To be Argued by:
ANDREA G. HIRSCH
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York

APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

TIMOTHY BECKINGHAM,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

ANDREA G. HIRSCH, ESQ.
Attorney for Defendant-Appellant
111 Broadway, Suite 1305
New York, New York 11415
(212) 267-1411

Otsego County Indictment No. 2004-086

Press of Fremont Payne, Inc. · 55 Broad Street, Third Floor, New York, NY 10004 · (212) 966-6570

Printed on Recycled Paper

TABLE OF CONTENTS

PRELIMINARY STATEMENT

This reply brief responds to arguments in the prosecution's brief. The facts and chief arguments for appellant, Timothy Beckingham, have been set out in his main brief and will not be repeated here. The prosecution's brief was served on October 22, 2013, and Beckingham is filing this brief on November 6, 2013.

ARGUMENT

Introduction

Considering its brevity, the prosecution's brief contains a remarkable number of factual and legal errors that will be refuted in detail below. Most significantly, contrary to the prosecution's assertion, Beckingham has presented extensive new evidence in support of his claim of innocence, refuting, among other things, both the medical examiner's central contentions and District Attorney Muehl's misleading summation argument that the autopsy showed that Joanne Beckingham did not overdose. The record, and not mere conjecture, demonstrates that trial counsel failed to prepare his expert and that he did virtually nothing to investigate Joanne's history and develop an understanding of her emotional, physical, and financial state, which led to her overdosing on prescription drugs and alcohol the night that she died. Finally, the issues concerning Tremaine Hutson, far from having been previously resolved, were barely hinted at because counsel never brought Hutson's chief allegations to light nor accurately presented those that he did. In short, the prosecution's response fails to present a single argument that either does not distort the facts or the law, or omit crucial facts. Accordingly, Beckingham should be granted the relief that he has requested.

Point I

Beckingham is actually innocent.

The prosecution suggests that the jury, the trial court in deciding Beckingham's C.P.L. § 330.30 motion, and this Court in deciding his direct appeal, have already resolved this issue (p. 2).[1] But, as discussed in Beckingham's main brief, trial counsel was ineffective both at trial and in litigating the 330.30 motion, and thus at neither juncture did he effectively challenge the evidence presented by the prosecution or offer the evidence that could have been presented in Beckingham's behalf and has now been presented. Thus the evidence that, on direct appeal, this Court found sufficient and that it considered when weighing the evidence was vastly different from the evidence now before the Court. In particular, the prosecution's argument that Beckingham's contention that he is innocent "is based on no new medical evidence" (p. 2) is a shocking misstatement.

As discussed in Beckingham's main brief (pp. 11-12), at trial, testifying for the prosecution, Medical Examiner Michael Sikirica asserted that Joanne Beckingham had not died from overdosing on Seroquel, that those who overdose on the drug suffer respiratory failure, and that a sign of respiratory failure is heavy lungs (R2019-2020). In summation, District Attorney Muehl then asserted that Sikirica had examined Joanne's lungs and had determined that she did not die from respiratory failure (R2399-400). Counsel did not have his own expert, Dr. Charles Wetli, present when Sikirica testified and he never presented any

---

[1] Numbers in parentheses preceded by "p." refer to the pages of the prosecution's brief or, when so identified, to Beckingham's main brief. "R" references are to the record.

testimony or evidence showing that Joanne did in fact have heavy lungs. Nor did he object to Muehl's misleading summation argument regarding the condition of Joanne's lungs found during the autopsy. In the 440 motion, however, Beckingham presented Wetli's affidavit stating that he re-reviewed the autopsy report and that Joanne's lungs were three times normal weight (R827-28). The prosecution never disputed that allegation, which, under *People v. Gruden*, 42 N.Y.2d 214 (1977), must therefore be deemed conceded.

Similarly, the prosecution ignores the wealth of medical authority presented in Beckingham's brief refuting Sikirica's testimony that CPR could not have caused Joanne's blood loss (pp. 37-42). It also ignores the medical evidence that Beckingham presented showing that all of Joanne's rib fractures were due to CPR (pp. 37-41).

