

People v McCrae
2013 NY Slip Op 30205(U)
January 22, 2013
Supreme Court, Kings County
Docket Number: 7486/05
Judge: Raymond Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

-against-

DECISION & ORDER
Ind. No.: 7486/05

DEION MCCRAE,

Defendant.

----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On December 19, 2004, in the rear of 471 Marcus Garvey Boulevard, in Brooklyn New York, defendant fired several shots at James McCrae. One shot hit James McCrae in the face, seriously injuring him. James McCrae survived his injuries and testified against defendant in the Grand Jury. In connection with these crimes, defendant was charged under Indictment Number 665/05 with Attempted Murder in the Second Degree (penal Law § 110.125.25[1]), Assault in the First Degree (Penal Law § 120.10[1]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[2]), and related charges.

During the pendency of the case under Indictment Number 665/05, defendant was free on bail. At some while at liberty, defendant admitted shooting James McCrae, and further stated that he was not worried about the Attempted Murder charge because James McCrae was the only witness and that defendant intended to “finish him off.”

On September 10, 2005, in the vicinity of 728 Chauncey Street, in Brooklyn New York, James McCrae was shot and killed. Before he died as a result of his wounds, James McCrae identified the defendant as the person who had once again shot him. In connection with these allegations, defendant was charged under Indictment Number 7486/05 with Murder in the First

Degree (Penal Law § 125.27-1[v]), Murder in the Second Degree (Penal Law § 125.25[1]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[2]), and Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[4]).

By decision and order dated March 16, 2006, the Court (Lott, J.) granted the People's motion to consolidate indictments 665/05 and 7486/05.

On January 29, 2007, the Court accepted a partial verdict under the consolidated indictment 7486/05, convicting defendant of Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree in connection with the December 19, 2004, shooting. The jury could not reach a unanimous verdict as to any of the charges stemming from the September 10, 2005, shooting. Defendant was sentenced as a second felony offender to a determinate term of imprisonment of twenty-three years for the Attempted Murder conviction, and fifteen years for the Criminal Possession of a Weapon in the Second Degree conviction to run concurrently with one another. (Lott, J., at trial and sentencing).

In March 2007, defendant again went on trial in connection with the September 10, 2005, shooting allegations, and the jury was unable to reach a unanimous verdict for a second time. Following the hung jury mistrial, defendant filed an appeal in the Second Department arguing four grounds: (1) that the two cases were improperly consolidated; (2) that James McCrae's grand jury testimony was admitted in error; (3) that James McCrae's dying declaration was improperly admitted at trial; and (4) that the People were permitted to improperly bolster a detective's testimony by eliciting testimony about a photographic identification procedure.

While defendant's appeal was pending, he was again retried in connection with the shooting on September 10, 2005. On June 30, 2009, defendant was acquitted of all charges in connection with the September 10, 2005, shooting. (Firetog, J.)

On September 29, 2009, defendant moved to file a supplemental brief in the Second Department. Defendant sought to argue that his acquittal for the murder of James McCrae should be considered in evaluating the decision to allow James McCrae's grand jury testimony into evidence. Defendant's application to file a supplemental brief was denied on November 18, 2009.

By decision and order dated January 12, 2010, the Second Department affirmed defendant's judgment of conviction. People v McCrae, 69 AD3d 759 (2d Dept 2010).

Defendant filed a motion, pursuant to CPL §440.10, on February 24, 2010, seeking to vacate his judgment of conviction on the grounds that the grand jury testimony of James McCrae was improperly admitted at his trial. Defendant argued that the acquittal constituted newly discovered evidence. By decision and order dated October 29, 2010, defendant's motion was denied in its entirety. (Sullivan, J.).

Defendant applied to the Second Department for leave to appeal the denial of his CPL § 440.10 motion. By decision and order dated July 22, 2010, defendant's application was denied. (Covello, J.).

Defendant now moves this Court for an order vacating his judgment of conviction pursuant to CPL §440.10(1)(h) on the grounds that he was denied his due process rights because the prosecutors failed to disclose that Corey Washington, a witness against him at trial, was offered a particular sentence in exchange for his testimony. Defendant further seeks to have his judgment of conviction vacated pursuant to CPL § 440.10(1)(g) on the grounds that there is newly discovered evidence that Corey Washington has a "mental history."

On October 12, 2012, the People filed opposition papers to defendant's application arguing that both claims are procedurally barred and that his all allegations are meritless.

For the foregoing reasons, defendant's motion is denied.

LEGAL ANALYSIS

Defendant has moved this Court for an order vacating his judgment of conviction on two separate grounds. Initially, the Court finds that the defendant was in an adequate position to raise both grounds underlying this motion when he filed his first motion to vacate his judgment pursuant to CPL § 440.10 on February 24, 2010. Accordingly, defendant's motion is denied pursuant to CPL § 440.10(3)(c).

Though the Court has denied the application as procedurally barred, both grounds would still be denied as meritless for the following reasons. Defendant's first ground for relief, specifically, that the People committed a Brady violation by not disclosing defendant's cooperation agreement with Federal prosecutors at the time of his trial is neither sufficiently alleged, nor factually accurate.

Defendant alleges that the People were aware that Washington would receive a sentence of "time-served" in exchange for his testimony and failed to disclose this fact. Defendant offers no factual support for his allegations, which are refuted by the record. Washington's plea agreement with the Federal government was turned over to defendant. The plea agreement was entered into evidence, and the plea agreement was a point covered during the cross-examination of Washington by defendant.

Defendant is incorrect in how the plea agreement worked between Washington and the Federal prosecutors. As Washington testified at trial, in exchange for his testimony he was promised no sentence, only a letter from the Federal prosecutors to the sentencing court. It was the sentencing court which pronounced the eventual sentence on June 26, 2009. The sentence was pronounced following the third time Washington testified. At no point were the People aware that defendant would receive the sentence he eventually received prior to June 26, 2009.

The People did not know what the sentence defendant would receive until after the third time he testified. There was no detail of the plea agreement that was undisclosed by the People when Washington testified. Accordingly, defendant's application based on a Brady violation, pursuant to CPL § 440.10(1)(h) is denied.

Defendant's second ground for relief is that a letter Washington sent to the sentencing court in 2009, constitutes newly discovered evidence because it reveals Washington's "history of mental illness." Defendant's application rests on a statement in a 2009 letter Washington sent to the Federal sentencing court wherein he states that he has seen a psychiatrist and a psychologist and that he has been prescribed him medication. Defendant make no further showing of a history of mental illness apart from this one letter

When a defendant brings a motion pursuant to CPL § 440.10(1)(g), they must meet certain requirements to show that the evidence is, in fact, newly discovered. In People v Salemi, the Court of Appeals articulated six criteria that a defendant must meet in order to succeed in such an application:

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; and, 6. It must not be merely impeaching or contradicting the former evidence.

Salemi, 309 NY2d 208, 215-216 (1955), *cert denied*, 350 US 950 (1956). *See also*, People v Tankleff, 49 AD3d 160, 179 (2d Dept 2007); People v Richards, 266 AD2d 714, 715 (3d Dept 1999); People v Lavrick, 146 AD2d 648, 649 (2d Dept 1989).

Defendant's claim hinges on the fact that Washington admits to seeing two doctors and being


given some medications. There is nothing alleged in defendant's papers which would "probably change the result if a new trial is granted." Therefore, defendant has failed to meet one of the basic criteria set forth by the Court of Appeals. Accordingly, defendant's application pursuant to CPL § 440.10(1)(g) is denied.

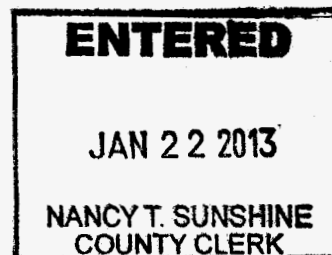
CONCLUSION

For the foregoing reasons, defendant's motion to vacate his judgment of conviction pursuant to CPL § 440.10 is denied.

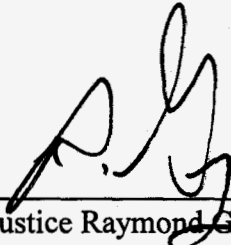
This opinion shall constitute the Decision and Order of this court.

Dated: January 22, 2013
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