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A FEW MORE WORDS ON CPL 710.30: PRECLUSION VS SUPPRESSION

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April 25th, 2022

INTRODUCTION:

Whenever the People intend to introduce at trial statements made by the defendant to law enforcement (or their agents), or witness testimony identifying the defendant as the perpetrator of the offense, they must give the defense TIMELY AND SUFFICIENT NOTICE of their intention to do so, lest they risk an order PRECLUDING such evidence altogether.

It is important to note that preclusion is a consequence of the People's failure to comply with the PROCEDURAL REQUIREMENTS of CPL 710.30 rather than a SUBSTANTIVE DETERMINATION by the court (either summarily upon the pleadings or after a hearing) that the defendant's statements must be SUPPRESSED as involuntary (CPL 710.20 [3], 60.45) and/or that that the police procedures resulting in the identification of the defendant violated his/her due process rights because they were UNFAIRLY SUGGESTIVE. (CPL 710.20 [6]).

Recognizing this distinction is important because moving to suppress an otherwise precludable statement (for want of proper notice) of which counsel becomes aware (e.g., via discovery, investigation or by dumb luck) may constitute a WAIVER of the preclusion argument and, if suppression is denied, the damning evidence will come in at trial.

Consequently, if the defense has good grounds for preclusion (and not so much for suppression), the better practice (at least for appeal purposes) may be to forego a suppression motion altogether and PRESERVE THE PRECLUSION ISSUE SHOULD the trial court render an adverse ruling. Conversely, if the case for suppression appears strong and the preclusion argument is weak, a motion to suppress may be the preferred course.

Such decisions can be a tricky (and risky) business that require not only a sense of strategy but an understanding of the nuances of CPL 710.30, the purpose of which is to provide the defendant with NOTICE OF THE PEOPLE'S INTENTION to introduce statements of the defendant and/or testimony identifying him/her as the perpetrator so that the defense can CHALLENGE THE ADMISSIBILITY of such evidence by making a MOTION TO SUPPRESS and, if warranted, obtaining a HEARING (e.g., Huntley, Wade). (People v O'Doherty, 70 NY2d 479 [1987].

As stated by the Court of Appeals in People v Lopez, 84 NY2d 425 (1994), "the defendant cannot challenge (evidence) of which he/she (has no knowledge)." (Citing, inter alia, People v Laing, 79 NY2d 166 [1992]). And, in People v Briggs, 38 NY2d 319 (1979), the Court said that the purpose of a hearing (on motion to suppress statements of the defendant), is to allow the defendant sufficient time to

challenge the voluntariness of his/her statements and permit an orderly hearing and determination of admissibility of such statements BEFORE TRIAL.

THE STATUTE

CPL 710.30:

1. THE EVIDENCE: Whenever the People intend to offer at trial (a) evidence of a STATEMENT MADE BY A DEFENDANT TO A PUBLIC SERVANT, WHICH STATEMENT IF INVOLUNTARILY MADE WOULD RENDER THE EVIDENCE THEREOF SUPPRESSIBLE ON MOTION PER CPL 710.20(3) or (b) testimony regarding an OBSERVATION OF THE DEFENDANT EITHER AT THE TIME OR PLACE OF THE COMMISSION OF THE OFFENSE OR UPON SOME OTHER OCCASION RELEVENT TO THE CASE, TO BE GIVEN BY A WITNESS WHO HAS PREVIOUSLY IDENTIFIED HIM/HER (or a pictorial, photographic, electronic, filmed or video recorded reproduction of him/her) AS SUCH, THEY MUST SERVE UPON THE DEFENDANT A NOTICE OF SUCH INTENTION, SPECIFYING THE EVIDENCE TO BE OFFERED.

When it comes to statements, the SUBSTANCE of the notice should include the TIME AND PLACE the statements were made and the SUM AND SUBSTANCE of them so they can be intelligently identified (and deciphered) by the defense. (See People v Bell, 2013 NY Slip Op 23436 [Rochester City Court 12/12/13], citing People v Lopez, supra at 428).

The notice should also state that the People INTEND to offer the statements (rather than just cite the statute and refer to them in a cover letter) and SPECIFY what they are rather than bury them in a pile of attached discovery material. (People v Bell, supra citing, in contrast, People v Raszl, 108 AD3d 1049 [4th Dep't 2013] where the 710.30 notice attached a copy of the defendant's written statement and stated the time and place of its making).

