

State of New York

Court of Appeals

BEFORE: HON. EUGENE M. FAHEY, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSEPH GENTILE,

Appellant.

**ORDER
DISMISSING
LEAVE**

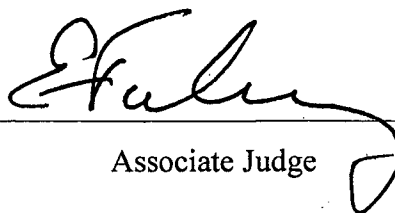
Ind. No. 2642/05

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

UPON the papers filed and due deliberation, it is

ORDERED that the application is dismissed because the order sought to be appealed from is not appealable under CPL 450.90 (1).

Dated: NOV 08 2017



Associate Judge

*Description of Order: Order of a Justice of the Appellate Division, Second Department, dated August 18, 2017, denying leave to appeal to the Appellate Division from an order of Supreme Court, Queens County, dated December 1, 2016.

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

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SL/

SHERI S. ROMAN, J.

2016-13006

DECISION & ORDER ON APPLICATION

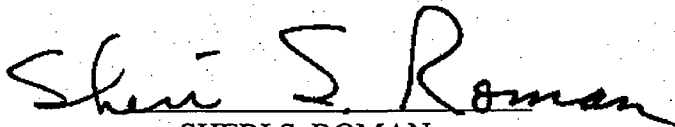
The People, etc., plaintiff,
v Joseph Gentile, defendant.

(Ind. No. 2642/05)

Application by the defendant pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal to this Court from an order of the Supreme Court, Queens County, dated December 1, 2016, which has been referred to me for determination.

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

ORDERED that the application is denied.



SHERI S. ROMAN
Associate Justice

August 18, 2017

PEOPLE v GENTILE, JOSEPH

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-10 - QUEENS COUNTY
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

PRESENT:

HON. RICHARD L. BUCHTER,
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

Indictment No.: 2642/05

Motion: To Vacate Judgment

JOSEPH GENTILE,

Defendant.
-----X

The following papers numbered
1 to 3 submitted in this motion.

By: Joseph Gentile, Pro Se
For the Motion

HON. RICHARD A. BROWN, D.A.
By: Nancy Fitzpatrick Talcott, A.D.A.

Opposed

	<u>Papers Numbered</u>
Notice of Motion/Affidavits/Exhibits	1-2
Affirmation in Opposition	3
Reply.....	4

Upon the foregoing papers, the defendant's pro se motion to vacate the judgment of conviction is denied.

The defendant was charged with Rape in the First Degree, Kidnapping in the Second Degree, Assault in the Second Degree, Unlawful Imprisonment in the First Degree, Criminal Possession of a Weapon in the Fourth Degree, and Unlawful Possession of a Loaded Rifle or Shotgun in connection with allegations that he had kidnapped, raped, and assaulted his ex-girlfriend on July 29, 2005. He was tried by jury and on September 29, 2006 was found guilty of the rape, assault, and weapons possession charges. The jury found him not guilty of the kidnapping charge and was deadlocked as to the unlawful imprisonment charge, which was ultimately dismissed. On November 22, 2006 the defendant moved for an order, pursuant to CPL § 330.30[3], setting aside the verdict on the grounds of newly discovered evidence. A hearing was held in connection with this motion on January 3, 2007 and on that day, the motion was denied by the court, which held that "the testimony adduced by the defendant was sufficiently impeached and so incredible as to be woefully inadequate" to create a probability "that had it been received at trial, the verdict would have been more favorable to the... defendant". That same day, the defendant was sentenced on the rape charge to a determinate period of incarceration of 18 years, to run concurrently with the sentences on all other charges. On January 11, 2007, the defendant filed a notice of appeal and on May 11, 2010 his conviction was affirmed by the Second Department (73 AD3d 944 [2nd Dept 2010]). Leave to appeal to the Court of Appeals was denied on

September 28, 2010 (15 NY3d 851 [2010]). While his appeal was pending, the defendant moved, pursuant to CPL §440.10, for an order vacating judgment, citing the following grounds: 1) that the People concealed the victim's pregnancy, preventing the jury from considering this fact to explain the victim's "deep emotional disturbance and chemical instability"; 2) that the court improperly refused to allow a UF-61 report to be admitted into evidence; 3) that the People concealed a "plea deal" between the prosecution and Peter Dipiano, who testified on their behalf; 4) that defense counsel provided ineffective assistance in that he failed to request a blood test to be performed on the victim's jeans to prove that the blood on them was due to her pregnancy, not to forcible sexual intercourse, failed to call the officer who filled out the UF-61 report to allow it to be admitted into evidence, failed to utilize the victim's sworn affidavit asking the court to vacate all charges against the defendant, failed to properly prepare a witness at the CPL 330.30 hearing, and referred to the defendant as having a "magical penis" during summation, which was offensive and prejudicial; 5) that there is newly discovered evidence to justify the motion, specifically: a) the affidavit of Carlos Gomez that he was present in the defendant's home when he returned there with the victim and that he would have corroborated the defendant's version of the events had he testified, which he did not do because he was threatened by the victim and her male friend; b) that after the trial, the victim informed the court that she was so afraid of the defendant that she and her family moved away, which the defendant contends is

untrue; c) that the victim was having an affair with one of the defendant's ex-employees, with whom she was conspiring to "remove the defendant from the picture"; that 6) that the prosecutor's summation was improper in that he denigrated the defense, vouched for the victim's credibility, and attempted to inflame the jury. The People opposed the motion and on January 23, 2009, the Court denied the motion on procedural as well as on substantive grounds.

