STATE OF NEW YORK

SUPREME COURT: COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK

V.

MICHAEL AGEE

DECISION AND ORDER

INDICTMENT NO. 201-042

APPEARANCES:

BRIAN D. SEAMAN
Niagara Co. District Attorney
PETER M. WYDYSH, Esq., and
THOMAS H. BRANDT, Esq.
Appearing for the
People

BRIAN SHIFFRIN, Esq., and
WILLIAM T. EASTON, Esq.
Appearing for the Defendant

Calvo-Torres, A.S.C.J.

The defense has brought a Motion to Vacate a Judgment pursuant to CPL 440.10, dated February 4, 2022. The People opposed this motion in a responding letter dated March 24, 2022. The Court makes its findings after reviewing these papers, and after considering the testimony and arguments of counsel at the hearing pursuant to CPL 440.10 held May 31, 2023.

PROCEDURAL BACKGROUND

Defendant was indicted on June 21, 2011, on four counts. The First Count was Attempted Robbery in the First Degree, PL 110.00/160.15(4),20.00 for an incident on December 17, 2010, at Rizzo's Used Furniture and Antiques. Counts Two, Three and Four relate to an incident on December 19, 2010, where a delivery person from Submasters restaurant named Joseph Tierney was robbed. Count Two was Robbery in the First Degree, PL 160.15(4), 20.00, Count Three was Robbery in the Second Degree, PL 160.10(1), 20.00, and Count Four was Robbery in the Second Degree, PL 160.10(3), 20.00. Both incidents occurred in the City of Niagara Falls. Defendant was convicted on Counts One, Two, and Three after a jury trial on November 15, 2012. He was sentenced on March 14, 2013.

THE DNA REPORT

Defendant first claims that he should be granted a new trial because the People failed to provide him with the results of a DNA report obtained by the People after his conviction. The People came into possession of the DNA report in October of 2013, according to the stipulation which was received in evidence at the CPL 440 hearing as Defendant's Exhibit B. The report states that some of the DNA found

on the knife recovered at the scene of the attempted robbery at Rizzo's Used Furniture Store on December 17, 2010, matched DNA taken from a person named Darius Belton at the time of his conviction for an unrelated crime. Although the People came into possession of this report in October 2013, they did not provide it to defendant. Defendant obtained it after filing a FOIL request in February 2021. Only then was the report provided to defendant on March 12, 2021.

The standard for determining whether a new trial should be granted based on newly discovered DNA evidence is set out in CPL 440.10(1)(g-1)(2). Under this statute, the court must first determine that the DNA testing was performed since the entry of judgment, then determine whether defendant has demonstrated that there exists a reasonable probability that the verdict would have been more favorable to the defendant. In the present case, the DNA report was not completed until October of 2013, many months after the verdict, sentencing of defendant and entry of judgment.

The People contend that the DNA report would not have affected the outcome of the trial. Evidence was presented at trial that a knife was found at the scene of the Rizzo's Used Furniture store crime. The People argue that the jury heard that defendant was excluded as being a contributor to the DNA found on the knife. Defendant, on the other hand, argues that new testing after trial found that DNA matching Darius Belton was on the knife. Defendant argues that this newly discovered DNA evidence would have changed the outcome of the trial to his own benefit.

The Court finds that taken alone, DNA evidence linking Darius Belton to the knife was not enough to establish a reasonable probability that the verdict would have been more favorable to the defendant (CPL 440.10(1)(g-1)(2)). However, taken together with the testimony of Darius Belton that he, and not the defendant, committed the Rizzo's Used Furniture store crime, the newly discovered DNA evidence becomes material and compelling as it tends to support Mr. Belton's claim that he was one of the perpetrators.

Furthermore, this evidence could have been used at trial to impeach the witnesses. No scientific, photographic, or video evidence establishing the identity of defendant as one of the perpetrators of either the attempted robbery at Rizzo's Used Furniture store or the robbery of Mr. Tierney, was produced at trial. The prosecution relied solely on eyewitness testimony to identify defendant. Thus, identifications by eyewitnesses were a central issue at trial. At the CPL 440 hearing, People's exhibits 3 and 4 were entered into evidence. These exhibits contain mug shot photographs of defendant and Darius Belton respectively. These photographs show a similarity in appearance between defendant and Darius Belton. A similarity in appearance between the two, aside from hairstyles, was also observed by the Court at the CPL 440 hearing. This similarity of appearance bolsters defendant's argument of possible misidentifications. Such an argument at trial could have been used by defendant to attack the eyewitness identifications. The Court finds that, given all these factors, defendant has demonstrated a reasonable probability that had the newly discovered DNA evidence been produced at trial the verdict would have been more favorable to the defendant.

