requiring vacatur. Alternatively, defendant argues that should the Court deny summary vacatur, defendant should be afforded a hearing to address the issues raised.

In its response, the People concede that the memo pad notes taken by Detective Wells should have been turned over to the defense prior to trial, but were not. The People essentially concede the facts as presented by the defense. But, the People argue that based on this error, the defendant is entitled to a hearing, not summary vacatur. As to Louissaint's statements, the People contest the validity of those statements but concede they raise issues of fact to be resolved at a hearing. As to the claims with respect to ineffective assistance of counsel and actual innocence, the People dispute the merits of those claims, but concede there are factual issues that should be addressed at a hearing.

The central question here, therefore, is whether the defendant is entitled to a hearing or summary vacatur of the judgment of conviction.

Brady Material

Detective Wells's Notes

Mark Jones and James Lewis

The memo pad notes and conversations with CID indicate that on October 17, 1990, Detective Wells was advised by Hempstead Police Department that Mark D. Jones was at the police department and had information about the Healy murder. Detective Wells interviewed Mark Jones who stated that his friend of 15 years, James Lewis, told Jones that "he [and] another person, his 'Homeboy' were involved in the Arby's stick up. Lewis said his homeboy shot the white guy who was with the two white girls because the guy would not give up the money." Lewis said this after he and Jones bought crack and heroin and got high. The notes also indicate "Jones lying" and "polygraph administered." And, the notes reference that a photo of James Lewis be shown to the witnesses.

The People assert that in another file within the NCPD records, there was a list of individuals whose photographs were shown to the witnesses and "Jimmy Lewis" was on that list. Based on those notes, the People speculate that Lewis's photo was shown to the witnesses. There is no support in the record for this assertion.

Peter Acerenza

Peter Acerenza was arrested on September 28, 1990. He had worked at Arby's prior to that date and had threatened Arby's manager Joann Romero, that he would shoot her if she did not leave the Arby's door open after closing the night of September 27, 1990. He also said he would kill Romero if she told the police. Romero alerted police, and Acerenza was arrested inside Arby's on September 28, 1990 at 3:16 a.m. He was released that same day after his arraignment.

On December 12, 1990, Jeffrey Abney called NCPD stating he had information on the Healy murder case. The notes say, "Peter got two guys to kill the girl and they shot the Hofstra coach" and "Peter also is involved with guns and drugs." Detectives interviewed Abney, who stated that Larry Castillo, Acerenza's brother-in-law, told Abney that Acerenza was "bugging out" about the Arby's murder. Acerenza told Castillo that he had been set up by the female manager at Arbys' and was arrested for burglary.

On February 17, 1991, Detective Wells interviewed Larry Castillo. He stated, after the Arby's murder, Castillo was with Acerenza at Acerenza's mother's house. Acerenza was angry about being set up for the Arby's burglary, and his mother was telling him to stay away from Arby's. She said if any problems occur there, Acerenza will be blamed. The next day, they all heard about the shooting. Acerenza was reportedly upset that he would be blamed, but relieved because he had nothing to do with it.

The notes indicate that Abney passed a polygraph test. NCPD conducted surveillance of Acerenza, and tried to speak with him. He refused to speak with Detective Wells.

Pizza Hut Case

Detective Wells notes indicate, “Shot white guy in chest because he gave him some shit - he didn’t robb [*sic*] him” and “He was going to rob Arby’s does stick ups late at night.” There is reference to a connection between the person who provided this information and robbery of a Pizza Hut in Hempstead, and speculation of a detective that the person involved in the Pizza Hut robbery also shot Healy. Fingerprints were found at the Pizza Hut robbery, and an unknown person – whose physical description was in the notes – was arrested in that case. The lead detective in that case is deceased and it is unknown what, if any, further investigation was done to connect the two crimes.

