People v Bennett
2013 NY Slip Op 31675(U)
July 5, 2013
Supreme Court, Kings County
Docket Number: 7458-1996
Judge: Michael A. Gary
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : **DECISION AND ORDER**
Pro Se CPL § 440 Motion

DELVILLE BENNETT

: IND. NO. 7458-1996

Defendant :

---X

MICHAEL A. GARY, J.

Defendant moves *pro se*, to vacate the judgment of conviction pursuant to CPL § 440.10. The People have opposed this motion in a written response.

The defendant was convicted after trial on December 10, 1997 of one count of Murder in the second first degree (Penal Law § 125.25) stemming from a dispute with Marlon Brown and Kenneth Phillips, tenants, who as fruit vendors, rented space from Delville Bennett, the owner of the lot. On May 30, 1996, Bennett and some others came to the lot and following an argument, an eyewitness testified, he saw one of the men point a gun at Kenneth Phillips and then heard a gunshot. Kenneth Phillips died from the gunshot wound. On February 3, 1998, after the court ruled on a defense motion to set aside the verdict, the defendant was sentenced, to an indeterminate term of a minimum of 20 years and a maximum of Life.

The defendant appealed his case to the Appellate Division Second Department which affirmed Mr. Bennett's conviction at 284 AD2d 338 (2d Dept., 2001). Leave to appeal to the Court of Appeals was denied at 96 NY2d 938 (2001, Table). He has now filed this, the third motion pursuant to CPL § 440, seeking to vacate the judgment.

It is significant to trace the path of defendant's litigation regarding post-conviction

review. After his appeals to the Second Department and the Court of Appeals, the defendant filed a CPL 440 motion in 2003. In that motion he argued that counsel was ineffective for abandoning an alibi defense and for not calling the alibi witness (Carmen Salas) to testify . The court denied the motion on February 23, 2003, finding it was unsupported by sworn affidavits from Salas or the defendant. (The People have attached a copy of the decision to their response to the instant motion.)

Sometime before the submission of the above-mentioned 440 motion , the defendant also filed a federal writ of habeas corpus in the United States District Court for the Eastern District. He withdrew the habeas writ, until he was notified of the denial of the 440 motion by Supreme Court. In the renewed habeas petition, defendant included the affidavits that he should have included in the original 440 motion. The judge in federal court considered the habeas motion, and according to the People, stated that he could not consider those affidavits as they had not been included in the state court claim, and then denied the motion on its merits. *See Bennet v. Fisher* 02–CV-5232 (EDNY, November 20, 2003, unpublished decision). Defendant appealed the denial of this motion, and the Second Circuit remanded the claim to allow the defendant to exhaust his state claims. In fact, the defendant filed a second 440 motion. This too was denied on procedural grounds in March, 2005 (attached to the People's motion). Following that denial, the defendant filed another habeas motion in the Eastern District, and this time Judge Weinstein held a full hearing on the defendant's claim of ineffective assistance of counsel regarding the alibi defense. Following the hearing the judge set forth, in a lengthy decision, all the conclusions he had reached. Both the defense attorney and the alibi witness had testified at that hearing regarding the claimed alibi defense. Concluding that defendant, who testified at the hearing telephonically from

prison, was wholly incredible, and Carmen Salas, incredible as it related to the time and date of her meeting with the defendant on the day of the murder, Judge Weinstein found that the defendant received effective assistance of his attorney, and based on the testimony that it was eminently reasonable not to pursue the alibi defense proffered by the defendant.

Most significantly, Judge Weinstein expounded on the reason no police report would have been generated on the date of the alleged alibi. If either or both the defendant and Salas are to be believed at all, their encounter with the police was brief and either both of them or each individually decided not to continue with their complaints against each other, thus no police report would have been filed. Further, because of the inconsistencies of their stories, Judge Weinstein held that Mr. Bennett's defense attorney did not act ineffectively in choosing not to call the alibi witness and denied the defendant's motion for habeas relief. Judge Weinstein's decision was affirmed by the second circuit in *Bennett v. Fischer,* 246 Fed. Appx. 761(2007). A *writ of certiorari* to the US Supreme Court was denied as well, 552 US 1288 (March 24, 2008).

Not to be deterred, defendant filed a FOIL request with NYPD in November 2003 seeking police reports for the incident between him and Salas. When NYPD delayed in acting on the FOIL request, defendant moved for an order and in fact received a sanction judgment against the police department for their delay in responding to the FOIL request. He has attached a copy of that order, as an exhibit to this motion, to support his position that vacatur of the judgment is required. He argues in this 440 motion that the sanction order proves the police reports were purposely destroyed, his attorney was deprived of those documents by the People, and as *Brady* material, those documents would have exonerated him, as they would have supported his alibi.

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The People adamantly oppose this position, and in the historical outline as above, point to the finding by Judge Weinstein that the alibi evidence was incredible, and the documentary evidence probably non-existent.

While the NYPD failed to honor the FOIL request in a timely manner, this court rejects the defendant's extrapolation from that fact to disingenuously assert that they purposely destroyed documents that support his innocence. In fact, this court finds extreme bad faith on the part of the defendant who seemingly requested documents pertaining to an incident when he knew none would be found. Mr. Bennett cannot be allowed to exploit the fact that the FOIL request was not answered in a timely manner to vouch for his alibi for the time of the murder.

Finally, the People correctly point out, that the documentary record contradicts the defendant's assertions, and pursuant to CPL § § 440.10(3)(b) and 440.30(4), the court may deny the defendant's motion, when that is the case. The statutes, in relevant part, state:

> CPL § 440.10 (3). Notwithstanding the provision of subdivision one the court may deny a motion to vacate a judgment when:
>
> (b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .
>
> CPL § 440.30 (4). Upon considering the merits of the motion, the court may deny it without conducting a hearing if:
>
> (d) An allegation of fact essential to support the motion (I) is contradicted by a court record or other official document, or is made solely by the defendant and unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

The hearing in federal court has determined this issue on the merits already and thus, CPL 440.30 (4) (d) precludes its determination here again. Most importantly, the United States Court of Appeals, Second Circuit, in its decision stated that it specifically reviewed the

conviction on its merits and was satisfied that pursuing the alibi defense as theorized by Mr. Bennett would not have changed the verdict (*Bennett v. Fisher*, 246 Fed. Appx. 761, at 764).

The defendant has failed to raise any ground cognizable under this, his third motion pursuant to CPL § 440.10, to warrant vacatur of the conviction and therefore, this court denies the motion in all respects.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
July 5, 2013

MICHAEL A. GARY, J. S. C.

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.

Appellate Division, Second Department
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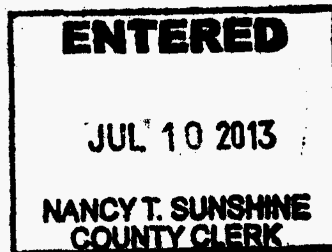

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