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WHEN VICTIMS AND DEFENDANTS SPEAK AT SENTENCING

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INTRODUCTION:

While many sentence proceedings can be predictable and mundane, especially where judgment is imposed pursuant to a pre-arranged plea-and-sentence agreement, others can be rife with uncertainty and discomfort, for example, where the court has made no sentence commitment, or the conviction resulted from a guilty verdict and the defendant is subject to the full range of possible punishment.

The situation can be made worse for the defendant if the victim of a felony crime submits a Victim Impact Statement (VIS) and then asks to speak at sentencing pursuant to CPL 380.50[2][b]).

In many instances, especially after a trial where the judge has heard the entire story of the case, there is very little of a factual nature that victims can add at sentencing other than to explain how the defendant's conduct has adversely affected their lives. It is not at all uncommon for victims to urge the court to impose the maximum sentence.

Depending on the nature of the crime, the extent of harm done and the personalities of the parties, victim allocutions tend to run the gamut from sorrowful, heart-rending pleas for justice to angry, vengeful demands for all that the law will allow. If nothing else, victims get the opportunity to stare down the defendant in a public courtroom and give him/her a big piece of their minds before the hammer comes down. (Think Larry Nassar, the team doctor of the U.S. Women's National Gymnastics Team who was convicted in 2017 of sexually assaulting several female athletes and was sentenced to 175 years in Michigan State prison on top of a 60-year federal sentence for child pornography).

JUDGES ARE AFFECTED BY IN-PERSON VICTIM STATEMENTS:

While judges may develop a strong sense of what a sentence should be after discussing the case with counsel, any such inclination can be turned on its ear if/when a victim makes an impassioned plea which not only engenders sympathy for the victim but elicits enmity for the defendant. Counsel should never forget that judges, like jurors, can be affected by emotional appeals and, as the arbiters of justice, they would rather not be perceived as too lenient when a harsher punishment was called for.

For example, in a DWI-fatality case, after the late victim's spouse and children have made a heartfelt tearful plea for the maximum punishment, there is very little if anything that counsel or the defendant can say to ease their pain or soften the sentence (unless the court gave a sentence commitment and intends to abide by it). In some sense, although the court can never give the victim's family what they

really want or make them whole again, a harsh sentence may be imposed not just to punish the defendant for the consequences of his/her crime but to send out a message that the courts take such matters seriously.

WHAT TO DO WHEN VICTIMS SPEAK AT SENTENCE:

If the court, after reading the pre-sentence report and any victim-impact statement, advises that it will abide by any previous sentence commitment regardless of what is said in court, then the best course of action is to say as little as possible when given the opportunity. A sincere expression of remorse for the crime and sympathy for the victim/family may be all this is necessary. In this circumstance, the VIS becomes more of a formality that everyone must endure but it is not a game changer.

On the other hand, if the victim and/or his/her surrogate goes off on a tirade of inflammatory invectives or makes false or incorrect statements, it is counsel's duty to correct them and take exception in a tactful but firm manner. (In some cases, victims who go overboard with bile and brimstone can alienate the judge and sway him/her toward a more lenient sentence).

VICTIM'S RIGHT TO SPEAK AT SENTENCE:

Prior to the enactment of CPL 380.50 in the early 1990's, courts had broad discretion to permit victims to speak at sentencing, but they were not required to do so. Then, in order to give crime victims a greater sense of participation in the process, the Legislature turned the privilege to speak into a right in felony cases provided that certain procedural steps were satisfied. (See People v Hemmings, 2 NY3d 1 [2004]).

As stated in CPL 380.50 (2)(b), if the defendant is being sentenced for a felony, the court, IF REQUESTED AT LEAST 10 DAYS BEFORE SENTENCE, SHALL ACCORD THE VICTIM THE RIGHT TO MAKE A STATEMENT regarding matters relevant to the question of sentence.

The court SHALL NOTIFY the defendant NO LESS THAN SEVEN DAYS before the sentence date of the victim's intention to make a statement at sentencing. If the defendant does not receive timely notice, he/she may request a reasonable adjournment.

Oftentimes, defense counsel will overlook the timely notice requirement so as not to prolong the inevitable (especially if the sentence was already agreed upon) or make the victim return to court yet again. However, if the VIS contains inflammatory or inaccurate information that could affect the outcome, counsel is well advised to take an adjournment to prepare an appropriate response.

