APPENDIX

166 A.D.3d 993
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,
v.
Robert ELLIS, appellant.

2012–07219
|
(Ind. 2224/10)
|
Argued - April 9, 2018
|
November 28, 2018

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Gregory Lasak, J., of attempted murder in the second degree, two counts of assault in the first degree, two counts of robbery in the first degree, two counts of criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fifth degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

prospective juror was not disqualified from serving as juror based on implied bias, supporting denial of defendant's for-cause challenge;

defendant was not denied a fair trial when he allegedly wore prison garb for three days of jury selection and more than five days of witness testimony during 18 day trial;

Supreme Court's error in admitting defendant's videotaped statement was harmless;

prosecutor's summation comments did not deprive defendant of a fair trial; and

Supreme Court providently exercised its discretion in denying defendant's motion for a mistrial after a witness made a brief reference to a charge for which defendant was not being tried.

Affirmed.

Barros, J., dissented with separate opinion.

Procedural Posture(s): Appellate Review.

****539** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Gregory Lasak, J.), rendered July 18, 2012, convicting him of attempted murder in the second degree, assault in the first degree (two counts), robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), and criminal possession of stolen property in the fifth degree, upon a jury verdict, and imposing sentence.

Attorneys and Law Firms

Paul Skip Laisure, New York, N.Y. (William Kastin of counsel), for appellant, and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, Nancy Fitzpatrick Talcott, Deborah E. Wassel, and Danielle O'Boyle of counsel), for respondent.

RUTH C. BALKIN, J.P., BETSY BARROS, ANGELA G. IANNACCI, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***993** ORDERED that the judgment is affirmed.

The defendant appeals from a judgment convicting him, inter alia, of the attempted second-degree murder, first-degree assault, and first-degree robbery of Carl Field. The defendant was prosecuted under a theory that he acted in concert with the codefendant, Dexter Bostic, who shot Field, and that the defendant drove the get-away car.

At the jury trial, a witness testified that on July 8, 2007, at about 3:30 a.m., while she was working as a prostitute on Sutphin Boulevard in Queens, the defendant picked her up in a Porsche, and they subsequently picked up Bostic. The witness further testified that Bostic had a black gun with a silencer, and that he and the defendant stated that they were looking for someone to rob. After the defendant and Bostic let the witness out of the car, she hurried down the street. Field and another witness testified that the Porsche came to a "screeching halt" on Sutphin Boulevard, and that Bostic got out of the vehicle and shot Field four times, hitting him in the leg. Bostic took Field's chain necklace before reentering

the Porsche, which then sped away. The witness who had been riding with the defendant and Bostic testified that she heard the shots and phoned the defendant, who told her, "we just shot some[one]." The witness overheard Bostic in the background saying that they just "popped" someone. Phone records established that the witness made a 48–second call to the defendant shortly after the incident. The evidence at trial further ***994** established that Field underwent a seven-hour operation to put a metal rod into his knee, spent six months in a hospital, and could not walk for two years.

The defendant argues in his main brief on appeal that (1) he was denied his right to counsel of his choice, (2) his for-cause challenge to a prospective juror was improperly denied, (3) he was deprived of a fair trial because he was made to appear at voir dire and subsequent trial proceedings in prison clothing, (4) the Supreme Court improperly admitted into evidence his videotaped statement in violation of his ****540** right to counsel, and (5) the prosecutor's comments in summation deprived him of a fair trial.

The defendant contends that he was denied the right to his choice of counsel because the Supreme Court denied his request to appoint the 18–B attorney who represented him in an unrelated criminal case that had concluded two years prior. We agree with our dissenting colleague that this issue is not properly raised on direct appeal, but rather should be raised in a CPL 440.10 motion to vacate the judgment of conviction because the facts supporting the defendant's claim are dehors the record (*see People v. Jackson*, 29 N.Y.3d 18, 52 N.Y.S.3d 63, 74 N.E.3d 302; *People v. Geritano*, 158 A.D.3d 724, 71 N.Y.S.3d 531).

The Supreme Court properly denied the defendant's for-cause challenge to a prospective juror who was a retired school security officer for the New York City Police Department (hereinafter NYPD). Coincidentally, this prospective juror's son had previously been excused as a prospective juror in this case because that son was an NYPD sergeant and knew two of the witnesses in the case. The son indicated in his voir dire that he would have a problem being fair, and he was excused on consent of both sides. However, upon voir dire questioning, the retired school security officer unequivocally stated that he could be impartial. After defense counsel challenged this prospective juror for cause, the court conducted its own questioning. The retired school security officer stated that he had not heard anything about the case, and that he had not and would not discuss the case with his son, and he reaffirmed that he could be fair and impartial (*see People v. Johnson*, 94 N.Y.2d 600, 709 N.Y.S.2d 134, 730 N.E.2d 932; *People v. Culhane*, 33 N.Y.2d 90, 350 N.Y.S.2d 381, 305 N.E.2d 469). Contrary to the defendant's contention and our dissenting colleague's conclusion, the mere fact that the retired school security officer was related to a prospective juror who was excused for cause does not establish an implicit bias (*cf. People v. Furey*, 18 N.Y.3d 284, 938 N.Y.S.2d 277, 961 N.E.2d 668; *People v. Powell*, 153 A.D.3d 1034, 61 N.Y.S.3d 362; *People v. Guldi*, 152 A.D.3d 540, 59 N.Y.S.3d 385; *People v. Montford*, 145 A.D.3d 1344, 45 N.Y.S.3d 598; ***995** *People v. Bedard*, 132 A.D.3d 1070, 18 N.Y.S.3d 217; *People v. Hamilton*, 127 A.D.3d 1243, 6 N.Y.S.3d 707; *People v. Greenfield* 112 A.D.3d 1226, 977 N.Y.S.2d 486). Thus, the expurgatory oath of the retired school security officer was sufficient to establish his impartiality. There is no evidence in this record that the retired school security officer had a relationship with the defendant, the victim, a prospective witness, or counsel so as to support a claim of implicit bias (*cf. People v. Furey*, 18 N.Y.3d at 287, 938 N.Y.S.2d 277, 961 N.E.2d 668).

Contrary to the conclusion of our dissenting colleague, the defendant's contention that he was deprived of a fair trial because he allegedly wore prison garb for 3 days of jury selection and more than 5 days of witness testimony during the 18–day trial is unpreserved for appellate review. At no point during jury selection or the first days of testimony did defense counsel or the defendant make an application to adjourn or object to the proceedings in order to obtain civilian clothes (*see* CPL 470.05[2]; *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126, *People v. Shaw*, 126 A.D.3d 1016, 1017, 6 N.Y.S.3d 119; *People v. Bullock*, 28 A.D.3d 673, 673, 813 N.Y.S.2d 223). In any event, the contention is without merit. While "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while ****541** dressed in identifiable prison clothes" (*Estelle v. Williams*, 425 U.S. at 512, 96 S.Ct. 1691), the record here establishes that the Supreme Court gave the defendant multiple pretrial adjournments during which he could have obtained civilian clothes, but he failed to do so. Further, the state-issued clothing that the defendant wore bore no markings indicating that it was prison clothing (*see People v. Johnston*, 43 A.D.3d 1273, 842 N.Y.S.2d 837; *People v. Everson*, 262 A.D.2d

1059, 694 N.Y.S.2d 252; *People v. Reid*, 137 A.D.2d 844, 525 N.Y.S.2d 307). Ultimately, the defendant was provided a civilian suit by his counsel, and there was no explanation as to why such clothing could not have been provided earlier in the proceedings.