Anthony Foreman

Hempstead Police Office John O’Leary advised Detective Wells that a confidential informant, Clinton Lewis, had information about the Healy murder. Lewis told Detective Wells that Anthony Foreman said a guy named Anton asked Foreman to do a stickup of Arbys. The notes also include Foreman’s address, phone number and photograph. There is no indication as to whether Foreman was interviewed, or as to whether any further investigation was done related to this information.

Black Cloud/Snooze

Detective Wells’s notes indicate he was advised by NYC Housing Detective Eddie Henson about “Black Cloud,” who may have information about the Arby’s murder and that Ronald Crain advised that someone named “Snooze” overheard a conversation among five black men about “doing a white guy in Hempstead.” There is no indication as to whether any further investigation was done related to this information.

Cynthia Louissaint’s Affidavit

Upon investigation of defendant’s conviction, defense counsel interviewed Louissaint. She provided to the defense an affidavit dated May 16, 2018 (“Louissaint Affidavit”) wherein she stated that on September 29, 1990, she resided near the scene of the murder. Just prior to the murder, at approximately 3:00 a.m., she was walking on Duncan Road near Arby’s to use the Arby’s pay phone. As she and her friend approached Arby’s, she observed a small grey car that was parked nearby. She saw two male blacks in the vehicle. The driver was in his mid-twenties, with a round face, navy blue shirt and dark colored baseball cap. The passenger was bent over so she did not see his face, but observed that he was wearing a dark baseball cap with bushy ‘afro-style’ hair protruding from it, a stocky build and a white shirt. She used the pay phone and then walked back toward Duncan Road. At that time, she saw a man who she believed was the passenger of the grey car on the corner of Duncan Road and Hempstead Turnpike near the group of “white college-aged kids.” This conclusion was based on his clothing, build, and hair protruding from the baseball cap. Moments later, Louissaint heard a gunshot, screaming and commotion near the Arby’s drive-through. Louissaint affirms that she saw the passenger of the grey vehicle run down Duncan Road toward the grey car. When she looked again in that direction, the car was gone.

Louissaint asserts that her recollection of that night is clear. Further, she states that she conveyed all of this information to the detectives who investigated the case and who interviewed her numerous times.

Louissaint also asserts that Detective Wells showed her pictures of Gary Lawrence, who she knew from school, and defendant, whose picture she saw in the newspaper after his arrest. Louissaint states that she told Detective Wells that defendant was not either of the two individuals she observed in the grey car or at the scene. Louissaint states that she also told the prosecutor, who is now deceased, that neither of the three men arrested for the murder were among the two males she saw at the scene.

Louissaint did not testify at the trial and was never contacted by defendant's attorney.

At the time of the Healy murder investigation, Louissaint was disclosed as a witness who was unable to identify the defendant in a photo array. The defense was not informed that Louissaint excluded the defendant, and the People assert that she did not in fact do so.

Defendant presents an affidavit of trial counsel that he did not recall being notified that Louissaint excluded defendant, and that had that occurred, he would have interviewed her and likely called her to testify. Counsel notes that at the pretrial suppression hearing the People represented that no one excluded defendant as one of the perpetrators.

Brady Analysis

A violation of defendant's due process rights on a *Brady* claim occurs when a defendant demonstrates: that the withheld evidence is favorable to the defendant in that it is exculpatory or impeaching in nature; the evidence was suppressed by the prosecution; and prejudice arose because the suppressed evidence was material. *People v. Rong He*, 34 N.Y.3d 956 (2019) (quoting *People v. Giuca*, 33 N.Y.3d 462, 473 (2019)). As to materiality, where there has been a general request for exculpatory evidence, the undisclosed evidence is material in that "there is a reasonable probability" that had it been disclosed, the result of the proceeding would have been different. *People v. Robinson*, 133 A.D.2d 859, 860 (2nd Dept. 1987) (quoting *People v. Chin*, 67 N.Y.2d 22, 33 (1986)). See also *People v. Ulett*, 33 N.Y. 3d 512 (2019); *People v. Wagstaffe*, 120 A.D.3d 1361 (2014). Here, there was no specific request for the information. Notably, there could be no such specific request because defendant was not aware of such material. Nevertheless, this Court will apply the "reasonable probability" standard.