Per CPL 380.50(2)(c), any statement by the victim must PRECEDE any statement by defense counsel and the defendant who has the right to rebut any statement by the victim.

(d) Where the People and the defendant have agreed to a disposition which includes a sentence that is acceptable to the court, and the court intends to impose such sentence, any rebuttal by the defendant shall be limited to an oral presentation made at the time of sentencing.

SCOPE OF PRE-SENTENCE REPORT (PSR)/MATTERS RELEVANT TO SENTENCE:

CPL 390.30(1) states that the elements of a PSR include information pertaining to the circumstances of the offense, the defendant's history of criminality/delinquency, the defendant's social history, employment history, family situation, financial status, education and personal habits.

Per subdivision 2, any relevant physical or mental examinations may be included.

CPL 390.30(3)(a) states that the PSR must contain analysis of as much of the information gathered as is relevant to sentencing.

VICTIM IMPACT STATEMENT (VIS):

3(b): The PSR MUST CONTAIN a VIS unless it appears that it would be of no relevance to the recommendation or the court's disposition which shall include an ANALYISIS of the VICTIM'S VERSION of the offense, the EXTENT OF INJURY OR ECONOMIC LOSS and ACTUAL OUT-OF-POCKET LOSS to the victim, and the VIEWS OF THE VICTIM regarding the disposition including the amount of restitution or reparation sought by the victim.

In homicide cases, or where the victim is obviously unavailable to assist in the preparation of the VIS, the information may be obtained from the victim's family.

It should be noted that in cases of Domestic Violence and/or Sexual Abuse, victim advocates may have a hand in helping the victim "cover all the bases" in the VIS. This may include a description of any on-going abuse and an explanation of why the victim may have remained with her abuser or, perhaps told the police or medical professionals that her injuries were caused by something (or someone) other than the defendant.

Pursuant to CPL 390.50(2) (b), the D.A. must give the victim at least 21 days' notice of the sentence date and inform him/her of the right to submit a VIS to the court. Notice of intent to do so must be submitted to the court 10 days before the sentence date and the defendant must be notified of such intent at least seven days before the sentencing. If the notice is untimely, the defendant, as noted above, has the right to request an adjournment of the sentence date.

Although CPL 390.50(2) requires disclosure of the PSR to the defense (including examination and copying), "NOT LESS THAN ONE COURT DAY PRIOR TO SENTENCING, there is nothing stopping counsel from asking the court to make it available (to both sides) as soon as the court receives it. (Some judges have been known to email the PSR to counsel or otherwise make it available for review as soon as it has been received).

Getting the earliest possible look at the PSR, in particular the VIS, can be invaluable to counsel's preparation for sentencing. In short, as stated by Abraham Tucker in 1768 in The Light of Nature Pursued "forewarned is forearmed," and knowing in advance what the victim is likely to say can help avert what might otherwise feel like an ambush.

HOW MANY "VICTIMS" CAN SPEAK AT SENTENCING?

A VICTIM is defined in CPL 380.50 as

1. The victim as indicated in the accusatory instrument or
2. If the victim is UNABLE OR UNWILLING to express him/herself before the court, or is so MENTALLY or PHYSICALLY DISABLED as to make it IMPRACTICAL TO APPEAR IN PERSON, or is DECEASED, then, a member of the victim's FAMILY or LEGAL GUARDIAN, or representative of the victim's legal guardian where such guardian/representative has personal knowledge of and a relationship with the victim, unless the court finds that it would be INAPPROPRIATE for such person to make a statement on the victim's behalf.

Although the statute seems fairly specific as to who can speak for the victim, case law has afforded judges wide latitude in exercising discretion to permit (or deny) multiple family members and others close to the victim to speak on his/her behalf when he/she is unavailable due to death or other infirmity or is otherwise unable or unwilling to speak for him/herself.

As noted in the Practice Commentary to CPL 380.50 (William C. Donnino, Practice Commentary McKinney's Vol 11A at p.376), " as with any act of discretion, a court should carefully consider the extent to which additional victim impact statements will assist the court in reaching an appropriate sentence determination…Multiple statements should not be allowed if the court finds that they will be unduly prejudicial to the defendant or will negatively impact the administration of justice …A court remains free, in the exercise of discretion, to decline a prosecutor's request to offer more than one victim impact statement or to restrict the number or length of such statements where they would be unhelpful, repetitive, inflammatory or otherwise inappropriate."

