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SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-2 - QUEENS COUNTY
125-01 Queens Boulevard
Kew Gardens, New York 11415

P R E S E N T :

HON. JOSEPH ROSENZWEIG

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THE PEOPLE OF THE STATE OF NEW YORK, : Indictment No. 2273/96

-against- : Motion: To Vacate Judgment
pursuant to CPL§ 440.10
DAVID BROOKS,
A.K.A. THEO AMES
Defendant. : Dated: February , 2002
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By *pro se* motion dated September 20, 2001, the defendant David Brooks moves *inter alia* for an Order of this Court permitting him to proceed as a poor person on a *pro se* CPL§440 motion filed herewith, in which he seeks *vacatur* of judgment of conviction pursuant to Criminal Procedure Law §440.10(1) (d) and (h). The motion to proceed as a poor person is granted only to the extent that this Court will entertain the defendant's *pro se* CPL§440 motion.

In support of this CPL§440 motion to vacate, the defendant advances the following arguments: (1) that his conviction was obtained in violation of his constitutional right to effective assistance of counsel, and (2) that the Prosecutor introduced important "material" evidence that was obtained in violation of his constitutional rights under the United States and New York State Constitutions. By supplemental motion dated November 14, 2001, the defendant further contends that his judgment should be vacated pursuant to CPL§440.10 (1)(g) inasmuch as he has uncovered "new evidence" since the trial and his failure to have this "new evidence" at time of trial prejudiced his defense. In the alternative, the defendant requests an Order for a hearing to determine the issues hereunder. By Responses dated November 14, 2001 and January 25, 2002, the People oppose this motion in its entirety.

PROCEDURAL HISTORY

On June 28, 1996, the defendant was arraigned on a six count Indictment charging him with crimes allegedly committed on two separate dates: February 4, 1996, and February 16, 1996. On March 31, 1998, on eve of trial, the Court¹ severed count one, Robbery in the First Degree, allegedly committed on February 16, 1996, from the remaining five counts which were allegedly committed on February 4, 1996. A bench trial was then commenced as to count one, Robbery in the First Degree, which charged the defendant with the gunpoint robbery of a complainant, Linda Peglow, the night manager of the Linden Maintenance Corporation, a yellow taxi cab stand located at 134-02 33rd Avenue, Flushing, Queens. On April 7, 1998, the defendant was convicted of Robbery in the First Degree and was thereafter sentenced to a determinate term of fifteen years.

An appeal was perfected in the Appellate Division, Second Department and Appellate Counsel contended (1) that the single witness identification evidence adduced at trial was inconsistent with other evidence and (2) that the identification evidence was tainted, thus depriving the defendant of his constitutional right of confrontation and due process. On March 5, 2001, the Appellate Division affirmed the judgment of conviction finding that “resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the trier of fact, which saw and heard the witnesses....[W]e are satisfied that the verdict of guilt was not against the weight of the evidence” (281 AD2d 428). Leave to appeal to the Court of Appeals was denied (96 NY2d 859).

On December 21, 1999, during the pendency of the appellate process, the defendant filed a *pro se* motion claiming that his judgment of conviction should be set aside pursuant to CPL§440, due to various Brady and Rosario violations committed by the People. Within one month however, he requested withdrawal of that motion without prejudice and on February 10, 2000, this Court granted that application. One year later, on February 21, 2001, the defendant filed a Freedom of Information Law (hereinafter F.O.I.L.) request to the Queens County District Attorney’s Office for all documents relating to this case. In response to that request, the District Attorney’s Office sent 44 documents to the defendant on June 14, 2001, including the Sprint report of the incident on February 16, 1996. It is this Sprint report which the defendant now alleges is “new evidence” underpinning this supplemental CPL§440 motion.

¹ Justice Thomas A. Demakos presided over the bench trial and imposed the sentence hereunder.

CONCLUSIONS OF LAW

The defendant's initial contention in this CPL§440.10 motion, is that defense counsel was ineffective at all stages of this criminal prosecution, to wit: at the line-up, at the pre-trial suppression hearing and at trial. In support of this argument, the defendant argues that not only did his lawyer fail to object to the line-up's suggestibility at the time it was conducted, but he failed to object to its suggestibility at pre-trial hearing and at trial; additionally, the defendant contends that counsel also failed to investigate and interview his witnesses and as a result, was unprepared for trial.

Although CPL§ 440 is intended to be the appropriate means of addressing a defendant's claim that he has been denied the effective assistance of counsel, this is usually due to the fact that effectiveness of counsel claims may be based upon matters *dehors* the record preventing an adequate review by an appellate court (see, People v. Lekhram, 209 AD2d 440, appeal denied 84 NY2d 1034; People v. Chiera, 255 AD2d 685). In this motion, however, not all the claims advanced by the defendant as to his counsel's ineffectiveness are claims which are *dehors* the record. To the extent that a defendant may claim that the ineffectiveness of counsel is related to matters that are on the record, this claim is reviewable on a direct appeal since the appellate tribunal can adequately evaluate such claim from its inspection of, and inquiry into, the record (see, People v. Felton, 239 AD2d 120, appeal denied, 91 NY2d 872). As a result, issues relating to the suggestibility of the defendant's photo identification, or to the subsequent line-up identification², were issues which were adjudicated at a pre-trial Wade hearing and were on the record; thus, they should have been included on the defendant's direct appeal. Moreover, issues concerning alibi witnesses³, or relating to defense counsel reserving his right to make an opening statement⁴, were also matters which were on the record and they too should have been included on a direct appeal. Having reviewed Appellate Counsel's brief, and finding that these claims were not raised at that juncture, this Court is now statutorily required to deny this branch of the defendant's motion pursuant to CPL§440.10[2][c].

As to the defendant's contentions that he had never been assigned counsel at arraignment

²Hubret North, Esq. represented the defendant at the line-up identification procedure.

³See minutes of Sandoval hearing, March 30, 1998, pp 2-4.

⁴See Trial minutes, p. 33.

or that that his trial attorney failed to file pretrial motions, these allegations are simply inaccurate and incorrect. This Court's inspection of the official court file and the papers included therein, conclusively demonstrate that the defendant was represented by counsel⁵ at arraignment and *omnibus* motions were filed by defense on the defendant's behalf. Notwithstanding the fact that several defense attorneys represented the defendant during the pendency of his case⁶, motions filed by earlier counsel were thereafter adopted by subsequent counsel. CPL§ 440.30(4) provides that upon considering the merits of a CPL§440 motion, the court may deny it without conducting a hearing if: (c) [A]n allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or (d) [A]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document. Thus, the defendant's argument as to these particular allegations are conclusively refuted by documentary proof and are unavailing.

Finally, as to the defendant's claims that he was denied the effective assistance of counsel due to his lawyer's failure to investigate the case, to hire an investigator or to do legal research, these are claims which are *dehors* the record and thus properly brought in a CPL§ 440 motion. In this motion, however, the defendant has failed to support these claims by affidavit or other evidence other than by his own unsupported allegations. CPL§440.30(4)(b) specifically provides that "a court may deny the motion without a hearing where such contention is made solely by the defendant and unsupported by other affidavit or evidence"(see, People v. Ford, 46 NY2d 1021). In such a case, the statute further provides that under these circumstances, "there is no reasonable possibility that such allegation is true" (CPL§440.30[4][b][ii]). Accordingly, this branch of the defendant's motion is also denied.

When an ineffective assistance of counsel claim is raised by a defendant, the law, the evidence and the circumstances of the case at the time of the trial are taken into consideration (People v. Baldi, 54 NY2d 137). Perceived with hindsight and retrospective analysis, a convicted defendant will oftentimes attempt to cull errors or deficiencies from within his defense, rather than to recognize them as merely disagreements with strategies or tactics that have failed (People v. Rivera, 71 NY2d 705; People v. Benn, 68 NY2d 941). When making such a claim, the defendant must demonstrate that, but for counsel's allegedly deficient performance, the outcome of the

⁵Winston Gordon, Esq.

⁶Indeed, Winston Gordon, Esq. was relieved due to "severe personal conflict" with the defendant (Sandoval proceeding, March 30, 1998, p3).

criminal proceeding would have been different (see, People v. Benn, *supra*; People v. Sullivan, 153 AD2d 223, appeal denied 75 NY2d 925).

Here, the defendant's claims of ineffective assistance of counsel are based on what he perceives to be counsel's failure to make certain motions and to interview and call potential witnesses to rebut the People's case. However, the testimony from the pre-trial hearings and trial clearly demonstrate that defense counsel *did* make numerous motions during the pendency of his case. It is clear to this Court that what the defendant now attempts to illustrate in his moving papers as errors or deficiencies from within his defense, are rather disagreements with strategies or tactics that have failed⁷ (People v. Rivera, 71 NY2d 705; People v. Benn, 68 NY2d 941). Moreover, the defendant has neglected to establish that but for defense counsel's alleged errors, the outcome of his case would have been different (see, People v. Washington, 233 AD2d 684, 689, lv denied 89 NY2d 1042). Accordingly, this Court finds that the defendant's claim that he was denied the effective assistance of counsel is denied in all respects pursuant to CPL§440.10(3)(c).

The defendant's second argument advanced in this CPL §440 motion is that the People introduced "material evidence" at trial which was in violation of his constitutional rights. This "material evidence" consisted of a photograph from an earlier arrest in which the defendant subsequently received Youthful Offender treatment and his file had been sealed. In this motion, the issues relating to the use of this photograph from a "sealed" file are the exact issues argued by Defense Counsel at the pre-trial Wade hearing⁸; thus, these issues and arguments were on the record. Having reviewed Appellate Counsel's brief, and finding that these claims were not raised on the direct appeal, a denial of this branch is mandated pursuant to CPL§440.10[2][c]. Assuming *arguendo* that this issue was not statutorily barred, it would nonetheless be denied by this Court. The New York Court of Appeals in People v. Patterson (78 NY2d 711), considered the propriety of using a defendant's "sealed" photograph in a subsequent identification procedure in an unrelated case in violation of CPL §160.50. The Court of Appeals has found that such use did not infringe upon any constitutional right of the defendant, nor did it warrant suppression of the identification evidence. Accordingly this branch of the defendant's CPL§ 440 motion is equally unavailing.

⁷It does not escape this Court's attention that this same defense counsel also represented the defendant at his second trial on the remaining "severed" counts of this Indictment. Interestingly, at that trial the defendant was acquitted of all counts. Did counsel pick and choose at which trial to be effective—and at which trial to be ineffective?

⁸Justice Pearl Appelman presided over the Suppression hearing on July 10, 1997.

Turning to the final grounds for *vacatur* of judgment advanced by the defendant in his second, or supplemental, motion dated November 14, 2001, the defendant contends that he has uncovered “new evidence” since the trial as a result of his F.O.I.L. request to the District Attorney’s Office. He claims that this “new evidence”, a Sprint report, had not previously been disclosed to defense and consequently, his defense at trial was prejudiced. Initially, this Court notes that upon the basis of these grounds, it could deny this supplemental motion at this juncture pursuant to CPL§440.10 (3)(c) inasmuch as these grounds should have been included within the initial CPL§440 motion filed on September 20, 2001. However, inasmuch as the defendant’s initial motion was still pending before this Court, this motion will be considered as well.

In this supplemental motion, the defendant now argues that the Sprint report is “new evidence” because it “was never received by defense upon discovery” prior to trial. Yet, other than the defendant’s unsubstantiated allegations that this document had been withheld, there is no other indication that this is so (see, People v. Allen, 285 AD2d 470). Absent from the defendant’s moving papers is an affidavit from trial counsel supporting this contention.(see, People v. Olivieri-Perez, 248 AD2d 645, 646). Indeed, not only do the People’s affirm in their responding papers that all police reports and other documents were disclosed to Defense⁹, but more importantly, they include a letter from the defendant’s appellate counsel indicating that among the documents that were turned over to defense prior to trial was, *inter alia*, the Sprint report¹⁰.

As a result, the grounds advanced in this supplemental motion are contravened conclusively by documentary proof (CPL§440.30[4][c]). Moreover, even assuming that the document was not disclosed, there is no “reasonable possibility” that the failure to disclose it contributed to the verdict of guilt (see People v. Machado, 90 NY2d 187,189). For these reasons, the defendant’s motion is denied in its entirety. The additional motion to conduct a hearing pursuant to CPL §440.30(5) is denied (People v. Satterfield, 66 NY2d 796).

The foregoing constitutes the decision of the Court. Order entered accordingly.

Copy of this decision and order forwarded to the District Attorney and to the defendant at his place of incarceration.

⁹ See, Affirmation of Assistant District Attorney Robin Leopold, January 28, 2000, initially submitted to the defendant prior to his withdrawal of his December 1999 CPL§440 motion.

¹⁰ See, letter of Betsy Hutchings, Legal Aid Society, February 14, 2000.

J.S.C.