POST-TRIAL/PRE-SENTENCE MOTIONS TO SET ASIDE A GUILTY VERDICT:

CPL 330.30

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In the normal course of events, sentencings follow guilty verdicts just as sure as night follows day, but occasionally, under limited and specific circumstances, counsel and client may be able to avoid (or at least postpone) the otherwise inevitable (entry of judgment of conviction/ imposition of sentence), by making a timely and legally sufficient motion to set aside the verdict (in whole or in part).

Criminal Procedure Law (CPL) 330.30 states that at any time AFTER rendition of the VERDICT and BEFORE SENTENCE, the court may, upon motion of the defendant, SET ASIDE or MODIFY the verdict, or any part thereof, based on: 1. ANY GROUND APPEARING IN THE RECORD which, if raised on an appeal from a prospective judgment of conviction would require a REVERSAL or MODIFICATION as a MATTER OF LAW by an appellate court.

A CPL 330.30(1) motion is DIFFERENT from a motion made pursuant to CPL 440.30 to: vacate a judgment (CPL 440.10), or a sentence (CPL 440.20 [by the defendant], and 440.40 [by the People]), insofar as the former MUST be made BEFORE sentence (a CPL 440 motion may be made at ANY TIME after entry of judgment including before or after an appeal has been decided), and the grounds for the 330.30(1) motion must APPEAR IN THE RECORD, (whereas a CPL 440 motion is usually based upon improper or prejudicial conduct NOT APPEARING IN THE RECORD which, if it had appeared in the record, would have required a reversal of the judgment on appeal).

A motion based on CPL 330.30(1), need not be in writing but the People must be given reasonable notice of it along with an opportunity to appear in opposition. (CPL 330.40[1]). In this context, the court sits not unlike an intermediate appellate court but its focus is restricted to matters of law (not matters of fact, weight of evidence or witness credibility [unless a witness is deemed incredible as a matter of law]) that would require reversal/modification of the judgment of conviction on appeal. (People v Carter 63 NY2d 530 [1984].

Examples include claims of legally insufficient evidence (assuming that the defendant moved for trial order of dismissal per CPL 290.10), prosecutorial misconduct (People v Robinson 190 AD2d 589 [2d dep't 1993]), erroneous jury instruction (People v Marabel 186 AD2d 53 [1st dep't 1992]), and ineffective assistance of counsel, if the grounds appear in the record (People v Wells 265 AD2d 589 [2d dep't 1999]).

If the basis for the alleged ineffective assistance appears outside the record, a CPL 440 is the proper vehicle. Counsel should also keep in mind that the alleged error of law raised in the CPL 330.30 must be PRESERVED by an appropriate objection made during the trial. (People v Benton 78 AD3d 1545 [4th dep't 2010]). If the issue is not preserved, the trial court, unlike an appellate court, cannot consider it in the interests of justice.

Denying the defendant his constitutional right to counsel (and a reasonable adjournment to retain counsel of his own choosing) qualifies as an abuse of discretion as a matter of law that is properly considered in the context of CPL 330.30(1). In People v Rohadfox 2014 NY Slip Op. 00841 (4th dep't 2014), the Fourth Department affirmed the the trial court's order granting the defendant's post trial motion to dismiss (treating it as a CPL 330 motion to set aside the verdict), for refusing the defendant's request (after discharging his family-retained attorney for withdrawing his suppression motion and requesting an expedited trial without the defendant's knowledge), for a reasonable continuance to obtain counsel of his own choosing. (People v McLaughlin 291 NY 480 [1944]). The Court determined that denial of such right constituted reversible error as a matter of law and was, therefore, properly addressed under CPL 330. (See also People v Bryan 2020 NY Slip Op. 00243 [1st dep't 2020]: reversible error to deny defendant one-day adjournment to call a material witness).