The defendant correctly contends that his videotaped statement was improperly admitted in violation of his right to counsel (*see* *People v. Lopez*, 16 N.Y.3d 375, 923 N.Y.S.2d 377, 947 N.E.2d 1155; *People v. Borukhova*, 89 A.D.3d 194, 931 N.Y.S.2d 349). However, the admission of the defendant's statement constituted harmless error because the evidence of his guilt, without reference to the statement, was overwhelming, and there was no reasonable possibility that the jury would have acquitted him had it not been for the constitutional error (*see* *People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. Borukhova*, 89 A.D.3d 194, 931 N.Y.S.2d 349; *People v. Payne*, 41 A.D.3d 512, 838 N.Y.S.2d 123).

The defendant failed to preserve for appellate review his contention that certain of the prosecutor's summation comments ***996** deprived him of a fair trial (*see* CPL 470.05[2]). In any event, the prosecutor's remarks in summation, for the most part, constituted fair comment on the evidence and the inferences to be drawn therefrom (*see People v. Fuhrtz*, 115 A.D.3d 760, 981 N.Y.S.2d 611; *People v. Birot*, 99 A.D.3d 933, 952 N.Y.S.2d 293; *People v. Guevara–Carrero*, 92 A.D.3d 693, 938 N.Y.S.2d 185; *People v. McHarris*, 297 A.D.2d 824, 825, 748 N.Y.S.2d 57), or were fair response to defense counsel's comments during summation (*see People v. Adamo*, 309 A.D.2d 808, 765 N.Y.S.2d 651; *People v. Clark*, 222 A.D.2d 446, 634 N.Y.S.2d 714; *People v. Vaughn*, 209 A.D.2d 459, 619 N.Y.S.2d 573), and any improper statements "were not so flagrant or pervasive" as to deprive the defendant of a fair trial (*People v. Almonte*, 23 A.D.3d 392, 394, 806 N.Y.S.2d 95; *see People v. Svanberg*, 293 A.D.2d 555, 739 N.Y.S.2d 837).

Contrary to the defendant's contention, raised in his pro se supplemental brief, viewing the evidence in the light most favorable to the prosecution (*see* *People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), there was legally sufficient evidence to establish the defendant's guilt of attempted murder in the second degree, assault in the first degree (two counts), robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), and criminal possession of stolen property in the fifth degree beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson*, 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see* *People v. Mateo*, 2 N.Y.3d 383, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley*, 69 N.Y.2d 490, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt as to those crimes was not against the weight of the evidence (*see* *People v. Romero*, 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

****542** Contrary to the defendant's further contention, raised in his pro se supplemental brief, the Supreme Court did not err in denying his motion for a missing witness charge, because the testimony of the subject witness would not have been material to the case (*see People v. Mamadou*, 129 A.D.3d 993, 13 N.Y.S.3d 440; *People v. Lopez*, 19 A.D.3d 510, 798 N.Y.S.2d 473; *People v. Rivera*, 174 A.D.2d 581, 570 N.Y.S.2d 687).

Contrary to the further contention raised in the defendant's pro se supplemental brief, the Supreme Court providently exercised its discretion in denying the defendant's motion for a mistrial after a witness made a brief reference to a police officer being shot, a charge for which the defendant was not being tried. "The decision to declare a mistrial rests with the sound discretion of the trial court, which is in the best position to ***997** determine if this drastic remedy is necessary to protect the defendant's right to a fair trial" (*People v. Redmon*, 81 A.D.3d 752, 752, 917 N.Y.S.2d 229 [internal quotation marks omitted]). Here, the court struck the improper testimony from the record and directed the jury to disregard it, thereby ameliorating any prejudice to the defendant resulting from the testimony (*see People v. Hicks*, 84 A.D.3d 1402, 924 N.Y.S.2d 551; *People v. Brescia*, 41 A.D.3d 613, 836 N.Y.S.2d 432; *People v. Brown*, 290 A.D.2d 251, 735 N.Y.S.2d 536).

The remaining contentions raised in the defendant's pro se supplemental brief are either based on matter dehors the record and, thus, not properly before this Court (*see People v. Ingram*, 142 A.D.3d 676, 37 N.Y.S.3d 551; *People v. Fully*, 109 A.D.3d 936, 971 N.Y.S.2d 459), or without merit (*see People v. Ingram*, 142 A.D.3d 676, 37 N.Y.S.3d 551).

BALKIN, J.P., IANNACCI and CHRISTOPHER, JJ., concur.

BARROS, J., dissents, and votes to reverse the judgment, on the law, and remit the matter to the Supreme Court, Queens County, for a new trial before a different Justice.

In 2007, the defendant, Robert Ellis, was arrested in relation to his alleged involvement in the shooting of Carl Field on July 8, 2007, in Queens, and the shooting of two police officers the next day, on July 9, 2007, in Brooklyn. In Kings County, the defendant, Dexter Bostic, and Lee Woods were charged with, inter alia, aggravated murder of Police Officer Russell Timoshenko and attempted murder of the other officer on July 9, 2007, in Brooklyn. By judgment rendered January 14, 2009, the Supreme Court, Kings County, upon a jury verdict, convicted the defendant of three counts of criminal possession of a weapon in the second degree. The defendant was acquitted of aggravated murder and attempted murder of the police officers. The codefendants, Bostic and Woods, were each convicted of aggravated murder.

In this Queens County case arising from the shooting of Field on July 8, 2007, the defendant was charged with attempted murder in the second degree, two counts of assault in the first degree, three counts of robbery in the first degree, robbery in the second degree, two counts of criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fifth degree. The defendant was convicted, upon a jury verdict, of all the charges except one count of robbery in the first degree and the count of robbery in the second degree, which counts were dismissed before the Supreme Court submitted the charges to the jury. Bostic was charged on the same indictment and convicted of the same charges as the defendant.

**543 I. *Right to Counsel*

*998 At his arraignment on this Queens County case on October 27, 2010, the defendant requested that Danielle Eaddy be assigned to represent him since she represented him during the investigations for both the Queens County and Kings County matters, and during the Kings County trial. The defendant's then-assigned counsel, Michael Siff, argued as follows:

> "MR. SIFF: Your Honor, ... [the defendant] was represented by ... Ms. E[a]ddy, in Brooklyn on the proceedings ... last year ... for which he did receive a conviction for a weapons charge only. He is asking that the Court appoint her to represent him. That's who he prefers. He, in fact, indicated that she was representing him when they pulled him out for different line-ups and other investigative matters and he feels since she was involved in that aspect of the case, she is very well versed with everything that was going on. Apparently, some witnesses that are in this matter ... testified in the Brooklyn matter. So he would feel more comfortable if the Court could assign her.
>
> "THE COURT: You want to hire her?
>
> "DEFENDANT: Can't afford it.
>
> "THE COURT: All right. Mr. Siff is assigned pursuant to 18B of the County Law. Application to have this other attorney represent you is denied."