In addressing materiality, the defendant need not establish that the defendant would more likely than not have received a different verdict with the evidence, but "whether in its absence [defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." This means that the defendant must show that the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *People v. Ultett*, 33 N.Y.3d 512

(2019) (quoting *Kyles v. Whitley*, 514 US 419, 434 (1995) citing *US v. Bagley*, 473 US 667 (1985)). As practically applied, a court must “evaluate the quality of the People’s proof against the suppressed evidence...” when making this determination. *Id.*

The first two prongs of a *Brady* violation analysis are not disputed here. The third prong – that of materiality – is the question to be addressed herein.

Here, the suppressed evidence, Detective Wells’s memo pad notes, consisted of information received from other law enforcement sources regarding potential suspects, interviews, and potential leads in the case. Defendant argues that had these notes been turned over in a timely manner, they would have: resulted in numerous avenues for further investigation, implicated other perpetrators and potential suspects, and provided other material witnesses. The material would have presented alternative theories to be developed and the withholding deprived defendant of opportunity to identify and present witnesses at trial who could have aided in his defense. Thus, defendant was deprived of meaningful access to favorable witnesses and informed decision making as to trial strategy. Further, those documents would have been used to impeach the People’s witnesses and provided a basis to argue that the police failed to conduct a thorough investigation.

When evaluated in the light of the weakness of the People’s case, defendant argues, the evidence was material and would have changed the outcome of the case. Defendant claims Scheele’s identification was weak in that: she was drinking on the night of incident; was noticeably traumatized during the line-up; failed to identify defendant in the photo array; and only identified the defendant after hearing his voice and failing to identify him in a photo shortly before the line-up. Defendant also argues that defendant’s confession – which he recanted shortly thereafter – was given involuntarily after over 18 hours in custody without food, drink, or sleep and under a coercive setting.

In support of his claims contesting the strength of the People’s case as a factor to be evaluated in the *Brady* analysis (as well as defendant’s actual innocence claim), defendant presents documentation from Dr. Brian Cutler. Dr. Cutler asserts that the conditions under which defendant’s confession was obtained renders that confession unreliable and the circumstances under which Scheele identified the defendant render that identification unreliable. Defendant argues that the conviction rests almost exclusively on this unreliable evidence.

In response, the People concede that the detective’s notes qualify as exculpatory under *Brady* and do not contest the substance of the notes. The People, however, argue that there is no *Brady* violation because the notes are not material in that had they been disclosed, the outcome of the trial would not have been different.

With respect to Jones’s statements, the People argue: his statements were given after he and Lewis ingested drugs; he failed a polygraph test; Jones’s testimony would have been inadmissible; and even if admissible, the jury would not have credited his testimony. The People also speculate that

Jones was motivated by a desire to collect a reward and that witnesses were shown photographs of Lewis.

With respect to Acerenza's notes, the People argue: the statement that "Peter got two guys to kill the girl and they shot the Hofstra coach" was a working theory of Detective Wells; Acerenza was concerned about the murder not because he was involved, but because he did not want to be falsely accused; and the shooting was not accidental, but a targeted robbery. Therefore, the People argue, there is little chance that this information would have created reasonable doubt.

With regard to the Pizza Hut robbery connection, the People assert that the notes in this respect were of little to no probative value as there were no similarities or links between the Pizza Hut robbery and the Healy murder.

As to the notes relative to Anthony Forman, Snooze, and Black Cloud, the People claim that this information consists of unreliable multiple-layered hearsay and would not have resulted in any useful information for the defense.

