SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM : PART 14
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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 1121/2009

GERALD HATCHER
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Hon. Dineen A. Riviezzo, J.:

Defendant moves to set aside the judgment of conviction pursuant to CPL 440.

Facts and Procedural History

This case was tried before me and a jury. The jury found the defendant guilty of rape in the first degree (four counts), sexual abuse in the second degree (four counts), sexual misconduct (four counts), and endangering the welfare of a child. The People's evidence included the testimony of the 11-year-old victim, defendant's girlfriend's daughter, that the defendant raped her on four separate occasions in the apartment in which they all resided as a family. The People's evidence also included DNA evidence which established that the victim had been pregnant with defendant's child, based upon DNA testing of the aborted product of conception. At trial, the defendant testified in his own behalf, denying the charges. He stated that he was unable to explain how or why the DNA tests indicated that he was the father of the unborn fetus.

Defendant moved prior to sentencing to set aside the verdict under CPL 330.30, 330.40, and 330.50, on the grounds that he was denied effective assistance of counsel; that his right to a speedy trial was violated; that the DNA evidence presented at trial was insufficient; and that new evidence

was discovered. New counsel was appointed for defendant, and sentencing was held in abeyance.

New counsel subsequently submitted a written motion requesting a hearing based on ineffective assistance of trial counsel, supported by the affidavit of the defendant. The defendant now stated that in fact he had an explanation for the presence of his DNA, and had told trial counsel "what actually happened," but that counsel advised him "we could not use that story." Defendant avers that he had been using cialis, and that on one occasion, when he was sleeping heavily, the victim herself initiated sexual contact, and the defendant, when he realized what was happening, immediately pushed her away.

The court held that defendant's claims of ineffectiveness were based on matters outside the record and therefore not properly brought pursuant to CPL 330.30 (1). The court further held that the appropriate remedy was by way of a CPL article 440 motion, and that, because the parties had fully briefed all of the issues, it would consider the motion on the merits. The court denied the motion because, considering the record in its totality, the defense strategy of providing no explanation, as opposed to an explanation supported only by defendant's uncorroborated and unsubstantiated testimony, did not deny the defendant meaningful representation. (See People v Brockway, 277 AD2d 482, 486-487, 715 NYS2d 476 [3d Dept., 2000]; People v McClain, 250 AD2d 871, 873, 672 NYS2d 503 [3d Dept.1998], *lv denied* 92 NY2d 901, 702 NE2d 850, 680 NYS2d 65 [1998]). To the extent that counsel's advice to defendant to leave out the "bizarre" explanation may have been deemed unethical, this alone does not establish ineffective assistance of counsel. (See People v. Appel, 120 A.D.2d 319, 321 [3d Dep't 1986] ["We would note, however, that breach of an ethical standard would not necessarily constitute ineffective assistance of counsel....]; Nix v. Whiteside, 106 S. Ct. 988, 993 [1986] ["Under the Strickland standard, breach

of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."]; Vazquez v. Scully, 694 F. Supp. 1094, 1099 [S.D.N.Y. 1988] [alleged breach of an ethical obligation by attorney in consenting to mistrial without advising client did not, without proof of deficient performance, amount to ineffective assistance of counsel].)

The Present Motion

Defendant now argues, again, that he received ineffective assistance of counsel. He contends that trial counsel failed "to make any investigative inquiries" into the legality of his arrest. (Affidavit in support, p. 1.) Defendant also argues that his counsel, had he performed a proper investigation, could have challenged the DNA analysis as incorrect, because the victim's "mother previously stated that complainant had regular menstrual cycles during the time prosecution claimed complainant was ten weeks pregnant..." ((Argument, p. 4). Defendant argues, in addition, that the DNA evidence was admitted into evidence in contravention of Crawford v. Washington (541 US 36 [2004]).

The People argue that the defendant's arguments are procedurally barred, and in addition, that they are without substantive merit.

