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MEMORANDUM

SUPREME COURT : KINGS COUNTY (Criminal Term, Part 24)

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PEOPLE of the STATE of NEW YORK,

By: Hon. Thomas J. Carroll

- against -

Dated: June 23, 2006

EVERTON SIMMS,

Indictment No. 5525/06

Defendant.

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The defendant moves to set aside the verdict on the ground that the verdict as it relates to juror number ten was ambiguous.

In deciding this motion, the court considered the motion papers with the attached relevant minutes, the People's Opposition and the court file.

Background

On June 27, 2005, two persons were robbed. On June 28, 2005, the defendant was arrested for the theft.

On August 29, 2005, the instant indictment, charging the defendant with robbery and related charges, was filed. On September 27, 2005, the defendant was arraigned and pleaded not guilty.

On April 25, 2006, jury trial commenced. On May 2, 2006, the jury sent a note to the court that they had reached a verdict. The court had the jury brought to the courtroom. After announcing a guilty verdict, the court polled the jury. During the polling of the jury, juror number ten said, "well, its my verdict, although I feel like I was

pressured to make that decision."[1] After completing the polling of the jury, the court inquired of the parties, outside the presence of the jury, as to what course of action the court should take about juror ten's response. The defense counsel stated that he did not know what to do, but was asking for a mistrial. After further colloquy, the court recessed.

After the recess, the court stated that it would send the other eleven jurors back to the deliberating room with an instruction not to discuss the case. Juror number ten was to remain in the courtroom where the court would "ask her certain questions, and I will ask her what did she mean by pressure, was there pressure inside the room or outside the room."[2] The defense counsel then inquired whether the court would ask "her [to] explain what pressure?" The court replied that it would not "invade the sanctity of the jury deliberation process . . . "[3] The defense counsel was not satisfied with this response and stated that if all that the court was going to inquire was whether the pressure was inside or outside the jury room that "we still do know no more than what we know now."[4] The court then stated that it would not go into what occurred in the jury room.

Thereafter, the court conducted an inquiry of juror number ten. The court first asked the juror what the juror meant by pressure. The juror responded, "I believe there

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[1] Page 5, lines 15-17. All pages referred to herein is a reference to the minutes attached to the motion. The minutes relate to what occurred from the time that the court stated that it had received a note that the jury had a verdict until the acceptance of the verdict.

[2] Page 9, lines 8-11.

[3] Page 9, lines 21-22.

[4] Page 9, lines 24-25.

was pure chaos in there. Everyone was speaking at the same time."[5] The court then informed juror number ten that it does not want to discuss what occurred in the jury room. In spite of the court's admonition juror number ten stated, "Well, I meant pressured by the fact that everyone is standing up, yelling at me, why can't you see it that way, why can't you see that way? Everyone is yelling like that. After eight hours of that you have to give in."[6] The court then inquired as to whether pressures came from outside the jury room, from home or from work.[7] The juror replied that there were no such pressures. Juror number ten was then excused.

The court then ruled that the pressure referred to by the juror did not come from outside the jury room. The court then invited comment by defense counsel.[8] Counsel then indicated that juror pressure is improper and stated "That is grounds for a mistrial, a hung jury at this point...".[9] Counsel argued that the verdict was not that of the juror because he was pressured by other jurors.

The court then asked that the jury be returned to the courtroom. The court informed the jury that it was accepting the verdict and then accepted the verdict and ordered that it be entered.

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[5] Page 11, lines 16-18.

[6] Page 12, lines 12-16.

[7] Page 12, line 22 through page 13 line 11.

[8] Page 13, lines 23-24.

[9] Page 14, lines 22-23.

The defendant has not been sentenced yet.

CPL 330.30

The power of a court to set aside a verdict is "created and measured by statute."[10] A lower court has no inherent power[11] to set aside a guilty verdict[12] but is limited to those grounds enumerated by statute and their statutory criteria. [13]

The defense counsel cites CPL 330 as authority for the court to set aside the verdict. However, counsel does not inform the court under which subdivision of that statute he is moving. Since all facts that are submitted on this motion were known to counsel prior to the acceptance of the verdict and appear on-the-record, subdivision 2 is inapplicable. Therefore, the only subdivision under which this motion could be made is subdivision 1.

