

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

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THE PEOPLE OF THE STATE OF NEW YORK :
: BY: WILLIAM M. ERLBAUM, J.
:
-against- : DATE: February 8, 2006
:
BRETNOL A. BRITTON, : INDICT. NO. 2825/2003
DEFENDANT. :
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On August 19, 2004, the defendant was convicted after a bench trial before this Court of Attempted Assault in the First Degree [PL 110/120.10(2)], Assault in the Second Degree [PL 120.05(2)], and Assault in the Third Degree [PL 120.00(1)]. The defendant was found guilty of committing these crimes against Leota McDonald on October 29, 2003, at approximately 9:15 A.M., inside 159-01 116th Avenue, Queens County. The defendant threw boiling water on the complainant, severely burning her arm, punching her in the face, and threatening her that, "next time it is going to be worse" (see, trial transcript, dated August 18, 2004, page 117, line 15).¹

On October 5, 2004, the defendant was sentenced for his crimes. He was sentenced to nine years incarceration on the

¹ The defendant and complainant had been involved in a romantic relationship and owned a house together.

Attempted Assault in the First Degree count, seven years incarceration on the Assault in the Second Degree count, and one year incarceration on the Assault in the Third Degree count. All sentences were to run concurrently. Furthermore, a full order of protection was issued in favor of the complainant, to remain in effect until August 19, 2016.²

The defendant filed a motion dated June 30, 2005, a supplemental motion dated August 11, 2005, and a letter dated October 14, 2005 seeking to vacate his conviction and sentence under the instant indictment pursuant to CPL Article 440. His application is based upon claims of newly discovered evidence and the ineffective assistance of trial counsel. The People filed an affirmation in response to the defendant's motion, dated November 17, 2005, wherein though they did not consent to the vacating of the defendant's conviction or sentence, they did consent to an evidentiary hearing to explore the allegations raised by the defendant.

The defendant was granted a hearing to evaluate his claims regarding newly discovered evidence and the ineffective assistance of trial counsel. The hearing was conducted on eight separate days beginning on January 3, 2006 and ending on January 12, 2006. Nine witnesses testified during the course of the

² Subsequent to his sentence being imposed, the defendant filed a notice of appeal to the Appellate Division, Second Department.

hearing, one witness gave testimony, before the hearing, via videotape, and that videotape was played in court during the hearing, numerous exhibits were admitted into evidence, and the parties made oral arguments to the Court in support of their respective positions.³

The defendant's first claim in support of his application to vacate his conviction and sentence is based upon the assertion that the main witness at the trial of this matter, the complainant, Leota McDonald, recanted her report to the authorities in that she told certain witnesses that the defendant did not burn and assault her, as she testified to at trial, but that she did those things to herself in an effort to remove the defendant from the house that they shared. The defendant alleges that the complainant made these statements prior to his trial, but that there was no way he could have known about it before his trial. The defendant asserts, therefore, that these statements constitute newly discovered evidence which would warrant the vacating of his conviction and sentence.

CPL 440.10[g] states that at "any time after the entry of judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that [n]ew evidence has been discovered since the entry of a judgment based

³ The Court notes that only two witnesses testified at the trial of this matter, which was conducted between August 17, 2004 and August 19, 2004.

upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant ...".

CPL 440.30[6] states that at a CPL 440 hearing, like the one conducted in this case, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion".

Accordingly, upon review of the testimony presented at the hearing, the Court must determine as a threshold matter if there is new evidence in this case: Did the complainant make the recantation statements alleged? If that question is answered in the affirmative, the Court must then determine if that evidence is indeed newly discovered, and if so, would it have affected the verdict in a way more favorable to the defendant. If the Court determines that the defendant failed to establish, by a preponderance of the credible evidence (see, People v. Barrero, 137 AD2d 759 [2nd Dept 1988]), that the complainant ever made the statements alleged, then clearly the defendant's claim as to the existence of newly discovered evidence must fail, in which case, there would be no occasion to reach the question of the availability of that non-existent evidence at defendant's trial

or the impact of its absence upon that trial, and, accordingly, the requirements of CPL 440.10[g] would be unachievable. (See, People v. Thompson, 148 AD2d 763 [2nd Dept 1989], appeal denied, 74 NY2d 748 [1989]).⁴

In an attempt to meet his burden regarding the claim of newly discovered evidence, the defendant has presented the testimony of several witnesses, Carolyn Moore, Sylvester Mann, Mildred Baptiste, Denise Deabreu and Dawna Alexander. In disputing that claim, the People presented the testimony of Neville Bobby Moore and the complainant, Leota McDonald. The Court will discuss these witness' testimony as it relates to the issues at hand.⁵

Carolyn Moore was the first witness to testify on behalf of the defense. She was considered by the defendant to be his "primary witness" (see, hearing minutes, dated January 12, 2006, page 729, line 18). She began her testimony by explaining that she grew up in Guyana next door to the defendant, and was a half-sister to the complainant. She described her relationship to both of them. The most significant aspect of her testimony involved a conversation she alleged she had with the complainant, which forms the crux of the defendant's claim of newly discovered

⁴ Though the Thompson case, as does Barrero, supra, deals with a motion pursuant to CPL 330.30, not CPL Article 440, the requirements of newly discovered evidence under the statutes are the same.

