

JUN 12 2013

STATE OF NEW YORK COURT OF CLAIMS

CHARLES BUNGE,

Claimant,

DECISION

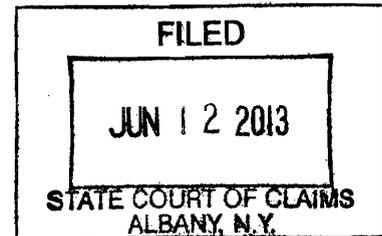
**ATTORNEY GENERAL
CLAIMS BUREAU**

-v-

THE STATE OF NEW YORK,

Claim No. 120933

Defendant.



BEFORE:

HON. FAVIOLA A. SOTO
Judge of the Court of Claims

APPEARANCES:

For Claimant:
Stoll, Glickman & Bellina, LLP
By: Andrew B. Stoll, Esq.

For Defendant:
Hon. Eric T. Schneiderman, Attorney General
By: Robert J. Schwerdt, AAG

This claim for unjust conviction and imprisonment, pursuant to Court of Claims Act § 8-b, was tried before me on the issue of liability on March 4 and 5, 2013. This decision follows the submission of post-trial memoranda.

On June 21, 2007, Charles Bunge, the claimant, was convicted of attempted robbery in the second degree [Penal Law (PL)§ 110/160.05 (2) (a)], Indictment Number 1850/2006, in Kings County, and was sentenced to six years in prison with three years' post-release supervision. On February 2, 2010, the Appellate Division, Second Department, reversed the judgment and remanded the case for a new trial. The Court determined that defendant was deprived of his due process rights to present his defense by the denial of his pre-trial motion for

leave to cross-examine the complaining witness by using a reward/wanted poster. That poster contained a picture of an individual, a Manuel Viara, who resembled defendant and who was wanted for committing a pattern of similar crimes utilizing the identical modus operandi (MO) as was charged against Mr. Bunge.

On March 26, 2010, Mr. Bunge was released on bail to await his second trial. The second trial was completed on November 15, 2010 and Mr. Bunge was found not guilty.

It is not disputed that: Mr. Bunge was convicted of a felony, was sentenced to a term of imprisonment and served part of his sentence; his conviction was reversed on one of the enumerated grounds set forth in Court of Claims Act § 8-b (5) (b) (ii); and, he was acquitted after a new trial.

Claimant argues that he also has shown, by clear and convincing evidence, the remaining two elements. Defendant, the State of New York (the State), contends that claimant has failed to demonstrate by clear and convincing evidence, that he: 1) did not commit any of the acts charged in the indictment [§ 8-b (5) (c)], and 2) did not by his own conduct cause or bring about his conviction [§ 8-b (5) (d)].

The Court finds that claimant has met his burden of proof, by clear and convincing evidence, and directs entry of interlocutory judgment in claimant's favor.

FACTS

Charles Bunge testified that on the morning of March 8, 2006, he left his paramour's home with his paramour and his son after making breakfast for them. He drove her car, dropped his son off at the train station for him to get to school and then dropped his paramour off at work.

The car was a burgundy, 1994, four door Honda Accord with a faded paint job, primer on three sides of the car, and a broken muffler, with Pennsylvania plates.

Mr. Bunge was driving the car with a suspended driver's license and a pending warrant for his failure to perform community service on a prior drug charge.

Mr. Bunge had been a heroin drug addict for over twenty years and at that time was still using drugs. He was unemployed for approximately six months after having been fired for fraternizing with his supervisor at the drug program.

After he dropped off his paramour, he went to have breakfast at Royal Restaurant on 76th Street and 5th Avenue in Bay Ridge, before proceeding to visit his mother who lived in Sunset Park. After breakfast he headed north up 5th Avenue when he was stopped by the police. This location, as well as his various movements and other locations, were pinpointed on Exhibit 5, a blown-up detailed map of the area. He believed that he was being stopped for the broken muffler, which was extremely noisy. Two female officers got out of the car. One approached him with her hand on her gun. She told him to turn the car engine off and requested to see his license and registration. While attempting to retrieve the documents from the glove box, the officer's radio went off. When asked his name, Mr. Bunge gave his brother's name and he asked whether something was wrong, did a robbery just happen? He then gave his real name and explained that his license was suspended.

