107 A.D.3d 1237
Supreme Court, Appellate Division,
Third Department, New York.

The **PEOPLE** of the State of New York, Respondent,
v.
Tarrant J. **SHEPPARD**, Appellant.

June 20, 2013.

Synopsis

Background: Defendant was convicted by jury of third-degree criminal possession of weapon, and was sentenced as second felony offender to 3 ½ to 7 years in prison. Defendant moved to vacate judgment of conviction. The County Court, Tompkins County, Rowley, J., denied motion, and defendant appealed.

Holdings: The Supreme Court, Appellate Division, Garry, J., held that:

[1] verdict was not against weight of evidence;

[2] trial court acted within its discretion in summarily deciding without a hearing defendant's motion to vacate judgment of conviction;

[3] **People** did not violate *Brady* by failing to disclose any promise by federal government to recommend sentences of less than ten years to witnesses in return for their cooperation against defendant; but

[4] trial court abused its discretion in allowing testimony describing defendant as "killer" who "got away with murder" from mother of individual killed when defendant's handgun discharged; and

[5] trial court improperly attributed guilt for individual's death to defendant in imposing sentence.

Affirmed as modified.

West Headnotes (9)

[1] Criminal Law
Construction of Evidence
Criminal Law
Inferences or hypotheses from evidence
Criminal Law
Conflicting Evidence

On challenge to verdict as against the weight of the evidence, where a different verdict would not have been unreasonable, appellate court must view the evidence in a neutral light and, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.

3 Cases that cite this headnote

[2] Weapons
Possession

Verdict that defendant who had previously been convicted of crime was guilty of third-degree criminal possession of weapon was not against weight of evidence; witnesses testified they had given defendant handgun and that defendant poked shooting victim with handgun while playfully wrestling, and police recovered ammunition magazine and handgun that was later identified as gun from which fatal shot was fired from creek embankment near apartment where defendant stayed. McKinney's Penal Law §§ 265.01(1), 265.02(1).

Cases that cite this headnote

[3] Criminal Law
Necessity for Hearing

Trial court acted within its discretion in summarily deciding without a hearing defendant's motion to vacate judgment of conviction of third-degree criminal possession of weapon, given the extensive written submissions by the parties. McKinney's CPL § 440.10.

Cases that cite this headnote

[4] **Criminal Law**
Information Within Knowledge of Prosecution

People did not violate *Brady* by failing to disclose any promise by federal government to recommend sentences of less than ten years to witnesses in return for their cooperation against defendant at trial for third-degree criminal possession of weapon and in federal drug prosecution; attorney prosecuting defendant was not involved in federal government's promise to witnesses and was not even aware of it at time of defendant's trial.

Cases that cite this headnote

[5] **Criminal Law**
Discovery and disclosure; transcripts of prior proceedings

Reversal of conviction for third-degree criminal possession of weapon was not required by any *Brady* violation arising from **People's** failure to disclose promise by federal government to recommend sentences of less than ten years to witnesses in return for cooperation against defendant and in federal prosecution; there was no reasonable probability result at trial would have been different, as it was clear to jury that witnesses received substantial benefit in exchange for cooperation because they faced potential life sentences and their cooperation agreements called for recommendation of ten-year sentences, and defendant had ample opportunity to cross-examine witnesses about agreement.

1 Cases that cite this headnote

[6] **Criminal Law**
Impeaching evidence

People's failure to inform defendant of criminal charges pending against three prosecution witnesses did not violate *Rosario*, as two of these individuals did not testify at trial and disorderly conduct charge against the third was not known to prosecuting attorney at the time of trial for third-degree criminal possession of weapon. McKinney's CPL § 240.45(1)(c).

Cases that cite this headnote

[7] **Criminal Law**
Test results; demonstrative and documentary evidence

People's alleged failure to turn over more than 500 pages of cell phone records and accompanying handwritten notes during prosecution for third-degree criminal possession of weapon did not violate *Rosario* or *Brady*, as the records did not relate to any witness's testimony at trial and the information contained therein was not favorable to defendant.

