

**People v Holden**

2013 NY Slip Op 33195(U)

December 23, 2013

Supreme Court, Kings County

Docket Number: 5738/2007

Judge: Danny K. Chun

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 19

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :  
 :  
 -against- :  
 :  
 JAMAR HOLDEN, :  
 :  
 Defendant. :  
 :  
-----X  
DANNY K. CHUN, J.

DECISION AND ORDER  
IND. NO. 5738/2007

The defendant moves, *pro se*, to vacate his judgment of conviction pursuant to C.P.L. § 440.10. The People oppose the motion.

The defendant was charged, under Kings County Indictment Number 5738/2007, with one count each of Murder in the Second Degree (PL § 125.25[1]), Bribing a Witness (PL § 215.00), Intimidating a Witness in the Third Degree (PL § 215.15[1]), and Tampering with a Witness in the Third degree (PL § 215.15[2]), and two counts of Criminal Possession of a Weapon in the Second Degree (PL §265.03)[1][b], [3]). On August 1, 2008, the defendant was convicted, after a jury trial, of Murder in the Second Degree, two counts of Criminal Possession of a Weapon in the Second Degree, and Bribing a Witness. On August 15, 2008, the defendant was sentenced to concurrent terms of imprisonment of twenty-five years to life for the murder count, five years plus five years of post-release supervision on each criminal possession of a weapon count, and two to four years on the bribing a witness count. The defendant is currently serving his term at Green Haven Correctional Facility.

In May of 2010, the defendant appealed the judgment of conviction to the Appellate

Division, Second Department, arguing: (1) that he was denied a fair trial by the admission of evidence of his prior bad acts; and (2) that trial testimony about the victim's statement that "Jamar" shot him was inadmissible hearsay and violated his right of confrontation. In a supplemental *pro se* brief dated September 10, 2010, the defendant claimed, *inter alia*, that he was deprived of his right to testify before the grand jury because the felony complaint lacked notice of the evidence that would be presented before the grand jury. Specifically, the defendant claimed that the felony complaint did not provide notice that Officer Dooley would be testifying before the grand jury.

On March 15, 2011, the Appellate Division affirmed the defendant's conviction in this case (People v. Holden, 82 A.D. 3d 1007 [2d Dep't 2011]). The defendant's application for leave to appeal to the Court of Appeals was denied on May 26, 2011 (People v. Holden, 16 N.Y. 3d 895 [2011]).

By papers dated October 25, 2011, the defendant filed a *pro se* motion to vacate the judgment of conviction, arguing that the indictment was jurisdictionally defective because Officer Dooley testified before the grand jury but did not provide any allegations in the felony complaint, making the felony complaint defective. By decision and order dated January 11, 2012, this court denied the defendant's motion, holding that the motion was procedurally barred pursuant to CPL § 440.10(2)(c). This court further held that, even if the defendant's claim was not procedurally barred, the claim was without merit because there is no statutory requirement that a witness must first provide allegations appearing in the felony complaint in order to testify before the grand jury. The defendant's application for leave to appeal to the Appellate Division from this court's denial of his § 440.10 motion was denied (Roman, J.).

This court is informed that on June 14, 2012, the defendant submitted a letter to the Conviction Integrity Unit of the Kings County District Attorney's Office, requesting that the unit review his conviction. The defendant alleged on the basis of various police reports that the prosecutor had knowingly elicited perjured testimony from Officer Dooley. The defendant argued that the report showed that Officer Dooley was not present at the crime scene and that Officer Dooley therefore could not have heard the victim identify defendant as the shooter, as he had testified at trial.

This court is further informed that on July 13, 2013, the Conviction Integrity Unit sent a letter to the defendant stating, in relevant part, that the documents submitted by the defendant "established that other Police Officers were assigned by radio dispatch as the response team, and that various other Police Officers were at the crime scene, but this in no way precludes the presence of Officer Dooley," that "the material [the defendant] forwarded does not support the conclusion that Officer Dooley was not present," and that the defendant had not presented any new information that would justify further investigation.

The defendant now moves again to vacate his judgment of conviction under C.P.L. § 440.10(1) claiming that: (1) the People knowingly elicited perjured testimony at trial from Officers Dooley, Daniel Cisak, and Victor Varghese that Officer Dooley was the first officer to arrive at the crime scene; (2) his trial counsel rendered ineffective assistance by failing to impeach the three officers using the spring report; and (3) information contained in the letter sent by the Conviction Integrity Unit to the defendant constitutes newly discovered evidence.

