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SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-20 - QUEENS COUNTY
125-01 QUEENS BOULEVARD - ANNEX
KEW GARDENS, NY 11415

P R E S E N T :

HONORABLE ROGER N. ROSENGARTEN
JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK

: **Ind. No. 5201/94**
Motion: to Vacate Conviction

-against- : **CPL 440.10 et seq.**

: **Submitted: June 6, 2002**

MARK PEARSON,

: **Hearing: n/a**

Defendant.

:

**The following papers numbered
1 to submitted in this motion.**

BY: Mark Pearson, Pro Se
For the Motion

HON. RICHARD A. BROWN, D.A.
District Attorney, Queens County for the People
BY: A.D.A. Anastasia Spanakos, Esq.
Opposed

Papers Numbered

Notice of Motion and Affidavits Annexed
Answering and Reply Affidavits
Exhibits
Minutes
Other

Upon the foregoing papers, and in the opinion of the Court herein, the defendant's motion to vacate his conviction pursuant to CPL 440 and for poor person relief is DENIED in all respects in accordance with the accompanying memorandum of this date.

Date: June 6, 2002

ROGER N. ROSENGARTEN
J.S.C.

MEMORANDUM

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THE PEOPLE OF THE STATE OF NEW YORK : BY ROSENGARTEN, J.
:
-against- DATE: June 6, 2002
:
MARK PEARSON, :
: INDICTMENT NO.: 5201/94
Defendant. :
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Defendant was convicted after a jury trial before Justice Finnegan of Murder in the Second Degree, Attempted Murder in the Second Degree, and Assault in the Second Degree. On May 17, 1997, the defendant was sentenced as a second-felony-offender to consecutive terms of imprisonment of 25 years to life on the Murder in the Second Degree count and 20 years to life on the Attempted Murder in the Second Degree count, and 3-1/2 to 7 years imprisonment on the remaining counts, to run concurrently with the sentence on the Attempted Murder in the Second Degree. On March 12, 2001, the Appellate Division, Second Department, affirmed the defendant's conviction, (*see, People v. Pearson*, 281 A.D.2d 494 [2d Dept. 2001]), finding that:

The defendant was not improperly denied *Brady* material (*see, Brady v Maryland*, 373 US 83; *People v Vilardi*, 76 NY2d 67; *People v Rushin*, 172 AD2d 571). Moreover, the Supreme Court properly allowed rebuttal testimony (*see, People v Harris*, 57 NY2d 335). The defendant's sentence was neither harsh nor excessive (*see, People v Suite*, 90 AD2d 80).

On April 12, 2001, defendant sought leave to appeal his conviction to the Court of Appeals. Leave was denied on May 23, 2001. (*see, People v. Pearson*, 96 N.Y.2d 833 [2001]). Defendant now moves, *pro se*, to vacate the judgements of conviction and for a new trial pursuant to CPL 440.10(1)(g),(h), claiming that:

- (a) he has newly discovered evidence that would have resulted in a more favorable verdict at trial;
- (b) his conviction was obtained in violation of his constitutional rights and he was denied a fair trial;

and, also moves to proceed as a poor person and have counsel appointed to him for the purpose of this post-judgment proceeding.

With regard to his CPL 440 application, this Court summarily rejects the defendant's contentions, for the following reasons.

"To be considered 'newly-discovered' so as to support a motion to vacate a judgment of conviction pursuant to *CPL 440.10* (subd 1, par [g]), the evidence in question must meet the six criteria set out in *People v Salemi* (309 NY 208, 216, *citing People v Priori*, 164 NY 459, 472), specifically: '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'". (*People v. Balan*, 107 A.D.2d 811, 814-815 [2d Dept. 1985]). It is well established that a defendant is entitled to vacatur of his conviction on the basis of newly discovered evidence only where the nature of the evidence is such that there is a probability, rather than a mere possibility, that the newly discovered evidence would change the result if a new trial were granted (*see, People v Salemi*, 309 NY 208, 215-216 [1955]; *People v Lane*, 212 AD2d 637 [2d Dept. 1995]; *People v Aulla*, 207 AD2d 497 [2d Dept. 1994]).

In the case at bar, this Court finds that the nature of the evidence provided¹ is such that it fails to satisfy the first of the six criteria set forth above; to wit, there is no probability, (or even a possibility, in the Court's view), that the introduction of the newly discovered evidence would change

¹ The evidence consists of the affidavit of a member of defendant's cell-block averring, some seven (7) years after the crime for which the defendant stands convicted, that he witnessed someone other than the defendant commit the murder of one victim and shooting of the other.

the result if a new trial were granted. (see, CPL 440.10[5]).

