SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Indictment #2882/91

-against-

YOHANNAN YHEL,

Defendant.

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RAYMOND GUZMAN, J.S.C.

In papers dated January 29, 2007, and received by this court on February 23, 2007, the defendant renews his *pro se* application[1] for an order, pursuant to CPL §390.50, directing the Department of Probation ("Probation") to provide him with a copy of the pre-sentence report (PSR) prepared in connection with his sentencing in the captioned case.

In keeping with its recently-announced policy, Probation has not replied to the defendant's current motion; Probation has made the "blanket" declaration that it takes no position on inmate requests for copies of PSRs, although it strongly opposes applications to contest the accuracy of information contained therein.

This court has reviewed the Supreme Court case file and the defendant's current papers, including the documents appended as exhibits thereto, and for the reasons set forth below, denies

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[1]By decision dated January 19, 2007, this court had denied the defendant's previous request for the PSR without prejudice, on the ground that the defendant had stated no reason for needing the report other than "to review [his] PSR for overall content and accuracy." Ruling such reason insufficient to warrant exercise of this court's discretion to order disclosure of the report, this court indicated that the defendant might renew his application upon the submission of additional information.

the defendant's application for an order directing Probation to furnish the defendant with a copy of the PSR prepared in connection with the captioned case.

Background Facts

At about 10:20PM on March 7, 1991, the defendant threw a rock through the window of a storefront-beauty salon in Brooklyn, entered the store through the broken window, and then unlocked the door to admit two accomplices, Ray Malave and Clarence Roberts. Although the salon was not open to the public at that hour, the female owner was still there working, styling the hair of two young women while their mother sat in the waiting area.

The defendant ripped the telephone out of the wall, and threatened to kill the women if they called the police. Roberts jumped over the counter, behind which the owner and one of the young women had ducked, and emptied the cash register; he then threw the cash register on the floor, where it struck the owner on the head and caused her briefly to lose consciousness. Roberts took the owner's handbag and left the store.

Meanwhile, Malave put a gun (or "what appeared to be a gun") to the other young woman's stomach and demanded the chains she was wearing around her neck, while the defendant pursued the young women's mother, who had locked herself in the bathroom. The defendant banged on the door, threatening to kill the woman if she did not open the door. When the woman complied, the defendant ripped the chains from her neck and took her handbag. Malave and the defendant then fled.

The defendant and Malave were arrested less than one half-hour later; Roberts was not apprehended.

The defendant was indicted for "acting in concert" to commit crimes charged in a total of sixteen counts,[2] none of which charged that a victim had been "physically injured," but some of which charged that a "participant in the crime" was armed with a "deadly weapon." Prior to submitting the case to the jury, the People dropped several counts, including the robbery and burglary counts charging that a deadly weapon was involved.

At trial, the defendant presented an "alibi defense," which the jury apparently did not find credible. On March 16, 1992, the jury found the defendant guilty of three counts of robbery in the first degree, a class "B" violent felony under PL §160.15[4] (one count for each victim), and one count of burglary in the second degree, a class "C" violent felony under PL §140.25[1][d].

PL §160.15[4] provides, in pertinent part, that a person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of committing the crime, he or another participant in the crime *displays what appears to be a firearm*, except that it is an "affirmative defense" that such firearm was not loaded and/or operable. (This means that if a defendant establishes by a preponderance of the evidence that what was displayed was not a loaded and operable firearm, guilt is mitigated from robbery in the first degree to robbery in the second degree. See, *e.g., People v Rivera*, 179 Misc.2d 710 [Sup. Ct. Bronx Co. 1999].) **PL §140.25[1][d]** provides, in pertinent part, that a person is guilty of burglary in the second degree when he knowingly enters a building with intent to commit a crime therein, and when, in

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[2] Six counts of robbery in the first degree (three each under both PL §§160.15[2] and [4]), three counts of robbery in the second degree (under PL §160.10[1]), two counts of burglary in the second degree (under PL §140.25[1][a]&[d]), two counts of grand larceny in the fourth degree (under PL §155.30[5]), one count of criminal mischief in the third degree (under PL §145.05), and one count each of criminal possession of a weapon in the second and third degrees (under PL §§265.03 and 265.02[4]).

effecting entry or while in the building, he or another participant in the crime *displays what appears to be a firearm.*

On May 13, 1992, the defendant, who had twice before been convicted of violent felonies [in 1983 and 1985],[3] was adjudicated a "persistent violent felony offender." The court rendered judgment[4] and sentenced the defendant to serve concurrent, indeterminate prison terms of 15 years to life on each robbery count, and eight years to life on the burglary count (Miller, J., at trial and sentence).