With respect to IDENTIFICATION, the notice should inform the defendant of the TIME, PLACE AND MANNER (e.g., show-up, line-up, photo array) in which the identification was made. (See People v Merrill, 272 AD2d 987 [4th Dept 1995], citing People v Lopez, supra at 428).

2. TIMING OF NOTICE: Such notice MUST be served WITHIN 15 DAYS AFTER ARRAIGNMENT AND BEFORE TRIAL, and upon such service, the defendant must be accorded a REASONABLE OPPORTUNITY TO MOVE BEFORE TRIAL PER CPL 710.40(1) TO SUPPRESS THE SPECIFIED EVIDENCE.

   BUT, FOR GOOD CAUSE SHOWN, THE COURT MAY PERMIT THE PEOPLE TO SERVE SUCH NOTICE THEREAFTER, AND IN SUCH CASE, IT MUST ACCORD THE DEFENDANT A REASONABLE OPPORTUNITY THEREAFTER TO MAKE A SUPPRESSION MOTION.

When CPL 710.30 was introduced in 1965, the People could withhold disclosure of their intent to offer statements and identification evidence until a REASONABLE TIME before trial which meant that such evidence was often not revealed until the eve of trial, thus resulting in eleventh-hour suppression motions and delays in the proceedings. Then, in 1976, not long after the rules of motion practice were amended to require (whenever practicable) that all motions be included in the same set of papers within 45 days after arraignment (CPL 255.20 [1],[2]), CPL 710.30 (2) was also amended to require that

the People serve their notice of intent WITHIN 15 DAYS of arraignment. (See People v O'Doherty supra at 488, and People v Lopez, supra).

Courts have interpreted the 15-day rule (which is intended, in part, to promote the orderly and efficient determination of motions BEFORE TRIAL), quite strictly, and only GOOD CAUSE (and NOT the absence of prejudice to the defendant or the fact that such evidence was provided via discovery) will overcome this requirement. (See People v Merrill, supra). As noted by the Court in Lopez, allowing the People to rely on the defendant's eventual receipt of such evidence through discovery would UNDERMINE THE STATUTE'S SCHEME AND NEGATE THE LEGISLATIVE (15-DAY) DIRECTIVE EMBODIED IN THE STATUTE.

Where the People fail to meet their statutory deadline and do not show good cause for delayed disclosure, the consequence is PRECLUSION which the Court of Appeals has described as an ACCEPTABLE PRICE TO PAY to achieve the desired goals of CPL 7103.30. (People v O'Doherty, supra, citing, inter alia, People v Spruill, 47 NY2d 869 [1979]).

LACK OF LAW ENFORCEMENT COMMUNICATION OR PROSECUTORIAL CONTINUITY NOT GOOD CAUSE

In People v O'Doherty 70 NY2d 479 (1987), the defendant and her cohort robbed a cabbie at gunpoint of his watch, wallet, and cash before he dropped them off in Queens NY. He described the female as a short, Puerto Rican person who spoke with an accent. (The defendant was a taller, Irish female who spoke with no discernable accent).

About a month later, the defendant and co-defendant were arrested in Queens for a similar robbery. The defendant admitted to the arresting officer that she and her partner had committed the earlier robbery of the cab driver. Remarkably, this officer did not communicate this information to either the detective or the prosecutor of the earlier robbery (who was also handling the second one) until five months after the defendant's arraignment.

The People moved for leave to file late notice of this statement, arguing that their ignorance of the arresting officer's information constituted GOOD CAUSE for not serving notice within 15 days of arraignment. Over the defendant's objection (and cross-motion to preclude), the Court permitted the late notice and, after a hearing, ruled the statement to be admissible as voluntarily made.

The Appellate Division AFFIRMED (121 AD2d 570) and held that since the defendant had received notice far enough ahead of trial to prepare a defense, the purpose of CPL 710.30 had been met.

The Court of Appeals REVERSED, finding that the lack of communication between the arresting officer and the detective (and prosecutor), did NOT amount to good cause even though the arresting officer was only involved in the arrest for the second robbery. The Court said that there may be situations where the relationship between the arresting officer and the prosecutor may be so attenuated to permit late notice, but this was NOT one of them.

The record established that that the arresting officer was in frequent contact with the detective and the ADA both of whom believed that the two robberies were related. Consequently, the lack of communication between the police and prosecutor did NOT provide a sufficient basis to forgive the late notice.

