NYS Court of Appeals Criminal Decisions for April 20, 2023

People v. Solomon

Short and sweet. This People's appeal is a unanimous memorandum, affirming the Third Department. The AD dismissed the superior court information ("SCI"), which was filed *after* the defendant was indicted, in violation of CPL 195.10(2) and *People v. Boston*, 75 NY2d 585, 587-589 (1990).

People v. Hartle

This is a 4 to 2 decision, affirming the Third Department. Judge Garcia authored the majority opinion. Judge Rivera authored the dissent, joined by Judge Wilson. The 50-year-old defendant, convicted by a jury of raping the 15-year-old daughter of a friend, lost his CPL 440 motion through a summary denial. The majority rejected the defendant's claim that recovered photos and text messages were "newly discovered evidence" under CPL 440.10. The defendant never sought to inspect his cell phone or the phone belonging to the complainant during pre-trial litigation.

The defendant's trial strategy was to deny he had sexual relations with the young complainant. Text messages from the complainant's cell phone were used during the defendant's cross-examination of her. She was never questioned regarding texts sent between her and the defendant or whether any messages had been deleted. Several years later, the defendant moved to vacate his convictions based on the newly discovered evidence of recovered texts and photos previously deleted *(by the defendant)* from his cell phone. These digital items were only recovered through "rooting," a new technology which was unavailable at trial. The defendant's mother swore she previously attempted to recover these items from the cellular carrier. Both trial defense attorneys swore they did not believe the evidence was accessible before.

The majority concluded that the defendant knew this evidence existed prior to trial. The defendant had deleted these items because he deemed them inculpatory. He may not subsequently use them to his advantage when technological advances benefit him. The defendant failed to satisfy the statutory due diligence prong under CPL 440.10(1)(g), which reads:

> [n]ew evidence has been discovered since the entry of a 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 [their] 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.

While he could have used these items to impeach the complainant at trial, the defendant ultimately used the absence of this evidence at trial to his advantage. There was purportedly no allegation that this evidence was inaccessible before trial. In sum, County Court did not abuse its discretion in denying the motion without conducting a hearing.

Judge Rivera observed in **dissent** that the defense submitted an expert affidavit and two reports establishing this evidence was inaccessible before entry of the judgment. CPL 440.30 creates a presumption that a hearing will be conducted. As only a "minimal showing" is required, a hearing should have been ordered to determine whether the defendant acted with due diligence in moving for relief and whether he established a probability that admission of the evidence would have resulted in a more favorable verdict. *See generally*, *People v. Jones*, 24 NY3d 623, 635-636 (2014) (ordering CPL 440 hearing in the context of new DNA method). Here, the moving papers contained "sworn allegations substantiating or tending to substantiate all the essential facts." CPL 440.30(5) The majority, however, creates a due diligence discovery standard and defense burden of production contrary to CPL 440.10(1)(g).

General knowledge of the existence of evidence (at the time of trial) is not the same thing as having access to it, or even understanding its nature. If inaccessible, the evidence cannot be "produced" at trial. There is no due diligence requirement to produce such evidence before the trial court; rather, the statute focuses on the availability of the evidence, not the number of futile attempts made to use it. Inaccessible evidence later accessible because of new technology should be deemed "newly discovered" under the statute. *See also*, *People v. Salemi*, 309 NY 208, 215-216 (1955) (providing common law rule that precipitated the statutory framework). Judge Rivera further avers about the applicability of new technology exonerating an individual in the post-conviction context. Accordingly, CPL 440.10(1)(g) should not be limited to evidence not in existence at the time of trial.

More commentary: The majority describes the defendant's CPL 440 submissions as "inadequate, conclusory, and self-serving," a point hotly disputed by the dissent. The Court in recent years has been overly demanding regarding the burden defendants must shoulder in both pleading their claims for relief and articulating themselves in court. *See*, *e.g.*, *People v. Arjune*, 30 NY3d 347, 358-360 (2017) (criticizing litigant's pleading and supporting affidavits in coram nobis motion); *People v. Dawson*, 38 NY3d 1055, 1065-1066 (2022) (Wilson, J., dissenting) (describing the Court's recent trend of requiring a heightened level of specificity from defendants in seeking relief in and out of court).