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ROCKLAND COUNTY
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ISION & ORDER

JONATHAN ELWELL,

. No.: 2016-122

CO-2016-000566

ZUCKERMAN, J.

Under Indictment No. 2016-122, Defendant was charged with Assault in the Second Degrée (Penal Law §120.05[4]), two counts of Vehicular Assault in the Second Degree (Penal Law §120.03[1]), Leaving the Scene of an Accident Without Reporting as a Felony (Vehicle and Traffic Law §600(2)a(b)) and two counts of Driving While Intoxicated (one count each of Vehicle and Traffic Law §1192[2] and §1192[3]). The charges relate to allegations that Defendant operated a motor vehicle while in an intoxicated condition, causing a collision with another motor vehicle; in so doing, caused physical injury to another person; and then left the scene of the collision without reporting same. On September 19, 2017, following a jury trial, Defendant was convicted of all counts.

By undated Notice of Motion, with annexed Affidavit in Support (sworn to on December 1, 2017), Defendant moves *pro se* for an Order, pursuant to CPL §330.30(1), setting aside the verdict. He asserts eight bases for said relief. Defendant also asks this court to recuse itself from any proceeding in connection with the

instant matter. In an Affirmation in Opposition, dated January 10, 2017, the People oppose the motion. The court has considered all of these papers in reaching the instant decision[1].

Contentions of the Parties

As set forth in his Notice of Motion, Defendant seeks relief, pursuant to CPL §330.30(1), setting aside the verdict on the following grounds:

1. the trial evidence was insufficient and/or the verdict was against the weight of the evidence,
2. violation of his statutory right to a speedy trial as set forth in CPL §30.30,
3, 4. the counts in the Indictment are duplicitous/multiplicitous,
5. evidence was admitted in violation of his Fourth and Sixth Amendment rights,
6. the People failed to provide him with Brady material,
7. the court submitted misleading and confusing instructions to the jury, and
8. the court generally violated his right to due process.

In addition, Defendant separately seeks recusal of the trial court from further proceedings in this matter.

The People summarily respond that the trial evidence met the

[1]Although both parties reference relevant pre-trial and trial proceedings, neither has submitted transcripts from any relevant proceedings, or portions thereof, with their motion papers.

standard for legal sufficiency. With respect to Defendant's remaining contentions, the People merely assert that the court previously ruled on them and/or are that they without merit.

Discussion

Pursuant to CPL §330.30(1), a trial court may set aside or modify a verdict on "[a]ny ground appearing in the record which, if raised upon 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." The possible grounds for seeking this type of relief include, but are not limited to, legal insufficiency of the evidence to support the charge(s) for which the defendant was convicted. *People v Danielson*, 9 NY3d 342 (2007).

I. DEFENDANT'S CPL §330.30 MOTION

1. Sufficiency/Against the Weight of the Evidence.

While Defendant, in his Notice of Motion, purported to move on sufficiency/weight of the evidence grounds, his Affidavit in Support completely fails to raise any issue with respect to those standards. Consequently, as the movant, Defendant has not met his initial burden as to those issues. Therefore, the motion must be denied.

2. Speedy Trial

Defendant asserts that he has been denied his statutory right to a speedy trial (CPL §30.30). More specifically, Defendant asserts that the People's allegedly illusory statement of

readiness, made 166 days after commencement of the action, should compel this court to vacate his conviction. As the People properly note, however, notwithstanding the merits, if any, of Defendant's argument, the motion is untimely and, therefore, must be denied.

CPL §210.20 provides

> **§ 210.20 Motion to dismiss or reduce indictment**
>
> 1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that:
> *****
> (g) The defendant has been denied the right to a speedy trial; or
> *****
> 2. A motion pursuant to this section, except a motion pursuant to paragraph (g) of subdivision one, should be made within the period provided in section 255.20. A motion made pursuant to paragraph (g) of subdivision one must be made prior to the commencement of trial or entry of a plea of guilty.

Since Defendant first sought statutory speedy trial relief after he was convicted, pursuant to CPL §210.20(2), the motion is clearly untimely. Therefore, it must be denied.

Moreover, as noted above, Defendant has precluded intelligent review of his speedy trial assertions by failing to provide any minutes of the proceedings in support of his application. Thus, he has failed to satisfy his burden on the motion.

Further, even in the absence of the minutes, the court file demonstrates that such delays as did occur were the result of Defendant's initial plea and proceedings relative thereto; withdrawal of that plea; and pre-trial motions and the hearings

ordered pursuant thereto. All of that time, as the People properly argue, is necessarily excludable. CPL §30.30(4).