After hearing additional conversation on the police radio, he was asked to get out of the car and to stand behind the vehicle. A Sergeant arrived, as did another patrol car. The Sergeant told him to relax, that someone was coming and that he would be on his way. A patrol car passed and Mr. Bunge was identified as the perpetrator of an attempted robbery that occurred

earlier on March 8, 2006. He was taken to the 68th precinct where he was given a ticket for driving with a suspended license and for noise pollution. He was then taken to the 62nd precinct and was placed in two lineups, where he was not identified. He was then charged, arraigned and indicted for attempted robbery in the second degree, attempted robbery in the third degree, attempted grand larceny in the fourth degree, reckless endangerment in the second degree, and assault in the third degree, all in connection with the March 8, 2006 incident.

Mr. Bunge was offered a plea bargain of six months' incarceration and five years' probation, which he refused, asserting that he was innocent.

While out on bail, awaiting trial on the indictment, Mr. Bunge noticed a crime stoppers' reward poster for a "Vieara Manuel", who was wanted for several robberies from March 2 - 5, 2006 within the 62nd Precinct in Brooklyn and the 120th Precinct in Staten Island. The poster stated: "The subject, Vieara Manuel drives up to the victim, forcibly grabs their purse and flees in a vehicle." As this poster described the charges against him, Mr. Bunge took the poster to his attorney. The trial court did not permit Mr. Bunge's attorney to introduce the poster, reference Manuel Vieara, or show a similarity between the charges against Mr. Bunge and the robberies committed by Mr. Vieara.

At trial, the complaining witness identified Mr. Bunge, and mentioned that the car had Pennsylvania plates. Mr. Bunge was found guilty and sentenced. Mr. Bunge never admitted guilt and was sentenced to the maximum for failure to show remorse.

Mr. Bunge had three prior misdemeanors for possession of drugs and a prior felony for assault.

At the second trial, Mr. Bunge was made the same offer of six months and probation, which he again refused. The second trial was essentially identical to the first except for the use of the poster. He was acquitted after a very short deliberation.

Although Mr. Bunge was not totally candid about his drug use, and while noting Mr. Bunge's record, the Court otherwise finds his testimony credible and specifically credits his testimony that he was not involved with and is innocent of the attempted robbery and other charges set forth in his indictment. That he is innocent of the charges also is shown by the credible testimony presented by the witnesses he called and the persuasiveness of his exhibits.

Manuel Viara testified pursuant to claimant's subpoena. He had no prior knowledge of Mr. Bunge's case and had never met or spoken to Mr. Bunge. Around March 2006, Mr. Viara lived in Brooklyn off Shore Road in the vicinity of 92nd Street. He too utilized Exhibit 5 to indicate various locations referenced in his testimony.

Mr. Viara was an admitted and convicted serial drive-by purse snatcher from the beginning of 1990 and thereafter and a crack addict. He was convicted in 1990 and 1993, and, after he was released and he returned home in 1999, he again was convicted in 2000 for a drive-by purse snatching that occurred in Staten Island. He was released in May 2004 and, in the beginning of 2006, he again started using crack very heavily and started stealing cars in order to commit drive-by purse snatchings and support his habit.

He got his supply from a dealer in Bay Ridge, who was located at 93rd between 3rd and 4th Avenue, a few blocks from where he lived. He stole several cars and a van, all near the area in which he obtained his crack.

He committed these robberies in the Caesar's Bay Shopping Center area because it was convenient. He also committed robberies in Staten Island.

In 2004 he straightened himself out, and had an apartment and a job. He testified that his mother was then diagnosed with cancer and he fell into a pit of despair and, in 2006, returned to his life of crime.

According to Mr. Viara, he was very successful in stealing pocketbooks because he would watch the victim and would circle the mall before taking their bag. He claimed they never saw his face. He recalled an incident where he was not successful because the victim (a white woman) would not let go of the purse, and when he told her to let go, she did not and she fell, and he took off in the vehicle.

Eventually he left town, as the police were looking for him and the reward posters were up with his name and picture. They knew he was the perpetrator of these robberies because, while eluding the police, he dropped his cell phone, which the police picked up.

