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SPEEDY TRIAL LAW UPDATE

ROBERT S. DEAN, ESQ. AND JAN HOTH, ESQ.



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FEDERAL AND STATE CONSTITUTIONAL SPEEDY TRIAL

Prepared by Robert S. Dean

I. Federal Constitutional Speedy Trial

The federal constitutional right to speedy trial is contained in the Sixth Amendment to the Constitution, and is applicable to the states via the Fourteenth Amendment. *Klopper v. North Carolina*, 386 U.S. 213 (1967). The appropriate relief for a federal speedy trial violation is dismissal of the charges, with prejudice. *Strunk v. United States*, 412 U.S. 434, 439-440 (1973).

In *Barker v. Wingo*, 407 U.S. 514, 532 (1972), and *Doggett v. United States*, 505 U.S. 647 (1992), the Supreme Court articulated a four-pronged “balancing test” as to whether the federal right to a speedy trial has been violated, with the facts to be evaluated on an “*ad hoc*” basis:

- Whether the pretrial delay was uncommonly long,
- Whether the government or the defendant is more to blame for the delay,
- Whether, in due course, the defendant asserted his right to a speedy trial, and
- Whether the defendant suffered prejudice as a result of the delay.

These *Barker* factors are considered “guidelines” only, not “rigid tests.” *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986), *cert. den.* 479 U.S. 936 (1986). No one factor is “either a necessary or sufficient condition of the deprivation of the right to a speedy trial.” *Barker v. Wingo*, 407 U.S. at 533.

The Sixth Amendment right to a speedy trial is not triggered until the actual commencement of the criminal case. *United States v. Marion*, 404 U.S. 307, 320 (1971). Pre-accusatory delay does not count. *United States v. Lovasco*, 431 U.S. 783 (1977). Nor does any period during which the accusatory instrument is dismissed, even if later reinstated or superceded. *United States v. Loud Hawk*, 474 U.S. 302 (1986).

However, in the “rare circumstance” where the defendant can prove “substantial prejudice to [the defendant's] right to a fair trial,” the pre-accusatory delay may run afoul of the federal due process clause. *United States v. Marion*, 404 U.S. at 324.

For federal constitutional analytical purposes, pre-accusatory delay, covered by the due process clause, and post-accusatory delay, covered by the speedy trial clause, are not aggregated. Rather, each portion of delay is evaluated separately. *United States v. Loud Hawk*, 474 U.S. at 302. In contrast, under the more liberal New York State due process clause, pre-and post-accusatory periods of delay are aggregated to determine whether there has been a violation. *People v. Singer*, 44 N.Y.2d 241, 253 (1978). Moreover, under state constitutional analysis, there is no strict requirement that the defendant show prejudice in order to prevail on a due process claim. *Id.*, at 253-254.

Practice Tip for Trial Practitioners:

Although state constitutional and statutory authority provide the defense with broader protections than the federal speedy trial and due process clauses – and thus should be the primary emphasis of such motions – the notices of motion to dismiss on delayed-prosecution claims should also cite to the federal speedy trial and due process clauses, in order to exhaust the claim for federal collateral relief purposes.

II. State Constitutional Speedy Trial

New York's speedy trial guarantee is contained in C.P.L. §30.20(1).¹ The New York State Constitution contains no speedy trial clause. Article 1, §6, of the State Constitution, however, provides that no should be deprived of life, liberty, or property without due process of law. An "unreasonable delay" in bringing a defendant to trial constitutes a state due process violation. *People v. Singer*, 44 N.Y.2d 241, 253 (1978). Furthermore, New York courts have never "drawn a fine distinction between due process and speedy trial standards," *id.*, at 253, and New York's due process clause provides broader protections to the defendant than the right to a speedy trial contained in C.P.L. §30.20.

New York's due process/speedy trial analysis is also more beneficial for the defendant than the federal analysis because it is broader and more flexible. Unjustifiable pre-and post-accusatory delay are aggregated to determine whether New York's due process clause has been violated – in contrast to the federal constitutional analysis. *People v. Singer*, 44 N.Y.2d at 253. Also, in New York's analysis, but not the federal one, dismissal may be required even though the defendant cannot show prejudice, *People v. Staley*, 41 N.Y.2d 789, 792 (1977), and even though the defendant has not asserted his right to a speedy trial. *Id.*, at 793. Under state due process analysis, moreover, the burden is placed on the People to establish good cause for a protracted delay. *People v. Lesiuk*, 81 N.Y.2d 485, 490 (1993). Therefore, the primary, but not exclusive, focus of the defense should be state rather than federal constitutional analysis.

¹This guarantee is also contained in New York Civil Rights Law §12.

In *People v. Taranovich*, 37 N.Y.2d 442, 445 (1975), the Court of Appeals set forth five factors to weigh in determining whether the state due process right to a prompt prosecution has been violated:

1. The extent of the delay

The Court of Appeals has refused to set forth per se period beyond which a criminal prosecution violates due process. *Id.*, at 455. A seven-month delay was found unreasonable in one case, *People v. Ilardo*, 103 Misc.2d 454 (Buffalo City Ct. 1980), and twenty-five years was found reasonable in another. *People v. Hoff*, 110 A.D.2d 782 (2d Dept. 1985).

2. The reason for the delay

Good faith prearrest investigative delay does not offend due process. *People v. Lesiuk*, 81 N.Y.2d 485, 490-491 (1993). Nonetheless, the People cannot justify such delay merely by uttering the talismanic words, "continuing investigation." There must be significant, substantial activity behind the delay. See, e.g., *People v. Rodriguez*, 205 A.D.2d 417 (1st Dept. 1994).

3. The nature of the charges

Serious crimes or complex cases will justify more delay than relatively simple/minor ones, *People v. Taranovich*, 37 N.Y.2d at 446, but only if that factor really *contributed* to the delay. *People v. Watts*, 57 N.Y.2d 299, 303 (1982).

4. Whether there has been an extended period of pretrial incarceration

Lengthy pretrial incarceration weighs heavily against the People, provided the incarceration is due solely to the prosecution at issue. *People v. McCummings*, 203 A.D.2d 656 (3d Dept. 1994). Pretrial liberty weighs against the defense. *People v. Decker*, 13 N.Y.3d 12 (2009); *People v. Imbesi*, 38 N.Y.2d 629, 632 (1976).

5. Whether the defense has been prejudiced by the delay

Delay is deemed to have prejudiced the defense if it has affected the chances for an acquittal. *People v. Romeo*, 12 N.Y.3d 51 (2009); *People v. Taranovich*, 37 N.Y.2d at 447. Note that where a delay is particularly lengthy, prejudice is presumed without the necessity of a particularized showing.

People v. Singer, 44 N.Y.2d at 253-254. Routine or unelaborated claims of prejudice, however, are rarely persuasive. *People v. Fuller*, 57 N.Y.2d 152, 160 (1982).

No one *Taranovich* factor or combination of factors is decisive. Instead, “the trial court must engage in a sensitive weighing process of the diversified factors present in the particular case.” *Id.*, at 445. Since each such claim is dependent upon a unique set of facts, no one case citation is controlling, and each claim must be thoroughly researched.

Practice Tips for Trial Practitioners:

1. Since New York case law makes no distinction between the State due process prompt prosecution guarantee and C.P.L. §30.20, defense attorneys need not draw any such distinction in factually analyzing their claims. However, both C.P.L. §30.20 and (especially) the State due process clause should be cited in the defendant’s motion papers, to preserve both for subsequent appellate review.

2. Although C.P.L. §30.30 claims have some apparent advantages over those framed as §30.20/due process claims – mainly because of the shorter time periods – the latter claims do have some substantial advantages over 30.30 ones:

- First, unlike C.P.L. §30.30 claims, §30.20/due process claims, *once fully litigated to a conclusion*, are not forfeited on appeal by operation of a guilty plea. *People v. Blakley*, 34 N.Y.2d 311, 314-315 (1974). In fact, the right to appeal such claims cannot even be bargained-away by an appeal waiver. *People v. Callahan*, 80 N.Y.2d 273, 280 (1972). Additionally, a plea will be considered coerced if the People condition their consent to the plea on the defendant’s withdrawal of a filed constitutional speedy trial motion. *See, People v. Alexander*, 19 N.Y.3d 203 (2012); *People v. Wright*, 119 A.D.3d 972 (3d Dept. 2014).
- Unlike C.P.L. §30.30 claims, §30.20/due process claims are applicable to homicide prosecutions and traffic infractions.
- Certain kinds of delay which are excludable under C.P.L. §30.30 would not necessarily militate against a §30.20/due process claim, e.g., court congestion delays, delays preceding plea withdrawals or mistrial declarations, and delays attributable to co-defendants.

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Center for Appellate Litigation
October 2014

Navigating the Procedural Minefield of C.P.L. §30.30

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New York's prosecutorial readiness rule, C.P.L. §30.30, is a procedural quagmire through which trial defense lawyers must tread with caution. What follows are some suggestions on meeting the sometimes exacting procedural requirements of filing and litigating §30.30(1) dismissal motions.

This article assumes that the reader has some basic familiarity with §30.30, which requires that the prosecutor announce readiness of trial within six months of the commencement of the criminal action—typically six months for a non-homicide felony—under pain of dismissal. It makes no attempt to explain the considerable “substantive” case-law generated by §30.30, such as what constitutes “genuine” readiness or an “excludable” period of delay pursuant to the “exceptional circumstances” provision of subdivisions 3(b) or 4(g). Any such comprehensive explanation would require a whole book, or at least a chapter of one.

Instead, the article attempts to set forth the procedural niceties which the §30.30 movant must follow in order to have her claim considered on the merits, either by the motion court or, failing that, on appeal.

Calculating Time

The day after commencement of the criminal action is the first day to be counted in calculating §30.30 delay. The last day, the day on which the prosecution announces

readiness, is also counted. If a prosecution commences on January 1st with the filing of the first accusatory instrument, January 2nd is the first day counted. If the prosecutor announces ready on January 30th, the total delay is 29 days. The same is true in calculating individual periods of delay, such as adjournments. If a case is adjourned from February 1st to February 20th, the first day counted is February 2nd and the last, February 20th. The total delay is 19 days.

In calculating whether the prosecution has exceeded the six-month deadline for felonies, one must bear in mind that six months equals six *calendar* months, not 180 days. To calculate the number of days in the six month period applicable to your case, you must determine the commencement date of the action, add six months to that date, and then count all the days in between. Those days will total anywhere between 181 and 184 days, depending upon the month in which the action is commenced.

Let us assume the felony complaint was filed on March 15th. Six months from that date is September 15th. In between those two dates are 184 days. Thus, 184 days is the prosecution's target period with respect to this particular action.

To determine whether the prosecution has exceeded the target period, you should total the number of days elapsed between the date the action commenced and the date the prosecution declared itself ready, then subtract the periods of delay excludable pursuant to subd. 4. To that total you should add on any post-readiness periods of delay—delay for which the prosecution is responsible after it initially announces readiness—chargeable to the prosecution pursuant to subd. 3. If the

total pre-and post-readiness period of delay exceeds the prosecution's target date, the court must grant the §30.30 dismissal motion.

**§30.30 Motion Practice:
Writing, Notice, and Timeliness
Requirements**

A §30.30 motion to dismiss must be made in writing and upon notice to the People. *People v. Lawrence*, 64 N.Y.2d 200, 203-204 (1984). The prosecution may waive these requirements by failing to object, but you should not count on such a waiver. Unlike other statutory pretrial dismissal motions, §30.30 motions are not required to be made within 45 days of arraignment on the indictment; rather, they need only be filed "prior to the commencement of trial." C.P.L. §210.20(2). They cannot be filed after the commencement of trial, even with leave of the court and the consent of the prosecutor. *People v. Lawrence, supra*. As long as the motion is filed prior to trial, the court may properly decide it afterwards. *People v. Waring*, 206 A.D.2d 329 (1st Dep't.1994).

Note that, if the §30.30 motion is denied, the defense gets the benefit of only the delay which accrued prior to the denial of the motion. If additional delay accrues after that decision and prior to trial, the defense should renew the §30.30 motion to get the benefit of the additional delay. *People v. Schiavo, B&S Salvage, Inc.*, 212 A.D.2d 816 (2d Dep't 1995).

The notice of motion should cite to C.P.L. §30.30, as otherwise the motion will be deemed to raise solely a constitutional speedy trial issue.

§30.30 Motion Practice:

Sufficiency of Motion Papers and Burden of Proof

The Initial Affirmation

The Court of Appeals has repeatedly held that the defense affirmation which accompanies a §30.30 motion, in order to satisfy the movant's initial burden pursuant to C.P.L. §210.45(1), need allege only "that the prosecution failed to declare readiness within the statutory prescribed time period." *E.g., People v. Luperon*, 85 N.Y.2d 71 (1995). Thus, rather than referring specifically to every pre-readiness adjournment period, the initial affirmation need only include "sworn allegations that there has been unexcused delay in excess of the statutory minimum." *People v. Santos*, 68 N.Y.2d 859, 861 (1986). Once the defense satisfies this initial burden, the burden then shifts to the People to identify any statutory exclusion upon which it wishes to rely in bringing themselves into compliance with the statutory time limit. *People v. Berkowitz*, 50 N.Y.2d 333, 349 (1980).

As a legal matter, then, an initial defense §30.30 affirmation could be very bare-bones and still trigger the People's burden of demonstrating exclusionary periods. As a *practical* matter, however, motion courts and even some Appellate Division judges expect this defense affirmation to allege those periods of delay that the defense contends are includable. *See e.g., People v. Stukes*, 211 A.D.2d 565 (1st Dep't 1995). That this view does not comport with the understanding of the State's highest court may not provide much comfort to the defense practitioner with a denied §30.30 motion in her file.

Thus, it may be wise for this initial affirmation to allege, at the least, the relevant

dates (e.g., when the action commenced and the date, if any, when the People declared themselves ready) and to allege that the total unexcused delay exceeds the statutory time period. If this recitation indicates the existence of facially excludable periods, however, the affirmation *must* further show either why those periods are not in fact excludable or that the total delay without those periods still exceeds the statutory time limit. *People v. Lomax*, 50 N.Y.2d 351, 357 (1980). Moreover, if the movant seeks to tack on any post-readiness periods of delay, those periods should be specifically alleged in the affirmation.