⁵ The transcript of this hearing spanned 867 pages.

evidence.

Ms. Moore testified that in the spring or summer of 2004, May or June, she went to visit the complainant at home after a trip to Home Depot. She was with her mother, Mildred Baptiste, her brother, Sylvester Mann, and her husband, Neville Bobby Moore. She testified that it was her brother, Mr. Mann, who suggested they go visit the complainant.⁶ She continued that while visiting, while Mr. Mann and Mr. Moore were downstairs in the basement, she and Ms. Baptiste had a conversation upstairs with the complainant. It was during that conversation that Ms. Moore alleges that the complainant informed her that the defendant did not burn her, but that she burned herself. The complainant allegedly demonstrated this for Ms. Moore and Ms. Baptiste. Ms. Moore also testified that the complainant stated that the defendant did not hit her, but that she hit herself in the mouth with a spoon.

In order to determine if Ms. Moore is a credible witness, the Court carefully scrutinized her testimony, as it stands alone, and as it relates to the testimony of other witnesses called during this hearing. Upon that careful scrutiny, the

⁶ Ms. Moore testified (see, hearing minutes, dated January 3, 2006, page 90, line 9) that Mr. Mann was having a relationship with a friend of the complainant, Judith Frazier. However, Mr. Mann denied during his testimony (see, hearing minutes, dated January 5, 2006, pages 290-291) any relationship with Judith Frazier other than friendship, and not a close friendship at that.

Court finds many inconsistencies in her testimony, as well as many instances where her testimony just does not make sense. The Court will review them individually.

Initially, it is relevant to evaluate the relationship Ms. Moore had with the defendant and with the complainant. At first glance, it appears that Ms. Moore has a bias in favor of the complainant, her half-sister, making it significant that she is willing to testify on behalf of the defendant, essentially against the complainant. She testified that she and the complainant, her half-sister, had a "good relationship" (see, hearing minutes, dated January 3, 2006, page 23, line 8), that they were "as two sisters" (see, hearing minutes, dated January 3, 2006, page 23, line 11). She also testified that though she knew the defendant when they both lived in Guyana, she has had no contact with him at all for years (see, hearing minutes, dated January 3, 2006, pages 19-20, 75-76). Therefore, if she is willing to come forward and help a man she hasn't had any contact with in years, at the expense of her half-sister, she must be telling the truth.

However, upon cross-examination of Ms. Moore, it became obvious that her closeness is clearly to the defendant and not the complainant. She was good friends with the defendant's sister, Dawna Alexander (see, hearing minutes, dated January 3,

2006, pages 76, and 119-123), and her brother, Mr. Mann was extremely close to the defendant (see, hearing minutes, dated January 5, 2006, pages 269-271). Though Ms. Moore described her relationship with the complainant, on direct examination, as one of sisters, it was revealed on cross-examination, that their relationship was actually sporadic at best.⁷ It is unclear in her testimony as to where and when and what type of contact she has had with the complainant through the years (see, hearing minutes, dated January 3, 2006, pages 59-60). Ms. Moore testified on cross-examination that she had only been to the complainant's home six times since 1988 (see, hearing minutes, dated January 3, 2006, page 81, line 10). Furthermore, defense exhibit A in evidence was a photo, taken August 21, 2003 (see, hearing minutes, dated January 3, 2006, page 32, line 14) of Ms. Moore, the complainant and others. One of the others was the complainant's boyfriend at the time. However, Ms. Moore, who allegedly was so close to the complainant, did not even know the boyfriend's name (see, hearing minutes, dated January 3, 2006, page 63, line 18- page 64, line 1). It appears to the Court that the relationship between the complainant and Ms. Moore was not

⁷ The complainant was the product of an affair that Ms. Moore's father had with a woman other than her mother, and Ms. Moore was not aware until she was 16 or 17 years old that the complainant was her half-sister (see, hearing minutes, dated January 3, 2006, page 53, line 25). The Court infers from the testimony of January 3, 2006, on page 54, line 23, that Ms. Moore, age wise, is in her forties.

sufficiently close for the Court to automatically credit her statements because she is giving testimony against her own half-sister.

