THE SILENT DEATH OF PEOPLE V. BERNIER[1]

By: Mark M. Baker

In a rather unceremonious, seemingly innocuous, but decidedly deadly stroke, on December 20, 1996, the New York Court of Appeals essentially abrogated what had become a criminal defendant's right to preserve for appellate review two mutually exclusive issues relating to the prosecution's efforts to introduce evidence of suppressible statements or identification. The practitioner should be well aware of this dramatic change in procedure, lest there be a forfeiture on appeal of what might otherwise have been the ability to obtain the *per se* preclusion of such evidence upon appropriate application.

The Notice Statute

Pursuant to CPL 710.30 (3), if the District Attorney fails to give the defense specific notice, within fifteen days of arraignment, of the prosecution's intent to introduce potentially involuntary, and therefore suppressible statements of the defendant, or of suppressible evidence of identification procedures, such will be precluded from admission at trial, absent good cause for any delay.[2] As the Court of Appeals had earlier explicated, in a case involving potentially suppressible statements, "...CPL 710.30 is a notice statute intended to facilitate a Defendant's opportunity to challenge before trial the voluntariness of statements made by him ..."[3]

As regards both statements and identification evidence, not only must the statutory

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[1] 73 N.Y.2d 1006, 541 N.Y.S.2d 760 (1989)

[2] CPL 710.30(2).

[3] See, People v. O'Doherty, 70 N.Y.2d 479, 484, 522 N.Y.S.2d 498 (1987); People v. Greer, 42 N.Y.2d 170, 179, 397 N.Y.S.2d 613 (1977); and People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), cited in People v. Lopez, 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879 (1994).

fifteen day requirement be strictly construed,[4] but the notice itself must sufficiently specify the precise evidence which the People intend to introduce.[5] Obviously, the purpose of the statute is to bestow upon the defense the knowledge that otherwise unknown and potentially excludable evidence exists, and hence to afford it the ability to bring appropriate motions to suppress. Successive decisions have been consistently zealous in enforcing these statutory constraints.[6]

People v. Bernier[7]

Because the sole purpose of the statute is to facilitate the bringing of suppression motions, an exception, and hence a waiver of the severe sanction of preclusion, exists when a defendant, "...despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70."[8] In People v. Bernier, the Court was faced with the issue as to whether there had been such a forfeiture of the right of preclusion, based upon the later conducting of a hearing to suppress identification evidence, notwithstanding the failure of the prosecution to have complied with the statute. There, in a robbery case, the defense had first moved to preclude all identification evidence,

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[4] O'Doherty, supra.

[5] Lopez, supra.

[6] See, e.g., People v. Amparo, 73 N.Y.2d 728, 535 N.Y.S.2d 588 (1988);People v. Boughton, 70 N.Y.2d 854, 523 N.Y.S.2d 454 (1987); People v. McMullin, 70 N.Y.2d 855, 523 N.Y.S.2d 455 (1987); People v. Ortiz, 142 A.D.2d 229, 535 N.Y.S.2d 703 (1st Dept.1988); People v. Brown, 140 A.D.2d 266, 528 N.Y.S.2d 565 (1st Dept.1988); People v. Pinney, 136 A.D.2d 573, 523 N.Y.S.2d 567 (2d Dept. 1988).

[7] 73 N.Y.2d 1006, 541 N.Y.S.2d 760 (1989)

[8] CPL 701.30(3).

which initially was called to its attention during jury selection. That motion was denied "...on condition that the prosecution make available the officers who investigated the robberies...".[9]

Thereafter, upon speaking to the officers, defense counsel stated that he had no information as to whether an out-of-court identification had been made, and that "maybe" a Wade[10] hearing should be conducted. Such hearing was later held, and although evidence of the identification procedure was suppressed, the court ultimately allowed the people to introduce evidence of an independent source for the in-court identification.

The Court of Appeals later upheld the Appellate Division's order of reversal of the judgment of conviction on the ground that "...the trial court had no basis for denying the initial defense motion to preclude for failure of timely statutory notice...".[11] Most importantly, in response to the prosecution's claim that the defendant had waived the protection of the statute by later moving to suppress, the Court (aside from noting that there had not really been a "...suppression motion qualifying under CPL 710.30[3]"[12]) stated that "[t]he waiver exception cannot become operative in a case such as this when the defendant clearly moved *initially* to preclude and lost."[13] Thus, as a result of Bernier, it has always been understood to be the rule that as long as an unsuccessful motion to preclude *preceded* a consequent motion to suppress (viz, the motion to preclude was made "initially"), such later application would not act as a forfeiture, pursuant to CPL 710.30(3), of the

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[9] 73 N.Y.2d at 1008, 541 N.Y.S.2d at 761.

[10] United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967).

[11] 73 N.Y.2d at 1008, 541 N.Y.S.2d at 761, citing CPL 710.30 and O'Doherty, supra.

[12] Id.

