STATE OF NEW YORK, COUNTY OF NASSAU
SUPREME COURT: PART 40

P R E S E N T: Hon. Teresa K. Corrigan
Acting Supreme Court Justice

Ind. No. 1643N/2017
Decision & Order

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THE PEOPLE OF THE STATE OF NEW YORK

Hon. Madeline Singas
Nassau County District Attorney
Mineola, New York 11501
By: ADA Brian Lee

-against-

JONITA MARTINEZ,

Frederick K. Brewington, Esq.
Attorney for Defendant
556 Peninsula Blvd.
Hempstead, New York 11550

Defendant.

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On June 26, 2018, defendant was convicted, after a jury trial, of two counts of assault in the second degree and one count each of resisting arrest and petit larceny. On May 15, 2019, defendant moved to set aside the verdict pursuant to CPL §§ 330.30(1) and (3). The People filed opposing papers on July 15, 2019. Defendant filed a reply on August 2, 2019. Additional letter correspondence was filed with the Court on August 13 and 21, 2019. For the reasons set forth below, defendant's motion to set aside the verdict is granted and a new trial ordered.

FACTS & PROCEDURAL HISTORY

Upon a review of the papers of both parties and the complete trial transcript in this matter, the Court makes the following findings of fact.

Defendant was initially charged with two counts of second-degree assault and one count each of resisting arrest, petit larceny and criminal possession of marihuana in the fifth degree stemming from an incident that occurred on January 26, 2017, in Elmont, Nassau County. The People alleged that defendant assaulted two officers who were investigating a petit larceny complaint. Defendant claimed that she was the victim of excessive force. Defendant took advantage of her right to testify before the grand jury. She was indicted on October 20, 2017, for second-degree assault (two counts), resisting arrest, and petit larceny.[1]

On March 9, 2018, while preparing the case for a suppression hearing, Assistant District Attorney (ADA) Joanna Kourkoumelis[2] asked Police Officer Daniel Dowsett if he was ever the subject of a disciplinary finding by the Nassau County Police Commissioner. After Dowsett said that he was, ADA Kourkoumelis followed protocol to seek that information. A three-page report related to that incident was received by the District Attorney's Office on March 9. It was

[1] The marihuana charge was not presented to the grand jury, as a laboratory analysis indicated that the cigarette in question contained "no controlled substance."
[2] ADA Kourkoumelis resigned from the District Attorney's Office on May 10, 2018, for unrelated reasons.

forwarded to various executives and ultimately sent by email to Bureau Chief (BC) Brian Lee. The report contained a 1999 Commissioner's finding of a 1997 internal investigation of Dowsett. The Commissioner found, in sum and substance, that Dowsett, along with certain fellow officers, provided a false narrative to blame an arrestee for damage caused to a civilian establishment and a police car that was actually the result of a police officer's actions.[3]

In papers related to the instant motion, BC Brian Lee acknowledges he received the emailed information prior to trial. However, because he received "no written instructions" as to its purpose or relevance, and because he was not yet supervising this matter, BC Lee states he did not appreciate its significance and did not give the email "careful scrutiny."

Defendant's trial began before Acting Supreme Court Justice Muraca on June 4, 2018. ADA Andrew Lee was lead prosecutor with BC Brian Lee acting as his "second seat." Prior to Dowsett's testimony, ADA Andrew Lee advised BC Brian Lee that he had provided defendant with impeachment material related to two civil suits in which Dowsett was involved. BC Brian Lee now admits that, at that time, he did not recall the email previously sent to him with the Commissioner's findings against Dowsett regarding the 1997 incident.

The trial testimony involved two separate factual scenarios at two distinct locations. The People presented evidence that defendant committed a petit larceny at a CVS in Elmont and that she was driven away from the scene by another individual. The description of the car was broadcast, and the car was eventually located and stopped by Police Officer Eric Williams at a second location in the vicinity of Hendrickson Avenue and Hempstead Turnpike in Elmont.

