

People v Wallace

2013 NY Slip Op 30819(U)

March 25, 2013

Supreme Court, Kings County

Docket Number: 6726/00

Judge: Joel M. Goldberg

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs. -

**HON. JOEL M. GOLDBERG
IND. NO. 6726/00
DATE: MARCH 25, 2013**

KEITH WALLACE,

DEFENDANT.

The defendant's *pro se* motion, pursuant to CPL 440.10, dated December 18, 2012, to vacate his May 15, 2001 judgment of conviction, upon consideration of the People's Answer, dated March 19, 2013, is denied.

Procedural History

The defendant was convicted following a jury trial of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree and respectively sentenced to concurrent terms of 25-years-to-life and 15-years-to-life. The judgment was affirmed on direct appeal by the Appellate Division and leave to appeal to the Court of Appeals was denied. *People v. Wallace*, 309 AD2d 955 (2d Dept. 2003) *lv. denied*, 1 NY3d 582 (2003).

On his direct appeal the defendant contended that the trial evidence was legally insufficient and that the verdict was against the weight of the evidence. The Appellate Division, at 956, determined that the defendant's legal insufficiency claim was unpreserved for appellate review and, in any event, was meritless, and further determined that the verdict was not against the weight of the evidence.

The defendant, on or about September 13, 2004, filed a *pro se habeas corpus* petition raising the same claims raised in the Appellate Division. This petition was denied, and the Court also denied a certificate of appealability for failure to make a substantial showing of the denial of a federal right. *Wallace v. Conway*, 2005 W.L. 941013 (E.D.N.Y. April 25, 2005).

The Present Motion

The defendant's present motion raises several claims that "falsified" and "perjured" testimony was introduced against him and that his trial counsel was ineffective both for failing to establish that certain prosecution witnesses lied at the trial and for failing to call witnesses who allegedly would have given exculpatory testimony. At the outset, before discussing these claims, it should be noted that these claims other than being made solely by the defendant, are not supported by sworn allegations substantiating or tending to substantiate the essential facts of these claims. *See* CPL 440.30 (1), (4) (b), and (4) (d).

The trial record is summarized in the People's Answer at 2 - 10 and will not be detailed in this decision. The defendant was working as a bouncer on August 14, 1999 at Spandex, a Brooklyn strip club. The evidence showed that a dispute arose between the deceased, Diallo Ellaba, who was a boyfriend and "agent" for one of the dancers, and Jamel Young, an owner of the establishment. Young, who was convicted in a separate trial of Manslaughter in the Second Degree and Criminal Possession of a Weapon in the Second Degree, and the defendant each fired shots at the deceased, striking him multiple times. While lying bleeding on the street, the deceased told one of the responding police officers, "Keith shot me."

The defendant claims trial counsel was ineffective for failing to call five witnesses who were interviewed by the police and whose interviews were summarized in police reports that were disclosed to the defense prior to trial: (1) Brian Parker; (2) Donna

Moore; (3) Denine Mitchell, a/k/a “Chocolate”; (4) Abel Wilson; (5) Aiesha Cook.

It is the defendant’s claim that these witnesses would all have contradicted the testimony of prosecution eyewitness Laticia Jacobs whom the defendant now contends was “given a plea deal for her false testimony” and was not even present at the time of the shooting but whose trial testimony perjuriously asserted she witnessed the defendant shoot the deceased. However, the defendant’s motion does not contain sworn statements from any of these five individuals. Instead, the defendant’s motion is based on police reports of their statements, none of which make any assertion to the effect that Laticia Jacobs was not present; these statements simply do not mention her by name. *See People’s Answer* at 2-5.

The defendant also contends trial counsel was ineffective for allegedly failing to investigate the crime scene and call Raymond Torres as a witness whom the defendant contends, based on a transcript of an interview of Torres by an Assistant District Attorney, would have established that Laticia Jacobs was not among the people he saw exit the club after the shooting, thereby establishing that Laticia Jacobs was not present at the club. However, this interview does not establish, or even support a reasonable inference, that Laticia Jacobs was not present. *See People’s Answer* at 5-6. (In that statement, submitted as Defendant’s Exhibit F, Raymond Torres stated that from his apartment window across the street, he saw a man fitting the defendant’s description [“a big guy, also a black man, big belly, heavy set”] shoot the deceased. *See Statement* 2-6 at 3. In light of this prospective trial testimony, trial counsel cannot be faulted for not calling Raymond Torres as a defense witness.)