Finally, Defendant has also failed to provide any evidence in support of his assertion that the People's statement that they were "ready for trial" was illusory. While the People may have consented to an adjournment for a period time while they were awaiting receipt of the Complainant's medical records, the absence of those records was irrelevant to several of the counts in the indictment and, while helpful, not necessarily fatal to their proof on the other counts. *Cf People v Miller*, 18 NY3d 831 (2011). Thus, based on untimeliness, as well as its lack of merit, the motion to dismiss for lack of speedy trial must be denied.

3, 4. Mulitiplicity.

Defendant next argues that certain counts of the indictment are duplicitous and/or multiplicitous. More specifically, Defendant asserts that the two counts of Vehicular Assault in the Second Degree (Penal Law §120.03[1]) are multiplicitous, notwithstanding that they require proof of different elements (one count requires proof of "common law driving while intoxicated" (VTL §1192[3]), the other driving with a blood alcohol content greater than 0.08 of one percentum by weight (VTL §1192[2])).

As an initial matter, Defendant concedes that this motion was made following the close of the trial testimony and was denied at that time by the court. Thus, in effect, Defendant now moves for

reargument (pursuant to CPLR §2221) of his prior motion seeking dismissal of certain Indictment counts for multiplicity. CPLR §2221 provides

R 2221. Motion affecting prior order

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:

1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and

2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court

*****

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy

> of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

Defendant, however, has neither moved within 30 days of the oral decision and order denying the motion during trial, nor has he properly denominated his application as a motion to reargue. The motion is thus untimely and defective and must be denied.

Further, Defendant's motion fails to contain a copy of the minutes which contain the argument in support of the underlying motion, precluding accurate review thereof. *See* CPLR §2214(c). Absent inclusion of the minutes supporting and opposing the application, it is difficult for the court to intelligently reconsider and rule on a motion seeking re-argument. *Cf Sheedy v. Pataki*, 236 AD2d 92, 97 [3d Dept 1997], *lv den* 91 NY2d 805 [1998]) (regarding moving and opposition papers; "[t]here is no authority for compelling a court to consider papers which were not submitted in connection with the motion on which it is ruling"); *Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 178 (2nd Dept 2014), *ap dism* 20 NY3d 1083 (2013), lv dism 20 NY3d 1084, citing Loeb v Tannenbaum, 124 AD2d 941 (3rd Dept 1986); *Plaza Equities, LLC v Lamberti et al.*, 118 AD3d 687, 688 (2nd Dept 2014--defendant's "papers on her motion for leave to renew and reargue were insufficient, as they did not include a complete set of the papers

originally submitted on her cross motion"); *Garrison v Quirk*, 120 Ad3d 753 (2nd Dept 2014). Thus, the motion, because it does not include the minutes of the arguments for and against the motion at trial, is procedurally defective in this regard as well.

Moreover, a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact or law not offered on the prior motion" CPLR §2221 (d)2. Absent the prior trial minutes, of course, the court is hard-pressed to evaluate the current argument offered to determine if it was offered previously or is asserted here for the first time. Nevertheless, as correctly argued by the People, it appears that the instant asserted legal argument offered by Defendant in support of his motion is not offered for the first time in support of the instant motion, but is, in fact, merely repetitive of the argument offered at trial. Finally, substantively, the instant motion fails to offer any new law which would change the prior determination. CPLR §2221(e)2. Therefore, the motion is not one properly for reargument and must be denied.

Nonetheless, on the merits, precedent from the Appellate Division, Third Department, compels the court to grant, in part, this prong of Defendant's motion. More specifically, in the absence of contrary authority, the court is constrained to follow the precedent from the clearly analogous case cited by Defendant,

People v Demetsenare, 243 AD2d 777 (3d Dept 1997).

In *Demetsenare*, the defendant was charged, *inter alia*, with two counts of Vehicular Manslaughter in the Second Degree (PL §125.12). As in the instant case, the two counts required proof of different elements (one count requires proof of "common law driving while intoxicated" (VTL §1192[3]), the other driving with a blood alcohol content greater than 0.08 of one percentum by weight (VTL §1192[2])). As in the instant case, the defendant was convicted of both counts. On appeal, the Appellate Division held that the counts were multiplictous and directed that the second count be dismissed. This court notes the absence of significant argument by the People in opposition to this motion. This court further notes that there is no firm contrary guidance from the Appellate Division, Second Department. Therefore, on constraint of the holding in *People v Demetsenare*, the court finds that Defendant, as in *Demetsenare*, has established "a ground appearing in the record which, if raised upon 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." CPL §330.30(1). Thus, this court is compelled to modify the verdict by vacating Defendant's conviction of the second count of Vehicular Assault in the Second Degree (the third count in the Indictment) as multiplicitous and dismiss that count.