In sum, the People argue that the information in Detective Wells's notes is speculative, vague, unverifiable and largely incredible. Therefore, the People assert that even had all the entries been turned over to the defense, there is no reasonable probability that the result of the proceeding would have been different. In this regard, the People stress that the evidence presented at the trial establishing defendant's guilt was strong, including an eyewitness identification and defendant's confession (and point to the codefendants statements inculcating themselves and the defendant - which were not admitted at defendant's trial). As to defendant's argument that the information in the notes establish that the police failed to conduct a thorough investigation and follow-up on numerous leads and avenues for investigation, the People assert that the notes indicate that the police sought out, received and investigated all leads, regardless as how lacking in detail or speculative they may have been.

Accordingly, the People argue that Detective Wells's notes create issues of fact for a hearing. The People do not concede the validity of defendant's factual allegations and argues his claims are not "conclusively substantiated by unquestionable documentary proof." Therefore, defendant is not entitled to summary vacatur of his conviction. CPL §440.30(3)(c). The People assert that because the claims are not subject to procedural bars and are not subject to summary denial (*See* CPL § 440.30(4)), defendant has met his burden of establishing sufficient issues of fact and credibility to warrant a hearing. At the hearing, the Court would address the credibility of the content of the notes and if they create a reasonable probability that the outcome of defendant's trial would have been different.

When evaluating materiality, no hearing is necessary where the Court may make such a determination from the record, and there is no factual issue to be litigated. *See, e.g., People v. Negron*, 26 N.Y.3d 262 (2015); *People v. Rong He*, 34 N.Y.3d 956 (2019). *Cf People v. Baxley*, 84 N.Y.2d 208 (1994).

Here, Detective Wells's notes are not in dispute. The People concede they exist in their present form as now disclosed. And, the People concede that these notes, which are exculpatory in nature, were not turned over to the defendant prior to trial. The People simply argue about the weight that the substance of these notes should be given in light of the evidence of defendant's guilt. Hence, there is no material factual issue to be litigated at a hearing with respect to Detective Wells's notes. Therefore, the Court may evaluate Detective Wells's notes in light of the complete trial record and make a determination as to materiality. *See id.*

The memo pad notes indicate at least two identifiable people who claimed to have committed the murder. Additionally, the notes provided identifying information of various individuals who heard these confessions. Even if not admissible themselves, the notes would have provided leads for additional admissible evidence and potential witnesses. *See Ulett*, 33 N.Y.3d at 521; *People v. Robinson*, 133 A.D.2d 859, 860-61 (2nd Dept. 1987); *Rong He*, 34 N.Y.3d 956. Consequently, the information contained in the notes would have provided numerous leads for the defendant to develop additional and alternative theories of the case. *See People v McGhee*, 180 A.D.3d 26, (1st Dept. 2019); *Ulett*, 33 N.Y.3d 512. Those investigative leads contradict the People's theory of the case and in some cases identify possible perpetrators. *See Rong He*, 34 N.Y.3d 956. Moreover, due to the volume of this material and the number of potential witnesses, disclosure would likely have led to significant additional exculpatory or impeaching evidence. *See Ulett*, 33 N.Y.3d at 519-521.

It is clear that the withholding of this material prevented defendant from being able to develop additional facts that could have aided his defense by establishing alternative theories to support his defense. *See McGhee*, 180 A.D.3d at 33; *Rong He*, 34 N.Y.3d 956. Hence, in the absence of all the notes and potential investigative leads, defendant was deprived of the opportunity to make an informed decision about his best trial strategy. *See Robinson*, 133 A.D.2d 859.

Additionally, the favorable evidence could have been used to impeach the detectives regarding investigative steps taken or ignored. While some of the leads were addressed in some fashion and witnesses were interviewed, in other cases, there is no indication of any follow-up or investigative steps.