Consequently, unless the sentence is a done deal going in with no likelihood of being changed no matter what anyone says at sentencing, counsel should not hesitate to object (first at a pre-sentence conference) to unfair "piling on" with multiple statements from relatives and friends of the victim whose only real purpose is to fan the flames of animus toward the defendant whom they'd like to see burned at the stake. Counsel should also keep in mind that the record of the sentence proceedings will accompany the defendant to the correctional facility (assuming a state prison sentence) and will be considered by the Parole Board when the defendant becomes eligible for release. The less incendiary the sentencing record, the better it will be for the client down the road.

In People v Hemmings, 2 NY3d 1 (2004), the Court of Appeals held that a sentencing court has wide latitude in the exercise of discretion to permit multiple surrogates (here, five family members and a close friend) to speak on the deceased victim's behalf, even though the defendant was acquitted of the crimes (Murder 2d degree and Manslaughter 1st degree) directed at that person.

The defendant was initially charged with the homicide offenses and Criminal Possession of a Weapon (CPW) for shooting the victim who had allegedly stolen property belonging to him. At trial, the defendant testified that the victim tried to shoot him first, but his gun misfired. A struggle then ensued and the defendant fired his gun, in self-defense, he said. The jury convicted the defendant of CPW 2d degree (possession of a loaded firearm with intent to use unlawfully against another).

At sentencing, over the defendant's objection, the court granted the People's request to hear from the victim's mother, the mother of his child, his uncle, cousin and a close friend. All of them gave brief

statements describing the incident (of which the court was already aware) and urging the maximum sentence.

Defense counsel, noting the defendant's age (18) and lack of significant criminal history, requested that his client be granted youthful offender (Y.O.) status which the Probation Department also recommended. The Court denied Y.O. (which would have capped his sentence range at a maximum indeterminate term of 1and1/3 to 4 years in prison) and imposed an eight-year prison term, (seven years below the maximum of 15 years). The Appellate Division affirmed.

On appeal, the defendant argued that the trial court erred in allowing more than one person to speak at sentencing, and their statements, he contended, were irrelevant inasmuch as the defendant was acquitted of the crimes pertaining to the victim.

The Court of Appels disagreed, noting the long common law history of allowing broad judicial discretion at sentencing and finding nothing in CPL 380.50 that forbids others (including those who are close to the victim) to address the court at sentencing. The key, in the Court's view, was whether such information will help the court reach an appropriate sentence, and multiple statements should not be allowed if the court concludes that they will be unduly prejudicial to the defendant or will adversely impact the administration of justice.

The Court held that the trial court did not abuse its discretion in allowing multiple statements, especially since they were relatively brief and factual in nature. The Court was also satisfied that the lower court was not prejudiced by the "maximum sentence" chorus as evidenced by the significantly less-than-maximum sentence that was imposed.

With respect to the "no conviction, no victim" argument, the Court noted that the theory of the CPW charge included "intent to use the weapon unlawfully against another," and that, according to the proof adduced at trial, the defendant went looking for the victim with a gun in his possession, believing that he had stolen something from him. And, as for the reasons why the jury chose to acquit on the homicide counts (e.g., failure of proof, self-defense, act of jury mercy), the Court elected not to speculate.

DEFENDANT'S RIGHTS AT SENTENCING WHEN THINGS GO SIDEWAYS:

CPL 380.50(2)(e) states that where:

1. The defendant has been found guilty after trial or there is no agreement between the (parties) as to a proposed sentence or the court, after the statement by the victim, chooses not to impose the proposed (agreed-upon) sentence;
2. The victim's statement includes allegations about the crime that were not fully explored during the proceedings or that materially vary from or contradict the evidence at trial; and
3. The court determines that such allegations are relevant to sentencing, then the court SHALL AFFORD THE DEFENDANT THE FOLLOWING RIGHTS:

A. A REASONABLE ADJOURNMENT of the sentencing to allow the defendant to present information to rebut the victim's allegations; and
B. Allow the defendant to submit WRITTEN QUESTIONS to the court that the defendant wants the court to put to the victim. The court, in its discretion, may decline to put any/all such questions to the victim and shall state its reasons on the record.

If the court, after hearing the victim's statement, decides that it cannot honor its previous sentence commitment and must impose a harsher sentence than previously promised, unless the defendant is willing to accept the new sentence, he/she should move, and the court SHOULD allow him/her to WITHDRAW his/her plea of guilty. That is because the defendant is deprived of the benefit of his/her plea bargain through no fault of his/her own. (See generally, People v Selikoff, 35 NY2d 1227 [1974], People v Farrar, 52 NY2d 302 [1981], People v Rockwell, 137 AD3d 1586 [4th Dept. 2021]).

Before accepting any harsher sentence or moving to withdraw the plea (which is the client's decision to make), counsel should point out all the ways that his/her client is UNFAIRLY PREJUDICED by the court's eleventh-hour change of heart, especially where the victim's statement, however upsetting it may be, offers no new information beyond what was elicited at trial or contained in the PSR.

On the brighter side, if the victim does not make a statement, the right to provide one is deemed to have been waived. Furthermore, the failure of the victim to make a statement SHALL NOT BE CAUSE FOR DELAYING THE PROCEEDINGS AGAINST THE DEFENDANT nor shall it affect the validity of the conviction, judgment or order. (CPL 380.50[2][f]).

THE DEFENDANT'S PRESENCE AND RIGHT TO SPEAK AT SENTENCE:

CPL 380.40(1) states that a defendant must be present at sentence when sentence is pronounced.

However, if a defendant is sentenced for a MISDEMEANOR or VIOLATION, the court may, upon motion of the defendant, dispense with his/her presence. (CPL 380.40[2]]). Such motion must be accompanied by a waiver of appearance signed by the defendant and acknowledging his/her awareness of the maximum possible sentence.

CPL 380.50(1) requires the court, at sentencing, to ACCORD THE DEFENDANT AN OPPORTUNITY TO MAKE A STATEMENT regarding any matter relevant to the question of sentencing. The Court must ask the defendant if he/she wishes to make a statement in his/her own behalf and give him/her an opportunity to do so if he/she so desires.

It is not enough for the court to say, "Does anyone wish to be heard," before sentence is imposed (People v Torres, 238 AD2d 933 [4th Dept. 1997]) or not specifically according the defendant an opportunity to be heard. (See, example, People v Smith, 49 NY2d 651 [3d Dept. 1975] where the defendant asked to be heard and the court replied, "talk to your lawyer," without further inquiry).

That said, it appears that substantial rather than literal compliance with the statute is enough to meet the requirement that the defendant be afforded the opportunity to make a statement before sentence is imposed. (See People v McClain, 35 NY2d 483 [1974]). In McClain, the Court held that in the several appeals incorporated in this decision, while there was not conformity with the literal dictates of the statute, there was sufficient compliance to avoid having to remand the cases for re-sentencing with an opportunity for the defendants to speak.

The Court noted that none of the defendants alleged that they had anything to say or that they would have addressed the sentencing court at all. None of them had expressed any desire to speak and in each instance, counsel addressed the court on the defendant's behalf.

The Court did suggest, however, that it would be better for the sentencing court to make it unmistakably clear that the defendant and his/her lawyer EACH has a right to address the court. The court should then ask the defendant if he/she wishes to make a statement and afford him/her the opportunity to do so if the answer is yes.

As noted by the Court, the remedy for non-compliance with the statute is not vacatur of the conviction but a remand to the lower court for sentencing preceded by the defendant's opportunity to be heard. To be preserved, however, the defendant should object at the time of sentencing. (People v Lopez, 110 AD3d 1248 [3d Dept. 2013]).

PEOPLE V BROWN: D'S CLAIM OF DENIAL OF THE RIGHT TO SPEAK AT SENTENCING INCLUDED IN APPEAL WAIVER:

In People v Brown 2021 NY Slip Op 02867 (5/6/21), the Court of Appeals held that the defendant's challenge to the sentence based on not being given an opportunity to speak at the sentencing was not reviewable because it did not survive a valid waiver of appeal. In the Court's view, the defendant's claim did not fall within the narrow class of non-waivable defects that undermine the integrity of the criminal justice system or implicate public policy considerations that transcend the individual contentions of a particular defendant seeking appellate review. (Citing People v Muniz, 91 NY2d 570 [1998]).