The Court also noted that a showing of good cause is INDISPENSIBLE to overlooking the 15-day rule and the fact that the defendant arguably had sufficient warning to prepare for trial was of no great moment since the purpose of timely notice is more about enabling the defendant to move for suppression of evidence than preparing a defense for trial.

Hence, in the Court's estimation, it was ERROR to permit the late notice and admit the defendant's statement, and such error was NOT HARMLESS considering the cabbie's less-than-spot-on description of the female robber.

BOILERPLATE 710.30 WITH NO PARTICULARS NOT GOOD ENOUGH

In People v Lopez, 84 NY2d 425 (1994), the Court of Appeals AFFIRMED the Appellate Division's REVERSAL of the trial court's refusal to PRECLUDE both statements and identification evidence even though the 710.30 notice only checked off boxes indicating "oral statements to public servant," and "identification of defendant by witnesses at a line-up" without providing any particulars.

The defendant was charged with (and convicted of) Attempted Murder 2d degree, Burglary 1st degree and Assault 1st degree for entering the victim's apartment via the kitchen window (to steal a TV) and stabbing her with a knife which she removed and then stuck him with in the back as he exited via the same window.

When the defendant was arrested a few days later on an unrelated warrant, he admitted attacking the victim (who later identified him in a line-up).

The defendant moved to preclude both the statement and identification, but the court deemed the notice to be adequate in light of discovery. In order to preserve the preclusion issue, defense counsel did NOT bring a suppression motion.

The AD, as noted above, reversed, finding that the People did not provide timely and sufficient notice, and there was neither good cause nor did the defendant move for suppression despite the lack of proper notice. (CPL 710.30[3]).

The Court of Appeals agreed, finding that the People failed to SPECIFY THE EVIDENCE that they intended to offer at trial, nor did they set forth the sum and substance of such evidence. (Citing People v Bennett, 56 NY2d 532 [1982]). The Court noted that while full copies of statements need not be supplied, they must be DESCRIBED SUFFICIENTLY so that the defendant can intelligently identify them, and the People must also inform the defendant of the time, place, and manner of any previous identification.

In Bennett, the Court held that an unnoticed statement which was the same as one which was properly noticed should not necessarily be precluded for lack of notice, nor should "substantially consistent" statements made to the same officer during the same conversation (but only one of which was noticed) suffer the same fate. (People v Cooper, 78 NY2d 476 [1991]).

REFERENCE TO CPL 710.30 IN A LETTER ATTACHED TO DISCOVERY MATERIAL DOES NOT CONSTITUTE PROPER NOTICE WITHOUT A STATEMENT OF INTENT AND SPECIFICATION OF THE EVIDENCE TO BE OFFERED.

In People v Bell, supra, the defendant moved to preclude statements allegedly made by him after the police found cocaine on the driver's side floor of a vehicle that he was driving, and which was pulled over for failing to obey a traffic control device.

The People argued that the statements were included among 16 pages of discovery material that was provided under a cover letter which said, "you are hereby given notice of all statements made to and/or identification procedures performed by a public servant that are DESCRIBED IN THE ATTACHED MATERIALS."

The defendant argued that the form letter lacked the necessary specificity, and while it purported to give notice of statements to law enforcement, it did NOT EXPRESS AN ACTUAL INTENT to introduce them against the defendant at trial.

The court said that while there is NO SPECIFIC FORMAT for a 710.30 notice, it must UNAMBIGUOUSLY COMMUNICATE THE PEOPLE'S INTENTION TO OFFER A STATEMENT MADE BY THE DEFENDANT INTO EVIDENCE AT TRIAL. (Citing, inter alia, People v Santana, 191 AD2d 174 [1st Dep't 1993]).

In the court's view, the People's letter was more of a notification of the possible existence of statements than a notice of intention to use them against the defendant at trial. The letter was also vague about the statements themselves and made no mention of the time and place when they were made. (In contrast, see People v Black, 177 AD2d 1040 [4th Dep't 1991] where defense counsel acknowledged having received and reviewed the defendant's statement contained in the discovery materials in sufficient time to prepare a defense even though the statement was not contained in the complaint as stated in the 710.30 notice).

In Bell, however, the defendant made a timely objection and argued that his ability to prepare a defense was hampered by the absence of notice of the statements that the People intended to offer against him. As the court saw it, the People's reliance on a letter referencing statements contained somewhere in a pile of discovery material did not satisfy the statute's requirements.