Dowsett and Police Officer Kenneth Magnuson arrived shortly thereafter to assist Williams. Dowsett testified regarding his observations and interactions with defendant, who was seated in the passenger seat. He stated that defendant was initially reluctant to get out of the car and sit on the curb while the police conducted their investigation into the petit larceny. He testified that defendant did eventually exit the car but did not sit on the ground. He stated that, at some point while the car was being inspected for alleged stolen property, and as Williams was opening the rear passenger door to view items contained in the back seat, defendant approached Dowsett and tossed what he believed was a marihuana cigarette at his feet.[4] Dowsett further testified that, as he went to retrieve the alleged marihuana cigarette from the ground, defendant attempted to stomp on either his hand or the alleged marihuana cigarette. Dowsett admitted that he pushed defendant in the chest area to fend her off. She then hit Dowsett. A melee ensued in which Magnuson joined in defense of Dowsett. During this physical altercation, while trying to handcuff defendant, both Magnuson and Dowsett were injured.

Magnuson testified that, although he did not see defendant throw anything, he observed Dowsett stoop to retrieve something from the ground and also saw defendant attempt to stomp on Dowsett's hand. Magnuson joined Dowsett in the physical altercation that led to defendant being handcuffed and placed under arrest.

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[3] The findings are detailed below.

[4] The marihuana cigarette was analyzed and found to be tobacco.

A large portion of this event was captured on video from a bystander. Missing from the recording was the interaction between Dowsett and defendant immediately preceding the physical altercation. The video resumed when the physical altercation was underway and had moved some distance from the vehicle.

Defendant adopted a portion of Dowsett's testimony in an effort to obtain a justification charge from the Court related to the physical altercation and the assault charges.

On June 26, 2018, a jury found defendant guilty on all counts. The court remanded defendant and adjourned the case to August 6, 2018, for sentencing.

On July 2, 2018, while BC Brian Lee was assisting another attorney on an unrelated matter, he discovered the March 9, 2018, email related to Dowsett. On July 6, 2018, the People hand delivered an *ex parte* letter to Judge Muraca's chambers explaining the March 9 email and attachment. On July 9, 2018, Judge Muraca conferenced the case, released defendant, and ordered the People to obtain the police department personnel file for Dowsett. Shortly thereafter, Judge Muraca recused himself from this matter and the case was transferred to this Court.

This Court conducted an in-camera review of Dowsett's police department personnel file and released to the People and defendant those documents that the Court believed were relevant to Dowsett's credibility and truthfulness. The Court made a second disclosure when it realized that the personnel file contained Rosario material related to "use of force" reports associated with defendant's arrest.

For purposes of this motion, the following information is pertinent as it relates to the Commissioner's 1999 findings against Dowsett regarding the 1997 incident:

1. Article 6, Rule 8, Subdivision 10 – Submitted a False Report: Falsely stated orally and in a written report that an individual who was under arrest caused damage to a police vehicle and civilian establishment when in fact a fellow officer's unattended police car caused the damage;
2. Article 6, Rule 8, Subdivision 11 – Impaired Efficiency of Police Department: Conspired with other officers to conceal an on-duty auto accident by fabricating a story to account for the damage to a store window;
3. Article 6, Rule 25 – Failed to Report Dereliction of Duty: Failed to report the negligent operation of a police vehicle which resulted in an auto accident.

None of the information about these findings or the underlying facts related to same was available to defendant at the time of her trial.

CONCLUSIONS OF LAW

Defendant argues first that the People committed a Brady violation, and second that, as a result of the People's untimely disclosure, new evidence was discovered that could not have been produced by the defense, even with due diligence, that would have led to a more favorable verdict. As such, defendant moves, *inter alia*, for the verdict to be set aside pursuant to CPL §§ 330.30(1) and (3). That statute states:

> At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of defendant, set aside or modify the verdict or any part thereof upon the following grounds:
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> 1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.
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> . . . .
>
> 2. That new evidence has been discovered since the trial which could not have been produced by defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to defendant.

CPL § 330.30.

