

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

CASE NO. 02464-2009

V.

HON. RICHARD AMBRO
PART 5

JOHN LICAUSI,

Defendant.

Hon. Timothy D. Sini, Esq.
Suffolk County District Attorney
By: Elena Tomaro, Esq.
Assistant District Attorney
Criminal Courts Building
200 Center Drive
Riverhead, NY 11901

John Licausi, DIN 10A5172
Defendant Pro Se
Eastern Correctional Facility
P.O. Box 338
Naponach, NY 12458-0338

Defendant, pursuant to Criminal Procedure Law §440.10 [f] and [g], 440.20 and 440.30 [5], seeks to vacate his judgment of conviction and sentence rendered on October 21, 2010. Although unclear, it appears defendant's motion contends that 1) he has discovered new evidence, including a) a 2016 decision finding there existed triable issues of fact concerning whether Officer Bogliole's pursuit of defendant was conducted in reckless disregard for the safety of others as well as a subsequent jury verdict finding civil liability based upon the officer's conduct, b) that Officer Bogliole was not authorized to engage in the pursuit of defendant's vehicle, c) the 2019 criminal conviction of former District Attorney of Suffolk County Thomas Spota regarding his involvement in a case wholly unrelated to defendant's 2010 conviction, as well as d) defendant's acquittal on the count of assault in the second degree evidencing that Bogliole engaged in misconduct and filed a false report and e) additional proof of Bogliole's motive to fabricate testimony, each of which, if admitted at trial, would have created a probability that the verdict would have been more favorable to defendant, 2) defendant was denied his right to a fair trial due to the trial judge's failure to recuse himself and the District Attorney's failure to seek a special prosecutor, 3) defendant was prejudiced by the Court's failure to dismiss the original indictment upon the filing of a superceding indictment, 4) the Court committed an *O'Rama* (*People v. O'Rama*, 78 NY2d 270 [1991]) violation concerning a requested readback of Officer Bogliole's testimony, 5) the Court erred when denying defendant's *Batson* challenge, 6) the Court failed to determine whether there was a quorum present in the grand jury that indicted defendant, 7) the prosecution tampered with and/or destroyed the Citgo filling station video, the Lowell Mechanical surveillance video, and the GPS device located

interoffice
via
the Court

inside Officer Bogliole's vehicle, 8) toxicology evidence was improperly received in evidence, 9) defendant was denied the effective assistance of counsel due to counsel's failure to seek a change of venue for the trial, 10) defendant was denied his right to call a toxicologist on his own behalf, 11) defendant's convictions for aggravated vehicular homicide and manslaughter in the second degree were redundant, 12) defendant should have received a justification charge, 13) defendant's judgment should be vacated based upon the theory of third-party culpability (as evidenced by newly discovered evidence, see 1-a) and finally, 14) the trial jury was not properly instructed on the element of recklessness under count one of the indictment charging Aggravated Vehicular Homicide. For the following reasons defendant's motion is denied.

CPL § 440.10 [f]

CPL § 440.10 [1] [f] provides that a court may vacate a judgment upon the ground that "[i]mproper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom."

A corollary of CPL § 440.10 [f] is CPL § 440.10 [2] [c] which provides that "the court must deny a motion to vacate a judgment when... [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to ... raise such ground or issue upon an appeal actually perfected by him."

Furthermore, CPL § 440.10[3][a] provides that "the court may deny a motion to vacate a judgment when, [a]lthough facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal."

Defendant's points 1-b, 1-d, 1-e, 2 through 12 and 14, are all record based and to the extent these arguments were not raised on defendant's appeal (a review of defendant's appellate briefs indicates that perhaps other than points 2 and 7, this is the case), his motion to vacate his judgment of conviction on these points is denied. CPL § 440.10[2][c].

To the extent any of these points were raised on defendant's appeal (see points 2 and 7

and defendant's Pro Se Supplemental Brief, Points II and III), clearly they were considered and rejected by the Appellate Division (*People v. Licausi*, 122 AD3d 771 [2nd Dep't. 2014]) and, therefore, are similarly denied. CPL § 440.10 [2] [a].

Moreover, in the event these arguments contained in points 1-b, 1-d, 1-e, 2 through 12 and 14 did not fully appear on the record, they are of a type that with due diligence could have been readily made to appear on the record in a manner providing an adequate basis for appellate review and absent any justification for that failure (as here), the Court, in its discretion, denies defendant's motion to vacate his judgment of conviction based on these arguments. CPL §440.10[3][a].

Furthermore, CPL §440.30[1][a] provides, in part, that a "motion to vacate a judgment pursuant to section 440.10 of this article ...must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he or she intends to challenge the judgment or sentence." §440.10[3][c] provides further that "the court may deny a motion to vacate a judgment when, [u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." This 440 motion is defendant's third collateral attack upon this judgment of conviction. Clearly, he was in a position to adequately raise the issues advanced in points 1-b, 1-d, 1-e, 2 through 12 and 14 in his first two motions (as well as in his Pro Se Supplemental Brief) but failed to do so. Defendant offers no justification for that failure which, almost 10 years after the entry of judgment, is critically important. *People v. Dennis*, 141 AD3d 730, 733 (2nd Dep't. 2016), *People v. Huggins* 130 AD3d 1069 (2nd Dep't. 2015), *People v. Cochrane*, 27 AD3d 659 (2nd Dep't. 2006), *People v. Degondea*, 3 AD3d 148, 162 (1st Dep't. 2003). Thus, on this basis, the Court, in its discretion, similarly denies defendant's motion to vacate the judgment based upon those arguments.