He moved to Georgia and then moved to Tennessee, until October 30, 2006. He returned to Brooklyn, then started stealing cars and robbing women in several drive-by purse snatchings in Brooklyn and Staten Island.

In November, 2006, while driving a stolen car, he was arrested for driving through a toll without paying. He was interviewed by both Manhattan and Staten Island police and pleaded guilty.

He remembered stealing a car with Pennsylvania plates and also taking a car from the car wash but could not remember exactly if he committed this specific robbery of March 8, 2006.

In March, 2007, he pleaded guilty to attempted robbery in Kings County and was sentenced to five years in prison. Mr. Vierea is presently released and on parole supervision. He is working in a restaurant and is drug free.

Mr. Vierea does not have specific recollection of the robberies and the complaining witnesses but admitted to committing many robberies at this location and time period.

The Court finds Mr. Vierea's testimony credible. He has no self-interest in this claim, and, while noting his criminal and substance abuse record, the Court finds his testimony at this trial forthright.

Richard Roche also was called as a witness by claimant. He testified that on March 8, 2006, while he was working for Key Foods located in Bay Ridge, Brooklyn, his van, full of groceries, was stolen. He eventually recovered the vehicle. This testimony matches that of Mr. Vierea, who admits to taking a van with groceries from this location.

Mary Johnson, called by claimant, was the victim of a Staten Island robbery. She lived in Staten Island and, prior to her retirement, worked as a Catholic school teacher. On a Sunday morning in November, 2006, while she was crossing the parking lot outside the shopping center, "her pocketbook was yanked off her right shoulder by someone driving by." The parking lot was in Staten Island and the main tenant was Waldbaum's. The main road to the shopping center is Richmond Avenue. She spoke to a Detective Kennedy at the scene. He called her a few days later and requested that she go to a lineup. Three weeks after the incident, the detective provided her with a photo array (Exhibit 1), and she identified Manuel Vierea as the person who took her pocketbook. Her pocketbook was recovered and returned, as it was found in the back

seat of a vehicle which had been stolen and apparently used in the robbery. The Court finds Ms. Johnson's testimony forthright and credible.

Detective Sean Kennedy, called by claimant, testified that he worked at the robbery squad in Staten Island for twenty-six years. He investigated Mary Johnson's case and found that the modus operandi of snatching pocketbooks in a drive-by was Mr. Vierea's MO.

Mary Johnson's property was recovered from the vehicle driven by Manuel Vierea, after he was stopped for driving through the Brooklyn Battery Tunnel without paying the toll.

While interviewing Mr. Vierea about other similar robberies, Mr. Vierea admitted to robbing Ms. Johnson and committing two other robberies with a similar pattern that had occurred during that period.

The notes of this interview (Exhibit 2) record that Mr. Vierea stated that he drove around the parking lot for forty-five minutes until he saw Ms. Johnson and took her pocketbook. He did not leave the car or stop, as he takes the bag from behind and no one sees his face. Mr. Vierea listed his address as 9000 Shore Road, Brooklyn, New York.

Detective Kennedy also questioned Mr. Vierea regarding the March 6th robbery, as it had a similar MO. Mr. Vierea did not recall that incident and did not want to discuss it as he was negotiating a deal with the New York County District Attorney's Office. The Court finds Detective Kennedy's testimony credible and forthright.

The State called Police Officer John Ciaricia from the 62nd precinct and Detective Lucy Rosa from the 68th precinct as witnesses. Officer Ciaricia responded to Kohl's at the Caesar's Bay Shopping Center and spoke to Katherine Pinto, the victim of the March 6th incident; Detective Rosa (then Officer Rosa), made the initial stop of Mr. Bunge. The Court finds that,

here, their testimony was not reliable or persuasive and often contradicted police documents in evidence.

Officer Ciaricia testified on direct that Ms. Pinto was upset and crying when he responded to the scene. He testified that she told him that she was robbed by a white male with black hair (on cross-examination he testified that it was dark hair), driving a red vehicle with Pennsylvania plates, and that she was dragged, and that a transmission containing this information was put over the radio, although not by him.