Cases that cite this headnote

[8] **Sentencing and Punishment**
Harm or injury attributable to offense

Trial court abused its discretion in allowing testimony describing defendant as "killer" who "got away with murder" from mother of individual killed when defendant's handgun discharged, at sentencing for third-degree criminal possession of weapon; there was no victim of the crime upon which defendant was convicted, as third-degree criminal possession of weapon required only the possession of a firearm by a person previously convicted of a crime, and was supported by evidence wholly separate from circumstances surrounding individual's death. McKinney's Penal Law §§ 265.01(1), 265.02(1).

Cases that cite this headnote

[9] **Criminal Law**
Sentence

Despite trial court's promise it would not consider testimony describing defendant as "killer" who "got away with murder" from mother of individual killed when defendant's handgun discharged, trial court may have done so in sentencing defendant to 3½ to 7 years in prison for third-degree criminal possession of weapon, requiring that sentence be vacated

and case remitted for resentencing. McKinney's Penal Law §§ 265.01(1), 265.02(1).

Cases that cite this headnote

Attorneys and Law Firms

****499** Donna C. Chin, Ithaca, for appellant.

****500** Gwen Wilkinson, District Attorney, Ithaca (Andrew M. McElwee of counsel), for respondent.

Before: PETERS, P.J., ROSE, LAHTINEN and GARRY, JJ.

Opinion

GARRY, J.

***1238** Appeals (1) from a judgment of the County Court of Tompkins County (Rowley, J.), rendered May 14, 2008, upon a verdict convicting defendant of the crime of criminal possession of a weapon in the third degree, and (2) by permission, from an order of said court, entered April 20, 2012, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

In November 2006, based upon his alleged role in the October 2003 shooting death of Enrique Chavez, defendant was charged by indictment with manslaughter in the second degree, criminally negligent homicide, criminal possession of a weapon in the third degree and tampering with physical evidence. Following a jury trial, defendant was found guilty only of criminal possession of a weapon in the third degree. After defendant unsuccessfully moved pursuant to CPL 330.30 to set aside the verdict, he was sentenced by County Court as a second felony offender to 3 ½ to 7 years in prison. Thereafter, he moved pursuant to CPL 440.10 to vacate the judgment of conviction, which motion was denied by County Court without a hearing. Defendant appeals from both the judgment of conviction and, by permission of this Court, from the order denying his CPL 440.10 motion.

[1] **[2]** First, defendant contends that the verdict is against the weight of the evidence. Where, as here, a different verdict would not have been unreasonable, this Court must view the evidence in a neutral light and, "like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (***People*** *v. Romero,* 7 N.Y.3d 633, 643, 826 N.Y.S.2d 163, 859 N.E.2d 902 [2006] [internal quotation marks and citations omitted]). As defendant admitted that he had been previously convicted of a crime, the **People** were required to prove at trial only that defendant possessed a firearm (*see* Penal Law §§ 265.01[1]; 265.02[1]; ***People*** *v. Pinkney,* 90 A.D.3d 1313, 1314, 935 N.Y.S.2d 374 [2011]). Diego Bush testified at trial that, on the night in question, he was at Chavez's apartment when defendant began to playfully wrestle with Chavez and poked him with a .380 caliber handgun. Bush then heard a gunshot, saw that Chavez had been wounded and called 911. According to Bush, defendant told him after the shooting that he did not know that the gun was loaded and did not mean to shoot Chavez. When questioned about conflicting statements ***1239** that he had made to the police immediately after the incident, Bush explained that he had lied about his involvement because he was afraid that the police would not believe him given his criminal history. Ismail Abdur–Razzaaq testified that he had given defendant a .380 caliber handgun, a holster and ammunition the day before the shooting. According to Abdur–Razzaaq, on the night of the shooting, he was at his sister's house when defendant arrived there and claimed that the shooting was an accident and then told them where he had hidden the gun. Umar Abdur–Razzaaq, Ismail's brother, testified that he had also been at his sister's house and gave defendant a ride home that night. Although defendant consistently denied any involvement in the incident, the testimony of Charles Rhody, defendant's roommate, contradicted defendant's claim that he had not left the apartment at all on the night of the shooting.