5. Dismissal for Fourth/Sixth Amendment violations.

Defendant next argues that taking his blood at or about the time of his arrest violated his Fourth and Sixth Amendment rights. Here, too, as an initial matter, Defendant concedes that he sought the identical relief in his omnibus motion, it was the subject of a court-ordered pre-trial hearing and, following that hearing, this court denied the application. Thus, here too, Defendant, in effect, again moves for reargument (pursuant to CPLR §2221). As with his motion based on multiplicity, however, this motion to reargue is similarly untimely as more than 30 days have elapsed since the oral decision and order denying suppression. Also, this motion is similarly defective for failure to be denominated a motion to reargue, fails to contain the minutes of the hearing, much less the arguments following the hearing and, as the People note, appears to merely repeat arguments previously made in support of the initial motion. In any event, the court previously held, and properly so, that the search conducted of defendant's person by drawing his blood was constitutionally proper and, therefore, this motion, too, must be denied.

6. Dismissal for *Brady* violations.

Defendant next argues that the Indictment should be dismissed for "*Brady* violations." *See Brady v Maryland*, 373 US 83 (1963). *Brady* requires production of evidence favorable to the accused which is in the possession of the prosecution and is material

either to the guilt or the punishment of a defendant. *Id.*, at 87.

Defendant's sole argument regarding the People's failure to provide him with *Brady* material is that potential exculpatory material may have existed on the Complainant's cellular telephone. Apparently, this was never investigated by law enforcement authorities.

To establish a claim on a *Brady* motion, Defendant, as the movant, must establish that

> (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material

People v Garrett, 23 NY3d 878, 885 (2014). Defendant's motion, however, fails to establish any of these three requirements. First, as the People correctly assert, he merely hypothesizes, rather than shows, the existence of any exculpatory evidence (purportedly that the victim was using his phone at the time of the motor vehicle collision) on the victim's cellular telephone.

Further, even had he demonstrated that such evidence was contained on the phone, he fails to show that such evidence--that the victim was using his cellphone--is favorable to the defendant because it is either exculpatory or impeaching in nature. Such hypothetical evidence appears to be neither exculpatory (it does not go to guilt or innocence) nor impeaching. Finally, had such evidence existed, and had it been exculpatory or impeachment material, Defendant has failed to show how he was prejudiced by its

alleged suppression. Consequently, Defendant's Brady motion must be denied as well.

7. Dismissal for Misleading Jury Charges.

Defendant seeks to set aside the verdict based on what he asserts was misleading and confusing jury instructions delivered by the court, whether initially or in response to jury notes. As the People properly note, however, Defendant failed to preserve that issue because he failed to make any objection to the charge, either before it was delivered or thereafter. In any event, once again, Defendant seeks relief based on grounds which appear in the record, yet he has again failed to include a copy of the minutes, precluding accurate review thereof. *See* CPLR §2214(c). Absent inclusion of the minutes of the jury instructions, it is difficult for the court to intelligently reconsider and rule on a motion seeking to find the instructions misleading. *Sheedy*, supra; *Biscone, supra; Plaza, supra; Garrison, supra.* Thus, the motion, because it does not include the minutes of the arguments for and against the motion at trial, if any, is procedurally defective and must be denied.

Even if the court were to consider Defendant's motion, it clearly has no merit. All instructions given to the jury were read *verbatim* from the New York State Criminal Jury Instructions, 2d Ed. Moreover, Defendant consented to all instructions prior to their administration. Thus, on the merits, the motion must be denied.

8. Violations of Due Process.

Although Defendant denominated as an eighth ground in his Notice of Motion, pursuant to CPL §330.30, that the court had violated his right to due process, his Affidavit in Support does not delineate a section designated as addressing such alleged violation. Nor are there specific allegations by Defendant in other portions of his papers of any specific acts by the court that violated that right. Consequently, having failed to meet his burden as to that issue, the motion must be denied.

II. DEFENDANT'S MOTION FOR RECUSAL

"Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal". *People v Moreno*, 70 NY2d 403 (1987). Judiciary Law § 14 provides

> **§ 14. Disqualification of judge by reason of interest or consanguinity**
>
> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, descending to the party, counting a degree for each person in both lines,

> including the judge and party, and excluding the common ancestor. But no judge of a court of record shall be disqualified in any action, claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his being a policy holder therein. No judge shall be deemed disqualified from passing upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge.

As noted by the *Moreno* Court, the discretionary decision regarding whether to recuse "...is within the personal conscience of the court...." *Id.*, at 405, citing *People v Horton,* 18 NY2d 355 (1966). A court's decision against recusal "...may not be overturned unless it was an abuse of discretion...." *Moreno, supra*, 406, citing *People v Tartaglia,* 35 NY2d 918 (1974).

