POST-VERDICT MOTIONS UNDER STATE AND FEDERAL CRIMINAL PRACTICE

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An application to set a aside a guilty verdict in a New York state court can only be predicated on issues earlier litigated, either at trial or in pre-trial motion practice. Contrastingly, if timely brought, the Federal Rules of Criminal Procedure allow a motion for a new trial based on issues that had not been earlier raised in the course of pre-verdict proceedings. This article briefly surveys the differing criteria for such post-verdict motions in the two jurisdictions.[1]

New York Procedure

In New York, "[a]ny time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon...[a]ny 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." [2] Therefore, upon entertaining a motion to set aside the verdict pursuant to subd. (1) of CPL §330.30, the trial judge may only exercise the power which is vested in an appellate court for the purpose of passing on preserved questions of law.[3]

Otherwise stated, a state trial judge, when entertaining a motion to set aside a verdict, can only consider issues that were duly protested on the trial record or raised in pre-trial motion practice.[4] Thus, even a constitutional challenge to the statute which served as the basis for prosecution cannot be the predicate for such a motion if it had not been earlier raised and appropriately preserved.[5]

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Practically, in determining such a motion to set aside a verdict in New York, a judge has less power than would an intermediate appellate court upon later review of the record. That is because, unlike a trial judge,[6] an intermediate appellate court "is authorized to determine not only questions of law but issues of fact (CPL §470.15, subds 1, 3), to reverse or modify a judgment when the verdict is against the weight of the evidence (CPL §470.15, subd 5), and to reverse '[a]s a matter of discretion in the interest of justice' (CPL §470.15, subds 3, 6)."[7]

Indeed, so limited is a trial court's post-verdict power in New York that it cannot even consider its own verdict following a bench trial. Thus, in People v. Carter,[8] after having been found guilty by the court in a non-jury trial of criminal possession of a weapon, the defendant moved to set the verdict aside under CPL §330.30(1) "on the grounds that guilt had not been proven beyond a reasonable doubt and that the verdict had been rendered without due deliberation."[9] The trial judge granted the motion, finding that upon a reassessment of the evidence, he believed that the People's testimony had not proved beyond a reasonable doubt the defendant's illegal possession of the subject pistol.

Although agreeing that a trial judge can correct its ministerial mistakes, the Court of Appeals disagreed that such had occurred. Therefore, it reversed the Appellate Division's affirmance and effectively reinstated the verdict of guilty. According to the Court of Appeals, "while a Trial Judge may correct a formal error in a verdict, such as an inaccurate statement of the verdict intended on a particular count or an incorrect recording of the verdict in the minute book...[citations omitted], the power does not extend to the alteration of a guilty verdict to one of not guilty based on a reassessment of the facts, for that is a correction of substance, not a mere ministerial act ...[citations omitted]."[10]

Notably, issues concerning the legal sufficiency of the evidence "may not be

addressed [in CPL §330.30(1) motions] unless they have been properly preserved for review during the trial."[11] And although such issues, by having been earlier raised in a timely motion for a trial order of dismissal,[12] may indeed have been appropriately preserved for purposes of re-visitation in a motion to set aside the verdict,[13] there exists a great risk in presenting a defense. That is because "a defendant who presents evidence after a court has declined to grant a trial motion to dismiss made at the close of the People's case waives subsequent review of that determination."[14] The effect of such waiver is to eviscerate an otherwise preserved issue of evidentiary insufficiency that might have been reviewable in a motion to set aside the verdict.

Finally, there is no specific statutory limitation on the period of time in which a motion to set aside the verdict may be brought. Rather, the motion may be interposed "[a]t any time after rendition of the verdict of guilty and before sentence..."[15]

Federal Procedure

Under federal procedure, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment."[16] Such "a motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period."[17] This seven day deadline is jurisdictional and cannot be extended by the court if first requested beyond the seven period.[18]

As is readily evident, the parameters of a post-verdict motion in federal court are far more expansive than in the state courts of New York. Thus, "[b]y its terms, Rule 33 confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice. In exercising the discretion so conferred, the court is entitled to 'weigh the

evidence and in so doing evaluate for itself the credibility of the witnesses.'"[19] The "district court must examine the entire case, take into account all facts and circumstances, and make an objective assessment."[20] In such an instance, "[t]o say that a trial judge cannot make his or her own evaluation of the testimony of a witness in the context of a Rule 33 motion is to ignore the overwhelming weight of authority to the contrary...It goes without saying that the evaluation of trial testimony may lead the judge to the conclusion that perjury has been committed."[21]

Conclusion

In New York, an application to set aside the verdict based on pre-trial or trial error, which may be interposed up until the time of sentence, can only raise issues of law that have been earlier preserved. Under federal rules, however, a motion for a new trial, which must be brought within seven days or within any extended period set within those seven days, can raise any claim which, in the court's discretion, warrants such relief in the interest of justice. Such power on the part of a federal judge to second guess a jury has no parallel in New York, either at the trial level or even in the Court of Appeals. Rather, only the Appellate Division is empowered to reverse a judgment in the interest of justice and order a new trial, or to dismiss an indictment where the verdict is found to have been against the weight of the evidence.

