

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS : CRIMINAL TERM : PART L-1

-----X  
PEOPLE OF THE STATE OF NEW YORK, : HON. ROBERT J. McDONALD  
: :  
: :  
- against - : Date: June 30, 2001  
: :  
FRANK SMALDONE, : Indt. No. 7708 - 91  
: Defendant(s). :  
-----X

The Defendant was convicted after trial of Murder in the Second Degree [Penal Law §125.25(2)] and Arson in the Third Degree [Penal Law §150.10(C)] for which he was sentenced on May 18, 1992 to two consecutive terms of imprisonment, which were for a minimum of 25 years to life, and a minimum of 5 years to a maximum terms of 15 years, respectively [Leahy, J.]. On May 13, 1992 defendant's motion to set aside the verdict was denied by the trial court. Thereafter, the trial and sentence were affirmed (*People v Smaldone*, 213 AD2d 685 *leave den* 86 NY2d 784).

Defendant has unsuccessfully sought various forms of relief. Defendant, then represented by new counsel, moved to vacate the judgment which was denied on June 27, 1997 [McGann, J.]. That same counsel sought *coram nobis* relief which was denied (*People v Smaldone*, 258 AD2d 601 *leave den* 93 NY2d 878). That same counsel unsuccessfully sought *habeas corpus* relief in Federal District Court, and despite instant counsel's efforts, the denial was affirmed and *certiorari* was denied (*Smaldone v Senkowski*, \_\_\_ F Supp \_\_\_ [2000 US Dist Lexis 10928] *affirmed* 273 F 3d 133 *cert denied* 535 US 1017).

In the interim, defendant unsuccessfully sought ancillary relief in a *pro se* motion objecting to the pre-sentence report used at his sentence [Rosengarten, J.] on April 22, 1999.

Defendant now moves pursuant to CPL 440.10 to upset the conviction on the ground that his initial trial counsel was legally inadequate and therefore his State and Federal Constitutional rights were violated, as well as other alleged infirmities in the trial, appellate, and collateral proceedings.

More specifically it is alleged that his trial counsel, Joseph Librie of Lysaght, Lysaght, & Kramer, P.C., failed to object to the trial court's charge with regard to a defendant's right to remain silent; failed to advise defendant and request of the court any lesser included charges; failed to retain a necessary ballistics expert; failed to inform defendant of an offered plea; and, failed to speak with or call as a witness a person, known to defendant, whose testimony would have been favorable.

Further, ineffective assistance of defendant's appellate lawyer is also alleged based on the fact that his appellate counsel was also a member of Lysaght, Lysaght, & Kramer, P.C., and he failed to argue ineffective assistance of defendant's trial counsel.

Finally, it is alleged that defendant was again denied effective assistance of counsel because his attorney, Roger Adler, retained to represent him to collaterally attack the failures of his trial and appellate counsel, was in error with regard to determining the time within which he could pursue collateral relief, which was ultimately denied, and resulted in the denial of any Federal relief (*see, Irons v Ricks*, \_\_\_ F. Supp 3d\_\_\_ (S.D.N.Y.) [NYLJ 06.10.03, p. 30 col. 6]).

CPL 440.10(2) provides that this court "must" deny a motion to vacate when the issue raised was previously determined on the merits upon an appeal from the judgment. The decisions rendered by the Appellate Division in this case preclude this court from granting the relief requested (*People v Salemi*, 306 NY 863 *cert denied* 348 US 845 *rehearing denied* 309 NY 308 *reargument denied* 2 NY2d 858 *cert denied* 350 US 950). Additionally, this court can not review the alleged errors of a court of equal jurisdiction in Justice McGann's decision denying defendant's previous CPL 440 motion. Any remediation should have been sought through a motion to reargue. However, if this court were to consider the merits of the instant motion it would still be denied.

The affirmation of defendant's trial counsel, attached as an exhibit in support of defendant's motion, relates to only two bases alleged in defendant's moving papers. His failure to object to the jury charge relating to defendant's right to remain silent has been addressed, as defendant's moving counsel properly notes, in *People v Pough*, 185 AD2d 330 *app denied* 80 NY2d 933 in which the Second Department found that while the wording of such a charge may have been "unwarranted," overall the court's charge was proper. Moving counsel's allegation that the *Pough* decision "is unfathomable and insupportable" is incorrect (*People v Knight*, 222 AD2d 525 *app denied* 88 NY2d 880; *People v Quinones*, 235 AD2d 437 *app denied* 90 NY2d 862). Further, where a defendant

sought relief based on a similar error by way of *coram nobis*, arguing ineffective assistance of counsel, that application was similarly denied (*see, People v Morales*, 273 AD2d 412, *app denied* 95 NY2d 869 *coram nobis denied* 287 AD2d 743).

Trial counsel also indicates that he did not request any lesser included charges. There is nothing in his affirmation, such as an admission that he did not know that he could have so requested lesser included charges, which could lead this court to conclude that his failure to do so amounted to ineffective assistance of counsel. It may well have been a question of trial strategy and this court may not second guess counsel as to the prudence of such strategy.

The content of the affidavit of Edward Cummins, a friend of defendant, whom the defendant now claims should have been called to testify, presents issues not addressed in trial counsel's affirmation. His affidavit is made more than ten years after the crime. Whether he would have given similar self-inculpatory testimony or whether it would have been receivable is "Monday morning quarterbacking." Defendant's trial attorney could have learned about Mr. Cummins from the police reports, and, in any case, it is not newly discovered evidence (*People v Suarez*, 98 AD2d 678 *app denied* 61 NY2d 766).

The issue as to the alleged failure of Mr. Adler to timely protect defendant's rights can not be addressed by this court in view of the denial of *certiorari* by the United States Supreme Court.

The remainder of defendant's instant application must be denied. The affidavit of George Krivosta, the ballistics expert, that it was error to permit the prosecutor "to use hypothetical presumed scientific testimony to speculate on the intent [sic] of a person who discharged a pistol." is beyond his area of expertise and has no legal significance. If this court were to consider the affidavit of Mr. Krivosta as newly discovered evidence, it still would not change this court's decision because such evidence is purely speculative (*People v Brown*, 56 NY2d 242).

Incidentally, the finding of the Appellate Division rejecting the argument of Mr. Adler, defendant's attorney who collaterally attacked the instant conviction based upon the alleged ineffectual representation of defendant's appellate counsel, inferentially refutes the charge of ineffective assistance of trial counsel.

The relief sought here is purely statutory and rests within the discretion of this court which this court declines to exercise (*People v Mazzella*, 13 NY2d 997; *People v Saurez, supra*; *People v*

*Johnson*, 113 AD2d 900).

Accordingly, Defendant's motion is denied.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this decision to the defendant and to the District Attorney.

---

ROBERT J. McDONALD, J.S.C.

MyFiles\Smaldone3.wpd