Reply Affirmation

Once the prosecution has responded to the defense motion by “identify[ing] the exclusions on which [it] intends to rely,” the burden then shifts to the defense to “identify any legal or factual impediments to the use of those exclusions.” *People v. Luperon*, 85 N.Y.2d 71, 78 (1995).

In practical terms, this means that the defense must submit a reply affirmation if it disputes any legal or factual assertion in the People’s response. Failure to do so will constitute a forfeiture of the right to dispute those factual or legal assertion in the future.

Burden of Proof

At a §30.30 hearing, the §30.30 movant has the burden of demonstrating “by a preponderance of the evidence” that the total period of pre-and post-readiness delay, regardless of applicable exclusions, exceeds the applicable time period. *People v. Anderson*, 66 N.Y.2d 529, 541 (1985). Once this burden is met, the burden shifts to the

prosecutor to show the existence of *pre-readiness* excludable periods. *People v. Cortes*, 80 N.Y.2d 201, 213 (1992). Calendar notations are in themselves, not sufficient to meet this burden. *People v. Berkowitz*, 50 N.Y.2d 333, 349 (1980).

As to *post-readiness* periods of delay, the burden is bifurcated: the defense has the ultimate burden of proving that post-readiness delay is not excludable; however, it is the People’s burden, in the first instance, to ensure that the reason for any post-readiness adjournment is clear in the record. *People v. Collins*, 82 N.Y.2d 177, 181-182 (1993).

§30.30 Motions and Guilty Pleas

A plea of guilty *always* waives a §30.30 claim. Even where the court and prosecutor agree, as part of a plea bargain, that the defendant should be able to raise such a claim on appeal, the defendant cannot do so.

On the other hand, under State law a constitutional speedy trial claim (whether grounded in C.P.L. §30.20, the 6th Amendment, or the Due Process clause of the State Constitution), once litigated to its conclusion, *cannot* be waived by a guilty plea. Even a bargained-for waiver of the right to appeal cannot forfeit a defendant’s right to raise such a claim on appeal.

A defense attorney advising her client as to the benefits of pleading guilty should take these forfeiture provisions into account.

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As should be clear to the discerning reader by now, to win a §30.30 claim it is not enough that the claim to be meritorious. The

claim must also be packaged successfully. The defense lawyer who litigates her §30.30 issue with attention to these procedural details will have an advantage over the unwary prosecutor.

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April 2015

April 21, 2015

TOP 5 CURRENT C.P.L. § 30.30 ISSUES

I. REPLY AFFIDAVITS ARE A MUST

- without one all of your claims are unpreserved

People v. Beasley, 16 N.Y.3d 289 (2011)

People v. Goode, 87 N.Y.2d 1045 (1996)

People v. Luperon, 85 N.Y.2d 71 (1995)

II. THE FIRST ADJOURNMENT FOLLOWING A DECISION ON A PRE-TRIAL MOTION MAY BE CHARGEABLE TO THE PEOPLE IN WHOLE OR IN PART

C.P.L. § 30.30(4)(a)

People v. Wells, 24 N.Y.3d 971 (2014)

People v. Green, 90 A.D.2d 705 (1st Dep't 1982)

III. ADJOURNMENTS FOR DNA TESTING ARE NOT PER SE EXCLUDABLE AS EXCEPTIONAL CIRCUMSTANCES

C.P.L. § 30.30(3)(g)

People v. Lathon, 120 A.D.3d 1132 (1st Dep't 2014) (materiality)

People v. Clarke, 122 A.D.3d 765 (2d Dep't 2014) (due diligence)

People v. Rahim, 91 A.D.3d 970 (2d Dep't 2012) (due diligence)

People v. Wearen, 98 A.D.3d 535 (2d Dep't 2012) (due diligence)

IV. PEOPLE'S STATEMENT OF READINESS MAY BE ILLUSORY

People v. Sibblies, 22 N.Y.3d 1174 (2014)

People v. Brown, 126 A.D.3d (1st Dep't 2015)

V. PEOPLE CAN BE READY ON SOME MISDEMEANOR COUNTS WHILE AT THE SAME TIME NOT READY ON OTHERS

People v. Doe, 46 Misc.3d 140 (A) (App. Term, 1st Dep't 2015)

People v. Naim, 46 Misc.3d 150 (A) (App. Term, 1st Dep't 2015)

People v. Ausby, 40 Misc.3d 126 (A) (App. Term, 1st Dep't 2014)

(unreported), reversing People v. Ausby, 40 Misc3d 1219(A) (unreported)

Defendant argues that all the information the trial court required was contained in the People's affirmation, which stated that the grand jury minutes were not produced until August 30, 2005, and therefore, the trial court had all the information it needed to "remedy the problem and thereby avert reversible error" (*id.* at 78, 623 N.Y.S.2d 735, 647 N.E.2d 1243). This argument is unavailing. Nothing in the People's affirmation would have alerted the trial court that *293 defendant was claiming that the People should be charged with 13 days of postreadiness delay due to the untimely production of the grand jury minutes. It was defendant's duty, either in his initial submission or in a reply, to draw the court's attention to the discrete periods that he now claims should have been chargeable to the People pursuant to CPL 30.30 and to explain why. Not only did defendant fail to highlight the 13-day period, he failed to offer any legal basis for his claim that the entire 42-day period was chargeable as postreadiness delay, or rebut in any way the People's contention that the 42-day period fell within one of the exemptions.

2 Defense counsel's obligation to point out the legal or factual impediments to the People's arguments is a rule to be "adher[ed] to strict [ly]" (*Goode*, 87 N.Y.2d at 1047, 643 N.Y.S.2d 477, 666 N.E.2d 182). That the trial court has all the factual information before it is immaterial. "[I]t is defense counsel who is charged with the single-minded, zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the argument to be advanced on the client's behalf" (*People v. Hawkins*, 11 N.Y.3d 484, 492, 872 N.Y.S.2d 395, 900 N.E.2d 946 [2008] [reviewing claim of legal insufficiency]). Defendant's failure to **preserve** his legal argument in Supreme Court precludes any further discussion or consideration of the merits of his claims.

Accordingly, the order of the Appellate Division should be affirmed.

****169 ***181** SMITH, J. (concurring).

I think the **preservation** here was adequate. Defendant argued that 42 days of time were chargeable to the People because of their failure to furnish the grand jury minutes promptly; that should be read as encompassing an argument that the first 13 days of that time were so chargeable for the exact same reason. It is not fair or realistic to insist that a defense lawyer follow arguments of this kind with a diminuendo sequence ("all three weeks are chargeable to the People, but if not the first two weeks are, and if not that the first week, and if not that the first three days ..."). This affirmance on **preservation** grounds will only encourage prosecutors in their already well-established tendency to pounce on every arguable imperfection in a defense lawyer's argument as a barrier to deciding a case on the merits.

I would reach the merits and would affirm the Appellate Division's order, essentially for the reasons stated by the Appellate Division majority.

***294** Chief Judge LIPPMAN and Judges GRAFFEO, READ, PIGOTT and JONES concur with Judge CIPARICK; Judge SMITH concurs in result in a separate opinion.
Order affirmed.

Parallel Citations

16 N.Y.3d 289, 946 N.E.2d 166, 921 N.Y.S.2d 178, 2011 N.Y. Slip Op. 02076

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People v. Luperon

Court of Appeals of New York. January 12, 1995. 85 N.Y.2d 71. 623 N.Y.S.2d 735. 647 N.E.2d 1243. (Approx. 20 pages)

Distinguished by People v. McCorkle, N.Y.A.D. 3 Dept., October 28, 1999

Original Image of 647 N.E.2d 1243 (PDF)

View New York Official Reports version

85 N.Y.2d 71
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,

v.

Fernando LUPERON, Appellant.

Jan. 12, 1995.

Defendant was convicted in the Supreme Court, Kings County, Miller, J., of assault in the first degree and criminal possession of a weapon in the second degree, and he appealed, alleging speedy trial violation. The Supreme Court, Appellate Division, affirmed, ruling that police had exercised due diligence in securing defendant's presence, 194 A.D.2d 807, 599 N.Y.S.2d 840, and appeal was taken. The Court of Appeals, Titone, J., held that delay of 69 days between issuance of bench warrant for defendant's arrest and date efforts to execute warrant were initiated was not excludable from statutory speedy trial period, absent showing that People acted with due diligence to execute warrant.

Reversed.

Bellacosa, J., filed dissenting opinion in which Levine, J., concurred.

West Headnotes (15)

Change View

1 Arrest Time for arrest

Delay of 69 days between issuance of bench warrant for defendant's arrest and date efforts to execute warrant were initiated was not excludable from statutory speedy trial period, absent showing that People acted with due diligence to execute warrant. McKinney's CPL § 30.30, subd. 4(c).

3 Cases that cite this headnote

2 Criminal Law Presumptions and burden of proof

Criminal Law Proceedings at Trial in General
While defense may satisfy its initial burden under speedy trial statute by alleging only that prosecution failed to declare readiness within statutorily prescribed time period, that principle concerns the substantive burden of proof and does not alter basic rules of error preservation, which determine what questions are reviewable in Court of Appeals. McKinney's CPL §§ 30.30, 470.05, subd. 2.

19 Cases that cite this headnote

3 Criminal Law Presentation of questions in general

Any matter that party wishes appellate court to decide must be brought to attention of trial court at time and in way that gave trial court opportunity to remedy problem and thereby avert reversible error. McKinney's CPL § 470.05, subd. 2.

56 Cases that cite this headnote

4 Criminal Law Proceedings

In context of speedy trial statute, People must ordinarily identify exclusions on which they intend to rely, and defense must identify any legal or factual impediments to those exclusions. McKinney's CPL § 30.30.

SELECTED TOPICS

Criminal Law

- Time of Trial
 - Delay of Trial
 - Claim of Violation of Statutory Speedy Trial Right
- Review
 - Appeal of Question of Venue

Secondary Sources

§ 186:84. Generally

33A Carmody-Wait 2d § 186:84

...The time encompassed by pretrial motions is excludable from the statutory speedy trial period, as constituting other proceedings involving the defendant. Since the legislature intended that the speedy ...

§ 186:89. Generally

33A Carmody-Wait 2d § 186:89

...The period of a delay resulting from a continuance granted by the court at the request or with the consent of the defendant or his or her counsel tolls the running of the readiness period. Where defens...

§ 30:1. Case law developments

18 West's McKinney's Forms Criminal Procedure Law § 30:1

...In People v. Lomax, 50 N.Y.2d 351, 428 N.Y.S.2d 937, 406 N.E.2d 793 (1980), the court of appeals held that the criminal action must be deemed to have been commenced for purposes of N.Y. Crim. Proc. Law...

See More Secondary Sources

Briefs

Petition for a Writ of Certiorari

2005 WL 3620008
Zedner v. United States of America
Supreme Court of the United States.
August 22, 2005

...Petitioner Jacob Zedner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction. The Second Circuit...

Brief in Opposition

2006 WL 2921959
Driver v. The State of Ohio
Supreme Court of the United States.
October 11, 2006

...Petitioner attached the opinions below to his brief at App. 29. State v. Driver, 7th Dist. No. 03 MA 210, 2006-Ohio-494, leave to appeal denied (2006), 109 Ohio St.3d 1507, 849 N.E.2d 1028, Moyer, C.J....

Brief of Petitioner

2012 WL 5884897
Boyer v. State of Louisiana
Supreme Court of the United States.
November 19, 2012

...The opinion of the Louisiana Third Circuit Court of Appeal affirming Mr. Boyer's conviction is reported at State v. Boyer, 10-693 (La. App. 3 Cir. 2/2/2011); 56 So. 3d 1119. JA 88-184. The Louisiana Su...

See More Briefs

Trial Court Documents

The People of the State of New York v. Ramos

2001 WL 36191846

- 13 Criminal Law**  In General; Necessity of Motion
 Defense counsel's reference to unexcused periods of prearrest delay in her motion paper preserved for review issue of People's unreadiness during those periods under speedy trial statute. McKinney's CPL § 30.30.
- 4 Cases that cite this headnote
- 14 Criminal Law**  Computation
 People did not justifiably rely on arithmetic errors in defense counsel's papers in determining whether speedy trial statute had been violated, where periods of delay in question had been clearly and correctly identified by counsel's motion papers, and there was nothing to prevent prosecutor from making his own calculations and drawing his own conclusions about number of days of claimed delay that were at stake. McKinney's CPL § 30.30.
- 15 Criminal Law**  Proceedings
Criminal Law  Presumptions and burden of proof
 Court's statements did not justify People's failure to explain or excuse People's unreadiness during prewarrant and postreturn periods identified in defendant's motion papers, for purposes of speedy trial statute; trial court did not suggest that entire period between issuance of bench warrant and defendant's arrest would be considered in determining whether prosecutor exercised due diligence in securing defendant's presence, and instead merely told prosecutor he did not have to submit detailed response papers because "hearing will be the determining factor." McKinney's CPL § 30.30.
- 8 Cases that cite this headnote

Attorneys and Law Firms

***736 *73 **1244 Laura Boyd and Philip L. Weinstein, New York City, for appellant.

Charles J. Hynes, Dist. Atty. of Kings County, Brooklyn (Ann Bordley, Roseann B. MacKechnie and Richard T. Faughnan, of counsel), for respondent.

*74 OPINION OF THE COURT

TITONE, Judge.

1 Defendant was charged with attempted murder and related offenses in a felony complaint that was filed on August 2, 1989. More than 15 months later, defendant moved to dismiss the charges, arguing that the People's October 26, 1990 statement of readiness came too late to satisfy their obligations under CPL 30.30. Inasmuch as a bench warrant for defendant had been issued and was outstanding during a substantial portion of the period between defendant's arraignment and the People's readiness declaration, the critical issue is the extent to which the People may rely on the exclusion provided in CPL 30.30(4)(c) to excuse their protracted unreadiness. Resolution of that question, in turn, depends on whether the entire period between the issuance of a bench warrant for defendant's arrest and the People's readiness declaration is excludable even though a 69-day portion of that period elapsed before efforts to execute the warrant were initiated. Concluding that the police's subsequent efforts to enforce the warrant do not insulate the People from judicial review of their prior inaction, we hold that the 69-day period of ***737 **1245 inaction is not excludable and that, in the absence of a cognizable explanation for other prearrest delays, the indictment should have been dismissed.