In People v Robinson 2018 NY Slip Op. 00954 (4th dep't 2018), the Fourth Department held that the trial court properly denied the defendant's CPL 330 motion (based on the People's alleged failure to turn over Brady/Rosario material consisting of a 911 call from the victim regarding an incident that occurred just before the defendant/victim's father allegedly strangled him), because the defendant's claims were based on matters that were OUTSIDE THE RECORD. (citing, inter alia, People v Wolf 98 NY2d 105 [2002]).

Also, in People West 633 KA 11-02345 (4th dep't 2014), the Fourth Department rejected the defendant's argument that the trial court erroneously denied his CPL 330.30 motion to set aside his conviction for, inter alia, Course of Sex Abuse Against a Child based on alleged ineffective assistance of counsel for not pursuing an alibi defense or calling an expert witness because, in the court's view, there was no chance of success in the former (the intended proof would not have established

an alibi), and, as to the latter, there was no showing that an expert would have helped the jury resolve any issues of fact. Other issues raised were considered to be outside the trial record.

It is worth noting that if a defendant decides to put on a case (i.e. calling witnesses and/or testifying), after his motion for a trial order of dismissal (TOD) (CPL 290.10), has been denied, he cannot, thereafter, in the context of a CPL 330.30 motion, challenge the legal sufficiency of the evidence without the court considering all the evidence presented at trial (including the defendant's proof). In People v Hines 97 NY2d 56 (2001), a constructive drug possession case, the trial court denied the defendant's motion for a TOD after which the defendant (along with his co-defendant) testified

In Hines, the People alleged that drugs and $7900.00 in cash were found by firemen responding to a fire in the hall pantry of an apartment (i.e.stash house) for which the defendant was the tenant of record. A subsequent search pursuant to warrant revealed more drugs and letters and other records in the defendant's name in a bedroom. The defendant claimed that he sublet the apartment to others and just happened to be on the premises to collect rent when the police came. (The co-defendant did not help the defendant's cause, claiming that he used the apartment recreationally).

Post verdict, the trial court reversed its decision on the TOD motion and granted the defendant's CPL 330.30 motion to set aside the verdict. The Appellate Division reversed and the Court of Appeals agreed, holding that the defendant, by putting on a case, waived review of his claim of legally insufficient evidence based on the People's evidence-in-chief. Consequently, the trial court had no authority to reconsider the issue as a matter of law. By putting on proof, then, the defendant runs the risk of filling in any gaps in the People's proof, and a reviewing court cannot then turn a blind eye to all the evidence that the jury considered in reaching its verdict. (People v Kirkpatrick 32 NY2d 1171 [1973]).

Procedurally, if the defendant brings a written motion under CPL 330.30(1) (required if under subdivisions 2 and 3), he/she must do so upon reasonable notice to the People, and must provide SWORN ALLEGATIONS (whether upon his own knowledge or upon information and belief [specifying the sources of information and grounds for such belief]), of ALL FACTS ESSENTIAL TO SUPPORT SUCH MOTION. (CPL 330.40[2][a]).

The People may then file an answer with the court (c.c. to the defense), denying or admitting any or all of the defendant's allegations. (CPL 330.40[2][b]).

Pursuant to CPL 330.40(2)(c), the must consider and decide if the motion can be resolved on the papers (per subdivisions (d) or (e), or hold a hearing (subdivisions [f]and[g]) to resolve any questions of fact. The court MUST GRANT the motion if: the defendant's moving papers allege a ground constituting a legal basis for the motion and contain sworn allegations of all essential facts to support such ground (and which the People concede). (Subd. 2[d]).

The court MAY DENY the motion if: i. The moving papers fail to allege any ground constituting a legal basis for the motion; or ii. The moving papers lack sworn allegations of fact essential to support the motion. If the court does not decide the motion on the papers per subdivision (d) or (e), it must conduct a hearing and make FINDINGS OF FACT essential to the determination thereof (subdivision [f]). At such hearing the DEFENDANT BEARS THE BURDEN OF PROVING EVERY ESSENTIAL FACT BY A PREPONDERANCE OF THE EVIDENCE.

