

**SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART C - QUEENS COUNTY
88-11 SUTPHIN BOULEVARD, JAMAICA, NEW YORK 11435**

P R E S E N T:

HON. DAVID GOLDSTEIN, J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK

**Indictment Nos.: 5068/91
2741/92**

DECISION AND ORDER

-against-

Dated: April 2, 2004

STEPHEN BRATHWAITE,

Defendant.

This is a motion for an order pursuant to CPL § 440.10(1) (f), vacating the judgment of conviction upon the alleged deprivation of defendant's legal and constitutional rights, in that the People engaged in prosecutorial misconduct on both the case in chief and upon collateral review of the prior motion to vacate the judgment.

Defendant was indicted for assault in the second degree for the stabbing of Darnell Thomas (Indictment 5068/91). He was subsequently indicted for murder in the second degree, for fatally shooting Jamel Langston, an eyewitness to the Thomas stabbing (Indictment 2741/92). The two indictments were consolidated and tried together under Indictment 5068/91, with defendant represented at trial by two separate attorneys.

The trial resulted in defendant's conviction for murder in the second degree, criminal possession of a weapon in the second degree, and assault in the second degree. He was sentenced as a predicate felon to concurrent indeterminate terms of 25 years to life on the murder conviction and 7½-15 years on the weapons possession count, and to a consecutive indeterminate term of 3½-7 years on the assault conviction.

On September 22, 1993, defendant moved to set aside the verdict

pursuant to CPL § 330.30, upon the ground of newly discovered evidence. In support of the motion, he submitted an affidavit from Wanda Hill, an alleged eyewitness to the murder, but who was not called during the trial. She stated that she was present when Langston was shot and that defendant was not the shooter. Hill also claimed that she did not know, until the trial had ended, that defendant had been accused of or tried for Langston's murder. The motion was withdrawn on December 23, 1993, the scheduled hearing date, when Hill recanted the substance of her affidavit in open court. As a result of an investigation, it was determined that defendant and four members of his family had threatened Hill in order to procure her affidavit.

In April, 1994, three members of defendant's family pleaded guilty to charges of, *inter alia*, bribery, tampering and coercion of a witness. After a jury trial, defendant and a remaining family member were each convicted of fourth degree solicitation and fifth degree conspiracy, but were acquitted of the remaining charges.

Subsequently, on November 11, 1994, defendant moved pursuant to CPL § 440.10, to set aside the homicide verdict upon the ground of newly discovered evidence. In support of the application, he submitted an affidavit from Marc Pringle, another alleged eyewitness to the shooting. After a hearing, this Court denied the motion (decision and order rendered July 11, 1996), finding that Pringle's testimony was incredible and insufficient to warrant vacatur.

Thereafter, defendant's conviction was affirmed by the Appellate Division, Second Department (217 AD 2d 635) and leave to appeal was denied by the Court of Appeals (86 NY 2d 872).

On March 22, 1996, defendant again moved to vacate the sentence upon the ground of ineffective assistance of counsel. This Court denied the motion in an order issued March 29, 1996. Thereafter, in February, 1997, defendant filed a request under the Freedom of Information Law, which was complied with in December, 1997. Based upon the documents provided

pursuant to defendant's FOIL request, another motion was made. Since a sufficient record existed for this claim to have been raised on defendant's direct appeal, the motion was procedurally barred (see, CPL § 440.10[2][b]), and was denied on substantive grounds by decision and order dated March 16, 1999.

This fourth motion, to vacate the judgment of conviction, is brought pursuant to §440.10 of the Criminal Procedure Law. Defendant argues that the testimony of a rebuttal witness at his prior §440 hearing, Loral Richard Huffman, was false, and that Assistant District Attorney Richard Schaeffer, notwithstanding knowledge that the testimony was perjurious, presented the rebuttal testimony at the hearing, during late 1995 or early 1996. Defendant submits an affidavit from Huffman, sworn to on June 14, 2001, alleging that he had testified in a number of homicide cases between 1996 and 1997; his testimony was false; and the prosecution was aware of this.

Defendant further contends that Marlon Avila, a/k/a Rayguan Shabazz, a prosecution witness who had testified at defendant's original trial in August of 1993, has testified, *between* September 19, 2002 and March 14, 2003, in a *number of cases* for the State of New York, and that Avila is a "professional witness." Defendant submits documents from the New York State Department of Correctional Services, which reflect that Avila was "out to court" on two dates, namely, September 19, 2002, and March 14, 2003. Defendant requests that he be informed of all the current cases in which Avila is a witness, and that he be afforded the opportunity to question Avila as to his status as a "professional witness." He contends that the People use "professional witnesses", "shifting them back and forth" between the prisons and the courthouses. He requests the right to ascertain "the locations and current identities of each and every professional witness."

The People oppose the motion, vehemently denying defendant's accusations. They attach to their moving papers as Exhibit 2, an

affidavit, sworn to August 28, 2001, by Loral Huffman, recanting his statements in the affidavit submitted by defendant and reaffirming his testimony at the court hearing, when he was called to testify by the District Attorney.

Succinctly put, the Court has before it a motion to vacate, which attacks the testimony of a convicted felon, Huffman, whose testimony at a prior § 440 hearing upon which the Court did not need to rely for its finding:

" * * * even were the Court to disregard in its entirety the testimony of Huffman, Pringle's testimony was so incredible, so devoid of any semblance of believability, that defendant's motion for a new trial, pursuant to CPL 440.10, based upon newly discovered evidence, should be denied on that ground alone * * * " (Order issued July 11, 1996)

That testimony was then recanted and was submitted in defendant's motion papers and then the recantation was recanted and submitted by the District Attorney. As has been observed "There is no form of proof so unreliable as recanting testimony." (*People v. Shilitano*, 218 NY 2d 161, 170; *People v. Dukes*, 106 AD 2d 906). Plainly, there is no necessity for a hearing here (see, *People v. Cintron*, 306 AD 2d 151).

It is clear that the testimony of Loral Huffman is far from reliable. His account of factual events changes repeatedly and supports the determination on the prior motion that, by disregarding the testimony in question, the result would be the same and the judgment of conviction would stand.

Secondly, defendant argues that Marlon Avila, a/k/a Rayguan Shabazz, was "out to court" on two occasions, September 19, 2002 and March 14, 2003, thus making him a professional witness. Overlooked, however, is that these two dates are more than nine years after the

trial. Defendant has not demonstrated how that fact could have affected his trial, which concluded years earlier. Nor is it sufficient to conclude that Avila was "professional witness."

Criminal Procedure Law § 440.10(1)(f) is a permissive section, authorizing the Court to vacate judgment when:

"Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom."

There is no basis for the exercise of such discretion in this case.

Accordingly, upon the foregoing grounds, defendant's motion to vacate the judgment of conviction is denied.

J.S.C.