I.

Defendant, who was accused of wounding his landlord in a shooting incident, was arraigned on a felony complaint on August 2, 1989. He was released two days later when the prosecutor informed the court that no Grand Jury action had yet been taken against him (see, CPL 180.80). Defendant did not appear on the next scheduled adjourn date, and a bench *75 warrant was issued for his arrest. Defendant was arrested on unrelated charges on October 16, 1989, at which time the existence of the outstanding bench warrant was discovered. Since the Grand Jury had still not acted on the charges arising from the shooting incident, the court once again released defendant on his own recognizance four days later (see, *id.*).

Defendant was indicted for crimes associated with the assault on his landlord on December 8, 1989, but no Supreme Court arraignment was scheduled and no notice was sent to defendant or his attorney (see, CPL 210.10[2]). An ex parte order for defendant's arrest was issued on December 19, 1989. Defendant did not appear until October 5, 1990, when he was located and returned on the warrant. At that point, the People requested and were granted a short-term adjournment.¹ Their "readiness" declaration was made on the adjourn date, October 26, 1990.

One month later, defendant moved to dismiss the indictment, alleging that the People were inexcusably "unready" for a total of "451 days," far more than the 184 days that CPL 30.30 allowed them in these circumstances. According to the defense papers, a large segment of this period—i.e., the "289-day period" between the issuance of the second bench warrant (December 19, 1989) and defendant's return on that warrant (October 5, 1990)—was not excludable under CPL 30.30(4)(c) because the People had not exercised due diligence in locating defendant during that period. Defendant also argued that the People were accountable for an additional "162 days" of unexcused delay. Notably, although there were no errors in the relevant dates cited in defendant's motion papers, defense counsel had miscalculated the number of days involved in the various identified periods. In fact, the period between the issuance of the bench warrant and defendant's return was 290 days, the additional days of claimed unexcused delay totaled 192 and the full period that defendant identified as being chargeable to the People totaled 482 days. Inasmuch as the court had indicated that "the hearing will be the determining factor" and that a lengthy reply was unnecessary, the prosecutor submitted only a brief responsive affirmation, stating that "[a] review of the papers submitted establish that the defendant's motion will depend on the efforts made by the *76 Police Department in arresting the defendant on the various warrants."

At the hearing, the People called Police Officer Elliot Rice, who had been assigned the responsibility of executing the December 19, 1989 warrant on February 26, 1990. Rice immediately made inquiries about defendant with the Correction Department. In April 1990, he made an unsuccessful attempt to locate defendant at the address on the warrant. Over the succeeding few months, Rice made an inquiry at the Post Office, contacted the Correction Department again, checked with the Department of Motor Vehicles, visited a second address listed on defendant's rap sheet and revisited defendant's former landlady, the complainant's wife. Finally, on October 4, 1990, defendant was located and arrested after his former landlady spotted him in the neighborhood and notified Rice.

During the oral argument following the hearing, defense counsel argued that although some efforts were made to locate defendant after February 26, 1990, there was no showing of any similar efforts between that date and December 19, 1989, the date the warrant was issued. Consequently, defense ***738 **1246 counsel contended, that period was not excludable under CPL 30.30(4)(c). And, when that period was added to other identified periods of unexcused delay, the statutorily authorized time for the People to become ready had been exceeded.

The People responded by arguing that Officer Rice had made "all reasonable * * * effort" to execute the warrant and that "the People are [not] under any obligation to pursue every potential avenue." With respect to "the other aspect of defendant's motion," the prosecutor argued that a "substantial amount of th[e] time [before indictment] is excludable [if, in fact, defendant had put in a notice that he wished to testify before the Grand Jury]." Additionally, the prosecutor stated, "[t]he People have a reasonable time to arraign that would be excludable."

On the basis of the argument and evidence presented at the hearing, the trial court ruled that the People had demonstrated over-all diligence, notwithstanding that two months had elapsed before their efforts to enforce the December 19, 1989 warrant began. Consequently, defendant's CPL 30.30 motion for dismissal was denied, and the matter proceeded to trial. Defendant was ultimately convicted of one count of first degree assault and one count of second degree criminal possession *77 of a weapon. The judgment of conviction was subsequently affirmed by the Appellate Division, which enumerated Officer Rice's efforts and found that they amounted to the requisite diligence. This appeal, taken by permission of a Judge of this Court, ensued.

II.

Defendant's appeal presents yet another variant on the question of the People's CPL 30.30 obligation to ready their case during the absence or unavailability of the accused.

The focus of the inquiry is CPL 30.30(4)(c), which excludes from the calculation of the People's readiness time "the period extending from the day the court issues a bench warrant pursuant to [CPL] 530.70 because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court". A condition precedent to the use of this provision is a showing that "the defendant [wa]s absent or unavailable and has either escaped from custody or has previously been released on bail or on his own recognizance" (CPL 30.30[4][c]). Under the statute, "[a] defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence" (*id.*). A defendant is "unavailable" "whenever his location is known but his presence for trial cannot be obtained by due diligence" (*id.*).

Defendant's first argument on this appeal is that the above-quoted provision, which was adopted to mitigate the effects of this Court's decision in *People v. Sturgis*, 38 N.Y.2d 625, 381 N.Y.S.2d 860, 345 N.E.2d 331; *see, People v. Bolden*, 81 N.Y.2d 146, 152, 597 N.Y.S.2d 270, 613 N.E.2d 145; Preiser, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 11A, CPL 30.30, at 171–172, is inapplicable to his case. As defendant points out, he was never notified of his indictment or of a scheduled arraignment date. Accordingly, defendant argues, the December 19, 1989 bench warrant was not one that was issued "because of the defendant's failure to appear in court *when required*," and the specific language of CPL 30.30(4)(c) that was aimed at cases involving certain absconders is unavailable (*cf., People v. Bolden, supra*, at 153, n. 3, 597 N.Y.S.2d 270, 613 N.E.2d 145).

2 3 4 5 Whether or not defendant's argument has merit, it was not raised in the trial court and therefore cannot be considered here. While the defense may satisfy its initial burden under CPL 30.30 by alleging only that the prosecution failed *78 to declare readiness within the statutorily prescribed time period (*see, e.g., People v. Cortes*, 80 N.Y.2d, at 201, 590 N.Y.S.2d 9, 604 N.E.2d 71; *People v. Santos*, 68 N.Y.2d 859, 508 N.Y.S.2d 411, 501 N.E.2d 19; *People v. Berkowitz*, 50 N.Y.2d 333, 428 N.Y.S.2d 927, 406 N.E.2d 783), that principle concerns the substantive burden of proof and does not alter the basic rules of preservation, which determine what questions are reviewable in this Court (*see, CPL 470.05[2]*). Those rules require, at the very least, that any matter which a party wishes the appellate court to decide have ***739 been **1247 brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error. In the CPL 30.30 context, the People must ordinarily identify the exclusions on which they intend to rely, and the defense must identify any legal or factual impediments to the use of these exclusions. Where, as here, the defense anticipates the People's reliance on a particular exclusion and makes specific arguments about its availability, it cannot subsequently change course and make an entirely different argument on appeal about the same exclusion.

III.

6 7 Turning to the argument that defense counsel did make before the trial court, we conclude that, as defendant contended, at least some of the period during which the December 19, 1989 bench warrant was outstanding is not excludable under CPL 30.30(4)(c). As we have recently held, a showing of diligent efforts to execute the bench warrant referred to in the statute is a prerequisite to the application of the statutory exclusion (*People v. Bolden*, 81 N.Y.2d 146, 597 N.Y.S.2d 270, 613 N.E.2d 145, *supra*). While the question whether the People have exercised diligence in locating an individual is a mixed question of law and fact (*see generally, People v. Ayala*, 75 N.Y.2d 422, 428, 554 N.Y.S.2d 412, 553 N.E.2d 960; *People v. Arroyo*, 54 N.Y.2d 567, 573–574, 446 N.Y.S.2d 910, 431 N.E.2d 271, *cert. denied* 456 U.S. 979, 102 S.Ct. 2248, 72 L.Ed.2d 855; *People v. Maneiro*, 49 N.Y.2d 769, 770, 426 N.Y.S.2d 471, 403 N.E.2d 176; *People v. Budd*, 46 N.Y.2d 930, 415 N.Y.S.2d 207, 388 N.E.2d 343), this Court may nevertheless inquire into whether the fact finder's conclusions are supported by the record (*see, People v. Bolden, supra*, 81 N.Y.2d at 155, 597 N.Y.S.2d 270, 613 N.E.2d 145; *see generally, People v. Harrison*, 57 N.Y.2d 470, 477–478, 457 N.Y.S.2d 199, 443 N.E.2d 447).

In this case, both courts below found that the People had exercised the requisite diligence, but, with respect to the period between December 19, 1989 and February 26, 1990, that finding was not supported by any evidence on the record. *79 Although the People's only witness, Officer Rice, was able to describe the police's efforts to locate defendant after the warrant was assigned to him on February 26th, he knew nothing of the efforts, if any, that were made before that date. Thus, no showing at all of diligence

was made.

8 We reject the People's suggestion that we should excuse the period of preassignment delay in recognition of the need to "process" bench warrants after they have been issued by Judges. In effect, the People are asking us to adopt a blanket exception for "reasonable administrative delay." We conclude, however, that the adoption of such an exception is inappropriate, since the "due diligence" standard that is mandated by the statute is flexible enough to permit consideration of processing demands where warranted by the demonstrated facts. Our holding is not that time spent processing a warrant is always chargeable to the People but simply that, as a matter of law, there were no facts here from which a court could infer the requisite diligence, administrative or otherwise.²

9 Contrary to the People's contention, we are not prevented from considering their lack of diligence during the period from December 19, 1989 to February 26, 1990 because of the lower courts' finding that the People acted diligently overall in their efforts to enforce the warrant. Nor does our holding ****740 **1248** mandate an unwarranted "[d]issection" of the prearrest period or otherwise increase the burden of law enforcement (dissenting opn., at 89, at 745 of 623 N.Y.S.2d, at 1253 of 647 N.E.2d). Speedy trial analysis has always taken discrete, logical time periods and determined whether, for some unifying reason, a particular period is or is not includable in the speedy trial time. Indeed, CPL 30.30(4)(c) excludes only those specific "periods" when the authorities have acted with due diligence in attempting to locate or apprehend the defendant ***80** (*People v. Bolden*, *supra*, 81 N.Y.2d at 150, 151–152, 597 N.Y.S.2d 270, 613 N.E.2d 145).³ Thus, the statutory language itself mandates consideration of the excludability of discrete, legally relevant blocks of time within the total period of the People's unreadiness. While it may often be difficult or impractical to divide the period of warrant enforcement into segments for purposes of analysis under CPL 30.30(4)(c), no such difficulty is present in this case, where a clear line can be drawn between the period before and the period after the warrant was assigned to a police officer and the efforts to enforce it began (*see, People v. Fuggazzatto*, 62 N.Y.2d 862, 477 N.Y.S.2d 619, 466 N.E.2d 159).

Additionally, it is no answer to suggest that the blame should be shifted to the defendant because of his failure to return to court. Defendant was released on October 20, 1989, before any indictment had been issued. Even after the indictment was filed on December 8, 1989, defendant was not given notice of a date that he should appear in court for arraignment.

10 11 For the foregoing reasons, we conclude that, as a matter of law, the 69 days of delay between the date the warrant was issued and the date that it was assigned for enforcement are not excludable under the *Sturgis* amendment to CPL 30.30(4)(c). Contrary to the dissent's suggestion, in the area of bench warrants, law enforcement officials are not privileged to adopt policies of "not churning their available law enforcement resources in chasing after the throngs of fugitives from justice" (dissenting opn., at 87, at 744 of 623 N.Y.S.2d, at 1252 of 647 N.E.2d). Those officials are bound by their oaths of office to make all reasonable efforts to enforce judicially issued warrants (*see, People v. Bolden*, *supra*, 81 N.Y.2d at 154–155, 597 N.Y.S.2d 270, 613 N.E.2d 145).⁴ Additionally, this Court is not privileged to defer to law enforcement's resource-allocation choices; rather, it is duty-bound ***81** to determine whether the law enforcement arm of government has acted in compliance with CPL 30.30's "due diligence" command. Notably, contrary to the dissent's suggestion (dissenting opn., at 87, at 744 of 623 N.Y.S.2d, at 1252 of 647 N.E.2d), the People are chargeable with all unready time unless they can establish a statutorily recognized exclusion (*e.g., People v. Cortes*, *supra*), and, in the case of exclusions claimed under CPL 30.30(4)(c), the People must establish as *co-equal elements* both that the defendant was missing and that they exercised diligence.⁵

****741 **1249 IV.**

12 When the 69–day period of delay between the date the court issued the warrant and the date it was assigned for enforcement is added to the other unexcused periods of prearrest delay, the total period of the People's unexcused unreadiness exceeds the six months permitted by the statute. Defendant's motion papers placed in issue the entire period of delay before the People's readiness declaration, including the 43 days between defendant's arraignment (*August 2, 1989*) and his first failure to appear (*September 14, 1989*), the 85 days between that date and the filing of the indictment (*December 8, 1989*), the 11 days between the filing of the indictment and the issuance of the second

bench warrant (December 19, 1989) and the 21 days between defendant's return on the warrant (October 5, 1990) and the People's readiness declaration (October 26, 1990) (a total of 160 days). Under well-established principles, the People had the burden of showing their entitlement to a statutory exclusion for some, if not all, of these periods (see, *People v. Cortes*, supra, 80 N.Y.2d at 213, 590 N.Y.S.2d 9, 604 N.E.2d 71; *People v. Santos*, supra; *People v. Berkowitz*, supra). Inasmuch as the People failed to offer any basis for excluding these periods, the 160 days they encompass must be added to the 69 days of unexcused *82 unreadiness that elapsed between December 19, 1989 and February 26, 1990, resulting in a total unexcused delay that substantially exceeds what is permitted by CPL 30.30 (see, *People v. Cortes*, supra; *People v. Santos*, supra).