On October 29, 2013, the defendant moved for an order granting further DNA testing on the victim's pants, claiming that the blood found therein was the result of "spotting" during pregnancy, and not forcible rape. His position was that had this information been provided to the jury, the verdict would have been more favorable to him. The defendant also asserted that he was deprived of the effective assistance of counsel by virtue of counsel's failure to seek forensic testing on the jeans and failure to utilize the UF-61 Report regarding the victim's "Affidavit of Withdrawal". The People opposed the motion in an Affirmation of Opposition dated December 10, 2013. The defendant then submitted a Reply, dated January 22, 2014. On March 3, 2014, the defendant's motion was denied on the ground that the claims raised in the motion had been previously raised in the defendant's first motion to vacate judgment and had already been denied on procedural grounds by virtue of the fact that "all of these claims [were] subject to review by the appellate court in that sufficient facts appear[ed] on the record to permit such review" (Decision, dated January 23, 2009, citing CPL 440.10[2]).

The Court also noted in its decision that not only were the claims subject to review by the appellate court, and therefore properly denied on that ground alone, but that since the issues were already raised and denied in the first motion to vacate judgment, the motion could properly be denied pursuant to CPL 440.10[3], which provides that a court may deny a motion to vacate judgment where the issue raised was "previously determined."

On May 11, 2015, the defendant moved to renew his prior motion to vacate judgment, claiming that judgment should be vacated on the grounds of newly discovered evidence. His contention was that the fact that a prosecution witness, Peter Dipiano, was offered a "deal" in exchange for his testimony and that this fact was not disclosed "until it became public in [a] news article" warrants an order vacating judgment (Defendant's motion, p6). Furthermore, he is contending that his position at trial, that the complaining witness was in collusion with an individual named Phil Caruso, is supported by Mr. Caruso's 2014 arrest on numerous drugs and weapons charges and by his characterization by the Daily News as a "reputed Gambino associate" (*id.*, p8). The People opposed the motion, claiming that the pleadings were insufficient and unsupported by sworn allegations of fact. In addition, with respect to allegations that the People failed to disclose a plea agreement with Mr. Dipiano, they submitted that the defendant was in a position to raise these allegations on two separate occasions, but failed to do so, so that the motion had to be procedurally denied.

Furthermore, the People claimed that Phil Caruso's arrest in 2014 "in no way establish[ed] any connection between Caruso" and the defendant or the victim, "let alone support any claim that Caruso conspired with the victim to set up [the] defendant" (People's Memo of Law, p5). On August 10, 2015, the defendant's motion was denied. The Court agreed with the People that the defendant's failure to raise the issue of his co-defendant's plea arrangement, which he acknowledged that he was aware of in 2007, on either direct appeal or in his two prior motions to vacate judgment, mandated that the motion with respect to this issue be procedurally denied (CPL 440.10[3]). It further held that the fact that Phil Caruso was arrested in 2014 has no bearing on the 2006 trial.

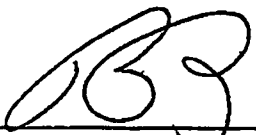
The defendant now moves for an order vacating judgment on the ground that he is actually innocent, that the prosecutor knowingly introduced false evidence at trial, and that his attorney was ineffective. The People oppose the motion, contending that they must be procedurally denied in that defendant's claims either: 1) "involve matters that are on the record" and therefore subject to review upon appeal; 2) were previously determined; or 3) of such a nature that they could have been raised in a prior motion to vacate judgment. They also assert that the motion should be denied on the merits in that no support for the defendant's claims have been provided to the Court.

In the opinion of the Court, the People are correct in their assertion that

the defendant's motion should be denied on procedural as well as substantive grounds. With respect to the procedural bar to the motion, the Court finds that both Criminal Procedure Law §440.10[3][c] and Criminal Procedure Law §440.10[2][c] support such a bar. CPL §440.10[3][c] provides that the Court may deny a motion to vacate judgment when "upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so" and CPL §440.10[2][c] provides that a court "must deny a motion to vacate a judgment when...although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure...to raise such ground or issue upon an appeal actually perfected by him." In the case at bar, the defendant's claims (regarding the prosecutor's alleged introduction of false testimony with respect to the extent of the complainant's injuries and the complainant's right to consent to the search of the defendant's home) are such that they would have been subject to adequate appellate review. Therefore the failure to raise this issue on appeal mandates denial of the motion to vacate judgment. Furthermore, the particular claims that the defendant now cites as the basis for a motion to vacate judgment could have been raised in his prior motions, but were not. The Court may therefore deny the motion to vacate on this ground as well.

The Court would point out that the motion to vacate judgment should fail on substantive grounds as well. The question of consent was litigated at the pre-trial suppression hearing and it was determined that the complainant had apparent authority to consent to the search of the defendant's home on the basis of her claim that she received mail at the location, kept her clothing there, and had a key. There is no indication that this information was untrue or that even if it was, that the prosecutor was aware of this fact. As to the extent of the complainant's injuries, the complainant testified at trial and the jury obviously credited her testimony. There is no basis to find that it was not true or that the prosecutor in some way manufactured the testimony or elicited it at trial knowing it to be untrue. Finally, the Appellate Division held that counsel for the defendant was not ineffective and provided meaningful representation, a conclusion with which this Court concurs. In the opinion of the Court, the defendant failed to overcome the "strong presumption that counsel's conduct f[ell] within the wide range of reasonable professional assistance" (Strickland v Washington, 466 US 668, 690 [1984]).

This shall constitute the decision and order. The clerk of the court is directed to mail a copy of this decision and order to the defendant at his place of incarceration and to the District Attorney.



RICHARD L. BUCHTER, J.S.C.

Dated: DECEMBER 1, 2016