

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 11, 2021

112388

THE PEOPLE OF THE STATE OF
NEW YORK

v

MICHAEL N. KELSEY,
Defendant.

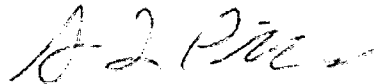
DECISION AND ORDER
ON MOTION

Application, pursuant to CPL 460.15, for permission to appeal to this Court from order of County Court, St. Lawrence County, dated June 9, 2020.

Upon the papers filed in support of the application, and no papers having been filed in opposition thereto, it is

ORDERED that the application is denied.

ENTER:



Hon. Stan L. Pritzker
Associate Justice

COUNTY COURT
COUNTY OF ST. LAWRENCE

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

Respondent,

- against -

Ind. No.: 2015-0123

MICHAEL N. KELSEY,

Defendant.

GARY PASQUA, District Attorney, Canton (Matthew L. Peabody of counsel), for the People.

MICHAEL KELSEY, defendant *pro se*.

CATENA, J.

Defendant moves to vacate his conviction pursuant to CPL 440.10 by motion dated February 24, 2020. The People responded by Affirmation dated March 25, 2020. The Defendant filed additional papers in support of his motion dated March 26, 2020 and a reply affidavit dated April 15, 2020.

On May 12, 2016, the defendant was convicted after trial of sexual abuse in the first degree (PL §130.65[2]), attempted sexual abuse in the first degree (PL §§110.00, 130.65[2]), forcible touching (PL §130.52), and endangering the welfare of a child (PL §260.10[1])(2 counts). The defendant then moved to set aside the verdict pursuant to CPL 330.30(1) alleging, among other things, that the prosecutor's opening statement was legally insufficient, and that the prosecution improperly introduced defendant's prior bad acts. The motion was denied by order of this Court and the defendant was sentenced on October 21, 2016. The defendant filed a

notice of appeal with the Appellate Division, Third Department, which affirmed this Court's judgment (*People v. Kelsey*, 174 AD3d 962 [3rd Dep. 2019]).

Initially, except for defendant's arguments concerning newly discovered evidence and interest of justice, the defendant's motion must be denied because the grounds or issues raised were previously determined on the merits upon appeal or could have been determined but for defendant's unjustifiable failure to raise such issues upon appeal (CPL 440.10[2][a],[c]). And to the extent defendant alleges facts not appearing on the record, they could with due diligence have readily been made to appear (CPL 440.10[3][a]). However, were this Court to reach the merits for those arguments that must be denied as aforementioned, it would find them to be without merit (CPL 440.30[4]).

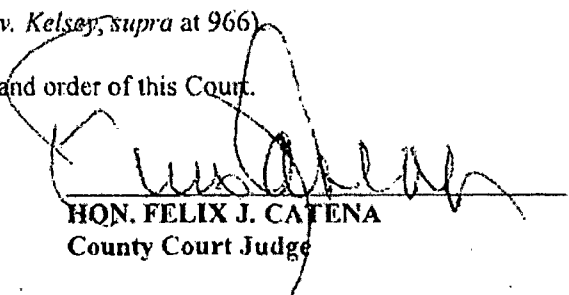
Regarding defendant's arguments concerning alleged newly discovered evidence, his motion must be denied because he merely alleges impeachment evidence that was in existence and, therefore, discoverable through cross-examination at the time of trial (*People v. Wagner*, 51 AD2d 186, 188 [3d Dept 1976]; *People v. Wood*, 94 A.D.2d 849, 850 [3d Dep 1983]). Here, defendant alleges the victims made statements in a January 17, 2019 deposition that they first told each other about the abuse they suffered while they were intoxicated in September 2014. "[T]he test . . . enunciated which has been approved and followed for determining the sufficiency of the new evidence requires that: (1) it must be of such nature as would possibly change the verdict should a new trial be granted; (2) it must have been discovered since the previous trial; (3) it must be of such nature that could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; (6) it must not be impeaching or contradictory of former testimony" (*People v. Wagner, supra*).

Finally, to the extent that defendant seeks relief in the interest of justice, this Court notes that the Appellate Division, Third Department determined that "[g]iven defendant's denial of responsibility for his actions, his exploitation of a position of trust and the devastating effect on the victims, we find no abuse of discretion or extraordinary circumstance warranting a reduction of the sentence in the interest of justice" (*People v. Kelsey, supra* at 966).

The foregoing constitutes the decision and order of this Court.

Dated:

June 9, 2020


HON. FELIX J. CATENA
County Court Judge

NOTICE:

THE DEFENDANT IS HEREBY ADVISED OF HIS RIGHT TO APPLY TO THE APPELLATE DIVISION, THIRD DEPARTMENT, P.O. BOX 7288, CAPITOL STATION, ALBANY, NEW YORK 12224, FOR A CERTIFICATE GRANTING LEAVE TO APPEAL FROM THIS DETERMINATION. THIS APPLICATION MUST BE MADE WITHIN 30 DAYS OF SERVICE OF THIS DECISION. UPON PROOF OF FINANCIAL INABILITY TO RETAIN COUNSEL AND TO PAY THE COSTS AND EXPENSES OF THE APPEAL, THE DEFENDANT MAY APPLY TO THE APPELLATE DIVISION FOR THE ASSIGNMENT OF COUNSEL AND FOR LEAVE TO PROSECUTE THE APPEAL AS A POOR PERSON AND TO DISPENSE WITH PRINTING. APPLICATION FOR POOR PERSON RELIEF WILL BE ENTERTAINED ONLY IF AND WHEN PERMISSION TO APPEAL OR A CERTIFICATE GRANTING LEAVE TO APPEAL IS GRANTED.

**Additional material
from this filing is
available in the
Clerk's Office.**