1. This discussion does not address applications grounded upon questions of juror misconduct or newly discovered evidence. For obvious reasons, such grounds normally arise only after the verdict has been rendered. *See* CPL §330.30(2) and (3). Similarly, the normal seven day limitation period under Fed. R. Crim. P. 33(b)(2) is relaxed as to newly discovered evidence issues, and the motion may be brought within three years of the verdict. *See* Rule 33(b)(1). Also not addressed are Rule 34 motions in arrest of judgment, which involve jurisdictional issues.

2. CPL §330.30 (1).

3.*See* People v. Hines, 97 N.Y.2d 56, 736 N.Y.S.2d 643 (2001); People v. Carter, 63 N.Y.2d 530, 483 N.Y.S.2d 654 (1984).

4. *See* People v. Davidson, 98 N.Y.2d 738, 751 N.Y.S.2d 161 (2002).

5. People v. Davidson, *supra*.

6. People v. Hawkins, 99 N.Y.2d 592, 757 N.Y.S.2d 810 (2003)

7. People v. Carter, *supra*, 63 N.Y.2d at 536,483 N.Y.S.2d at 657; *see also* People v. Bleakley, 69 N.Y.2d 490, 515 N.Y.S.2d 761 (1987).

8. 63 N.Y.2d 530, 483 N.Y.S.2d 654 (1984).

9. 63 N.Y.2d at 535, 483 N.Y.S.2d at 656.

10. 63 N.Y.2d at 538, 483 N.Y.S.2d at 658.

11. People v. Hines, *supra*, 97 N.Y.2d at 61, 736 N.Y.S.2d at 646; *see also* Baker, *Preserving Appeals Over Evidentiary Insufficiency*, N.Y.L.J., January 24, 2002.

12. CPL §290.10(1); People v. Gray, 86 N.Y.2d 10, 629 N.Y.S.2d 173 (1995).

13. Because the motion judge in such instance is effectively conducting a preliminary appellate review of preserved issues of law upon which an appellate court might later order the appropriate corrective action, the motion judge can do the same. Thus, although with respect to trial errors, the remedy is a new trial (CPL §470.20[1]), when there is an appropriately preserved evidentiary insufficiency, the court must set aside the verdict and dismiss the indictment (CPL §470.20[2]).

14. People v. Hines, *supra*, 97 N.Y.2d at 61, 736 N.Y.S.2d at 646.

15. CPL §330.30(1). It should be noted, however, that pursuant to CPL §255.20(1), issues raised in pre-trial motions, which are normally required to be filed within forty-five days of arraignment and before the commencement of trial, may still be brought "within such additional time as the court may fix upon application of the defendant made prior to entry of judgment." *See also* CPL §255.20(3) ("Any other pre-trial motion made after the forty-five day period may be summarily denied, but the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits"). On the other hand, under Fed. R. Crim. P. 12(b)(3), any issues that are determinable without a trial are required to be raised pre-trial, at pains of waiver of the issue under Rule 12(e). However, "for good cause, the court may grant relief from the waiver[]," usually requiring a strict showing of cause for the delay and resulting prejudice. *See e.g.*, United States v. Forrester, 60 F.3d 52, 59 (2d Cir. 1995);United States v. Tarascio, 15 F.3d 224, 225 (2d Cir. 1993)

16. Fed. R. Crim P. Rule 33(a).

17. Fed. R. Crim P. Rule 33(b)(2).

18. United States v. McCarthy, 271 F.3d 387, 399 (2d Cir. 2001); United States v. Moreno, 181 F.3d 206, 212 (2d Cir.), *cert. denied*, 528 U.S. 977 (1999).

19. United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992), quoting United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir.1980); *see also*, United States v. Ferguson, 246 F.3d 129 (2d Cir. 2001).

20. United States v. Ferguson, *supra*, 246 F.3d 134.

21. United States v. Sanchez, *supra*, 969 F.2d at 1413, citing 3 Wright & Miller, *Federal Practice and Procedure* § 553 (1982) and 9 Fed.Proc.L.Ed. § 22:990. In Sanchez, however, the Court of Appeals overturned the District Court's granting of a Rule 33 motion on the ground that its discretion in that regard was found to have been abused, noting that "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." 969 F.2d at 1414. Thus, "[t]he test is whether 'it would be a manifest injustice to let the guilty verdict stand.' United States v. Reed, 875 F.2d 107, 114 (7th Cir. 1989)." United States v. Sanchez, *supra*, 969 F.2d at 1414.