REVIEWABLITY OF CPL 30.30 CLAIMS ON APPEAL FROM A GUILTY PLEA

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By pleading guilty, defendants automatically give up – or "forfeit" – appellate review of some legal issues.[1] Forfeiture occurs by operation of law, whether the defendant knows it or not, and is a bar to appellate review that is distinct from waiver, which involves a voluntary and expressed relinquishment of a known right to appeal.[2]

There are those issues that do survive a guilty plea. They are reviewable on appeal from a judgment entered upon a plea because they are granted such reviewability by statute[3], they are jurisdictional in nature, or they involve rights "of a constitutional dimension that go to the very heart of the process."[4] For instance, the Criminal Procedure Law expressly grants a defendant the right to review of the denial of suppression on appeal from a judgment entered upon a plea.[5] CPL 710.70 (2) provides:

> "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction

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[1] Issues forfeited by a guilty plea include trial-related issues (such as severance, joinder, *Sandoval, Molineux, Batson,* and evidentiary issues); CPL 710.30 notice issues; statutory double jeopardy claims; statute of limitation claims; and issues involving non-jurisdictional defects in the accusatory instrument.

[2] *People v Baldwin,* 162 AD2d 603 (2d Dept 1990); *People v Parker,* 57 NY2d 136, 140 (1982)

[3] *People v Elmer,* 19 NY3d 501, 509 (2012)

[4] *People v Konieczny,* 2 NY3d 569, 573 (2004)

[5] CPL 710.70 (2); *see also* former Code of Criminal Procedure §§ 813-c, 813-g

notwithstanding the fact that such judgment is entered upon a plea of guilty."[6]

As of January 1, 2020, appellate review of CPL 30.30 claims will no longer be forfeited by guilty plea.

Under current law, a guilty plea forfeits appellate review of the denial of a CPL 30.30 ("statutory speed trial") motion to dismiss.[7] In this regard, CPL 30.30 claims are different from constitutional speedy trial claims, which are reviewable on appeal from a guilty plea.[8]

This is about to change, however. The governor has signed into law an amendment to CPL 30.30, which will go into effect on January 1, 2020, allowing for review of a 30.30 claim upon appeal from a guilty plea. This amendment, which will be set forth under subsection 6 of CPL 30.30, provides:

> "An order finally denying a [CPL 30.30] motion to dismiss … shall be reviewable upon appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."[9]

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[6] *People v Elmer,* 19 NY3d at 509

[7] *People v Suarez,* 55 NY2d 940 (1982)

[8] *Id.*

[9] 2019 Senate-Assembly Bill S1509C, 2009C, Part KKK

The legislature clearly modeled CPL 30.30 (6) after CPL 710.70 (2), which the amendment tracks nearly word for word.

Effective January 1, 2020, CPL 30.30 claims will survive waivers of appeal.

It evident that the legislature intends for this amendment to make 30.30 claims survive not just the guilty plea but also any waiver of the right to appeal, just like constitutional speedy trial claims do. The legislature has apparently made a policy choice to insure that 30.30 motions are correctly decided.[10]

The best evidence of this legislative intent is the amendment's wording itself.[11] The amendment includes the mandatory language "*shall* be reviewable," which reflects an intent to confer unqualified reviewability.[12]

This legislative intent is further evident when the amendment's operative language is compared to that of CPL 710.70 (2). While the amendment tracks 710.70 (2) nearly word for word, there is a noteworthy distinction. In drafting the amendment, the legislature chose not to carryover

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[10] *People v Callahan,* 80 NY2d 273, 280 (1992)

[11] *See Riley v County of Broome,* 95 NY2d 455, 463-464 [2000]).

[12] *See People v Rudolph*, 21 NY3d 497, 501 (2013) (use of obligatory language reflected policy choice to make consideration of a youthful offender adjudication mandatory and non-waivable)

710.70 (2)'s permissive "*may* be reviewed" phrase, which allows suppression claims to be waived on appeal,[13] and instead substituted the mandatory "*shall* be reviewable" language. The legislature's use of different words was presumably by choice: the legislature does not want to subject the reviewability of 30.30 claims to the type of permissive language that allows defendants to waive the right to appellate review of their suppression claims.[14]

The new reviewability rule should apply to all appeals not finally decided before January 1, 2020, regardless of when the CPL 30.30 motion was made and the judgment was entered.

This new 30.30 rule is to go into effect January 1, 2020. The 64,000 dollar question is whether the new rule applies to defendants whose 30.30 motions are denied and guilty pleas are entered prior to the effective date but whose convictions are not yet final – in other words, whose appeals have not yet been decided – before the new rule goes into effect on January 1st. Appellate Division precedent indicates that the new rule should apply to such defendants. The Appellate Division has held that guilty pleading defendants whose judgments were entered prior to the effective

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[13] *See People v Williams,* 36 NY2d 829 (1975)

[14] *See Pajak v Pajak*, 56 NY2d 394, 397 (1982) ("The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended . . .")

date of other, closely analogous reviewability rules were entitled to the benefit of the new rules where their appeals were not decided until the rules had gone into effect.

Suppression claims were originally made reviewable on appeal from a guilty plea by Section 813-c (unreasonable search and seizure claims) and 813-g (involuntary statement claims) of the Code of Criminal Procedure, which had effective dates of April 29, 1962 and July 16, 1965 respectively. The First Department, in *People v Sullivan*, held that because Code of Criminal Procedure 813-c was procedural and remedial, a defendant who had his search and seizure motion denied and pleaded guilty prior to the 813-c's 1962 effective date was entitled to the benefit of the new rule – and thus did not forfeit his search and seizure claim – where his appeal was not yet decided until the new rule had gone into effect.[15] Similarly, the Second Department, in *People v Rosen,* held that a defendant who had his *Huntley* motion denied and pleaded guilty prior to 813-g's 1965 effective date did not forfeit his *Huntley* claim where the defendant's appeal was not decided until after the effective date.[16]

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[15] *People v Sullivan,* 18 AD2d 1066 (1st Dept 1963)

[16] *People v Rosen,* 24 AD2d 1009 (2d Dept 1965)