THE PEOPLE OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

KENNETH DEFGRIFFENREIDT,

Defendant.

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DECISION AND ORDER
Indictment #222/85

RAYMOND GUZMAN, J.S.C.

On May 5, 1986, the defendant in the captioned case was found guilty by jury verdict of robbery in the third degree. On May 27, 1986, judgment was entered and the defendant was sentenced to an indeterminate prison term of 1-1/3 to 4 years (Owens, J., at trial and sentence). The defendant is currently incarcerated pursuant to a subsequent conviction in an unrelated case.[1]

In hand-written papers dated March 27, 2007, and referred to this court on May 16, 2007, the defendant now moves *pro se*, pursuant to CPL §440.10, to vacate judgment in the captioned case. On June 15, 2007, the People filed papers in opposition to the defendant's motion.

This court has reviewed the papers filed by both parties, including the exhibits attached thereto, and the documents contained in the Supreme Court case file, including the minutes from the defendant's sentence proceeding on May 27, 1986. For the reasons set forth below, the defendant's motion is summarily denied.

History of the Captioned Case

On January 4, 1985, the then-19-year-old defendant was arrested for robbing a woman on

[1] According to the People, the defendant was convicted of attempted murder and kidnaping, both in the 2nd degree, in 1994, and is now serving a sentence of 31 years- to- life.

a subway train; he was subsequently charged by Indictment #222/85 with robbery and grand larceny, both in the third degree. The defendant was represented at arraignment and throughout the proceedings by counsel associated with the Legal Aid Society (LAS) – initially by Collette Carpenter, Esq., and as of June 1985 (if not earlier), by Stephanie Benson, Esq. Documents in the court file for the captioned case indicate that LAS had also represented the defendant before the same court (Owens, J.) in a previous, unrelated case (Indictment #5153/84).[2]

Court records reflect that during the 16-month pendency of the captioned case, the parties made efforts to negotiate a disposition, and that the court (Owens, J.) ordered a "pre-pleading investigation" on October 17, 1985. Meanwhile, counsel also undertook to have the defendant evaluated psychologically.

The court file contains a ten-page psychological report prepared by Dr. Goldklang, of Kenwood Psychological Services, who interviewed and administered tests to the defendant on March 23, 1985. In his report, Dr. Goldklang presented the defendant's account of his childhood, much of which was spent in foster care and Division For Youth custody, and summarized the results of his tests. With respect to the latter, Dr. Goldklang determined, *inter alia*, that the defendant had a "full scale" I.Q. of 76 ("functioning intellectually in the borderline range"), but observed that the defendant's "powers of attention, concentration and recall" were

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[2] The minutes of the sentence proceeding in the captioned case include counsel Benson's reference to the defendant's previous guilty plea to robbery (under Indictment #5153/84), and the court's acquiescence to then-counsel Carpenter's request that the defendant be placed in "J-Cap." The court file includes a letter to Judge Owens, dated 11/29/84, from a social worker and counselor for LAS, who evaluated the defendant at Ms. Carpenter's request, and recommended J-Cap, a residential therapeutic program serving "not only drug abusers but youths such as [the defendant] who have been unable to adjust in the community." According to Ms. Benson's comments at sentencing in the captioned case, and other documents in the file, the defendant quit J-Cap on his first day in the program because he would have been required to remove his earring, cut his hair, and participate in drug counseling even though he did not abuse drugs.

"sound," and opined that the defendant was "capable of more effective intellectual functioning." Dr. Goldklang also opined that the defendant suffered from "an adjustment disorder with mixed emotional features," but "would likely not warrant a diagnosis of psychopathology if he were given help." Dr. Goldklang concluded that jail would be an inappropriate "placement" for the defendant, and recommended that he be sent to a "structured facility such as a group home for adolescents and young adults," and provided with academic, vocational, and counseling services.

