

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

D32639  
O/prt/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 4, 2011

MARK C. DILLON, J.P.  
RUTH C. BALKIN  
RANDALL T. ENG  
JEFFREY A. COHEN, JJ.

---

2009-11111

DECISION & ORDER

The People, etc., respondent,  
v David Bernard, appellant.

(Ind. No. 0002/07)

---

Lynn W. L. Fahey, New York, N.Y. (Steven R. Bernhard of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Ellen C. Abbot, and Daniel Bresnahan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lasak, J.), rendered November 17, 2009, convicting him of robbery in the first degree (four counts), robbery in the second degree (two counts), criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, and criminal possession of stolen property in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the matter is remitted to the Supreme Court, Queens County, for a new determination of the defendant's motion to set aside the verdict pursuant to CPL 330.30, upon which motion the defendant's counsel on this appeal shall represent him, and the appeal is held in abeyance in the interim. The Supreme Court, Queens County, shall file the new determination with all convenient speed.

The defendant was convicted, upon a jury verdict, of four counts of robbery in the first degree and various other offenses. Prior to sentencing, the defendant moved, pro se, to set aside the verdict pursuant to CPL 330.30 on the ground that a certain witness was not called to testify at trial. At the sentencing hearing, the Supreme Court asked defense counsel if he was adopting the defendant's motion. Defense counsel responded, in sum and substance, that he had reviewed the

motion and did not adopt it. He added that if he were to adopt the motion, he would have had to indicate that he had “a belief that it had some legal merit.” The Supreme Court proceeded to deny the defendant’s motion and impose sentence.

Defense counsel, by taking a position adverse to his client on the motion to set aside the verdict pursuant to CPL 330.30, deprived the defendant of effective assistance of counsel (*see People v Gruttadauria*, 40 AD3d 879, 880; *People v Rosenbauer*, 1 AD3d 1050; *People v Betsch*, 286 AD2d 887; *People v Burton*, 251 AD2d 1020). Accordingly, the matter must be remitted to the Supreme Court, Queens County, for a new determination of the motion, upon which motion the defendant’s counsel on this appeal shall represent him. We express no opinion as to the merits of the defendant’s motion and we decide no other issues at this time.

DILLON, J.P., BALKIN, ENG and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court