APPEALING ADVERSE SUPPRESSION ORDERS

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INTRODUCTION

Criminal cases, most frequently those involving possession of drugs, guns, or stolen property, often rise or fall, not upon verdicts but upon decisions of the trial court granting or denying suppression of critical evidence.

When a motion to suppress is denied, the defendant must decide whether to cut his/her losses and plead guilty (preferably to a lesser offense) or roll the dice at trial. If there is an acquittal despite the court’s order, the defendant (assuming there are no detainers) may get on with his/her life unrestrained by legal encumbrances.

 If found guilty, the defendant has the right to appeal the judgment of conviction based on any trial errors that were properly preserved by objection (and/or motion for trial order of dismissal) and/or the lower court’s arguably erroneous decision to suppress the evidence that contributed to the verdict (CPL 450.10[1]).

Even when the defendant has pled guilty, unless he/she has expressly waived his/her right to appeal from a final order denying suppression (for example, in consideration of a plea to a lesser charge which is seldom offered after a hearing), a guilty plea will not foreclose an appeal of the order to the intermediate appellate court (see *People v Holz*, 35 NY3d 55 [2020]).

As stated in CPL 710.70(2), “an order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

In *Holz*, supra, the Court of Appeals held that the defendant’s right to appeal extended to his guilty plea to a crime (burglary) that was not directly related to the evidence (jewelry) underlying a separate burglary count in the same indictment that was dismissed in satisfaction of the plea.

The police, acting on a tip, confronted the defendant near the site of successive burglaries (two days apart) and directed him to remove his hands from his pockets. When he did so, he revealed a bag of jewelry (taken in the second burglary) which he falsely claimed to have purchased at a nearby house sale. A check with the homeowner promptly refuted the defendant’s story.

The defendant was arrested and charged with burglary involving the theft of the jewelry and a separate count based on the theft of a laptop from the same house two days earlier. His subsequent motion to suppress the jewelry was denied as the court found reasonable suspicion to detain the defendant and direct him to remove his hands from his pockets. Thereafter, he pled guilty to the count relating to the stolen laptop and the count involving the stolen jewelry was dismissed in satisfaction of the plea. He was sentenced as a second felony offender to six years in prison and five years of post-release supervision.

 The defendant appealed to the Fourth Department, arguing that the lower court erred in denying his motion to suppress. The court affirmed his conviction, finding that the judgment of conviction DID NOT ENSUE from the denial of the motion because the evidence that the defendant sought to suppress related to the jewelry which did not underly the count to which he had pled guilty (167 AD3d 1417 [4th Dept 2018]). The court did not, therefore, reach the merits of the suppression motion.

The dissenting justice (Whalen, P.J.), concluded that the determination whether a guilty plea ensues from an order denying suppression depends on whether there is a REASONABLE POSSIBILITY that the alleged suppression error CONTRIBUTED TO the plea. Support for this position can be found in CPL 470.15(1), which authorizes intermediate appellate courts to consider issues of law or fact which “*may have* adversely impacted the appellant” (emphasis added). The dissenter also felt that the court should have addressed the merits of order denying suppression.

The Court of Appeals agreed with the dissenting justice and concluded that the majority had taken a myopic view of the meaning of “ensuing judgment of conviction.” Noting that the phrase is not defined in CPL 710.70, the Court looked to the Oxford Dictionary definition which states that to ensue means to occur or arise subsequently or to follow as a result (Oxford University Press 2022).

The Court read the statute and interpreted its history to conclude that the Legislature intended the broadest of relational terms to convey the connection between the suppression order and the judgment of conviction.

Rejecting the People’s argument that the judgment of conviction does not include counts not pled to but merely satisfied by a guilty plea (to a different count), the Court concluded that the statute extends to counts that are satisfied as part of the defendant’s plea to another count in the same accusatory instrument.

The Court also deemed it bad policy to say that an intermediate court lacks the jurisdiction to review a trial court’s determination of suppression issues when the evidence in question is not directly related to count of conviction because it would shield erroneous decisions from review and give rise to a plethora of unreviewable errors.

Absent an on-the-record concession by the defendant that the suppression order played no part in his decision to plead guilty, or an express waiver of the right to appeal the decision, the court determined that the matter should be resolved on the merits and remitted the case to the AD for such determination.

PEOPLE’S APPEAL

In cases involving potentially suppressible evidence, prosecutors will (or at least should) not only evaluate the quantum and quality of their proof but also consider the possibility that the evidence was obtained in violation of the defendant’s constitutional rights.

If, for example, the police pat down a pedestrian with no demonstrable reason to believe he/she may be armed, pull a vehicle over for no discernable reason, or enter a suspect’s home without a warrant, exigency or consent, the prosecutor should think twice about presenting the case to a grand jury. If an indictment is obtained, there is (or should be) a strong likelihood that the evidence obtained (e.g., weapon, drugs, stolen property, statements) will be rendered unavailable to the prosecution at trial.

If a prosecutor makes an unusually generous plea offer (even to a defendant with a lengthy criminal history) it is often because he/she has concluded that if a suppression hearing were held, their case would be severely weakened if not altogether undone. Nevertheless, they sometimes forge ahead like the British cavalry into the Battle of Balaclava (see Tennyson’s Charge of the Light Brigade) only to suffer serious losses that could have been avoided.