By the time of jury selection, Siff was no longer representing the defendant. At jury selection, the defendant's assigned counsel, Dennis Coppin, declined to adopt the defendant's pro se motion which sought to have Eaddy substituted for Coppin as defense counsel. Coppin noted, however, that Eaddy had represented the defendant during the lineups relating to the instant case. The written pro se motion stated that Eaddy represented the defendant during lineups, and that she previously cross-examined the "same witnesses at [his] previous trial." The defendant argued that given Eaddy's familiarity with the case, any delay in appointing her would be minimal, and that "[i]n the past she has indicated that if she is assigned to this case she is ready and willing to take the assignment." The Supreme Court responded that Eaddy was "some attorney that [it had] never heard of," and that the defendant's request was "just another dilatory tactic." The court further noted Coppin's work on the case, and denied the defendant's request to substitute Eaddy as his counsel.

"An indigent defendant's constitutional right to the assistance of counsel 'is not to be equated with a right to choice of assigned counsel' " (*People v. Espinal*, 10 A.D.3d 326, 329, 781 N.Y.S.2d 99, quoting *People v. Sawyer*, 57 N.Y.2d 12, 18–19, 453 N.Y.S.2d 418, 438 N.E.2d 1133; *see People v. Porto*, 16 N.Y.3d 93, 99, 917 N.Y.S.2d 74, 942 N.E.2d 283). "[H]owever, 'that distinction is *999 significantly narrowed once an attorney-client relationship is established' " (*People v. Espinal*, 10 A.D.3d at 329, 781 N.Y.S.2d 99, quoting *People v. Childs*, 247 A.D.2d 319, 325, 670 N.Y.S.2d 4; *see People v. Knowles*, 88 N.Y.2d 763, 766–767, 650 N.Y.S.2d 617, 673 N.E.2d 902; *People v. Hall*, 46 N.Y.2d 873, 875,

414 N.Y.S.2d 678, 387 N.E.2d 610). "[O]nce an attorney-client relationship has been formed between assigned counsel and an indigent defendant, the defendant enjoys a right to continue to be represented by that attorney as counsel of his [or her] own choosing" (*People v. Griffin*, 92 A.D.3d 1, 5, 934 N.Y.S.2d 393, *affd* 20 N.Y.3d 626, 964 N.Y.S.2d 505, 987 N.E.2d 282; *see People v. Espinal*, 10 A.D.3d at 329, 781 N.Y.S.2d 99; *see also People v. Arroyave*, 49 N.Y.2d 264, 270, 425 N.Y.S.2d 282, 401 N.E.2d 393). Courts have recognized that the ****544** right of a defendant to be represented at trial by counsel of his or her own choosing serves critical needs, including the "need for a defendant to be willing to confide freely and fully in his [or her] attorney so that the channels of communication and advice between counsel and his [or her] client may remain free-flowing and unobstructed," as well as the considerations that "[m]utual cooperation between defendant and counsel is often times a critical prerequisite to effective legal representation," and that "the accused is more likely to harbor a feeling that his [or her] presumed innocence and individual rights were scrupulously protected at trial" (*People v. Arroyave*, 49 N.Y.2d at 270, 425 N.Y.S.2d 282, 401 N.E.2d 393).

"While the right to counsel of choice is qualified, and may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system, [the Court of Appeals has] made clear that courts cannot arbitrarily interfere with the attorney-client relationship, and interference with that relationship for purpose of case management is not without limits, and is subject to scrutiny" (*People v. Griffin*, 20 N.Y.3d 626, 630, 964 N.Y.S.2d 505, 987 N.E.2d 282). "[A] court commits reversible error where it interferes with an established attorney-client relationship without making 'threshold findings that [the attorney's] participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense' " (*People v. Espinal*, 10 A.D.3d at 329, 781 N.Y.S.2d 99, quoting *People v. Knowles*, 88 N.Y.2d at 767, 650 N.Y.S.2d 617, 673 N.E.2d 902).

The defendant's claim that the Supreme Court interfered with an established attorney-client relationship by failing to assign Eaddy to represent him is different than the more common scenario where the court has *discharged* an indigent defendant's assigned counsel (*see People v. Griffin*, 92 A.D.3d 1, 934 N.Y.S.2d 393; *People v. Espinal*, 10 A.D.3d 326, 781 N.Y.S.2d 99; *People v. Childs*, 247 A.D.2d 319, 670 N.Y.S.2d 4; *see also People v. Hall*, 46 N.Y.2d 873, 414 N.Y.S.2d 678, 387 N.E.2d 610). Even so, given the facts of this case, including that Eaddy represented the defendant during intertwined investigations ***1000** of both the Kings County and Queens County cases and at trial in the Kings County case, the same principles apply in determining whether the court improperly interfered with an established attorney-client relationship.

Since the Supreme Court was informed at the time of arraignment in Queens County that the defendant had established an attorney-client relationship with Eaddy in both the Kings County and Queens County cases, it was incumbent upon the court to assign her as counsel unless she was not ready, willing, or able to accept the assignment (*see People v. Jackson*, 216 A.D.2d 323, 324, 627 N.Y.S.2d 779 [stating that a court should not interfere with an established attorney-client relationship "where, as here, counsel was also representing the defendant on a number of other pending criminal matters"]). At the time of arraignment, there was no risk that Eaddy's participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense. To the contrary, Eaddy's familiarity with the defendant and the case, as well as the defendant's preference for her as his assigned counsel, would most likely have expedited matters. Indeed, the attorney who was assigned to represent the defendant at the arraignment, Siff, was eventually discharged in March 2011 and replaced with Coppin, with whom the defendant expressed dissatisfaction and requested further substitution.

****545** Instead of inquiring as to Eaddy's availability at the time of arraignment, the Supreme Court summarily denied the defendant's request for the constitutionally impermissible reason that the defendant was too indigent to pay for her services (*see generally Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *People v. Price*, 262 N.Y. 410, 187 N.E. 298).

Despite the Supreme Court's error in failing to make proper inquiry regarding defendant's request to maintain his attorney-client relationship with Eaddy, the defendant's claim that the court violated his right to counsel of his own choosing cannot be reviewed on direct appeal for the simple reason that the record discloses no information as to whether Eaddy was ready, willing, and able to accept the assignment. Although the defendant suggested in his pro se motion made during jury

selection that Eaddy had earlier expressed her willingness to take the assignment, there is nothing in the record from Eaddy to either corroborate the defendant's assertion, or to otherwise suggest that she was available to represent the defendant on the scheduled trial date. Since any such information would be based on matter dehors the record, the defendant's contention ***1001** cannot be reviewed on direct appeal. In the event that such information exists, the appropriate vehicle to review the defendant's allegation that the court violated his right to counsel of his own choosing would be a motion pursuant to CPL 440.10 (*see People v. Fisher*, 121 A.D.3d 1013, 1014, 995 N.Y.S.2d 168; *People v. Folger*, 110 A.D.3d 736, 736, 971 N.Y.S.2d 890).

II. *Presumption of Innocence*

The defendant was deprived of a fair trial because he was compelled to wear the same prison clothing for three days of jury selection and more than five days of trial testimony (*see Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126).

On May 10, 2012, which was the scheduled date for jury selection, the defendant fainted as a result of not receiving his prescribed medication. After inquiring about his condition, the Supreme Court asked the defendant, "Do you have any civilian clothes?" The defendant replied, "No." When the court asked if his family brought him any clothing, the defendant explained that his family was out of state attending to an emergency. The defendant further stated that he did not have any civilian clothes in the facility where he was being held, but that he "can get clothes." The court then stated as follows: "All right. The clothing you are wearing right now [there] is no indication on those cloth[es]; there is no writing at all on *that thing* you are wearing right now. You look pretty good to me" (emphasis added). The court adjourned the proceedings to allow the defendant to be medically examined or obtain his medication.

