

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM: PART 35

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

Indictment No.: 249/2000

KAREEM MAYO & DONNELL PERKINS,

Defendants.
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DENA E. DOUGLAS, J.

Defendants Kareem Mayo (Mayo) and Donnell Perkins (Perkins) move pursuant to Criminal Procedure Law (CPL) sections 440.10 (1) (b), (c), (d), (g), and (h), to vacate their judgments of conviction on the grounds of newly discovered evidence and actual innocence.¹ With respect to the claim of newly discovered evidence, defendants jointly claim that information discovered since the trial regarding the vision of Ernest Brown (Brown) -- the singular eyewitness to this incident -- calls into question his credibility, the veracity of his testimony and, therefore, raises a reasonable probability that the verdict would have been different if the trial jury was aware of the newfound evidence. Perkins additionally argues that the subsequent developments in the study of the reliability of eyewitness identifications also constitutes newly discovered evidence. As for the actual innocence claims, each defendant asserts that he was not present at the scene of the incident and thus, were wrongly identified and convicted. Mayo maintains that he was visiting family in Virginia for the holiday season and Perkins claims that he was in his bedroom at the time this incident occurred.

The People oppose defendants' motions in their entirety.

¹ In a letter dated August 18, 2022, defendant Perkins advised the court that he was withdrawing the *Brady* claim asserted in his CPL 440 motion. Defendant Mayo joined and similarly withdrew his *Brady* claim.

This court conducted a CPL 440 hearing on defendants' motions on June 21, June 22, June 23, July 18, July 19, July 20, July 21, August 8, August 9, August 10, August 23, August 24, October 6, November 28, November 30, December 1, December 2, December 12, December 13, December 14, December 20, and December 22, 2022.

For the reasons set forth below, defendants' motions are granted.

Background and Procedural History

For the death of Reuben Scrubb (Scrubb) on December 25, 1999, under Kings County Indictment No. 249/2000, defendants were charged with two counts of murder in the second degree (Penal Law §§ 125.25 [1], [2]), and related weapons offenses.

On April 16, 2001, at the outset of jury selection in this matter, the People, for the first time, disclosed the identity of Brown to defendants and their trial counsel.

According to Brown's trial testimony, as pertinent here, on December 25, 1999, at approximately 4:00 a.m., Brown and Scrubb were outside Po'k Knockers, a club on Atlantic Avenue in Kings County, where the two friends had socialized and consumed alcohol in the early morning hours. Brown testified that Perkins bumped into Scrubb on the sidewalk, causing a verbal argument between the two. As Scrubb and Perkins continued to argue, Perkins crossed the street towards a gas station located at the intersection of Atlantic Avenue and Grand Avenue. Brown stated that the area was well-lit and that he had opportunities to observe Perkins as he argued with Scrubb.

Brown and Scrubb then headed to the same gas station because Brown wanted to ask the gas station attendant for a pen. At that time, Brown observed an Infiniti Q45 pull up to the gas station and saw Perkins enter the passenger side of the vehicle. The vehicle then pulled up in front of Brown and Scrubb. Mayo, the driver of the vehicle, argued with Scrubb about his interaction

with Perkins. After a five-minute exchange, Brown testified that it appeared the vehicle was pulling out of the gas station.

However, the vehicle then reversed and again stopped in front of Brown and Scrubb. Perkins remarked "Pop him" and Brown observed the barrel of a gun held by Mayo. Mayo leaned past Perkins and fired approximately three to four gunshots. Brown ducked behind a gas pump and observed Scrubb on the ground when the shooting ended. According to Brown, the lighting conditions at the gas station were "bright" and he had an unobstructed view of Mayo's face.

During his direct testimony, Brown made in-court identifications of both Mayo and Perkins.

On cross-examination and recross-examination, Brown testified that he was farsighted, did not have 20/20 vision, and required eyeglasses for reading. He denied needing eyeglasses for any other purpose.

After the trial, on April 25, 2001, the jury convicted defendants of second-degree murder.

On May 16, 2001, the court sentenced Mayo to a term of imprisonment of 25 years to life and Perkins to a term of 22 years to life (Demarest, J., at hearing, trial, and sentence).