As *Moreno* also noted,

> Yet, this court has noted that it may be the better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality (*Corradino v. Corradino,* 48 N.Y.2d 894, 895, 424 N.Y.S.2d 886, 400 N.E.2d 1338, *supra*). Even

> then, however, when recusal is sought based upon "impropriety as distinguished from legal disqualification, the judge * * * is the sole arbiter" (*People v. Patrick,* 183 N.Y. 52, 54, 75 N.E. 963, *supra; see also, e.g., People v. Bartolomeo,* 126 A.D.2d 375, 391, 513 N.Y.S.2d 981, *lv. denied* 70 N.Y.2d 702, 519 N.Y.S.2d 1037, 513 N.E.2d 714 [Kaye, J.]; *Matter of Johnson v. Hornblass,* 93 A.D.2d 732, 733, 461 N.Y.S.2d 277).

People v Moreno, supra at 405-06.

Defendant moves for recusal, asserting in general fashion that the court consistently "ruled against" him. Defendant, however, fails to offer specific instances of bias. Rather, he merely relies on the purportedly unfavorable rulings. Defendant also asserts that statements made at his first sentencing proceeding (the court later granted Defendant's motion to withdraw his guilty plea) were clear evidence of bias. The People oppose the motion, arguing that the court has shown no bias against Defendant, whether before, during, or after trial. In the absence of sufficient allegations in support of the motion, it must be denied.

Further, Defendant, bearing the burden on the motion as the movant, has frustrated proper review on the issue by his failure to submit minutes of the proceedings. *Cf People v Rivera,* 39 NY2d 519 (1976) *People v Cameron,* 219 AD2d 662 (2nd Dept 1995). Therefore,

it must be denied on these grounds, too.

Even if the court were to address Defendant's argument based upon statements made by the court at Defendant's first sentencing proceeding, the motion would nonetheless have to be denied. In *People v Glynn*, 21 NY3d 614 (2013), the Court examined statements alleged as grounds for recusal which had been made by the trial judge during prior plea negotiations. These statements included

> The judge proceeded to a discussion of the appropriate sentence if defendant were to accept a negotiated plea. He reviewed the presentence investigation and noted that the report showed defendant had never had a job "on the books," had smoked marihuana daily for 32 years, and had an extensive criminal history. Additionally, the judge noted that, according to the presentence investigation report, defendant owed substantial sums in back child support for his 10 children. The judge continued by remarking that because the youngest child was only seven years old defendant was "going to owe well over a million dollars in child support." In light of the report, the judge indicated that he would sentence defendant to four years' incarceration.

The *Glynn* Court went on to hold:

> The judge's comments were not indicative of bias or prejudice.

> Rather, the comments were based on the information contained in the presentence investigation report and made during the course of the judge's execution of his responsibilities in presiding over the matter. Further, there was no other record evidence that actual bias or prejudice existed. Indeed, the judge sua sponte raised the issue of his prior relation with defendant and could not recall any particulars of the past criminal matters. Thus, the court's refusal to **1140 ***695 recuse itself was not an improvident exercise of discretion.

Here, Defendant has failed to produce any minutes in support of his motion. Instead, he has cited statements made by the court during a sentencing proceeding, statements which, as in *Glynn*, are actually facts or matters relating to the case, or to circumstances as set out in documents such as the presentence report. Defendant has failed to meet his burden to demonstrate bias by the court against him, and thus his motion for recusal must be denied.

With respect to Defendant's unfounded allegations regarding this court's bias against him, it should be noted that certain actions and decisions by the court clearly belie his claims. For example, early in the proceedings, at Defendant's urging and despite vociferous opposition by the People, the court accepted Defendant's plea of guilty with the understanding that, if he successfully completed substance abuse treatment, he would be

sentenced to probation. When Defendant failed to complete the program (he refused to even commence treatment), the court sentenced him to the specific alternative sentence that he was promised at the time he pled guilty. When the court subsequently determined that the sentence imposed was illegal, it had Defendant brought before it and granted his motion to withdraw his guilty plea. Moreover, throughout all proceedings, including the trial, the court went out of its way to treat Defendant with dignity and respect. Any assertions to the contrary are misplaced.

Wherefore, Defendant's motion to set aside the verdict or for recusal is denied, except insofar as granted herein.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
January 19, 2018

HON. DAVID S. ZUCKERMAN, J.C.C.

HON. THOMAS P. ZUGIBE
District Attorney, Rockland County
One South Main Street, Suite 500
New City, New York 10956
BY: Michael J. Dugandzic, Esq.
Senior Assistant District Attorney

KEVIN M. DUNLAP, ESQ.
Gribetz & Loewenberg, PLLC
Attorneys for Defendant
155 North Main Street
New City, NY 10956