This is especially true when one realizes that Ms. Moore, in complete contradiction to her testimony on direct examination that she has had no contact with the defendant in years, lied to the Court. Though she was adamant during her direct testimony and reaffirmed it on cross-examination that she has not spoken to the defendant since she has been in the United States,⁸ it became crystal clear during the testimony of the defendant (see, hearing minutes, dated January 6, 2006, pages 482-492), that Ms. Moore did indeed talk with the defendant while he was incarcerated as a sentenced prisoner in the instant case.⁹ Needless to say, this lie told by Ms. Moore to the Court undermines her credibility. But, that was not the only falsehood in Ms. Moore's testimony.

For example, Ms. Moore testified that while she and her mother were hearing the alleged recantational statements, Ms. Moore's husband, Neville Bobby Moore was not present but downstairs in the basement for quite some time, maybe up to an

⁸ Ms. Moore came to the United States in 1988 (see, hearing minutes, dated January 3, 2006, page 18, line 10).

⁹ During the defendant's testimony, he initially denied remembering having any conversations with Ms. Moore. However, the People "refreshed his recollection" with an audio tape (People's Exhibit 9 for identification) of a conversation between the defendant, Carolyn Moore, and Dawna Alexander, recorded while the defendant was incarcerated.

hour (see, hearing minutes, dated January 8, 2006, page 91, line 9). That was the purported reason he was not present at the conversation, leaving only Ms. Moore and her mother, Ms. Baptiste to hear the alleged recantation. However, when Mr. Moore testified, he explained that he was actually only in the basement for five or ten minutes (see, hearing minutes, dated January 5, 2006, page 368, line 25).

The inconsistencies continue: on pages 61-62 of Ms. Moore's testimony on January 3, 2006, she stated that the complainant was not a mean or vindictive person, yet on page 96 of the minutes, and in her written affidavit, marked People's Exhibit 1 in evidence, she said she was; Ms. Moore described the complainant's burn after the incident as "a very little mark" (see, hearing minutes, dated January 3, 2006, page 37, line 19), however, People's Exhibit 2 in evidence, which was also introduced at the trial of this matter, shows the complainant's burn after the incident as quite significant, and covering a large portion of her upper arm; Ms. Moore testified that on the day she was at the complainant's home and allegedly heard the recantational statements, she went there in one car with Mr. Mann, Mr. Moore, and Ms. Baptiste (see, hearing minutes, dated January 3, 2006, page 82). However, Mr. Mann testified that he did not travel there with Ms. Moore, but that he went in his own vehicle (see,

hearing minutes, dated January 5, 2006, pages 286-287); Ms. Moore testified that the complainant made the admission to her in the middle of their visit (see, hearing minutes, dated January 3, 2006, page 106), while Ms. Baptiste testified that the admission came at the end of the visit, when everyone was getting ready to leave (see, videotaped testimony of Mildred Baptiste, in evidence as People's Exhibit 3, at 1:12:06 on the counter); and finally, Ms. Moore testified that the visit she had with the complainant when she allegedly made her statements occurred in May or June of 2004 (see, hearing minutes, dated January 3, 2006, page 35, lines 5-10), however, the defense conceded at page 728 of the hearing minutes, dated January 12, 2006, that the visit took place in November or December of 2003. November or December of 2003 is also the time that the complainant testified that the visit occurred (see, hearing minutes, dated January 9, 2006, page 597). Each of Ms. Moore's misrepresentations is significant in and of itself. Collectively, they make it most difficult for the Court to credit Ms. Moore's testimony.

Adding to that difficulty is Ms. Moore's incongruous behavior after she allegedly found out that the complainant framed an innocent man. Ms. Moore did nothing (see, hearing minutes, dated January 3, 2006, pages 98-100). She did not tell anyone, not even her husband of 19 years (see, hearing minutes,

dated January 3, 2006, page 103; hearing minutes, dated January 5, 2006, page 370, lines 19-22). In fact, it wasn't until November of 2004, one year later, that she supposedly told the defendant's sister, Dawna Alexander, her friend, about the alleged recantation. The Court finds that that inaction is incomprehensible, that if the complainant truly made the statements in question to Ms. Moore, Ms. Moore would have immediately taken the necessary steps to help the defendant, particularly in light of Ms. Moore's familiarity with the judicial system after her son was arrested for a crime he did not commit (see, hearing minutes, dated January 3, 2006, pages 136-137, 142).

Based upon the above discussion, the inconsistencies, the lies, the falsehoods, and the general incredibility of her testimony, the Court finds the testimony of Carolyn Moore unworthy of belief.

In further support of his motion, the defendant called as a witness Sylvester Mann, brother of Carolyn Moore, half-brother of the complainant, and close friend of the defendant. Though Mr. Mann was not a participant in the aforesaid alleged conversation between Carolyn Moore, Mildred Baptiste, and the complainant, Mr. Mann testified that the complainant told him, on October 30, 2003, the day after she was burned, punched in the

face, and threatened, that she burned herself. If the Court could reasonably credit this statement by Mr. Mann, it would have importance in the Court's determination of the defendant's motion. However, the Court is unable to do so.