The court file also contains a fourteen-page "alternative sentencing proposal," submitted to the court on September 3, 1985, at counsel's request, by Federation Employment and Guidance Service [FEGS]. This proposal, which also relates the defendant's personal history and refers to Dr. Goldklang's findings, recommended that the defendant be sentenced to a period of probation, during which he would be required to participate in vocational training and undergo psychological counseling, while living in the stable home environment offered by the defendant's sister. Like Dr. Goldklang, the authors of this proposal remarked that the defendant appeared more intelligent than the tests had indicated.

However, efforts to negotiate a disposition of the captioned case proved unsuccessful, and the defendant's trial began on April 29, 1986.

After the defendant was found guilty, counsel re-submitted the FEGS sentencing proposal to the court, with a cover letter asking that it be considered "in lieu of a formal presentence report." In her letter, Ms. Benson urged compassion for the defendant, and mentioned that he had recently "come into a moderately-sized inheritance."

At the sentence proceeding on May 27, 1986, counsel offered a lengthy oral statement on the defendant's behalf, referring to his difficult life and describing him as "kind" and

"cooperative;" as in her letter to the court, Ms. Benson mentioned the defendant's inheritance, urged compassion, and asked the court to give the defendant "youthful offender treatment" and to impose the sentence proposed by FEGS. For his part, the defendant thanked Ms. Benson, and thanked the court, promising that when this was over, the court would never see him again.

Nevertheless, the court declined to give the defendant "YO" treatment, noting that he had done so in the "previous case,"[3] and sentenced the defendant to the prison term indicated *supra*. The court clerk advised the defendant that he could appeal by filing a "notice of appeal" within thirty days, and that if he could not afford to retain counsel, he could write to the Appellate Division to ask that counsel be provided to prosecute his appeal free of charge.

With counsel's assistance, the defendant *pro se* filed a timely notice of appeal in papers dated June 2, 1986, and in papers dated July 30, 1986, counsel filed a motion to set aside the defendant's sentence. The motion to set aside the sentence was denied on September 15, 1986 (Owens, J.). Apparently, the defendant never applied to the Appellate Division *in forma pauperis* for appointed appellate counsel, and never perfected an appeal.

The Pertinent Statutes

CPL §440.10 provides that a court may grant a defendant's motion to vacate a judgment of conviction at any time after such judgment is entered on a number of grounds, including the ground that it was obtained in violation of one or more of the defendant's constitutional rights (CPL §440.10[1][h]); one such right is the defendant's right to effective assistance of counsel at trial. The statute further provides that the court may deny a motion to vacate judgment without a hearing, *inter alia*, when the moving papers fail to allege a ground constituting a legal basis for

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[3] Presumably, the court was referring to Indictment #5153/84 (see *fn.* 2, *supra*).

the motion; and/or when an allegation of fact essential to support the motion is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and when under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true (CPL§440.30[4][a]; [4][d]).

CPL §730.30[1] provides that a court wherein a criminal action is pending against a defendant must order an examination (pursuant to the procedures in CPL §730.20) when such court is of the opinion that such defendant may be an "incapacitated person." Under CPL §730.10[1], an incapacitated person is defined as a person "who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense."

The Defendant's Motion to Vacate Judgment

The defendant asserts that the judgment against him in the captioned case should be vacated on the ground that due to ineffective assistance of trial counsel, he (1) was denied his "constitutional right" to appeal the conviction, and (2) did not receive a psychiatric examination pursuant to CPL §730, which would have shown that he was incompetent to stand trial.

Specifically, the defendant asserts that his trial counsel "erroneously failed" to file papers enabling him to pursue an appeal "as a poor person" and to obtain court-appointed appellate counsel. The defendant adds that he did not file his instant motion sooner because he only recently learned that no appeal was pursued -- the defendant states that he received a letter "provided by the Second Judicial Department dated March 13, 2007,"advising that the notice of appeal was filed on June 10, 1986, and that "appeal is still pending and the case is still open."[4]

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[4] The defendant does not submit a copy of this letter, but for reasons not clarified in the defendant's motion, he submits a copy of a document from the 2nd Circuit U.S. Court of Appeals, dated 3/30/05, dismissing the defendant's appeal in an unrelated matter (*Degraffenriedt v Gianotta*, Docket #02-0238-pr) for failing to pay the docketing fee or move to proceed *in forma pauperis*.