In a case strikingly similar to the case at bar, the defendant, in *People v. Robinson*, 211 A.D.2d 733, 734 [2d Dept. 1992], proffered, as "newly discovered evidence", the affidavit of an individual the defendant met in prison, who averred, six years after the crime for which the defendant was convicted, that he witnessed someone other than the defendant commit the subject murder. In affirming the motion court's decision to deny the defendant's motion without a hearing, the Second Department held:

These averments presented fully and in the best possible light all the evidence the affiant could possibly offer on the defendant's behalf. Furthermore, in light of *the credibility shortcomings inherent in evidence of this nature*, the averments did not disclose a probability, as opposed to a mere possibility, that the jury, if presented with this new evidence, would have returned a verdict more favorable to the defendant. (*emphasis added*).

(see also *People v. Perkins*, 234 AD2d 482 [2d Dept. 1996]).

In the opinion of the Court, the judicious holding set forth above is of binding precedential effect in the case at bar. The defendant herein, convicted of the crimes of the murder of one victim, and the attempted murder of another, has submitted, as newly discovered evidence pursuant to CPL 440.30, the affidavit of an individual he met while at Five Points Correctional Facility in Romulus, New York. The affiant avers, some seven (7) years after the crime for which the defendant stands convicted, that he witnessed someone other than the defendant commit the murder of one victim and shooting of the other.

This Court finds the Ross affidavit facially incredible and factually insufficient as newly discovered evidence pursuant to CPL 440.30. It suffers from the same inherent credibility shortcomings addressed by the Second Department in *Robinson*, to wit:

1. the defendant and the deponent/alleged eyewitness share a cell-block at Five Points Correctional Facility in Romulus, New York, where the deponent is serving 54 months to nine (9) years, with a maximum expiration date of April 23, 2009, and the defendant is serving the lengthy sentence set forth in the preamble to this Memorandum;

2. while not impossible, it stretches the imagination that, out of approximately 70 New York State correctional facilities, of which this Court is aware, and over 1500 inmates at Five Points Correctional Facility alone, the defendant, by sheer happenstance, meets and shares a cell-block with the one individual who witnessed the occurrence and will now, seven (7) years later, come forward with exculpatory information;
3. the deponent/alleged eyewitness does not provide a full name, surname, address or description for the alleged actual shooter, referring to him only as "Carlton". The Ross affidavit merely reiterates information that was previously known to the defendant and his trial counsel, alluding to the involvement of "Carlton" (a/k/a Pierre Mitchell), without adding any new facts (see, DD-5's, and witness statements attached to defendant's motion);
4. the deponent/alleged eyewitness is a predicate felon with numerous drug arrests and convictions, currently serving 54 months to nine (9) years for an alleged drug sale for which he was convicted in 2001;
5. the deponent/alleged eyewitness has numerous warrants on his prior cases, and has used several aliases in an attempt to evade prosecution, clearly evincing a flagrant disregard for the criminal justice system, and a willingness to place his own interests above those of society;
6. the deponent, alleged eyewitness was an absconder, with an outstanding bench warrant against him at the time of the crime for which the defendant stands convicted, yet claims that he was hanging around on the street a few blocks from his address of

record at the time "listening to the guys rapping" at 142 Place and Foch Blvd. (see, Ross affidavit at p.1);

7. the deponent/alleged eyewitness, an individual with numerous contacts and extensive experience with the criminal justice system, had information germane to the police investigation of a murder, but did not attempt to use that information to negotiate more favorable treatment on the open drug case he had at the time, or his subsequent drug cases, choosing instead to withhold that information and freely supply it to the defendant seven (7) years later, after his conviction, allegedly for no money or personal gain;

8. there are internal inconsistencies in the Ross affidavit, to wit:

(a) the deponent states that "Mina" was a "good sister", (see, Ross affidavit at p.1), apparently unaware or uninformed that it was "Mina's" testimony at trial that identified the defendant, whom she knew well, as the shooter, and resulted in his conviction;

(b) the deponent claims to have witnessed the death of a "very good friend" (see, Ross affidavit at p.1), yet failed to come forward to provide the police with information to bring his friend's killer to justice. Instead, the deponent gratuitously supplies that information to the defendant, a fellow inmate, seven years later;

(c) the deponent was so concerned about the shooting of his friends that he "waited until the police and the Ambulance came" (see, Ross affidavit at p.2), yet, when the police came, he left, rather than providing the police with the information regarding the shooter, or inquiring as to the condition of his friends;

9. the deponent/alleged eyewitness, apparently anticipating a problem with the credibility, voluntariness and bias of his statement, interposes a pre-emptive defense by stating, in the last four lines of his fourteen-line statement, "that his statement was made voluntary", that "I have not been paid money", "coered [sic] into making the statement", and that "this statement is true". (see, Ross affidavit at p. 3, lines 11-14).