The court also rejected the People's waiver argument since the defendant had not moved to suppress the statements in question. (CPL 710.30[3]).

WHAT IF THE DEFENDANT MOVES TO PRECLUDE AND TO SUPPRESS IN THE ALTERNATIVE?

In People v Rhames, 2018 NY Slip Op 50332(U) (Mt Vernon City Ct 3/16/18) the defendant, charged with Assault 3d degree, Menacing 2d degree , CPW 4th degree and Harassment 2d degree, moved to preclude an unnoticed statement allegedly made by him at the scene of his arrest, wherein he allegedly admitted punching the victim ("because he was beating up a little boy"), and then threatening him with a knife that he had retrieved from his car. (The defendant made similar statements, which were noticed, to another officer who transported him to the police station).

The defendant learned of the first statements only after the People provided Rosario material in connection with a Huntley hearing that the defendant requested in connection with the second statement. The defendant moved to PRECLUDE the first statement for lack of notice. (He also moved to

expand the Huntley hearing to include a Mapp/Dunaway hearing upon learning that the police had recovered the knife from the defendant's vehicle).

Regarding preclusion, the People argued that the notice provided at arraignment was sufficient to apprise the defendant of the existence of the unnoticed statements (which the People included in a superseding information and in their response to the defendant's omnibus motion).

The court ruled that the absence of timely notice CANNOT BE CURED by documents turned over in discovery or contained in an accusatory instrument (citing People v Lopez, supra), nor does the lack of prejudice excuse the lack of proper notice.

The court pointed out that unlike People v Cooper, supra, and People v Bennett, supra, the second statements were made to a different officer at a different time and place from the initial statements made at the arrest scene. Therefore, they should have been included in the 710.30 notice.

Moreover, in the court's view, the fact that the defendant had moved to suppress the noticed statement did not constitute a waiver of the right to seek preclusion of the latter, unnoticed statement. (Citing CPL 710.30 [3]) and People v St Martine, 160 AD2d 35 [1st Dep't 1990]).

BACK TO THE STATUTE:

SUBDIVISION 3 OF CPL 710.30 states that in the absence of service of notice upon a defendant (as prescribed herein), no evidence of a kind specified in subdivision one (i.e., statements of the defendant and identification evidence) may be received against him/her upon trial UNLESS he/she has, despite the lack of such notice, MOVED TO SUPPRESS SUCH EVIDENCE AND SUCH MOTION HAS BEEN DENIED and the evidence thereby rendered admissible per CPL 710.70(2).

The idea behind this subdivision is that since the purpose of the statute (to enable the defendant to make a pre-trial challenge to the admissibility of such evidence) has been satisfied, there is no longer any basis to preclude when the road to suppression has already been taken and the court has been called upon to rule on the question of admissibility. (See People v Amparo, 73 NY2d 728. 729 [1988].

In People v St Martine, supra, the First Department held that the defendant, (charged with burglary, attempted robbery, criminal possession of a weapon and possession of stolen property) did NOT, by seeking to suppress "any/all statements," waive his right to object (on grounds of lack of proper notice) to the admission of statements of which he was UNAWARE when the motion was filed.

The defendant entered an elderly victim's apartment, carrying a stolen gun and stole a small amount of cash before being observed by a neighbor a half-hour later on the roof of a nearby apartment. The police spotted him on a patio with a jacket and briefcase at his feet. He took off running and was caught after which the neighbor identified him in a show-up. The brief case contained the gun, ammunition, and some burglar's tools.

Although the People served notice of statements of the defendant to two officers, there were other inculpatory statements that the defendant became aware of only after reviewing Rosario material provided just before the suppression hearing (with respect to the noticed statements, identification, and physical evidence).

The detective to whom the unnoticed statements were made testified about them at the hearing. At the defense's request, the hearing was adjourned in the middle of cross examination. When it resumed several weeks later, defense counsel moved to PRECLUDE the unnoticed statements. The People replied that all the defendant's statements were turned over as Rosario material, and the court concluded that the defendant had ample time in the interim to review and challenge their admissibility. The defendant's motion to preclude was denied as was the motion for suppression.

The First Department reversed, noting that while the People timely provided a portion of the defendant's statements, the entire contents were not disclosed during the 15-day period required by CPL 710.30 (2). In the court's view, half a loaf was not good enough to meet the statute's mandates especially where the defendant was unacquainted with the full breadth of the defendant's admissions when his motion to suppress any/all statements was made.