First, despite the fact that Mr. Mann and the defendant were close friends, Mr. Mann testified that he told no one about the complainant's alleged confession until after the defendant was sentenced, about a year later, to a lengthy term of incarceration on October 5, 2004.¹⁰ And even then, he only told his mother and sister (see, hearing minutes, dated January 5, 2006, page 293, lines 114-18). He did not tell the authorities,¹¹ the defendant's sister, or perhaps most importantly, the defendant himself. Furthermore, he did not say anything until after the defendant's sentence was imposed, not earlier, around the time of the defendant's arrest or during the defendant's trial. Mr. Mann's lack of any action on the part of his friend, someone he called "Brother B" (see, hearing minutes, dated January 5, 2006,

¹⁰ Mr. Mann also testified that he never told anyone that the complainant injured her face with a spoon until his testimony at the hearing, where he stated that allegation in response to a question from the Court (see, hearing minutes, dated January 5, 2006, page 355, line 9).

¹¹ Even though he met with representatives from the District Attorney's Office regarding this matter in June, 2005 (see, hearing minutes, dated January 5, 2006, page 318), he did not mention his claim even to them. The People heard Mr. Mann's claim that the complainant had made a recantation on October 30, 2003, only on the first day of the hearing, January 3, 2006 (see, hearing minutes, dated January 5, 2006, pages 328-329).

page 282, lines 15-17), undermines his credibility as to the alleged conversation he had with the complainant on October 30, 2003 when a recantation was purportedly made.

However, that is not the only deficiency in Mr. Mann's testimony. Mr. Mann, as did Ms. Moore, actually lied to this Court, wherein he testified that on the day that the complainant was burned, October 29, 2003, he was at her house, and that when he arrived there, three individuals were present, who told him that the complainant burned herself. Mr. Mann testified that he only knew the name of one of the individuals, a Godfrey Scott (see, hearing minutes, dated January 5, 2006, page 274, line 21). Mr. Mann testified that Mr. Scott did not want any trouble with the police, so he did not tell Mr. Mann what he saw (see, hearing minutes, dated January 5, 2006, page 276). The problem with this testimony from Mr. Mann is that Mr. Scott was not even in the United States on October 29, 2003, and therefore was clearly not in the complainant's house when she was burned. Mr. Mann's effort to put his friend, Mr. Scott, in the complainant's house on October 29, 2003 to corroborate his story, backfired. People's exhibit 10 in evidence is a stipulation between the parties wherein they agreed that if Richard C. Sabella, a Senior Special Agent for the Immigration and Customs Enforcement Department of the United States Government were called to testify

at this hearing, he would state that Godfrey Scott left this country on October 18, 2003, and has not returned to the United States since. That means that Mr. Scott left this country eleven days before Mr. Mann places him at the complainant's house on the day in question. Clearly, Mr. Mann misrepresented to the Court.

Furthermore, Mr. Mann admits lying to the Court. During cross-examination by the People, Mr. Mann explained that he had no way to contact the defendant after he allegedly found out the complainant was framing the defendant. However, on page 315, lines 13-19 of the hearing minutes of January 5, 2006, Mr. Mann was asked, "When you said before that there was no way that you could have contacted him that was a lie, you knew it was a lie when you said it. There was a way you could have contacted him if you really wanted to; correct?" To which Mr. Mann replied, "Yes". It can reasonably be inferred that had the complainant recanted as Mr. Mann alleged, he would have had a reason to inform the defendant immediately. Mr. Mann testified that he did not tell representatives from the District Attorney's Office about the complainant's alleged recantation because he did not know what their intentions were when they were investigating the matter (see, hearing minutes, dated January 5, 2006, page 321, line 20). However, when Mr. Mann was confronted with that statement, he admitted that he did indeed know their intentions

(see, hearing minutes, dated January 5, 2006, page 321, line 25-
page 322, line 2). It would clearly be unreasonable for this
Court to credit the bizarre testimony of Sylvester Mann.

Mildred Baptiste also testified, via videotape, People's
Exhibit 3 in evidence, proffered on behalf of the defendant. She
presented much of the same testimony as Carolyn Moore, in that
she stated she visited with the complainant in her home in May or
June of 2004 (see, People's Exhibit 3, 12:10:20 on the
counter)¹², that she traveled there in the same car as Sylvester
Mann (see, People's Exhibit 3, 12:56:54 on the counter), that Mr.
Mann spent most of his time downstairs in the basement (see,
People's Exhibit 3, 1:02:06 on the counter), and that the
complainant said she injured herself (see, People's Exhibit 3,
12:06:39 on the counter). It is clear from the analysis of
Carolyn Moore's testimony that these facts were all contradicted
by other testimony. Additionally, Ms. Baptiste, like Ms. Moore
and Mr. Mann, also did not report the alleged incident to the
police (see, People's Exhibit 3, 12:27:40 on the counter).