Finally, CPL § 440.10 [3] [b] provides in part that "[n]otwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when...[t]he ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court." The grounds or issues raised by defendant herein that were previously determined on the merits as set forth in the People's Memorandum of Law pages 23-30, are similarly denied for this additional reason.

CPL § 440.10 [g]

CPL § 440.10 [1] [g] provides that a court may vacate a judgment on the grounds that “[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 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.”

To be considered newly discovered evidence for purposes of a CPL § 440.10 [1] [g] motion, the evidence must meet six criteria: “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. Balan*, 107 AD2d 811, 814-15 (2nd Dep’t. 1985), quoting *People v. Salemi*, 309 NY 208, 216 (1955).

CPL § 440.30 [4] [b] provides that the court may deny a 440.10 or 440.20 motion without conducting a hearing if the “motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts...”

Missing from defendant’s sworn allegations concerning points 1-a through e is a more detailed description of the proffered evidence to establish its admissibility, its expected evidentiary impact, whether the proffered evidence is merely cumulative to trial evidence and whether such evidence is relevant for purposes beyond impeachment, sufficient to satisfy most or all of the first, fourth, fifth and sixth criteria described in *Balan*, supra.

Consequently, points 1-a through e are, in the discretion of the Court, denied.

CPL § 440.20

CPL § 440.20 provides that a court may “set aside [a] sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.” In this regard,

defendant states, that "[t]he defendant's culpability should be mitigated because Suffolk County Police Officer Bogliole was found 'intentionally reckless', knowing harm would follow." Defendant continues that his "primary claim is that his culpability should be mitigated in the interest of justice, and a lesser included offense should be applied and a sentence reduction based on Third-Party Police Culpability" that reveals the complex extraordinary circumstances."

Though initially citing CPL § 440.20, defendant appears to rely on the above referenced summary judgment decision and subsequent civil jury verdict¹ (see points 1-a and 13) to establish third-party police culpability and thereby seeks the vacatur of the judgment pertaining to one or more of his crimes of conviction. Thereafter, defendant apparently intends to plead guilty to a lesser included offense(s) to obtain a reduced sentence. However, this dubious collateral attack on the validity of the judgment by relying on newly discovered evidence of third-party culpability is properly brought pursuant to CPL § 440.10 [1] [g] and as discussed above, relief on this basis is denied.

Indeed, to give rise to criminal liability, defendant's conduct need not have been the sole cause of Mr. Foster's death, but rather just "an actual contributory cause of the death" which "was a reasonably foreseeable result of the conduct." See, Criminal Jury Instruction (CJI) "Cause of Death." As the Court of Appeals has noted, "the mere fact that other persons share responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury. It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, that it may possibly break the causal nexus." *Hain v. Jamison*, 28 NY3d 524, 529 (2016)². Defendant's speculative claim³ of third-party police

¹Finding that Officer Bogliole operated his police vehicle with a reckless disregard for the safety of others and that the operation of the vehicle was a substantial factor in bringing about the death of Scott Foster

²This paragraph has been incorporated virtually verbatim into the CJI

³See relatedly, *Licausi*, supra at 772-773: "The County Court providently exercised its discretion in precluding the defendant from presenting the testimony of a Suffolk County Police Department Internal Affairs inspector who reviewed an investigation of the arresting officer's conduct during the pursuit of the defendant, which testimony was offered to show that the officer had a motive to fabricate his testimony. While extrinsic proof tending to establish a motive to fabricate is never collateral and may not be excluded on that ground, a trial court may, as here, in the exercise of its discretion, properly exclude such proof where it is too remote or speculative."

culpability does not detail the purported non-cumulative, newly discovered evidence⁴ which underpinned the civil verdict that is sufficient to sever the causal nexus. The Court, in its discretion, finds that defendant's failure in this regard is procedurally fatal to his argument. CPL § 440.30[(4) [b].

Furthermore, considering the civil verdict standing alone to constitute newly discovered evidence without reference to the proof adduced at the trial, is improper. Clearly, the verdict by itself, which evinces only the result, would not qualify as evidence as contemplated by either the statute or by *Balan*, supra.

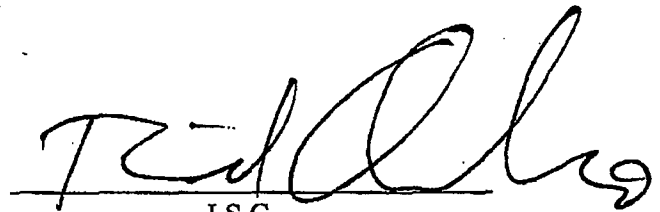
With respect to defendant's reliance on CPL § 440.20, his sentence, enhanced as a result of his status as a persistent felony offender, was implicitly found by the Appellate Division, Second Department to have been authorized, legally imposed and valid as a matter of law. *Licausi*, supra. CPL § 440.10 [2] [a]. In any event, defendant's argument is without merit. See PL § 70.08 [1] [a], [2] and [3] [b]. Consequently, the relief sought by defendant pursuant to CPL § 440.20 is denied.

Assignment of Counsel (CPL § 440.30 [5])

The Court declines to assign counsel for defendant in this matter as his motion is denied in its entirety without need for a hearing. See County Law § 722 [4].

Accordingly, defendant's motion is denied.

This shall constitute the Order and decision of the Court.


J.S.C.

Dated: November 24, 2020

⁴ See *Balan*, supra, CPL §440.10[2][c].

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

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LINDA CHRISTOPHER, J.

2021-00101

DECISION & ORDER ON APPLICATION


The People, etc., plaintiff,
v John Licausi, defendant.

(Ind. No. 2464-2009)

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, Suffolk County, dated November 24, 2020, 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.


LINDA CHRISTOPHER
Associate Justice

March 3, 2021

PEOPLE v LICAUSI, JOHN

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