The dissenting justice (Hon. Rowan D. Wilson) began by remarking that the right of the condemned person to speak at sentencing dates back to the ancient Greeks (and has continued throughout English and American common law), and the failure to accord the accused that basic right implicates fundamental fairness, thus warranting remand for resentencing.

In this case, the defendant pled guilty to Attempted Assault 1st degree in exchange for a negotiated determinate sentence of seven years in prison followed by five years of post-release supervision (PRS). The defendant waived his right to appeal at the time of the plea and was later sentenced as agreed.

At the commencement of the sentence proceedings, the court clerk stated, "before the court pronounces sentence, the People will be given the opportunity to make a statement, then your lawyer and you (defendant) will make a statement, if you wish."

For their part, the People simply asked that the defendant be sentenced in accordance with the plea-and-sentence agreement. Defense counsel objected to the court's denial of the defendant's tonsorial request and asked that the surcharge be deferred.

The court then explained the order of protection and asked the defendant if he understood. The defendant said, “yes, but I don’t know the victim.” He also expressed concern about violating the order unwittingly to which the court replied that intent was a necessary element.

The court then imposed sentence at which point the defendant said, “am I gonna get a chance to talk? This whole thing is bull----. I don’t understand this. It don’t matter. Let’s get this shit over with. I’ll see y’all when I see ya. Fuck that.” The defendant was never allowed to say his piece.

In the dissenter’s view, notwithstanding the waiver of appeal, the defendant still had every right to expect that his bargain included the right to speak at his sentence. Further, such right is a matter of fundamental fairness of the plea-and-sentence process which should survive the waiver of appeal. (Citing People v Seaberg, 74 NY2d 1 [1989]).

The dissenter also found no sense in the defendant’s waiver of appeal (entered during the plea colloquy) of a right that only came to fruition in a subsequent proceeding (sentencing). Though this was a bargained-for plea and sentence, the defendant did not bargain away his right to be heard at sentencing. (Citing People v Maracle, 19 NY3d 925 [2012]: “a defendant does not knowingly and intelligently waive the right to appeal her sentence where it had not yet been declared by the court at the at the time of the plea colloquy, …months before sentence.”).

Moreover, the right of allocution at sentencing ensures that the defendant will be treated fairly and not deprived of his/her liberty without being afforded the opportunity to make a public statement.

As the dissenter saw it, the majority ran roughshod over the Legislature’s express intent to require a sentencing court to give the defendant the opportunity to exercise his/her right to be heard at sentence. The defendant never relinquished the right and since he was deprived of it, it would be no great inconvenience to return the case to the lower court to allow him to speak before resentencing.

ORDER OF PRESENTATION:

CPL 380.50(1) directs that the court must allow the prosecutor (and the victim upon proper notice) to address the court in either order followed by defense counsel and the defendant who gets the penultimate word in the proceedings.

FINAL THOUGHT:

While the defendant’s words may not affect the court’s judgment (which may well be predetermined), sometimes they can reveal the defendant’s “human” side, especially when the defendant shows genuine remorse for his/her conduct and some hint of promise toward rehabilitation. That is why defendant’s who have pled guilty should always have something useful to say at sentencing, and counsel should work with the client to make sure that the content, tone and tenor of his/her statement are appropriate. Never should the defendant minimize his culpability at this stage nor, worse yet, cast blame in the victim’s direction. That can only add insult to injury (and invite a harsher sentence).

In the case of a guilty verdict, the defendant has every right to maintain his/her claim of innocence from the pre-sentence interview through the sentence. In this situation, the less said, the better. If the victim speaks at sentencing in a case where the issue was not whether the crime occurred but whether the

defendant was correctly identified as the perpetrator, counsel should not re-victimize the victim at sentencing but acknowledge the harm, correct any errors in the victim's rendition and assert that the verdict notwithstanding, the client respectfully maintains his innocence and hopes that the appellate court will agree with his/her position.

Unless the defendant is a loathsome, unrepentant scoundrel who has nothing good to say, counsel should urge the client to prepare and present a heartfelt (and hopefully realistic) plea for as much mercy that the court can provide. In many cases, saying nothing when an explanation (or expression of remorse) is called for only makes it easier for the court to do its worst.