The Court notes that in contrast to this testimony, the transcript of the radio run (Exhibit 4) stated that the perpetrator had blond hair and that the license plate information was not known or relayed. In response to a question of whether the victim could identify the perpetrator, the transcript also stated that “she saw the back of his head, not the face.”

Officer Ciaricia proceeded to the arrest location with Ms. Pinto. He told her that someone had been stopped who fit the description and they were going to see if it was the perpetrator. It took five to ten minutes to get to the arrest location where there was an unmarked vehicle and a plainclothes officer standing next to Mr. Bunge.

He drove by slowly and asked “is that the guy”, and she said yes.

The vehicle was impounded and an empty green pocketbook was recovered with a damaged strap located in the front seat. The purse was not tied to any other crime.

On direct, he remembered many details, including that it was a clear day. In contrast, on cross-examination, his frequent response to various material questions was that he could not recall.

Detective Lucy Rosa has been with the police department for twenty-seven years, the last five years as a detective. On March 8, 2006, she was an officer on patrol in uniform, driving a marked car. She heard a radio call of a robbery in progress, and that the perpetrator was a white male in a red car with Pennsylvania plates. When she was stopped at a light, Mr. Bunge's car pulled up behind her, and she saw that the driver was a white male driving a red car. She pulled over and that vehicle proceeded in front of her, and she stopped Mr. Bunge after she heard his car, which had a broken muffler, and for his failure to signal a right turn.

She pulled him over after he made his turn, noticed the Pennsylvania plates and stopped half a car length behind Mr. Bunge. She exited her vehicle and stated that the driver stuck his head out the window and said "did a robbery just happen?" She testified that she had not reached the driver and no transmission was coming from her radio. She testified as to his statement at both the first and second trial.

She asked for his paperwork. Mr. Bunge gave his name as Edward Bunge and could not produce any paperwork. He admitted that he was not Edward, that his license was suspended and that he had a warrant outstanding.

She put over the radio the plate number and asked for a description of the perpetrator. She was told male, white, and driving a red car with Pennsylvania plates and that the complaining witness was being brought to the location. Fifteen minutes after the stop, a patrol car came with the complaining witness, who identified Mr. Bunge, and he was placed under arrest.

Detective Rosa also testified that, at the second trial, Mr. Bunge had changed his hair color.

During cross-examination, Detective Rosa testified that she approached the vehicle on heightened alert, and that the plate and the vehicle's noise matched the description placed over the radio.

The Court finds that, here, Detective Rosa's testimony was evasive and contradictory, and finds incredible her testimony regarding Mr. Bunge's lighter hair color at the second trial. The Court further finds that her testimony was tailored to bolster the arrest.

In addition to the Court finding that here the testimony of the State's witnesses was not credible, the Court further finds that the testimony flies in the face of the actual radio run. The Court's review of Exhibits 3 & 4, a recording of all calls, the police communication and a transcript of same, reveals that little was known of the alleged assailant, and what was conveyed contradicted the witnesses' testimony.

What was conveyed was that the car was red, very clean, a four door, possibly a Honda Civic. No license plate information was known or relayed to the police, the pocketbook was not taken from the victim, no direction of flight was provided and no description of the perpetrator was given, except that he was a white male with blond hair. No further description was provided to the arresting police because the complainant only saw the back of his head, not his face. There was no mention of a loud noise emanating from a broken muffler.

Discussion and Conclusion

In enacting the Unjust Conviction Act, the legislature intended "that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against the state." Court of Claims Act § 8-b (1). The legislature "struck a balance between the competing goals of compensating those unjustly

convicted and imprisoned and preventing the filing of frivolous claims by those who are not actually innocent.” *Moses v State of New York*, 137 Misc 2d 1081, 1084. The statutory language of clear and convincing “indicates that the Legislature did not intend to provide monetary compensation for every mistake made in the course of a prosecution of an individual for a crime he did not commit and for which he was imprisoned.” *Rogers v State of New York*, 181 Misc 2d 683, 686, *affd* 280 AD2d 930, citing *Ausderau v State of New York*, 130 Misc 2d 848, 851, *affd* 127 AD2d 980, *lv denied* 69 NY2d 613.