There are two additional points about Ms. Baptiste's
testimony that are worth noting. They undermine Ms. Baptiste as
a credible witness. The first is that Ms. Baptiste testified

¹² Interestingly enough, Ms. Baptiste made the same error as to
the time of this visit, saying it occurred in May or June of 2004
instead of November or December of 2003, as Carolyn Moore did,
almost as if their testimonies were rehearsed.

that after she and her daughter, Carolyn Moore, left the complainant's house they discussed the statements the complainant allegedly made (see, People's Exhibit 3, 12:41:52 on the counter). However, her son-in-law, Mr. Moore testified that had that conversation occurred between them, he would have remembered it (see, hearing minutes, dated January 5, 2006, page 380, lines 12-16).

The second point concerning Ms. Baptiste's testimony is that, significantly, she stated, more than once, starting at 12:57:23 on the counter and continuing, that the complainant, Leota McDonald, first said that the defendant did indeed burn her. It was not until later on in the conversation that Ms. Baptiste alleged that Ms. McDonald said that she burned herself. This point is extremely important. It is in direct contradiction to Ms. Moore's testimony in that Ms. Moore never mentioned that the complainant first stated that the defendant did in fact burn her. The serious infirmities of Ms. Baptiste's testimony, particularly the implosion of her story on cross-examination leaves her bereft of credibility.

Denise Deabreu was another witness who testified on behalf of the defendant. She testified on direct- examination that she and the complainant were friends, and that the complainant was so desperate to have the defendant out of the house she shared with

him, that she was scheming to inculcate him in crimes he did not commit, such as drug possession and rape, or even trying to kill him.¹³ She also testified that, though she could not remember exactly what was said, or when it was said, the complainant mentioned something about a burning (see, hearing minutes, dated January 9, 2006, pages 540- 543).

However, Ms. Deabreu's allegations simply did not withstand cross-examination. First, it became apparent that this witness and the complainant were not such close friends as the witness initially implied (see, hearing minutes, dated January 9, 2006, page 587), as there were long periods of their connection when they were not in contact. Though the Court at this time is not evaluating the level of their friendship at the specific time the witness testified the complainant was scheming against the defendant, as the witness was unable to pin down that time period, the Court takes note of this as it relates to how forthcoming the witness was while on the witness stand.

Furthermore, the witness testified that she and the defendant had no independent relationship, that she only knew of him through her friend, the complainant (see, hearing minutes,

¹³ To refute Ms. Deabreu's testimony, the People called the complainant, Leota McDonald to the stand. She denied planning the things Ms. Deabreu accused her of doing, such as trying to frame the defendant. Ms. McDonald also refuted the testimony of Carolyn Moore, Sylvester Mann, and Mildred Baptiste. She denied telling any of them that she burned and injured herself.

dated January 9, 2006, page 552). However, she also testified that after the complainant and the defendant were no longer romantically involved, she did call him (see, hearing minutes, dated January 9, 2006, page 554), and though she supposedly had no relationship with his family, she had spoken to the defendant's sister, Dawna Alexander, many times (see, hearing minutes, dated January 9, 2006, page 556, page 573), and she was even willing to speak to the defendant's attorney, though she eventually changed her mind (see, hearing minutes, dated January 9, 2006, page 572). Lastly, as it relates to the question of the witness' appearance of being forthcoming, the Court takes note of the hearing minutes, dated January 9, 2006, at page 545, line 24- page 546, line 5, where the witness was asked the name of the friend who told her the defendant had been arrested. She replied, "I can't remember what his name was. Do I have to say the name of the friend?" The witness did answer the question. However, the Court finds this exchange particularly odd. The witness' lack of openness and candor detract from her credibility.

Additionally, the Court notes that Ms. Deabreu was not very clear and consistent on many important details she testified to in Court. For example, where she first testified that the complainant told her she wanted to have the defendant killed, Ms.

Deabreu later testified that she may have heard it from someone else (see, hearing minutes, dated January 9, 2006, page 567-568); that though she spoke to the defendant and warned him of some things the complainant was plotting against him, she didn't tell him everything (see, hearing minutes, dated January 9, 2006, page 564); that she doesn't remember telling him about a possible burning (see, hearing minutes, dated January 9, 2006, page 565); that during their conversation she held back some information from him (see, hearing minutes, dated January 9, 2006, page 569); and that she does not remember what she held back (see, hearing minutes, dated January 9, 2006, page 570).

Also, Ms. Deabreu's testimony revealed an apparent bias against the complainant. When the witness was being cross-examined about things she told the District Attorney's Office about the complainant, regarding whether or not the complainant indicated to this witness that she had stolen things, the hearing minutes, dated January 9, 2006, at page 578, lines 1-3 reflect that the witness was asked, "Anything pretty much they asked you if she stole you were willing to say you absolutely heard that?" To which Ms. Deabreu replied "Yes." The Court is unsure about the origin of this bias, other than to note that the two women had a long history together which included periods of time when they were not in contact, when their partners had disputes (see,

hearing minutes, dated January 9, 2006, page 584), and when the complainant asked the witness to move out of the complainant's house (see, hearing minutes, dated January 9, 2006, page 589).

