

Proctor v District Attorney, N.Y. County

2008 NY Slip Op 33200(U)

November 19, 2008

Supreme Court, New York County

Docket Number: 401364/08

Judge: Kibbie F. Payne

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

ALLEN PROCTOR

INDEX NO. 401364/08

MOTION DATE 08-28-08

- v -

MOTION SEQ. NO. 002

DISTRICT ATTORNEY, NEW YORK COUNTY

MOTION CALL NO. _____

The following papers, numbered 1 to _____ were read on this motion for

Article 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

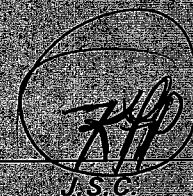
Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgment/Decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: November 19, 2008



Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

-----X
ALLEN PROCTOR,

Petitioner,

Index No. 401364/08

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules

Judgment/Decision

-against-

DISTRICT ATTORNEY, NEW YORK COUNTY

Respondent.

KIBBIE F. PAYNE, J.:

UNFILED JUDGMENT
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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

The petition and petitioner's subsequent summary judgment motion, respectively submitted on August 20, 2008 and August 28, 2008 are consolidated for disposition and are disposed of in the accompanying judgment and decision. In this Article 78 proceeding, commenced by order to show cause, petitioner seeks the disclosure of certain information by respondent pursuant to the New York Freedom of Information Law ("FOIL"). Respondent has answered, seeking dismissal of the proceeding.

Petitioner's summary judgment motion is predicated upon respondent's alleged failure to answer, this motion is premature. At the time petitioner made the motion, respondent's time to answer the petition had not yet expired. Indeed, the instant petition was fully submitted, with opposition.

Petitioner Allen Proctor, currently incarcerated for grand larceny in the fourth degree, submitted a FOIL request to

[* 3]

respondent, seeking "all investigative reports and documents relative to" the criminal action against him. His February 2, 2008 FOIL request, was denied by respondent in a February 20, 2008 letter, which stated that the "[d]isclosure of documents during pending proceedings would interfere with the handling of the appeal as well as with any further investigation that might be necessary" (Petition at unnumbered exhibit). The appeal to which the letter refers is petitioner's appeal of his grand larceny conviction, an appeal that petitioner admits is currently pending.

Thereafter, petitioner challenged the denial, claiming that the request was improperly denied. Specifically, petitioner alleged that the materials he sought were "investigative documents to assist him in his forthcoming CPL 440 motion to vacate judgment [in the underlying criminal conviction]" (Petitioner's March 4, 2008 letter). Thereafter, on April 4, 2008, respondent informed petitioner by letter that it was upholding its February 20th determination, finding that petitioner's pending appeal barred access to the requested materials.

Petitioner then commenced the instant proceeding. In his petition, Mr. Proctor states that he "cannot effectively argue either his (primary goal) CPL 440 motion or (secondary goal) direct appeal without the disclosure of [the subject] substantive

[*4]
and vital documents" (Petition, ¶ 18). According to petitioner, the documents he seeks will reveal "that his constitutional and statutory jurisdictional right to a facially sufficient accusatory instrument was infringed and violated" (*id.*, ¶ 5).¹

Denial of a FOIL request is proper where the disclosure of the materials sought by petitioner "would have interfered with petitioner's then still pending criminal appeal and any subsequent proceedings within the same prosecution" (*Matter of Moreno v. New York County Dist. Attorney's Off.*, 38 AD3d 358, 359 [1st Dept 2007]; see also *Sideri v. Office of the DA*, 243 AD2d 423, 423 [1st Dept 1997]). Here, it is undisputed that petitioner has a pending criminal appeal regarding his underlying criminal conviction. While respondent claims that the disclosure of these materials would interfere with that pending appeal, petitioner has failed to cite any law that militates for such disclosure in the face of the claimed interference.

Finally, although petitioner requests that "counsel be assigned [to him] with expediency" (Petitioner's Letter dated July 18, 2008), he cites neither statute nor law that would provide for the assignment of counsel in this civil proceeding. In the instant proceeding, the relief that petitioner seeks do

¹ Although petitioner submits additional affidavits, the court will not consider those portions of the documents that raise new allegations or arguments, which were not set forth in the petition.

not merit assignment of counsel (*Planck v. County of Schenectady*, 51 AD3d 1283 [3d Dept 2008]; see also *Morgenthau v. Garcia*, 148 Misc 2d 900 [Sup Ct, NY County, Jun. 11, 1990]). Accordingly, it is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

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

Dated: November 19, 2008

ENTER:



KIBBIE F. PAYNE
J.S.C.

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TABLE
appear in person at the trial (p. 10)
with sufficient evidence to sustain the
charge of murder. The jury was
informed of this fact and the jury
found the defendant guilty of murder.