

**People v Pender**

2010 NY Slip Op 32833(U)

August 20, 2010

Supreme Court, Kings County

Docket Number: 4153/79

Judge: Sheryl L. Parker

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**SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY: PART 5**

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<p><b>THE PEOPLE OF THE STATE OF NEW YORK,</b></p> <p style="text-align: center;">-vs-</p> <p><b>RICKY PENDER,</b></p> <p style="text-align: right;"><b>Defendant.</b></p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p><b>Decision and Order</b></p> <p><b>Indictment: # 4153/79</b></p>
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**JUSTICE SHERYL L. PARKER**

Defendant moves *pro se* for this Court to vacate his judgment pursuant to C.P.L. § 440.10(1)(c) and (h) and set aside his sentence pursuant to §440.20(1). After review of the defendant’s motion, the People’s response and the court records, the following is the Court’s decision.

On November 26, 1980 the defendant plead guilty to assault in the first degree under indictment 203/80. The promised sentence was two and one third to seven years incarceration. This matter stemmed from a November 20, 1979 shooting of Steve Jones. The defendant, who was fifteen years old at the time, and Jones got into an altercation and the defendant shot Jones in the back, causing serious physical injury. The defendant, through his defense counsel, also negotiated a sentence of seven years to life for pleading guilty to murder in the second degree as a Juvenile Offender under indictment 4153/79. This matter stemmed from a December 7, 1979 shooting of Jodi Stoudemire for a sheepskin coat. The defendant approached Stoudemire and

demanded his sheepskin coat. When Stoudemire refused, the defendant shot him in the neck area one time and removed his coat after Stoudemire had fallen to the ground mortally injured.

On January 12, 1981, the defendant was sentenced as promised, each indictment to run concurrently with the other. On August 6, 1984, the defendant's sentences were affirmed by the Appellate Division, Second Department. (*People v. Pender*, 104 A.D.2d 539 [2d Dept 1984].) On September 21, 1984, permission to appeal to the Court of Appeals was denied. (*People v. Pender*, 63 N.Y.2d 778 [1984].)

The defendant now puts forth various bases for vacation of his conviction and sentence on indictment 4153/79 relating to the circumstances of Stoudemire's death. The first claim is that the defendant's conviction resulted from the introduction of false material evidence and should therefore be vacated. The second claim is that defense counsel failed to conduct a pre-trial investigation and failed to inform the defendant about a conflict between the autopsy report and other evidence and therefore, he was deprived of meaningful representation. The defendant asserts that because of this failure to investigate where on his body Stoudemire was shot and failure to inform defendant about a purported discrepancy in paperwork, he was deprived of meaningful representation and stresses that a lesser sentence could have been negotiated had an investigation occurred. The third claim is that the court relied on false information at sentencing. The defendant claims that the police reports, accusatory instrument, and pre-sentence probation report contain information that creates a false impression of material fact in that the victim was shot twice in the head. The defendant also claims that the New York State Division of Parole continues to rely on that false material evidence to keep him incarcerated. Finally, although

defendant claims that the pre-plea investigation should be changed because the interviewing probation officer characterized the defendant as antisocial; this is beyond the scope of a motion to set aside a sentence.<sup>1</sup>

C.P.L. §440.10(1)(c)

The defendant's claim under C.P.L. §440.10(1)(c) fails because the statute is only applicable to material evidence adduced at trial and here, there was no trial; the defendant plead guilty to the indictment. Therefore, the defendant's claim is denied.

C.P.L. §440.10(1)(h)

The defendant's claim that defense counsel failed to conduct a pre-trial investigation and failed to inform him about a conflict between the autopsy report and other evidence and therefore he was deprived of meaningful representation is without merit. An attorney provides effective assistance of counsel when the evidence, the law, and the circumstances of a particular case are considered together and show that the attorney provided meaningful representation. (*People v. Baldi*, 54 N.Y.2d 137, 147 [1981].) Under federal law, for a defendant to prove ineffective assistance of counsel he must show that the attorney's performance fell below an objective

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<sup>1</sup>The defendant's claim that the pre-plea investigation report should be altered because the probation officer stated that "we feel society should be protected from defendant's anti-social behavior" is without merit and this court lacks jurisdiction to address the claim. (*People's 6*.) Any challenges to a probation report must have been made prior to sentence. (*Matter of Sciaraffo v. New York City Dept. of Probation*, 248 A.D.2d 477 [1998].) A court lacks jurisdiction to amend a probation report after sentencing. (*People V. Elliot*, 803 N.Y.2d 20 [2005].) Therefore, here, no amendment of the pre-plea investigation report is warranted. Additionally, the defendant puts forth no legal basis upon which his conviction should be vacated due to the pre-sentence report's characterization of antisocial behavior. (C.P.L. 440.10.)

