

**People v Wright**

2007 NY Slip Op 31377(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0001396/1978

Judge: Edward J. McLaughlin

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CRIMINAL TERM: PART 93  
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THE PEOPLE OF THE STATE OF NEW YORK,

— against —

CHARLES WRIGHT,

Defendant.

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EDWARD J. McLAUGHLIN, J.:

**Decision On Motion  
To Vacate Sentence**

**Ind. No. 1396/78**

**INTRODUCTION**

Almost 27 years ago, defendant was convicted of assault in the first degree, and the court adjudicated the defendant to be a persistent felony offender and imposed a persistent felony offender sentence. Defendant proceeded *pro se* at sentencing. The sentencing minutes do not demonstrate whether or not defendant had an opportunity to review the pre-sentence report before the sentencing. He alleges that he never reviewed the pre-sentence report on the day of sentence and argues that he must be resentenced. Defendant’s motion is denied.

**BACKGROUND**

On October 11, 1979, a jury found defendant guilty of assault in the first degree. The conviction arose from defendant’s stabbing a woman in the chest. The court conducted a persistent felony offender hearing and found him to be a discretionary persistent felony offender (*People v Wright*, 104 Misc2d 911 [Sup Ct, NY County 1980]). On June 24, 1980, the court sentenced defendant to a prison term of from 15 years to life. Defendant unsuccessfully appealed his conviction and was denied permission to appeal to the Court of Appeals (111 AD2d 143 [1st Dept], *lv denied* 65 NY2d 822 [1985]).

At the persistent felony offender hearing, the prosecution presented evidence that defendant had committed six prior crimes (*see People v Wright*, 104 Misc2d at 915-916). His first crime was a 1960 conviction for attempted assault in the second degree in which

defendant stabbed a woman. He committed his next five crimes while on parole in 1965. During a five month period in 1965, defendant murdered two women, raped one woman, attempted to rape another woman, and assaulted yet another woman.

After defendant was apprehended, he was indicted for murder, rape, sodomy, and assault. The murder charges were dismissed after defendant's confessions to those crimes were ordered suppressed. Defendant thereafter pleaded guilty one count of rape in the first degree in satisfaction of all charges contained in the indictment and was sentenced to an indeterminate prison term of from 30 to 40 years.<sup>1</sup>

At sentencing, defendant represented himself. The Department of Probation prepared a pre-sentence investigation report. The sentencing minutes are silent about whether the pre-sentence report was provided to defendant on the day of sentencing. The court does not refer to the report at any time before imposing sentence, and defendant does not acknowledge having seen the report or request an opportunity to review the report.

In his post-judgment motion, defendant argues that his sentence must be vacated because the court did not provide him with a copy of the pre-sentence report before sentence was imposed. He alleges that the court did not make a copy of the pre-sentence report available to him on the day of sentence, and that the court did not state any reason for not making the report available to him.

Defendant contends that he would have challenged the contents of the pre-sentence report if he had been given the opportunity to do so. He contends that the pre-sentence report is erroneous because "the report, itself, deals with his conviction of April 6th 1979, instead of his conviction of October 11th, 1979." Defendant's motion does not contain any

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<sup>1</sup> Defendant was paroled in 1977, having served less than one-half of his minimum prison term.

other challenges to the information contained in the report.

The pre-sentence report erroneously lists April 6, 1979, as the date of conviction. On that date, defendant had pleaded guilty. Defendant later withdrew his guilty plea because the court could not honor the promised sentence. Defendant then proceeded to trial and was found guilty by a jury on October 11, 1979.

### LAW

A defendant proceeding *pro se* is entitled to examine and copy the pre-sentence report not less than one day before sentencing subject to the court's authority to except from disclosure certain categories of information (CPL 390.50 [2] [a]). The statute ensures that the defendant has an opportunity at sentencing to contest any information that might negatively influence the court's sentencing decision (*see People v Rogers*, 54 AD2d 616, 617 [4th Dept 1976]).

The CPL specifies when a court can grant or deny a post-judgment motion without conducting an evidentiary hearing. A court must grant a motion to vacate sentence without conducting a hearing when the motion papers allege a legal basis for relief and the factual allegations supporting that legal basis are either conceded to be true or conclusively established by unquestionable documentary proof (CPL 440.30 [3] [a], [c]). A court may deny such a motion without conducting a hearing when the factual allegations needed to support the legal claim are made solely by the defendant and unsupported by any other affidavit or evidence, and no reasonable possibility exists that the defendant's allegations are true (CPL 440.30 [4] [d] [I], [ii]). If the court does not grant or deny the motion in the fashion described above, the court must be required to conduct a hearing to allow the defendant the opportunity to prove by a preponderance of evidence every fact essential to support the motion (CPL 440.30 [5]).

The statutory requirements for granting a post-judgment motion without an evidentiary hearing have not been satisfied. The prosecution does not concede the truth of the defendant's allegation that he did not view the pre-sentence report before the court imposed sentence. Nor has defendant substantiated that sworn allegation by unquestionable documentary proof. The sentencing minutes are silent about whether defendant viewed the pre-sentence report and therefore cannot constitute unquestionable documentary proof supporting defendant's allegation. The court might have given a copy of the pre-sentence report to the defendant before proceedings were conducted on the record and neglected to mention that fact for the record.<sup>2</sup>

An evidentiary hearing might have been appropriate in this case if defendant had filed his motion sooner, but the time for conducting a meaningful hearing has long passed. Defendant was sentenced nearly 27 years ago. The sentencing judge is dead, and any other potential witnesses, even if still alive after 27 years, cannot be expected to recall such an insignificant event as whether defendant reviewed his pre-sentence report on the day of sentencing. The passage of time eliminates any reasonable possibility that an evidentiary hearing would produce a preponderance of credible evidence supporting defendant's personal factual allegation. Defendant is solely responsible for this situation, and he has provided no explanation for why he waited until December 2006 to litigate an alleged violation of CPL 390.50. This court, therefore, denies defendant's motion without conducting an evidentiary hearing (*see* CPL 440.30 [d] [i], [ii]).

In any event, defendant was not prejudiced by any alleged denial of an opportunity to review the pre-sentence report on the day of sentence. He received the minimum sentence

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<sup>2</sup> Notably, defendant does not explicitly allege that he did not have an opportunity to review the pre-sentence report before proceedings were conducted on the record.

allowed by law for a persistent felony offender (*see* PL 70.10 [2]). Although the court was not legally required to impose such a sentence after adjudicating defendant a persistent felony offender (*see* CPL 400.21 [9]), the evidence at the persistent felony offender hearing, which defendant had an opportunity to contest, easily supported a decision to impose such a sentence. According to that evidence, defendant's criminal history included a five-month crime spree that included two murders, a rape, an attempted rape, and an assault. The only erroneous information identified by defendant—that the pre-sentence report lists the date of conviction as the date of a guilty plea that was later withdrawn—could not have possibly influenced the court's decision about whether or not to impose a persistent felony offender sentence. The purpose of the CPL 390.50 would not be served by ordering a resentencing so defendant could contest the alleged inaccuracy contained in his pre-sentence report.

Defendant's motion is denied.

Dated: May 1, 2007

 EDWARD J. McLAUGHLIN