New York
Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Taylor v. State, N.Y.Ct.Cl., November 8, 2019
150 A.D.3d 876, 55 N.Y.S.3d
286, 2017 N.Y. Slip Op. 03769

**1 The People of the State
of New York, Respondent,
v
Urban Fermin, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2013-05376, 352/10
May 10, 2017

CITE TITLE AS: People v **Fermin**

HEADNOTES

Crimes
Jurors
Selection of Jury

Crimes
Pretrial Motions
Material Witness Hearing

Crimes
Evidence
Loss or Destruction of Evidence

Crimes
Lesser Included Offense

Lynn W. L. Fahey, New York, NY (De Nice Powell of counsel), for appellant.
Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Nancy Fitzpatrick Talcott, and Deborah E. Wassel of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme *877 Court, Queens County (Holder, J.), rendered March 18, 2013, as amended March 25, 2013, convicting him of attempted murder in the first degree (two counts), attempted murder in the second degree (two counts), reckless endangerment in the first degree, attempted assault in the first degree (two counts), attempted aggravated assault on a police officer (two counts), burglary in the first degree, robbery in the first degree (two counts), robbery in the second degree (two counts), criminal possession of a weapon in the second degree (two counts), grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, criminal possession of stolen property in the fifth degree (two counts), unauthorized use of a vehicle in the first degree, and unlawful fleeing a police officer in a motor vehicle in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment, as amended, is modified, on the law, by vacating the convictions of attempted murder in the second degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment, as amended, is affirmed.

The defendant, who was tried together with a codefendant, stole a car, committed a home invasion, robbed a woman on the street, and then led the police on a car chase through South Ozone Park and South Jamaica, Queens, while the codefendant shot at the police out the car window. The defendant was apprehended on foot after the men abandoned the car; the codefendant was arrested at home later the same day. After a trial, the jury found the defendant guilty of numerous crimes.

The record does not support the defendant's claim that a *Batson* violation occurred in this case (*see Batson v Kentucky*, 476 US 79 [1986]). Where a party contends that opposing counsel has used peremptory challenges in a discriminatory manner, the trial court must engage in a three-step process for evaluating that contention: " 'The first step requires that the moving party make a prima facie showing of discrimination in the exercise of peremptory challenges; the second step shifts the burden to the nonmoving party to provide race-neutral reasons for each juror being challenged; and **2 the third step requires the court to make a factual determination as to whether the race-neutral reasons are merely a pretext for discrimination' " (*People v Jones*, 139 AD3d 878, 879 [2016], quoting *People v Carillo*, 9 AD3d 333, 334 [2004]; *see Batson v Kentucky*, 476 US 79 [1986]; *People v Smocum*, 99 NY2d 418, 421-422 [2003]; *People v Allen*, 86 NY2d 101, 104 [1995]). Thus, a party asserting a *Batson* challenge " 'should articulate and *878 develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed' " (*People v Gamble*,

more than 2½ years later, and there is no indication that the defendant requested either access to that evidence or the performance of any further testing of it during that lengthy interval. Most significantly, there was no indication of any bad faith on the part of the prosecution, notwithstanding the defendant's argument that greater care should have been taken in storing the evidence or greater efforts should have been made to recover it (*see People v Haupt*, 71 NY2d at 931). Since the loss of this evidence due to a natural disaster did not prejudice the defendant or prevent him from presenting a defense, the Supreme Court properly declined to give an adverse inference instruction and instead elected to simply instruct the jury that it could consider the prosecution's loss of the evidence in its deliberations (*see People v Ignacio*, 148 AD3d 824 [2017]; *People v Hester*, 122 AD3d 880, 880-881 [2014]).

The defendant's challenge to certain testimony regarding the DNA evidence is unpreserved for appellate review and, in any event, without merit (*see People v John*, 27 NY3d 294, 313-315 [2016]; *People v Brown*, 13 NY3d 332, 340 [2009]; *People v Henderson*, 142 AD3d 1104 [2016]; *People v Beckham*, 142 AD3d 556 [2016]; *People v Hernandez*, 140 AD3d 1187 [2016]; *People v Kelly*, 131 AD3d 484, 486 [2015]; *People v Fernandez*, 115 AD3d 977, 978-979 [2014]).