13 We reject the People's contention that defendant's claims with regard to these additional 160 days were "unpreserved" and therefore cannot form the basis for an appellate dismissal under CPL 30.30. Although she had no burden to do so, defense counsel specifically referred to these periods in her detailed motion papers. Thus, there can be no doubt that the defense raised a "question of law" with regard to the People's unreadiness during those periods. Moreover, since the People did not raise an issue with regard to these periods during the CPL 30.30 hearing, defense counsel's failure to mention all of them during that hearing cannot be regarded as a waiver or an abandonment of the underlying issues.

14 We also reject the People's argument that they should be afforded a second chance to litigate the excludability of these additional periods because the trial court's statements and the arithmetic errors in defense counsel's papers lulled them into believing that their excludability was not outcome determinative. The People's reliance on defense counsel's erroneous computation was unjustified, since the periods of delay in question were clearly and correctly identified in counsel's motion papers and there was nothing to prevent the prosecutor from making his own calculations and drawing his own conclusions about the number of days of claimed delay that were at stake.

15 Nor do the trial court's statements furnish a justification for the People's failure to explain or excuse the People's unreadiness during the prewarrant and postreturn periods identified in defendant's motion papers. The People now claim that before the hearing on defendant's CPL 30.30 motion began, the trial court "narrowed the issues * * * to the single question of whether the * * * period from December 19, 1989 to October 5, 1990 should be charged to the People," but the claim is simply not supported by the record. The trial court merely told the prosecutor that he need not submit detailed response papers because "the hearing will be the determining factor." Thus, insofar as the record reveals, it was the prosecutor who "narrowed" the scope of the inquiry, first by submitting an affirmation stating his view that resolution of the motion would depend on the police's diligence "in arresting *83 the defendant on the various warrants," and thereafter by limiting his hearing proof to ***742 ***1250 the efforts the police made to locate defendant following the issuance of the December 19, 1989 warrant.⁶

Hence, there was no judicial "error of law which functionally deprive[d] the People of their * * * opportunity to put in their case" or otherwise caused them to limit their proof to the period of defendant's second absence (*People v. Giles*, 73 N.Y.2d 666, 671, 543 N.Y.S.2d 37, 541 N.E.2d 37; see, *People v. Crandall*, 69 N.Y.2d 459, 464-465, 515 N.Y.S.2d 745, 508 N.E.2d 657; see also, *People v. Alls*, 83 N.Y.2d 94, 102, 608 N.Y.S.2d 139, 629 N.E.2d 1018). Indeed, the record does not even demonstrate the existence of an informal understanding that might have led the prosecutor to believe that he could safely limit his proof. Moreover, any prosecutorial assumption that the outcome would necessarily rest on the excludability of the period from December 19, 1989 to October 5, 1990 as a whole would have to have been dispelled when defense counsel specifically argued during the hearing that even if some of that period were excludable, the segment of time between the issuance of the warrant and its assignment to Officer Rice for enforcement was not. This argument, coupled with defense counsel's additional hearing argument concerning delays during two other discrete periods, was certainly sufficient to place the prosecutor on notice that the excludability of delays outside the December 19, 1989 to October 5, 1990 period could become important—or even dispositive—in resolving defendant's entitlement to a CPL 30.30 dismissal.

Since defense counsel's oral and written arguments gave adequate warning that defendant's position did not rise or fall with the disposition of that period as a whole, it was incumbent upon the prosecutor to offer some more specific and fact-based explanation for the other delays than that "[t]he People have a reasonable time to arraign" (but see, *People v. Cortes*, 80 N.Y.2d, at 213, 590 N.Y.S.2d 9, 604 N.E.2d 71,

supra; *People v. Correa*, 77 N.Y.2d 930, 569 N.Y.S.2d 601, 572 N.E.2d 42) and that a "substantial amount" of the time before indictment might be excludable if, in fact, defendant had requested to testify before the Grand Jury. In this regard, it is worth repeating that the excludability of any period of prerediness delay is a question on which the prosecution has the burden of proof (e.g., *People v. Santos*, *supra*; *People v. Berkowitz*, *supra*).

***84 V**

Because of the People's failure to establish the excludability of at least 160 days outside of the December 19, 1989–to–October 5, 1990 period and because of their failure to prove that they exercised due diligence during the 69 days that elapsed between the December 19, 1989 issuance of the bench warrant and the date that the warrant was assigned for enforcement, there exists a total of more than 184 days of unexcused prerediness delay. Consequently, the People did not satisfy their statutory readiness obligation and the motion to dismiss the indictment under CPL 30.30 should have been granted.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

BELLACOSA, Judge (dissenting).

We respectfully dissent and vote to affirm defendant's conviction of assault in the first degree and criminal possession of a weapon in the second degree. The essential question in this case turns on the trial court's mixed law and fact determination that is affirmed by the Appellate Division. Since the majority bypasses that procedural obstacle, which would compel affirmance in this Court, and reaches the merits of this CPL 30.30(4) (c) issue, we disagree with its imposition of a confusing and extraordinary "undue" diligence gloss on the statute.

I.

The merits issue on this appeal is whether the People satisfied the "due diligence" exception under CPL 30.30(4)(c) with respect to ****743 **1251** their readiness to proceed to trial against a fugitive defendant. Due diligence, by its nature and function, is an elastic concept, best determined judicially on a record-by-record evidentiary weighing. That elasticity and appropriate respect for the fact-finding distribution of judicial authority are displaced by the holding of this case. Instead, fractionalized time line and time interval appraisals are mandated as a matter of law from this final judicial review perch (*compare*, *People v. Taranovich*, 37 N.Y.2d 442, 445, 373 N.Y.S.2d 79, 335 N.E.2d 303). The new mandate lacks jurisprudential realism or justification.

Reversal of this conviction and outright dismissal of the serious criminal charges, in our view, are unwarranted because:

- (1) the People satisfied their statutory duty and burden;
- *85 2**) this counter-intuitive result finds no precedential support;
- (3) the language and legislative history of CPL 30.30 do not support the strained statutory construction (*see*, *People v. White*, 73 N.Y.2d 468, 541 N.Y.S.2d 749, 539 N.E.2d 577, *cert. denied* 493 U.S. 859, 110 S.Ct. 170, 107 L.Ed.2d 127);
- (4) this result "breed[s] contempt" for law and the judicial process generally and especially among defendants who receive a bonanza for negligent or intentional failure to return to court (Mem. of State Exec. Dept., 1972 McKinney's Session Laws of N.Y., at 3259; *see also*, *Matter of Jose R.*, 83 N.Y.2d 388, 610 N.Y.S.2d 937, 632 N.E.2d 1260); and
- (5) the rationale imposes undue burdens on the People and the trial courts.

II.

On August 2, 1989, defendant was arrested and arraigned upon a felony complaint charging him with attempted murder. Defendant shot his .38 caliber revolver through his apartment door when his landlord presented himself to collect the rent. The landlord was seriously injured. Defendant was released two days later on his own recognizance, with his understanding reflected to the trial court that he should be present on September 14, 1989 (*see*, Temporary Order of Protection in favor of assault victim against defendant, signed by defendant). Defendant failed to appear, and the court issued a warrant for his

arrest. On October 16, 1989, defendant was arrested and arraigned on a new offense and remained in custody until October 20, at which time the court again released him on \$25,000 bail. On December 8, 1989, the Grand Jury indicted defendant, and on December 19, 1989, another arrest warrant was issued to secure his presence in court to answer the criminal charges. Approximately 10 months passed before defendant was again involuntarily returned to court on the warrant.

At the due diligence hearing, Police Officer Elliot Rice, an officer with over 16 years experience and member of the Kings County Warrant Squad, testified that he was assigned defendant's warrant on February 26, 1990, at which time he requested photos of the defendant. At the time Officer Rice received defendant's warrant, he had as many as 60 other warrants to execute. On March 1, he requested the Department of Correction to check whether defendant was incarcerated *86 on any unrelated charge. After receiving a negative response, Officer Rice continued his search by visiting defendant's address listed on the warrant. On June 8, he visited a different address listed on defendant's rap sheet, but was informed that defendant did not reside at that location. Also, Officer Rice did a postal check and ran a search with the Department of Motor Vehicles. On July 12, 1990, Officer Rice again checked with the Department of Correction but received another negative response. Finally, on October 4, 1990, defendant was captured after defendant's former landlady, the assault victim's spouse, spotted defendant back in the neighborhood and reported that to Officer Rice.

At the conclusion of the due diligence hearing, the trial court denied defendant's CPL 30.30 motion, holding that the efforts made by the Warrant Squad were sufficient to meet the due diligence standard. In making this finding, the court stated correctly that "[i]t is not required that the police make attempts every week or every month; or that all possible avenues are exhausted. What is ***744 **1252 required and what the standard is [is] a reasonable attempt to locate the defendant and it is this Court's finding [] that the People have met that burden."

The Appellate Division stated in affirming:

"Contrary to the defendant's contentions, he was not deprived of his right to a speedy trial * * *. Although approximately 14 ½ months elapsed between commencement of this criminal action * * *, and the People's announcement of readiness for trial, this delay was directly attributable to the defendant's absence * * *. We conclude that the People satisfied their obligation to attempt to determine the defendant's location through the exercise of due diligence" (194 A.D.2d 807, 807–808, 599 N.Y.S.2d 840 [citations omitted]).

Despite the undisturbed and mixed findings of law and fact made by the courts below, this Court now carves 69 days out of the due diligence determination of those courts. The lower courts' decisions appropriately considered and covered the whole period of defendant's absence. This Court declares that the 69–day extrapolation effects a violation of CPL 30.30 as a matter of law.

III.

CPL 30.30 is not a *speedy trial* statute. It is a prosecution *87 *ready rule* (see, Preiser, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 11A, CPL 30.30 [Historical Background], at 167–168, 172; see also, *People v. Anderson*, 66 N.Y.2d 529, 535, 498 N.Y.S.2d 119, 488 N.E.2d 1231). Section 30.30(4)(c) states in pertinent part:

"In computing the time within which the people must be ready for trial pursuant to subdivisions one and two, *the following periods must be excluded*: * * *

"(c) *the period of delay resulting from the absence or unavailability of the defendant or, where the defendant is absent or unavailable and has either escaped from custody or has previously been released on bail or on his own recognizance, the period extending from the day the court issues a bench warrant pursuant to section 530.70 because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court pursuant to a bench warrant or voluntarily or otherwise. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence*" (CPL 30.30[4][c] [emphasis added]).

Thus, any period of readiness delay resulting from defendant's absence must be excluded from the time chargeable to the People. That is the major premise of the statute itself. Absented time is chargeable to the People only if the People do not employ due

diligence to locate a defendant (CPL 30.30[4][c]), or if they adopt a uniform policy of not churning their available law enforcement resources in chasing after the throngs of fugitives from justice (see, *People v. Leone*, 65 N.Y.2d 674, 675, 491 N.Y.S.2d 623, 481 N.E.2d 254; *People v. Bratton*, 65 N.Y.2d 675, 677, 491 N.Y.S.2d 623, 481 N.E.2d 255).¹

Defendant, nevertheless, argues that, as a matter of law, the prosecution cannot benefit from the plain, threshold statutory exclusion of time if some chunk or aggregated portion of his absence can be isolated from the People's over-all due diligence effort to relocate and recapture him. Defendant's exclusive ***88** support for this bold proposition, not found in the statute itself, is his perfunctory assertion that generalized law enforcement inaction might otherwise be encouraged. This argument suffers from numerous flaws. First, there is no statutory, legislative or precedential authority to support such a counter-intuitive flip of the due diligence prong of CPL 30.30(4). Also, the argument resonates with a policy choice that belongs to the Legislature, not the courts. This case, after all, involves pure statutory construction, not common-law or constitutional adjudication, with respect to which courts have a significantly *****745** greater substantive role and responsibility.

Statutes should be construed according to the ordinary meaning of their words (see, *People v. White*, 73 N.Y.2d 468, 473, 541 N.Y.S.2d 749, 539 N.E.2d 577, cert. denied 493 U.S. 859, 110 S.Ct. 170, 107 L.Ed.2d 127, supra). We have recently and unanimously emphasized in analogous circumstances that "[a]pplication of this cardinal rule * * * is not to be mechanically applied when an absurd or futile result would ensue, especially one at variance with the policy and purpose of the legislation" (*Matter of Jose R.*, 83 N.Y.2d 388, 393, 610 N.Y.S.2d 937, 632 N.E.2d 1260, supra). Accordingly, the controlling guidance in interpreting statutes is the legislative intent, expression, purpose and history (*People v. White*, supra, 73 N.Y.2d at 473, 541 N.Y.S.2d 749, 539 N.E.2d 577; see also, *People v. Anderson*, 66 N.Y.2d 529, 535, 498 N.Y.S.2d 119, 488 N.E.2d 1231, supra).

Undeniably, section 30.30 was enacted to encourage prompt attention and resolution of criminal charges. Indeed, upon signing this measure into law, the Governor stated that this law "will provide a strong inducement for more rapid disposition of criminal cases in a manner consistent with available resources and the need to avoid creating additional danger to public safety" (Governor's Approval Mem., 1972 McKinney's Session Laws of N.Y., at 3385). As to delays caused by defendants, the statute flatly recognizes that defendants are individually responsible for the time of their own absences from court when their whereabouts cannot be determined with due diligence by law enforcement authorities (see, CPL 30.30[4][c]). This Court has even acknowledged that the 1984 amendment to CPL 30.30 was designed to "lessen" the People's burdens in defendant "absence or unavailability" circumstances (*People v. Bolden*, 81 N.Y.2d 146, 153, 158, 597 N.Y.S.2d 270, 613 N.E.2d 145).

The determinative question, therefore, is not when the due diligence effort to locate and retrieve a fugitive defendant commences. At its most elemental level in these absent defendant situations, this case reduces to what is "diligence", what ***89** is "due," and when. This case is not just another "variant" (majority opn., at 77, at 738 of 623 N.Y.S.2d, at 1246 of 647 N.E.2d) of defendant unavailability, nor a mere burden of persuasion matter, nor simply about something called an "[i]n effect" "reasonable administrative delay" exception (majority opn., at 79, 739 of 623 N.Y.S.2d, 1247 of 647 N.E.2d). Rather, the dispositive consideration is whether courts should examine the entire spectrum of efforts the People deploy to satisfy the flexible statutory concept of due diligence over the full span of a defendant's unauthorized "holiday" from court in avoidance of answering criminal charges. That is precisely what both lower courts did. The majority scuttles that approach and substitutes a new judicial exercise and review, despite its disclaimer to the contrary. Dissection into discrete, daily, due diligence accounting periods and time intervals to determine when and to what extent the People satisfied the general statutory "due diligence" requirement is the inevitable consequence of today's ruling.

