

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.: 574/95

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

EUGENE PEETZ

Defendant.

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DEFENDANT PRO SE

For the Motion

NEW YORK CITY DEPARTMENT
OF PROBATION

BY: PAMELA S. GOLDFEDER, ESQ.

Opposed in Part

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

Kew Gardens, New York
Dated: June 7, 2004

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. 574/95

EUGENE PEETZ

Defendant.

-----X

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

By motion dated May 14, 2004, defendant seeks an order of the court to obtain a copy of the pre-sentence report pursuant to CPL 390.50 so that he can obtain the information the prison officials are using for: “(i) security classification; (ii) necessity of rehabilitation programs; (iii) eligibility for the rehabilitative programs; and (iv) used by the Parole Board.” Specifically, defendant seeks a copy of the report to “ensure its overall accuracy so that I may endeavor to correct any existing discrepancies or clarify any misinformation’s therein.”

In response, the New York City Department of Probation has submitted an affirmation dated May 25, 2004, whereby they take no position related to the release of the pre-sentence report; however, oppose any application by defendant to contest the accuracy of items contained in such report as untimely.

For the reasons stated herein, defendant’s motion for release of the pre-sentence report is granted with certain limitations. Defendant’s motion to amend or attempt to correct the report upon receipt is denied as untimely.

FACTS

On February 15, 1995, a four-count indictment was filed with the court charging defendant with burglary in the second degree, criminal mischief in the fourth degree, criminal possession of stolen property in the fifth degree and petit larceny.¹ On or about September 25, 1998, defendant pled guilty to attempted burglary in the second degree (PL 110/140.25[2]). Defendant was sentenced as a persistent violent felony offender on or about February 28, 2001, and received a sentence of from 6 (six) years to life. At the time of his plea, defendant waived his right to appeal.

DECISION

I. 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). There is no statutory right to disclosure of a pre-sentence report under the circumstances presented here. See People v. Delatorre, 2 Misc.3d 385, 767 N.Y.S.2d 766 (Westchester County Ct. 2003).²

¹On September 11, 1995 the Hon. Randall Eng, Queens County Supreme Court, permitted an amendment to the indictment to reflect defendant’s true name, Eugene Peetz.

²Nevertheless, CPL 390.50 (2)(a) gives a defendant a right to a copy of a pre-sentence report; however, this section is not controlling here. 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).

Furthermore, a statutory right also exists for a defendant to obtain a copy of the pre-sentence report for purposes of appeal, which again does not apply here. See CPL

Here, CPL 390.50(1) is controlling regarding the release of defendant's pre-sentence report. Therefore, release of the report to defendant is discretionary by the court pursuant to statute.³ Defendant must make a factual showing sufficient to warrant the disclosure of the report to him. See People v. Delatorre, *supra*, at 388. Under appropriate circumstances, a court may authorize disclosure of a defendant's pre-sentence report to the defendant. Disclosure to a defendant has been held appropriate where the report may have been considered by the Parole Board in denying parole release to a defendant. See People v. Tatta, 2001 N.Y. slip op. at 4040U, 2001 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 2001), *citing*, People v. Wright, 206 A.D.2d 337, 614 N.Y.S.2d 732 (1st Dept. 1994), *app. denied*, 84 N.Y.2d 873 (1994); see also 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. Bonizio, 147 Misc.2d 1050, 559 N.Y.S.2d 76 (N.Y. Sup. Ct. 1990).

In Bonizio, *supra*, the appellate court held that the lower court acted within its authority by permitting the defendant to obtain a copy of the pre-sentence report because the report may have been the basis of the Parole Board's denial of the defendant's parole application (emphasis added). Notably, under Executive Law Sections 259-I(1) (a) & (2)(c), a pre-sentence report is one of the factors the Parole Board is required to consider upon an application for release of a defendant.⁴

390.50(2)(a). Moreover, the court does have the discretion to limit disclosure of certain portions of the report, unless necessary for appellate review. See CPL 390.50 (2)(a).

³Here, no appeal was filed by defendant, thus, release of the report is not mandatory by statute under CPL390.50(2). Defendant's bare assertion that "during sentence in the matter defense counsel neither challenged nor received a copy of the PSR" is unsupported and does not address the issue of defendant's current request. Defendant has not claimed that he requested a copy of the report and that this request denied. See also People v. Blanche, 193 A.D.2d 991, 598 N.Y.S.2d 102 (3rd Dept. 1993).

⁴Some courts have held that this alone is insufficient to warrant release of a pre-sentence report and apply a standard requiring "some indication in the record" that the Board actually considered the report when rendering its decision. See e.g. Matter of Allen v. People, 243 A.D.2d 1039, 663 N.Y.S.2d 455 (3rd Dept. 1997). Therefore, the requirement for release may be moving toward an even more stringent standard.

As part of the factual showing to support his position that he is entitled to obtain a copy of his pre-sentence report, defendant asserts that he was denied parole in 2001 and again in 2003. In addition, defendant claims that the report has also been relied upon to determine his security classification in a medium security correctional facility and his eligibility and necessity for rehabilitative programs. Thus, this court finds that after redaction by the Department of Probation of any and all confidential materials, including, but not limited to names, addresses, and telephone numbers, defendant may obtain a copy of the report.⁵

Because defendant will ultimately be appearing again before the Parole Board and will be entitled to a copy of the report at that time, the court exercises its discretion and finds that the defendant has established sufficient facts to warrant disclosure of a copy of the pre-sentence report and disclosure is thus, granted in the interests of justice and in the interest of judicial economy. See People v. Tatta, supra.

II. Alleged Corrections or Amendments to Pre-sentence Report

At the time of his sentence, defendant did not challenge the accuracy of the pre-sentence report. 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 N.Y.S.2d 353 (3d Dept. 1996);

⁵Even if defendant makes a factual showing sufficient, in this court's view, to release of the report, defendant is not entitled to an unredacted copy of the report since portions may contain confidential information. See Matter of Shader v. People, 233 A.D.2d 717, 650 N.Y.S.2d 350 (3rd Dept. 1996); see also Matter of Kilgore v. People, 274 A.D.2d 636, 710 N.Y.S.2d 690 (3rd Dept. 2000); Matter of Hoyle v. People, 274 A.D.2d 633, 710 N.Y.S.2d 257 (3rd Dept. 2000).

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

Accordingly, defendant's motion is granted in part and denied in part. The defendant's motion for the 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 to send a copy of the redacted report to defendant.

Dated: June 7, 2004

Kew Gardens, New York

SEYMOUR ROTKER
JUSTICE SUPREME COURT