

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

D28615
H/prt

_____AD3d_____

Submitted - September 24, 2010

REINALDO E. RIVERA, J.P.
PETER B. SKELOS
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2008-07702

DECISION & ORDER

The People, etc., respondent,
v Lorenzo Lobban, appellant.

(Ind. No. 1977/05)

Marianne Karas, Armonk, N.Y., for appellant and appellant pro se.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Andrea M. DiGregorio and
Cristin N. Connell of counsel), for respondent.

Appeal by the defendant, by permission, from an order of the County Court, Nassau County (Calabrese, J.), dated June 9, 2008, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of conviction of the same court rendered April 17, 2007, convicting him of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts), reckless endangerment in the first degree, and menacing in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the order is affirmed.

Contrary to the defendant's contention, defense counsel's failure to move to suppress his post-arrest statements based upon a purported violation of *Payton v New York* (445 US 573), did not constitute ineffective assistance of counsel, as the subject statements were exculpatory and consistent with the theory of defense (*see People v Caban*, 5 NY3d 143, 152; *People v Benevento*, 91 NY2d 708, 712; *People v Washington*, 71 AD3d 1064).

Furthermore, the defendant was not deprived of the effective assistance of counsel because his attorney formerly represented one of the People's witnesses in an unrelated criminal

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matter. In order to prevail on such a conflict-based claim of ineffective assistance of counsel, the defendant must show that “the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation” (*People v Konstantinides*, 14 NY3d 1, 10 [internal quotation marks omitted]; see *People v Smart*, 96 NY2d 793, 795; *People v Longtin*, 92 NY2d 640, 644, cert denied 526 US 1114; *People v Ortiz*, 76 NY2d 652, 657). Contrary to the defendant’s contention, the record demonstrates that his attorney’s prior representation of the witness did not affect the conduct of the attorney’s cross-examination of that witness (see *People v Smart*, 96 NY2d at 795; *People v Lyle*, 288 AD2d 324, 325; *People v Finley*, 190 AD2d 859, 860).

RIVERA, J.P., SKELOS, CHAMBERS and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court