CPL 330.30 (1), as is relevant, reads as follows:

> "At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set

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[10] *People v Schmidt*, 216 NY 324, 328 (1915); *see also People v Jackson*, 78 NY2d 638, 647 (1991).

[11] In some cases, the Court of Appeals has stated that a lower court has the "inherent" power to set aside a judgment obtained by "fraud, misrepresentation, violation of defendant's constitutional rights or other similar trial errors" (*People v Farrell*, 85 NY2d 60, 68 [1995]). These grounds have all been incorporated in CPL 440 and, thus, the statute controls.

[12] *People v Carter*, 63 NY2d 530, 537-538(1984); *People ex rel Jerome v General Sessions*, 185 NY 504, 506-507 (1906); *see also People v Rao*, 271 NY 98, 100-101 (1936).

[13] *People v Reyati*, 254 AD2d 199, 200 (1998); *People v Forbes*, 191 Misc2d 573, 576 (2002); *see also Jackson*, 78 NY2d at 647; *Schmidt*, 216 NY at 328 ; *People v Salemi*, 309 NY 208, 215 (1955).

> aside or modify the verdict or any part thereof upon the following grounds:
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> "1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment ***as a matter of law by an appellate court***." (Emphasis supplied)

The court's jurisdiction to set aside a verdict is limited to situations where the appellate division would be required to reverse the conviction "as a matter of law." Matters that the defendant has failed to preserve are issues that an appellate court ***cannot*** reverse "as a matter of law" and, thus, a trial court lacks jurisdiction to entertain under CPL 330.30 (1).[14] Of course, the Appellate Division has interest of justice jurisdiction which is not granted the trial court under this section. In order to preserve an issue for appeal, the defendant must specifically object to the error and specifically inform the court of what is the error alleged.[15]

At no time prior to the acceptance of the verdict, did the defendant claim that the juror's response was ambiguous or that the court should clarify what the juror meant. After the voir dire of the juror, counsel only objected because he claimed the verdict was not that of the juror because of the other juror's actions. Thus, the defendant has failed to preserve his current claim for appellate review, and the court lacks jurisdiction to grant

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[14] *People v Payne*, 3 NY3d 266, 274-275 (2005); *People v Guerrero*, 69 NY2d 628 (1986) *rvsg on the dissent at* 111 AD2d 355-356 (1985).

[15] *See People v Mercado*, 91 NY2d 960, 963 (1998); *see People v Santos*, 86 NY2d 869, 870 (1995); *People v Oliver*, 63 NY2d 973, 975 (1984).

him relief.

The motion to set aside the verdict is denied.

However, in the interest of completeness and in the event a higher court may disagree with the court's conclusion, the court will address the merits of the defendant's claim.

Law

In *People v Pickett,*[16] during the polling of the jury, a juror stated that the juror's vote was made under duress. The trial court made no inquiry as to the meaning or source of the duress. In reversing the judgment, the Court of Appeals said:

> "In light of the juror's reference to 'duress', the trial court should have addressed the juror out of the presence of the other jurors, ***instructing her that communications among the jurors that were a part of their deliberative process in attempting to reach a verdict on the issues they were charged to decide*** (including their efforts by permissible arguments on the merits to persuade each other) ***were secret and not to be disclosed to him***. The Judge should then have inquired of her whether, within the limitation just described, she could relate to him the circumstances to which she had referred as 'duress'. If she could not tell him what she meant by duress without violating the secrecy of the jury deliberations, she should tell him nothing. ***The court would then have had no occasion for further action other than to accept the verdict of the juror.***" (Emphasis supplied)[17]

In this case, the court followed the exact procedure outlined by the Court of

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[16] 61 NY2d 773 (1984).

[17] *Id.* at 774.

Appeals. The only pressure indicated by juror number ten came from "other jurors" and not from any circumstance outside of the juror deliberative process. Under these conditions, the Court of Appeals directs the court to "accept the verdict."

Additionally, pressure placed by fellow jurors on other jurors does not provide a legal basis for vacating a verdict.[18]

The motion to set aside the verdict is also denied on this ground.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

[18] *People v Karen*, 17 AD3d 865, 867 (2005); *People v Liguori*, 149 AD2d 624, 626 (1989); *People v Maddox*, 139 AD2d 597, 597 (1988); *People v Smalls*, 112 AD2d 173, 175 (1985).