Further, the prosecution ignores that, besides the medical evidence, the 440 motion and motion to renew presented much other new evidence showing that Beckingham is innocent. As reviewed in Beckingham's main brief, Tremaine Hutson explained that, contrary to his trial testimony, Beckingham never said anything about having pushed Joanne — and that the prosecution had coerced him into making that statement (pp. 31-34). Moreover, his affidavit was corroborated by the minutes of his plea and sentencing, which showed that the sentencing was the product of a deal (R985-987). Indeed, Chief Assistant District Attorney Michael Getman, the author of the prosecution's brief, prosecuted Hutson's case and at Hutson's sentencing noted the "agreed-upon disposition" that had been reached (R984-985). As Hutson explained in his affidavit, the deal was given to him in exchange for inculpating Beckingham in his written statement — a benefit that the prosecution never

disclosed, thus violating *Brady v. Maryland*, 373 U.S. 83 (1963). A fellow jail inmate also corroborated what Hutson said. He averred that, at the time, Hutson had told him that "the DA came to me and said, "We'll offer you a break on your charges if you . . . say that Tim confided in you" so he "did it" (R912-913). And a false-confession expert explained that interrogators often trap defendants into saying that they might have blacked out and committed the crime, even when the defendant — like Beckingham — remembers *not* having committed it. Individuals who are fatigued, as Beckingham was, not having slept for 48 hours when interrogated, are especially vulnerable to this tactic (R869-873).

Finally, the prosecution ignores the extensive evidence that Joanne overdosed. She had a long history of anxiety, heavy prescription-drug and alcohol use, depression, and, more recently, suicidal thoughts, and the evidence presented in the 440 motion showed that the day of her death culminated in a financial crisis for her, whereby she no longer had money to pay for alcohol and drugs. When her desperate effort to find a new source of funds failed and Beckingham walked out, all indicia showed that she overdosed and that her death was not due to a domestic assault. It is undisputed that pills were strewn about her bed; a drink was on her nightstand; she had no defensive wounds — indeed, apart from the hematoma on her scalp, she had no external injuries; Beckingham had no wounds or bruises himself; nothing in the home was amiss; and directly after leaving, Beckingham told his sons that he had left her and asked them to go home and make sure that she was alright. In short, when examined

objectively, the evidence, including the new material presented in postconviction proceedings, convincingly points to Beckingham's innocence.

Point II

Counsel was ineffective.

In defending counsel's representation, the prosecution initially relies on generalities — counsel's experience and case-law warnings against hindsight analysis (pp. 2-3). But counsel's experience is beside the point; counsel's actions and omissions in Beckingham's case are what count. What is more, counsel suffered from severe health problems when he represented Beckingham, which may have compromised his ability to do the work that was needed.

The details of the record repeatedly refute the prosecution's specific contentions that counsel performed meaningfully. The prosecution asserts that "[t]here is nothing in the record to support Appellant's contention that [counsel] failed to meet with his expert" (p. 3). Yet Wetli's invoice, submitted to the Court under seal because it was submitted to the trial court that way, shows no meetings with counsel and, upon reviewing it, Wetli averred in an affidavit that the invoice confirmed his recollection that he did not prepare with trial counsel, either in person or by phone (R1200). Consistent with the invoice itself, Wetli said that he and counsel talked about Beckingham's case by phone in February and July of 2005, and he testified at trial nearly one year later, in March 2006 (R 1200). Nonetheless, the prosecution writes, "The expert states in his Affidavit that he reviewed the victim's medical records with

[counsel]" (p. 3) and, a sentence later, cites to Wetli's affidavit (R1200). But Wetli's affidavit does not say that. Nor does his earlier affidavit (R827-831).

The prosecution also says that Wetli "does not claim that he was inadequately prepared to testify or to be cross-examined" (p. 3). But those assertions would be legal conclusions, which Wetli has no expertise to draw. As detailed in Beckingham's principal brief, the record manifests that Wetli was inadequately prepared, including in not being present for Sikirica's testimony (pp. 50-56). Thus, not having been told anything by counsel, when Wetli testified, he did not know what Sikirica had said (R827). And he was unaware that Sikirica had testified that Joanne did not die from respiratory failure and that people who die from respiratory failure often have heavy lungs — even though the autopsy showed that Joanne's lungs were three times normal weight. Perhaps most importantly, Wetli did not realize that Sikirica's entire basis for concluding that the liver laceration was assault-caused was his erroneous belief that a liver laceration due to CPR could not result in massive bleeding. Counsel thus never even asked Wetli about Sikirica's assertion. And on cross-examination, Wetli briefly said that he had seen significant bleeding from liver lacerations caused by CPR but never backed that assertion with specific cases or with studies or other authorities (R2292).

