

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment Nos.: 5453-94; 891-95

JAVON BOATWRIGHT,

Motion: Pursuant to CPL 390.50
to Release Pre-Sentence Report

Defendant.

-----X

DEFENDANT PRO SE

For the Motion

NEW YORK CITY DEPARTMENT
OF PROBATION

BY: GAYLE A. DAVIS, ESQ.

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: September 14, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19

-----X
THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment Nos.: 5453-94; 891-95

JAVON BOATWRIGHT,

Defendant.

-----X

The following constitutes the opinion, decision and order of the Court.

By motion dated August 10, 2005, defendant moves pursuant to Criminal Procedure Law Section 390.50(2) to obtain his pre-sentence report to prepare an appeal.

In response, the New York City Department of Probation has submitted an affirmation, dated September 9, 2005, whereby they take no position with regard to defendant's request for release of the report.¹ However, should the Court order release of a copy of such report, the Department of Probation requests that a properly redacted copy, as per the Court's direction, would be warranted. In their response, the Department opposes any application by defendant to correct the report as untimely. This issue is not before the Court, however, such an application would be denied.²

¹In their response, the Department of Probation notes that CPL § 390.50(2) specifically states that "the pre-sentence report shall be made available by the court for examination and copying in connection with an appeal in the case, including an appeal under this subdivision."

²Challenges to the contents of the pre-sentence report must be raised before sentencing. See Matter of Antonucci v. Nelson, 298 A.D.2d 388, 751 N.Y.S.2d 395 (2d Dept. 2002)(Supreme Court properly denied defendant's attempt to expunge allegedly inaccurate information in pre-sentence report; thus, challenges untimely and should have been raised before sentencing court); see also Matter of Sciaraffo v. New York City Dept. of Probation, 248 A.D.2d 477, 669 N.Y.S.2d 513 (2d Dept. 1998); Matter of Salahuddin v. Mitchell, 232 A.D.2d 903, 649

For the reasons stated herein, defendant's motion for release of the pre-sentence report is denied.³

FACTS

Under indictment number 5453-94, defendant was charged in a thirteen-count indictment, filed on November 18, 1994, with acting in concert to commit *inter alia* the crime of Murder in the Second Degree (P.L. §§ 120.25[1],[2],[3]).

Under indictment number 891-95, defendant was charged in a five-count indictment, filed on March 1, 1995, with acting in concert to commit *inter alia* Robbery in the First Degree (P.L. § 160.15[4]).

On May 7, 1996 defendant pled guilty to Robbery in the First Degree under indictment number 891-95 and was sentenced on May 28, 1996 to a term of from five to fifteen years incarceration. On May 7, 1996, defendant also pled guilty under indictment number 5453-94 to Second Degree Murder and was sentenced to a term of incarceration on May 28, 1996 of from five years to life. This sentence was to run concurrently to his sentence under indictment 891-95. Defendant waived his right to appeal and executed the appropriate documentation indicating his intent to waive this right for both cases.

Release of Pre-Sentence Report

Criminal Procedure Law Section 390.50 addresses disclosure of pre-sentence reports. In general, subdivision one states that: "except where specifically required or permitted by statute or

N.Y.S.2d 353 (3d Dept. 1996); Matter of Gayle v. Lewis, 212 A.D.2d 919, 622 N.Y.S.2d 626 (3d Dept. 1995).

³This Court notes that defendant waived his right to appeal and executed the appropriate documentation indicating his intent to waive this right. The waiver, reviewed and signed by defendant in court states: "The undersigned defendant in consideration of and as part of the plea agreement being entered into, hereby waives any and all rights to appeal from the judgement [sic] of conviction herein.

upon specific authorization of the court,” a report by the probation department in connection with a defendant’s sentence is confidential. There is no constitutional right to a copy of a pre-sentence report. See People v. Peace, 18 N.Y.2d 230, 273 N.Y.S.2d 64 (1966). See People v. Delatorre, 2 Misc.3d 385, 767 N.Y.S.2d 766 (Westchester County Ct. 2003).

Nevertheless, CPL 390.50 (2)(a) gives a defendant a right to a copy of a pre-sentence report prior to sentencing.⁴ Moreover, a statutory right exists for a defendant to obtain a copy of the pre-sentence report for purposes of appeal. See CPL 390.50(2)(a). Matter of Legal Aid Bureau, Inc. v. Armer, 74 A.D.2d 737, 425 N.Y.S.2d 706 (4th Dept. 1980)(defendant has “clear right to review pre-sentence reports for the purpose of preparing briefs and for use before the parole board.”); People v. Harris, 187 Misc.2d 591, 725 N.Y.S.2d 530 (N.Y. Sup. Ct. 2001) (same); see e.g. People v. Peetz, 4 Misc.3d 597, 781 N.Y.S.2d 418 (Sup. Ct., Queens County, June 7, 2004).

Here, defendant has not filed a notice of appeal based upon a review of the files maintained by this Court. A notice of appeal must be filed within thirty days of imposition of sentence. See CPL § 460.10. Thus, defendant would have had to have filed a notice of appeal within thirty days of his sentence, May 28, 1996. Therefore, in addition to waiving his right to appeal, defendant is time-barred from filing an appeal. Furthermore, defendant has not supported his application with any documentation as to whether he has obtained leave to file a late notice of appeal or has been granted an extension. Absent such proof, the Court will not order release of the report. Should circumstances change or defendant proves that he is indeed perfecting an appeal, then release of the report will be granted as is mandated by statute.

Accordingly, defendant’s motion is denied with leave to renew should he receive an extension from the Appellate Division granting him leave to file an appeal.

⁴CPL 390.50(2)(a) provides: “Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination and for copying by the defendant’s attorney, the defendant himself, if he has no attorney, and the prosecutor.” The purpose of the statute is to give a defendant an opportunity to contest any information in the probation report at sentencing. See People v. Harris, 187 Misc.2d 591, 725 N.Y.S.2d 530 (N.Y. Sup. Ct. 2001).

A copy of this decision and order forwarded to defendant and to the Department of Probation.

Kew Gardens, New York
Dated: September 14, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT