

**People v Turner**

2007 NY Slip Op 33795(U)

October 12, 2007

Supreme Court, Kings County

Docket Number: 0006160/1996

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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

-against-

DECISION AND ORDER  
Kings County  
Indictment Number 6160/96

HALBERT TURNER,  
Defendant.

-----X

Chambers, Cheryl E., J.

Defendant pro se moves pursuant to CPL 440.20 to set aside the sentence imposed upon his conviction of robbery in the first degree. His motion is denied.

**FINDINGS OF FACT**

On February 15, 1996, at McDan's Hotel in Brooklyn, defendant, who lived at the hotel, and an unapprehended man, both wearing ski masks, took money and jewelry from a supervisor at the hotel at gunpoint. Defendant and his accomplice also took a watch from Jacqueline Vargas, the desk clerk of the hotel.

For these acts, defendant was charged, by Kings County Indictment Number 6160/96, with robbery in the first degree, two counts of robbery in the second degree, robbery in the third degree, assault in the second and third degrees, unlawful imprisonment in the second degree, two counts of grand larceny in the fourth degree, and petit larceny. He was convicted by a jury of robbery in the first degree.

On June 17, 1997, at the sentencing proceeding, defendant controverted an allegation in the statement filed by the People setting forth defendant's predicate violent felony convictions. The court held a hearing pursuant to CPL 400.16 (2) and found that defendant had three predicate violent felony convictions and, as he stood convicted of a violent felony offense, was,

therefore, a mandatory persistent violent felony offender. The court imposed an indeterminate sentence of 25 years to life in prison.

The judgment of conviction was affirmed (*People v Turner*, 265 AD2d 588 [2d Dept 1999]). Leave to appeal to the Court of Appeals was denied (*People v Turner*, 94 NY2d 908 [2000]).

In support of his present motion, defendant contends that the court held a hearing pursuant to CPL 400.20, and found, inter alia, that “the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest” (CPL 400.20[1]). He argues that the Supreme Court, in *Cunningham v California*, 127 S Ct 856 (2007), held that such fact-finding by the judge during a sentencing proceeding violates the Sixth Amendment right to a jury trial.

#### CONCLUSIONS OF LAW

Penal Law 70.08 (1) (a) defines a persistent violent felony offender as a person who stands convicted of a violent felony offense after having previously been subjected to two or more predicate violent felony convictions. Penal Law 70.08 (2) and (3) provide that when the court has found that a person is a persistent violent felony offender, and stands convicted of a B violent felony offense, the court must impose an indeterminate sentence with a maximum of life and a minimum of at least 20 years and not more than 25 years. After a hearing, the court found that defendant was a persistent violent felony offender and sentenced him in accordance with the statutory mandate (*People v Carter*, 280 AD2d 977 [4<sup>th</sup> Dept 2001], *lv denied* 96 NY2d 679 [2001]).

Defendant does not challenge the court's finding. Rather, he challenges an additional finding he claims the court made regarding his history and character. He argues that under *Cunningham* a sentence imposed upon such a finding is violative of his Sixth Amendment right to a jury trial.

Defendant is mistaken. The court made no finding regarding his history and character. He was sentenced as a mandatory persistent violent felony offender based solely upon his prior convictions. Moreover, the *Cunningham* Court recognized that a sentencing court may make findings regarding prior convictions without violating a defendant's right to a jury trial: "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant" (*Cunningham* at 864).

For the foregoing reasons defendant's motion is denied.

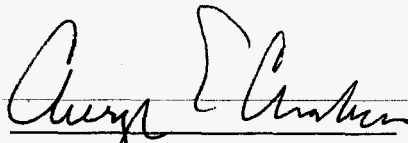
This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the 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 (22 NYCRR 671.5).

Dated: October 12, 2007

ENTER

  
J.S.C.

**ENTERED**  
OCT 17 2007  
NANCY T. SUNSHINE  
COUNTY CLERK