However, the defendant's convictions of two counts of attempted murder in the second degree must be vacated. Where multiple counts, including inclusory concurrent counts, are submitted to a jury, "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" (CPL 300.40 [3] [b]). A count is an inclusory concurrent count where (1) it is "impossible to commit the greater crime without concomitantly committing the lesser offense by the same conduct" and (2) there is "a reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater" (*People v Miller*, 6 NY3d 295, 302 [2006]). As the People correctly concede, the counts of attempted murder in the second degree were inclusory concurrent counts of attempted murder in the first degree (*see id.* at 300-302; *People v Rosas*, 30 AD3d 545, 546 [2006], *affd* 8 NY3d 493 [2007]); thus, the defendant's convictions of attempted murder in the second degree and the sentences imposed thereon must be vacated and those counts of the indictment must be dismissed. ***881**

The defendant's remaining contentions are without merit. Mastro, J.P., Leventhal, Hall and Sgroi, JJ., concur.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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URBAN FERMIN,

Petitioner,

JUDGMENT
19-CV-145 (WFK)

v.

ANTHONY J. ANNUCCI,

Respondent.

---------- X

A Decision and Order of Honorable William F. Kuntz II, United States District Judge, having been filed on August 26, 2020, denying Petitioner's petition for a writ of *habeas corpus* in its entirety; and denying the issuance of a certificate of appealability, *See* 28 U.S.C. § 2253; it is

ORDERED and ADJUDGED that Petitioner's petition for a writ of *habeas corpus* is denied in its entirety; and that a certificate of appealability shall not issue. *See* 28 U.S.C. § 2253.

Dated: Brooklyn, NY
August 27, 2020

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

URBAN FERMIN,

Petitioner,

v.

ANTHONY J. ANNUCCI,

Respondent.

----------X

DECISION & ORDER
19-CV-145 (WFK)

WILLIAM F. KUNTZ, II, United States District Judge: Urban Fermin ("Petitioner"), proceeding *pro se*, brings this petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 (the "Petition"), challenging his conviction for, *inter alia*, Attempted Murder in the First Degree, Reckless Endangerment in the First Degree, and Attempted Aggravated Assault on a Police Officer. Petitioner raises eight claims: (1) deprivation of his right to a fair trial and right to present a defense; (2) due process violation for failure to turn over *Brady* and *Rosario* material; (3) due process violation whe nthe trial court refused to give adverse inference charge to jury; (4) denial of meaningful review of Petitioner's conviction; (5) prosecutorial misconduct during summation; (6) prosecutorial misconduct in shifting the burden to the defense; (7) due process violation for discriminatory use of preemptory challenges; and (8) violation of the confrontation clause. Pet. at 5–6, ECF No. 1.[1] For the reasons discussed below, the Petition is DENIED.

BACKGROUND

I. Conviction and Sentencing

On February 2, 2010, Petitioner and his co-defendant, Darius Lowery, committed two robberies, a burglary, and shot at police during a subsequent pursuit. Aff. of Ellen C. Abbot in Opp'n to Pet. ¶ 4, ECF No. 7 ("Abbot Aff."). After stealing a white Ford Focus, the two men drove to a nearby house, entered, and pointed guns at the family inside. *Id.* ¶¶ 5, 8. They stole a television and other items and then fled in the Ford Focus. *Id.* ¶ 5. They drove to another location where Lowery pointed a gun at a woman on the street, demanded her purse, then went through her pockets stealing her phone and cash. *Id.* ¶¶ 5, 9. After they returned to the car,

[1] As the Petition is comprised of multiple documents without consistent pagination, in this Decision & Order page citations to the Petition refer to the PDF page number of the ECF docket entry.

After Lowery and Petitioner were arrested, police tested clothing from the scene including a jacket, hat, and gloves. *Id.* ¶ 13. DNA testing returned matches with Petitioner and a third individual. *Id.* After the DNA tests were conducted, but prior to trial, Hurricane Sandy destroyed the property warehouse in which the clothing was being stored. *Id.*