The Defendant's Current Motion

The defendant advises that he currently remains incarcerated pursuant to this sentence, having been turned down for parole release in a Parole Board decision dated May 2, 2006, following his "initial" Parole Board interview [or "hearing"].[5] The defendant asserts that he needs a copy of the PSR in order to appeal his "May 2006 parole hearing denial, as well as numerous temporary release denials." The defendant contends that the Parole Board and the Department of Correctional Services ("DOCS") have denied him parole release and temporary

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[3] According to court records, the defendant was convicted by guilty plea of attempted robbery in the second degree on 2/1/83; sentenced to 1-3 years in prison; and released on parole on 12/30/83. On 10/5/84, the defendant was arrested for robbery again. On 5/21/85, he plead guilty to attempted robbery in the first degree; he was sentenced to 54 mos. - 9 years, and released on parole on 2/21/90.

[4]The judgment of conviction was affirmed on the defendant's direct appeal. See *People v Yhel*, 215 AD2d 793 [2d Dept. 1995], *leave to appeal denied*, 86, NY2d 805 [1995]. In addition, the defendant's motion to set aside his sentence on the ground that he had wrongly been adjudicated a persistent felony offender was denied (on April 6, 2000) (Miller, J.), and the defendant's motion to vacate judgment on the ground that the court entered judgment under the wrong sections of the Penal Law was denied (on December 3, 2003) (Silverman, J.).

[5] An offender serving an indeterminate sentence is "initially" eligible for discretionary parole release after being incarcerated (including prison and jail time combined) for a period equal to the minimum term of the sentence, less any "good time" the offender has earned, not to exceed one-sixth of the minimum term.

release, respectively, based on the false belief or "claim" that during the commission of the crime, the defendant "possessed a loaded operable handgun, and the victims of the crime were physically injured."

This court noted in its previous decision (*fn.* 1) that challenges to the contents of pre-sentence reports must be raised before sentencing (citing, *inter alia*, Antonucci v Nelson, 298 AD2d 388 [2d Dept. 2002]). In his current motion, the defendant assures that he does not wish to challenge the accuracy of information in the PSR, but "to ascertain if the report contains information relating to the defendant possessing a weapon (handgun), and physically injuring any witness/victim in the instant offense, or if the report supports the defendant's position that no one was injured and that he did not possess a weapon." The defendant says he hopes to use the PSR to "prove to DOCS" that he neither possessed a weapon nor injured anyone.

Parole Board and DOCS Decisions

The defendant submits a two-page "Parole Board Release Decision Notice," dated May 2, 2006, denying him parole release. It states in pertinent part that the decision was "based on the following factors: Your instant offense is robbery 1st (3 cts) and burglary 2nd in which you, acting in concert with others, broke into a store at gunpoint, stole property and money from the customers in the store. You committed this offense while on parole for a prior robbery. Your criminal history dates back to 1983 and includes three robberies and failure at community supervision. Note is made of you[r] programming and disciplinary record. You are clearly a violent and dangerous criminal."

The second page of the notice includes information identifying the defendant and the crimes for which he is incarcerated; it also reports that the crime(s) involved a "weapon" and

"force/physical injury."

The defendant also submits a DOCS document entitled "Temporary Release Notice of Appeal Decision," dated November 13, 2006, affirming a decision to deny the defendant "Industrial Training Leave." The reasons for the decision are summarized as: "I/O Nature; Recdvst Hist;Violent Hist; Par/Prb Viol; and Weapons," and are more fully explained in "comments" which refer to the length of the defendant's criminal history; his two prior prison terms for attempted robbery; and the fact that the instant offense "involved an in-concert gunpoint robbery committed while under parole supervision." The comments conclude with the statement that "the serious and violent nature of your continued involvement in criminal behavior coupled with your poor adjustment to community-based supervision renders you a poor candidate for industrial training leave."

The defendant submits another DOCS document, a pre-printed "form" entitled "Security Reclassification Guideline," dated October 22, 1993, on which boxes were "checked" to indicate that the defendant's current offense involved a weapon (as opposed to no weapon), and that the nature of the "forcible contact" involved in the offense was "injury" (as opposed to "none," "threats," "serious injury," or "death").

Discussion and Decision

The defendant has apparently concluded that the use of the words "weapon," "gunpoint" and "injury," in these documents, demonstrates that the Parole Board and DOCS declined to release the defendant only because they (erroneously) believe he was found guilty of using a "loaded and operable gun," and/or of causing "physical injury" during the robbery/burglary. The defendant says he hopes to use the PSR to "prove" them wrong.

This court does not share the defendant's interpretation of the Parole Board and DOCS decisions, but even if the defendant is correct, the information in the PSR (whatever it may be) cannot constitute the "proof" he seeks.

(1) As noted *supra*, the defendant was convicted of no crime involving a "loaded and operable firearm," or "physical injury." If the defendant believes the Parole Board and DOCS have inaccurately recorded the defendant's convictions, the best way to "prove" the correct convictions is to provide them with a copy of his "certificate of disposition" (submitted by the defendant with his motion papers), *not* with a copy of his PSR.

(2) The term "physical injury" has a specific meaning in the Penal Law, which differs from the "dictionary" definition and ordinary usage, and perhaps the usage of the Parole Board and DOCS. A person is not guilty of causing "physical injury" under the Penal Law unless the People prove that he caused a victim to suffer "impairment of physical condition and substantial pain." See PL §10.00[9]. The defendant and his accomplices were not charged with, let alone convicted of, causing "physical injury" under the Penal Law. However, this does not negate the evidence that the defendant and his accomplices employed violent force, and engaged in rough physical contact with their victims. A person who has had chains ripped from her neck, a cash register fall on her head, or a gun thrust in her stomach might be said to have been "injured" in the ordinary sense of that word – even if not under the definition in the Penal Law.

(3) Likewise, the term "deadly weapon" has a specific definition in the Penal Law. A person is not guilty of being armed with a deadly weapon under the Penal Law unless the People prove that he was armed with a "loaded weapon from which a shot, readily capable of producing death or other serious injury, may be discharged." See PL §10.00[12]. The defendant and his

accomplices were initially charged with being armed with such a weapon during the robbery/burglary, but apparently the People lacked sufficient proof that the weapon brandished during the crime was a loaded and operable firearm; accordingly, those charges were dropped, and the defendant and his accomplices were instead convicted of "displaying what appeared to be a firearm." However, the People's inability to prove that the "apparent firearm" was a "deadly weapon" under the Penal Law does not negate the fact that it was a "weapon" used by the defendant and his accomplices to convince the victims that if they were not compliant, they would be shot. In this sense, it is not inaccurate to describe the incident as a "gunpoint robbery," even if the instrument employed only looked like a gun.

(4) The defendant has submitted an excerpt from the People's answer to the defendant's pre-trial "omnibus motion" asking the People, *inter alia*, to "set forth the substance of the defendant's conduct." The defendant has "inked out" or "redacted" approximately half of the People's reply to this question, leaving no legible references to the "apparent firearm" or to the conduct of the defendant's accomplices.

This court finds the defendant's submission of this redacted document troubling. It suggests either that the defendant fails to understand that he is no less guilty of "displaying what appeared to be a firearm" than his accomplice Malave (who reportedly held the apparent firearm), or that he is trying to mislead this court.

Be that as it may, the PRS cannot be used to prove, disprove or re-argue the facts upon which the defendant's convictions were based. The determination of these facts is exclusively within the purview of the jury, based upon the evidence presented at trial.

Accordingly, this court declines to exercise its discretion under CPL §390.50 to order

Probation to provide the defendant with a copy of his PRS for use in connection with appeal(s) of the Parole Board's May 2006 decision and/or any DOCS decision denying the defendant temporary release from custody. See *Thomas v Scully*, 131 AD2d 488 [2d Dept. 1987]. The defendant may renew his application next year, in connection with his next scheduled appearance for parole release consideration. (According to the Parole Board's May 2006 decision, the defendant's next appearance is scheduled for May 2008.)

The defendant's motion is summarily denied.

The foregoing constitutes the decision, opinion and order of the court.

Dated: March 28, 2007
Brooklyn, New York

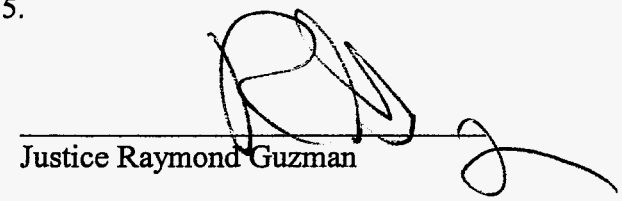
ENTERED

MAR 2 9 2007

NANCY T. SUNSHINE
COUNTY CLERK

Raymond Guzman
Supreme Court Justice

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of such appeal, the defendant may apply to the Appellate Division for the assignment of cousel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted. See 22 NYCRR §671.5.



Justice Raymond Guzman