

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 27

THE PEOPLE OF THE STATE OF NEW YORK, :
 : Indictment #: 6081/85
 :
-against- : By: Hon. G. Reichbach
 :
 : **DECISION AND ORDER**
 :
 : Date: August 27, 2007
FREDERICK DIAZ, :
 :
Defendant :
 :

The defendant has moved for an order authorizing DNA testing pursuant to CPL §440.30(1-a), for an order vacating his judgment of conviction under CPL §440.10, and to set aside his sentence pursuant to CPL §440.20.

The defendant was convicted for a crime which occurred on October 12, 1984 when he was eighteen years old. On that date, a jury determined that he and his co-defendant entered the home of the Kogan family in an apparent burglary attempt and ended up murdering two members of the family: Zina Kogan, a 37 year old wife and mother, and her 12 year old son, Edward Kogan, by repeatedly stabbing the victims as well as strangling Mrs. Kogan. Several witnesses observed two Hispanic males fleeing the scene via the fire escape, however, the police were unable to solve the crime until two informants, to whom the defendants had admitted the crime, came forward approximately one year later.

In October of 1985, the defendant gave a videotaped confession of the crime to an assistant district attorney, and while he admitted his participation in the crime, he minimized it and tried to place most of the blame on the co-defendant. In that confession, in which the defendant evinced a calm and controlled demeanor, the defendant admitted that he and the co-

defendant had planned to burglarize the Kogan residence, believing that it would be empty. When the victims returned unexpectedly, the defendants decided to proceed with their plan anyway, and used the ruse that Mr. Kogan, for whom they had both worked in the past, had sent them to repair something. While Mrs. Kogan allowed them to enter, she attempted to call her husband to check with him, and at that time, the co-defendant grabbed her and started to stab her. While she was clearly critically wounded, she was still making coughing noises when the co-defendant left the kitchen and went into the bedroom and killed the child. Defendant claimed he panicked when he heard people banging on the door calling for Mrs. Kogan, so he stated that he ripped the telephone cord out of the wall and strangled Mrs. Kogan to keep her quiet and to ensure she was dead. Upon conducting a quick search for valuables, the co-defendant located a gun in a drawer, which he took. The defendants then fled down the fire escape.

Two days after the defendant confessed, the co-defendant was arrested and also made a videotaped confession. Not surprisingly, the co-defendant tried to pin most of the blame on this defendant, although he admitted to stabbing Mrs. Kogan four or five times and admitted to strangling her with the telephone cord, as well. He also confessed to stabbing the child in the stomach about three times.

The defendants were charged with two counts of murder for each victim for a total of four counts: two counts of intentional murder (P.L. §125.25(1)) and two counts of felony murder (P.L. §125.25(3)). While evidence recovered at the crime scene included fingerprints, hair samples, and blood, none of the evidence matched the defendant and was therefore not introduced at trial. The Prosecution relied almost entirely on the confessions of the two defendants. Upon conviction, the defendant was sentenced to a period of incarceration for 25 years to life for each murder, with the sentences to run consecutively.

On June 26, 1989, defendant's judgment of conviction was unanimously affirmed in *People v. Diaz*, 153 A.D.2d 575 (2nd Dept. 1989). In his appeal, defendant had challenged the propriety of various jury instructions delivered by the court, comments made by the prosecutor on summation, and the consecutive sentences. The court determined that the claims regarding jury instructions and summation were not preserved, however, it found that they did not warrant

review in the interests of justice, and further found that the defendant's sentence did not warrant a reduction. On October 26, 1989, the Court of Appeals denied the defendant leave to appeal.

Defendant now moves, pursuant to CPL §440.30(1-a), for an order granting DNA testing of evidence recovered at the crime scene in 1984 which he believes includes hair, fingernail, and blood samples. He argues that this "newly discovered evidence" would exonerate him, resulting in a reasonable probability of a more favorable verdict.

After an exhaustive search, the People have determined that the evidence the defendant seeks to test is no longer available.¹ They have met their burden under *People v. Pitts*, 4 NY3d 303 (2005) to show that the evidence no longer exists and is therefore unavailable for testing. They have filed affidavits from three individuals, including the supervisor in charge of the Brooklyn Property Clerk Division at Gold Street, an evidence property control specialist from the Long Island City warehouse, and a police officer assigned to search barrel evidence containers at the Erie Basin Auto Pound in Red Hook, where some vouchered evidence is stored. After three separate searches were conducted at Gold Street, Sgt. John Hamill determined that while the evidence had not been officially destroyed, none of the evidence or records related to it could be found. Evidence property control specialist Geraldine Kiely was able to determine that some of the vouchered evidence in question had been stored at a Meeker Avenue storage facility that had experienced a fire and asbestos leak in the mid-1990s and was no longer in existence. Police Officer Ceferino Cruz, after conducting a thorough search of the Erie Basin Auto Pound was

¹ The People have an obligation to preserve evidence until all appeals have been exhausted. *People v. Hernandez*, 25 A.D.3d 566 (2nd Dept. 2006). The defendant's conviction became final 90 days after final action by the Court of Appeals, when the defendant's time for filing a petition for a writ of certiorari in the United States Supreme Court expired. Therefore, in late January 1990, sixteen years prior to filing this motion, this defendant had exhausted his appeals. While there is no time limit for bringing a post-conviction motion requesting the performance of forensic DNA testing under *People v. Pitts*, 4 NY 3d 303, (2005) the likelihood that the evidence is still in existence is far greater when the motion is brought in a more timely manner. Furthermore, New York does not currently have a statutory requirement to preserve biological evidence for post-conviction DNA analysis, although this is clearly an area the legislature needs to address to conform the statutory scheme regarding preservation of untested biological material with due process requirements. And finally, it wasn't until March 1994, ten years after the commission of this crime, that the Court of Appeals ruled that DNA evidence was admissible at trial in New York. *People v. Wesley*, 83 NY2d 417 (1994). The prosecution can hardly be faulted for failure to foresee this possible development and failure to preserve biological evidence ten years prior to the Court declaring such evidence admissible.

unable to find any relevant evidence for testing and though unable to determine the precise date of the loss or destruction of the requested evidence, stated his personal belief that it was destroyed as a result of the fire at the Meeker Avenue location. The only evidence that could be located was a knife recovered from the defendant in an unrelated incident approximately four months after the commission of this crime. It was never admitted into evidence, and as the People argue correctly, the only relevant DNA evidence, if it were possible to recover some from the knife, would be inculpatory—the victim’s blood. If there was no DNA evidence, or DNA evidence recovered from people other than the victims of this crime, it would not be exculpatory due to the passage of time between the date of the crime and the date that the knife was recovered.

This conviction did not rest on physical evidence linking the defendant to the crime. In fact, defense counsel argued to the jury that there were no fingerprints or blood evidence to connect the defendant, however the jury convicted him on the basis of his confession, which was chilling both in the detail conveyed and the calm control evinced by the defendant. The defendant has failed to show that a reasonable probability exists that the verdict would have been more favorable to him had the results of DNA testing been introduced at trial, and since the People have met their burden of showing that the evidence is no longer available for testing, this portion of the defendant’s motion is denied. *People v. Shenouda*, 307 AD2d 938 (2nd Dept 2003).

Defendant also moves to vacate his conviction due to ineffective assistance of counsel. The vast majority of his claims are based on the record, yet defendant never raised this ground in his direct appeal. In support of his claim, defendant alleges that his counsel failed: to make relevant objections, to effectively cross-examine witnesses, to make a motion to recuse the judge, to call witnesses on the defendant’s behalf, to conduct a re-direct examination of defendant to correct allegedly misleading information, to object to the prosecutor’s summation, to request limiting instructions, to object to the instructions to the jury, and failed to object to the submission of both the intentional and felony murder counts. Each of these allegations are based on the record and are therefore barred pursuant to C.P.L. §440.10(2)(c).

Defendant also makes some off-the-record claims, however, most of these claims are disagreements about trial strategy and are unsupported by sworn allegations to substantiate them, as required by C.P.L. §440.30.(4)(b).

Even if the Court were to reach the merits of defendant's claim, "[t]o prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that he or she was deprived of a fair trial by less than meaningful representation; mere disagreement about strategies or tactics will not suffice. There must be an absence of strategic or other legitimate explanations for counsel's conduct which prejudiced the defense or the defendant's right to a fair trial." *People v. Kliti*, 25 A.D.3d 568 (2nd Dept. 2006). (citations omitted).

The Court of Appeals has stated, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Benevento*, 91 NY2d 708, 712 (1998) citing *People v. Baldi*, 54 NY2d at 147. Viewed objectively, counsel's trial strategy in this case "might well have been pursued by a reasonably competent attorney." *People v. Satterfield*, 66 NY2d 796, 799 (1985). While ultimately unsuccessful, defense counsel mounted a zealous and cogent defense. He vigorously cross-examined witnesses, made appropriate objections, and, in the face of an extensive confession and little or no physical evidence, argued to the jury that the confession had been coerced. "Trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness." *People v. Rivera*, 71 NY2d 705, 708 (1988). Defendant has failed to demonstrate ineffectiveness of counsel and his motion on these grounds is denied.

Finally, defendant moves to set aside or modify his sentence based upon claims of ineffective assistance of counsel, insufficiency of evidence, and inconsistent verdicts. However, pursuant to C.P.L. §440.20, this Court may only set aside a sentence if it was unauthorized, illegally imposed, or otherwise invalid as a matter of law. Defendant was convicted of committing two homicides which were particularly brutal in nature. He was given the maximum authorized sentence of 25 years to life for each count, with the sentences to run consecutively. The sentence imposed was not illegal or otherwise invalid as a matter of law, and therefore, this Court must deny the defendant's motion on this ground.

Defendant's motion is denied in its entirety.

This constitutes the decision and order of the Court.



HON. GUSTIN L. REICHBACH
N.Y.S. SUPREME COURT

Gustin L. Reichbach
J.S.C.

ENTERED

SEP 12 2007

NANCY T. SUNSHINE
COUNTY CLERK