

Appendix A-11  
Queens County Supreme  
Court Denying 440 Motion  
Date October 12, 2018 (A-11)

SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM PART K 18 QUEENS COUNTY  
125-01 QUEENS BOULEVARD  
KEW GARDENS, NY 11415

P R E S E N T:

HONORABLE STEPHANIE ZARO  
ACTING JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER  
OF THE COURT

-against-

Ind. No. 1395-2002

CPL §440 MOTION

MICHAEL WESLEY,

Defendant.

Defendant stands convicted of Criminal Possession of a Weapon in the Third Degree (PL §265.02 [4]). The defendant's appeal was denied by the Appellate Division Second Department and his application for leave to appeal to the Court of Appeals was denied.

Defendant now moves *pro se* to vacate his conviction pursuant to CPL §440.10. He contends that newly discovered evidence has come to light necessitating the vacatur of his conviction and awarding him a new trial.

The People have filed a response opposing the motion. After giving due deliberation to the parties' respective arguments, the defendant's motion is denied, for the following reasons.

The defendant contends that the newly discovered evidence consists of statements made by Shaquana McCray, Erica White's friend who was present on the day of the defendant's arrest, and Naacion McCray, who allegedly overheard Erica White speaking to a third party about the circumstances of the defendant's arrest. In support of his motion, the defendant has submitted affidavits from both individuals. In addition, he has submitted a transcript of what appears to be a phone interview between Shaquana McCray and Irwin Blye, a private investigator. Said document is purported to be a sworn statement but there is no allocution incorporated into it.

In her affidavit, Shaquana McCray states that on April 28, 2002 she was present in Erica White's basement apartment when three men entered and spoke to Erica White. After they left, the defendant arrived at the apartment and was informed by Erica White that the police had been there and that they would be returning. The defendant entered the apartment and Erica White took her children and Shaquana outside, telling them the police were coming back. When the police did return, Shaquana watched the police enter the apartment unescorted and return with the defendant in custody.

The relevant section of Naacion McCray's affidavit, dated May 14, 2018, alleges that on August 1, 2015, he overheard Erica White talking to Loretta White about the 2002 incident involving the defendant. Reportedly, he was able to overhear the alleged conversation between them in which Erica said that Detective Ivan Borbon lied about being escorted into the apartment on April 22, 2002 because she (Erica) was too terrified to go back into the apartment with him. He further alleges that he overheard Erica say that ADA Karen Ross allegedly told her (Erica) to also lie to the jury about escorting him. Finally, Naacion states that he overheard Erica say that she believed the firearm recovered belonged to someone other than the defendant.

The People contend that the motion must be denied because there is no reasonable probability that the defendant's new evidence would have changed the outcome of the suppression hearing or trial. They point out that there was no legal requirement that Erica escort the officers into her apartment and, as such, there was no Fourth Amendment issue presented. They further assert that the defendant has no standing to assert fourth Amendment violations, citing *People v Stephanski*, 286 AD2d 859 (4<sup>th</sup> Dept. 2001).

The court notes that the defendant never claims that the new evidence would tend to establish or even question the suppression court's finding that Erica consented to the entry into her apartment or that he had standing to contest said entry.

The People also argue that the defendant's assertion that the new evidence tends to establish that Detective Borbon and Erica White lied about her (Erica) escorting him into the apartment is contradicted by the record. They indicate that there was no testimony during the trial from either the detective or Erica that she escorted the police into the apartment.

Shaquana McCray, is an alleged eyewitness that was reportedly present in Erica White's basement apartment on April 28, 2002 where the defendant was arrested. Although the defendant alleges that her testimony "could not have been produced by the defendant at the trial even with due diligence on his part", he fails to explain why he didn't call her as a witness during the trial. Presumably, he was aware of her presence at the time or could have discovered such information exercising due diligence in his investigation. As such, Shaquana McCray's statement does not constitute newly discovered evidence.

With regard to Naacion McCray's statement, the court notes that it is uncorroborated hearsay, with no indicia of reliability. Notwithstanding, his affidavit, in which he alleges to have

“overheard” a detailed conversation concerning the defendant’s arrest thirteen years after the fact and then provides a detailed account of that conversation three years later, it is incredible on its face. As such, the court gives no weight to Naacion McCray’s statement.

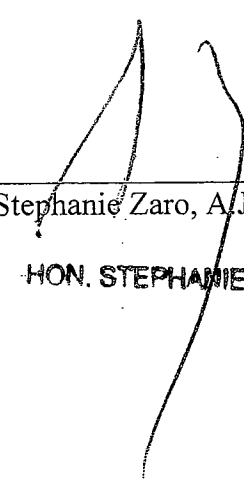
Even assuming that both witness’s statements constituted newly discovered evidence, there is no indication in the record before the court that said evidence would have been either material or relevant or that it would have created a substantial likelihood of acquittal if it had been raised in the underlying proceeding.

#### CONCLUSION

As such, the court finds that the defendant has failed to establish the existence of newly discovered evidence would have created a substantial likelihood of acquittal if it had been raised in the underlying proceeding. Accordingly, the defendant’s motion seeking a new trial is denied.

This opinion constitutes the decision and order of the court.

Dated: Kew Gardens, New York  
October 12, 2018



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Stephanie Zaro, A.J.S.C.

HON. STEPHANIE ZARO

Supreme Court of the State of New York  
Appellate Division : Second Judicial Department

M260638  
SL/

WILLIAM F. MASTRO, J.

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2018-12285

DECISION & ORDER ON APPLICATION

The People, etc., plaintiff,  
v Michael Wesley, defendant.

(Ind. No. 1395/02)

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APPENDIX-B DECISION OF  
SUPREME COURT OF STATE OF  
NEW YORK Appellate Division  
Second Dept  
March 4, 2019

Application by the defendant pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal to this Court from an order of the Supreme Court, Queens County, dated October 12, 2018, which has been referred to me for determination.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

ORDERED that the application is denied.



WILLIAM F. MASTRO  
Associate Justice

March 4, 2019

PEOPLE v WESLEY, MICHAEL

**Additional material  
from this filing is  
available in the  
Clerk's Office.**

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