In addition, the defendant, relying on a police report by Detective Guittierrez, claims trial counsel was ineffective for allegedly failing to investigate the crime scene and cross-examining Detective Guittierrez about a “falsified and tainted photo array procedure” viewed by Laticia Jacobs. However, this report does not support the defendant’s claim. *See People’s Answer* at 6.

Further, the defendant, relying on one page of a police report by Detective Cetin, claims trial counsel was ineffective for failing to cross-examine Detective Cetin and Laticia Jacobs about Jacobs' alleged perjured testimony and prior false statements to the detective. Again, this document in no way supports the defendant's claim. *See People's Answer* at 6-7.

The trial record disclosed that Jacobs, 18 years-old at the time, was arrested as a juvenile and, without any promises of leniency by the police or District Attorney's Office in exchange for her cooperation, gave the police information about the defendant's culpable involvement in this matter. *See People's Answer* at 3, n.3.

Additionally, the defendant claims an Assistant District Attorney and Detective Cetin conducted a "known falsified and perjurious" audio-taped statement of Denine Mitchell – who did not testify at the trial – which contradicted a prior statement she had made on August 15, 1999 to Detective Cetin. In the ten-page transcript of Mitchell's audio-taped statement, given on February 11, 2000, at page 9 (submitted as Defendant's Exhibit I), she stated that she saw "Keith" shooting the deceased. In an earlier interview on August 14, 1999 by Detective Cetin which was summarized in his police report (Submitted as Defendant's Exhibit C), Mitchell said, in part, that she heard shots but did not say she saw anyone do any shooting.

These inconsistent statements do not establish that the defendant did not fire shots that night or that this witness did not, in fact, see the defendant shoot the deceased, or that law enforcement investigators were responsible for Denine Mitchell saying in her second statement that she saw the defendant shoot the deceased when, in fact, this was known not to be true. Because the witness did not testify at the trial, the inconsistent statements did not prejudice the defendant, regardless of which version may have been true. The defendant's motion fails to allege any credible facts to support a reasonable inference that Denine Mitchell was wrongfully persuaded to say she saw the defendant shoot the deceased so that she would be unavailable to testify as a defense witness. Neither has it

been demonstrated in any way that Denine Mitchell actually possessed exculpatory evidence that should have been utilized by trial counsel. *See* People's Answer at 7.

The defendant raises several additional points not addressed in the People's Answer, none of which have any merit.

The defendant claims trial counsel "ineffectively waived defendant's Confrontation Clause" rights by stipulating to police testimony regarding the recovery by the police of the two guns that were used in the shooting. *See* Defendant's Motion at 11-12. This stipulation and the purported lack of the defendant's consent to it was on the trial record (noted in the Defendant's Motion at 11-12 to be at pages 448-451 of the trial record).

Because the trial record was sufficient to review on the defendant's direct appeal this claim of an improper stipulation, but such issue was not raised, it may not now be raised on this motion. CPL 440.10 (2) (c). Further, the defendant makes no argument as to how this stipulation prejudiced him or deprived him of meaningful representation at the trial. Thus, as to this claim, the motion fails to allege essential facts. CPL 440.30 (4) (b).

Similarly, the defendant argues that trial counsel was ineffective for failing to call a "Forensic Expert" to refute the medical examiner's "false testimony" about the amount of external bleeding caused by the bullet wounds received by the deceased. *See* Defendant's Motion at 12. However, the defendant's motion contains no supporting factual affidavit from anyone, expert or otherwise, that would contradict the medical examiner's trial testimony. Thus, lacking these sworn allegations, there is no basis to believe defense counsel was ineffective for not calling such a witness. CPL 4430.30 (4) (b).

On page 2, par. "d", of the Defendant's Notice of Motion, the defendant contends trial counsel was ineffective "for failing to call Defendant's little Sister and neighbors, as witnesses to testify that he was at home" on the date of the crime. However, no other mention of this purported alibi is made in the defendant's supporting affidavit. Thus, the

claim is not supported by any sworn factual allegations as is required. CPL 440.30 (1).

Finally, the defendant's claim of "actual innocence" is not established so as to warrant a hearing. The defendant's motion is devoid of sworn factual allegations, other than his own, to support this claim. His allegations throughout his motion concerning what he claims other witnesses did or did not see, or did or did not do, are not based on personal knowledge, are otherwise all factually unsupported and, under all the circumstances, there is no reasonable possibility that his claims are true. CPL 440.30 (4) (d).

Accordingly, the defendant's motion is denied.

SO ORDERED



JOEL M. GOLDBERG
JUDGE

MAR 25 2013