The court held that only when the defendant moves to suppress PARTICULAR STATEMENTS and then procures a ruling may he be deemed to have waived the 15-day notice requirement as to those statements only. (Citing People v Peck, 68 NY2d 928 [1986]).

Similarly in People v Merrill, supra, the Fourth Department held that the People's 710.30 notice (with respect to identification of the defendant) was inadequate for failing to set forth the time, place and manner of identification, and the trial court erred in denying the defendant's motion to preclude even though he had moved, in the alternative, for suppression of identification testimony if preclusion was denied. As the majority saw it, the defendant did not relinquish his right to preclusion by subsequently participating in a Wade hearing after preclusion was denied. (See also People v Scott, 222 AD2d 1004 [4th Dep't 2004]).

The dissenting justices (Denman, P.J., and Balio, J.), argued that unlike the defendant in People v Lopez supra, the defendant here moved for suppression (in the event preclusion was denied), thus falling squarely within the ambit of CPL 710.30 (3). By making such motion, the defendant, in the dissenters' estimation, was afforded the same opportunity to have the court rule upon the admissibility of the evidence as he would had timely notice been provided. (Citing People v Amparo, supra).

LOWER COURTS ARE ALL OVER THE PLACE ON WHETHER SUPPRESSION MOTIONS WAIVE PRECLUSION

In People v Heller, 180 Misc 2d 160 (Crim Ct City of NY 1998), the court held that both the statutory language and purpose of compelling early (now automatic) discovery and motion practice (within 45 days of arraignment) support a STRICT APPLICATION of the preclusion rule (against the People) and do NOT support a finding of waiver from simultaneous motions (to preclude and suppress).

However, in People v Rodriguez, 179 Misc2d 912 (Sup Ct Monroe County 1999), the court concluded that since the purpose of CPL 710.30 is to afford the defendant the opportunity to make motions to suppress evidence, once a defendant has made such a motion (even in the alternative), and obtained the OPPORTUNITY FOR A HEARING, the purpose of the notice requirement has been fulfilled and preclusion is no longer appropriate, and thus will be deemed to have been waived.

In People v Smith, 8 Misc 3d 441 (NY Dist Ct 2005), the defendant (charged with petit larceny and possession of stolen property) made an omnibus motion which, among other requested relief, sought

preclusion of two unnoticed show-up identifications that were revealed in discovery, and in the alternative, suppression based on undue suggestiveness.

The court ordered a Wade hearing and (without expressly addressing preclusion), denied the motion "in all other respects." At the start of the hearing, defense counsel moved to re-argue the implied denial of his preclusion motion which the People never really addressed or argued good cause for the lack of notice.

A new judge took over the case and expressly denied preclusion, reasoning that the defendant's motion to suppress, though made as an if-come, afforded him the same opportunity to have the court rule upon the admissibility of the identification as if timely notice had been given. (Citing People v Merrill, 87 NY 2d at 988).

Citing, inter alia, People v Rodriguez supra, the court in Smith said that whether a suppression hearing has just been scheduled (or a motion made and then withdrawn), the key is that the defendant was afforded the opportunity for a hearing. In the Smith court's view, the making of the suppression motion, whether pursued to a conclusion or not, establishes the opportunity for pretrial scrutiny which triggers the exception of CPL 710.30 (3).

WORDS TO THE WISE:

In cases where counsel becomes aware of potentially suppressible evidence at the start of or during another hearing (e.g., on motion to suppress statements for which timely notice was provided), counsel should advise the court that any such evidence (e.g., identification testimony which the People withheld on the belief, accurate or not, the identification was confirmatory, or additional statements), counsel probably should NOT agree to expand the hearing to include suppression of such evidence. Rather, counsel should move to PRECLUDE such evidence for lack of proper notice. Alternatively, if the situation is unclear, counsel should ask the court to hold a separate inquiry to determine whether the identification was such that notice was, in fact, not required. (See cases outlined below).

If the court concludes that notice was not required, then "no harm no foul." However, if the court concludes otherwise, (e.g.., the identification was NOT confirmatory), counsel should continue to PRESS FOR PRECLUSION for lack of notice.