****501** Though defendant now claims that neither Bush nor Ismail Abdur–Razzaaq is credible since they both have significant criminal histories and both stood to gain a substantial benefit on unrelated charges in exchange for their cooperation, "these issues were fully explored during cross-examination and ... credibility questions [are] within the jury's province to resolve" (***People*** *v. Hoppe,* 96 A.D.3d 1157, 1159, 946 N.Y.S.2d 671 [2012], *lv. denied* 19 N.Y.3d 1026, 953 N.Y.S.2d 559, 978 N.E.2d 111 [2012] [internal quotation marks and citations omitted]). Moreover, in addition to the witness testimony, the evidence established that the police recovered an ammunition magazine and a .380 caliber handgun, which was later identified as the gun from which the fatal shot was fired, from a creek embankment near Chavez's apartment. Police also recovered a holster, ammunition and a user's manual for a .380 caliber handgun, as well as personal items of defendant and correspondence addressed to him,

from a bedroom in Chavez's apartment in which defendant admitted that he sometimes stayed. Mindful that the jury is free to selectively credit—or discount—portions of the witness testimony that it hears, and according the appropriate deference to those credibility determinations, we cannot say that the verdict here was against the weight of the evidence (*see id.* at 1159–1160, 946 N.Y.S.2d 671).

[3] **[4]** **[5]** Next, defendant contends that County Court erred by summarily deciding his motion pursuant to CPL 440.10 to vacate the judgment of conviction without a hearing. However, a hearing is not required in every instance and here, particularly considering the extensive written submissions by the parties, we do not find that County Court abused its discretion (*see* ***People*** *v. Samandarov,* 13 N.Y.3d 433, 436, 892 N.Y.S.2d 823, 920 N.E.2d 930 [2009]; ***People*** *v. Dozier,* 94 A.D.3d 1226, 1229, 942 N.Y.S.2d 266 [2012], *lv. denied* 19 N.Y.3d 996, 951 N.Y.S.2d 472, 975 N.E.2d 918 [2012]; ***People*** ***1240** *v. Snyder,* 91 A.D.3d 1206, 1214, 937 N.Y.S.2d 429 [2012], *lv. denied* 19 N.Y.3d 968, 950 N.Y.S.2d 120, 973 N.E.2d 218 [2012], *cert. denied* —— U.S. ——, 133 S.Ct. 791, 184 L.Ed.2d 585 [2012]). As to the merits, defendant contends that the **People** committed a *Brady* violation by misrepresenting the length of the sentences that the United States Attorney's office promised the Abdur–Razzaaq brothers in exchange for their cooperation in the case against defendant as well as a federal drug prosecution. According to defendant, although the cooperation agreements called for a recommendation by the federal prosecutor that the brothers each receive a sentence of 10 years—the statutory minimum for the crimes with which they were charged—they were released after less than three years, which, defendant argues, indicates that the federal prosecutor made a recommendation for less than 10 years. Even assuming this to be true, there is no evidence that the District Attorney prosecuting defendant was involved in that decision or even aware of it at the time of defendant's trial (*compare* ***People*** *v. Colon,* 13 N.Y.3d 343, 349, 890 N.Y.S.2d 424, 918 N.E.2d 936 [2009]). Moreover, it is clear that the Abdur–Razzaaq brothers received a substantial benefit in exchange for their cooperation in the case against defendant considering that they each faced a maximum sentence of life in prison, and defendant had ample opportunity to cross-examine them on this issue. Under these circumstances, there is no "reasonable possibility" that the result at trial would have been different and, therefore, reversal is not required (***People*** *v. Bond,* 95 N.Y.2d 840, 843, 713 N.Y.S.2d 514, 735 N.E.2d 1279 [2000] [internal quotation marks and citation omitted]; *see* ***People*** *v.* ****502** *Phillips,* 55 A.D.3d 1145, 1149, 865 N.Y.S.2d 787 [2008], *lv. denied* 11 N.Y.3d 899, 873 N.Y.S.2d 275, 901 N.E.2d 769 [2008]).