The Court finds that the testimony of Ms. Deabreu was, to say the least, not convincing. Not only were there inconsistencies throughout, but it was palpably vague and unclear as to details, there were instances of the witness manifesting herself as less than forthcoming, as well as displaying a possible bias against the complainant. Accordingly, her testimony can not reasonably be credited.

Dawna Alexander, the defendant's sister, also testified at the hearing as to the issue of whether or not the complainant allegedly confessed to Carolyn Moore that the complainant burned herself. She testified that she was informed by Carolyn Moore of the alleged admission in October or November of 2004 (see, hearing minutes, dated January 4, 2006, page 203, lines 12-14). She also testified that she began contacting lawyers about the statement "around February" (see, hearing minutes, dated January 4, 2006, page 205, line 4) or "around the end of January, February" (see, hearing minutes, dated January 4, 2006, page 205, line 19).

When the witness was asked on direct examination the reason for the delay between finding out about the alleged recantation

by the complainant and contacting lawyers, she replied that she did not know where to turn, and that she was working two jobs which took up all of her time (see, hearing minutes, dated January 4, 2006, page 205, line 21- page 206, line 6).

However, on cross-examination it became clear that Ms. Alexander was, like other witnesses who testified during the course of this hearing, less than truthful. It was revealed that during the time period when Ms. Alexander stated on direct examination that she was unable to find an attorney because she was so busy with work, she was actually unemployed (see, hearing minutes, dated January 4, 2006, pages 222-227). Therefore, not only did Ms. Alexander have no credible explanation for taking no action on behalf of her brother between the time when she allegedly found out that the complainant stated she burned herself, and the time when she actually tried to contact lawyers to help him, a period of nearly four months, but her false claim of working two jobs also exposed her as less than truthful.

Moreover, Ms. Alexander also testified that she did not know who to contact to help the defendant. It is reasonable to wonder why she did not get in touch with trial counsel (see, hearing minutes, dated January 4, 2006, page 235) who could have undoubtedly given her advice on what to do. The Court notes that Ms. Alexander attended the trial of this matter (see, hearing

minutes, dated January 4, 2006, page 217) so she clearly had propinquity to the defendant's attorney. It is also reasonable to ponder why a sister would take no action on behalf of her brother if she had actually learned that he had been framed and is in jail for a crime he did not commit.

As no rational, credible answer to this question appears in the record, the hypothesis arises that the reason for Ms. Alexander's silence for so long is that she knew that the complainant never made an admission that she burned herself and intentionally busted her own lip, that the whole story was concocted to set aside the defendant's conviction and sentence. Some alleged facts adduced at the hearing in this case do not compute. Why would the complainant confess that she burned herself to members of the defendant's inner circle? If Ms. McDonald were interested in having the defendant removed from her home, why would she tell a group of people who would want to help him? Why would these people, all with relationships to the defendant, not immediately do anything to help him get out from under a frame-up?

The record is permeated with references to the defendant's family's upset over the defendant's nine year prison sentence. They arguably felt that the punishment did not fit the crime and with Dawna Alexander apparently at the center of the project, put

together this story of the complainant's confession that she injured herself in an attempt to relieve the defendant of his imprisonment and conviction.¹⁴ The People have argued that had the defendant been sentenced to a minimum term of incarceration, this defense recantation claim would not have been made, an argument that seems tenable.

From a common sense standpoint the Court can not fathom any other reason for the behavior of the witnesses who testified as to this aspect of the hearing. The outright lies presented during the course of the hearing, the inconsistencies and biases revealed, and the general lack of believability of the movant's witnesses leaves the Court with no other rational option than to, collectively, not credit their testimony. Accordingly, the Court finds that the defendant did not meet his burden pursuant to CPL 440.30[6] in presenting a preponderance of credible evidence that the complainant in this case ever made any recantation to anybody.¹⁵ There is no new evidence in this case. Accordingly,

¹⁴ The Court notes Dawna Alexander's involvement with each of the witnesses who testified on behalf of the defendant (except for Sylvester Mann), and even with the complainant (see, sentencing minutes, dated October 5, 2004, page 9, wherein the People stated that Ms. Alexander contacted the complainant prior to sentence). She participated in a three-way phone call between the defendant and Carolyn Moore, she brought Ms. Noel to trial each day, and she was in constant contact with the other witnesses.