If the court grants the defendant's motion to set aside or modify (e.g. reduce to a lesser-included offense), a verdict (or any part thereof [i.e.one count but not another], it must take the same action that an appropriate appellate court would take upon reversing or modifying a judgment upon a particular ground in issue. (Per CPL 470.15[2], for example, if the evidence was not legally sufficient to establish the defendant's guilt of a charged crime but sufficient to support a lesser included offense, the court may, per subdivision 2(a), modify the judgment by changing it to a conviction for the lesser offense; or, if the evidence is legally sufficient to support some but not all of the crimes for which the defendant was convicted, the court can modify the judgment by reversing it as to the unsupported counts and affirming as to the sufficient counts. (Subdivision 2[b]).

The second avenue for a CPL 330.30 motion is subdivision 2 which requires the defendant to establish that there was MISCONDUCT by or in relation to a JUROR OUTSIDE THE COURT'S PRESENCE which MAY HAVE AFFECTED A SUBSTANTIAL RIGHT of the defendant and which the defendant DID NOT KNOW OF BEFORE THE VERDICT WAS RENDERED.

As a general rule, jury verdicts may not be impeached by peeling back the curtain and exposing the inner workings of the deliberation process. However, evidence of outside influences (i.e. not part of the trial record) such as juror exposure to articles in the news or information obtained on the internet, unauthorized visits to the crime scene, or jurors conducting their own experiments or relying on the individual expertise of a juror to reach conclusions, can provide the basis to set aside a verdict pursuant to CPL 330.30(2). (See, for example, People v Romano 8 AD3d 503 [2d dep't 2004], People v Stanley 87 NY2d 1000 [1990] and People v Maragh 94 NY2d 569 [2000]).

In People v Maragh supra, a DV Manslaughter case (D was accused of causing internal injuries by repeatedly punching his GF in the stomach), the Court of Appeals held that the verdict was infected by the entire jury's exposure (as revealed at a 330.30 hearing), to the personal opinions of a nurse juror about blood loss leading to ventricular fibrillation which contradicted the opinion of the defense expert with respect to death due to seizures from a venous air embolism. (Another RN/juror made personal estimates of blood volume loss which she shared with the other jurors).

The trial court granted the motion, ruling that the nurses on the jury acted, in effect, as unsworn witnesses. The Appellate Division reversed and the Court of Appeals reversed that determination. Citing People v Brown 48 NY2d 388, 394, the Court noted that "because juror misconduct can take many forms, no ironclad rule is possible. In each case, the facts must be determined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered...Each instance of...misconduct must be examined with respect to its particular facts"(citing People v Irizarry 83 NY2d 557[1994]), and the court has discretion to determine whether the misconduct was such as to warrant undoing the verdict and granting a new trial.

The Court determined that the jury's exposure to and reliance upon the nurses' information and conclusions created a SUBSTANTIAL RISK of prejudice to the defendant by coloring the views of the other jurors. While jurors aren't expected to divorce themselves from their own life experiences, the Court found that there was grave risk in jurors performing personal specialized assessments beyond the knowledge and experience of other jurors and communicating their conclusions on a material issue with the full force of an un-cross-examined expert.

Juror misconduct can also be established where a juror behaves in a manner that reflects actual or implied bias that can violate the defendant's fundamental constitutional right to a fair trial decided by an impartial jury.

In People v McGregor 2019 NY Slip Op. 08283 (1st dep't 2019), the court held that the trial court erred in denying the defendant's motion to set aside a Manslaughter verdict (gang-related shooting case), based on an improper relationship that developed during deliberations between a witness for the prosecution (rival gang member testifying pursuant to plea deal) and a smitten juror who had written to him while he was in jail. Testimony at a hearing further revealed that the witness left a return the message on the juror's voice mail, and, since the trial, she wrote the prosecutor requesting lenience in his upcoming sentence and he, in turn, sought the court's help in obtaining a marriage license. The juror admitted falling for and reaching out to the witness but insisted that neither her feelings for him (nor his testimony, for that matter), had any effect on the verdict. (She also said the she did not reveal her situation to her fellow jurors).

