

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25308
W/kmg

_____AD3d_____

Argued - November 2, 2009

MARK C. DILLON, J.P.
ANITA R. FLORIO
HOWARD MILLER
DANIEL D. ANGIOLILLO, JJ.

2008-03159

DECISION & ORDER

The People, etc., respondent,
v Kelly Santos, appellant.

(Ind. No. 07-00271)

John M. Schwarz, Jr., Suffern, N.Y., for appellant.

Francis D. Phillips II, District Attorney, Goshen, N.Y. (Lauren E. Dunnock and Andrew R. Kass of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Orange County (De Rosa, J., at trial; Freehill, J., at sentencing), rendered April 2, 2008, convicting him of burglary in the first degree (two counts), attempted assault in the second degree, criminal possession of a weapon in the fourth degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and a new trial is ordered.

The County Court erred in denying the defendant's motion to set aside the verdict pursuant to CPL article 330. During trial, testimony was elicited during the cross-examination of the complainant that the complainant was involved in a civil action, and had contacted a certain named law firm with respect to that action. The subject matter of the civil action involved the safety and security of the building in which the complainant resided, which is the same building that the defendant allegedly burglarized. The Trial Judge made no comment when this testimony was elicited. Thereafter, the defendant was convicted.

Following the verdict, but before the sentencing hearing, the Trial Judge held a recusal

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hearing. At that time, he related that he had just been informed by the Assistant District Attorney trying the case that the Trial Judge's wife was a partner in the law firm representing the complainant in the related civil action against the owner of the apartment building allegedly burglarized by the defendant.

Under the circumstances of this case, the defendant is entitled to have the judgment vacated and a new trial. A judge shall disqualify himself or herself where "the judge knows that he or she . . . or the judge's spouse . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest [in] the proceeding" (22 NYCRR 100.3[E][1][c]; see 22 NYCRR 100.3[E][1][d][iii]). When the Trial Judge in the instant matter heard the name of his wife's law firm mentioned, he had the obligation to inquire further and, upon inquiry, to do as he only later did, which was to recuse himself. Since he did not, the conviction must be vacated and the matter remitted to the County Court, Orange County, for a new trial (see 22 NYCRR 100.3[E][1][c], [E][1][d][iii]; *People v Alomar*, 93 NY2d 239; see also Judiciary Law § 14; cf. *Matter of Kurz v Justices of the Supreme Ct. of N.Y., Kings County*, 228 AD2d 74).

DILLON, J.P., FLORIO, MILLER and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court