¹⁵ The Court notes the holding of People v. Yates, 290 A.D.2d 888, 890 [3rd Dept. 2002], that "there is no form of proof so unreliable as recanting testimony", quoting from People v. Rodriguez, 201 AD2d 683 [2nd Dept 1994], appeal denied, 83 NY2d 914 [1994]. The defendant in Rodriguez contended that he was

it is not necessary for the Court to reach the question of whether any new evidence is truly newly discovered or to reach the question of whether it would have impacted upon the trial. The newly discovered evidence claim stumbles at the threshold. (See, CPL 440.10[g]; See also, People v. Barrero, 137 AD2d 759 [2nd Dept 1988]), where the "trial court concluded that the witness's proposed testimony, which contradicted in part the testimony of both the prosecution and defense witnesses, as well as her own prior statements, was totally unworthy of belief" and since the "purported new evidence was not credible" it "was not likely to result in a more favorable verdict to defendant upon retrial"). The defendant's motion to vacate his sentence and conviction on this ground is hereby and in all respects denied.

The defendant also seeks to vacate his conviction and sentence on the grounds of ineffective assistance of trial counsel. The defendant claims that his attorney, Peter Toumbekis, failed to present an alibi defense at trial, in that he did not call to the witness stand Audrey Noel, and did not enter into evidence a receipt from a hardware store, and that his trial attorney failed to call him to the stand to testify on his own behalf, as an alibi witness, and generally so he could testify

entitled to relief pursuant to CPL Article 440 based upon the recantation of the People's main trial witness. The Court found the recantation incredible. Therefore, denial of the requested relief was entirely proper.

that he did not commit the crime in question.¹⁶

When evaluating a claim of ineffective assistance of counsel, the "core of the inquiry is whether defendant received meaningful representation" (see, People v, Benevento, 91 NY2d 708, 712 [1998]). That determination is made by reviewing "the evidence, the law, and the circumstances of a case, viewed in totality and as of the time of the representation" (see, People v. Baldi, 54 NY2d 137, 147 [1981]). "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffectiveness" (see, People v, Benevento, 91 NY2d 708, 712 [1998]). Furthermore, to prevail on such a claim, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (see, People v, Benevento, 91 NY2d 708, 712 [1998]).

In the case at bar, the defendant was unable to demonstrate that by failing to present an alibi defense trial counsel did not have a strategic or legitimate explanation. In fact, through the testimony adduced at the hearing, it is quite clear why trial counsel did not present such a defense. As to the defendant's

¹⁶ The defendant is not claiming from the standpoint of the four corners of the trial transcript that trial counsel was shown, in any way, to be ineffective (see, hearing minutes, dated January 12, 2006, page 778, lines 14- 21).

hearing testimony on the issue of alibi, he explained that on the day and time in question, after he dropped off Audrey Noel at her home, he stopped at his sister's house, a bakery, an electrical store, and a store where he purchased a lease (see, hearing minutes, dated January 6, 2006, pages 446-447). However, the defendant had presented his original defense counsel with a written statement (People's Exhibit 8 in evidence) that was markedly contrary to his hearing testimony. Clearly, rational trial counsel would recommend against the defendant testifying when the defendant has provided his attorney with a writing containing unclear and contradictory explanations accounting for his time, one which could have been used with devastating force on cross-examination. Additionally, during the cross-examination of the defendant at this hearing, where the People were trying to pin the defendant down as to his whereabouts at the time in question, he responded to many of the questions with an unclear recollection of the events, "it could be true" (see, hearing minutes, dated January 6, 2006, page 471, line 15); "probably it was mentioned" (see, hearing minutes, dated January 6, 2006, page 471, line 7); when asked, "did you forget that?" he responded, "Yeah, probably" (see, hearing minutes, dated January 6, 2006, page 472 lines 20-21). The defendant's inability to be a reliable, credible witness had to have been of concern to any

rational defense counsel.

Regarding a receipt (Defense Exhibit C in evidence) and a statement from a hardware store clerk (Defense Exhibit D in evidence), it should first be noted that defense counsel shared this information with the Assistant District Attorney prosecuting the matter at trial (see, hearing minutes, dated January 10, 2006, pages 670-672). Clearly then, trial counsel was aware of this information. As to why trial counsel did not seek to introduce the exhibits into evidence, the Court notes that this evidence does not support an alibi defense since it does not cover the period of time when the crime was being committed, by at least a half-hour, and possibly more. See, People v. Mathews, 276 AD2d 385 [1st Dept 2000], leave denied, 96 NY2d 736 [2001]. That alone provides a legitimate reason for a rational counsel not offering them into evidence.

