SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 921-03

ROBERT BOEHM,

Defendant.

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Motion: Pursuant to CPL 390.50 to Release Pre-Sentence Report

DEFENDANT PRO SE
For the Motion

NEW YORK CITY DEPARTMENT OF PROBATION

BY: GAYLE A. DAVIS, ESQ.

Upon the foregoing papers, and due deliberation had, the motion is granted. See accompanying memorandum this date.

Kew Gardens, New York
Dated: April 7, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19
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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No.: 921-03

ROBERT BOEHM,

Defendant.
----------X

The following constitutes the opinion, decision and order of the Court.

By motion dated March 4, 2005, defendant moves pursuant to Criminal Procedure Law Section 390.50(2) to obtain his pre-sentence report to prepare an appeal.

In response, the New York City Department of Probation has submitted an affirmation, dated March 23, 2005, whereby they take no position with regard to defendant's request for release of the report.[1] However, should the Court order release of a copy of such report, the Department of Probation requests that a properly redacted copy, as per the Court's direction, would be warranted. In their response, the Department opposes any application by defendant to correct the report as untimely. This issue is not before the Court, however, such an application would be denied.[2]

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[1]In their response, the Department of Probation notes that CPL § 390.50(2) specifically states that "the pre-sentence report shall be made available by the court for examination and copying in connection with an appeal in the case, including an appeal under this subdivision."

[2]Challenges to the contents of the pre-sentence report must be raised before sentencing. See Matter of Antonucci v. Nelson, 298 A.D.2d 388, 751 N.Y.S.2d 395 (2d Dept. 2002)(Supreme Court properly denied defendant's attempt to expunge allegedly inaccurate information in pre-sentence report; thus, challenges untimely and should have been raised before sentencing court); see also Matter of Sciaraffo v. New York City Dept. of Probation, 248 A.D.2d 477, 669 N.Y.S.2d 513 (2d Dept. 1998); Matter of Salahuddin v. Mitchell, 232 A.D.2d 903, 649

For the reasons stated herein, defendant's motion for release of the pre-sentence report is granted.[3]

FACTS

Defendant was charged in a three-count indictment filed on June 13, 2003, with the crimes of: Burglary in the Second Degree (PL 140.25[2)]; Grand Larceny in the Third Degree (PL 155.35) and Criminal Mischief in the Fourth Degree (PL 145.00[1]).

On April 29, 2004, after an extensive explanation of his plea and promised sentence, including an in-depth explanation of his post-release parole supervision, defendant voluntarily entered a plea of guilty to Burglary in the Second Degree. The plea was taken pursuant to Alford v. North Carolina, 400 U.S. 25 (1970), and People v. Serrano, 15 N.Y.2d 304 (1965). Defendant waived his right to appeal and executed the appropriate documentation indicating his intent to waive this right.

Defendant was sentenced to seven years incarceration on September 15, 2004 after being arraigned as a Second Violent Felony Offender pursuant to Penal Law Section 70.04.[4]

N.Y.S.2d 353 (3d Dept. 1996); Matter of Gayle v. Lewis, 212 A.D.2d 919, 622 N.Y.S.2d 626 (3d Dept. 1995).

[3]Nevertheless, this Court notes that defendant waived his right to appeal and executed the appropriate documentation indicating his intent to waive this right. The waiver, reviewed and signed by defendant in court states: "The undersigned defendant in consideration of and as part of the plea agreement being entered into, hereby waives any and all rights to appeal from the judgement [sic] of conviction herein including but not limited to any and all 4th, 5th, 6th amendment rights; any pre-trial motions, hearings, or issues; [and] any issues regarding plea and sentence." A copy of the original waiver is part of the Court file. Thus, should defendant perfect an appeal, the validity of such waiver will be determined by the Appellate Division.

[4]In a prior motion before this Court, defendant moved to withdraw his negotiated plea upon the ground that his rights under the Sixth Amendment had been violated. Additionally, defendant moved for reassignment of counsel. This Court denied defendant's applications in a decision dated August 30, 2004.

Release of Pre-Sentence Report

Criminal Procedure Law Section 390.50 addresses disclosure of pre-sentence reports. In general, subdivision one states that: "except where specifically required or permitted by statute or upon specific authorization of the court," a report by the probation department in connection with a defendant's sentence is confidential. There is no constitutional right to a copy of a pre-sentence report. See People v. Peace, 18 N.Y.2d 230, 273 N.Y.S.2d 64 (1966). See People v. Delatorre, 2 Misc.3d 385, 767 N.Y.S.2d 766 (Westchester County Ct. 2003).

Nevertheless, CPL 390.50 (2)(a) gives a defendant a right to a copy of a pre-sentence report prior to sentencing.[5] Moreover, a statutory right exists for a defendant to obtain a copy of the pre-sentence report for purposes of appeal. See CPL 390.50(2)(a). Matter of Legal Aid Bureau, Inc. v. Armer, 74 A.D.2d 737, 425 N.Y.S.2d 706 (4th Dept. 1980)(defendant has "clear right to review pre-sentence reports for the purpose of preparing briefs and for use before the parole board."); People v. Harris, 187 Misc.2d 591, 725 N.Y.S.2d 530 (N.Y. Sup. Ct. 2001) (same); see e.g. People v. Peetz, 4 Misc.3d 597, 781 N.Y.S.2d 418 (Sup. Ct., Queens County, June 7, 2004).

Here, defendant has filed a notice of appeal and has been assigned counsel for purposes of perfecting the appeal, Appellate Advocates. Based upon this Court's conversation with counsel, the Court has been informed that counsel already possesses a copy of defendant's pre-sentence report.[6] Thus, this Court is referring defendant's application to his appellate attorney. The Court hereby authorizes release by counsel of a copy of the requested report. However, counsel is directed to redact any and all confidential materials, including, but not limited to

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[5]CPL 390.50(2)(a) provides: "Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination and for copying by the defendant's attorney, the defendant himself, if he has no attorney, and the prosecutor." The purpose of the statute is to give a defendant an opportunity to contest any information in the probation report at sentencing. See People v. Harris, 187 Misc.2d 591, 725 N.Y.S.2d 530 (N.Y. Sup. Ct. 2001).

[6]Appellate Advocates has been assigned and this Court confirmed the assignment by speaking with Lynn Fahey, Esq. of that office.

names, addresses, and telephone numbers and to send a copy of the redacted report to defendant.

Accordingly, defendant's motion is granted and referred to appellate counsel.

A copy of this decision and order forwarded to Counsel for defendant, defendant and to the Department of Probation.

Kew Gardens, New York
Dated: April 7, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT