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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART K-8

THE PEOPLE OF THE STATE OF NEW YORK :	
:	BY: ROBERT CHARLES KOHM, J.
-against- :	
:	DATE: DECEMBER 19, 2002
DONALD STRONG, :	
Defendant. :	INDICT. NO. 1151/80
:	

Defendant makes this motion pursuant to CPL §440.10 for an order directing the District Attorney's Office, the New York City Police Department, and Queens General Hospital to conduct a search for biological evidence susceptible to DNA testing, and for an order directing DNA testing.

After a jury trial defendant was convicted of rape, burglary, assault, and attempted robbery. On July 9, 1981, he was sentenced to concurrent terms of imprisonment for all charges. In a previous motion to vacate the judgment of conviction, the Court denied the relief requested on August 11, 1986, and held that defendant was not deprived of effective assistance of counsel.

Defendant appealed the judgment of conviction, and the Appellate Division, Second Department, affirmed and held that the sentence was not excessive (see, People v Strong, 137 AD2d 733).

The Court of Appeals denied defendant's application for leave to appeal (see, People v Strong, 71 NY2d 1034).

In another motion to vacate the judgment of conviction, defendant argued again that he had ineffective assistance of counsel. On March 27, 2000, this Court denied the motion to vacate.

Defendant now makes this motion requesting a search for forensic evidence and to have such evidence tested for DNA which could vindicate his claim that he is innocent.

There is no merit to defendant's argument.

In the Affirmation in Opposition the People advise that they have attempted to locate forensic evidence in this case and they were unsuccessful. The District Attorney's file appears to be lost, the Police Department was unable to locate anything, and Queens General Hospital has nothing.

The Court must grant an application for DNA testing on specific evidence, upon defendant's request, if it determines that, defendant was convicted before January 1, 1996, and, if a test had been conducted on such evidence and the results had been admitted at the trial, there exists a reasonable probability that the verdict would have been more favorable to the defendant (CPL 440.30[1-a]).

In the case at bar, defendant has not shown that any evidence with DNA was secured in connection with this case, that there is a likelihood that the results of that DNA test would exclude him, and there exists a reasonable probability that the verdict would have been more favorable.

The evidence in this case established that defendant did not have an erect penis and he did not ejaculate. Also, he was identified by Mrs. Velez as well as her husband. Even if defendant's DNA was not found on any vouchered evidence, it is not probable that the results of DNA testing would affect the verdict, were a new trial to be held (see, People v Smith, 245 AD2d 79; People v De Oliveira, 223 AD2d 766).

Although the People are unable to located their file, defendant's due process rights were not violated and he was not prejudiced. Defendant must act diligently in making a request for DNA testing (People v Kellar, 218 AD2d 406.). The People are not required to preserve crime scene forensic evidence after appeals are exhausted. There is no statutory obligation to preserve crime scene items for future forensic testing (People v Ahlers, 285 AD2d 664; People v Watkins, 189 AD2d 623).

Also, CPL §440.10(3)(c) provides that the court may deny a motion to vacate a judgment when a previous motion was made and defendant was in a position to raise the ground or issue underlying the present motion but did not do so. In this case,

defendant made prior motions to vacate the judgment of conviction and could have raised the issues in his other motion.

A judgment of conviction is presumed to be valid. This presumption of regularity exists until contrary substantiating evidence appears. The party challenging the validity has the burden of coming forward with sufficient allegations to create an issue of fact (People v Richetti, 302 NY 290). Sufficient evidentiary facts must be alleged in order to raise a triable issue of fact sufficient to challenge the presumed validity of a judgment of conviction. Bare allegations are insufficient to carry this evidentiary burden. It is not enough to make conclusory allegations. Supporting facts must be provided (see, CPL 440.30(4)(d); People v Brown, 56 NY2d 242; People v Session, 34 NY2d 254). Defendant has not met his burden of creating an issue of fact.

Based on the foregoing, the motion for an order directing a search for forensic evidence and DNA testing is denied in all respects.

Order entered accordingly.

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

ROBERT CHARLES KOHM, J.S.C.