On the adjourned date, May 14, 2012, defense counsel indicated that the defendant had made a pro se motion, which counsel did not adopt, seeking, inter alia, the Supreme Court's recusal and substitution of counsel, and raising an issue regarding the presence of uniformed police officers during the trial and their influence upon the jury. As part of that pro se motion, defense counsel stated that the defendant had a "complaint" that "he has a jumpsuit on" and did not have "a suit for the jury." Counsel stated that the defendant has an "upstate green jacket that he has from the jail in Downstate." Despite his client's protest, the defense attorney stated that he was prepared to go forward with jury selection. The court noted that "the clothing ... has no indication that it's from the Department of Corrections," that "there is no lettering on there," and that it ****546** was "just a plain jumpsuit." The court also noted that the outfit was green and "not orange." The court then clarified that the defendant's outfit was not a jumpsuit, but rather "a shirt and pants." The defendant asked if he could make a record regarding his objections, but the court refused ***1002** to allow further argument, telling the defendant to "talk to [his] attorney about that." Thereafter, the court called the prospective jurors into the courtroom for jury selection.

Jury selection proceeded on May 14, 15, and 16 with the defendant wearing the same prison clothing. After the jury was selected, the defendant wore the same prison clothing for opening statements and testimony on May 16, and for witness testimony on May 17. On May 21, the next trial date, the following colloquy took place:

"THE COURT: Mr. Ellis, how is everything?

"DEFENDANT: Not much better. My clothes are still dirty. I got clean underclothes, but everything else is still dirty.

"THE COURT: You have clean underclothes?

"DEFENDANT: Yeah. That's it."

The Supreme Court then asked the prosecutor if he was ready to proceed. The defendant wore the same prison clothing on May 21, 22, 23, and 24, during which time nine witnesses testified. Finally, on May 29, the defendant appeared in a civilian suit. Defense counsel told the court that he had provided the suit for his client. The court informed counsel that "the Department of Correction would not allow [the defendant] to [wear] it because of its color," and that it "instructed the court officers that they were to put the suit on him in the pens here so he has a suit on."

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law" (*Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481; *see Estelle v. Williams*, 425 U.S. at 503, 96 S.Ct. 1691). A defendant is "entitled to appear in court with the dignity and the self-respect of a free and innocent [person]" (*People v.*

Roman, 35 N.Y.2d 978, 979, 365 N.Y.S.2d 527, 324 N.E.2d 885). Presenting an accused before the jury in prison attire, which is a continuing visual communication to the jury that the accused requires incarceration, impairs the presumption of innocence, and operates usually against only indigent defendants, which is "repugnant to the concept of equal justice embodied in the Fourteenth Amendment" (*Estelle v. Williams*, 425 U.S. at 505–506, 96 S.Ct. 1691; *see People v. Then*, 28 N.Y.3d 1170, 1172, 49 N.Y.S.3d 44, 71 N.E.3d 535; *People v. Roman*, 35 N.Y.2d at 979, 365 N.Y.S.2d 527, 324 N.E.2d 885).

"[A]lthough the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of ***1003** compulsion necessary to establish a constitutional violation" (*Estelle v. Williams*, 425 U.S. at 512–513, 96 S.Ct. 1691).

Here, the defendant objected to wearing prison garb at jury selection as early as May 14, 2012, and then, when given an opportunity, the defendant again protested that his prison clothing was dirty on May 21, 2012. Thus, the defendant's complaints about his clothing were sufficient to preserve his claim for appellate review.

****547** Contrary to the Supreme Court's suggestion, there is no rule that clothing constitutes identifiable prison garb only if it is orange, a jumpsuit, or has markings or writing on it indicating that the defendant is a prisoner. This case is readily distinguishable from *People v. Then*, 28 N.Y.3d 1170, 49 N.Y.S.3d 44, 71 N.E.3d 535, where the defendant's orange correctional pants were purposefully hidden from the jury during a short span of time, and where the black knitted top worn by the defendant was clearly not identifiable as correctional garb (*id.* at 1171–1172, 49 N.Y.S.3d 44, 71 N.E.3d 535). In stark contrast to the facts of this case, the trial court in *Then* stated that it understood the defendant's concerns, made a concerted effort to conceal the defendant's orange pants from the jury, and arranged for civilian clothes to be delivered to the defendant for the next day (*id.* at 1171–1172, 49 N.Y.S.3d 44, 71 N.E.3d 535). This case is also distinguishable from cases where the clothing worn by the accused was deemed not to be identifiable prison garb (*cf. People v. McFarlane*, 96 A.D.3d 879, 946 N.Y.S.2d 255; *People v. Johnston*, 43 A.D.3d 1273, 842 N.Y.S.2d 837).

Here, there is no question that the clothing worn by the defendant was prison-issued clothing. The defendant wore the same green top and bottom for three days of jury selection and more than five days of trial testimony. Even the Supreme Court described the defendant's clothing as "that thing." Based upon the description of the clothes and the fact that the defendant wore the same clothes for at least eight days, a reasonable juror could only conclude that the clothing was prison garb. Given the defendant's objection to wearing dirty prison clothes, I conclude that he preserved his contention for appellate review, and that, as a matter of law, he was deprived of a fair trial (*see Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126).

III. *Right to an Impartial Jury*

The judgment of conviction should also be reversed because the Supreme Court erred in denying the defendant's for-cause challenge to a prospective juror. During the third round of jury selection, the panel of prospective jurors included a father and a son. The son was a sergeant in the New York City Police Department (hereinafter NYPD) and worked in a crime laboratory. ***1004** He acknowledged knowing two of the police criminalists who had testified in the Kings County case and were expected to testify in this case. When asked if he would have a problem sitting as a "fair juror," the son replied, "I think everyone would agree. I don't think you guys would pick me." The son was excused with the consent of both counsel.

The father reported that he was a retired school safety agent employed by the NYPD for 15 years. He acknowledged that his fellow juror son was a sergeant in the NYPD, and that he had a brother who was a retired detective in the NYPD. When asked if he could be fair despite his employment and familial connections to the NYPD, the father responded, "I think so." He assured the Supreme Court that he did not discuss the case with his son and would not do so, and that he would not credit a police officer's testimony more than any other witness's testimony.

The defendant challenged the father for cause. His counsel argued, inter alia, as follows: "I am raising a cause challenge against him because it is my opinion that to have him on this jury is very unfair to [the defendant]. I realize we did run out

of challenges, but this case, I assume, will get some attention at some point. There will be police officers in the audience at some point based on flyers that I have seen ... [indicating] that they plan on **548 attending and the parents of this [slain] officer, which is their absolute right to attend. Bottom line is with this person being left on the jury ... I feel that his ability to judge this case fairly and impartially as time goes on and based on his background and his connection to his son, it is his son who supervises ... two important witnesses in this case. I am objecting."