At trial, the prosecution called as witnesses the victims of the burglary and robberies. *E.g.*, R. at 7-7:86–110; 7-11:123–7-12:50; 7-12:52–90.[2] The prosecution also called J. Lucas Herman, a criminalist from the Office of the Chief Medical Examiner, to explain the DNA results to the jury. R. at 7-11:13–118. Additionally, the prosecution called Darryl Allen, a local business owner, who had been standing on a street corner and saw Petitioner and Lowery in the white Ford Focus during the police pursuit. R. at 7-9:141–7-10:114. Prior to Mr. Allen's testimony, he spoke with the trial court and prosecutor outside the presence of Petitioner's counsel to discuss whether he would testify of his own free will or whether the trial court needed to compel his testimony with a material witness order.[3] R. at 7-9:129–131. The trial court confirmed Mr. Allen did not require compulsion to testify. *Id.* On the stand, Mr. Allen testified he had been given an "ultimatum" by the police that if he did not testify, the police "can make this difficult for you to even exist in South Jamaica, Queens or anywhere else you go." R. at 7-10:25, 7-10:94. He further testified three individuals had approached him and threatened his life if he cooperated with the police. R. at 7-10:102.

[2] As the State Court Record is comprised of multiple documents without consistent pagination, in this Decision & Order page citations to the State Court Record refer to the ECF docket entry followed by the PDF page number of the document to which the citation refers.

[3] Sometime after the trial, but before Petitioner's appeal, the prosecutor's office lost the documents which had supported their application for the material witness order for Mr. Allen. Abbot Aff. ¶ 17 n.4

the merits of the charges against the defendant, his exclusion did not have a substantial relationship to his ability to defend against those charges," and moreover "the defendant has not established that he was entitled to a copy of the transcript of the discussion or the submissions in support of the prosecution's earlier material witness application relating to this witness." *Id.* at 878.

The Appellate Division rejected Petitioner's argument under *Rosario* as although he "established that the prosecution inadvertently delayed in disclosing certain information regarding threats allegedly made against a prosecution witness in violation of *People v Rosario*, he failed to demonstrate that he was substantially prejudiced by the late disclosure, as he extensively covered the same subject matter in his cross-examination of the witness." *Id.* (internal citations omitted). Regarding his claims of prosecutorial misconduct during summations the Appellate Division held "the majority of the prosecutor's argument fell within the permitted scope of summation and constituted fair comment upon the evidence or a fair response to the defense summation" and to "the limited extent that the prosecutor's remarks may have exceeded those bounds, the Supreme Court promptly addressed the defendant's objections and issued appropriate curative instructions." *Id.* at 879. The Appellate Division also affirmed the trial court's refusal to issue an adverse inference charge to the jury, regarding the evidence lost in Hurricane Sandy as "[m]ost significantly, there was no indication of any bad faith on the part of the prosecution" and "loss of this evidence due to a natural disaster did not prejudice the defendant or prevent him from presenting a defense." *Id.* at 880. Finally, the Appellate Division held Petitioner's claim of a violation of the confrontation clause was "unpreserved for appellate review and, in any event, without merit," *id.*, and his "remaining contentions are without merit," *id.* at 881.

discovery on June 3, 2019, which was denied by the Court on December 10, 2019. ECF Nos. 10, 14. On February 14, 2020, Petitioner filed a reply memorandum in further support of his Petition. Pet'r's Reply Mem. of Law, ECF No. 15 ("Pet'r Mem").

DISCUSSION

I. Legal Standard

The Court's review of the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. A federal *habeas* court may only consider whether a person is in custody pursuant to a state court judgment "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA requires federal courts to apply a "highly deferential standard" when conducting *habeas corpus* review of state court decisions and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks and citations omitted).

Because the Court of Appeals, Appellate Division and the trial court adjudicated Petitioner's claims and properly considered the federal jurisprudence, the Court's "review is extremely deferential: a state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Chrysler v. Guiney*, 806 F.3d 104, 118 (2d Cir. 2015) (internal quotation marks omitted). With these legal principles in mind, the Court now turns to the analysis of Petitioner's request for *habeas* relief.

II. Denial of Right to Prepare a Defense

Petitioner claims he was "deprived of a fair trial by the prosecution and trial court preventing him to prepare and present a defense to the charges, in violation of the 6th and 14th Amendments of U.S. Constitution." Pet. at 5. However, Petitioner does not specify any acts that denied him the opportunity to prepare and present a defense to the charges. After a thorough

citations omitted). Additionally, factual determinations by state courts "shall be presumed to be correct," 28 U.S.C. § 2254(e)(1), and "[t]he petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence." *Shabazz v. Artuz*, 336 F.3d 154, 161 (2d Cir. 2003) (internal quotation omitted).