Similarly, the record demonstrates that Wetli was unprepared to address the rib fractures. He flip-flopped as to the cause of individual fractures when testifying and he said that some could have been due to an assault, when his firm conclusion was that there was no

assault; all of the evidence indicated that Joanne had died from an alcohol and drug overdose (R2261-2262). Likewise, Wetli was unprepared to testify about Joanne's medical records in any meaningful way. His invoice and affidavits show that he looked at the records almost a full year before trial. When testifying, he glossed over them, only briefly touching on Joanne's heavy prescription drug use, her depression, and her suicidal ideation (R2274-75).

The prosecution also asserts that Beckingham's contention that trial counsel did not review the medical records himself is based on "conjecture" (p. 3). But it is in fact based on the strong circumstantial evidence that the copy of the medical records that was contained in counsel's files was untouched. Unlike every other document in his files, the copy did not contain a mark or notation and was not categorized. Nor did counsel ever refer to the medical records and, when asked if he had reviewed them, he sidestepped the question saying that he had seen "everything" and had gone over everything with Wetli (R64). But Wetli's own invoice and affidavit refute those assertions.

In justifying counsel's failure to use the medical records to demonstrate how troubled Joanne was, especially in the last year of her life, the prosecution asserts that "[a]ppellant did not want [counsel] to present unflattering evidence about . . . his wife" (p. 3). But the prosecution omits that, besides saying that he did not want counsel to "dump a lot of dirt on Joanne and make her look devious," Beckingham also said that counsel never told him that he had reviewed Joanne's medical records, that they never discussed whether counsel should

present evidence about "Joanne, her medical condition, [or] her emotional state," and that counsel just outlined what he planned to do (R825).[2]

Nor, contrary to the prosecution's assertion (p. 3), would the medical records have been damaging either in what they revealed or by "opening the door" to other evidence. When giving her history during her October 2003 psychiatric evaluation, Joanne said that Beckingham had been physically abusive early on in their relationship — they had been together for 12 years — but was no longer (R669-670).[3] Joanne further said that Beckingham was "occasionally emotionally and verbally abusive" (R670), and the record shows that they argued; Ruth Beckingham attested to it as did Jesse Lyon, Joanne's son (R818, 823). But Jesse also said that, "looking back to 10 years" before Joanne's death, he did not remember Beckingham ever physically abusing her (R823). Moreover, notwithstanding the arguing, both Barbara Beckingham and Ruth described an attentive husband, who often checked, or sent one of the boys to check, to see how Joanne was (R818, 821).

The prosecution's further assertion that the medical records could have "opened the door to more damaging evidence" is unfounded and spurious. The point is that counsel did not even review them, not that he did not introduce them. In any event, throughout these 440

---

[2] Although Beckingham's affidavit that appears in the record is unsworn, a sworn affidavit was sent to the trial court.

[3] Beckingham's main brief stated that the medical records dated from 1999 (p. 27). In fact, they span the years 1992-2004.

proceedings, the prosecution has never identified any "more damaging evidence" that would counter Beckingham's claims.

Moreover, the prosecution ignores Beckingham's broader point that counsel never investigated, either by using Joanne's medical records or by speaking with Beckingham's family and Joanne's son Jesse Lyon, to determine, generally, what might have motivated her to overdose and what might have caused her to do so that night. Whether or not counsel in fact used the medical records, he had to review them and follow up on any leads that they might provide. *See People v. Oliveras*, 21 N.Y.3d 339, 346-48 (2013). Likewise, he had to speak with Beckingham's family, and their sworn allegations (R1117-1118, 1121, 1122, 1123-1124, 1128) showing that he never spoke with any of them are undisputed. Beckingham's family and Jesse corroborated that Joanne was extremely troubled and was a heavy user of prescription drugs and alcohol. Likewise, they explained that Joanne had grave financial problems and that, on the day of her death, she had been found to be forging Joey Lyon's checks (R821, R823). Had counsel investigated Joanne's history through her medical records and family, he would have been much better prepared to understand and to bring home to the jury Joanne's despairing condition on the night that she overdosed.

