SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM, PART 16
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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

- against -

Indictment No.
3115-2013

RUDOLPH RAMRUP,

Defendant.
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RICHARD LEE PRICE, J.:

Defendant is charged with four counts of operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law § 1192 [2] and [3], as both "E" felonies and misdemeanors).

By decision and order dated December 15, 2014, this court granted defendant's motion to compel the People to produce hard copy reports and corresponding documentation for the following: all records from December 29, 2011, through June 29, 2013, relating to the maintenance, calibration, inspection, check and/or other tests performed on the Intoxilyzer 5000EN that was utilized (one year prior to and six months following defendant's arrest); certification certificate of the Intoxilyzer 5000EN operator; and, any and all documents relating to the preparation and testing of the simulator solution, the forensic method utilized in the production of the simulator solution, the standard operating procedures for the

production of all simulator solutions utilized in defendant's testing, and the actual chromatograms of the headspace gas chromatography.[1]

Subsequently, the People then sought permission to file a motion seeking leave to reargue. The matter was adjourned for that purpose, and on January 23, 2015, the People filed their motion. On April 15, 2015, the defendant filed his opposition to their request for leave. On May 4, 2015, this court heard oral argument. After review of the motion papers, papers on file with the court, and prior court proceedings, leave to reargue is denied.

Generally, nothing contained in the CPL provides for leave to reargue. But the CPLR does, and this court is constrained to follow it. While the Appellate Division, First Department, opined the CPLR has "no application to criminal actions and proceedings," it was in the context of the defendants' oral motion to set aside the verdict that the court orally decided on the record (*People v Silva*, 122 AD2d 750, 750 [1986]). In *Silva*, the First Department found defendants' claim that the appeal was "procedurally flawed" pursuant to CPLR 2220 invalid because the People were not required to serve a copy of the written order as a prerequisite to appeal where the order was entered orally on the record (*Silva* at 750). Since then, however, several courts have determined, as this court does, that where there are

[1] Although not part of the People's motion to reargue, this court also ordered a hearing on defendant's motion to preclude the use of videotape surveillance footage recordings from the Whitestone Bridge. While the People implicitly acknowledged that additional surveillance recordings were not available to them, the basis of that order was that the People failed to specify the basis of such unavailability or identify their efforts to preserve and produce such recordings.

no applicable provisions in the CPL concerning the issue at hand, those provisions of the CPLR that address the issue may be applied in a criminal action (see e.g. *People v Davis*, 169 Misc 2d 977 [County Ct, Westchester County 1996, Leavitt, J.]; *People v Radtke*, 153 Misc 2d 554 [Sup Ct, Queens County 1992, Goldstein, J.]; *People v Cortez*, 149 Misc 2d 886 [Crim Ct, Kings County 1990, Stallman, J.]).

Regarding reargument, then, CPLR 2221 provides in pertinent part:

> (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.

Notably, a party may not simply move to reargue. Rather, a party must ask for leave to do so by identifying that reargument is sought, and specify the basis upon which it is sought. While the decision to grant leave rests within the sound discretion of the court, its purpose "'is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law'" (*Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992], quoting *Foley v Roche*, 68 AD2d 567 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]; see also CPLR 2221 [d]). But, persuading the court to change its decision is not, as some view it, synonymous with a successive opportunities to more effectively or strenuously argue its position, or present an argument that it initially advanced (*Haque v Daddazio*, 84 AD3d 940, 941–942 [2nd Dept 2011]; *Mazinov v Rella*, 79 AD3d 979, 980 [2nd Dept 2010]; *Pryor v Commonwealth Land Title Ins.*

Co., 17 AD3d 434, 435–436 [2nd Dept 2005]; *McGill v Goldman*, 261 AD2d 593, 594 [2nd Dept 1999]). In other words, "'Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided'" (*Mangine*, 182 AD2d at 477, quoting *Foley*, 68 AD2d at 567-568).

Here, defendant moved to compel production of certain documents and reports relating to the maintenance, inspection, and operation of the Intoxilyzer 5000 EN arguing that such records fall squarely within the documents required to the produced under CPL 240.20 (1) (c). In granting that motion, this court, by decision December 15, 2014, specifically rejected the People's narrow reading of CPL 240.20 (1) (k), holding instead that the statute explicitly provides the listed items are discoverable "in addition to any material required to be disclosed pursuant to this article, any other provision of law, or the constitution of this state or of the United States" (CPL 240.20 [1] [k]).

In moving for leave to reargue, the People advance the same argument, albeit more extensively. For example, included on the last page of their moving papers is a self-serving letter from the New York State Police refusing to produce the documents demanded opining that are not discoverable under CPL 240.20 [1] [k]. Interestingly, that letter is dated January 22, 2015, more than a month after this court's decision. This court is hardly persuaded by their interpretation of CPL 240.20 [1] [k], nor is it bound by such defiant refusal. That aside, the obvious question is why the People failed to either obtain or incorporate it in their

opposition papers to the extent it is relevant at all. Indeed, the broader question is why their opposition papers were wanting for both thoroughness and completeness.

Indeed, the People's conspicuous failure to explain or address their insufficient and unpersuasive opposition, both in their papers and upon being questioned about it during oral argument is puzzling. Though the People are quick to argue that this court misapprehended the law, they have yet to provide any basis upon which they should be entitled to a second opportunity to persuade it otherwise. Perhaps it could be because their failure to properly argue the issue initially contributed, at least in part, to this court's decision. More problematically, when pressed, the People provided the hair-splitting explanation that granting them time to file a motion seeking leave to reargue was itself leave to reargue.

In short, the People's contention that this court misapprehended or overlooked the law ostensibly amounts not to seeking leave to reargue, but rather a do-over attempting to cure their failure to engage in proper, thorough, and effective advocacy. Law office failure, however, absent an acceptable excuse or otherwise unsubstantiated and conclusory explanation, is indefensible (*see Pichardo–Garcia v Josephine's Spa Corp.*, 91 AD3d 413 [2012]; *Galaxy General Contracting Corp. v 2201 7th Avenue Realty LLC*, 84 AD3d 940 [2011]; *Wells Fargo Bank*, 84 AD3d 789 [2011]; *M.R. v 2526 Valentine LLC*, 58 AD3d 530, 531–32 [2009]). Such is hardly a

basis to justify granting leave to reargue.

Leave to reargue this court's decision dated December 15, 2014, is therefore denied.

This shall constitute the decision and order of this court.

Dated: May 22, 2015

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Richard Lee Price, J.S.C.