This court denies the defendant's motion in its entirety for the following reasons.

Under C.P.L. § 440.10(3)(c), this court has the discretionary power to deny a motion if “[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.” Here, the defendant raises prosecutorial misconduct and ineffective assistance of counsel claims on the basis of information contained in a sprint report, which the defendant concedes has been in his possession at least since his direct appeal in 2010 (see Def. Motion at 21). Therefore, the defendant could have raised these issues in his previous 440 motion filed in 2011, but failed to do so. As such, this court denies the defendant’s motion as to the prosecutorial misconduct and ineffective assistance of counsel claims.

Furthermore, even if this motion was not procedurally barred, this court finds that all the claims raised by the defendant in his motion to be without merit. As to the defendant’s prosecutorial misconduct claim, the defendant provides no sworn allegations of fact necessary to demonstrate that the officers testified falsely at trial, let alone that the People knew the testimony was false. See C.P.L. § 440.30(4)(b). Therefore, this court finds that there is no basis for this court to determine that the police officers were testifying falsely at trial. As such, the defendant’s motion pertaining to the prosecutorial misconduct claim is denied.

This court also finds the defendant’s related claim of ineffective assistance of counsel also without merit. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. Strickland v. Washington, 466 US 668 (1984); People v. Linares, 2 N.Y.3d 507, 510 (2004); see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1 §6. Under the two-prong test of the federal standard, a court must decide (1) whether the counsel’s performance fell below an objective standard of reasonableness and (2) whether the defendant suffered actual

prejudice as a result. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Strickland v. Washington, 466 U.S. 668, 687 (1984). In New York, “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.” People v. Baldi, 54 N.Y.2d 137, 147 (1981). As stated above, this court does not find that the police officers were falsely testifying, and therefore, contrary to the defendant’s claim, there was nothing for the defense counsel to impeach on this issue. Thus, this court denies the defendant’s motion pertaining to his claims of ineffective assistance of counsel.


Similarly, this court finds the defendant’s claim that information contained in the letter from the Conviction Integrity Unit to the defendant constituted newly discovered evidence that would have changed the outcome of the trial. In order to constitute newly discovered evidence pursuant to C.P.L. § 440.10(1)(g), a defendant must establish that the evidence in question is of such character that it would probably change the results if a new trial were held; that it was discovered since the trial; that it would not have been produced at trial with the exercise of due diligence; that it is not cumulative; that it is material to the issues; and that it must not merely contradict the former evidence. People v. Salemi, 309 N.Y. 209, 215-216 (1955), cert denied 350 U.S. 950; People v. Gurley, 197 A.D.2d 534, 535 (2nd Dep’t. 1993). The proffered evidence must, inter alia, do more than merely impeach or contradict the former evidence. People v. Legette, 153 A.D.2d 760, 761 (2nd Dep’t. 1989); People v. Baxley, 194 A.D.2d 681,

682 (2nd Dep't 1993). In *People v. Tankleff*, the court held that in deciding a CPL § 440.10(1)(g) motion, the hearing court is obligated to conduct a critical analysis of the proffered new evidence, and cannot merely engage in the mechanical exclusion of such evidence. See *People v. Tankleff*, 49 A.D.3d 160, 79-80 (2nd Dep't. 2007). Moreover, the court must view and evaluate all of the evidence in its entirety, basing the final decision on the likely cumulative effect of the new evidence had it been presented at trial. *Id.*

Here, contrary to the defendant's assertion, the letter from the Conviction Integrity Unit does not concede that the police officers' testimony at the defendant's trial was false. Therefore, even if the letter was introduced at the defendant's trial, this court does not find that the outcome of the trial would have been different. As such, the defendant failed to meet the requirement under C.P.L. § 440.10(1)(g) to establish that the letter constitutes "newly discovered evidence." Hence, the defendant's motion pertaining to the newly discovered evidence claim is denied.

Wherefore, defendant's motion to vacate his judgment is denied in its entirety. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
December 23, 2013

A handwritten signature in black ink, appearing to read 'D K C', written over a horizontal line.

DANNY K. CHUN, 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.

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**ENTERED**  
DEC 23 2013  
NANCY T. SUNSHINE  
COUNTY CLERK