After defendants' direct appeals were exhausted and other collateral proceedings to vacate their judgments of conviction were denied, by an Order dated June 15, 2001, this court (D'Emic, J.) granted defendants' CPL 440.10 motions insofar as ordering hearings for the respective claims raised therein.

Summary of Hearing Testimony

As relevant here, the following witnesses testified during the CPL 440 hearing concerning Brown's vision, use of eyeglasses, and his identifications of defendants.

Keeler Brown

Keeler Brown, the ex-wife of Brown, testified at the CPL 440 hearing that Brown required eyeglasses for additional purposes beyond reading. Ms. Brown stated that Brown wore eyeglasses during daily activities such as watching television, playing video games, and cooking. She also testified that Brown complained about his vision. For example, Brown indicated that he would have difficulty seeing while driving. However, according to Ms. Brown, Brown often did not wear eyeglasses outside the home for reasons of vanity.

Ms. Brown further stated that she was friends with Scrubb through Brown, but had no knowledge of the criminal proceedings related to Scrubb's murder, including the identities of the defendants. Ms. Brown became involved in the current proceedings when Clark Robertson, her brother and a friend of the Mayo and Perkins families, indicated that defense attorneys wished to speak with Ms. Brown about Brown's vision and use of eyeglasses.

Through Ms. Brown's hearing testimony, the defense was able to admit into evidence various photographs of Brown wearing eyeglasses, including pictures of him wearing eyeglasses during his youth.

Dr. Rosamund Gianutsos

Dr. Rosamund Gianutsos was declared an expert witness in the fields of the usage and language of the New York State Department of Motor Vehicles (DMV) and the types of eye examinations conducted by the DMV.

Dr. Gianutsos testified that the DMV utilizes the Snellen chart, the commonly known eye examination chart, to test whether an applicant possesses a minimum vision level of 20/40. Individuals with vision worse than 20/40 are required to have corrective lenses in order to obtain a driver's license.

With respect to Brown, Dr. Gianutsos reviewed his past driver's licenses and driving abstract. Although Dr. Gianutsos could not state that Brown needed corrective lenses in 1999, his driver's abstract indicated a need for corrective lenses.

Dr. Nancy Franklin

Dr. Nancy Franklin was declared an expert in the field of memory and eyewitness identifications and generally testified about the fallibility of the memories and identifications made by eyewitnesses. In short, Dr. Franklin explained that perceptual circumstances, such as duration of exposure to an incident, lighting conditions, and viewing angles, among other factors, can impact the reliability of memory. Additionally, a witness's personal condition, such as stress levels, fatigue, or use of substances may affect the accuracy of memory or an identification. Moreover, with respect to identifications, the greater the delay in making an identification after witnessing an incident, the likelihood of a misidentification increases.

With respect to this particular incident, Dr. Franklin reviewed Brown's trial testimony and opined that in light of the factual circumstances of the incident, ranging from Brown's consumption of alcohol to the stress of the event and to the delay in the identification procedures employed by the police, Brown's identifications of Mayo and Perkins were unreliable.

Dr. Michael Newton

Dr. Michael Newton was declared an expert witness in the field of ophthalmology for purposes of the CPL 440 hearing. Dr. Newton testified that he had reviewed Ms. Brown's testimony as well as three eyeglass prescriptions and a 2005 driver's license evaluation for Brown. Based on that information, Dr. Newton opined that in 1999, Brown suffered from a considerable degree of hyperopia. Although hyperopia is known colloquially as farsightedness and understood to mean that nearby objects may appear blurry, Dr. Newton explained that individuals suffering from significant farsightedness, such as Brown, have difficulty seeing from multiple distances.

Dr. Newton further explained that Brown's 2005 driver's license evaluation indicated that Brown had 20/50 vision or worse because of New York state's minimum requirement of 20/40 vision. As such, without corrective lenses, Brown would have difficulty seeing objects, road signs, or other hazards on the road. Dr. Newton further concluded that Brown's vision in 2005 would not have been significantly different in 1999 based on his age and degree of hyperopia.