“[T]he purpose of the statute is not to provide a windfall to a criminal defendant who is sufficiently experienced with the judicial process to exploit it to his own advantage”. *Britt v State of New York*, 260 AD2d 6, 19. A claimant should not be rewarded for his own misconduct and equitable considerations will not authorize such a reward. *Moses v State of New York*, 137 Misc 2d 1081, 1085-1086.

A claimant seeking to prove an unjust conviction claim carries a “heavy burden”. *Reed v State of New York*, 78 NY2d 1,11. The clear and convincing standard “means evidence that is neither equivocal nor open to opposing presumptions”. *Solomon v State of New York*, 146 AD2d 439, 440. The standard is significant and a higher and more demanding standard than preponderance of the evidence, and it serves to impress the fact finder with the importance of the decision. *Id.* Here, clear and convincing evidence is evidence that satisfies this Court, as trier of fact, that it is highly probable that claimant is innocent of the underlying charge and did not contribute to his own conviction; the evidence cannot be equivocal, contradictory or open to opposing inferences. *See Acosta v State of New York*, 22 AD3d 367; *Alexandre v State of New York*, 168 AD2d 472; *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211. “The

requirements imposed by Court of Claims Act § 8-b are to be strictly construed”. *Vasquez v State of New York*, 263 AD2d 539; *Fudger v State of New York*, 131 AD2d 136, *lv denied* 70 NY2d 616.

In this claim, the Court closely observed the witnesses, determined their credibility, and carefully considered and weighed the testimony and exhibits. As with many trials, and, in particular, in unjust conviction claims, credibility plays a pivotal role. To this fact finder, claimant’s testimony was forthright and credible, as was the testimony of his witnesses. In contrast, the Court finds that here the testimony of the State’s witnesses was evasive, not reliable, and not persuasive. As to the conflicting testimony between claimant and his witnesses and that of defendant’s witnesses, the Court specifically credits the testimony of claimant and his witnesses.

Innocence

“As noted by the Law Revision Commission, the ‘linchpin’ of the statute is innocence”. *Ivey v State of New York*, 80 NY2d 474, 479. While “an acquittal is not, ipso facto, equivalent to a determination of innocence, generally or for purposes of this remedial statute” (citing *Reed v State of New York*, 78 NY2d 1, 7) “it is a useful and relevant indicator of innocence”. *Ivey*, 80 NY2d at 479-480.

The Court finds that claimant has met his burden of proof and demonstrated, by clear and convincing evidence, that he is innocent of the charges. In arriving at this determination, the Court considered, among other matters, the following. Mr. Bunge always maintained his innocence, even after his conviction in the first trial and when such a position resulted in a harsher sentence. He twice rejected plea bargains. His retrial, when he was permitted to present

evidence of the wanted/reward poster, resulted in an acquittal. The Court finds his testimony credible and persuasive. Similarly, the Court finds the testimony of his witnesses credible and persuasive. These witnesses had no self-interest or motivation, and were impartial. The State's cross-examination of claimant and of his witnesses, and the testimony of the State's witnesses, failed to adduce any testimony that defeats claimant's showing.

The Court specifically rejects the State's arguments to the contrary. For example, the State asserts that claimant's showing of innocence is insufficient in light of the identification of claimant by Ms. Pinto at the "show-up identification" and during her sworn grand jury and trial testimonies. (While the State points to these testimonies, the State did not introduce into evidence her grand jury testimony, which generally is not available in any event, or her trial testimonies, or call her as a witness at this trial.) The Court does not agree. To this trier of fact, and under these circumstances, and without questioning the complainant's integrity, the Court places far greater weight on claimant's testimony and that of his witnesses and exhibits at this trial than the identification (which the State refers to as a recognition) by a complainant who did not see the perpetrator's face and who identified claimant as a result of a highly suggestive drive-by identification, and her subsequent identifications at trials. The Court similarly does not agree with other various reasons advanced by the State in an attempt to discount claimant's showing and to buttress the testimony of the State's witnesses.