The defendant also alleges that counsel neglected her duty to investigate the defendant's background to determine his ability to assist in his defense, and contends that had she done so, she would have discovered that he was "semi-retarded, with an IQ of 49," and "not mentally fit to stand trial, let alone take the stand." The defendant asserts that his "mental disease" also rendered him "lacking substantial capacity" to assist counsel in filing his "notice of appeal" [*sic*]. The defendant faults counsel for not requesting a CPL §730 examination, and the court for not ordering one *sua sponte*.

In purported support of the allegation that he was mentally unfit to stand trial, the defendant submits a one-paragraph report from the Attica Correctional Facility Office of Mental Health, dated June 26, 1986, in which a psychologist states that he administered tests to the defendant and determined that the defendant's full scale IQ was 49, placing him in the "moderate retarded range of intellectual functioning."

The People's Response

The People argue that the defendant's claims should be summarily rejected in their entirety. First, they point out that the record unequivocally establishes that the defendant's trial counsel filed a proper notice of appeal on the defendant's behalf, and suggest that the defendant may have confused "filing a notice of appeal" with "perfecting an appeal." They state that the latter involves *inter alia*, filing a brief and the transcript of the trial court proceedings, and is not trial counsel's responsibility. The People assert that it was the defendant's responsibility to ask the Appellate Division to appoint counsel to assist him in prosecuting an appeal "as a poor person," and that the defendant was so advised at his sentence proceeding.

Accordingly, the People ask that the defendant's motion to vacate judgment on the

ground that his trial counsel's ineffective assistance denied him his right to appeal be summarily denied under CPL §440.30[4][a].

Second, the People contend that there is no basis for believing that the defendant's mental state rendered him unfit to proceed at trial. The People maintain that the reports in the court file (referenced *supra*) establish that the defendant was "of normal intelligence, communicative and cooperative;" they further contend that even if the Attica psychologist's post-trial calculation of the defendant's IQ [as being in the "moderate retarded" range] was accurate, it does not prove, nor does the Attica psychologist assert, that the defendant was incompetent to proceed at trial.

The People state that the test for fitness to proceed is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him," citing *People v Picozzi*, 106 AD2d 413 [2d Dept. 1984] (quoting *Dusky v United States*, 362 U.S. 402 [1960], and *People v Francabandera*, 33 NY2d 429, 436 [1974]). They argue that the record establishes that the defendant met that test according to the factors listed by the court in *People v Picozzi, supra*, namely, whether the defendant "(1) is oriented as to time and place; (2) is able to perceive, recall and relate; (3) has an understanding of the process and the roles of the judge, jury, prosecutor and defense attorney; (4) can establish a working relationship with his attorney; (5) has sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate (without necessarily adopting) the fact that one course of conduct may be more beneficial to him than another; and (6) is sufficiently stable to enable him to withstand the stresses of trial without suffering a serious prolonged or permanent breakdown." The People point out that even the Attica psychologist noted that the defendant was "oriented in time, place and person," and suffered from no "overtly psychotic condition."

Thus, the People submit, because neither counsel nor the court would have had reason to doubt the defendant's fitness to proceed, counsel's failure to request a competency examination under CPL §730 did not constitute ineffective assistance. The People cite *People v Benevento*, 91 NY2d 708 and *People v Hobot*, 84 NY2d 1021, to note that a defendant alleging ineffective assistance of counsel has the "onerous" burden of establishing that he was denied "meaningful representation," *i.e.*, that counsel committed an "egregious and prejudicial" error, which was not justifiable for any legitimate reason, and seriously compromised the defendant's right to a fair trial. The People assert that the defendant has not met this burden.

Accordingly, the People urge that the defendant's claim that he was incompetent to proceed at trial, and/or that his counsel's failure to request a "730" examination constituted ineffective assistance, be summarily rejected under CPL §440.30[4][d].