With respect to the underlying incident, Dr. Newton opined that given the hour of the day during which the shooting occurred and Brown's consumption of alcohol, eye muscle fatigue would have impacted his vision and made it more difficult to identify defendants. Dr. Newton believed that Brown would have had difficulty seeing fine details of Perkins at further distances. Similarly, because of his hyperopia, he would have had difficulty seeing the driver of the Infiniti Q45 from a closer distance. Although corrective lenses can compensate for such visual impairments, Brown was not wearing eyeglasses at the time of the incident.

Discussion

Newly Discovered Evidence

CPL 440.10 (1) (g) provides that a court may vacate a judgment of conviction when:

New evidence has been discovered since the entry of judgment based 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 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; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

Defendants bear the burden to prove every fact essential to support their motion by a preponderance of the evidence (*see* CPL 440.30 [6]), and "[t]o justify vacatur of a judgment of conviction based on newly discovered evidence pursuant to CPL 440.10 (1) (g), the evidence must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not

been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence” (*People v Davidson*, 150 AD3d 1142, 1144 [2d Dept 2017], quoting *People v Deacon*, 96 AD3d 965, 967 [2d Dept 2012] [internal quotation marks omitted]; see *People v Mazyck*, 118 AD3d 728, 730 [2d Dept 2014]).

“A motion to vacate a judgment of conviction upon the ground of newly-discovered evidence rests within the discretion of the hearing court” (*People v Malik*, 81 AD3d 981, 981 [2d Dept 2011], citing *People v Tankleff*, 49 AD3d 160 [2d Dept 2007]; see *People v Bellamy*, 84 AD3d 1260, 1261 [2d Dept 2011]). Accordingly, the hearing court must assess “the probable effect of the newly-discovered evidence on the verdict”; that is, the hearing court must determine whether the newly discovered evidence, when viewed in conjunction with the trial record, would have probably resulted in a more favorable verdict for defendants (*Malik*, 81 AD3d at 982).

Based upon its review of the trial and hearing record, the court finds that defendants have satisfied the statutory criteria for a newly-discovered evidence claim (see CPL 440.10 [1] [g]; see *People v Gurley*, 197 AD2d 534, 536 [2d Dept 1993]).

By a preponderance of the evidence, defendants have now presented information, discovered since the trial, that seriously undermines the accuracy of Brown’s testimony and his identifications of defendants. First, Ms. Brown, the ex-wife of Brown, stated that it was a misrepresentation for Brown to have testified before the jury that he only needed eyeglasses for reading. Ms. Brown indicated that Brown started wearing glasses in his youth and required them for various daily activities.

Dr. Newton opined that, based on his review of Brown’s eyeglass prescriptions and other documents related to his driver’s license applications, Brown suffered from a significant degree of hyperopia, causing him to have difficulty seeing from multiple distances. Thus, in Dr. Newton’s

opinion, it would have been difficult for Brown to make an identification, particularly because he was not wearing corrective lenses when this incident occurred.

Dr. Gianutsos, in her brief testimony, confirmed that Brown has a restriction for corrective lenses on his driving abstract.

Finally, Dr. Franklin generally discussed the scholarship concerning the reliability of eyewitness memory and identifications. Applying these factors and principles to the underlying facts in this case, she believed that there was a high likelihood of error in Brown's identifications of defendants due to various factors such as his vision, fatigue, stress levels, and opportunity to observe the perpetrators.

When this newly discovered evidence is viewed with the trial record, there is a probability that it "could have raised reasonable doubt in the jurors' minds (*People v Singh*, 111 AD3d 767, 769 [2d Dept 2013]). Where, as here, the prosecution's case hinges upon a single eyewitness, the credibility of that witness is significant and a jury should have the benefit of that evidence for its consideration (*see People v Kane*, 235 AD 738, 738 [2d Dept 1932]). Defendants' convictions rested largely upon the testimony of Brown, the only eyewitness to the underlying incident and the only individual to identify defendants. Neither a weapon nor any other evidence was recovered inculcating defendants for this crime. As such, Brown's credibility was a material issue for the jury's consideration. Thus, it is the court's view that the evidence introduced at the CPL 440 hearing pertaining to Brown's vision "is of such extraordinary significance in undermining the [eyewitness's] credibility that it creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant . . ." (*People v Jackson*, 29 AD3d 328, 328 [1st Dept 2006]).