"A basic premise of our criminal justice system is that a defendant has the right to trial by an impartial jury" (*People v. Arnold*, 96 N.Y.2d 358, 360, 729 N.Y.S.2d 51, 753 N.E.2d 846; *see People v. Branch*, 46 N.Y.2d 645, 652, 415 N.Y.S.2d 985, 389 N.E.2d 467 ["Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury"]). CPL 270.20(1)(c) permits, inter alia, a challenge for cause to a prospective juror on the ground that the prospective juror has a preexisting relationship to the defendant, the victim, a prospective witness, or counsel that "is likely to preclude him [or her] from rendering an impartial verdict" (*see People v. Furey*, 18 N.Y.3d 284, 287, 938 N.Y.S.2d 277, 961 N.E.2d 668). "This is referred to colloquially as an 'implied bias' that requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect [his or her] ability to be fair and impartial" (*id.* at 287, 938 N.Y.S.2d 277, 961 N.E.2d 668 [citation omitted]; *see* *1005 *People v. Rentz*, 67 N.Y.2d 829, 831, 501 N.Y.S.2d 643, 492 N.E.2d 771; *People v. Branch*, 46 N.Y.2d at 650, 415 N.Y.S.2d 985, 389 N.E.2d 467). Such bias "cannot be cured with an expurgatory oath" because the risk of prejudice arising out of the relationship itself is so great that it "creates the perception that the accused might not receive a fair trial before an impartial finder of fact" (*People v. Furey*, 18 N.Y.3d at 287, 938 N.Y.S.2d 277, 961 N.E.2d 668; *see People v. Branch*, 46 N.Y.2d at 651, 415 N.Y.S.2d 985, 389 N.E.2d 467).

Thus, the Court of Appeals has "advised trial courts to exercise caution in these situations by leaning toward 'disqualifying a prospective juror of dubious impartiality' " (*People v. Furey*, 18 N.Y.3d at 287, 938 N.Y.S.2d 277, 961 N.E.2d 668, quoting *People v. Branch*, 46 N.Y.2d at 651, 415 N.Y.S.2d 985, 389 N.E.2d 467), rather than "testing the bounds of discretion by permitting such a juror to serve" (*People v. Branch*, 46 N.Y.2d at 651, 415 N.Y.S.2d 985, 389 N.E.2d 467). In determining whether a prospective juror's relationship with potential witnesses or interested party requires disqualification for cause as a matter of law, the court should evaluate the frequency of contact and nature of the relationships (*see People v. Furey*, 18 N.Y.3d at 287, 938 N.Y.S.2d 277, 961 N.E.2d 668; *People v. Rentz*, 67 N.Y.2d at 830, 501 N.Y.S.2d 643, 492 N.E.2d 771).

In the exercise of caution, the Supreme Court should have granted the defendant's for-cause challenge to the prospective juror. This trial followed a Kings County trial in which the defendant had been acquitted of murder and attempted murder arising from the shooting of two NYPD officers, one of whom was killed. Given the close temporal proximity of the criminal conduct underlying both cases, the investigations were intertwined, and it was expected that both trials would involve many of the same witnesses. The trials of both cases were well publicized. Uniformed police officers and the family of the slain officer were expected to be in attendance in this trial as they had been in the Kings County case. Indeed, defense counsel informed the court that he observed flyers urging uniformed police officers to attend the subject trial. The prospective juror's son, a sergeant in the NYPD, acknowledged his work relationship with two **549 NYPD criminalists who testified in the Kings County case and were expected to testify in this case. The prospective juror himself was a retired employee of the NYPD, and his brother was a retired detective in the NYPD.

Given all of the circumstances, including (1) the prospective juror's employment and familial relationships with the NYPD, (2) the allegations in the Kings County case that the defendant was involved in the shooting death of an NYPD officer and the attempted murder of another police officer, and (3) that the prospective juror's son, in effect, disqualified himself based upon his working relationship with two criminalists who were expected to testify in this trial, it should have been apparent that seating the prospective juror would create "the perception *1006 that the accused might not receive a fair trial before an impartial finder of fact" (*People v. Furey*, 18 N.Y.3d at 287, 938 N.Y.S.2d 277, 961 N.E.2d 668; *see People v. Branch*, 46 N.Y.2d at 651, 415 N.Y.S.2d 985, 389 N.E.2d 467; *People v. Montford*, 145 A.D.3d 1344, 1348, 45 N.Y.S.3d 598).

Since the defense had exhausted its peremptory challenges, the Supreme Court's erroneous denial of the defendant's challenge for cause constitutes reversible error (*see* CPL 270.20[2]; *People v. Hamilton*, 127 A.D.3d 1243, 1247, 6 N.Y.S.3d 707).

IV. *Summary*

Although the Supreme Court erred in failing to conduct a proper inquiry with respect to the defendant's request to have Eaddy assigned to represent him, the defendant's claim that his right to counsel of his own choosing was violated cannot be reviewed on direct appeal since the record discloses no information that Eaddy was ready, willing, and able to represent him.

Nonetheless, the presumption of innocense was impaired when the Supreme Court compelled the defendant to appear before the jury in prison garb, and the court deprived the defendant of his right to an impartial jury by erroneously denying his challenge for cause to a prospective juror. The court's dismissive treatment of the defendant's aforementioned concerns and the cursory denial of his objections lead me to the conclusion that not only was the defendant deprived of a fair trial, but that he should be tried again before a different Justice. "The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right" (*People v. Crimmins*, 36 N.Y.2d 230, 238, 367 N.Y.S.2d 213, 326 N.E.2d 787).

Accordingly, I vote to reverse the judgment, on the law, and remit the matter to the Supreme Court, Queens County, for a new trial before a different Justice.

All Citations

166 A.D.3d 993, 88 N.Y.S.3d 537, 2018 N.Y. Slip Op. 08143

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225 A.D.3d 784
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,
v.
Robert ELLIS, appellant.

2022–02809
(Ind. No. 2224/10)
Argued—January 23, 2024
March 20, 2024

Synopsis

Background: After affirmance, 34 N.Y.3d 1092, 116 N.Y.S.3d 654, 139 N.E.3d 1234, of defendant's convictions of attempted murder in the second degree, assault in the first degree, robbery in the first degree, criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fifth degree, defendant moved to vacate judgment of conviction, alleging that he was denied his right to counsel of his choice. The Supreme Court, Queens County, Michael Aloise, J., denied prisoner's motion without a hearing. Defendant appealed.

The Supreme Court, Appellate Division, held that trial court did not violate right to counsel of choice when it denied defendant's request for assignment previously-appointed attorney.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

Attorneys and Law Firms

****648** Patricia Pazner, New York, NY (William Kastin of counsel), for appellant, and appellant pro se.

Melinda Katz, District Attorney, Kew Gardens, NY (Johnnette Traill and Nancy Fitzpatrick Talcott of counsel), for respondent.

BETSY BARROS, J.P., CHERYL E. CHAMBERS, LARA J. GENOVESI, LOURDES M. VENTURA, JJ.

DECISION & ORDER

***784** Appeal by the defendant, by permission, from an order of the Supreme Court, Queens County (Michael Aloise, J.), dated March 15, 2022, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court (Gregory Lasak, J.) rendered July 18, 2012, convicting him of attempted murder in the second degree, assault in the first degree (two counts), robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), and criminal possession of stolen property in the fifth degree, upon a jury verdict, and imposing sentence.

ORDERED that the order is affirmed.

By judgment rendered July 18, 2012, defendant was convicted, upon a jury verdict, of attempted murder in the second degree, two counts of assault in the first degree, two counts of robbery in the first degree, two counts of criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fifth degree, and the conviction was affirmed by this Court (*see People v. Ellis*, 166 A.D.3d 993, 88 N.Y.S.3d 537, *affd* 34 N.Y.3d 1092, 116 N.Y.S.3d 654, 139 N.E.3d 1234). This Court concluded that the defendant's contention that he was denied his right to counsel of his choice should be determined by motion pursuant to CPL 440.10. The defendant thereafter moved to vacate the judgment of conviction pursuant to CPL 440.10, and his motion was denied. The defendant appeals, by permission.