In contrast, the evidence establishing defendant's guilt consisted primarily of one eye witness's identification of the defendant in a line-up months after the incident and shortly after seeing a photograph of him, along with defendant's confession. As to the identification, Scheele, the only witness who identified defendant at the scene, was shown photographs and failed to identify anyone from those photographs. After defendant was arrested on the Freeport case approximately five months after the murder, detectives showed Scheele a photograph of the defendant. She did not identify him from the photograph. Later that day, a line-up was conducted with the defendant in it. At the line-up, Scheele asked for defendant to step forward and say, "just do it." After defendant said the phrase, Scheele identified him as the man who was with the man who shot Healy. None of the other witnesses identified defendant in the line-up. As to defendant's confession, it was detailed and has been upheld repeatedly by the trial court and appellate court as voluntarily given.

In assessing the trial evidence as a whole, however, it was not overwhelming or strong. There was no forensic or physical evidence tying defendant to the crime, and none of the other witnesses present at the time of the shooting identified defendant as the one with the shooter or at the scene.

Hence, in reviewing the voluminous documentation and potential leads contained in the memo pad notes, and weighing that against the evidence presented at trial, this Court concludes that had Detective Wells's notes been turned over to the defense in a timely manner, there is a reasonable probability that the outcome would have been different. *See Ulett*, 33 N.Y.3d 512; *Negron*, 26 N.Y.3d 262; *Robinson*, 133 A.D.2d 859. Further, in consideration of the volume of the material, even if one or two of the entries failed to uncover any probative evidence to be introduced at trial, the material must be considered collectively. *See People v. Jimenez*, 142, A.D.3d 149, 161 (citing *Kyles v Whitley*, 514 U.S. 419, 436 (1995)). When viewing the material collectively, the failure to disclose it severely erodes the public's sense of justice in this case. In short, the cumulative effect of the suppression of this material would have put the People's case in such a different light as to undermine confidence in the verdict. *See Ulett*, 33 N.Y.3d 512.

Thus, defendant is entitled to a new trial. *See* CPL § 440.10(1)(h). Defendant's motion to vacate defendant's judgment of conviction and sentence based on the *Brady* violation with respect to Detective Wells's notes is granted and a new trial is ordered.

An equally valid basis for vacatur based on the memo pad notes is that defendant alleges a ground constituting legal basis for the motion, such ground is supported by sworn allegations of fact, and the sworn allegations of fact essential to support the motion are conceded by the People to be true and are conclusively substantiated by unquestionable documentary proof. CPL § 440.30(3)(c); *cf People v. Baxley*, 84 N.Y.2d 208 (1994).

With respect to Louissaint's Affidavit, defendant argues that the statements contained in Louissaint's affidavit are *Brady* material that should have been disclosed to the defense prior to trial. Further, defendant claims that Louissaint's exclusion of defendant at the scene, taken along with the weak evidence in the People's case, would have resulted in a different outcome in the case, had she been called as a witness. Therefore, defendant argues vacatur is required.

The People contest the veracity of the statements contained in the affidavit. Specifically, the People highlight the length of time it has taken for Louissaint to come forward with these claims, Detective Wells's statements that Louissaint never affirmatively said defendant was not at the scene, Louissaint had been less than forthcoming with police during the murder investigation and with the CID prosecutor, and these claims are belied by the record. The People also argue that even if Louissaint's claims that she did not see defendant at the scene were true, this evidence would have been of little probative value due to her vantage point and the other evidence admitted at trial. And, even if she had conveyed this exclusion evidence to law enforcement, this evidence if disclosed is not material.

The People concede, however, that the affidavit raises issues of fact to warrant a hearing on the matter to determine if Louissaint affirmatively told detectives that defendant was not one of the perpetrators, if this information was not disclosed to the defense, and if so, if it was material evidence.

In light of this Court's findings with regard to Detective Wells's note, the Court need not make a determination as to Louissaint's affidavit and the *Brady* claim. This evidence may be addressed at the new trial.

Ineffective Assistance of Counsel

Defendant asserts that had the information contained in Louissaint's affidavit been disclosed to defense counsel then his failure to interview Louissaint or call her as a witness would render his performance ineffective.