Without question, the practical consequence of this new rule is a command to overburdened and conscientious law enforcement personnel that they henceforth keep pursuing and rearresting hosts of defendants continuously during pretrial release periods, no matter how many times courts set them free pending trial. Segmentation and aggregation of days and time frames are logically and inexorably the kinds of calculations that will have to be done from now on in judicial assessments of due diligence at every level. The new rubrics create a functionally impossible accounting and accountability burden in these multitudinous fugitive-from-justice scenarios that will result in uneven applications. Moreover, it is placed on the wrong parties and enables and facilitates

accuseds to evade personal responsibility from answering for their criminal misdeeds (*compare for practical consequences, People v. Antommarchi*, 80 N.Y.2d 247, 590 N.Y.S.2d 33, 604 N.E.2d 95, *rearg. denied* 81 N.Y.2d 759, 594 N.Y.S.2d 720, 610 N.E.2d 393).

We emphasize that we would not diminish one iota the People's accountability for their "readiness" and "due diligence" in accordance ***746 **1253 with the statute's explicit commands. Correspondingly, however, released accuseds should be accountable for the *sine qua non* of their pretrial release—returning to court as the law requires. Without question, defendant knew of his responsibility to return to court by the express terms of the order of protection which he signed. Also, he cannot feign blissful ignorance of the fact of the unresolved felony complaint, which he knew all about and for which he kept getting arrested. Accordingly, there is no basis to excuse *90 his absence on some lack of follow-up notice, as though the criminal charges had evaporated merely because of his release. No reasonable person and no reasonable rule of law or burden of proof should tolerate and condone such coy escapism.

By accepting defendant's due diligence gloss on CPL 30.30, the majority erases any day of reckoning for these serious criminal charges. The emergence of this latest statutory twist that imposes continuous daily investigations into the whereabouts of every released missing defendant, as the pinpointed measurements of due diligence, will surprise the enactors and amenders of CPL 30.30 and delight the beneficiaries of this interpretative largesse (*compare, People v. White*, 73 N.Y.2d 468, 541 N.Y.S.2d 749, 539 N.E.2d 577, *cert. denied* 493 U.S. 859, 110 S.Ct. 170, 107 L.Ed.2d 127, *supra*).

The majority purports to limit the sweep of its holding by stating that "[w]hile it may often be difficult or impractical to divide the period of warrant enforcement into segments for purposes of analysis under CPL 30.30(4)(c), no such difficulty is present in this case, where a clear line can be drawn between the period before and the period after the warrant was assigned to a police officer and the efforts to enforce it began" (majority opn., at 80, at 740 of 623 N.Y.S.2d, at 1248 of 647 N.E.2d). That line drawing is pure fact-finding analysis and creates a maze of a rule for future application in every level of the court system. Moreover, two illustrations using the very facts of this case demonstrate, additionally, the transparency of the purported limitation which is reflected repeatedly in fact-differentiated terms and analysis (majority opn., at 78, 79–80, at 738, 739–740 of 623 N.Y.S.2d, at 1246, 1247–1248 of 647 N.E.2d).

Warrant Officer Rice attempted to locate defendant on only the following dates: February 26, March 1, April 11, May 16, May 30, June 8, June 21 and July 12, 1990. Thus, courts can isolate the following periods which represent blocks of time when law enforcement was not actively pursuing defendant: February 27—February 28; March 2—April 10; April 12—May 15; May 17—May 29; June 1—June 7; June 9—June 20; June 22—July 11; and July 13—October 4, 1990. Since there is no "evidence on the record" that the police "exercised the requisite diligence" (majority opn., at 78, at 739 of 623 N.Y.S.2d, at 1247 of 647 N.E.2d) during these time periods, and it is not "difficult" or "impractical" to segment these time periods, under the majority's precedential reasoning, these periods, when challenged by defendants, must also be charged against the People. Second, if a Warrant Officer did some preliminary, timely, locating activity upon issuance of the warrant and then allowed a 69-day hiatus to occur to chase *91 other fugitives, that interim block of time would fall on the People's nondue diligence ledger—unless a tolling concept is also going to be added to the fractionalized due diligence concept. These are mere samples of the real world impacts of today's precedent—a day-by-day due diligence "sword of Damocles" in every case.

IV.

The stated purpose of CPL 30.30 was to better utilize judicial resources to "attack * * * case backlogs" (Mem. of State Exec. Dept., 1972 McKinney's Session Laws of N.Y., at 3259, 3260), to "provide a strong inducement for more rapid disposition of criminal cases in a manner consistent with available resources," (Governor's Approval Mem., *op. cit.*, at 3385) and "[t]o promote prompt trials for defendants" (Mem. of State Exec. Dept., *op. cit.*, at 3259). The legislative exertion was designed to improve the "system" of justice and to reduce danger to the public safety. Correspondingly, "[t]he public, defendants and the victims of crimes all have a strong interest in the prompt trial ***747 **1255 of criminal cases. The knowledge that punishment for the guilty will be swift and sure acts as an effective deterrent to crime" (Mem. of State Exec. Dept., *op. cit.*, at 3259). Today's ruling recalibrates the "ready" policy variables and "breed[s] contempt for the law and

convince[s] criminals that they can 'beat the system' " (*id.*). Despite the Court's recent expression in *People v. Bolden*, 81 N.Y.2d 146, 151, 597 N.Y.S.2d 270, 613 N.E.2d 145, *supra*, that this statute was "precisely worded" and drafted with "precision", the majority now *sua sponte* adds substantive gloss and splinters the due diligence formula of this statute.

Mixed precedential signals also emerge in relation to this Court's recent unanimous holding in *Matter of Jose R.*, 83 N.Y.2d 388, 610 N.Y.S.2d 937, 632 N.E.2d 1260, *supra*. In *Jose R.*, a juvenile absconded following a delinquency adjudication and was returned to Family Court 14 months later. A motion to dismiss was made on the basis of denial of the right to a timely dispositional hearing. While the Court acknowledged the hurdle of the literal language of Family Court Act § 350.1, it concluded that the juvenile's disobedience in failing to return to Family Court precluded dismissal of the charges. As with *Jose R.*, the Court here should statutorily interpret this statute within the framework of the intent and policy behind CPL 30.30 and especially under subdivision (4)(c).

***92** The due diligence component was not imposed on the People to be wielded as a sword by defendants who were granted the benefit of pretrial release, only to have them turn around and evade trial long enough to assert that their evasion morphs into dismissal of the criminal charges (*compare, Matter of Randy K.*, 77 N.Y.2d 398, 407, 568 N.Y.S.2d 562, 570 N.E.2d 210 [dissenting opinion by then-Judge Kaye]). By avoiding their day in court, defendants achieve a twin bonanza—they escape prompt trial, the essential goal of CPL 30.30, and they are granted dismissal of the criminal charges to boot. Defendants have no incentive to show up for a day of reckoning and every incentive to stonewall and lay low for however long it takes to secure improbable dismissals for their finesse or effrontery.

Since the erratic arithmetic calculations of this rule have nothing to do with guilt or innocence or individualized or idealized justice, we suggest that prosecutors and Trial Judges should experiment with two procedural counterplays to try to offset the widespread adverse consequences of today's ruling: (1) give *Parker* warnings (*People v. Parker*, 57 N.Y.2d 136, 454 N.Y.S.2d 967, 440 N.E.2d 1313) and try defendants in absentia, so that when they are recaptured they can be immediately sent to State prison instead of through another round of local, pretrial rituals; or (2) remand many more accuseds to custody pending trial to insure presence for prompt, CPL 30.30—ready, satisfied trials or pleas.

The risk of failing to keep meticulous account books and logs is dismissals with prejudice of criminal charges, without reference to their merit. Courts, too, will be relegated to examining spreadsheets (see attached illustrative graphic for this case, at 95). To arm defendants with this potent ultimate weapon that will allow them to thwart the People's efforts to be ready to dispose of the merits of criminal charges contradicts the sound and fair administration of justice. It could not possibly have been the contemplated legislative intent. Of course, the Legislature could reassert itself again to amend section 30.30, as it tried to do in 1982 and 1984 in its effort to overturn earlier untoward rulings of this Court under this same statute (see, *People v. Sturgis*, 38 N.Y.2d 625, 381 N.Y.S.2d 860, 345 N.E.2d 331; L.1984, ch. 670; Governor's Approval Mem., 1984 McKinney's Session Laws of N.Y., at 3628 [the purpose of amending CPL 30.30(4)(c) was "to correct (the) problem created by the * * * decision in *People v. Sturgis*"]).

V.

To comply with the fractionalized test of "due diligence" under CPL 30.30, prosecutors must remain customarily vigilant, ***93** keep accurate time logs, and announce in court that they are "ready" to proceed. They will also have to anticipate every conceivable shift in theory and argument at every level of court and engage in minute mathematical computations, projections and aggregations. ****748 **1256** To avoid being legally trumped by defendants using street-smart strategies in subsequent courts, the People will even have to challenge and press against the efforts of trial courts trying to limit and focus issues to those that are then relevant to varied ready-for-trial calculations.²

Finally, this case is not about common-law interstitial development, a unique provenance of the Judicial Branch. It is pure statutory construction, which means the Judicial Branch is obligated to explore and execute the intent and will of the Legislative and Executive Branches in enacting law. The Judiciary's policy preferences and choices are inappropriate and irrelevant. The articulated rationale of this case blinks the limitations in the distribution of governmental power, and the purported sufficiency articulation masks the substantive standard of law and *ratio decidendi* against which all future cases in this

85 N.Y.2d 71, 647 N.E.2d 1243, 623 N.Y.S.2d 735

Footnotes

- 1 Defense counsel did not consent to this request (see, *People v. Cortes*, 80 N.Y.2d 201, 216, 590 N.Y.S.2d 9, 604 N.E.2d 71; *People v. Liotta*, 79 N.Y.2d 841, 843, 580 N.Y.S.2d 184, 588 N.E.2d 82).
- 2 The description in *People v. Lewis*, 150 Misc.2d 886, 578 N.Y.S.2d 393 of warrant-processing methods in the New York City Criminal Courts, upon which the People heavily rely, is no substitute for a showing *on the record* of the steps that were taken in connection with defendant's warrant. Additionally, because of the record's silence on the point, we do not consider whether the People's burden of establishing due diligence may be satisfied by proof of the existence of local processing procedures that are calculated to expedite warrant enforcement (see, *People v. Lewis*, *supra*; cf., *People v. Bratton*, 65 N.Y.2d 675, 491 N.Y.S.2d 623, 481 N.E.2d 255, *affg* 103 A.D.2d 368, 480 N.Y.S.2d 324). Notably, the opinion in *Lewis* indicates that a lag time of at least "two to three weeks" is normally expected before a precinct warrant officer actually receives the warrant for assignment (*id.*, 150 Misc.2d at 890, 578 N.Y.S.2d 393.) That delay is a far cry from the 69 days of unexplained delay that occurred in the present case.
- 3 Of course, diligence is not required under CPL 30.30(4)(c) when the defendant is to be deemed "absent" because "his location is unknown and he is attempting to avoid apprehension or prosecution"—a claim not made by the People here.
- 4 The dissent misunderstands the holdings in *People v. Leone*, 65 N.Y.2d 674, 675, 491 N.Y.S.2d 623, 481 N.E.2d 254 and *People v. Bratton*, 65 N.Y.2d 675, 676, 491 N.Y.S.2d 623, 481 N.E.2d 255, *supra*. In those cases, the Court held that the People could adopt a policy of postponing indictments of absent defendants as a means of conserving scarce prosecutorial resources without running afoul of CPL 30.30's readiness deadlines. In neither case was it suggested that the police may choose to conserve their law enforcement resources by postponing enforcement of bench warrants or selecting which warrants will be pursued "diligently." Indeed, in both cases, the Appellate Division opinion adopted by this Court was careful to note that the threshold requirement of police diligence in attempting to locate the defendant had been satisfied (see, *People v. Leone*, 105 A.D.2d 757, 481 N.Y.S.2d 186; *People v. Bratton*, 103 A.D.2d 368, 480 N.Y.S.2d 324, *supra*).
- 5 In response to the dissent's attempt to revive former Chief Judge Cardozo's appealingly phrased argument against the exclusionary rule (*People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585), we defer to the wisdom of former Supreme Court Justice Tom Clark, who stated: "[T]here is another consideration—the imperative of judicial integrity" * * * The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws" (*Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081, quoting *Elkins v. United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669). Indeed, contrary to the dissent's claim that our straightforward application of CPL 30.30 " 'breed[s] contempt' for law and the judicial process" (dissenting opn., at 85, at 743 of 623 N.Y.S.2d, at 1251 of 647 N.E.2d), we conclude that the real source of "contempt for law" is the disregard of the law's dictates by government officials, who lead by example (*Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 [Brandeis, J., dissenting]).
- 6 The People's reliance on a notation in the court file characterizing the hearing as one "on due diligence" is unpersuasive, since there is no way of knowing the origin of or reason for that characterization (cf., *People v. Berkowitz*, 50 N.Y.2d 333, 347–349, 428 N.Y.S.2d 927, 406 N.E.2d 783, *supra*).

OPINION OF THE COURT

Memorandum.

The order of the Appellate Term should be reversed and the order of Criminal Court of the City of New York reinstated.

In October 2006, defendant was convicted of assault in the third degree in ****2** Criminal Court of the City of New York but, in March 2010, the Appellate Term reversed the judgment due to an improper jury charge, and remanded the case for a new trial (26 Misc 3d 143[A], 2010 NY Slip Op 50393[U] [App Term, 1st Dept 2010]). The People then sought leave to appeal to this Court.

On May 10, 2010, while the People's application for leave to appeal was still pending, Criminal Court adjourned defendant's case until June 21. An assistant district attorney was present at the adjournment. A Judge of this Court denied the People's leave application on May 14, 2010 (14 NY3d 894 [2010]).

