SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9
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THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER
Ind No.: 2234/91

-against-

MICHAEL BROWNLEE,
Defendant.
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RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On January 31, 1990, at approximately 12:30 p.m., defendant shot and killed George Egerton, Jr. on the corner of Van Sicklen Avenue and Pitkin Avenue in Brooklyn, New York. Reidus Sabb, an individual who had know the defendant, at first heard a gunshot and turned to see defendant standing in front of Egerton, who was pleading for his life with his hands in the air. Sabb shouted at to defendant not to kill Egerton. Defendant turned, cursed at Sabb, and shot Egerton in the head. Defendant fled the scene. Sabb called 911, waited until the police and ambulance arrived and then left. The next day she called the police to inform them of what she had witnessed. George Egerton died six days later as a result of his gun shot wounds.

Following three trials, defendant was convicted of Murder in the Second Degree.[1] On June 15, 1995, defendant was sentenced to an indeterminate term of imprisonment of twenty years to life (Gerges J., at third trial and sentence).

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[1]Defendant's first trial resulted in a judgment of conviction which was reversed by the Second Department due to the trial court's error in giving a missing witness charge concerning a potential defense witness. People v Brownlee, 199 AD2d 520 (2d Dept 1993). Defendant's second trial resulted in a mistrial based on a juror informing the trial court that they could not render a verdict.

Defendant filed an appeal of his conviction with the Second Department in June 1998, claiming that the evidence was insufficient to support his conviction, that the prosecuior made inappropriate remarks, and that the sentence was unduly harsh. Defendant's judgment of conviction was affirmed by the Second Department. People v Brownlee, 256 AD3d 353 (2d Dept 1998).

Defendant has also sought post-conviction relief pursuant to CPL §440.10. Defendant's first motion, dated March 14, 1996 sought to vacate the judgment of conviction on the grounds that defense counsel was ineffective because he did not have sufficient time to prepare for the case. Defendant's motion was denied by decision and order dated June 24, 1996.

Defendant filed a second motion to vacate his judgment of conviction pursuant to CPL § 440.10 dated January 9, 2003. In his second motion defendant argued that there was newly discovered evidence which was favorable to him. Defendant's second motion was denied by decision and order dated September 9, 2003.

The third motion to vacate pursuant to CPL § 440.10 was dated November 4, 2004, and argued that defensen counsel was ineffective because they failed to use the services of an investigator and failed to find a potential alibi witness. The motion was denied by decision and order dated March 14, 2005.[2]

Defendant now moves this Court pursuant to CPL § 440.30(1-a) for DNA testing of a blood stained hat recovered at the crime scene, and to vacate his judgment of conviction. Defendant does not contend that this is a motion pursuant to CPL § 440.10(1)(g) based on newly discovered evidence. However, insofar as CPL § 440.30(1-a) does not offer the relief requested by defendant,

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[2]Defendant's three prior motions to vacate were heard by Hon. Abraham Gerges. Since Justice Gerges is no longer sitting, this motion is properly before this Court.

the Court will examine the application pursuant to both CPL § 440.10(1)(g) and CPL § 440.30(1-a).

The People have filed opposition to defendant's motion on the grounds that it is procedurally barred.

For the following reasons defendant's motion is denied.

LEGAL ANALYSIS

Defendant argues that he is entitled to DNA testing of a black knit hat found at the crime scene and vouchered by Police Officer Dennis Lane. Defendant has attached a copy of the voucher to his moving papers as Exhibit A. As noted on the voucher, the knit hat was found near the body of the victim. Criminal Procedure Law section 440.30(1-a) provides in pertinent part:

> 1-a.(a) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

The statute does not impose on defendant a due diligenge requirement, nor is there a time limit imposed on when this motion can be brought by a defendant. *See*, People v Pitts, 4 NY3d 303, 311 (2005). However, defendant is required to demonstrate that there exists a reasonable probability that the verdict would have been more favorable to him had the DNA testing been done on the hat and the results admitted at trial. *See*, People v Pitts, 3 NY3d at 311; People v Perry, 89 AD3d 1114, 1115 (2d Dept 2011); People v Bolling, 65 AD3d 1054 (2d Dept 2009).

In the instant application, defendant has failed to meet his burden. The knit hat which was recovered at the scene was found near the victim. There is no indication that anyone other than the victim of the shooting was injured and bleeding. Defendant cannot show that there exists a reasonable probability that DNA testing on the hat would have led to a more favorable verdict. Accordingly, defendant's application for DNA testing pursuant to CPL § 440.30(1-a) is denied.

Defendant also seeks to have his judgment of conviction vacated, though he does not assert this as a newly discovered evidence application pursuant to CPL § 440.10(1)(g). Because these papers were filed pro se, the Court will examine this claim as if it had been properly brought under CPL § 440.10(1)(g).

Criminal Procedure Law, section 440.10(3)(c) states that a court may deny an application where, "[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue but did not do so." Here, defendant was in a position to raise this issue on any of his three previous applications to vacate his judgment of conviction but failed to do so. Accordingly, defendant's motion is denied.

Even were this application not being denied pursuant to CPL § 440.10(3)(c) ,it would still be insufficient as a motion brought on the grounds of newly discovered evidence. When a defendant moves to vacate their judgment of conviction pursuant to CPL § 440.10(1)(g), the law is clear:

> Newly discovered evidence, in order to be sufficient must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not 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; 6. It must not be merely impeaching or contradicting the former evidence. People v Malik, 81 AD3d 981, (2d Dept 2011).

Defendant fails to show that the blood on the knit hat would result in a changed result if a new trial were granted. Defendant also failed the due diligence requirement as this evidence was known to defendant at the time of his trial. Accordingly, defendant's motion pursuant to CPL § 440.10(1)(g) is denied.

CONCLUSION

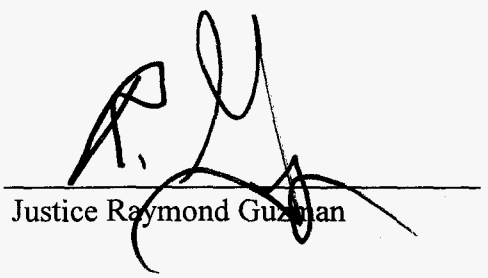
For the foregoing reasons, defendant's motions to vacate his judgment of conviction pursuant to CPL § 440.10 and to have evidence subjected to DNA testing pursuant to CPL § 440.30(1-a) is denied.

This opinion shall constitute the decision and order of this Court.

Dated: July 3, 2011
Brooklyn, New York

RAYMOND GUZMAN
Justice of the Supreme Court

The defendant is hereby advised 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 financial inability to retain counsel and to pay the costs and expenses of such 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 certofocate granting leave to appeal is granted. See 22 NYCRR §671.5.



Justice Raymond Guzman