In light of the new discovery rules requiring early and automatic discovery, in particular CPL 245.20 (1) which requires disclosure (a) all written, recorded and oral statements made by the defendant to law enforcement, (c) the names of all persons whom the prosecutor knows to have evidence/information relevant to any offense charged (which should include anyone who has identified the defendant as the perpetrator), (d) the names of all law enforcement personnel whom the prosecutor know to have evidence/information relevant to any offense charged and (e) all written/recorded statements made by persons with such relevant information, it would seem that the opportunities for surprise should be fewer and farther between than before January 2020 (when the new rules took effect).

However, the possibility for inadvertent or intentional non-disclosure of potentially suppressible evidence should NOT be underestimated, and counsel should keep in mind that DISCOVERY IS NO SUBSTITUTE for the notice required by CPL 710.30 (1)(a) and (b). (See People v Lopez, supra).

PRECLUSION INQUIRY

In People v Whiting, 5 Misc 3d 802 (Crim Ct City of NY 2004), the defendant, (charged with Assault 3d degree) moved to preclude identification testimony (not listed on the 710.30 notice) after learning from police reports that the victim had identified him as the assailant in a police-arranged observation of him in a detention room three days after the incident. The reports also indicated that the victim was assaulted by a "person unknown" whom the victim could not name or describe.

The People opposed preclusion, contending that the identification was CONFIRMATORY (and, therefore, no notice was necessary) because the victim recognized the defendant who went to the same school. In the alternative, they suggested that the court conduct a Rodriguez hearing to gauge the extent of the victim's familiarity with the defendant.

The court held that since the defendant had raised a substantial question whether an identification procedure occurred for which notice was required, there should be a hearing to determine whether such a procedure took place, (and if so, should have been noticed). (Citing People v Castagna, 196 AD2d 879 [2d Dep't 1993]).

As the court saw the matter, if the evidence established that the identification was confirmatory, then there would be no basis for preclusion since improper suggestiveness would not be in issue and notice was not necessary in the first place. However, if it was not confirmatory (as suggested by the police reports), then the failure to provide notice of the identification would warrant preclusion.

The court noted that this type of proceeding is different from a Rodriguez hearing where a finding that the identification was not confirmatory would then require the People to establish that the identification procedure was not unduly suggestive (a constitutional rather than procedural question), lest the identification be SUPPRESSED rather than precluded.

Similarly, in People v Davis, 2016 NY Slip Op 02051 (4th Dep't 5/23/18), the Fourth Department, in this weapons-possession case, held the appeal in abeyance and remitted the matter to the lower court (which had summarily denied the defendant's preclusion motion) to hold a HEARING to determine whether a station-house identification procedure had taken place.

The People had provided a BLANK 710.30 NOTICE, and, in response to the defendant's preclusion motion, stated that "there were no identification procedures requiring a 710.30 notice."

The evidence at the suppression hearing established that the defendant fled from the passenger side of a parked vehicle and eluded capture until later that day. The People did not dispute that after the defendant's arrest by a different officer who brought the defendant to the police station (at the direction of the first officer who observed the suspect), the first officer identified the defendant at the station as the person he saw alighting from the vehicle.

The AD stated that the record suggested but was not clear whether there had been an identification procedure at the station house for which notice was required. Consequently, the case was remitted for a hearing to determine whether there was such a procedure and, if so, whether it was confirmatory.

THE PEOPLE MAY NOT APPEAL FROM AN ORDER OF PRECLUSION

In People v Laing (and the companion case of People v Wade), 79 NY2d 166 (1992), the Court of Appeals held that the People cannot appeal from an order granting preclusion under CPL 710.30 because it is not among the appealable orders (unlike a suppression order under CPL 710.20) authorized by CPL 450.20 (8).

The defendant in Laing was arrested for a gas station robbery committed several days earlier and was identified from a single photograph shown to the victim by police. This identification was listed on the 710.30 notice, but the court suppressed it on account of undue suggestiveness. Just before jury selection, the prosecutor informed defense counsel about another witness who had also identified the defendant from a single photo a week after the robbery. The People claimed that this identification was confirmatory (hence, no need for notice) but the court precluded it for lack of notice.

In Wade, the defendant was charged with Criminal Sale of a Controlled Substance 3d degree, stemming from a hand-hand to hand drug transaction with an undercover police officer who later identified him at the scene. Although the People provided the defense with a voluntary disclosure form, there was no 710.30 notice of the post-sale, on-scene (show up) identification which the People claimed was confirmatory. The trial court granted the defendant's motion to preclude the identification. The People appealed from both orders.