Contrary to the defendant's contention, the Supreme Court properly denied that branch of his motion which was to vacate the judgment of conviction pursuant to CPL 440.10 on the ground that he was denied his right to counsel of his choice. Criminal defendants who retain their own attorneys have the right to select who will represent them (*see People v. O'Daniel*, 24 N.Y.3d 134, 138, 996 N.Y.S.2d 580, 21 N.E.3d 209). However, while the constitutional right to assistance of counsel grants an indigent defendant a right to a court-appointed attorney, that defendant does not have a choice of assigned counsel (*see id.; People v. Fulgencio*, 168 A.D.3d

1094, 92 N.Y.S.3d 370). "The right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option" (*People v. Washington*, 25 N.Y.3d 1091, 1095, 13 N.Y.S.3d 343, 34 N.E.3d 853 [internal quotation marks omitted]; *see People v. English*, 201 A.D.3d 733, 734, 156 N.Y.S.3d 885).

***785** The distinction between the right to assistance of counsel and the right to counsel of choice, however, is "significantly narrowed once an attorney-client relationship is established" (****649** *People v. Childs*, 247 A.D.2d 319, 325, 670 N.Y.S.2d 4; *see People v. Knowles*, 88 N.Y.2d 763, 766–767, 650 N.Y.S.2d 617, 673 N.E.2d 902; *People v. Griffin*, 92 A.D.3d 1, 934 N.Y.S.2d 393, *affd* 20 N.Y.3d 626, 964 N.Y.S.2d 505, 987 N.E.2d 282). "Once an attorney-client relationship has formed between assigned counsel and an indigent defendant, the defendant enjoys a right to continue to be represented by that attorney as 'counsel of his own choosing' " (*People v. Espinal*, 10 A.D.3d 326, 329, 781 N.Y.S.2d 99, quoting *People v. Arroyave*, 49 N.Y.2d 264, 270, 425 N.Y.S.2d 282, 401 N.E.2d 393). Discharging assigned counsel who is representing the defendant can constitute reversible error (*see People v. Griffin*, 20 N.Y.3d at 631–632, 964 N.Y.S.2d 505, 987 N.E.2d 282; *People v. Burton*, 28 A.D.3d 203, 811 N.Y.S.2d 663). While the right to be represented by counsel of choice "is qualified in the sense that a defendant may not employ [it] as a means to delay judicial proceedings" (*People v. Arroyave*, 49 N.Y.2d at 271, 425 N.Y.S.2d 282, 401 N.E.2d 393), a court may not interfere with that right "arbitrarily" (*People v. Knowles*, 88 N.Y.2d at 766, 650 N.Y.S.2d 617, 673 N.E.2d 902). Accordingly, a court may not interfere with an "established attorney-client relationship" without making "threshold findings that [the attorney's] participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense" (*id.* at 766–767, 650 N.Y.S.2d 617, 673 N.E.2d 902). Such findings must demonstrate that interference with the attorney-client relationship is "justified by overriding concerns of fairness or efficiency" (*id.* at 769, 650 N.Y.S.2d 617, 673 N.E.2d 902).

In July 2007, the defendant was assigned counsel (hereinafter the 18–B attorney) to represent him in a case pending in Kings County (hereinafter the Kings County case). In August 2008, the 18–B attorney represented the defendant during lineups in this case arising out of a shooting in Queens County. By judgment rendered January 14, 2009, the defendant was convicted, upon a jury verdict, in the Kings County case (*see People v. Ellis*, 117 A.D.3d 843, 985 N.Y.S.2d 727).

In October 2010, an indictment in this case was filed in Queens County. The 18–B attorney communicated with the prosecutor in the Kings County case and the Administrator of the Assigned Counsel Plan for the Second Department, noting that she was assigned to represent the defendant in the Kings County case, and in 2008, during lineups in this case, and wished to be assigned to represent the defendant with respect to the Queens County indictment. The Administrator replied in an email that "It's totally fine with me that you pick up the Ellis case in Queens—it's just that the final decision always rests with the judge. If the judge has an issue with an out of county ***786** appointment, he or she can give me a call. Otherwise, the case is yours as far as I am concerned."

However, the 18–B attorney did not file a notice of appearance in this case with the Supreme Court, Queens County. At the defendant's arraignment on the indictment, although his then-assigned counsel asked to have the 18–B attorney assigned to represent the defendant, that request was denied. In 2011, the defendant asked for, and was assigned, new counsel, but there is no indication that, at that juncture, he requested the 18–B attorney. In 2012, the defendant moved to have his new counsel relieved and to have the 18–B attorney assigned to represent him. The defendant's motion was denied, on the ground that it was the eve of trial, and the counsel representing him had done extensive work on the case. The defendant then proceeded to trial and was convicted.

****650** Under the circumstances here, by the time the defendant was indicted in Queens County, there was no established attorney-client relationship between the defendant and the 18–B attorney. The 18–B attorney represented the defendant in 2008, during lineups in Queens County, and last represented the defendant in the Kings County case, which had concluded in 2009. Accordingly, there was no interference with an established attorney-client relationship with respect to this case.

The defendant's remaining contentions raised in his pro se supplemental brief relating to those branches of his motion which were to vacate the judgment of conviction based upon claims of actual innocence and ineffective assistance of counsel are without merit.

State of New York
Court of Appeals

BEFORE: HON. ROWAN D. WILSON, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

ROBERT ELLIS, Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: AUG 12 2024

Chief Judge

*Description of Order: Order of the Appellate Division, Second Department, entered March 20, 2024, affirming an order of the Supreme Court, Queens County, dated March 15, 2022.

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART TAP-D

P R E S E N T: HON. MICHAEL ALOISE
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No. 2224/2010

Motion: To vacate judgement

ROBERT ELLIS,

Defendant.

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BY: WILLIAM KASTIN, ESQ.

MELINDA KATZ D.A.
BY: NANCY FITZPATRICK TALCOTT, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the defendant's motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: March 15, 2022

MICHAEL ALOISE
JUSTICE SUPREME COURT

HON. MICHAEL B. ALOISE

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART TAP-D
----------X
THE PEOPLE OF THE STATE OF NEW YORK

BY: MICHAEL ALOISE, J.S.C.

- against - Indictment No. 2224/2010

ROBERT ELLIS,

Defendant.
----------X

The following constitutes the opinion, decision and order of the Court.

BACKGROUND

In this case, the defendant was indicted for Attempted Murder, Robbery, and other charges. He was also indicted for a separate matter in Brooklyn. Evidence presented in the defendant's Brooklyn case overlapped with evidence presented in the defendant's Queens case. Ms. Danielle Eaddy represented the defendant in the Brooklyn case. She was also assigned to represent the defendant at the lineups in his Queens case.

On October 27, 2010, during the Supreme Court arraignment on the defendant's Queens case, Mr. Siff, who had been assigned to the defendant's Queens case, brought to the court's attention that Ms. Eaddy had represented the defendant in his Brooklyn case and at the Queens lineups and noted that the defendant would feel more comfortable if the court could assign Ms. Eaddy to his Queens case. The court asked the defendant if he was able to retain Ms. Eaddy and he replied that he was not. The court denied the defendant's application to have Ms. Eaddy represent him on the Queens indictment and assigned Mr. Siff to the case.