A motion to set aside a verdict may be denied without a hearing where the allegations do not set forth a legal basis for relief (CPL § 330.40[2][e][i]), and may be granted without a hearing where the facts essential to deciding the motion are undisputed by the parties (CPL § 330.40[2][d]). For the reasons set forth below, defendant's motion to set aside the verdict under CPL § 330.30(1) is denied without a hearing because it is procedurally barred and therefore there is no legal basis for granting relief under that section. However, defendant's motion under subdivision three is granted without a hearing because the undisputed facts, as set forth by the trial record and the submissions by the parties, establish as a matter of law that newly discovered evidence that could not have been discovered by defendant prior to trial "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to defendant." CPL § 330.30(3).

A motion under CPL § 330.30(1) is limited to grounds that appear in the record and are preserved for appellate review. Claims raised for the first time after a jury verdict may not be considered. See People v. Giles, 24 NY3d 1066 (2014); People v. Wolf, 98 NY2d 105, 119 (2002); People v. Benton, 78 AD3d 1545 (4th Dept 2010); *see also* CPL § 170.05(2). The information upon which defendant relies came to light after the completion of the trial, and defendant's Brady claim, accordingly, was raised for the first time after the verdict. Thus, it is not contained within the trial record and is not reviewable pursuant to CPL § 330.30(1). Defendant's general request

for Brady information throughout the trial did not preserve her current claim regarding the specific violation now alleged. Defendant would have had to have identified the actual Brady violation during the trial to preserve the issue. See Benton, 78 AD3d 1545. This was not possible based on the undisputed facts before the Court. Therefore, defendant's requested relief pursuant to CPL § 330.30(1) must be denied.

Defendant next raises a newly discovered evidence claim and moves for relief pursuant to CPL § 330.30(3). To begin, the People argue that defendant did not meet the minimum requirements necessary for the Court to consider her claim. The Court disagrees. Defendant's initial moving papers and her reply contain sworn allegations of fact sufficient to develop a claim pursuant to CPL § 330.30(3).

Moreover, the Court can decide defendant's newly discovered evidence claim without holding a hearing. Both sides agree that new evidence was discovered post-verdict and that the defense could not have uncovered it even with due diligence. The only question left for this Court to decide is whether that evidence is of "such a character as to create a probability" that, if presented at trial, the "verdict would have been more favorable to defendant."

In People v. Hargrove, 162 AD3d 25 (2d Dept 2018), the Second Department addressed the factors to consider in determining whether newly disclosed evidence creates a probability of a more favorable outcome to the defense.[5] Those factors which the court may consider include:

> [W]hether and to what extent the new evidence is (1) material to the pertinent issues in the case, (2) cumulative to evidence that was already presented to the jury, and (3) merely impeaching or contradicting the evidence presented at trial.

Id. at 60.

The Hargrove Court advised that an evaluation of the new evidence must occur in the context of the trial record and the facts established within the moving papers. The reviewing court should consider "the reactions of the jurors" had they heard the new evidence in conjunction with the already established trial evidence. Id. The Hargrove Court also discussed the scenario, present here, wherein the People argue that the newly discovered evidence would have minimal impact. The Hargrove Court opined that, in making its probability determination, the Court must evaluate the possibility that the newly discovered evidence would significantly change the cross examination of the witness to whom the evidence relates. Id. at 61.

In People v. Ulett, 33 NY3d 512 (2019), which involved a Brady violation, the Court of Appeals analyzed whether the undisclosed evidence met the "reasonable probability" standard of materiality. The Court considered that defendant may have proceeded differently had the newly discovered evidence been known during the trial. In that case, a newly discovered video depicting the scene of a murder was the subject of the appeal. The Court stated that the video was relevant

[5] Although Hargrove involved a motion to vacate judgment under CPL § 440.10(1)(g), the newly discovered evidence standard in that statute is identical to the one set forth in CPL § 330.30(3).

to several issues at trial and as such its impeachment value was far beyond simple "contradictory testimony." Id. at 520.