[13] Id.; emphasis added.

defendant's right to have the earlier denial of the preclusion motion reviewed on appeal.[14]

People v. Merrill[15]

Only seven years later, absent any discussion of Bernier whatsoever, the Court of Appeals, overturning the reversal of the judgment of conviction in that case, simply adopted the dissent in People v. Merrill. In Merrill, the Defendant had moved for CPL 710.30 preclusion of certain statements, and "in the alternative", for suppression of the same proposed evidence. The majority at the Appellate Division, citing Bernier and McRae, held that "Defendant did not waive his right to preclusion by moving, in the event that the preclusion motion was denied, for suppression of the identification testimony or by participating in a Wade hearing (see, CPL 710.30[3]). A defendant who initially moves to preclude and loses does not waive his right to preclusion by later participating in a Wade hearing...[citations omitted]."[16]

The two dissenting Justices, however, viewed the defendant's bifurcated motion rather differently. Upon distinguishing Lopez, Bernier and quoting Amparo, where those defendants had *never* moved to suppress within the intent of CPL 710.30(3), they concluded that, although made in

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[14] See, People v. McRae, 195 A.D.2d 180, 184, 607 N.Y.S.2d 624, 627 (1994), lv. denied, 83 N.Y.2d 969, 616 N.Y.S.2d 22 (1994) ("...a defendant may preserve his or her objection by protesting the lack of notice *before* moving to suppress (People v. Bernier, 73 N.Y.2d 1006, 1008 541 N.Y.S.2d 760, 761; People v. St. Martine, 160 A.D.2d 35, 39-40, 559 N.Y.S.2d 697 [1st Dept. 1990], lv. denied, 76 N.Y.2d 990, 563 N.Y.S.2d 779 [1990]"; emphasis added). It is noted, however, that in Lopez, that extremely careful defendant, "[e]lecting to preserve for appellate review his claim that the notice was insufficient..., did not seek suppression and no ...[suppression] hearings were held (see, CPL 710.30[3]; People v. Bernier, 73 N.Y.2d 1007, 1008, 541 N.Y.S.2d 760, 761; People v. Amparo, 73 N.Y.2d 728, 535 N.Y.S.2d 588)." 84 N.Y.2d at 427, 618 N.Y.S.2d at 881.

[15] 87 N.Y.2d 948, 642 N.Y.S.2d 126 (1996), rev'g for the reasons stated in the dissenting memorandum at the Appellate Division, 212 A.D.2d 987, 988, 624 N.Y.S.2d 702 (4th Dept. 1995).

[16] 212 A.D.2d at 987, 624 N.Y.S.2d at 703.

the alternative, Merrill's motion to suppress (as opposed to his motion to preclude) "...'afforded defendant the same opportunity for a court to pass upon the admissibility of the statement as he would have had if timely notice had been given.'"[17] As a result, the purpose of the notice statute had been served, notwithstanding the prosecutorial failure to have complied with its mandate.

Following the Court of Appeals' reversal in Merrill, the Bernier/McRae rule was fast becoming no more than a relic. However, given the legal maxim that "...'[t]he language of any opinion must be confined to the facts before the court'...[citations omitted]...,"[18] the Court's rationale in overturning the granting of preclusion could still be ascribed to the fact that the suppression motion in Merrill, albeit in the alternative, had been interposed *contemporaneously* with the motion to preclude and not *subsequently*. In the latter instance, therefore, as had been specifically held in Bernier and McRae, the denial of a CPL 710.30 motion to preclude could still be reviewable, even though a *later* motion to suppress might have been filed.

People v. Kirkland[19]

Just prior to Christmas, upon *sua sponte* review (and thus, absent even the submission of briefs by the parties), the Court of Appeals delivered what can only be regarded as the *coup de grace* to the Bernier/McRae rule, regarding even *later* filed suppression motions. In Kirkland, the defendant had unsuccessfully moved, prior to trial, for preclusion of identification evidence pursuant to CPL 710.30. *Following the denial of that motion*, the defendant first made an oral application to suppress and a request for a Wade hearing -- as Bernier had specifically suggested was the

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[17] 212 A.D.2d at 988, 624 N.Y.S.2d at 703.

[18] People v. Anderson, 66 N.Y.2d 529, 535-536, 498 N.Y.S.2d 119, 123 (1985).

[19] __N.Y.2d__ , 1996 N.Y. Lexis 3589 (slip op. no. 293, decided December 20, 1996).

appropriate procedure to follow.

Without even a whimper, The Court of Appeals reversed the Appellate Division's order, which had in turn reversed the resulting conviction for failure to have accorded the defendant sufficient CPL 710.30 notice. Citing its non-discussion in Merrill, its decision in Lopez, and, indeed, without even referring to Bernier (let alone attempting to distinguish its rather absolute language in that now-forgotten case), the Court of Appeals baldly concluded that "[t]he notice requirement is excused when a defendant moves for suppression of the identification testimony...[citations omitted]. Since the defendant here moved to suppress the identification testimony and received a full hearing on the fairness of the identification procedure, any alleged deficiency in the notice provided by the People was irrelevant."[20] Not even an effort was undertaken to contrast contemporaneous suppression motions with those made subsequent to the denial of CPL 710.30 relief.

Conclusion

It seems rather apparent that a defendant who loses a motion to preclude either statements or identification on the grounds of deficient, or non-existent CPL 710.30 notice, has a most difficult decision to make. Despite the fact that such evidence may nevertheless be suppressible, if the defense wishes to preserve the preclusion issue for appellate review, then, as in Lopez, a motion to suppress better not be filed. If such suppression motion is in fact interposed, either contemporaneously,[21] or subsequently,[22] it now appears that the CPL 710.30 issue will be

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[20] Id.; Slip opinion at p. 2.

[21] Merrill, supra.

[22] Kirkland, supra.

forfeited forever. Clearly, People v. Bernier has been executed and interred, without so much as even a terse eulogy.