[6] The **People's** failure to inform defendant of criminal charges pending against three prosecution witnesses does not constitute a *Rosario* violation (*see* ***People*** *v. Hendrix,* 235 A.D.2d 575, 576, 652 N.Y.S.2d 127 [1997]; ***People*** *v. Wolf,* 176 A.D.2d 1070, 1071–1072, 575 N.Y.S.2d 726 [1991], *lv. denied* 79 N.Y.2d 1009, 584 N.Y.S.2d 464, 594 N.E.2d 958 [1992]). We further note that two of these individuals did not testify at trial (*see* ***People*** *v. Tucker,* 95 A.D.3d 1437, 1441, 944 N.Y.S.2d 383 [2012], *lv. denied* 19 N.Y.3d 1105, 955 N.Y.S.2d 561, 979 N.E.2d 822 [2012]), and disclosure regarding the disorderly conduct charge against the third, Bush, was not statutorily required, as the **People** were unaware of that recent charge at the time of trial (*see* CPL 240.45[1][c]; ***People*** *v. Carter,* 50 A.D.3d 1318, 1320–1321, 856 N.Y.S.2d 270 [2008], *lv. denied* 10 N.Y.3d 957, 863 N.Y.S.2d 141, 893 N.E.2d 447 [2008]). Contrary to defendant's contention, it is not reasonable under the circumstances here presented to impute knowledge of that pending charge to the entire District Attorney's office. In any event, even if the failure to disclose was in error, on this record there is no reasonable possibility that the **People's** failure to disclose Bush's pending charge contributed to the verdict (*see* ***1241** ***People*** *v. Hendrix,* 235 A.D.2d at 576, 652 N.Y.S.2d 127), particularly considering the fact that defendant effectively cross-examined him about his extensive criminal history.

[7] Nor does the **People's** alleged failure to turn over more than 500 pages of cell phone records and accompanying handwritten notes constitute a *Rosario* or *Brady* violation. These records did not relate to any witness's testimony at trial (*see* ***People*** *v. Smith,* 221 A.D.2d 251, 252, 634 N.Y.S.2d 63 [1995], *lv. denied* 87 N.Y.2d 1025, 644 N.Y.S.2d 159, 666 N.E.2d 1073 [1996]), and the information contained therein has not been shown to be favorable to defendant (*see* ***People*** *v. Fuentes,* 12 N.Y.3d 259, 263, 879 N.Y.S.2d 373, 907 N.E.2d 286 [2009]). Further, the failure to turn over the records does not require reversal as defendant has not established that there is a reasonable possibility that the disclosure would have resulted in a different outcome at trial (*see* ***People*** *v. Auleta,* 82 A.D.3d 1417, 1420–1421, 919 N.Y.S.2d 222 [2011], *lv. denied* 17 N.Y.3d 813, 929 N.Y.S.2d 801, 954 N.E.2d 92 [2011]).

[8] **[9]** Next, we find that County Court abused its discretion in allowing Chavez's mother to speak at the

sentencing hearing. There is no victim of the crime upon which defendant was convicted, as criminal possession of a weapon in the third degree requires only the possession of a firearm by a person previously convicted of a crime (*see* Penal Law §§ 265.01[1]; 265.02[1]; *compare* ***People*** *v. Hemmings,* 2 N.Y.3d 1, 5 n., 776 N.Y.S.2d 201, 808 N.E.2d 336 [2004]). Here, defendant's conviction upon this charge was supported by evidence wholly separate from the circumstances surrounding Chavez's death, as Ismail Abdur–Razzaaq testified that he had provided the handgun to defendant the day prior. It was thus error to allow the mother to give a statement in which she described defendant as a "killer" who "got away with murder." Moreover, we find merit in defendant's contention, though not preserved (*see* ***People*** *v. Morgan,* 27 A.D.3d 579, 579, 810 N.Y.S.2d 369 [2006], *lv. denied* 6 N.Y.3d 851, 816 N.Y.S.2d 757, 849 N.E.2d 980 [2006]), that despite promising it would not consider the mother's statement in imposing sentence, County Court may have considered the homicide ****503** charges when it sentenced him to the statutory maximum prison sentence of 3 ½ to 7 years. As defendant contends, from a review of the sentencing transcript, it appears that the court improperly attributed guilt for Chavez's death to him. Consequently, in the interest of justice, we vacate the sentence and remit to County Court for resentencing (*see* ***People*** *v. Pacquette,* 73 A.D.3d 1088, 1088, 900 N.Y.S.2d 683 [2010], *affd. on other grounds* 17 N.Y.3d 87, 926 N.Y.S.2d 856, 950 N.E.2d 489 [2011]).

