

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

578

KA 18-02187

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRINCE ROYAL-CLANTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Rory A. McMahon, A.J.), rendered September 4, 2018. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree and attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, and the amended indictment is dismissed without prejudice to the People to represent any appropriate charges under counts one and two of the amended indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and attempted rape in the first degree (§§ 110.00, 130.35 [1]). Defendant contends that he was deprived of his right to testify before the grand jury and that the court (Brunetti, A.J.) thus erred in denying his motion to dismiss the amended indictment pursuant to CPL 190.50 (5) (c). We agree. "CPL 190.50 (5) (a) provides that a defendant's request to testify is timely as long as it is made prior to the filing of the indictment" (*People v White*, 147 AD3d 1492, 1493 [4th Dept 2017]). Here, defendant's June 8, 2017 notice, which " 'satisfied the statutory requirements for notifying the People of a request to appear before the grand jury' " (*id.*), was received by the District Attorney on the same day, prior to the filing of the amended indictment on June 9, 2017. Contrary to the contention of the People and the rationale of the court, it is of no moment under the statute that defendant had previously declined the opportunity to testify (*see People v Kellman*, 156 Misc 2d 179, 180-183 [Sup Ct, Kings County 1992]). "Where, as here, defendant's request to testify is received after the grand jury has voted, but before the filing of the indictment, defendant is entitled to a reopening of the proceeding to enable the grand jury to

hear defendant's testimony and to revote the case, if the grand jury be so advised" (*White*, 147 AD3d at 1493).

Defendant's contention that the suppression court failed to adequately set forth its findings of fact and conclusions of law at the end of the suppression hearing is unpreserved for appellate review (see *People v Junior*, 119 AD3d 1228, 1231 [3d Dept 2014], *lv denied* 24 NY3d 1044 [2014]; *People v Perez*, 89 AD3d 1393, 1395 [4th Dept 2011], *lv denied* 18 NY3d 961 [2012]; *People v Hunt*, 187 AD2d 981, 982 [4th Dept 1992], *lv denied* 81 NY2d 887 [1993]), and defendant's further contention regarding the voluntariness of his statements was, under the circumstances of this case, waived (see generally CPL 710.70 [3]; *People v Bostic*, 144 AD2d 477, 477-478 [2d Dept 1988], *lv denied* 73 NY2d 889 [1989]).

In light of our determination, we need not consider defendant's remaining contentions.