Here, the Commissioner's 1999 findings of wrongdoing by Dowsett were pertinent to an issue in the case, were not cumulative to evidence already presented, and were not "merely impeaching" or contradictory to the evidence at trial. The trial record and moving papers reveal that the People relied heavily, and almost exclusively, on Dowsett's testimony to prove the legality of his acts and those of his fellow officers during defendant's stop and arrest. As ADA Andrew Lee stated in his summation:

> In assessing the defendant's conduct there, we have the luxury of that video. The problem is it's not complete. It's missing the conduct that provides one of the very reasons the officers had a basis to make that arrest. There is no dispute about what happens on the video. It speaks for itself.
>
> But because the video is not complete, we need to rely on testimony from the witness stand to fill in that gap, to fill in the gap between segment one, segment two, and segment three on the video. And when it comes to that timeframe, I submit, ladies and gentlemen, that the best person who fills in that gap is Police Officer Daniel Dowsett, who is now retired. He had the best vantage point.
>
> He told us what was missing from the video...that's when the defendant began to get belligerent. That's when she started pacing back and forth and yelling. And that's when he observed defendant heading to the rear passenger door of the car and dropping something; what appeared to him, based on his training and experience, to be a marihuana cigarette. . . .
>
> We are still in the gap on the video when Officer Dowsett tells us the moment when defendant tried to stomp on his hand, or the cigarette, he pushed her back in the chest.

Summation pp. 553-54.

Clearly, the People placed a lot of weight on Dowsett's testimony. His interaction with defendant led to the altercation that resulted in his injuries and those of Magnuson.

In their papers, the People dispute the significance of the Commissioner's findings by arguing that defendant adopted the testimony of Dowsett in her summation to obtain the benefit of a justification charge. What the People fail to realize is that defendant is not now constrained by what she argued at trial. That the new evidence, if discovered earlier, would have provided defendant with "avenues for alternative theories for the defense," supports a finding of materiality. Ulett, 33 NY3d at 521.

Dowsett was found to have falsely provided testimony both orally and in a written report to his superior officers about the facts surrounding an arrest many years ago. In that case, he was found to have acted to conceal an incident, occurring while he was on duty, that he perceived would have been detrimental to him and his fellow officers. He was found to have failed to accurately report an incident that he observed to cover up the actions of his fellow officers. If defendant had been given this information in time to use at trial, she may have pursued a different line of defense in which she would not have embraced any of Dowsett's testimony. And if utilized on cross examination, in conjunction with the two "excessive use of force" complaints against Dowsett that were settled without an admission of guilt, the information would have enabled the jury to seriously question the veracity of his trial testimony.

Adding to questions about Dowsett's credibility was his testimony regarding the alleged marihuana cigarette that he claimed defendant threw at his feet, which became the catalyst for the physical altercation. No other witness testified to smelling the marihuana. A forensic laboratory determined that the cigarette that Dowsett recovered did not contain marihuana or any controlled substance. Yet Dowsett and the People called it an "alleged marihuana cigarette" throughout the trial. When juxtaposed against Dowsett's prior findings of misconduct, the jury could have concluded that the marihuana testimony was manufactured to justify his interaction with defendant.

The People's argument that they would have introduced defendant's grand jury testimony if she attempted to claim that Dowsett was not credible misses the point. They denied defendant the ability to make this argument when they failed to turn over the information, which Dowsett told them existed. Any claim that the People could have successfully countered the impeachment value of the newly discovered evidence is speculative.

The new information surrounding Dowsett is material to his credibility, which was paramount to the People's case. The information was not cumulative to any other evidence available to the defense at the time of trial. It is not sufficiently similar to the two civil suits against Dowsett that were settled without a finding against him, such that the new information would have had no impact on the trial. Lastly, the new information is not "merely impeaching," but rather impeachment material that would likely cause the jurors to have a different reaction to Dowsett's testimony.

For all of the above reasons, defendant's motion is granted pursuant to CPL § 330.30(3). The verdict is set aside and a new trial is ordered. All other relief is denied.

SO ORDERED

ENTER

Teresa K Corrigan

TERESA K. CORRIGAN, A.J.S.C.

Dated: September 30, 2019