

**People v Moore**

2007 NY Slip Op 30706(U)

April 10, 2007

Supreme Court, Kings County

Docket Number: 0008281/1996

Judge: Raymond Guzman

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

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

DECISION AND ORDER  
Indictment #8281/96 &  
#8432/96

-against-

MICHAEL MOORE,

Defendant.

-----X  
RAYMOND GUZMAN, J.S.C.

On July 1, 1997, the defendant was found guilty by jury verdict of robbery in the first degree, under Indictment #8432/96; on July 23, 1997, judgment was rendered and the defendant was sentenced to serve an indeterminate prison term of 12-1/2 to 25 years (Friedman, J., at trial and sentence). On July 23, 1997, the defendant also plead guilty in an unrelated case, to attempted robbery in the third degree, under Indictment #8281/96, and was sentenced to a one-year prison term, to be served concurrently with his 12-1/2 to 25 year sentence under Indictment #8432/96 (Friedman, J., at plea and sentence). The defendant currently remains incarcerated pursuant to the 12-1/2 year to 25 year sentence.

On or about December 16, 1998, the defendant, represented by appellate counsel, filed an appeal from his judgment of conviction, under Indictment #8432/96, with the Appellate Division, Second Department. On May 24, 1999, the Appellate Division issued a decision ordering the judgment against the defendant affirmed.

In papers dated January 29, 2007, and referred to this court on April 2, 2007, the

[\* 2]

defendant *pro se*, moves this court for an order, pursuant to CPL §390.50, directing the Department of Probation to furnish him with a copy of the “pre-sentence report”(PSR) prepared in connection with his sentencing.

In keeping with its recently-announced policy, the Department of Probation did not file a reply to the defendant’s motion; the Department has made a “blanket” declaration that it takes no position on inmate requests for copies of their PSRs, although it strongly opposes applications to contest the accuracy of information contained therein.

This court has reviewed the defendant’s papers and the Supreme Court case file, and for the reasons set forth below, denies the defendant’s motion at this time without prejudice to renew.

It is well-established that a defendant has no constitutional right to obtain a copy of his PSR (see, e.g., *People v Peace*, 18 NY2d 230 [1966]), but there is disagreement among New York State’s Judicial Departments as to a defendant’s statutory right to the PSR in connection with a collateral proceeding, such as an appearance before a Parole Board or an appeal from a Parole Board decision.

The statute governing the confidentiality of the PSR (CPL §390.50) provides that the PSR “may not be made available to any person except as specifically required or permitted by statute or upon specific authorization of the court” (CPL §390.50[1]). There are only two situations in which the statute requires that a defendant’s PSR be made available to the defendant and/or his counsel: (1) the sentencing court must make the PSR available not less than one day prior to sentencing, unless the parties waive the time requirement; and (2) the court must make the PSR

available in connection with any appeal in the case. See CPL §390.50[2][a].

The Fourth Department has held that a defendant has the right to obtain a copy of his PSR in connection with an appearance before the Parole Board (*Matter of Legal Aid Bureau of Buffalo, Inc. v Armer*, 74 AD2d 737 [4<sup>th</sup> Dept. 1980]), but not in connection with an appeal from a Parole Board decision, unless there is an indication “in the record” that the Board considered the PSR in rendering its decision (*People v Allen*, 243 AD2d 1039, 1040 [3d Dept. 1997]). The First Department appears to agree (*People v Wright*, 206 AD2d 337 [1<sup>st</sup> Dept. 1994]).

However, here in the Second Department, the Appellate Division has ruled that CPL §390.50 does not grant a defendant any right to obtain a copy of his PSR in connection with a collateral proceeding, and that disclosure in this context is within the sole discretion of the court. See *Thomas v Scully*, 131 AD2d 488 [2d Dept. 1987]. The Appellate Division in the Third Department, which takes the same position, has offered guidance on the proper exercise of this discretion, opining that a court should order disclosure of a PSR only upon a factual showing of the need therefor. See, e.g., *Matter of Gutkaiss v People*, 11 AD3d 845 [3d Dept. 2004]; *Matter of Campney v People*, 279 AD2d 882 [3d Dept. 2001]; *Matter of Blanche v People*, 193 AD2d 99 [3d Dept. 1993].

Some lower courts in the Second Department, including this court, have adopted this standard, and have denied motions to obtain PSRs when the applicants fail to make out a sufficient factual showing of need. See, e.g., *People v Harris*, 187 Misc.2d 591 [N.Y. Sup. Kings Co. 2001]; *People v Zarzuela*, 11 Misc.3d 1076(A), 2006 WL 908628 [N.Y. Sup. Queens Co. 2006]. For example, the court in *People v Harris, supra*, denied a motion to obtain a PSR

because “defendant merely states that he will be appearing shortly before the Parole Board[;] he does not say he has been notified of an upcoming Parole Board hearing” (*People v Harris*, 187 Misc.2d, supra, at 593.) The *Harris* court invited the defendant to renew his application with proof that such hearing had been scheduled.

The defendant in the instant case states that “in order to properly represent himself, a copy of the pre-sentence report is necessary.” In one section of his papers he states that he is currently “in the process of appearing before the Parole Board;” in another section, he quotes the statutory provision noted *supra*, stating that CPL §390.50[2] “provides that pre-sentence reports shall be made available for examination and copying in any appeal.” These assertions not only fail to make out a sufficient factual need for the PSR, they appear contradictory.

The right to the PSR in connection with an appeal applies *only* to the defendant’s direct appeal from judgment. As noted *supra*, the defendant’s direct appeal was filed in December 1998, and decided by the Appellate Division in May 1999.

If the defendant is appealing a decision of the Parole Board, he does not have a statutory right to his PSR, and must provide this court with enough information to establish his imminent need for the report. The defendant should submit a copy of the Parole Board’s decision denying him parole release, and a copy of a letter from the Division of Parole confirming receipt of the defendant’s notice of appeal, and/or advising him as to the deadline for perfecting his appeal.

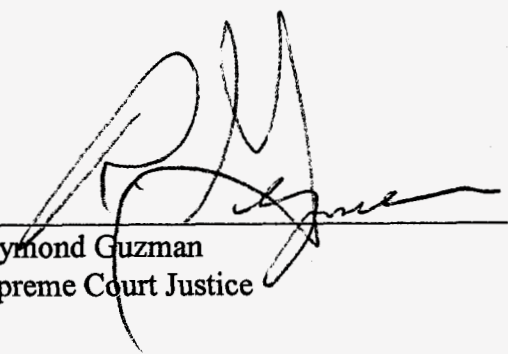
If, instead, the defendant is preparing for a Parole Board appearance, he should provide proof to this court as to when he is next scheduled to appear.

Accordingly, the defendant’s motion to obtain a copy of his pre-sentence report is denied

at this time, without prejudice to renew upon the defendant's submission of additional information, as indicated herein.

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

Dated: April 10, 2007  
Brooklyn, New York



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 counsel 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.



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Justice Raymond Guzman