Contrary to the People's argument, this evidence could not have been obtained before trial with due diligence. Under the circumstances of this prosecution, Brown's identity was kept

confidential and not disclosed by the People until the eve of trial. As such, defendants had scant opportunity to meaningfully investigate Brown in preparation for trial (*see People v Hildenbrandt*, 125 AD2d 819, 821-822 [3d Dept 1986]). Indeed, there was evidence adduced at the CPL 440 hearing from both former defense counsels that they were unaware of Ms. Brown, did not have occasion to interview her or conduct any other investigation of Brown's eyesight (*see People v Stokes*, 83 AD2d 968, 969 [2d Dept 1981]). That defense counsels briefly cross-examined Brown regarding his eyesight and remarked during summation that his eyesight may have been poor is not a basis to deny this claim. Neither defense counsel possessed the current evidence, presented during this hearing, to conduct a more thorough cross-examination of Brown.

Accordingly, defendants' newly-discovered evidence claims are granted.

Actual Innocence

"A claim of actual innocence may be asserted, either as a gateway to review of another claim which is otherwise procedurally barred, or as a freestanding claim justifying relief in and of itself." (*People v Hamilton*, 115 AD3d 12, 21 [2d Dept 2014] [internal quotation marks omitted]). A claim of actual innocence is premised on the fundamental principles of due process and the prohibition against cruel and unusual punishment. (*see Tankleff*, 49 AD3d at 177 ["It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit."]).

However, "actual innocence means factual innocence, not mere legal insufficiency of evidence of guilt, and must be based upon reliable evidence which was not presented at the trial." (*Hamilton*, 115 AD3d at 23 [internal quotation marks and citation omitted]). "Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed guilty" (*People v Davis*, 193 AD3d 967, 967 [2d Dept 2021] [internal quotation

marks omitted]). Thus, a defendant establishes a *prima facie* claim of actual innocence when he or she proffers evidence that was unavailable at trial and makes “a sufficient showing of possible merit to warrant a fuller explanation.” (*People v Jones*, 115 AD3d 984, 986 [2d Dept 2014], quoting *Hamilton*, 115 AD3d at 25).

Here, defendants have not offered any credible evidence of their actual innocence that would warrant granting this claim. At the CPL 440 hearing, defendants testified on their own behalf and also called various alibi witnesses such as Caridad Ayala (Ayala), Robyn Burton (Burton), and Donnell Mayo. Ayala and Burton testified that Mayo was in Richmond, Virginia from December 19 to December 29, 1999. Mr. Mayo, the father of Perkins and the uncle of Mayo, testified that in the early morning hours of December 25, 1999, Perkins was in his bedroom at the residence. The witnesses indicated that they did not consider offering their testimony to defendants during their trial.

The court does not find these witnesses to be credible. Moreover, the alibis that the witnesses provided were not unavailable at the time of trial and, ultimately, do not establish the factual innocence of both Mayo and Perkins. (*see People v Griffin*, 120 AD3d 1257, 1257-58 [2d Dept 2014] [finding that defendant failed to make a *prima facie* showing of actual innocence]; *People v Woods*, 120 AD3d 595 [2d Dept 2014]; *cf. Hamilton*, 115 AD3d at 27 [finding that defendant made a *prima facie* showing based upon evidence of a credible alibi and manipulation of the witnesses, and the fact that witnesses against him had recanted]). These witnesses’ self-serving claims of actual innocence, without more, are insufficient to demonstrate that Mayo and Perkins were factually innocent of the charged offenses in this case (*see People v Jones*, 45 Misc3d 1201[A], at *35 [Sup Ct, Queens County 2014] [rejecting self-serving claims of innocence]).


Consequently, defendants’ actual innocence claims are denied.

Conclusion

Accordingly, after considered examination of the trial record and the evidence adduced at the CPL 440 hearing in this matter, defendants' motions to vacate their judgments of conviction are granted and a new trial is ordered.

This shall constitute the Decision and Order of the Court.

Dated: January 23, 2023
Brooklyn, NY



Hon. Dena E. Douglas, J.S.C.