Claimant's Conduct was not a Contributing Factor

The element of a claimant establishing that he did not by his own conduct cause or bring about his conviction is described as requiring a claimant:

“to establish that he did not cause or bring about his prosecution by reason of his own misconduct. Examples of such misconduct would include falsely giving an uncoerced confession of guilt, removing evidence, attempting to induce a witness to give false testimony, attempting to suppress testimony or concealing the guilt of another.” Report of the Law Revision Commission, 1984 McKinney’s Session Laws of NY, ch. 1009, at 2932.

These five examples of misconduct are illustrative and not exhaustive. *Coakley v State of New York*, 150 Misc 2d 903, *affd* 225 AD2d 477. The purpose of this provision is “to carry ‘out simply the equitable maxim that no one shall profit by his own wrong or come into court with unclean hands’ (citation omitted).” *Rivers v State of New York*, 152 Misc 2d 332, 336-337, *affd* 202 AD2d 565. The legislature “left open to the judiciary the task of determining on a case-by-case basis what conduct would make a claimant ineligible to recover damages for unjust conviction and imprisonment.” *Rogers v State of New York*, 181 Misc 2d 683, 686, *affd for reasons stated below*, 280 AD2d 930. “What will undo a claim to recover damages for unjust conviction and imprisonment is a claimant’s knowing withholding of available, admissible, and material exculpatory evidence, or his or her knowing presentation of evidence that is provably false through evidence independent of proof of guilt.” *O’Donnell v State of New York*, 26 AD3d 59, 65. “In the context of a claim to recover damages for unjust conviction and imprisonment, a criminal defendant’s conduct may cause or bring about a conviction only if it is made known to the jury, leads to other evidence that is presented to the jury, or keeps relevant evidence from the jury.” *O’Donnell*, 26 AD3d at 62.

Thus, for example, a claimant’s decision not to call his wife does not constitute “mere trial strategy” but places it more “in the area of withholding potentially exculpatory information”, where the record demonstrated that the decision not to call her was made by claimant and not

counsel and made for other reasons. *Taylor v State of New York*, 194 AD2d 113, 116, *affd sub nom. Williams v State of New York*, 87 NY2d 857. So, too, a failure to call individuals who could vouch for a claimant's movements constitutes conduct contributing to a conviction and, moreover, "emphasizes the gap between the evidentiary standards obtaining in a criminal trial and under the Unjust Conviction Act." *Groce v State of New York*, Claim No. 91765, dated January 27, 1999, Marin, J., *affd* 272 AD2d 519. Hiding from the police for three days and making a statement that bordered on an admission (*Murnane v State of New York*, UID 2000-010-013 [Ct Cl, Ruderman, J., May 26, 2000], *affd* 288 AD2d 277), offering a false alibi to the police (*Moses v State of New York*, 137 Misc 2d 1081), and intentionally concealing the guilt of an identical twin (*Stevenson v State of New York*, 137 Misc 2d 313), have been held to constitute conduct that disqualifies a claimant.

Here, claimant did not remove evidence, falsely give an uncoerced confession of guilt, attempt to induce a witness to give false testimony, attempt to suppress testimony, or conceal the guilt of another person – the illustrative list set forth in the Law Revision Commission Report. *See Coakley v State of New York* 150 Misc 2d 903, *affd* 225 AD2d 477. The Court further finds that claimant has demonstrated, by clear and convincing evidence, that he did not otherwise contribute to his conviction. That he was in the wrong place at the wrong time and that he was not a model citizen do not constitute conduct that contributed to his own conviction. The Court also does not agree with the State's assertion that the jury clearly saw the statement as a confession, and notes that while this statement was also introduced and used at the second trial, the second jury acquitted Mr. Bunge. Here, under these circumstances, claimant's statement did not constitute conduct that contributed to his conviction and disqualifies him from recovery.

As a result of the foregoing, the Court finds that defendant is liable to claimant under § 8-b of the Court of Claims Act. Any motions not ruled upon are denied.

A damages trial shall be scheduled as soon as practicable. A conference is scheduled for September 16, 2013, at 10:00 a.m.

The Clerk of the Court is directed to enter interlocutory judgment against the defendant on liability.

**New York, New York
May 22, 2013**

**FAVIOLA A. SOTO
Judge of the Court of Claims**