After a close review of the alleged *Brady* material, R. at 7-9:129–31, the Court finds no reason to disturb the determination of the Appellate Division. During the *ex parte* communication between Mr. Allen and the Court, the only issue discussed was whether Mr. Allen would return to testify of his own volition, R. at 7-9:129–131. None of Mr. Allen's statements during the conversation could reasonably be considered exculpatory or impeaching material. *Compare id.* (the *ex parte* conversation), *with id.* at 7-9:142–7-10:125 (his direct and cross-examination). As such, the *ex parte* transcript was not *Brady* material and Petitioner's claim on this basis must be denied.

B. *Rosario* Violations

Petitioner's claims under *Rosario* fail as they are solely questions of state law. *Candelaria v. Graham*, 14-CV-2876, 2018 WL 4688933, at *9 n.18 (E.D.N.Y. Sept. 28, 2018) (Donnelly, J.) ("*Rosario* claims are state claims, and not cognizable on federal habeas review."). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Here, the Appellate Division determined this issue of state law when it stated Petitioner "failed to demonstrate that he was substantially prejudiced by the late disclosure, as he extensively covered the same subject matter in his cross-examination of the witness." *Fermin*, 150 A.D.3d at 878. "[I]t is not the province of a federal habeas court to reexamine state-court

court. As bad faith is an essential element to succeed on a *habeas* claim for loss of "potentially useful evidence," this claim must be denied. *Youngblood* 488 U.S. at 58.

V. Loss of Documents Prior to Appeal

Petitioner also raises an argument he was denied "meaningful review" of his conviction, as a result of the prosecution's loss of documents related to the material witness order, "in violation of due process." Pet. at 5–6. Prior to Petitioner's direct appeal, but after his conviction, the Queens County District Attorney's office lost documents used to support their application for a material witness order for Mr. Allen. Abbot Aff. ¶ 17 n.4. On direct appeal, the Appellate Division rejected Petitioner's argument, holding Petitioner had "not established that he was entitled to . . . the submissions in support of the prosecution's earlier material witness application." *Fermin*, 150 A.D.3d 878.

A petitioner is only entitled to *habeas* relief if fairminded jurists could not disagree the state court determinations "are inconsistent with the holding in a prior decision" of the Supreme Court. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "[T]he Supreme Court has not clearly established that post-conviction destruction [of evidence] is a due process violation," and therefore, "the petitioner's claim in this regard [is] not cognizable on federal habeas review." *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007).

Even assuming, *arguendo*, the Supreme Court's holding in *Youngblood* applies to post-trial losses of evidence, "Petitioner has not even alleged, much less presented any evidence, that the loss of the [evidence] here was the result of bad faith on the part of the District Attorney's office." *Carroll v. Greene*, 04-CV-4342, 2006 WL 2338119, at *15 (S.D.N.Y. Aug. 11, 2006) (Sweet, J.) (citing *Youngblood* 488 U.S. at 58). Therefore, Petitioner's claim for *habeas* on this ground must be denied.

the record demonstrates the prosecutor was reasonably responding to Petitioner's counsel's attempt to discredit one officer for chasing Petitioner into backyards and to discredit two others for not chasing Petitioner into the same backyards. R. at 7-18: 16. Petitioner further complains the prosecutor improperly vouched for state witnesses, but the record shows the prosecutor appropriately focused on the motivations of the witnesses. *E.g.*, *id.* at 7-18:18 ("[T]here is no reason for this officer to tell any story but the truth . . . . They have no reason to fabricate at all."). After reviewing the summations and record as a whole, the Court finds no basis to conclude the comments during summation "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 (1974)). Petitioner's claim for relief, based on prosecutorial misconduct must be denied.

VII. *Batson* Challenge to Jury Selection

Petitioner claims his equal protection rights were "violated by the prosecution's blatant discriminatory peremptory juror challenges striking all African-American women." Pet. at 6. During the jury selection process, the prosecution used three preemptory challenges against prospective jurors, two of whom were Black women and a third woman whom the trial court considered Hispanic. R. at 7-5:104–06. Petitioner's counsel argued to the trial court the strikes established a *Batson* violation. *Id.* at 7-5:104–05. The record is unclear as to the racial makeup of the jury and jury pool as, despite his *Batson* challenge, Petitioner did not enter these details into the record. However, the prosecution's notes indicate a Black woman was seated as juror number seven. *Id.* at 7-1:150.

