

**People v Davis**

2008 NY Slip Op 33541(U)

October 21, 2008

Supreme Court, Kings County

Docket Number: 8801/95

Judge: William E. Garnett

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

THE PEOPLE OF THE STATE OF NEW YORK  
  
-against-  
  
RONALD DAVIS,  
  
Defendant.

DECISION AND ORDER

Ind. # 8801-95

Date: October 21, 2008

By: Hon. William E. Garnett

By notice of motion, dated on August 1, 2008, the defendant moves pro se, pursuant to CPL §390.50, for an order directing the New York City Department of Probation to provide him with a copy of the pre-sentence report prepared for the instant indictment.

The defendant contends, in his affidavit, that he needs the pre-sentence report to litigate the Board of Parole's denial of his application for parole release which is the subject of an Article 78 proceeding pending in the Albany County Supreme Court. In support of this application, the defendant has annexed, as "Exhibit A", an Order to Show Cause demonstrating that an Article 78 proceeding has been commenced against the New York State Board of Parole. The defendant also asserts that he needs the pre-sentence report so that he may ascertain the information prison officials are using for "(a) security classification; (b) necessity of rehabilitation programs; (c) eligibility for the rehabilitative programs; and (d) used by the Parole Board." Affidavit, pp 2-3.

The New York City Department of Probation submitted a letter to

the Court that the "the Department hereby waives notice and an opportunity to be heard on motions for the release of PSI's, thereby allowing the courts to deal with these motions ex parte."

The Court has obtained a copy of the Parole Board's decision denying the defendant's application for parole release. The decision indicates that the Parole Board reviewed the "record" and interviewed the defendant. The decision also recites facts about the commission of the crime.

#### LAW

Pursuant to CPL §390.50[1], a pre-sentence report "is confidential and may not be made available to any person ... except where specifically required or permitted by statute or upon specific authorization of the court."

A defendant has no constitutional right to a copy of the pre-sentence report. People v. Peace, 18 NY2d 230 [1966]). A defendant does, however, have a statutory right to review or obtain a copy of the pre-sentence report prior to sentencing and for the purposes of appeal. CPL §390.50[2][a]). These provisions do not apply in this case.

Pursuant to CPL §390.50[1], a court, in the exercise of its discretion, may permit the disclosure of a pre-sentence report even in a collateral proceeding where the defendant makes a proper factual showing of need. Matter of Shader v. People, 233 AD2d 717

[3<sup>rd</sup> Dept. 1996]; Matter of Kilgore v. People, 274 AD2d 636 [3<sup>rd</sup> Dept. 2000]; People v. Zarzuela, 11 Misc3d 1076(A) [Sup. Ct., Queens Co. 2006]; People v. Peete, 4 Misc3d 597 [Sup. Ct., Queens Co. 2004]; People v. Delatorre, 2 Misc3d 385 [County Ct., Westchester Co. 2003].

A court may authorize disclosure of the pre-sentence report where the report may have been considered by the Parole Board in denying parole release. Matter of Shader v. People, 233 AD2d 717 [3<sup>rd</sup> Dept. 1996]. In Matter of Shader v. People, supra, the defendant's application for parole release had been denied by the Board of Parole. The defendant filed an administrative appeal from that determination with the Division of Parole. The court held that the defendant made an adequate "showing inasmuch as a presentence report is one of the factors required to be considered by the Board of Parole upon application for release (see, Executive Law §259-i[1][a];[2][c])"; People v. Peetz, 4 Misc3d 597 [Supreme Court, Queens Co. 2004].

Subsequently, in the Matter of Allen v. People, 243 AD2d 1039 [3<sup>rd</sup> Dept. 1997], the Third Department adopted a more restrictive standard for releasing pre-sentence reports. In this case, the defendant's application for parole release had been denied. Prior to completing his administrative appeal of the Board's decision, the defendant requested a copy of the pre-sentence report which he contended was utilized by the Board in denying his request for parole. The court held that the mere fact that the report may have

been the basis for the Board's denial of the defendant's parole application was insufficient to warrant release of the pre-sentence report. The court explained that there must be "some indication in the record" that the Board actually considered the report when rendering its decision. The defendant made no such showing. Cf. People v. Delatorre, 2 Misc3d 385 [County Court, Westchester 2003][sufficient showing made that it could be inferred from the decision of the Parole Board that the Board relied upon information contained in the pre-sentence report].


The defendant asserts that he needs a copy of the report for his pending Article 78 petition challenging the Board of Parole's denial of parole release. The Court has obtained a copy of the Board of Parole's decision which the defendant is contesting. The pre-sentence report is one of the factors that the Board is required to consider upon application for release. Executive Law §259-i[1][a];[2][c)"; People v. Peetz, supra. The Board's decision indicates that it conducted "a review of the record." It can be presumed therefore that the Board followed the law and considered the pre-sentence report before the Board denied parole. Moreover, this presumption that the Board considered the report is buttressed by the fact that the Board summarized the facts of the crime in its decision. Thus, under the standard set forth in the cases cited above, the defendant is entitled to the pre-sentence report.

Based on the foregoing analysis, the defendant's motion for release of his pre-sentence report is granted to the extent that the

Department of Probation is directed to redact any and all confidential materials, including but not limited to names, addresses, and telephone numbers and thereafter is further directed to send a copy of the redacted report to the defendant. People v. Shader, supra; People v. Delattore, supra; People v. Peetz, supra. This relief is granted solely for the purpose of providing the report for the pending Article 78 proceeding.

This opinion shall constitute the decision and order of the court.

Dated: October 21, 2008  
Brooklyn, New York

  
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William E. Garnett  
A.J.S.C.

HON. WILLIAM GARNETT

**ENTERED**  
OCT 22 2008  
NANCY T. SUNSHINE  
COUNTY CLERK