Later, Mr. Siff was relieved from representing the defendant and Mr. Coppin was

assigned to represent the defendant at trial. In a motion dated May 8, 2012, the defendant requested that Mr. Coppin be relieved as counsel and that Ms. Eaddy be assigned to the Queens case. On May 14, 2012, defense counsel handed the defendant's motion up to the court but did not adopt it, and the court addressed the defendant's motion in court. At this time, the defendant's case had already been moved to trial and the court considered the *pro se* motion for assignment of new counsel to be a "dilatory tactic."

On appeal, the defendant raised several issues including one that is relevant to his current motion – that the court deprived him of a fair trial when it refused to appoint Ms. Eaddy to represent him on his Queens case when he asked the court to do so at his arraignment. In response, the People argued that the defendant's claim was more appropriately presented in a section 440 motion, rather than on direct appeal. The People also argued that the defendant had no right to counsel of choice when he was appointed an attorney by the court and, as such, his claim was meritless. On November 18, 2018, the Appellate Division, Second Department, affirmed the defendant's judgment of conviction and held that the defendant's claim that Ms. Eaddy should have been assigned to represent him was dehors the record and, accordingly, could not be raised on direct appeal.[1] *See People v. Ellis*, 166 A.D.3d 993 (2nd Dept 2018), *affirmed* 34 N.Y.3d 1092.

By motion, dated December 18, 2020, the defendant seeks an order of the Court to vacate his judgment of conviction pursuant to section 440.10(1)(h) of the Criminal Procedure Law upon the grounds that he was denied his rights to: due process and his right to counsel because the court did not assign Danielle Eaddy, who had represented him in a case that the defendant had in Brooklyn, to represent the defendant in his Queens case. The defendant also claims in a pro se motion that was adopted by counsel that he is actually

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[1] The Honorable Betsy Barrios dissented in the Appellate Division's decision. In her dissent, Justice Barrios concluded that the trial court interfered with an established attorney-client relationship when it denied the defendant's request to have Ms. Eaddy assigned to his Queens case. As discussed below, this court disagrees with the conclusions reached in the dissenting opinion.

innocent of the crimes for which he was convicted and he claims that his attorney was ineffective for failing to investigate his case. In support of his motion, the defendant submits an affidavit from himself, as well as an affidavit from Danielle Eaddy, Farran Tavneau, and James Cortu. He also submits portions of the transcripts from both his Brooklyn and Queens cases and correspondence between Ms. Eady and others.

Ms. Eaddy (who is now a Bureau Chief at the Kings County District Attorney's Office) states in her affirmation that she represented the defendant on his Kings County case, which occurred one day apart from the conduct charged in his Queens County indictment, and which had overlapping witnesses, evidence, and co-defendants. She affirms that Ms. Barbara DiFiore, the Administrator for the Assigned Counsel Plan for the Appellate Division, Second Department, assigned Ms. Eaddy to represent the defendant on the line-ups in the Queens Case in 2008 while she was representing the defendant on the Brooklyn matter.

According to Ms. Eaddy's affirmation, on October 2010, she contacted the ADA who was prosecuting the Brooklyn case and stated that she represented the defendant on both the Queens and Brooklyn matter. She then contacted Ms. DiFiore to remind her that she had been assigned to the Queens lineups and wanted to confirm that she would continue to represent the defendant on the Queens indictment. Ms. DiFiore responded that it was "fine" with her but that it was ultimately up to the court. Ms. Eaddy affirmed that she was "ready, willing, and able" to represent the defendant on the Queens indictment, with which she was "fully familiar," but did not do so because the court refused to assign her to the Queens case.

In response, the People have filed two affirmations in opposition – one dated April 9, 2021 and the other dated August 2, 2021[2] – in which they assert that the defendant's motion should be denied in its entirety because it is meritless.

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[2] The People's April response addressed the issues raised in the section 440 motion filed by counsel. The People's August response addressed the issues raised in the defendant's pro se section 440 motion, which was ultimately adopted by counsel.

On December 15, 2021, the court heard oral argument on the defendant's motion. For the reasons stated herein, defendant's motion is denied.

DECISION

A criminal defendant who retains his or her own counsel has a right to choose who will represent him or her. *People v. O'Daniel*, 24 N.Y.3d 134.138 (2014). A criminal defendant who cannot afford to hire his or her own attorney is entitled to a court appointed lawyer, but is not entitled to choose a court-assigned attorney. *Id.* Once an attorney-client relationship between a defendant and a lawyer is established, however, a court may not interfere with that relationship arbitrarily. *People v. Espinal*, 10 A.D.3d 326 (1st Dept. 2004).

If a criminal defendant with an assigned attorney argues that he would like a different attorney to represent him or her, the court has a duty to investigate and "must make at least a minimal inquiry" into the issue. *People v. Porto*, 16 N.Y.3d 93, 100 (2010). After exploring the issue, the court may substitute counsel upon a showing of good cause. *People v. Washington*, 25 N.Y.3d 1091 (2015). The timing of the request, its effect on the progress of the case, and whether presently assigned counsel will provide meaningful assistance are factors that are relevant to the court's determination. *See Porto*, 16 N.Y.3d at 100; *People v. Linares*, 2 N.Y.3d 507, 510 (2004).

The trial court properly exercised its discretion in denying the defendant's two requests to assign Ms. Eaddy to represent him on this Queens case. At the defendant's Queens arraignment he was represented by assigned counsel Mr. Siff. Mr. Siff brought to the court's attention that the defendant had previously had a related criminal case in Brooklyn where he had been represented by Ms. Eaddy, that Ms. Eaddy had represented the defendant at line-ups in the Queens case, and noted that the defendant preferred that Ms. Eaddy represent him on his Queens case. The court asked the defendant if he was able to retain Ms. Eaddy and he replied that he was not. The court denied the defendant's request to assign Ms. Eaddy and continued to have Mr. Siff represent the defendant. The

information before the court did not establish an ongoing attorney-client relationship between Ms. Eaddy and the defendant, only generally alerted the court that the defendant had a previous relationship with Ms. Eaddy and that she was familiar with certain aspects of the Queens case and had been assigned to represent him during the Queens lineups, and that the defendant preferred that Ms. Eaddy represent him rather than Mr. Siff. Under these circumstances, the court acted properly when it denied the defendant's request to have Ms. Eaddy represent him and, instead, continued Mr. Siff's representation of the defendant. Notably, the defendant did not object to this assignment at this time or at any point prior to the eve of trial, approximately two years after his arraignment.

In between his arraignment and his trial, the defendant asked for Mr. Siff to be relieved. At that time, he made no mention of Ms. Eaddy. The court relieved Mr. Siff and assigned Mr. Coppin to represent the defendant.

Although Ms. Eaddy affirms that she contacted the court to inform the court that she represented the defendant in Brooklyn and wanted to also represent him on the Queens matter,[3] there is no specific mention of who in the courthouse she contacted or whether or not she attempted to reach out to Justice Lasak, who had presided over the Queens case and who would have had control over who was assigned to the defendant's case. In addition, counsel never filed a notice of appearance in Queens, even after she became aware that the defendant had been indicted there. She affirms that she contacted an ADA in Brooklyn to let her know that she planned to represent the defendant in Queens. None of this was sufficient to alert the Queens trial court that Ms. Eaddy was willing and able to represent the defendant in Queens.