Discussion

Prior Motion

The People contend that the because his prior CPL 330.30 motion was in fact a de facto CPL 440.10 motion, his present arguments are barred by the rule that a defendant may ordinarily make but one motion under CPL 440.10. See CPL 440.10 (3) [c]. However, while the People's contentions have merit, in fairness the court feels that on this occasion, as defendant did not formally move under CPL 440.10 in his prior motion, he should not be foreclosed at the present time from

making such a motion.[1]

Ineffectiveness of Counsel

Defendant clearly received meaningful representation, as was found on the prior motion, and as the court reiterates now. A claim of ineffective assistance of trial counsel requires proof of less than meaningful representation. Counsel here put forth a reasonable defense in the face of strong proof, focusing on the inconsistencies in the People's case, and effectively impeaching the testimony of the victim. Counsel made cogent opening and closing statements, properly challenged the testimony of witnesses and fully participated in the formulation of the jury charge. (See People v Brockway, 277 AD2d 482, 486-487, 715 NYS2d 476 [3d Dept., 2000]; People v McClain, 250 AD2d 871, 873, 672 NYS2d 503 [3d Dept.1998], *lv denied* 92 NY2d 901, 702 NE2d 850, 680 NYS2d 65 [1998]). Counsel was also effective under the federal standard established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). (People v Ramirez, 29 Misc. 3d 1201A, 2010 NY Slip Op 51661U, 4 [Crim Ct, NY County 2010]; see People v. Caban, 5 NY3d 143,155-156, 833 N.E.2d 213, 800 N.Y.S.2d 70 (2005); see also People v. Baldi, 54 NY 2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981); People v. Stultz, 2 NY3d 277, 287, 810 N.E.2d 883, 778 N.Y.S.2d 431 (2004) (holding "a defendant's showing of prejudice [to be] a significant but not indispensable element in assessing meaningful representation," focusing instead on "the fairness of the proceedings as a whole").

None of the specific arguments now raised have any merit. There was clearly probable cause

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[1]In future, of course, the general rule should and will be applied should defendant make any further motion under CPL 440.10.

to arrest the defendant, based on the accusations of the victim and her identification of the defendant. While defendant in his papers seems to suggest identification was in issue, he fails to make clear what was clear during trial – that defendant was the live-in boyfriend of the victim's mother, and thus clearly known by the victim. The fact that the victim stated that another person impregnated her did not refute the existence of probable cause. People v. Baker, 2013 N.Y. LEXIS 116, 2013 NY Slip Op 782 [Feb. 7, 2013] [probable cause for arrest exists if the facts and circumstances known to the arresting officer warrant a prudent person in believing that the offense has been committed])

As to defendant's claim that the defense counsel did not investigate the victim's menstrual cycle, it is not clear how any investigation in this regard would have cast any doubt on defendant's guilt, or the validity of the DNA evidence. In any event, defendant did seek to impeach the victim by cross examining her on her direct testimony that she had her menstrual period in December 2008.

The admission into evidence of the underlying analytical DNA reports did not violate Crawford. In People v Meekins, 10 NY3d 136, 884 NE2d 1019, 855 NYS2d 20 [2008]), a pre-*Melendez-Diaz* case (Melendez-Diaz v. Massachusetts, 129 S CT 2527 (2009)), the Court of Appeals held that the introduction of a DNA report from a private subcontractor laboratory that tested the victim's rape kit was not a *Crawford* violation, even though the technicians who performed the test did not testify at trial. The Court concluded that the reports were not "testimonial" because the technicians merely recorded neutral testing procedures and the "graphical DNA test results, standing alone, shed no light on the guilt of the accused in the absence of an expert's opinion that the results genetically match a known sample," and such an expert did testify at the trial.