standard of reasonableness and therefore prejudiced the defendant. (*Strickland v. Washington*, 466 U.S. 668 [1984]; *Hill v. Lockhart*, 474 U.S. 52 [1985].) Under state law, when a defendant pleads guilty and then claims ineffective assistance of counsel the defendant must show that he did not receive an advantageous plea and that something in the record casts doubt on the apparent effectiveness of counsel. (*People v. McClure*, 236 A.D.2d 633 [2d Dep't 1997].) When a defendant reaped the benefits of a favorable plea and the record does not cast doubt on the effectiveness of counsel, he has received adequate representation. (*Id.*; *People v. Benevento*, 91 NY2d 708 [1998]; *People v. Aguayo*, 73 AD3d 938 [2<sup>nd</sup> Dept. 2010]). The record of the instant plea illustrates that defense counsel engaged in a conversation with the defendant and his mother regarding the plea agreement. The record also shows that the defendant understood and answered the judge's questions clearly, and defendant indicated that he was voluntarily accepting the plea.

To challenge the voluntariness and intelligence of a guilty plea because of ineffective assistance of counsel the defendant must show that the attorney's representation fell below an objective standard of reasonableness and that the attorney provided constitutionally ineffective counsel that affected the outcome of the plea process. (*People v. McDonald*, 1 NY3d 109 [2003].) However, when a defendant claims that an attorney failed to investigate or discover exculpatory evidence, he must show that the content and nature of the evidence would have caused the defendant to reject a negotiated plea and proceed to trial. (*Id.* at 113.) Therefore, there must be a reasonable probability that but for the attorney's errors the defendant would have not plead guilty and would have insisted on going to trial. (*Id.*)

Defendant does not maintain that he would have insisted on going to trial but instead states that his only misgiving is that he believed that a better plea could have been negotiated. Therefore, taken as a whole, defense counsel provided effective counsel based on evidence, the law, and circumstances of the case.

C.P.L. §440.20

The defendant's claim that the sentencing court relied on the felony complaint which contained materially false evidence that the victim was shot twice in the head as opposed to one time in the neck and that the Parole Board has continued to rely on this false information to keep him incarcerated is unfounded. Under New York law, a person can not be prosecuted solely on a felony complaint. A felony complaint serves only as a basis for commencement of a criminal action. (C.P.L. §100.10.) "[T]he only methods of prosecuting an offense in a superior court are by indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney." (C.P.L. §210.05).

Here, there is no record that the court relied on *any* evidence when accepting the defendant's plea and sentencing the defendant on indictments 4153/79 and 203/ 80. The court simply agreed to the sentence that resulted from a negotiated plea. However, the documents that may have been reviewed for sentencing purposes do not indicate that the victim was shot twice in the head. The indictment against the defendant is silent as to where the victim was shot. The autopsy report reveals that the deceased was shot one time in the "suprasternal notch", which is the soft dip below the throat, above the sternum, between the clavicle bones.<sup>2</sup> The cause of

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<sup>2</sup> Merriam-Webster Medical Dictionary

death was determined to be a “bullet wound of the chest with involvement of left innominate vein, left common carotid artery and aorta. Internal hemorrhage. Homicide.” A police report generated indicated that the victim was shot in the throat. The probation report which is reviewed by the court prior to sentence was silent as to where the deceased was shot.

Additionally, by order in March of 1980, the court granted the defendant’s motion to inspect the grand jury minutes. A review by this Court of the grand jury minutes revealed that the death certificate was admitted into evidence and indicated that the victim’s death was a result of a bullet wound to the “chest area”. (*Grand Jury Minutes*, P. 5). Additionally, there was eye witness testimony that the defendant shot the victim in the neck. (*Grand Jury Minutes*, P 9). Therefore, the trial court would have had knowledge that the victim was shot once in the neck and not twice in the head. Finally, the defendant has provided no indicia that the court heard any evidence regarding the victim being shot twice in the head. Consequently, the defendant has failed to provide sworn allegations substantiating the facts alleged. (C.P.L. §440.30[4][b]). Additionally, the defendant has failed to meet the statutory requirement in showing that his sentences were unauthorized, illegally imposed or invalid as a matter of law. (C.P.L. §440.20[1]; §440.30[4][a]).


The defendant’s claim that the New York State Division of Parole has improperly relied on information that the victim was shot twice in the head is irrelevant to the validity of the defendant’s original sentence. The defendant must follow proper procedure for challenging the Parole Board in the jurisdiction in which he is incarcerated not the jurisdiction in which he was prosecuted. (*Silman v. Travis*, 95 N.Y.2d 470, 474 [2000]; *Hogan v. Culkun*, 18 N.Y.2d 330

[1966].) Additionally, the defendant previously raised this issue upon a prior 440.10 motion and that motion was denied. (Marrus, J.) (C.P.L. §440.10[3][b]).

Accordingly, for the above reasons, the defendant's motions to vacate the judgment and set aside his sentence are denied.

The foregoing constitutes the decision and order of the court.

Dated: August 20, 2010  
Brooklyn, New York

  
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SHERYL L. PARKER  
Justice of the Supreme Court

**ENTERED**  
AUG 30 2010  
NANCY T. SUNSHINE  
COUNTY CLERK