

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

D33031  
N/nl

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - November 1, 2011

MARK C. DILLON, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
ARIEL E. BELEN, JJ.

---

2010-02277

DECISION & ORDER

The People, etc., respondent,  
v Robert Perry, appellant.

(Ind. No. 59/88)

---

Steven Banks, New York, N.Y. (Harold V. Ferguson, Jr., of counsel), for appellant.

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart of counsel; David Blondell on the brief), for respondent.

Appeal by the defendant pursuant to CPL 450.10(5) from an order of the Supreme Court, Richmond County (Rienzi, J.), dated February 4, 2010, which denied, without a hearing, his motion pursuant to CPL 440.30(1-a) for forensic DNA testing of certain evidence recovered by the police.

ORDERED that the order is affirmed.

Contrary to the defendant's contention, the Supreme Court correctly determined that, despite certain changes in the law relevant to motions pursuant to CPL 440.30(1-a) (*see* CPL 440.30[1-a][b]; *People v Pitts*, 4 NY3d 303, 311) since the time of the defendant's prior unsuccessful motion pursuant thereto (*see People v Perry*, 295 AD2d 452), the defendant was still required to demonstrate that there exists a reasonable probability that the verdict would have been more favorable to him if a DNA test had been conducted on the evidence at issue, and if the results had been admitted at the subject trial (*see* CPL 440.30[1-a]). The defendant failed to make such a showing. Under such circumstances, the Supreme Court properly denied, without a hearing, the defendant's motion pursuant to CPL 440.30(1-a) for forensic DNA testing of certain evidence

November 29, 2011

PEOPLE v PERRY, ROBERT

Page 1.

recovered by the police (*see People v Pitts*, 4 NY3d at 311; *People v Bolling*, 65 AD3d 1054, 1054; *see also e.g. People v Hai Guang Zheng*, 69 AD3d 878, 879; *cf. People v Barnwell*, 6 AD3d 1147, *revd sub nom. People v Pitts*, 4 NY3d 303).

DILLON, J.P., BALKIN, LEVENTHAL and BELEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court