The People contest the credibility of the statements contained in the affidavit, but concede that the defendant has raised issues of fact as to credibility to warrant a hearing as to whether counsel's performance has met the minimum requirements for effective representation.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-prong test for establishing when an attorney renders ineffective assistance of counsel: (1) the representation was deficient and (2) that defendant was prejudiced by the deficient performance in that "there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Benevento*, 91 N.Y.2d 708 (1998). In *People v. Baldi*, 54 N.Y.2d 137, 147 (1981), the New York Court of Appeals held that "[s]o long as the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."

In light of the foregoing, the Court need not make a determination as to this claim.

Actual Innocence

Defendant argues that the conviction should be vacated because defendant is actually innocent of the murder. See CPL § 440.10(1)(h). A court may vacate a judgment of conviction where a defendant establishes by clear and convincing evidence that he is innocent of the crime(s) charged. *People v. Hamilton*, 115 A.D.3d 12 (2nd Dept. 2014).

Defendant claims that his innocence has been established by clear and convincing evidence in that: the information contained in Louissaint's affidavit – newly discovered evidence – exculpates him; Scheele's identification of defendant should be given no weight due to her intoxication and a

suggestive identification procedure; and defendant's confession was coerced, false, and should be disregarded.

The People respond that its case was strong and Louissaint's statements are unreliable. Therefore, the People assert that the defendant would be unable to prove his innocence by clear and convincing evidence. The People, however, concede that the Louissaint affidavit establishes enough merit to warrant a hearing to explore the innocence claim.

In light of this Court's findings with respect to the *Brady* violations involving Detective Wells's notes, the Court need not reach this claim. This claim and what weight the evidence should be given will be addressed at a new trial.

Newly Discovered Evidence

Defendant asserts that CPL § 440.10(1)(g) is an equally viable ground for vacatur in that the detective's notes that were not disclosed to the defense and Louissaint's statements contained in her affidavit are newly discovered evidence that warrant vacatur of the conviction. *See* CPL § 440.10(1)(g); *People v. Singh*, 111 A.D.3d 767 (2nd Dept. 2013).

A Court may grant a motion to vacate a conviction based on newly discovered evidence where the new evidence: 1) "has been discovered since the entry of a judgment based upon a verdict of guilty after trial;" 2) "could not have been produced by the defendant at the trial even with due diligence on his part;" and 3) is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." CPL § 440.10(1)(g).

With regard to Detective Wells's notes, defendant asserts that the detective's notes and testimony of individuals referenced therein would have been admissible as business records and relevant to show: alternative theories of the case, failure of the police to adequately investigate, and guilt of parties other than the defendant.

The People argue that the notes contain vague unsupported allegations, none of which would be admissible evidence at trial and therefore cannot support a newly discovered evidence claim. Therefore, it is not probable that there would have been a different verdict and summary vacatur is not warranted. The People concede that the notes raise issues of fact and credibility to warrant a hearing. Thus, at a hearing the defendant would have to prove by a preponderance of the evidence – and with admissible evidence – that the undisclosed notes are of such character to create a probability that had such evidence been received at trial, the verdict would have been more favorable to the defendant.

As to Louissaint's statements, the People argue that the affidavit could have been obtained years ago, particularly in light of the fact that she provided a similar statement for a co-defendant years prior. Louissaint was known to the defense as a witness and therefore could have been produced at defendant's trial. The People also point to Louissaint's lack of credibility in coming forward now, inconsistencies between her claims and the trial record.

In light of the foregoing findings with regard to the *Brady* violation, the Court need not make a determination upon this ground.


Accordingly, defendant's motion is granted, the conviction is vacated, and a new trial ordered.

This shall constitute the Decision and Order of this Court.

So Ordered.

Dated: July 22, 2021
Mineola, New York

ENTER,


HON. PATRICIA A. HARRINGTON
JCC, AJSC

