

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - March 20, 2008

WILLIAM F. MASTRO, J.P.
FRED T. SANTUCCI
RANDALL T. ENG
ARIEL E. BELEN, JJ.

2006-07195

DECISION & ORDER

The People, etc., respondent,
v Javier Pacheco, appellant.

(Ind. No. 1240/00)

Steven Banks, New York, N.Y. (Susan Epstein of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Solomon Neubort of counsel), for respondent.

Appeal by the defendant, by permission, from an order of the Supreme Court, Kings County (Guzman, J.), dated June 30, 2006, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court (Barbaro, J.), rendered January 10, 2001, convicting him of murder in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the order is affirmed.

The defendant's claim regarding ineffective assistance of trial counsel could have been raised on direct appeal from the judgment of conviction (*see* CPL 440.10[2][a], [c]). In any event, the claim is without merit because the defendant did not establish that counsel's representation was deficient (*see People v Baldi*, 54 NY2d 137). Specifically, the defendant did not establish that counsel was deficient in failing to move to dismiss the count charging him with depraved indifference murder on the ground that the facts supported a finding of intent rather than recklessness since, at

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the time of the trial, counsel was acting in accord with the law defining depraved indifference murder (see *People v Danielson*, 9 NY3d 342, 350; *People v Paisley*, 93 NY2d 1024).

MASTRO, J.P., SANTUCCI, ENG and BELEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court