THE POLICE REPORT

Defendant next contends that the failure of the People to provide him with the police report of Detective Robert DeMarco dated on or about January 12, 2011, denied him a fair trial. This report was stipulated into evidence as part of defense exhibit A and identified as exhibit D within that exhibit. The report states that Detective DeMarco met with a probation officer on that date. The probation officer

had stated that she had information about a stolen cell phone. The probation officer stated that one of her juvenile probationers, Janajah Payne, reported that she received a stolen cell phone from her boyfriend, Darius Belton. Ms. Payne had indicated that Mr. Belton got the phone from two other individuals named "D" and "Rakeem". The report further states that Detective DeMarco attempted to interview Ms. Payne with her mother present, but Ms. Payne and her mother refused. This report was not turned over to the defense until early 2021 after defendant made a FOIL request for all police reports relating to the crimes at hand. Defendant claims that this report constitutes "newly discovered evidence" that should trigger the granting of a new trial.

The standard set out by CPL 440.10(1)(g) states that a judgment may be vacated if such new evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his or her part, and which is of such a character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant, provided that such a motion based upon such ground must be made with due diligence after the discovery of such evidence. The Court first finds that defendant's present motion was in fact made with due diligence after receiving such evidence, having been filed on February 4, 2022. The Court next finds that the police report could not have been produced by defendant at trial, even with due diligence being exercised. The People concede that they did not turn this document over to defendant before trial, and that it was produced only after a FOIL request was made by defendant.

Concerning the question of whether this report is of such character as to create a probability that had it been received at trial the verdict would have been more favorable to the defendant, the Court finds in the affirmative. The report would have provided the defense with a new avenue of investigation had it been provided before trial. The report links Darius Belton and two other individuals to the robbery of Joseph Tierney. The defense could have investigated and potentially produced new witnesses and/or an alternative perpetrator or perpetrators. Furthermore, as noted above in the discussion regarding the newly discovered DNA evidence, the Court recognizes the potential raised at the hearing that a misidentification of defendant occurred at trial, given the similarity in appearance between defendant and Darius Belton. These factors all contribute to the Court's finding that had the police report been provided to defendant and received at trial, it would have created a probability of a verdict more favorable to the defendant.

THE TESTIMONY OF DARIUS BELTON

Turning now to the testimony of Darius Belton at the CPL 440 hearing, defendant claims that the testimony of Darius Belton constitutes newly discovered evidence supporting a new trial. Applying the CPL 440.10(1)(g) standard set out above, the Court finds that defendant's present motion was made with due diligence after discovering the existence of Darius Belton's claim. The Court further finds that this evidence could not have been produced by defendant at the trial even with due diligence on his part. Here, the People did not provide the police report of Detective Robert DeMarco until early 2021, which was after the trial. The defense could not have known with due diligence prior to receiving this report that Darius Belton was a potential suspect. Furthermore, DNA evidence linking Darius Belton to the Rizzo Used Furniture store crime was also not available until after trial.

The Court must next determine whether this newly discovered evidence is of such character as to create a probability that had such evidence been received at trial, the verdict would have been more

favorable to the defendant. The Court finds that the testimony of Darius Belton incriminating himself and exculpating the defendant in both the attempted robbery of Rizzo's Used Furniture store on December 17, 2010, and the robbery of Mr. Tierney on December 19, 2010, was of such character as to create a probability that had his testimony been received at trial, the verdict would have been more favorable to the defendant.

In making this determination, the Court considered several factors. The first such factor is that the Court observed the appearances of both the defendant and Darius Belton at the hearing. The Court noted that both were of approximately the same age, have the same general build, have similar skin coloration, and have similar facial features. Other than Mr. Belton having much longer hair than defendant, they were very similar in appearance. The similarities in body size apparently date back to 2012, as shown by arrest reports for defendant and Darius Belton from that year. The arrest reports were provided to the Court by the defense with the consent of the People by email on June 7, 2023. One arrest report from 2012 lists defendant as 19 years of age, 5 feet 8 inches tall, and 170 pounds. The other arrest report from 2012 lists Darius Belton as age 18, 5 feet 9 inches tall and 180 pounds. Given the similarity in appearances between the two, the Court recognizes the potential for misidentification.

Another factor that the Court considered was the degree of knowledge of the details of the crimes shown by Mr. Belton. On direct examination at the CPL 440 hearing, Darius Belton testified that he and two other individuals committed the attempted robbery of Rizzo's Used Furniture store on December 17, 2010. He demonstrated an intimate knowledge of the details of that incident. Mr. Belton testified that he used a silver revolver in the attempted robbery and had carried a knife in his pocket. He testified that he dropped the knife on the way out of the store. Mr. Belton further testified that he struggled over the gun with one of the store employees. He testified that there were a total of about 4 to 6 people in the store at the time of the incident, and indicated where each was located during the incident. Mr. Belton also recalled that a red Mustang was used as a getaway car.

Mr. Belton testified that he provided weapons to the perpetrators of the other crime. He testified that he then purchased one of the cell phones stolen from Mr. Tierney. He testified that he purchased it from one of the perpetrators for $50.00. He further testified that he gave that phone to his girlfriend, Janajah Payne. This testimony is corroborated by the police report of Detective Robert De Marco. Of note and contrary to his apparent knowledge of many other details of the crimes, Mr. Belton was not able to recall the names or nicknames of his alleged accomplices, other than to state that defendant was not one of them.

Mr. Belton's testimony is further corroborated by the test results showing a match to a known sample of his own DNA, with DNA found on the knife left at Rizzo's Used Furniture store. The police report of Detective DeMarco also tends to corroborate Mr. Belton's claim that he was involved in some way with the robbery of Mr. Tierney.

BRADY

We turn finally to the question of whether the People's failure to turn over the DNA report and the police report of Detective DeMarco were Brady violations, and if so, whether a new trial is warranted. In People v Ulett, 33 NY3d 512, the Court of Appeals established a three-part test to

determine if a Brady violation has occurred, and whether a new trial is required. First, the Court must determine if the evidence was favorable to the defendant because it was either exculpatory or impeaching in nature. Second, the court must find that the evidence was suppressed by the People. Third, it must be determined whether prejudice arose because the evidence was material.

With respect to the first part of the Ulett test, the Court finds that both the DNA report and the police report were favorable to the defendant because they were both exculpatory and impeaching in nature. Given the fact that the identification of defendant at trial was established solely by eyewitness testimony, any evidence calling into question the identifications would tend to be both exculpatory and impeaching.

With respect to the second part of the test, the prosecution is required to disclose information that is both favorable to the defense and material to either defendant's guilt or punishment. The rule applies regardless of good faith or bad faith of the prosecutor (Ulett, supra, at 515). The People concede that both items were not provided to the defense.

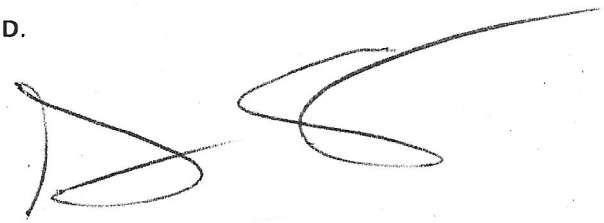
The third part of the test in Ulett, is whether prejudice arose because the evidence was material. The Court of Appeals ruled that the test for "materiality" is whether "there is a reasonable probability that had it been disclosed to the defense, the result would have been different" (see People v Garrett, 23 NY3d 878). The court in Ulett goes on to state that "In determining materiality, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence" (citing Kyles v Whitley, 514 US 419).

Applying the "materiality" test to the case at hand, the Court finds that the cumulative effect of the People's failure to provide the defendant with the DNA report and the police report was that defendant was denied a fair trial. These items of evidence, coupled with the new testimony of Darius Belton, put the entire case in a different light as to undermine confidence in the verdict (Ulett, supra, at 520, citing Kyles, supra).

For the foregoing reasons, the defendant's motion to vacate the Judgment and requesting a new trial is **GRANTED**.

This is the **DECISION** of the Court and it is so **ORDERED**.

Dated: July 26, 2023
Buffalo, NY



HON. BETTY CALVO-TORRES, A.S.C.J.