In light of the foregoing, defendant's contention that the sentence imposed is harsh and excessive is academic. Defendant's challenge to statements made by the prosecutor during summation is not preserved for our review. To the extent not specifically addressed herein, defendant's remaining contentions have been considered and found to be without merit.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the sentence imposed; matter remitted to the County Court of Tompkins County for resentencing; and, as so modified, affirmed.

ORDERED that the order is affirmed.

***1242** PETERS, P.J., ROSE and LAHTINEN, JJ., concur.

Parallel Citations

107 A.D.3d 1237, 967 N.Y.S.2d 498, 2013 N.Y. Slip Op. 04633

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119 A.D.3d 986
Supreme Court, Appellate Division,
Third Department, New York.

The **PEOPLE** of the State of New York, Respondent,
v.
Tarrant J. **SHEPPARD**, Appellant.

July 3, 2014.

Synopsis

Background: Defendant was convicted by jury of third-degree criminal possession of weapon, and was sentenced as second felony offender to 3 1/2 to 7 years in prison. The County Court, Tompkins County, Rowley, J., denied defendant's motion to vacate the judgment of conviction. Defendant appealed from the judgment of conviction and the denial of his motion. While the appeal was pending, defendant filed second motion to vacate the judgment of conviction based upon newly discovered evidence. Before the second motion was decided, the Supreme Court, Appellate Division, Garry, J., affirmed denial of the first motion, modified the judgment of conviction by vacating the sentence, and remitted the matter for resentencing. The County Court, Tompkins County, Rowley, J., resentenced defendant to the same prison term and denied his second motion to vacate the judgment of conviction, without a hearing. Defendant appealed from the judgment that resentenced him and, by permission, from the order denying his second motion to vacate the judgment of conviction.

Holdings: The Supreme Court, Appellate Division, Garry, J., held that:

[1] trial court did not abuse its discretion in sentencing defendant to maximum permissible period of confinement for a second felony offender convicted of a class D felony, despite his relatively minimal criminal history and long-standing issues with substance abuse, but

[2] defendant was entitled to a hearing on his motion to vacate judgment of conviction.

Affirmed as modified.

West Headnotes (6)

[1] Sentencing and Punishment
Lack of significant prior record

Sentencing and Punishment
Substance abuse and addiction

Sentencing and Punishment
Remorse, acceptance of responsibility, and cooperation

Trial court did not abuse its discretion in sentencing defendant convicted of third-degree criminal possession of weapon to maximum permissible period of confinement for a second felony offender convicted of a class D felony, despite his relatively minimal criminal history and long-standing issues with substance abuse; trial court specifically considered those factors and nonetheless concluded that the maximum term was appropriate, based upon defendant's failure to take responsibility for the instant offense and his history of repeated failures to take advantage of or comply with opportunities for substance abuse treatment. McKinney's Penal Law § 70.06(3)(d).

1 Cases that cite this headnote

[2] Criminal Law
Statements Against Interest

A defendant has a fundamental right to offer into evidence the admission of another to the crime with which he or she is charged. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[3] Criminal Law
Statements Against Interest

Depriving a defendant of the opportunity to offer into evidence another person's admission to the crime with which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[4] Criminal Law

Statements Against Interest

A statement is admissible under the hearsay exception for declarations against penal interests if: (1) the declarant is unavailable because of death, absence or a refusal to testify on constitutional grounds, (2) the declarant knew when making the declaration that it was contrary to his or her penal interest, (3) he or she had competent knowledge of the facts, and (4) other independent evidence supports the reliability and trustworthiness of the declaration.

1 Cases that cite this headnote

[5] Criminal Law

Statements Against Interest

Where a hearsay statement tends to exculpate a criminal defendant, a more lenient standard of reliability is applied in determining whether the statement is admissible than to inculpatory statements; an exculpatory declaration is admissible if competent independent evidence establishes a reasonable possibility that the statement might be true.

Cases that cite this headnote

[6] Criminal Law

Particular Issues

Defendant was entitled to a hearing on his motion to vacate judgment of conviction for third-degree criminal possession of weapon in order to determine whether newly discovered witness testimony created the probability that had it been received at trial, it would have had a probable effect on the verdict, where witnesses' hearsay affidavits stating that other individual, who was the only person linked by forensic evidence to the weapon that defendant was convicted of possessing, had stated that defendant "did not possess and had nothing to do with the gun" tended to exculpate the defendant.

Cases that cite this headnote

Attorneys and Law Firms

***169** Donna C. Chin, Ithaca, for appellant.

Gwen Wilkinson, District Attorney, Ithaca (Daniel Johnson of counsel), for respondent.

Before: STEIN, J.P., McCARTHY, GARRY, LYNCH and DEVINE, JJ.

Opinion

GARRY, J.

Appeals (1) from a judgment of the County Court of Tompkins County (Rowley, J.), rendered August 14, 2013, which resentenced defendant following his conviction of the crime of criminal possession of a weapon in the third degree, and (2) by permission, from an order of said court, entered October 17, 2013, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

In October 2003, Enrique Chavez died after he was shot in his apartment in the City of Ithaca, Tompkins County. Defendant was one of several individuals who were suspected of involvement, but no arrests were made at that time. Several years later, Ismail Abdur–Razzaaq and his brother, Umar Abdur–Razzaaq, implicated defendant in the shooting as part of a cooperation agreement related to pending federal charges. Defendant was thereafter charged with manslaughter in the second degree, criminally negligent homicide, criminal possession of a weapon in the third degree and tampering with physical evidence. Following a jury trial, he was acquitted of all charges except criminal possession of a weapon in the third degree. His motion to set aside the verdict pursuant ***170** to CPL 330.30 was denied, and he was sentenced as a second felony offender to the statutory maximum prison term of 3 ½ to 7 years.

Thereafter, defendant moved pursuant to CPL 440.10 to vacate the judgment of conviction, and County Court denied the motion. He appealed from the judgment of conviction and the denial of this motion. While that appeal was pending, defendant moved again pursuant to CPL 440.10 to vacate the judgment of conviction based upon newly discovered evidence. Before the second motion was decided, this Court affirmed the denial of the first CPL 440.10 motion, modified

the judgment of conviction by vacating the sentence, and remitted the matter for resentencing (107 A.D.3d 1237, 967 N.Y.S.2d 498 [2013], *lv. denied* 22 N.Y.3d 1203, 986 N.Y.S.2d 423, 9 N.E.3d 918 [2014]). County Court then resentenced defendant to the same prison term and denied his second CPL 440.10 motion, without a hearing. Defendant now appeals from the judgment that resentenced him and, by permission, from the order denying the second CPL 440.10 motion.