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable

cannot establish a prima facie *Batson* claim based solely on the prosecution's decision to strike two, or even three Black women from the jury pool. *See Sweeper v. Graham*, 14-CV-6346, 2017 WL 4516645, at *10 (S.D.N.Y. Sept. 26, 2017) (McMahon, C.J.) ("Petitioner's numbers-based argument [that two Black women were struck from the jury pool]—without more—was insufficient to meet his step-one burden under Batson."). "[T]he Appellate Division did not apply *Batson* and its progeny in an unreasonable manner when it concluded that, in the circumstances presented, the statistical evidence did not warrant an inference of discrimination." *Carmichael*, 848 F.3d at 546. Accordingly, Petitioner's claim for relief under *Batson* must be denied.

VIII. Violation of the Confrontation Clause

As his final claim for relief, Petitioner argues his rights under the confrontation clause of the Constitution were violated when the trial court allowed criminalist, J. Lucas Herman, to testify about the results of DNA tests, which he had not himself conducted. Pet. at 6; R. at 7-11:13–118. Mr. Herman testified he received a DNA profile produced by testing the clothing recovered from the scene and determined "that profile is the same as the profile of Urban Fermin." R. at 7-11:24, 37–38. Petitioner's counsel did not object to Mr. Herman's expert testimony at trial. *Id.* at 7-11:16 (counsel explicitly stating he had no objection). On direct appeal, Petitioner conceded he had not preserved the issue for appeal. R. at 7-1:71.

Indeed, when Mr. Herman testified at Petitioner's trial in 2010, there was no colorable Confrontation Clause objection for Petitioner's counsel to preserve. "Controlling New York law at the time provided that a report of raw DNA testing results that does not offer any conclusion as to whether the DNA matches a given individual did not trigger a criminal defendant's rights under the Confrontation Clause." *Santana v. Capra*, 284 F.Supp.3d 525, 544 (S.D.N.Y. 2018)

v. Coughlin, 22 F.3d 427, 429 (2d Cir. 1994) (quoting *Strickland*, 466 U.S. at 690, 691–92). However, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. As a Confrontation Clause objection to Mr. Herman's testimony in 2010 would have failed, the Court "conclude[s] that [Petitioner's] counsel made a reasonable, strategic decision based on New York law" and "acted within the range of professionally competent assistance." *Jameson*, 22 F.3d at 428; *see Santana*, 284 F. Supp. 3d 525, 545 (denying *habeas* as "the Sixth Amendment did not require the petitioner's trial counsel to anticipate any of these changes in the law [of the Confrontation Clause] when Ms. Nori testified").

As Petitioner has not demonstrated cause for his default he cannot be entitled to *habeas* relief on this claim unless a failure to consider the claim would result "in a fundamental miscarriage of justice," *Coleman*, 501 U.S. at 750, "i.e., the petitioner is actually innocent," *Aparicio v. Artuz*, 269 F.3d 78, 90 (2d Cir. 2001). Here, the prosecution presented sufficient evidence of Petitioner's identity in the form of eye-witness testimony, *e.g.*, R. at 7-9:160, even aside from the DNA evidence testified to by Mr. Herman. *See Wedra v. Lefevre*, 988 F.2d 334, 343 (2d Cir. 1993) (finding it no miscarriage of justice where "[t]he prosecution presented sufficient evidence aside from the issue [raised by the petitioner's *habeas* claim] on which the jury could have convicted"). Accordingly, there is no basis for this Court to overturn the state's "adequate and independent finding of procedural default" and *habeas* relief on this ground must be denied. *Harris*, 489 U.S. at 262.

MANDATE

E.D.N.Y. – Bklyn
19-cv-145
Kuntz, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of April, two thousand twenty-one.

Present:

Debra Ann Livingston,
Chief Judge,
Richard C. Wesley,
Susan L. Carney,
Circuit Judges.

Urban Fermin,

Petitioner-Appellant,

v. 20-3459

Anthony J. Annucci, Acting Commissioner of DOCCS,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 05/12/2021