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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DANNY SART'A,

Defendant.

RESPONSE TO
DEFENDANT'S
MOTION TO
VACATE
CONVICTION AND
SENTENCE
PURSUANT TO C.P.L.
440.10

Ind. No. 5942/2008

NICHOLAS N. VIORST, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office and am assigned to the prosecution of the above-captioned case.
2. This affirmation is submitted in reply to the defense motion to vacate the conviction pursuant to C.P.L. §440.10.
3. On March 24, 2007, defendant was convicted, after a jury trial, of Gang Assault in the Second Degree and acquitted of Gang Assault in the First Degree, stemming from an incident that occurred outside of a nightclub in the early morning hours of November 10, 2007. On August 25, 2009, defendant was sentenced to a determinate prison term of four years and five years of post-release supervision. Defendant appealed his conviction to the Appellate Division, First Department which rejected

his claims and unanimously affirmed the judgment of conviction. People v. Sarita, 77 A.D.3d 555 (2010), leave denied, 16 N.Y.3d 800 (2011) (Ciparick, J.).

4. The District Attorney's Office has conducted an extensive review of the case, which included interviewing multiple witnesses, some of whom were previously known to the parties, and some of whom were not known to the parties at the time of the trial.¹ In addition, the original case file, relevant records, trial testimony, and surveillance video were reviewed. The defendant (accompanied by his attorney) was also interviewed for the first time since he had testified in the Grand Jury.

5. Based on this extensive review, the People concede that there is newly discovered evidence that justifies vacatur of the defendant's conviction and warrants a new trial.

6. It is well settled that "[t]he power to grant an order for a new trial on the ground of newly-discovered evidence is purely statutory. Such power may be exercised only when the requirements of the statute have been satisfied, the determination of which rests within the sound discretion of the court." People v. Salemi, 309 N.Y.2d 208, 215 (1955), cert. denied, 350 U.S. 950 (1956); see also People v. Taylor, 246 A.D.2d 410, 411 (1st Dep't 1998); People v. Robinson, 211 A.D.2d 733 (2d Dep't 1995); People v. Gurley, 197 A.D.2d 534 (2d Dep't 1993). Under C.P.L. §440.10(1), a trial court may vacate a conviction based on a claim that "new evidence

¹ The review turned up no basis to conclude that any of the witnesses unknown to the defendant or to the People at the time of the trial should have been known to them.

has been discovered, which is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to defendant.”


7. In order to justify the vacatur of a conviction, the newly discovered evidence (1) must be such that its admission into evidence would probably have changed the trial’s outcome; (2) must have been discovered since the trial; (3) could have not been discovered before the trial by the exercise of due diligence; (4) must be material to the issue; (5) must not be cumulative to the issue; and (6) must not merely impeach or contradict the former evidence. People v. Salemi, 309 N.Y. at 216, quoting People v. Priori, 164 N.Y. 459, 472 (1900); see also People v. Wainwright, 285 A.D.2d 358 (1st Dept 2001); People v. Richards, 266 A.D.2d 714 (3d Dep’t 1999); People v. Reyes, 255 A.D.2d 261 (1st Dep’t 1998); People v. Taylor, 246 A.D.2d at 411.

8. Here, accounts provided by witnesses during the People’s post-conviction review of the case satisfy the Salemi factors. Had this newly discovered evidence been before the jury, the verdict may well have been different. Therefore, the People conclude that under the law new evidence exists that may have affected the outcome of the trial.

9. Accordingly, the People consent to the defendant's motion that his conviction and sentence be vacated and that he be afforded a new trial.

Cyrus R. Vance, Jr.
District Attorney
New York County

By:



Nicholas N. Viorst
Assistant District Attorney
Of Counsel
212-335-9529

