

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

D24241
C/prt

_____AD3d_____

Argued - June 4, 2009

ROBERT A. SPOLZINO, J.P.
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2007-04894

DECISION & ORDER

The People, etc., respondent,
v Victor Bolling, appellant.

(Ind. No. 1331/92)

Lynn W. L. Fahey, New York, N.Y. (Lisa Napoli of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Ellen C. Abbot, and Anastasia Spanakos of counsel), for respondent.

Appeal by the defendant pursuant to CPL 450.10(5) from an order of the Supreme Court, Queens County (Hanophy, J.), dated April 16, 2007, which denied his motion pursuant to CPL 440.30(1-a) for DNA testing.

ORDERED that the order is affirmed.

The defendant's motion pursuant to CPL 440.30(1-a) for DNA testing of blood found on a pole on a public street was properly denied on the ground that there was no "reasonable probability" that the test results would have resulted in a "more favorable verdict . . . had the results . . . been introduced at trial" (*People v Pitts*, 4 NY3d 303, 311; see *People v Mattocks*, 15 AD3d 676). Since the pole was in a public place, the blood could have come from other persons, not involved in the crime (see *People v Brown*, 36 AD3d 961).

Further, this issue was previously raised in the United States District Court for the Eastern District of New York, which found that the defendant's claim with respect to the "exculpatory potential of the evidence is purely speculative" (*Bolling v Stinson*, _____ F Supp

September 8, 2009

Page 1.

PEOPLE v BOLLING, VICTOR

_____, 1999 WL 287733 *7, 1999 US Dist Lexis 6620 *21 [EDNY 1999]). Although that finding is not binding on this Court, it does constitute persuasive authority (*see People v Kin Kan*, 78 NY2d 54).

SPOLZINO, J.P., ANGIOLILLO, CHAMBERS and LOTT, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court