Subsequent to the decision in Melendez-Diaz, the Court of Appeals again considered the issue of DNA evidence under Crawford. In People v. Brown, 13 NY3d 332 (2009), the Court

permitted the introduction of a DNA report processed by a subcontractor laboratory to the Office of the Chief Medical Examiner (OCME) through the testimony of a forensic biologist from OCME. The report, which consisted of machine-generated raw data, graphs and charts representing the characteristics of the male DNA specimen found in the victim's rape kit, was "nontestimonial," under Crawford. The expert witness forensic biologist conducted the actual analysis linking defendant's DNA to the profile found in the victim's rape kit. She testified that she had personally examined the subcontractor's file; she interpreted the profile of the data represented in the machine-generated graphs; and she made the critical determination linking defendant to the crime. She also stated that she was familiar with the procedures and protocols used by the subcontractor, and the court held that the defendant could have challenged her claims on cross-examination. No conclusions, interpretations or comparisons were apparent in the DNA report, and the technicians who generated the report would not have been able to offer any testimony other than how they performed certain procedures.

Both of the foregoing Court of Appeals cases were decided before the Supreme Court decided Bullcoming v. New Mexico, 131 S. Ct. 2705 (June 23, 2011). In that case, the Supreme Court held that a forensic laboratory blood-alcohol report, was not admissible in evidence when the forensic analyst who prepared the report was not called as a witness. The analyst who was called by the State as a witness did not participate in, interpret or observe the performance of the testing on the defendant's blood sample. In Bullcoming it was not disputed that the forensic report was testimonial in that it was accusatory - it contained the defendant's blood alcohol content.

In the present case, as in People v. Brown, the underlying lab reports were not testimonial, as they contained only raw data which is not accusatory – this data does not in fact have any

particular meaning to a lay person unless interpreted by an expert witness. Here the expert who actually performed the comparison between the products of conception and the defendant's DNA profile, and concluded that there was a match, is the person who testified at trial. And this testimony is the "testimonial" evidence under *Crawford*. Thus the present case is governed by People v. Brown and People v. Meekins, and is not affected by the more recent decision in Bullcoming where the report itself was found to be testimonial. See People v. Pealer, 2013 N.Y. LEXIS 135, 2013 NY Slip Op 1019 [N.Y. Feb. 19, 2013] [distinguishing Bullcoming, and holding that routine inspection, maintenance and calibration of breathalyzer machines can be offered as evidence in a criminal trial without producing the persons who created the records). As was noted recently in People v. Rios, 102 A.D.3d 473, 2013 N.Y. App. Div. LEXIS 139, 2013 NY Slip Op 142 (1st Dep't 2013):

> "A fair reading of the analyst's testimony establishes that she made her own independent comparison between defendant's DNA profile and the DNA recovered from semen stains on the victim's underwear. The record does not support defendant's assertion that the witness merely reported on or agreed with a comparison made by others in her office. Thus, the witness did not merely provide surrogate testimony that failed to satisfy the Confrontation Clause (compare Bullcoming v New Mexico, 564 U.S. , 131 S Ct 2705, 2709-2710, 180 L. Ed. 2d 61 [2011])."

The motion is denied without a hearing. People v. Jones, 101 A.D.3d 1482, 956 N.Y.S.2d 703, 2012 N.Y. App. Div. LEXIS 9087 (3d Dep't 2012) [no abuse of discretion in County Court denying defendant's pro se CPL article 440 motion without a hearing]; People v. Yanayaco, 99

A.D.3d 416, 952 N.Y.S.2d 110, 2012 N.Y. App. Div. LEXIS 6514, 2012 NY Slip Op 6558 (N.Y. App. Div. 1st Dep't 2012) [denying CPL 440.10 motion without holding a hearing where the trial record and the parties' submissions were sufficient to decide the motion, and there was no factual dispute requiring a hearing.])

This constitutes the order of the Court.

3-21-2013

Date

J. S. C.

HON. DINEEN ANN RIVIEZZO

ENTERED

MAR 26 2013

NANCY T. SUNSHINE
COUNTY CLERK

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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