Because of a clerical error in Criminal Court, defendant's case was not placed on the June 21, 2010 calendar, and no representative of the District Attorney was present in court on that date. Once the District Attorney's office discovered the miscalendaring in July, and informed Criminal Court, a new calendar date of August 23, 2010 was set. At no time prior to that did the People declare themselves ready for trial.

On August 23, defendant moved to dismiss the accusatory instrument on speedy trial grounds, pursuant to CPL 170.30 (1) (e), arguing that more than 90 days had elapsed since the denial of leave to appeal to this Court. Criminal Court granted defendant's motion to dismiss, concluding after a fact-finding hearing "that there was unexplained and unexcused prosecutorial inaction with this case" that "lasted longer than the statutory speedy trial time allotted."

The Appellate Term reversed, holding that the People had no obligation to advance the case to an earlier date upon receiving the certificate denying leave (***973** 36 Misc 3d 144[A], 2012 NY Slip Op 51544[U] [App Term, 1st Dept 2012]). A Judge of this Court granted defendant leave to appeal. We now reverse.

CPL 170.30 (1) is clear. A motion made pursuant to that section must be granted if the People are not "ready for trial within . . . ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony" (CPL 30.30 [1] [b]). When a defendant's judgment of conviction is reversed and the case is sent back for a retrial, "the criminal action . . . must be deemed to have commenced on . . . the date the order occasioning a retrial becomes final" (CPL 30.30 [5] [a]).

The parties do not dispute that under CPL 30.30 (5) (a) a new criminal action commenced when a Judge of this Court denied the People leave to appeal from the Appellate Term's order. The People point to the fact that, under the Criminal Procedure Law, "[i]n computing the time within which the people must be ready for trial . . . a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: . . . *appeals*; . . . and the period during which such matters are under consideration by the court" must ****3** be excluded (CPL 30.30 [4] [a] [emphasis added]).

The People contend therefore that the period from May 10, 2010 to August 23, 2010 is excludable, relying on *People v Vukel* (263 AD2d 416 [1st Dept 1999], *lv denied* 94 NY2d 830 [1999]), which held that when a trial court orders an adjournment for control purposes because of the pendency of a defendant's application for leave to appeal to this Court, the entire period of the adjournment is excludable under CPL 30.30 (4) (a), as time resulting from the appeal. In *Vukel*, the Appellate Division rejected the argument that the People have "an obligation to advance the case to an earlier date upon receiving the certificate denying leave" (*id.* at 417).

(1), (2) The mere lapse of time, following the date on which the order occasioning a retrial becomes final, does not in itself constitute a reasonable period of delay resulting from an appeal within the meaning of CPL 30.30 (4) (a). Otherwise, the People would be permitted to delay retrial for the duration of an adjournment in the trial court, no matter how lengthy, even after a Judge of our Court has denied leave to appeal, without consequence under CPL 30.30. Such a rule would be inconsistent with "the dominant legislative intent informing CPL 30.30, ***974** namely, to discourage prosecutorial inaction"

(*People v Price*, 14 NY3d 61, 64 [2010]). To the extent *Vukel* holds otherwise, it should not be followed.

Here, the Appellate Term erred as a matter of law in ruling that the period from May 10, 2010 to August 23, 2010 was automatically excludable as time resulting from an appeal under CPL 30.30 (4) (a). We agree with Criminal Court that the People provided no justification on the record for any "reasonable period of delay" under CPL 30.30 (4) (a) to be added to the 90 days provided under CPL 30.30 (1) (b).

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Order reversed and the order of Criminal Court of the City of New York reinstated, in a memorandum.

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People v Green

Supreme Court, Appellate Division, First Department, New York November 04, 1982 90 A.D.2d 705 455 N.Y.S.2d 368 (Approx. 2 pages)

Distinguished by People v. Taylor, N.Y.City Crim.Ct., May 10, 2007

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90 A.D.2d 705, 455 N.Y.S.2d 368

The People of the State of New York, Appellant,

v.

John Green, Respondent

Supreme Court, Appellate Division, First Department, New York

November 1, 1982

CITE TITLE AS: People v Green

Order, Supreme Court, New York County (H. Altman, J.), entered May 12, 1981, granting defendant's motion to dismiss the indictment pursuant CPL 30.30 (subd 1, par [a]), unanimously reversed, on the law, the indictment reinstated and the matter remanded for further proceedings not inconsistent herewith. Finding that, at a minimum, a period of 194 days was chargeable to the People in violation of defendant's right to a speedy trial (CPL 30.30, subd 1, par [a]), Trial Term granted the motion to dismiss the indictment.

At issue are two periods of contested time which were charged to the People. Review of the transcript of the October 25, 1979 proceedings reveals that the case was being adjourned to November 5, 1979 for the submission of answering papers to defendant's renewed motion to suppress statements and identification testimony. Although the transcript may be read to yield the inference that a decision, at least to the extent of ordering a hearing, might be forthcoming on November 5, we do not find any suggestion that the People were expected to go forward on that date in the event a hearing were ordered. Moreover, the People could hardly be expected to be prepared for a hearing even before they were aware that the court was ordering one. That the court *706 understood that both sides would require time to prepare is clear from its spontaneous remarks at the time it announced its decision on November 5 granting a *Wade* and *Huntley* hearing. The 10-day adjournment thereafter requested by the People "to be ready" was reasonable and should not have been charged to them. (*People v Dean*, 45 NY2d 651, 657; CPL 30.30, subd 4, par [a].) That the court, for its own convenience, adjourned the matter for 15 days to November 20, 1979 does not affect the reasonableness of the adjournment. Since these 15 days should have been excluded in computing the time within which the People had to be ready, the period of time charged to them is reduced to 179 days. Contrary to Trial Term's finding, no issue exists as to the period between February 24, 1981 and March 17, 1981. Both the Assistant District Attorney and defense counsel were actually engaged. Since, however, the circumstances underlying the adjournment from March 17, 1981 to April 1, 1981 are not apparent from the record, a hearing is required. The People contend that the victim was in Colombia during this period, and thus unavailable to testify. If this were so and the People acted with due diligence in arranging her return, this period should not be charged to them (CPL 30.30, subd 4, par [g]; see *People v Goodman*, 41 NY2d 888), notwithstanding that the Assistant District Attorney was also on trial during this period.

Concur -- Kupferman, J. P., Sandler, Sullivan and Carro, JJ.

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SELECTED TOPICS**Criminal Law**Statutory Speedy Trial Time
Times of Defendants Arraignments and Trial**Secondary Sources****§ 30:1.Case law developments**18 West's McKinney's Forms Criminal
Procedure Law § 30:1

...In *People v. Lomax*, 50 N.Y.2d 351, 428 N.Y.S.2d 937, 406 N.E.2d 793 (1980), the court of appeals held that the criminal action must be deemed to have been commenced for purposes of N.Y. Crim. Proc. Law...

§ 1878.Generally33 N.Y. Jur. 2d Criminal Law: Procedure §
1878

...For readiness for trial purposes, and subject to some statutory exceptions, the action is commenced on the date the first accusatory instrument is filed, notwithstanding that it may be replaced or supe...

§ 19:11.Readiness—Present readinessNew York Driving While Intoxicated § 19:11
(2d ed.)

...While by and large the announcement of "readiness" has become a mechanistic exercise whereby the People declare, in ritual fashion, that they are ready to proceed to trial, such declaration must nevert...

See More Secondary Sources

Briefs**Respondent's Brief**2010 WL 6424974
THE PEOPLE OF THE STATE OF NEW
YORK, Respondent, v. Isidore FARKAS,
Defendant-Appellant.
Court of Appeals of New York.
July 20, 2010

...On August 18, 2005, near 50th Street and 11th Avenue in Brooklyn, defendant confronted Harold Weinberg about Weinberg's taking photographs of a nearby construction site owned by defendant. When Weinber...

Respondent's Brief and Appendix2002 WL 32173974
THE PEOPLE OF THE STATE OF NEW
YORK, Respondent, v. Lynette COOPER,
Defendant-Appellant.
Court of Appeals of New York.
June 20, 2002

...On July 1, 1999, at approximately 11:30 a.m., at the corner of Flatbush and Ditmas Avenues in Brooklyn, defendant Lynette Cooper and an unapprehended person confronted Andrea Fludd. The unapprehended P...

Appellant's Brief2006 WL 5397680
THE PEOPLE OF THE STATE OF NEW
YORK, Plaintiff-Respondent, v. Charles
DOUGLAS, Defendant-Appellant.
Supreme Court, Appellate Division, Second
Department, New York.
December 18, 2006

...1. The original docket numbers in the Court below were 2003QN015490 and 2002QN049143. The last (consolidated) indictment number in the Court below was 803/2003. 2. The full names of the original partie...

See More Briefs

Trial Court Documents

The People of the State of New York v. Ramos

2001 WL 36191846
The People of the State of New York v. Ramos
County Court of New York, Fulton County
December 03, 2001

...This matter comes before the Court on Defendant's motion to dismiss the indictment on speedy trial grounds. Defendant stands charged, under a two-count indictment, with the crimes of Burglary in the Se...

People of the State of New York v. Allen

1990 WL 10549766
People of the State of New York v. Allen
County Court of New York, Seneca County
January 19, 1990

...W. PATRICK FALVEY, J.C.C. The Court herein is faced with an issue made unique by its particular factual situation. Defendant, William Horton Allen, and his co-defendant, were indicted for two counts of...

People v Davis

Supreme Court, Appellate Division, First Department, New York January 18, 2011 80 A.D.3d 494 915 N.Y.S.2d 250 (Approx. 2 pages)

View National Reporter System version

80 A.D.3d 494, 915 N.Y.S.2d 250, 2011 N.Y. Slip Op. 00254

The People of the State of New York, Respondent

v

Jacqueline Davis, Appellant.

Supreme Court, Appellate Division, First Department, New York

January 18, 2011

CITE TITLE AS: People v Davis

HEADNOTESCrimes
Forgery
Sufficiency of EvidenceCrimes
Right to Speedy TrialSchwartz, Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellant.
Cyrus R. Vance, Jr., District Attorney, New York (Amyjane Rettew of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J., at motions; Arlene D. Goldberg, J., at jury trial and sentence), rendered April 29, 2010, convicting defendant of forgery in the second degree (nine counts), grand larceny in the fourth degree and falsifying business records in the first degree, and sentencing her to an aggregate term of 30 days, with five years' probation and restitution in the amount of \$1,025, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence refuted defendant's assertion that she had permission to sign another person's name to the withdrawal slips at issue. The evidence also supported inferences that defendant used these forged slips to obtain money for herself, and that she caused the making of false entries in business records.The court properly denied defendant's speedy trial motion. The period from July 2 to July 16, 2009 was excludable as a delay resulting from pretrial motions, including "the period during which such matters are under consideration by the court" (CPL 30.30 [4] [a]). The People's delay in producing grand jury minutes was reasonable (see *People v Harris*, 82 NY2d 409, 413 [1993]); in any event, during the same period the court was also considering a consolidation motion that did not involve grand jury minutes. The period from July 30 to September 17, 2009, was excludable as a reasonable time to *495 prepare after the court's decision on motions (see *People v Green*, 90 AD2d 705 [1982], *lv denied* 58 NY2d 784 [1982]), thus constituting "a reasonable period of delay resulting from . . . pre-trial motions" within the meaning of CPL 30.30 (4) (a). In any event, the last three weeks of this period were excludable for the separate reason that they were granted at defense counsel's request (CPL 30.30 [4] [b]), where defense counsel actively participated in setting the date and sought a longer adjournment for his own convenience (see e.g. *People v Matthews*, 227 AD2d 313 [1996], *lv denied* 88 NY2d 989 [1996]).

We have considered and rejected defendant's remaining claims. Concur—Gonzalez, P.J., Mazzaelli, Moskowitz, Acosta and Román, JJ.

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SELECTED TOPICS**Criminal Law**

Times of Defendants Arraignments and Trial

Secondary Sources**§ 856. Generally**

22A C.J.S. Criminal Law § 856

...Under various state speedy trial statutes or rules, where the delay in bringing the defendant to trial is excusable, as where the delay is occasioned by exceptional circumstances, or there is good caus...

**§ 948. Determination as to viola
determinative factors**

21A Am. Jur. 2d Criminal Law § 948

...What constitutes a violation of the right to speedy trial depends generally on the circumstances of the individual case. Because the right to a speedy trial is a vaguer concept than other procedural ri...

**Remedy for delay in bringing ar
to trial or to retrial after revers:**

58 A.L.R. 1510 (Originally published ...)

...In many cases wherein relief has been sought for delay in bringing an accused person to trial, or to retrial after reversal, it appears that the petitioner, applicant, or appellant was not entitled to ...

See More Secondary Sources

Briefs**Petitioner's Brief on the Merits**2008 WL 5264661
State of Vermont v. Brillon
Supreme Court of the United States.
November 17, 2008

...FN1. We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. See Pet. App. 4. The ord...

Reply Brief for the Petitioner2009 WL 33834
State of Vermont v. Brillon
Supreme Court of the United States.
January 06, 2009

...Brillon has admitted all of the facts that are necessary for this Court to decide the case as a matter of law. Brillon admits that he fired Ammons on the eve of trial. Resp't Br. at 10; that he threate...

Respondent's Brief on the Merits2008 WL 5266420
State of Vermont v. Brillon
Supreme Court of the United States.
December 17, 2008

...The nearly three years between Brillon's July 30, 2007 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of ina...

See More Briefs

Trial Court Documents**People of the State of New York v. Allen**1990 WL 10549766
People of the State of New York v. Allen
County Court of New York, Seneca County
January 19, 1990

...W. PATRICK FALVEY, J.C.C. The Court herein is faced with an issue made unique by its particular factual situation. Defendant, William Horton Allen, and his co-defendant,

People v Lathon

Supreme Court, Appellate Division, First Department, New York September 25, 2014 120 A.D.3d 1132, 992 N.Y.S.2d 424992 N.Y.S.2d 424 (Mem)

View National Reporter System version

120 A.D.3d 1132, 992 N.Y.S.2d 424 (Mem), 2014 N.Y. Slip Op. 06368

The People of the State of New York, Appellant

v

Demetrius Lathon, Respondent.