In the event of an adverse ruling, they must go back to their drawing board and decide whether they can still proceed to trial without the evidence that has been suppressed. If the answer is no, they must (or should) then evaluate whether the hearing court’s order of suppression is likely to be affirmed on appeal. If the answer is yes, they will likely cut their losses and move to dismiss the indictment (or those counts encompassed by the order of suppression).

CPL 450.20 and 450.50

If the People believe they have a reasonable chance of getting the order of suppression reversed, they can take an appeal to the appropriate intermediate appellate court (CPL 450.20[8]) provided they also file a statement certifying that, because of the suppression order, the remainder of their proof is a. INSUFFICIENT AS A MATTER OF LAW or b. so weak overall that any reasonable chance of obtaining a conviction has been effectively destroyed (CPL 450.50 [2]).

 In *People v Kates* (53 NY2d 591 [1981]), the People appealed from the trial court’s order suppressing the defendant’s blood test results on the grounds that they were obtained in violation of VTL 1192(4) and the Equal Protection Clause. The Fourth Department reversed, finding that there was no statutory or constitutional bar to admissibility of the test results.

The defendant argued that there was no basis for the People to appeal since they had other proof of intoxication. The AD rejected this argument based on the People’s certification that the BAC evidence was essential to their case.

The Court of Appeals agreed with the AD and upheld its determination reversing the lower court’s suppression order.

Regarding the defendant’s challenge to the People’s CPL 450.50 certification, the Court noted that the statute requires the prosecutor (who is in the best position to assess the strengths and weaknesses of his/her own case) to make a personal evaluation of the quality of the remaining proof which need not be exposed to nor challenged by the defense. However, once the People take an appeal and file the requisite certificate, they cannot then change their position and try the defendant on the remaining evidence if the suppression order is affirmed. Only if the order is reversed and the evidence is restored to them, may the People proceed to trial. This makes the decision to take a People’s appeal, and file the accompanying 450.50 statement, something of a Rubicon for the People.

However, in *People v McIntosh* (173 AD2d 490 [2nd Dept 1991]), the Second Department held that where the People obtain the appellate court’s permission to WITHDRAW their appeal (based upon a re-evaluation of their case post suppression), they can proceed to trial on whatever proof they have remaining.

In that case, County Court suppressed physical evidence, statements of the defendant, and identification testimony, thus prompting the People to file a notice of appeal and CPL 450.50 statement outlining the futility of proceeding without the evidence that had been dispatched.

Several weeks later, the People sought leave to withdraw their appeal which the Second Department granted. The defendant then moved to dismiss the indictment, arguing that CPL 450.50(2) precluded further proceedings upon it without an appellate court reversal of the order of suppression (citing *Matter of Forte v Supreme Ct. of State of N.Y.*, 48 NY2d 179 [1979]).

The People appealed (CPL 450.20[1]) and the Second Department reversed the lower court’s order of dismissal. The court noted that while CPL 450.50(2) (which is designed to limit prosecution appeals of interlocutory orders to those which effectively dispose of their case), bars further prosecution of an indictment unless and until the suppression order is reversed, here, the withdrawal of the appeal upon court permission, nullified it and, consequently, there was no determination of the merits of the lower court’s suppression order.

In the court’s view, it is the UNSUCCESFUL PROSECUTION of an appeal rather than the FILING of the notice thereof with the requisite certification that triggers the bar to further prosecution of an indictment which is the subject of an order of suppression (citing *Forte*, at 188).

Since the People were not unsuccessful on appeal, nor was there an affirmance of the suppression order, there was no obstacle to their proceeding to trial with whatever proof they had left.

The court further noted, however, that the People would be charged with the speedy trial time from the filing of the appeal and moving to withdraw it. Normally, what is now CPL 30.30(7) re-commences the action for speedy trial purposes following, among other things, an appeal.

FINAL OBSERVATION

Both prosecutors and criminal defense attorneys should carefully evaluate any/all suppression issues before proceeding with a prosecution whether upon an information in the local criminal court or upon an indictment (or superior court information) in superior court. Doing so can better inform decision making on both sides whether to offer or accept a plea or proceed to a suppression hearing.

If the defense is successful in reducing the People’s arsenal of evidence, the People will likely request an adjournment to re-assess the state of their remaining proof and decide whether they can/should go forward with their weakened case, throw up the white flag or pursue an appeal in the hopes that the appellate court will view the suppression issues differently than the trial court.

Usually, suppression issues are more gray than black and white, but if the defense has presented persuasive arguments and the hearing record supports the judge’s decision to suppress, the case should either end there (because the People have seen the futility of their position) or result in an affirmance on appeal.

If the decision is reversed, the defense should either angle for a favorable sentence commitment (which may be hard to come by at this stage of the proceedings) or proceed to trial. If the suppression issue involved voluntariness of the defendant’s statements, or a suggestive pre-trial identification procedure that casts doubt on the reliability of an in-court identification, then counsel should consider raising it with the jury (CPL 710.70 [3]; *People v Aponte*, 204 AD3d 1031 [2nd Dept 2022]). As the title to the 1939 Bob Hope-Martha Raye film states, “Never Say Die.”