[1] Defendant contends that his sentence—the maximum permissible period of confinement for a second felony offender convicted of a class D felony (*see* Penal Law §§ 70.06[3][d]; [4][b]; 265.02)—is harsh and excessive in view of his relatively minimal criminal history and long-standing issues with substance abuse. However, the record reveals that County Court specifically considered these factors and nonetheless concluded that the maximum term was appropriate, based upon defendant's failure to take responsibility for the instant offense and his history of repeated failures to take advantage of or comply with opportunities for substance abuse treatment. We find no abuse of the court's discretion in this regard or any extraordinary circumstances warranting a reduction in the interest of justice (*see* ***People*** *v. Dawson,* 110 A.D.3d 1350, 1353, 973 N.Y.S.2d 850 [2013]; ***People*** *v. Ashley,* 45 A.D.3d 987, 989, 845 N.Y.S.2d 539 [2007], *lv. denied* 10 N.Y.3d 761, 854 N.Y.S.2d 323, 883 N.E.2d 1258 [2008]; ***People*** *v. Abbott,* 275 A.D.2d 481, 484, 711 N.Y.S.2d 611 [2000], *lv. denied* 96 N.Y.2d 731, 722 N.Y.S.2d 798, 745 N.E.2d 1021 [2001]).

Defendant next contends that County Court erred in denying his second motion pursuant to CPL 440.10 to vacate the judgment of conviction. Contrary to defendant's contention, the bench decision in which the court set forth the reasons for denying the motion, as amplified by the court's comments during argument on the motion, was sufficient to comply with the statutory requirement to "set forth on the record [the court's] findings of fact, its conclusions of law and the reasons for its determination" (CPL 440.30[7]; *see* ***People*** *v. Watkins,* 79 A.D.3d 1648, 1648–1649, 913 N.Y.S.2d 620 [2010], *lv. denied* 16 N.Y.3d 800, 919 N.Y.S.2d 517, 944 N.E.2d 1157 [2011]). Further, upon review, we agree with County Court that two of the three issues raised in the motion had been raised in defendant's first CPL 440.10 motion. As these issues were considered and resolved upon the prior appeal, they are not now properly before us (*see* CPL 440.10[3][b]; ***People*** *v. Glinton,* 74 N.Y.2d 779, 780, 545 N.Y.S.2d 93, 543 N.E.2d 736 [1989]; ***People*** *v. De Oliveira,* 223 A.D.2d 766, 769, 636 N.Y.S.2d 441 [1996], *lv. denied* 88 N.Y.2d 1020, 651 N.Y.S.2d 19, 673 N.E.2d 1246 [1996]).

As for the third issue, defendant relies upon what he contends is newly discovered evidence that creates a probability that the trial verdict would have been more favorable to him if the evidence had been received at trial (*see* CPL 440.10[1][g]). Defendant ***171** submitted affidavits from his mother and a private investigator describing statements allegedly made to them after the trial by Jameel Melton, who shared an apartment with Chavez before the shooting. After Chavez was shot in this apartment, police found a holster and ammunition in a purse in Melton's bedroom closet; they also located a user's manual for a .380 caliber handgun in a pair of jeans on the bed in Melton's room, and Melton's fingerprints were identified on this document. Police later found a .380 caliber handgun and loaded magazine on the bank of a nearby creek, and forensic testing revealed that the bullet that struck Chavez had been fired from this weapon. None of this physical evidence was ever linked with defendant's fingerprints or DNA. Shortly after the shooting, Melton told police that he was not in Ithaca at the time of the incident, having taken a bus to New York City earlier that day. He initially denied any knowledge of a weapon, but later acknowledged that he had found a gun in his closet and had handled it before leaving for New York City. Melton did not testify at trial. Ismail Abdur–Razzaaq testified that he gave a .380 caliber gun to defendant, both Abdur–Razzaaq brothers testified that defendant later made incriminating statements, and Diego Bush testified that he saw defendant playfully wrestling with Chavez and poking him with such a weapon just before it went off (*see* 107 A.D.3d at 1238–1239, 967 N.Y.S.2d 498).

In her affidavit, defendant's mother averred that Melton—then in jail awaiting determination of unrelated criminal charges—told her that he owned the gun that had been used to shoot Chavez, that defendant had neither possession nor knowledge of this gun, and that Melton would be willing to testify to this effect if his attorney approved; she also said that Melton expressed concern that such an admission could result in additional charges against him. Defendant's private investigator stated that, during a meeting with Melton and Melton's counsel in jail, Melton told him that defendant "did not possess and had nothing to do with the gun" and that Melton was willing to testify on this subject. The **People** responded that they had attempted to investigate these claims but had been told by Melton's counsel that he was unwilling to speak with the **People** and no longer wanted anything to do with defendant's case. In denying the motion, County Court

expressed its belief that the hearsay affidavits of the private investigator and defendant's mother were an insufficient basis for defendant's motion, in view of the fact that Melton himself had not supplied an affidavit and was apparently unwilling to testify. We disagree.