Audrey Noel, with whom the defendant was having a romantic relationship at the time of the crime, also testified at the hearing, claiming to be an alibi witness. She was interviewed by defense counsel before the trial (see, hearing minutes, dated January 3, 2006, page 155, lines 5-7) and counsel provided information regarding her to the Assistant District Attorney prosecuting the case (see, hearing minutes, dated January 10, 2006, page 672, lines 15-16). Clearly, again, counsel was

familiar with this evidence and discussed it with the People. The Court notes that this witness' description of events did not adequately conform to the defendant's time frame. For example, in defendant's written statement to his attorney, he wrote that he and Ms. Noel left his house at approximately 8:20 A.M. (see, People's Exhibit 8 in evidence), yet Ms. Noel testified they left between 8:30 A.M. and 8:45 A.M. (see, hearing minutes, dated January 3, 2006, page 152, line 19). Furthermore, Ms. Noel was unable to account for the defendant's time after he dropped her off. Both the inconsistencies in their statements and the fact that they had a romantic relationship, making her a partisan, would provide a rational trial counsel with tactical reasons for not calling her to the stand, fearing her testimony would hurt, more than help the defendant. In any event, the Court's inference here is unnecessary because the defendant plainly did not meet his aforesaid burden of demonstrating that by not calling Ms. Noel at trial, trial counsel did not have a strategic explanation. See, People v. Park, 229 AD2d 598 [1996]; People v. Brooks, 283 AD2d 367 [1st Dept 2001], leave denied, 96 NY2d 916 [2001].

The defendant also claims that trial counsel did not fully investigate his case. However, based upon the testimony of Assistant District Attorney Brian Lee who prosecuted this case at

trial, defense counsel was fully involved in this case. Not only did counsel provide the Assistant District Attorney with Defense Exhibits C and D, but they frequently discussed the case at length, including the possibility of reaching a disposition, and counsel showed him photographs of the house concerning certain property the complainant was allegedly removing, as well as a complaint filed against the complainant by the defendant (see, hearing minutes, dated January 10, 2006, pages 673-674). Clearly, trial counsel was involved in this case and representing the defendant in an effective manner, thus the Court can not agree with the defense allegation.¹⁷

The defendant further claims that he wanted to testify at the trial of this matter, but that trial counsel unilaterally prevented him from doing so. In considering this claim, the Court must evaluate the defendant's testimony and decide if he is credible. On that point, the Court is immediately drawn to the defendant's testimony at the hearing on January 6, 2006, reflected on pages 482- 492 of the transcript (also discussed supra). The defendant denied remembering having any contact with

¹⁷ The Court finds, also, that under the federal standard of ineffective assistance of counsel, the defendant failed to meet that test, demonstrating that "counsel's performance was deficient and that the deficiency in performance prejudiced the defendant" (see, People v, Benevento, 91 NY2d 708, 712 [1998], referring to Strickland v. Washington, 466 US 668 [1984]). In the case at bar, the defendant clearly failed to prove that counsel's performance was deficient. There is no need to reach the issue of prejudice.

Carolyn Moore. He was evasive in answering the People's questions and claimed he could not recall any conversations between them. However, as discussed supra, it is clear that they had a long conversation while the defendant was incarcerated. The defendant admitted that they discussed how well things were proceeding in the post-conviction aspect of his case leading up to the instant CPL Article 440 motion (see, hearing minutes, dated January 6, 2006, page 490, lines 18-22). The defendant demonstrated a lack of forthcomingness in his testimony that this Court may not ignore.

Furthermore, the Court notes that the defendant admits that he and trial counsel did discuss whether or not he would testify at trial (see, hearing minutes, dated January 6, 2006, page 495, lines 15-18). And although the defendant claims he was denied his right to take the witness stand by his attorney, he admits that he never told the Court he wanted to testify (see, hearing minutes, dated January 6, 2006, page 496), that he never thought of dropping trial counsel as his attorney (see, hearing minutes, dated January 6, 2006, page 493, lines 18-20), and that trial counsel told him that if he wanted to testify he would prepare him to do so (see, hearing minutes, dated January 6, 2006, page 502, lines 6-7). Additionally, the Court notes that the defendant did not complain about trial counsel, nor raise any issue about

being denied the right to testify at his trial, when he spoke at his sentencing on October 5, 2004.

The defendant has the burden of demonstrating by a preponderance of credible evidence that he wanted to testify and his trial counsel denied him that right. Based upon the discussion above, the Court finds that with his testimony alone on this topic, the defendant has not met his burden.

It is important to note the absence of testimony in this case by trial counsel. Had the defendant called him to testify at this hearing, perhaps he could have supported the defendant's position. The defendant and the People at this hearing debated who had the obligation to call trial counsel, and they each thought the obligation fell on the other party. However, in this case, the Court must agree with the People's position that since the burden of proof was on the defendant, if trial counsel's testimony was relevant, as it was here, the defendant had that obligation. See, People v. Scott, 10 NY2d 380 [1961].

Accordingly, the defendant's motion to vacate his sentence and conviction on the ground of ineffective assistance of counsel is denied.

Based upon the above discussion, the defendant's entire motion pursuant to CPL Article 440 is hereby denied in all respects.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the attorney for the defendant and to the District Attorney.

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WILLIAM M. ERLBAUM, J.S.C.