The Court began by noting that CPL 330.30(2) permits a court to set aside a verdict based on juror misconduct that MAY HAVE AFFECTED A SUBSTANTIAL RIGHT and WAS NOT KNOWN TO HIM BEFORE RENDITION OF THE VERDICT. If such misconduct is found, the trial court is NOT supposed to conduct its own harmless error analysis. (Citing People v Estella 68 AD3d 1158 [3d dep't 2009]). Absent a showing of substantial prejudice, however, CPL 330.30(2) is not in play, and each case must be examined on its particular facts to assess the NATURE OF THE MISCONDUCT and the LIKELIHOOD OF PREJUDICE. (Citing People v Irizarry supra, 83 NY 2d 557 [1994]).

The Court then went on to stress the importance of the defendant's "cardinal" right to a trial by a jury that is and also appears to be fair and unbiased (Citing, inter alia People v Johnson 94 NY2d 600 [2010] and People v Neulander 2019 NY Slip Op. 07521 [NY Ct of Appeals 10/22/19]). According to the Court, ACTUAL BIAS reflects a STATE OF MIND that is LIKELY TO PRECLUDE a juror from rendering an impartial verdict (Citing People v Torpey 63 NY2d 361 [1984]), and includes an unwillingness or inability to follow court instructions. IMPLIED BIAS exists where a juror "BEARS SOME RELATIONSHIP" to a party or person in the case that is LIKELY to preclude the juror from returning an impartial verdict. (Citing People v Branch 46 NY 2d 649 [1979]). Factors to be considered include the nature of the relationship and the frequency of contact between the parties, and, if juror bias is established, he/she must be excluded notwithstanding any conclusory protestations to the contrary (People v Furey 18 NY3d 284 [2011].

In People v Southall 156 AD3d 111 (1st dep't 2011) the court determined that a prospective juror was both actually and impliedly biased for failing to disclose during voir dire that she had an application for employment pending before the DA'S office at the time of the trial. In the court's view, her subsequent claims (at a 330.30 hearing) of no bias rang hollow because her application (and hope of securing employment with the office that was prosecuting the defendant), created a relationship that gave rise both to an appearance and a likelihood of partiality toward her would-be employer.

Similarly, in McGregor, the juror's claim that the verdict was not influenced by her attraction to (and blatantly improper communication with the People's witness) bespoke a "disposition in favor of the People" that could not be cured. Moreover, the People's claim of harmless error was deemed to be entirely unavailing to the Court which described the defendant's right to a fair trial by an impartial jury as "self-standing" and not subject to harmless error analysis by the trial court. (Citing People v Crimmins 36 NY2d 238 [1975]).

If the court sets aside a verdict pursuant to CPL 330.30(2), it MUST ORDER A NEW TRIAL. (CPL 330.50[2]). Upon such order, the indictment is deemed to contain ALL THE COUNTS that were charged at the time of the previous trial

(INCLUDING those that the court dismissed), BUT EXCLUDING any counts upon which the defendant was ACQUITTED.(CPL 330.50[4]).

Another basis for seeking to set aside a verdict is the post-trial DISCOVERY OF NEW EVIDENCE which the defendant COULD NOT HAVE PRODUCED at trial (with due diligence), and which is of SUCH CHARACTER as to CREATE A PROBABILITY of a more favorable verdict for the defendant (e.g. acquittal or conviction upon a lesser offense), had it been presented at the trial. (CPL 330.30[3]). As with the other subdivisions, the burden is upon the defendant to establish the importance of the evidence and it's unattainability for the trial. In this regard, the defendant must demonstrate that the evidence would probably have changed the outcome (People v Scarinicio 109 AD2d 928 [3d dep't 1985), or would have been likely to create reasonable doubt where it did not otherwise exist (US v Augurs 427 US 97 [1976]).

In People v Lostrumbo 2020 NY Slip Op. 02403 (4/24/20), the Court, in this Sex Abuse case, rejected the defendant's claim of error in the trial court's denial of his 330.30(3) motion to set aside the verdict based on deleted emails between the defendant and the victim which he failed to show could not be produced at trial. (Citing People v Brown 104 AD3d 1203 [4th dep't 2013]). The defendant also failed to establish that admission of those messages at trial would have created a probability of a more favorable outcome. (Citing People v Salemi 309 NY 208 [1955]).