Decision

The Defendant's Right to Appeal. Contrary to the defendant's contention, neither the state (see, *e.g., Handy v Butler*, 183 AD 359 [1918]) nor federal constitution(see, *e.g., Martinez v Court of Appeal*, 528 US 152 [2000]) guarantees the right to appeal or the right to counsel in appellate proceedings. The right to appeal is conferred by statute, and when a state confers such right, due process requires that the state provide counsel to the indigent to "make certain that criminal defendants receive the careful advocacy needed to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over"(*People v West*, 100 NY2d 23, 28 [2003]). However, such defendants must "affirmatively exercise and timely assert" their statutory appellate rights; a "defendant who is properly informed of his appellate rights," including an indigent defendant's right to obtain assigned appellate counsel through application to the Appellate Division, "may not let the matter rest," or he may be found to have

abandoned his appeal. See *Id.* at 26.

The record establishes that the defendant was told at his sentencing that he could apply to the Appellate Division for appointed appellate counsel; shortly thereafter, the defendant's trial counsel not only assisted the defendant in filing a timely notice of appeal, but also filed papers moving to set aside the defendant's sentence. Trial counsel was not ineffective for not also prosecuting an appeal on the defendant's behalf; as noted *supra*, it is the defendant's responsibility to assert and exercise his statutory appellate rights.

The CPL §730 Examination. The defendant's allegation that his counsel inadequately investigated his background and mental ability is manifestly false; indeed, it is hard to imagine that counsel (Ms. Benson and her predecessor Ms. Carpenter) could have been more thorough.

Although it appears that counsel did not seek a court-ordered CPL §730 examination in the captioned case, it is clear that counsel had the defendant evaluated by a psychologist [Dr. Goldklang] in March 1985, and by a social service agency [FEGS] several months later. As noted *supra*, both stated that the defendant seemed more intellectually capable than indicated by his IQ test score, which placed him on the borderline between low-average intelligence and mild mental retardation. In addition, the defendant was evaluated by a social worker and counselor for LAS in November 1984, in connection with his previous case (see *fn.* 2, *supra*), who remarked that the defendant presented himself as someone with "at least average intelligence."

Due process prohibits the prosecution of an incapacitated person, *i.e.*, a person who by reason of mental disease or defect lacks the capacity to understand the proceedings against him or to act in his own defense (CPL §730.10[1], *supra*). See, *e.g.*, Preiser, Practice Commentaries, McKinneys Cons Laws of NY, Book 11A, CPL 730.10, at 442, citing *Medina v California*, 1992, 112 S.Ct. 2572. However, defendants are "presumed competent," and a court is under no

obligation to issue an order of examination before permitting a prosecution to proceed, unless it has reasonable ground to believe that a particular defendant is an incapacitated person. See, *e.g.*, *People v Morgan*, 87 NY2d 878 [1995].

Contrary to the defendant's suggestion, mental retardation does not necessarily render a person "incapacitated" under CPL §730 (see, e.g., People v Miranda, 125 AD2d 418 [2d Dept. 1986]), but in any event, the question is inapposite to the captioned case. In the seventeen months preceding the defendant's trial in April 1986, the defendant was professionally evaluated at counsel's request on at least three separate occasions, and was not only *not* diagnosed as being retarded, the consensus was that his intellectual ability appeared to be low-average or average. Accordingly, this court agrees with the People that the record suggests no reasonable ground for either the defendant's counsel or the trial court, both of whom had dealt with the defendant over a period of time, to have believed that the defendant was an incapacitated person.

In conclusion, this court finds that far from rendering ineffective assistance, the record establishes that the defendant's counsel in the captioned case represented him vigorously, thoroughly, and with dedication.

Accordingly, the defendant's motion to vacate judgment is summarily denied in its entirety, pursuant to CPL §440.30[4][a] and [4][d].

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

Dated: June 28, 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 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

ENTERED

JUN 2 9 2007

NANCY T. SUNSHINE
COUNTY CLERK