

People v Dawkins
2013 NY Slip Op 30450(U)
February 26, 2013
Supreme Court, Kings County
Docket Number: 2809/05
Judge: Joel M. Goldberg
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs. -

**HON. JOEL M. GOLDBERG
IND. NO. 2809/05
DATE: FEBRUARY 26, 2013**

**WAYMON DAWKINS,
(AKA WAYMON DARKINS,)**

DEFENDANT.

The defendant's *pro se* motion, dated December 27, 2012, pursuant to CPL 440.10 to vacate the judgment convicting him of Attempted Murder in the First Degree and sentencing him to a prison term of 25-years-to-life to run consecutively to a Westchester County conviction (on which the defendant is serving a life-without-parole prison term upon a conviction for Murder in the First Degree and other charges – *See People v. Darkins*, 81 AD3d 846 [2d Dept. 2011], *lv. denied*, 17 NY3d 794 [2011]), upon consideration of the People's response, dated February 20, 2013, is denied.

The Defendant's Contentions

The defendant's motion contains three "POINT" headings. However, each of these "POINTS" contains various factual and legal claims, some of which are repeated in more than one "POINT." These claims, as can best be determined from reading the defendant's motion are:

The defendant received ineffective assistance of counsel because counsel:

1. failed to investigate or call alibi witnesses at trial;
2. agreed with the Court and the prosecutor to redact exculpatory evidence from a police complaint report;
3. failed to challenge the legality of the defendant's arrest;
4. failed to challenge the search warrant on the ground that the warrant was based on information obtained from the defendant's illegal arrest;

5. requested that the Court administer *Parker* warnings to the defendant;
6. waived the defendant's right to testify in the Grand Jury;
7. failed to object to the Court's adjournment of the suppression hearing after it had commenced [so that the defendant could be tried in Westchester County on Murder in the First Degree charges that were related to the events under consideration at the suppression hearing];
8. failed to object to the Court's refusal to conduct a preliminary hearing [pursuant to CPL Article 180];
9. failed to adopt some of the defendant's *pro se* motions;
10. failed to challenge the legality of his arrest;
11. failed to call an expert witness to testify about the defendant's claustrophobia [and how it would have impacted on the voluntariness of his statements to the police];
12. failed to call his accomplice, Parys Johnson, as a witness at trial; and
13. failed to investigate an allegedly falsified police Sprint report.

The defendant also claims:

14. the Court should have assigned new counsel [at the suppression hearing] because counsel requested that the Court administer *Parker* warnings to the defendant and that the Court should have ordered a CPL Article 730 examination of the defendant [Following the suppression hearing, the Court assigned new counsel to represent the defendant at the trial.];
15. the Court wrongfully deprived the defendant of his right to represent himself; and
16. the Court committed an error in adjourning the suppression hearing to allow the defendant to be tried in Westchester County.

Prior Proceedings and Discussion

On March 5, 2008, the defendant brought a prior CPL 440.10 motion claiming he received ineffective assistance of counsel at his pre-trial suppression hearing based on counsel's failing to call certain witnesses including "a rebuttal medical witness" (which the Court, in its decision on the prior motion, interpreted to mean "an expert to refute the expert

testimony offered by the People regarding the defendant's claim that the voluntariness of his statements was affected by claustrophobia").

In a Decision and Order, dated May 29, 2008, the defendant's prior motion was denied without a hearing, because "the motion does not contain facts that substantiate or tend to substantiate that he received ineffective assistance of counsel at the suppression hearing or trial," citing CPL 440.30 (4) (b).

By a motion dated June 17, 2008, the defendant sought to reargue this Court's May 29, 2008 Decision and Order. In that motion, the defendant raised additional claims of ineffective assistance of counsel based on purported failures (1) to "investigate" certain matters, (2) to make certain motions, (3) to object to certain testimony at the suppression hearing, (4) to object to the adjournment of the Kings County pre-trial suppression hearing in order to allow the Westchester County case to proceed to trial, (5) and the Court's denial of the defendant's motion to dismiss the indictment for failure to honor his request to testify in the Grand Jury and to afford him a preliminary hearing.

In a Decision and Order, dated July 24, 2008, the Court granted the defendant's motion to reargue and adhered to its original decision, noting that many of the issues raised in the motion would be reviewable on the defendant's then-pending direct appeal and that all of the new issues raised in the motion to reargue had no merit.

A Justice of the Appellate Division, in a decision dated August 28, 2008, denied the defendant's application to appeal from this Court's denial of the defendant's prior motion to vacate the judgment.

Because the defendant was in a position to raise all of the issues in his prior CPL 440.10 motion that are now raised in this motion – and, in fact, has repeated some of those previously denied claims in this motion – the present motion is summarily denied. CPL 440.10 (3) (b) (as to claims made in the prior motion) and (c) (as to claims that were not made in the prior motion but could have been).

Furthermore, a year following the defendant's prior unsuccessful CPL 440.10 motion, the defendant filed his main brief on direct appeal in the Appellate Division. The main brief claimed only that the trial court improperly denied the defendant's rights to self-representation and to be present at trial.

By a *pro se* supplemental brief, dated April 10, 2010, the defendant also claimed, *inter alia*, that counsel was ineffective and the Court committed error for allowing the suppression hearing to be interrupted by the Westchester County proceedings (Def. Supp. Brief, “DSB”, at 31-33) that the Court “ignored defendant’s objections to counsel not calling witnesses on his behalf (DSB at 35), and that defense counsel was ineffective for failing to submit alibi notice (DSB at 14), for not calling the defendant’s doctor to testify about the defendant’s claustrophobia (DSB at 14 and 62), “for not calling a rebuttal firearm expert, or at the very least an expert in residue” (DSB at 38), failing to vindicate the defendant’s right to a preliminary hearing and testify before the Grand Jury (DSB at 54-55); for allowing the Court to make certain redactions to a police report, citing the trial record (DSB at 67-69), and further, that the defendant was illegally arrested, the search warrant was illegally obtained, and the Court’s rulings at the suppression hearing were wrong (DSB at 19-30).

On February 22, 2011, the defendant’s conviction was unanimously affirmed. *People v. Dawkins*, 81 AD3d 972 (2d Dept. 2011) *lv. denied*, 17 NY3d 794 (2011). The Appellate Division held that all of the defendant’s arguments, both in the main brief and the supplemental brief were “without merit,” including all of the *pro se* claims regarding ineffective assistance of counsel to the extent that those claims concerned matters that were not off-the-record.

Therefore, to the extent that the defendant’s current claims were either determined on the merits upon that appeal or were unjustifiably not raised on that appeal, the motion based on those claims must be denied. CPL 440.10 (2) (a) and (c).

The Court agrees with the analysis set forth in the People’s Memorandum of Law (at 2-9) that only two of the defendant’s current claims have not already been decided on the merits and were not reviewable on the defendant’s direct appeal, because they are, at least in part, based on off-the-record facts.

Notwithstanding this Court’s above decision to deny these claims pursuant to CPL 440.10 (3) (c), because they were unjustifiably not raised on the defendant’s prior CPL 440.10 motion, this Court will address these claims.

The first of these two claims, is that defense counsel was constitutionally ineffective for failing to call the defendant’s alleged accomplice, Parys Johnson, as a witness. However,

the defendant has presented no sworn allegations of fact, or even unsworn allegations, that Parys Johnson was available, willing to testify, and possessed any exculpatory information. Sworn allegations are required to support every fact essential to support the motion. CPL 440.30 (1). In this case, the defendant has not alleged any facts tending to establish that defense counsel was ineffective to the extent that the failure to call Parys Johnson as a witness deprived the defendant of effective assistance of counsel under either Federal or State Constitutions. *Strickland v. Washington*, 466 US 668 (1984); *People v. Stultz*, 5 NY3d 277 (2004).

The defendant's second claim that is based on off-the-record facts that have not already been decided on the merits is the claim of ineffective assistance of counsel based on counsel's alleged failure to investigate an allegedly falsified police Sprint report (Defendant's Motion at 22 and Defendant's Exhibit Q). The Sprint report in Defendant's Exhibit Q has a date of August 26, 2005 although the contents of that report appear to depict police communications concerning the pursuit and apprehension of the defendant. Because these events actually took place on April 18, 2005 through April 19, 2005, the defendant contends that the radio transmissions reflected in that report were not made contemporaneously with the events described in the report but, in fact, were "created" months later on August 26, 2005.

In their Answer, the People attach as Exhibit A, a Sprint report containing similar information printed in a different format showing a date of "April 19, 2005" at the top of the page. The People posit in their Answer that the "August 26, 2005" date on Defendant's Exhibit Q represents the date the report was printed and does not establish that the events reflected in the report were not broadcast "live" on April 18 and 19, 2005.

Because this discrepancy alone does not establish that anything was "falsified" or that the defendant was deprived of effective assistance of counsel by an alleged failure by defense counsel to "investigate" why the report used at the trial had a date of August 26, 2005, the defendant has failed to provide sufficient allegations of fact tending to establish that there was a failure by his counsel to provide effective assistance to the extent that it would justify vacating this judgment. CPL 440.10 (4) (b) (essential facts to support this claim had not been

supported by sworn allegations of fact). *See also*, CPL 440.30 (4) (d) (the Exhibit of the Sprint report provided by the People contradicts the defendant's allegation that the defendant's Exhibit was "falsified" and under the circumstances there is no reasonable possibility that the events recorded in both Sprint reports were not contemporaneous with the radio transmissions actually made).

Accordingly, the defendant's motion is denied in all respects.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