If the court sets aside a verdict pursuant to CPL 330.30(3) based on NEW EVIDENCE, the court must, except as otherwise provided, order a NEW TRIAL. However, with the People's consent, the court may MODIFY the verdict by reducing the crime for which the defendant was convicted to a lesser included offense (if the court is satisfied that the new evidence probably would have resulted in such verdict).

The case of People v Collins 72 AD2d 431 (4th dep't 1980) explains the distinction between a motion for a MISTRIAL (CPL 280.10) and a motion to set aside a verdict per CPL 330.30 and underscores the importance of not confusing one with the other. In that case, the defendant was tried on charge of Assault (1st degree) upon a female student (on the campus of Fredonia State College), whom he approached in a pick-up truck and tried to strike up a conversation. He was later identified by the victim at the hospital in a show-up procedure. He told a campus security officer that he was just driving around the campus but denied having any contact with the victim. (This statement was not noticed pursuant to CPL 710.30). At trial, the defendant asserted an alibi defense and called a witness who testified that they were at a nearby shopping mall watching firemen put out a fire that broke out at one of the stores. The People elicited the statement of the defendant to campus security about driving around campus. (The only objection was that it was beyond the scope of the cross examination).

The defense moved for a mistrial based on the prosecutor's comment in summation that the defendant said nothing about being elsewhere (watching a mall fire), when he spoke to campus police. In the defendant's view, the People improperly commented on the defendant's right to remain silent. The court reserved decision but did not rule on the motion until after a guilty verdict was returned on the lesser included offense of Assault 2d degree.

The defendant then moved to set aside the verdict, and the court, following an adjournment for written argument (that also included grounds not mentioned in the mistrial motion [e.g. prosecutor's alleged vouching for the victim's credibility and improper attack on alibi witness' credibility], set aside the verdict.

The Fourth Department reversed, holding that to the extent that the court's ruling may have constituted a belated determination on the mistrial motion, it was invalid because such motion must be made and decided DURING THE TRIAL and not after. (Per CPL 280.10, the court may, at any time during trial declare a mistrial and order a new trial upon the defendant's motion where there occurs, during the trial, an error or legal defect in the proceedings, in or out of the courtroom, which is prejudicial to the defendant and deprives him of a fair trial).

The court noted that the very purpose of a mistrial order is to discharge the jury before it retires to deliberate rather than after it returns a verdict. Moreover, the trial judge has much broader discretion in deciding a mistrial motion (from which the People cannot appeal), than it does under CPL 330.30 which is specifically limited to the circumstances set forth therein. Consequently, to allow the defendant to pursue a delayed order granting a mistrial after an unfavorable verdict would be to confer upon him an unfair advantage not contemplated by the Criminal Procedure Law.

Insofar as the trial court's decision to set aside the verdict may have been made under CPL 330.30, the Appellate Division held that it was error inasmuch as the prosecutor's argument about the defendant's failure to mention his alibi when questioned by the authorities was proper impeachment of the defendant's alibi claim at trial which, in the court's view, would have been natural to include in his statement to police. (See People v Chery 28 NY3d 139 [2011]). As such, it was not an affront to the defendant's right to remain silent. The court also found that the prosecutor's other arguments were not improper and that the evidence was otherwise legally sufficient to support the charge.

Whether the defendant obtains a mistrial (during trial/before any verdict), or an order to set aside a verdict that has already been rendered (but before imposition of sentence and entry of judgement), the upshot is usually the same: unless a favorable plea offer is now made, in all likelihood, the case will have to be re-tried. And while no one really likes to try the same case more than once, this time, counsel at least will have obtained a pretty good preview of what is to come. And hopefully, the outcome will be much less “guiltier” the second time around*.

*The Second Time Around.” (Cahn and Van Heusen).