The prosecution's assertion that "[a]ll of the issues involving Tremaine Hutson were resolved on the record during the trial and thus have already been reviewed by the Appellate Division in the initial appeal" (p. 3) is equally baseless. Trial counsel, who also represented Beckingham on his direct appeal, raised no issues on the appeal regarding his own conduct

either at trial or with respect to the 330.30 motion.[4] Thus none of the issues raised here — counsel's rejecting the trial court's offer of a continuance during which counsel might have spoken with Hutson; counsel's failure to adequately interview Hutson once he recanted; counsel's getting Hutson's plea and sentence dates wrong and never obtaining his minutes, which would have revealed the favorable deal that he had been given; counsel's failing to assert a *Brady* violation and to set out what he had been told (e.g., that Muehl and Investigator Michael TenEyck had coerced Hutson to testify by threatening him with perjury); and counsel's failing to challenge Muehl's hearsay assertion that Hutson had had no altercations with corrections officers before trial — were ever passed on by this Court. Nor, likewise, contrary to the prosecution's contention (p. 3), did counsel raise on appeal any of his own failures to object to improper evidence or argument. See Beckingham's main brief, at pp. 63-65.

Finally, the prosecution asserts that Beckingham did not present sufficient evidence "to show that [counsel] mishandled the alleged juror misconduct situation" and that, in this regard, his moving papers "contained no legally admissible facts" (p. 3).[5] But, for the reasons discussed in Beckingham's main brief, at p. 63, his factual allegations mandated a hearing on this issue. Ted and Barbara Beckingham presented sworn affidavits saying that they told counsel during the trial that they had learned that courtroom deputy York Ashley

---

[4] At the Court's request, Beckingham will provide copies of the direct-appeal briefs.

[5] While the prosecution labels this claim one of "juror misconduct," Beckingham alleged that the deputy's misconduct violated his rights to confrontation and due process (R106).

had told a juror — his mother-in-law, Vicki Judd — that Beckingham was guilty, and that counsel said that he could do nothing (R1125-1127). Ruth Beckingham recalled their telling him (R819). Since counsel could have drawn up affidavits for the Beckinghams, obtained affidavits from Ashley's children, and, citing *People v. Ciaccio*, 47 N.Y.2d 431 (1979), moved for a hearing, his failure to act rendered him ineffective in this regard as well.

Point III

The prosecution violated *Brady v. Maryland*.

Like the 440 court, the prosecution maintains that "all of the issues concerning" Hutson were resolved in the 330.30 motion and on direct appeal. But Beckingham never raised a *Brady* claim in the 330.30 motion and, as in *People v. Bryce*, 88 N.Y.2d 124, 130 (1996), the allegations he presented in the 440 motion and motion to renew were entirely different from those presented on his direct appeal. Indeed, the virtual silence of the prosecution (other than to invoke the 330.30 motion and the direct appeal) in the face of extensive, detailed, sworn allegations and undisputed corroborating evidence of blatant *Brady* violations, is remarkable. For the reasons stated in Beckingham's main brief, at pp. 65-68, this claim mandates reversal.

Point IV

The 440 court erred in summarily denying Beckingham's claim that his rights to confrontation and due process were violated by a courtroom deputy's telling a juror that he was guilty.

Refusing to acknowledge that a statement that is not offered for the truth of the matter asserted is not hearsay, and that in any event C.P.L. § 440.30 does not require non-hearsay allegations, the prosecution insists that the 440 court properly denied this claim. For the reasons set out in Beckingham's main brief, at pp. 69-70, it did not. A claim that a courtroom officer tampered with a juror mandates that the court follow the same procedure that applies to all 440 claims. Factual allegations that are neither "conclusively substanti-

ated" nor "conclusively refuted" "by unquestionable documentary proof," C.P.L. § 440.30(3)(c), (4)(c), and cannot be dismissed on the ground that "there is no reasonable possibility" that they are true, § 440.30(4)(d), must be decided by a hearing. § 440.30(5). Beckingham's claim fit this category. The court thus erred in refusing to hold a hearing.

Conclusion

For the reasons stated in Point I, Beckingham's conviction should be vacated and the indictment dismissed. Alternatively, for the reasons stated in Points II and III, his conviction should be reversed and a new trial granted. If the conviction is not reversed, for the reasons stated in Point IV, the appeal should be held in abeyance and the case remitted to another county for a hearing.

November 2013

Respectfully submitted,

Andrea G. Hirsch
Attorney for Appellant Timothy Beckingham
111 Broadway - Suite 1305
New York, New York 10006