After jury selection was about to begin, the defendant asked for Mr. Coppin to be relieved and for Ms. Eaddy to represent him. The timing of this request, which was made after a jury panel was brought to court, was too late to establish good cause for the removal

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[3] Ms. Eaddy's representation of the defendant on the Brooklyn case had ended by the time the Queens case had been indicted.

of Mr. Coppin, who was fully prepared to proceed with the defendant's trial.

In short, the defendant did not establish before Judge Lasak that he had an on-going relationship with Ms. Eaddy, the record on this motion similarly does not establish that he had an ongoing attorney-client relationship with Ms. Eaddy, and the defendant was not entitled to have his general preference for Ms. Eaddy honored when he was provided with court-appointed counsel. Accordingly, Judge Lasak properly denied the defendant's request to have Ms. Eaddy represent him on his Queens case and the defendant's motion to vacate his judgment of conviction on this ground is denied.

The defendant also claims that his conviction should be vacated because he is actually innocent. The People argue that the Court of Appeals decision in *People v. Tiger*, 32 N.Y. 3d 91 (2018), establishes that section 440.10 of the Criminal Procedure Law does not establish a freestanding claim of actual innocence. But *Tiger* expressly left open the issue of whether a defendant who has been convicted after trial can raise a freestanding claim of actual innocence (*Id. at note 9)*, and the Appellate Division, Second Department, by which this court is bound, has expressly held that a freestanding claim of actual innocence raised in a section 440 motion after a jury verdict is cognizable. *See People v. Fraser*, 165 A.D.3d 697 (2nd Dept. 2018).

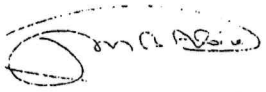
The defendant, however, has failed to make a prima facie showing that he is, in fact, innocent. In this case, the evidence presented at trial overwhelmingly established the defendant's guilt. The affidavits offered by the defendant in support of his motion do not establish, by clear and convincing evidence, that no juror that would have considered this evidence would have convicted him. The defendant's claim that he is actually innocent is, therefore, summarily denied. *See People v. Griffin*, 120 A.D.3d 1257 (2nd Dept 2014).

Finally, the defendant claims that counsel was ineffective because he failed to investigate the defendant's case, failed to object to the defendant wearing prison attire, and failed to adopt his motion to set aside the verdict. The record in this case establishes that counsel provided the defendant with competent, meaningful, and zealous representation.

The defendant has not met his burden of establishing that his attorney was ineffective. The defendant's claim that his conviction should be vacated because his attorney was ineffective is, therefore, denied.

For the reasons stated above, the defendant's motion to vacate his conviction pursuant to section 440.10 of the Criminal Procedure Law is summarily denied.

Kew Gardens, New York
Dated: March 15, 2022



MICHAEL ALOISE
JUSTICE SUPREME COURT HON. MICHAEL B. ALOISE

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY: CRIMINAL TERM, PART TAP-D

----------x

THE PEOPLE OF THE STATE OF NEW YORK, :

AFFIRMATION

Respondent, :

-against- :

ROBERT ELLIS, :

Defendant-Petitioner. :

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

DANIELLE V. EADDY, an attorney admitted to practice in the Courts of this State, hereby affirms under the penalties of perjury that the following statements are true, except those made on information and belief, which she believes to be true:

1. I am currently a Trial Bureau Chief with the Kings County District Attorney's Office, where I am responsible for the supervision and trial of cases in five Brooklyn precincts. I have held this position since February 2017. From 1994 to 2006, I served as an Assistant District Attorney in the Kings County District Attorney's Office for 12 years, and was a Bureau Chief of a Trial Bureau at the time of my departure in 2006. In the interim, from 2006 to 2017, I was a defense attorney in private practice.

2. During my time as a defense attorney, I was assigned in July 2007, pursuant to Article 18B, to represent Mr. Ellis in his Brooklyn trial. Mr. Ellis was acquitted of murder and attempted murder but convicted of weapon possession.

3. During the time I was representing Mr. Ellis in his Brooklyn case, he had an open case in Queens County. The Brooklyn case and Queens case had overlapping witnesses, evidence, and co-defendants, and the two incidents occurred one day apart.

4. While I was representing Mr. Ellis in the Brooklyn case, Barbara DiFiore, the Administrator of the Assigned Counsel Plan for the Appellate Division, Second Department for Kings, Queens, and Richmond Counties, assigned me to represent Mr. Ellis in his Queens case. Accordingly, because I was assigned to represent Mr. Ellis in his Queens case, I represented Mr. Ellis at the Queens line-ups that took place in August 2008 in which Mr. Ellis was the subject.

5. After I represented Mr. Ellis at the Queens line-ups, I represented him at his November and December 2008 Brooklyn trial. Following his acquittal of two counts and conviction of one count, I represented him at his January 14, 2009, Brooklyn sentencing.

6. In October 2010, I learned that Mr. Ellis was being produced for a court appearance. On October 25, 2010, I contacted the Brooklyn prosecutor who tried that case, A.D.A. Anna-Sigga Nicolazzi, stated that it was unclear to me at the time whether the court appearance was for the Kings County conviction or the open Queens case, and emphasized, "[i]f it is related to either, I wanted to make all parties aware that I had been assigned to represent him in not only our matter, but the Queens matter as well."

7. That same afternoon, after I learned that the court appearance was for the Queens County open case, I e-mailed Ms. DiFiore. I reminded her that while I was representing Mr. Ellis in his Brooklyn case, she had assigned me to the Queens case to represent him at his Queens line-ups. I also reiterated that the Brooklyn case and Queens case were related and had overlapping witnesses. I stated to Ms. DiFiore that I just discovered Mr. Ellis's Queens indictment had been filed and that

a court appearance was calendared, and emphasized: "I informed both the ADA and the Court that I had already been assigned to the matter in Queens and that I would appear on his behalf. I just wanted to confirm that this is still the case."

8. Ms. DiFiore responded that although the ultimate decision was the court's, "[i]t's totally fine with me that you pick up the Ellis case in Queens" and "[i]f the judge has an issue with an out of county appointment, he or she can give me a call. Otherwise, the case is yours as far as I'm concerned."

9. When I subsequently sought to confirm that I was representing Mr. Ellis in the pending Queens County case, the chief administrative judge determined that the assignment was not to be decided by the panel administrator and that the court would assign an attorney to the case.

10. I was ready, willing, and able to represent Mr. Ellis in his Queens County case from October 2010 through the time of his May and June 2012 Queens trial. The only reason I did not represent Mr. Ellis at his Queens trial was because the court refused to assign me, despite my request and despite my prior representation of Mr. Ellis at his Queens line-ups.

11. I was fully familiar with all of the allegations in the Queens case before the Queens trial took place. Because I had already defended Mr. Ellis in his Brooklyn trial, and litigated the Molineux application by the Brooklyn prosecutor that addressed the Queens allegations, I was well aware of the claims being made by the People in the Queens case.

12. The Brooklyn case and the Queens case had overlapping witnesses and evidence, all of which I knew in great detail. I was prepared to continue my representation of Mr. Ellis at his Queens trial and my continued representation of him would not have delayed the proceedings. Rather, my continued representation of Mr. Ellis would have expedited his Queens case. I was already entirely

knowledgeable about the Queens allegations, evidence, witnesses, and theory of defense, and I had already represented Mr. Ellis at his lengthy inter-related Brooklyn trial.

Dated: Brooklyn, New York
November 12, 2020

DANIELLE V. EADDY