The Appellate Division dismissed the appeals noting that while CPL 450.20 (8) permits a Peoples' appeal from an adverse, pre-trial suppression order (provided they also file a statement per CPL 450.50 that their case has been rendered either insufficient as a matter of law or so weak overall as to destroy any reasonable possibility of obtaining a conviction), there is no such authorization for appeal from an order of preclusion.

The court concluded that the absence of such authorization reflected a legislative judgment that the loss of the use of unnoticed evidence is an acceptable price to pay to achieve the goals of CPL 710.30 (opportunity to suppress evidence and orderly and prompt resolution of motions), (People v O'Doherty, supra), and that absent an express authorization to appeal, such right could not be read into the statute. (Citing, inter alia, People v Dejesus, 54 NY2d 447 [1981]).

The court also rejected as a creative contrivance the People's argument that CPL 450.20 [8] should be broadly interpreted to include CPL 710.30 orders with suppression orders under CPL 710.20 because they both result in depriving the People of evidence (of statements and identification) at trial.

In the court's view, CPL 710.30 is not a component part of a substantive suppression motion but, rather, is a separate, procedural condition precedent to the defendant's ability bring a motion to suppress evidence. So, unless timely notice of intent is given (or the court permits late notice for good cause shown), suppression under CPL 710.20 doesn't even come into play. (Citing People v Taylor, 65 NY2d 1 [1985]).

Accordingly, since there is no statutory basis to appeal from a CPL 710.30 preclusion order, the Court of Appeals affirmed the orders dismissing the appeals.

INCULPATORY STATEMENTS, SEX AND 710.30

In People v Albert, 2019 NY Slip Op 03227 (4th Dep't 2019), the defendant in this murder case challenged the trial court's denial of his motion to preclude unnoticed statements that he made to a woman (who secretly taped the conversation for the police) as a prelude to having sex with her.

The defendant argued that his statements admitting to the homicide, (in a supposed attempt to allay her concerns and make her more receptive to his advances by baring his soul), should have been set forth in a 710.30 notice because the witness was acting as an agent of the police to further a law enforcement objective. (People v Ray, 65 NY2d 282 [1985]).

The majority of the Fourth Department held, however, that since the defendant offered to tell the witness anything she wanted to know, and there was no indication of any promise of sex in exchange for a confession, there was no risk of involuntariness by false incrimination (CPL 60.45 [2][b]). (Citing People v Bradberry, 131 AD3d 800 [4th Dep't 2105]). Hence, there was no colorable basis for suppression and the failure to provide notice of the statement was deemed to be a MERE IRREGULARITY not warranting suppression. (Citing People v Clark, 198 AD2d 46 [1st Dep't 1993]).

The dissenting justices (Hon. John V. Centra and Brian F. DeJoseph) rejected the majority's "mere irregularity" conclusion, arguing that there was a colorable basis for suppression because County Court could have found (had a suppression hearing been conducted) that the defendant's admission may have been made upon an implicit promise of sex.

In the dissenters' view, in a case where the defendant was at least arguably entitled to a hearing to assess the voluntariness of his statement to a police agent, a 710.30 notice should be provided regardless of the prosecutor's opinion that the defendant's statements were voluntary, despite what a court might find after a hearing. (Citing People v Brown, 140 AD3d 266 [1st Dep't 1988]).

Consequently, since there was a question whether the defendant's statements were voluntary, the defendant had the right to have the court review the circumstances under which they were made and determine whether they were, in fact, freely given. (Citing People v Boone, 98 AD3d 629 [2d Dep't 2012]). In view of the lack of 710.30, the dissenters would have precluded the statement and ordered a new trial without it.

FINAL THOUGHT

For all intents and purposes, CPL 710.30 is and should be a clear signal of the People's intention to offer evidence that is subject to suppression so that the defendant can understand what he/she may be up against at trial and head it off at the pass by pre-trial motion and a hearing. As noted at the outset, a defendant cannot move to suppress evidence about which he/she has no knowledge. (People v Lopez, supra).

If notice is not provided, counsel should not be too quick to pull the trigger on suppression, lest the preclusion issue be shot down for purposes of appeal. While different cases seem to take different views

on whether pursuing the former waives the latter, the best guide appears to be the words of CPL 710.30(3) which states that if the defendant, despite the absence of notice, moves to suppress such evidence and such motion is denied, the evidence may be received against him upon trial.

As with all strategic decisions in a criminal case, forewarned is usually forearmed.