

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-23 - QUEENS COUNTY
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM
Justice

_____ :
THE PEOPLE OF THE STATE OF NEW YORK :
_____ : Ind. No.: 1772/80

— -against- :
: Motion: Vacate

Judgment
GARY PERFETTO, :
: _____
: :
Defendant. : Submitted: April 26, 2005
_____ :

The following papers numbered
1 to 2 submitted in this motion.

SE _____ GARY PERFETTO, PRO
Motion For The

HON. RICHARD A. BROWN, D.A.
BY: JILL A. GROSS-MARKS, ADA
Opposed

	<u>Papers</u>	<u>Numb</u>
<u>ered</u>		
Notice of Motion/Affidavits/Exhibits _____	_____	<u>1</u>
Answering & Reply Affidavits/Exhibits _____	_____	<u>2</u>
Hearing Minutes _____	_____	_____

Upon the foregoing papers, defendant's motion to vacate judgment is denied in accordance with the accompanying memorandum decision.

GLORIA D'AMICO
Clerk

Date: May 3, 2005 _____

M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: JHO-H

THE PEOPLE OF THE STATE OF NEW YORK	:
	:
- against -	:
	:
GARY PERFETTO,	:
	:
Defendant.	:
	:

By: ROBERT CHARLES KOHM, J.
Date: May 3, 2005
Ind. No.: 1772/80

The defendant, pro se, moves pursuant to CPL 440.10 to vacate the judgment rendered April 10, 1985, convicting him of murder in the second degree and robbery in the first degree, upon a jury verdict, and imposing sentence.

The defendant alleges that his Sixth Amendment right to confront the witnesses against him, as recently reconsidered and expanded in Crawford v Washington (541 US 36), were violated when a then deceased night watchman's report was admitted into evidence as a business record. The report placed the defendant at the relevant time at the scene of the murder of which he was convicted.

The defendant's claim is both procedurally barred and without merit. The defendant unsuccessfully appealed his conviction almost twenty years ago (People v Perfetto, 133 AD2d 127). The Appellate Division specifically found that the night watchman's report had been correctly admitted into evidence under

the business records exception to the hearsay rule (id., at 128-129). The Court also found the balance of the defendant's contentions, which included a claim that admission of the report violated his confrontation rights, to be devoid of merit. The defendant then unsuccessfully sought leave to appeal to the Court of Appeals (People v Perfetto, 70 NY2d 959).

Crawford is not retroactively applicable to collateral proceedings involving judgments which have become final on direct review (see, Murillo v Frank, 402 F3d 786; Mungo v Duncan, 393 F3d 327, cert denied ___ US ___, 2005 US Lexis 3587; Brown v Uphoff, 381 F3d 1219, cert denied ___ US ___, 125 S. Ct. 940; Evans v Luebbers, 371 F3d 438, cert denied ___ US ___, 125 S. Ct. 902; People v Vasquez, 2005 NY Misc LEXIS 285; but see, Bockting v Bayer, 399 F3d 1010; People v Dobbin, 6 Misc3d 892, lv denied ___ NY3d ___, 2005 NY App Div LEXIS 1789). Crawford "substitut[ed] a per se bar on the admission of out-of-court testimonial statements that were not subject to prior cross-examination for the balancing test that previously delineated the limits of the right to confrontation" (United States v Saget, 377 F3d 223, 232). The decision broke new ground, and its per se rule was not dictated by existing precedent. Thus, Crawford established a "new" procedural rule (see, Murillo v Frank, supra). Accordingly, it would be retroactively applied only if it fell within either of the two well-established exceptions to the general nonretroactivity of such rules: if it prohibited a certain category of punishment for a class of defendants because of their status or offenses, or

constituted a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding (see, Beard v Banks, ___ US ___, 124 S Ct 2504; Tyler v Cain, 533 US 6565; People v Eastman, 85 NY2d 265).

The first exception to nonretroactivity is clearly inapplicable. To fall within the second, two requirements must be met: infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter the court's understanding of the bedrock procedural elements essential to the fairness of a proceeding (Beard v Banks, supra; Tyler v Cain, supra).

The United States Supreme Court case which first enunciated the above two exceptions, Teague v Lane (489 US 288), noted, as to the second, that, "Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge" (489 US at 313).

The Supreme Court reiterated that belief in Beard v Banks (supra), which was decided three months after Crawford. Noting that it had repeatedly "explain[ed] that [the second Teague exception] 'is clearly meant to apply only to a small core of rules requiring observance of those procedures... that are implicit in the concept of ordered liberty' (citations omitted)" (Beard, supra, at 2513-2514), the Court went on to state that "it should come as no surprise that we have yet to find a new rule

that falls under the second Teague exception" (Beard, supra, at 2514).

While Crawford may be said to have extended the scope of the Confrontation Clause, the rule it enunciated was not so "sweeping and fundamental" as to be comparable to the right to counsel enunciated in Gideon v Wainwright (372 US 335), the only rule the Supreme Court has indicated "might" fall within the second Teague exception, and, so, be retroactively applicable on collateral review (see, Beard v Banks, supra, at 2514-2515). Thus, Crawford is inapplicable to defendant's pending motion.

Moreover, even were Crawford retroactively applicable, it would not have excluded the watchman's report from evidence. As previously noted, Crawford applies only to "testimonial" statements. While the Supreme Court declined to "spell out a comprehensive definition of 'testimonial'" (Crawford, supra, at 1374), it provided examples of those statements at the core of the definition, including prior testimony at a preliminary hearing, previous trial, or grand jury proceeding, and responses to police interrogation (id., at 1364, 1374). The types of statements cited by the Court as testimonial involve a declarant's knowing responses to structured questioning in an investigative or courtroom setting, where the declarant would reasonably expect that his or her answers might be used in future judicial proceedings; the expectation arises because, as Crawford noted, testimony is "[a] solemn declaration or affirmation made for the

purpose of establishing or proving some fact'" (Crawford, supra, at 1364, quoting 1 N. Webster, An American Dictionary of the English Language [1828]).

Business records like the watchman's report, however, are neither solemn affirmations nor documents prepared with an eye toward future litigation. Rather, it is the routineness of a record's entry, its systematic, contemporaneous reflection of day-to-day operations that largely distinguishes a business record, and makes it admissible as inherently trustworthy (see, CPLR 4518; People v Cratsley, 86 NY2d 81). Business records, as Justice Scalia stated in Crawford, "by their nature" are not testimonial (at 1367; see also, People v Rogers, 8 AD3d 888; United States v Travers, 2004 US App LEXIS 20493).

Finally, the defendant's Blakely (Blakely v Washington, ___ US ___, 124 S. Ct. 2531) and Apprendi (Apprendi v New Jersey, 530 US 466) claims are inapposite, as these cases deal only with sentencing procedures, and not the validity of the underlying judgments.

Accordingly, the defendant's motion to vacate judgment is denied in its entirety.

ROBERT CHARLES KOHM, J.S.C.