[2] **[3]** **[4]** **[5]** "[A] defendant has a fundamental right to offer into evidence the admission of another to the crime with which he or she is charged" (***People*** *v. Page,* 115 A.D.3d 1067, 1069, 982 N.Y.S.2d 188 [2014], *lv. dismissed* 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723 [May 12, 2014]). "Depriving a defendant of the opportunity to offer into evidence another person's admission to the crime with which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense" (***People*** *v. Gibian,* 76 A.D.3d 583, 585, 907 N.Y.S.2d 226 [2010], *lv. denied* 15 N.Y.3d 920, 913 N.Y.S.2d 647, 939 N.E.2d 813 [2010] [citations omitted]; *see Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 [1973]). The **People's** claims regarding Melton's unwillingness to testify were themselves hearsay, and simply created issues of fact as to whether he was available and, if not, whether his posttrial ***172** statements were admissible as declarations against his penal interest (*see* ***People*** *v. McFarland,* 108 A.D.3d 1121, 1122–1123, 969 N.Y.S.2d 295 [2013]). A statement is admissible under this hearsay exception if (1) the declarant is unavailable because of death, absence or a refusal to testify on constitutional grounds, (2) the declarant knew when making the declaration that it was contrary to his or her penal interest, (3) he or she had competent knowledge of the facts, and (4) other independent evidence supports the reliability and trustworthiness of the declaration (*see* ***People*** *v. Brensic,* 70 N.Y.2d 9, 15, 517 N.Y.S.2d 120, 509 N.E.2d 1226 [1987]; ***People*** *v. Martin,* 8 A.D.3d 883, 886, 780 N.Y.S.2d 640 [2004], *lv. denied* 3 N.Y.3d 677, 784 N.Y.S.2d 16, 817 N.E.2d 834 [2004]). Where, as here, the statement at issue tends to exculpate a criminal defendant, a more lenient standard of reliability is applied than to inculpatory statements; an exculpatory declaration is admissible if competent independent evidence "establishes a reasonable possibility that the statement might be true" (***People*** *v. Settles,* 46 N.Y.2d 154, 169–170, 412 N.Y.S.2d 874, 385 N.E.2d 612 [1978]; *accord* ***People*** *v. McFarland,* 108 A.D.3d at 1122, 969 N.Y.S.2d 295; ***People*** *v. Deacon,* 96 A.D.3d 965, 968, 946 N.Y.S.2d 613 [2012], *appeal dismissed* 20 N.Y.3d 1046, 961 N.Y.S.2d 374, 985 N.E.2d 139 [2013]).

[6] Here, Melton was the only person linked by forensic evidence to the weapon that defendant was convicted of possessing. Moreover, the fact that Melton made one of the hearsay statements in the presence of his counsel is a compelling consideration in assessing whether it is reasonably possible that it was truthful. In view of these circumstances and the relatively minimal evidence supporting defendant's conviction, a hearing is necessary to promote justice, and the CPL 440.10 motion should not have been summarily denied (*see* ***People*** *v. Page,* 115 A.D.3d at 1069, 982 N.Y.S.2d 188; ***People*** *v. McFarland,* 108 A.D.3d at 1122–1123, 969 N.Y.S.2d 295).

STEIN, J.P., McCARTHY, LYNCH and DEVINE, JJ., concur.

ORDERED that the judgment is affirmed.

ORDERED that the order is reversed, on the law, and matter remitted to the County Court of Tompkins County for further proceedings not inconsistent with this Court's decision.

Parallel Citations

119 A.D.3d 986, 989 N.Y.S.2d 168, 2014 N.Y. Slip Op. 04982