Supreme Court, Appellate Division, First Department, New York
September 25, 2014

CITE TITLE AS: People v Lathon

HEADNOTE

Crimes

Right to Speedy Trial

Excludable Time—Material and Necessary DNA Analysis

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant. Center For Appellate Litigation, New York (Robert S. Dean of counsel), and Kaye Scholer LLP, New York (Aaron H. Levine of counsel), for respondent.

Order, Supreme Court, Bronx County (Darcel D. Clark, J.), entered on or about October 9, 2012, which granted defendant's CPL 30.30 motion to dismiss the indictment, unanimously reversed, on the law, the motion denied, the indictment reinstated and the matter remanded for further proceedings.

Defendant's speedy trial motion turns on the preindictment period from April 15, 2011 through August 15, 2011, during which the People were awaiting the results of DNA testing of samples taken from defendant and his codefendant pursuant to a court order. Under the circumstances of this case, this period was excludable as a "delay occasioned by exceptional circumstances" resulting from the "unavailability of evidence material to the people's case" (CPL 30.30 [4] [g] [i]; see *People v Robinson*, 47 AD3d 847, 848 [2d Dept 2008], *lv denied* *1133 10 NY3d 869 [2008]). The fact that the automobile presumption (Penal Law § 265.15 [3]) was available to the People to establish defendant's possession of the pistol did not mean that the DNA analysis was not "material" to the People's case, since defendant had expressed his intention to testify before the grand jury for the purpose of disclaiming any connection with the pistol and rebutting the presumption (see *People v Verez*, 83 NY2d 921, 924 [1994]). Moreover, the materiality and necessity of the DNA analysis had already been determined in the court order compelling **2 defendant and his codefendant to provide saliva samples, and defendant does not contend that the People failed to act diligently to obtain the DNA analysis. Concur—Sweeny, J.P., Moskowitz, DeGrasse and Manzanet-Daniels, JJ.

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SELECTED TOPICS

Criminal Law

Witness of the Scheduled Trial Date

Secondary Sources**§ 30:1. Case law developments**

18 West's McKinney's Forms Criminal Procedure Law § 30:1

...In *People v. Lomax*, 50 N.Y.2d 351, 428 N.Y.S.2d 937, 406 N.E.2d 793 (1980), the court of appeals held that the criminal action must be deemed to have been commenced for purposes of N.Y. Crim. Proc. Law...

Excludable periods of delay under Speedy Trial Act (18 U.S.C.A. § 3174)

46 A.L.R. Fed. 358 (Originally published in 1980)

...This annotation collects and analyzes the federal cases which have construed or applied the provisions of 18 U.S.C.A. § 3161(h), defining certain periods of delay which are excludable from the computat...

Prejudice Resulting from Unreasonable Delay in Trial

7 Am. Jur. Proof of Facts 2d 477 (Originally published in 1975)

...A person accused of a crime has the right to a speedy trial, which right is guaranteed by various sources and is considered fundamental in nature. This right exists regardless of whether the person is ...

See More Secondary Sources

Briefs**Brief for the United States**2009 WL 2473881
Bloate v. United States of America
Supreme Court of the United States.
August 12, 2009

...The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 534 F.3d 893. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 20a-24a) is unrepo...

Brief for the Petitioner2009 WL 1759020
Bloate v. United States of America
Supreme Court of the United States.
June 18, 2009

...FN* Counsel of Record The decision of the Eighth Circuit (Pet. App. 1a-19a) is reported at 534 F.3d 893. The district court's decision (Pet. App. 20a-24a) is available at 2007 WL 551740. The judgment o...

Reply Brief for the Petitioner2009 WL 2917819
Bloate v. United States of America
Supreme Court of the United States.
September 11, 2009

...FN* Counsel of Record In our opening brief, we explained why delay caused by the preparation of pretrial motions is not automatically excluded from the speedy trial calculation under 18 U.S.C. § 3161(h)...

See More Briefs

Trial Court Documents**People of the State of New York v. Austin**2007 WL 4289327
People of the State of New York v. Austin
Supreme Court, New York, Kings County

People v. ClarkeSupreme Court, Appellate Division, Second Department, New York. November 12, 2014. 122 A.D.3d 765. 995 N.Y.S.2d 727. 2014 N.Y. Slip Op. 07865. **SELECTED TOPICS**

View New York Official Reports version

122 A.D.3d 765

Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., respondent,

v.

Nnamdi CLARKE, appellant.

Nov. 12, 2014.

Synopsis

Background: Following denial of his motion to dismiss indictment on "speedy trial" grounds, defendant was convicted in the Supreme Court, Queens County, Kohm, J., of criminal possession of a weapon in the second degree, reckless endangerment in the first degree, and unlawful possession of marijuana. Defendant appealed.

Holding: The Supreme Court, Appellate Division, held that the People failed to exercise due diligence in obtaining a DNA sample from defendant, and so the 161-day period between the date defendant consented to the taking of the oral swab and the date the People produced a complete report of the results of the DNA test was not excludable from speedy trial calculation.

Judgment reversed, order vacated, motion to dismiss granted, and matter remitted.

West Headnotes (1)

Change View

1 Criminal Law  Delay Attributable to Prosecution

The People, who moved to take an oral swab from defendant for a DNA test more than 17 months after defendant's arrest and arraignment, approximately 9 months after defendant was indicted, and almost 3 months after the court issued a determination deciding those branches of defendant's omnibus motion which were to suppress physical evidence and statements made to law enforcement officials, failed to exercise due diligence in obtaining the DNA sample, and so the 161-day period between the date defendant consented to the taking of the oral swab and the date the People produced a complete report of the results of the DNA test was not excludable on the ground that their need to obtain the DNA test results constituted excusable, exceptional circumstances, such that the People exceeded the six-month statutory period in which they were required to be ready for trial. McKinney's CPL § 30.30(4) (g).

Attorneys and Law Firms

**727 Lynn W.L. Fahey, New York, N.Y. (William Kastin of counsel), for appellant, and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, **728 Johnnette Traill, Sharon Y. Brodt, Jeanette Lifschitz, Nicoletta J. Caferri, and Roni C. Piplani of counsel), for respondent.

WILLIAM F. MASTRO, J.P., L. PRISCILLA HALL, SHERI S. ROMAN, and JOSEPH J. MALTESE, JJ.

Opinion

*765 Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kohm, J.), rendered December 16, 2010, convicting him of criminal possession of a weapon in the second *766 degree (two counts), reckless endangerment in the first degree, and unlawful possession of marijuana, upon a jury verdict, and imposing

Criminal Law

Sixth Amendment Speedy Trial Right of Fugitive Defendant

Secondary Sources**Prejudice Resulting from Unreasonable Delay in Trial**

7 Am. Jur. Proof of Facts 2d 477 (O'Connell, published in 1975)

...A person accused of a crime has the right to a **speedy trial**, which right is guaranteed by various sources and is considered fundamental in nature. This right exists regardless of whether the person is ...

Waiver or loss of accused's right to speedy trial

57 A.L.R.2d 302 (Originally published ...)

...This annotation supplements one in 129 A.L.R. 572. There is an annotation in 118 A.L.R. 1037 on, "Constitutional or statutory right of accused to **speedy trial** as affected by his incarceration for another ..."

PROSECUTORIAL READINESS, SPEEDY TRIAL AND THE ABSENT DEFENDANT: HAS NEW YORK'S 25-YEAR DILEMMA FINALLY BEEN RESOLVED?

15 Touro L. Rev. 25

...Few provisions of New York State's criminal procedure law have been as often litigated, or have been the subject of as much invective, as section 30.30 of the Criminal Procedure Law, which provides tha...

See More Secondary Sources

Briefs**Respondent's Brief on the Merits**2008 WL 5266420
State of Vermont v. Brillon
Supreme Court of the United States.
December 17, 2008

...The nearly three years between Brillon's July 30, 2001 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of inactivity...

Brief for Respondent2012 WL 6694054
Boyer v. State of Louisiana
Supreme Court of the United States.
December 19, 2012

...FN* Counsel of Record 1. The State of Louisiana (the "State") has long made the vigorous and effective representation of indigent capital defendants a priority. To this end, in 1994, the Louisiana Supr...

Petitioner's Brief on the Merits2008 WL 5264661
State of Vermont v. Brillon
Supreme Court of the United States.
November 17, 2008

...FN1. We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. See Pet. App. 4. The ord...

See More Briefs

Trial Court Documents**People of the State of New York v. Allen**1990 WL 10549766
People of the State of New York v. Allen

sentence. The appeal brings up for review an order of the same court (Griffin, J.), dated June 9, 2010, which denied, without a hearing, the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial.

ORDERED that the judgment is reversed, on the law, the order is vacated, the defendant's motion to dismiss the indictment pursuant to CPL 30.30 on the ground that he was deprived of his statutory right to a speedy trial is granted, and the matter is remitted to the Supreme Court, Queens County, for the purpose of entering an order in its discretion pursuant to CPL 160.50.

On May 14, 2009, the People moved to take an oral swab from the defendant for a **DNA test**. This motion was made more than 17 months after the defendant's November 29, 2007, arrest, and December 3, 2007, arraignment on the criminal complaint, approximately 9 months after the defendant was indicted on August 18, 2008, and almost 3 months after the court issued a determination dated February 20, 2009, deciding, after a hearing, those branches of the defendant's omnibus motion which were to suppress physical evidence and statements he made to law enforcement officials. On June 5, 2009, the defendant, while preserving an objection on **speedy trial** grounds, consented to the taking of the oral swab. On November 13, 2009, the People produced a complete report of the results of the **DNA test**.

The defendant moved pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a **speedy trial**. Contrary to the People's contention, because the People failed to exercise due diligence in obtaining the **DNA** sample from the defendant, the 161-day period between June 5, 2009, and November 13, 2009, was not excludable on the ground that their need to obtain the **DNA test** results constituted excusable, **exceptional circumstances** (see CPL 30.30[4][g]; *People v. Wearen*, 98 A.D.3d 535, 538, 949 N.Y.S.2d 170; *People v. Rahim*, 91 A.D.3d 970, 972, 937 N.Y.S.2d 325; see generally *People v. Washington*, 43 N.Y.2d 772, 773, 401 N.Y.S.2d 1007, 372 N.E.2d 795). Adding this period of time to the periods of delay correctly conceded by the People, the People exceeded the six-month period in which they were required to be ready for trial (see CPL 30.30[1][a]). Accordingly, the judgment must be reversed, the defendant's motion pursuant to CPL 30.30 granted, and the indictment dismissed.

In light of our determination, we do not reach the defendant's remaining contentions, including those raised in his pro se *767 supplemental brief.

Parallel Citations

122 A.D.3d 765, 995 N.Y.S.2d 727, 2014 N.Y. Slip Op. 07680

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County Court of New York, Seneca County
January 19, 1990

...W. PATRICK FALVEY, J.C.C. The Court herein is faced with an issue made unique by its particular factual situation. Defendant, William Horton Allen, and his co-defendant, were indicted for two counts of...

People v. Rahim

Supreme Court, Appellate Division, Second Department, New York. January 31, 2012 91 A.D.3d 970 937 N.Y.S.2d 325 2012 N.Y. Slip Op. 00000 (App. Div. 2, 1/31/12)

Distinguished by People v. Ocasio, N.Y. Sup., February 22, 2013 Original Image of 91 A.D.3d 970 (PDF)

View New York Official Reports version

91 A.D.3d 970

Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., respondent,

v.

Ahmad Abdul RAHIM, appellant.

Jan. 31, 2012.

Synopsis

Background: After the Supreme Court, Kings County, D'Emic, J., denied defendant's motion to dismiss indictment, defendant was convicted in a jury trial in the Supreme Court, Kings County, Reichbach, J., of aggravated criminal contempt and criminal contempt. Defendant appealed.

Holding: The Supreme Court, Appellate Division, held that people violated defendant's statutory speedy trial right.

Reversed and remitted.

West Headnotes (3)

Change View

- 1 **Criminal Law**  Delay caused by accused
Criminal Law  Delay Attributable to Prosecution
 Adjournment of 23 days was chargeable against people for purposes of defendant's statutory speedy trial right in prosecution for aggravated criminal contempt and criminal contempt, where people requested adjournment because case had been reassigned to new prosecutor, who needed time to become familiar with case, and 12-day period within that adjournment, between people's request for oral swab from defendant for DNA test and return date, was not excludable as delay resulting from pretrial motion. McKinney's CPL § 30.30(4)(a).
 3 Cases that cite this headnote
- 2 **Criminal Law**  Delay Attributable to Prosecution
 Adjournment of 77 days, from grant of people's request for DNA test to announcement of test results, was chargeable against people for purposes of defendant's statutory speedy trial right in prosecution for aggravated criminal contempt and criminal contempt, where people did not demonstrate due diligence in obtaining evidence to be used in DNA test. McKinney's CPL § 30.30.
 3 Cases that cite this headnote
- 3 **Criminal Law**  Delay Attributable to Prosecution
 Adjournment of 26 days, from announcement of DNA test results to date on which pretrial suppression hearing was scheduled, was chargeable against people for purposes of defendant's statutory speedy trial right in prosecution for aggravated criminal contempt and criminal contempt, although people argued that delay was excludable as reasonable to allow people, after granting of defendant's omnibus motion and failed plea negotiations, to prepare for hearing, where omnibus motion was granted four months prior to adjournment and there was no evidence that parties had engaged in earnest plea negotiations. McKinney's CPL § 30.30.

Criminal Law

Constitutional Validity of Speedy Trial Delay
 Provision of Speedy Trial Act Excluding
 Period of Delay

Secondary Sources**§ 948. Determination as to viola
determinative factors**

21A Am. Jur. 2d Criminal Law § 948

...What constitutes a violation of the right to **speedy trial** depends generally on the **circumstances** of the individual case. Because the right to a **speedy trial** is a vaguer concept than other procedural ri...

**Remedy for delay in bringing a
to trial or to retrial after revers:**

58 A.L.R. 1510 (Originally published ...)

...In many cases wherein relief has been sought for delay in bringing an accused person to trial, or to retrial after reversal, it appears that the petitioner, applicant, or appellant was not entitled to ...

