People v Desmarat

2011 NY Slip Op 33487(U)

October 4, 2011

Supreme Court, Kings County

Docket Number: 4409-2002

Judge: Mark R. Dwyer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 26
--X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

OPINION AND ORDER
INDICTMENT NO. 4409-2002

JEAN MARC DESMARAT,

October 4, 2011

DEFENDANT.
--X
MARK DWYER, J.:

Defendant Desmarat moves pursuant to CPL Section 440.10 for an order vacating a judgment of conviction against him dated November 6, 2003 (Chambers, J.). By that judgment defendant was convicted of Murder in the Second Degree and was sentenced to a prison term of from 25 years to life. Defendant argues here (1) that testimony was received at trial in violation of his rights under the Confrontation Clause of the United States Constitution; (2) that statements of individuals who did not testify, which were the foundation for the testimony violating the Confrontation Clause, were not disclosed to the defense, in contravention of constitutional and statutory discovery rules; and (3) that his trial lawyer was ineffective for permitting these errors to occur. For the reasons that follow, the court denies defendant's motion.

I

Defendant's Confrontation Clause claim must be denied for procedural and substantive reasons. By way of background, defendant's claim relates to the trial testimony of two witnesses--Detective Peter McMahon and Criminalist Harpreet Singh. Defendant claims that Detective McMahon's testimony about observations at and near the crime scene included hearsay that was grounded in a police report created by one Detective Davidson, and that Detective Davidson was not subject to cross-examination at trial. Similarly, defendant asserts that the testimony of Mr. Singh, a criminologist, was based on a report by another criminologist, Ms. Palumbo, and that Ms. Palumbo was not subject to cross-examination at trial.

[* 2]

Defendant's claim is rejected by this court on procedural grounds. First, if hearsay had been admitted at trial in violation of defendant's rights, the claim could have been presented on direct appeal. The transcript of defendant's trial of course contains the full testimony of Detective McMahon and Mr. Singh. A Confrontation Clause claim therefore could have been presented on direct appeal--but none was. Defendant's claim is therefore barred by CPL Section 440.10 (3) (a).

On that front, it is perhaps possible that a Confrontation Clause claim would not fully appear on the face of the record. A witness could theoretically disguise the fact that his testimony was founded, not on first-hand observations, but on hearsay statements by another. But the supposed foundation information as to defendant's first complaint--the report of Detective Robinson, a DD5 dated June 27, 2002--is now part of the record in this case.[1] There is absolutely nothing in that DD5 that suggests that the trial witness, Detective McMahon, based his testimony on anything but personal observations. Detective Peterson described investigative steps that apparently were taken without Detective McMahon, and McMahon testified to nothing that he would have been unable to see personally (see Trial Transcript at 451-52). As to defendant's claim about Ms. Palumbo's supposed information, there likewise is no reason to think, based on post-trial revelations, that Mr. Singh's testimony was not based on first-hand observation. That is, defendant provides nothing now to create any doubt that Mr. Singh himself did the lab work about which he testified. In short, defendant's claim is not supported by anything outside the trial record, and accordingly it should have been presented, if at all, on direct appeal.

On the merits, defendant's Confrontation Clause claim is quite frivolous. First, Detective McMahon testified that he and other detectives visited the Windjammer Motor Inn, the scene of the crime, on June 27, 2002. He then described only physical objects that, as far as anything shows, he personally observed. He noted that a Detective Kluberdanz--the partner of Detective Davidson--gained access to room 210. But he also said that "we" made observations in and about that room and around the victim's body (e.g. see Trial Transcript:

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[1] The DD5 was submitted as an exhibit in the People's response to defendant's current motion, as well as in a coram nobis application made by defendant in 2010.

450-53). There is no basis at all to doubt that he had himself seen everything he discussed in his testimony, even if he might not have been the first officer to see some of what he discussed. Accordingly, defendant has not shown that hearsay was admitted or that his Sixth Amendment rights were violated.[2]

Second, a Ms. Palumbo was once mentioned in the trial. During a scheduling colloquy, the People referred to a need to hear from Ms. Palumbo about when she could testify concerning her scientific analysis (see Trial Transcript at 502). But Mr. Singh later took the stand and testified to DNA tests he himself had performed (see Trial Transcript at 629-53). No additional reference was made to Ms. Palumbo, and defendant has submitted no additional information about her or any work she might have done in this case. There is no basis whatsoever in the trial record or in defendant's subsequent submissions to doubt that Mr. Singh performed the work he described, or that the transcript reference to Ms. Palumbo was a simple mistake.

Defendant's Confrontation Clause claim is based on theories that could have been raised on appeal as completely and persuasively as they can be now. And that claim is entirely unfounded. This court rejects defendant's claim for both reasons.

II

Defendant's discovery claim is, in essence, that exculpatory "Brady" material was not disclosed to him--namely, Detective Peterson's DD5 and Ms. Palumbo's lab report. Defendant's claim is frivolous. The supposedly withheld DD5 of Detective Peterson is before the court. Nothing in it is exculpatory. The document, which is less than two pages long, recounts the detective's investigative steps upon arrival at the Windjammer Motor Inn on June 27, 2002. He spoke to hotel staff, canvassed the area, and entered room 210. In that room he observed two small pieces of paper money and white powder. Nothing in the DD5

[2] Defendant may also mean to argue that "hearsay" testimony by Detective McMahon was wrongly introduced at his suppression hearing. But hearsay is admissible at suppression hearings. CPL Section 710.60 (4).

tends to negate defendant's guilt, would have helped impeach a trial witness, or was helpful to defendant's suppression claims.

The same result pertains as to defendant's complaint about Ms. Palumbo's report. As noted in Part I, there is no reason to think that anyone but Mr. Singh performed the lab work that defendant attributes to Ms. Palumbo. If someone named Palumbo had anything to do with this case, defendant has presented no reason to believe that she wrote a report or that any report is at all exculpatory. Simply put, defendant's claim has no foundation.

III

Defendant's complaints about trial counsel's effectiveness are contingent upon his substantive claims, and fall with them. As to the Confrontation Clause, counsel obviously was not ineffective for failing to object to hearsay, or to demand that the "true" declarants be produced, when neither Detective McMahon nor Mr. Singh testified to hearsay. Similarly, counsel was not ineffective for failing to complain that Detective Peterson's DD5 was not disclosed--if in fact it was not--when that DD5 did not contain exculpatory information. And once more, counsel cannot be called ineffective for failing to demand the supposed report of Ms. Palumbo when there is no reason to think such a report exists, much less that it contained exculpatory information.

On top of all that, the defense strategy, as revealed by defense counsel's summation (Trial: 666-98), was unconnected to the crime scene testimony of Detective McMahon. Defense counsel argued simply that, whoever it was who killed the victim, it was not defendant. And defense counsel affirmatively used the testimony of Mr. Singh, as it showed that the blood of the victim and at least two others--but <u>not</u> defendant--was found at the crime scene.

* * *

For these reasons, defendant's motion for an order vacating the judgment against him is denied without a hearing.

This constitutes the decision and order of the court.

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 the denial of defendant's CPL 440.10 motion. This application must be made within 30 days of service of this Decision and Order. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the 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 certificate granting leave to appeal is granted (22 NYCRR 671.5).

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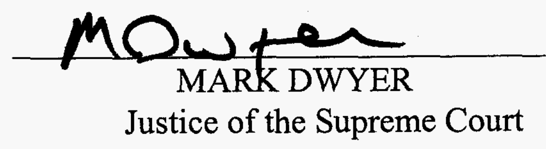

MARK DWYER
Justice of the Supreme Court

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