Moreover, the Ross affidavit is lacking in the degree of factual specificity which would lend credibility to the deponent's claim that he was an eyewitness to this event. In this regard, the Court finds that there is no reasonable possibility that the facts contained therein are true. (see, CPL 440.30[4][d][ii]). As the Court of Appeals stated in *People v. Monroe*, 40 N.Y.2d 1096 [1977], "especially suspect is the belated exculpation of defendant by an individual after he has nothing to lose, i.e., where the individual does not come forward with this information until his own fate has been sealed by criminal conviction." The Court further finds that the second of the statutory criteria has not been met, insofar as there is no information contained in the Ross affidavit that was unknown to the defendant and his counsel at trial, thereby contraindicating its status as "newly discovered" evidence. In determining whether the evidence, to wit, the Ross affidavit, is "newly discovered" after trial, the actual date of the affidavit is not dispositive, but rather, the issue is whether the information contained therein was new. (see, *People v. Taylor*, 246 AD2d 410 [1st Dept. 1998]; see also *People DiPippo*, NYLJ, October 23, 2000 at p. 21). Clearly, the information contained in the Ross affidavit, specifically that someone by the name of "Carlton" (a/k/a Pierre Mitchell), might be implicated in the incident, was known to the defendant and counsel at the time of trial as evidenced by the DD-5s and other reports annexed to the defendant's motion papers, as well as the defendant's statement that "counsel came into possession of a DD-5, dated July 27, 1995...said DD-5 being identified as Court Exhibit B". (see, Pearson affidavit, at p. 5). The only thing that is "new" at the time of this motion is that a fellow inmate whom the defendant met seven years later is now prepared to testify to this

single proposition.

Given the quality of the evidence, the Court will not exercise its discretion to order a hearing, at which the State of New York would be obliged, at taxpayer expense, to produce and transport the defendant and his colleague, Mr. Ross, from an upstate prison for a sojourn to New York City. (see, generally, *People v. Friedgood*, 58 N.Y.2d 467, 473 [1883]). Nor will this Court, particularly in this period of budgetary austerity, toss judicial economy to the wind by expending its time and that of its staff at the expense of the people of this state to hear evidence, which in its view, is totally lacking in credibility and raises no issues warranting a hearing.

In conclusion, the defendant has failed to meet his burden to establish, by a preponderance of the evidence, that the Ross affidavit constitutes newly discovered evidence warranting vacatur of his conviction or a new trial. The proffered evidence fails to meet at least two of the six statutory criteria to qualify as newly discovered evidence. The Court is unconvinced that the exculpatory information that another individual other than the defendant could have been the perpetrator of the crime was unknown to the defendant or could not have been discovered prior to trial through the exercise of due diligence. Collectively, and in the considered opinion of this Court, in weighing the contents of the Ross affidavit, there is no possibility, let alone a probability, that a jury hearing the testimony of Mr. Ross would have returned with a different verdict. Accordingly, the defendant's motion to vacate his conviction based on newly discovered evidence is denied in all respects.

As to the defendant's claim that errors that took place at trial mandate vacatur of his conviction, it is axiomatic that matters complained of, which appear on the record, and could have been reviewed on appeal, are procedurally barred under CPL 440.10(2)(c). This is clearly illustrated by the defendant's numerous citations to the trial record in his motion papers. These matters clearly could have been brought before an appellate court for review. The defendant has fully availed himself of his appellate remedies. As such, there is no acceptable reason why defendant did not aggregate his complaints in one forum rather than raise them before different tribunals. Procedurally, his failure to raise all record matters in his appeal acts to bar the within application.

Accordingly, the defendant's motion to vacate his conviction based upon errors committed at trial is similarly denied in all respects.

As to the defendant's request for the appointment of counsel, and poor person relief, the defendant is not entitled to counsel in a collateral, post-conviction proceeding. (*see, Pennsylvania v. Finley*, 481 US 551 [1987]; *see also, People v. Richardson*, 159 Misc.2d 167 [Sup. Ct. Kings. Co. 1993]). Accordingly, that branch of his motion is also denied in its entirety.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this memorandum and order to the attorney for the defendant and to the District Attorney.

Date: June 6, 2002

ROGER N. ROSENGARTEN
J.S.C.