**§ 960. Pleas or motions filed by
accused; retention or schedul
problems of defense counsel**

21A Am. Jur. 2d Criminal Law § 960

...A defendant may not assert violation of his or her right to **speedy trial** where the delay in question was attributable to motions or proceedings instituted in his or her own behalf prior to or during tr...

See More Secondary Sources

Briefs**Petitioner's Brief on the Merits**

2008 WL 5264661
 State of Vermont v. Brillon
 Supreme Court of the United States.
 November 17, 2008

...FN1. We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. See Pet. App. 4. The ord...

Respondent's Brief on the Merits

2008 WL 5266420
 State of Vermont v. Brillon
 Supreme Court of the United States.
 December 17, 2008

...The nearly three years between Brillon's July 30, 2001 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of ina...

Reply Brief for the Petitioner

2009 WL 33834
 State of Vermont v. Brillon
 Supreme Court of the United States.
 January 06, 2009

...Brillon has admitted all of the facts that are necessary for this Court to decide the case as a matter of law. Brillon admits that he fired Ammons on the eve of trial, Resp't Br. at 10; that he threate...

See More Briefs

Trial Court Documents**The People of the State of New York v.
Ramos**

2001 WL 36191846
 The People of the State of New York v.
 Ramos

1 Case that cites this headnote

County Court of New York, Fulton County
December 03, 2001

...This matter comes before the Court on Defendant's motion to dismiss the indictment on **speedy trial** grounds. Defendant stands charged, under a two-count indictment, with the crimes of Burglary in the Se...

Attorneys and Law Firms

****326** Lynn W.L. Fahey, New York, N.Y. (Barry Stendig of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Ann Bordley of counsel), for respondent.

PETER B. SKELOS, J.P., THOMAS A. DICKERSON, LEONARD B. AUSTIN, and
ROBERT J. MILLER, JJ.

People of the State of New York v. Allen

1990 WL 10549766
People of the State of New York v. Allen
County Court of New York, Seneca County
January 19, 1990

...W. PATRICK FALVEY, J.C.C. The Court herein is faced with an issue made unique by its particular factual situation. Defendant, William Horton Allen, and his co-defendant, were indicted for two counts of...

Opinion

***970** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Reichbach, J.), rendered June 23, 2008, convicting him of aggravated criminal contempt and criminal contempt in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, by the same court (D'Emic, J.), of the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial.

***971** ORDERED that the judgment is reversed, on the law and as a matter of discretion in the interest of justice, the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial is granted, the indictment is dismissed, and the matter is remitted to the Supreme Court, Kings County, for the purpose of entering an order in its discretion pursuant to CPL 160.50.

The Supreme Court erred in denying the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he had been deprived of his statutory right to a speedy trial. Pursuant to CPL 30.30(1)(a), the People were required to be ready for trial within six months of the commencement of this criminal action, in which a felony was charged (*see People v. Goss*, 87 N.Y.2d 792, 796, 642 N.Y.S.2d 607, 665 N.E.2d 177; *People v. Smith*, 88 A.D.3d 749, 930 N.Y.S.2d 489, *lv. **327 denied* 17 N.Y.3d 955, 936 N.Y.S.2d 81, 959 N.E.2d 1030). In this case, the six-month period consisted of 181 days. The People conceded that 90 days of delay were chargeable to them. At issue on this appeal are three periods of postreadiness delay.

1 On December 10, 2007, after declaring their readiness for trial, the People requested an adjournment because the case had been reassigned to a new prosecutor, who needed time to become familiar with the case. The request was granted, and the proceeding was adjourned until January 2, 2008. On December 21, 2007, the People made a motion, returnable on January 2, 2008, to take an oral swab from the defendant for a DNA test. Contrary to the People's contention, the 12 days from December 21, 2007, through January 2, 2008, were not excludable under CPL 30.30(4)(a), as a reasonable period of delay resulting from a pretrial motion. The 23-day adjournment from December 10, 2007, to January 2, 2008, was granted so that the new prosecutor could become familiar with the case, which adjournment, when granted, was chargeable to the People. The subsequent filing of a motion did not serve to convert any portion of this chargeable 23-day period to an excludable period. Although the defendant failed to preserve this contention for appellate review, we reach it in the interest of justice.

2 The second disputed time period occurred between January 2, 2008, when the People's motion for a **DNA test** was granted, and March 19, 2008, when they announced the results of the **DNA test**. Contrary to the People's contention, because they failed to demonstrate that they exercised due diligence in obtaining the **DNA** evidence, this 77-day period was not excludable on the ground that their need to obtain the **DNA test** results constituted excusable, **exceptional circumstances** (*cf. People v. Robinson*, 47 A.D.3d 847, 848, 850 N.Y.S.2d 533; *People v. Williams*, 244 A.D.2d 587, 665 N.Y.S.2d 87). ***972** Although the People were not required to move for **DNA testing** during the time that the defendant's competency to understand the proceedings against him or to assist in his own defense was unsettled, the defendant was found competent on September 6, 2007, and the People did not move for **DNA testing** until December 21, 2007. The People's failure to move for **DNA testing** for 3 1/2 months demonstrated that they did not exercise due diligence in obtaining this evidence (*cf. People v. Burwell*, 260 A.D.2d 498, 689 N.Y.S.2d 165). Accordingly, the 77-day delay was properly chargeable to the People (*id.*; *see generally People v. Washington*, 43 N.Y.2d 772, 774, 401 N.Y.S.2d 1007, 372 N.E.2d 795).

3 The final period of postreadiness delay occurred between March 19, 2008, and April 14, 2008, the date on which a pretrial suppression hearing was scheduled. The People argued that this time period was excludable as a reasonable delay to allow them, after the granting of the defendant's omnibus motion and failed plea negotiations, to prepare for the hearing and trial. However, the defendant's omnibus motion was granted four months before the adjournment that was granted on March 19, 2008 (*cf. People v. Reed*, 19 A.D.3d 312, 314–315, 798 N.Y.S.2d 47), and the People failed to demonstrate on the record that the parties were actually engaged in earnest plea negotiations (*cf. People v. Bahadur*, 41 A.D.3d 239, 240, 841 N.Y.S.2d 5; *see generally People v. Robbins*, 223 A.D.2d 735, 637 N.Y.S.2d 208). Accordingly, the People failed to meet their burden of demonstrating that this 26–day period of delay was excludable (*see generally People v. Berkowitz*, 50 N.Y.2d 333, 349, 428 N.Y.S.2d 927, 406 N.E.2d 783 [“once the defendant has shown the existence ****328** of a delay greater than six months, the burden of proving that certain periods within that time should be excluded falls upon the People”]).

Adding these three periods of chargeable postreadiness delay to the 90 days of delay conceded by the People, the People exceeded the 181 days in which they were required to be ready for trial. Accordingly, the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he had been deprived of his statutory right to a **speedy trial** should have been granted (*see People v. Chavis*, 91 N.Y.2d 500, 673 N.Y.S.2d 29, 695 N.E.2d 1110; *People v. Devore*, 65 A.D.3d 695, 696, 885 N.Y.S.2d 497).

Parallel Citations

91 A.D.3d 970, 937 N.Y.S.2d 325, 2012 N.Y. Slip Op. 00808

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People v. Wearen

Supreme Court, Appellate Division, Second Department, New York. August 1, 2012 98 A.D.3d 535 949 N.Y.S.2d 170 2012 N.Y. Slip Op. 08122

SELECTED TOPICS

Distinguished by People v. Ocasio, N.Y.Sup., February 22, 2013

Criminal Law
Constitutional Validity of Speedy Trial Delay

View New York Official Reports version

98 A.D.3d 535

Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., respondent,
v.
Anthony WEAREN, appellant.

Aug. 1, 2012.

Secondary Sources

§ 948.Determination as to viola
determinative factors

21A Am. Jur. 2d Criminal Law § 948
...What constitutes a violation of the right to
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...In many cases wherein relief has been
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appellant was not entitled to ...

§ 960.Pleas or motions filed by
accused; retention or scheduli
problems of defense counsel

21A Am. Jur. 2d Criminal Law § 960
...A defendant may not assert violation of his
or her right to speedy trial where the delay in
question was attributable to motions or
proceedings instituted in his or her own behalf
prior to or during tr...

See More Secondary Sources

Briefs

Petitioner's Brief on the Merits

2008 WL 5264661
State of Vermont v. Brillon
Supreme Court of the United States.
November 17, 2008
...FN1. We shall follow the Vermont Supreme
Court's use of "State" to refer to the
prosecution, and "state" to refer to the criminal
justice system funded by the state of
Vermont. See Pet. App. 4. The ord...

Respondent's Brief on the Merits

2008 WL 5266420
State of Vermont v. Brillon
Supreme Court of the United States.
December 17, 2008
...The nearly three years between Brillon's
July 30, 2001 arraignment and his June 14,
2004 trial began and ended with the normal
activities of pretrial preparation. In between
was a lengthy period of ina...

Reply Brief for the Petitioner

2009 WL 33834
State of Vermont v. Brillon
Supreme Court of the United States.
January 06, 2009
...Brillon has admitted all of the facts that are
necessary for this Court to decide the case
as a matter of law. Brillon admits that he fired
Ammons on the eve of trial, Resp't Br. at 10;
that he threate...

See More Briefs

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Kron, J.,
of burglary in the second degree, criminal mischief in the fourth degree, and petit larceny,
after the same court, Griffin, J., denied defendant's motion to dismiss the indictment for
violation of defendant's statutory right to a speedy trial. Defendant appealed.

Holding: The Supreme Court, Appellate Division, held that People failed to prove that 85
days were excludable from six-month statutory speedy trial period.

Reversed and remitted.

West Headnotes (2)

Change View

1 Criminal Law Presumptions and burden of proof
Where the defendant in a criminal prosecution meets his or her initial burden in
establishing that the People exceeded the six-month statutory time period after
commencement of the criminal action within which the People are required to
be ready for trial, the burden shifts to the People to prove that certain periods
of time should be excluded in computing the time within which they must be
ready for trial. McKinney's CPL § 30.30(1)(a).

3 Cases that cite this headnote

2 Criminal Law Delay Attributable to Prosecution
Criminal Law Length of Delay
In prosecution for burglary, criminal mischief, and petit larceny, the People
failed to prove that 85 days between defendant's refusal to provide
confirmatory DNA sample and defendant's motion to dismiss indictment were
excludable from six-month statutory speedy trial period; assistant district
attorney (ADA) averred that she had previously been informed by unidentified
person on unspecified date that no confirmatory DNA sample was needed, and
that supervisor at Office of Chief Medical Examiner informed her on
unspecified date that OCME did, in fact, need confirmatory DNA sample, which
was obtained by court order, but there was no explanation for the People's
failure to seek confirmatory DNA sample in the 19 months following notification
of DNA test results for blood recovered from crime scene. McKinney's CPL §
30.30(4)(g).

2 Cases that cite this headnote

Attorneys and Law Firms

**170 Lynn W. L. Fahey, New York, N.Y. (Lisa Napoli of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Nicoletta J.
Caferrì, and Laura T. Ross of counsel), for respondent.

REINALDO E. RIVERA, J.P., ARIEL E. BELEN, SANDRA L. SGROI, and ROBERT J. MILLER, JJ.

Opinion

535** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered December 2, 2009, convicting him of burglary in the second degree, criminal mischief in the fourth degree, and petit larceny, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, without a hearing (Griffin, J.), of the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived *171** of his statutory right to a speedy trial.

***536** ORDERED that the judgment is reversed, on the law, the defendant's motion to dismiss the indictment pursuant to CPL 30.30 on the ground that he was deprived of his statutory right to a speedy trial is granted, the indictment is dismissed, and the matter is remitted to the Supreme Court, Queens County, for the purpose of entering an order in its discretion pursuant to CPL 160.50.

The defendant was convicted of charges arising from an incident that occurred on July 7, 2006. On that date, a burglary occurred at a residence in Queens, and investigators were able to recover blood from an interior basement door, a sample of which they sent for DNA testing. A DNA profile of the sample was developed and compared to the New York State Combined DNA Index System (hereinafter CODIS). By letter dated January 22, 2007, the New York State Division of Criminal Justice Services notified the New York City Office of the Chief Medical Examiner (hereinafter OCME) that the DNA of the blood recovered from the crime scene matched the DNA profile of the defendant.

On January 31, 2007, the defendant was arrested and arraigned in connection with the incident of July 7, 2006. At his arraignment, the defendant signed a waiver of his CPL 30.30 right to a speedy trial, effective through February 28, 2007, and the matter was adjourned, with the defendant's consent, until April 19, 2007. On April 19, 2007, the grand jury voted on the indictment, which was filed on April 20, 2007. The defendant was arraigned on the indictment on May 15, 2007.

In an order dated August 8, 2008, the Supreme Court (Griffin, J.), granted that branch of the defendant's motion which was to be released on his own recognizance pursuant to CPL 30.30(2)(a) because the People had not answered "ready" for trial. The court adjourned the matter for trial. On September 9, 2008, the People requested a confirmatory DNA sample from the defendant, to which the defendant refused to consent. The People were then granted an adjournment in order to obtain a court order for a confirmatory DNA sample from the defendant, which they obtained on September 23, 2008.

On December 4, 2008, before the People received the results of the defendant's confirmatory DNA sample, the defendant moved pursuant to CPL 30.30 to dismiss the indictment on the ground that he was denied his statutory right to a speedy trial. In an order dated January 13, 2009, the Supreme Court (Griffin, J.), denied the motion without a hearing.

Pursuant to CPL 30.30(1)(a), the People were required to be ready for trial within six months of the commencement of this ***537** criminal action, in which a felony was charged (see *People v. Chavis*, 91 N.Y.2d 500, 504, 673 N.Y.S.2d 29, 695 N.E.2d 1110; *People v. Goss*, 87 N.Y.2d 792, 796, 642 N.Y.S.2d 607, 665 N.E.2d 177). In this case, the six-month period consisted of 181 days. The People do not dispute that 106 days of delay are chargeable to them.

1 A motion to dismiss an indictment pursuant to CPL 30.30(1)(a) must be granted where the People are not ready for trial within six months of the commencement of a felony criminal action (see CPL 30.30[1][a]; 210.20[1][g]; *People v. Chavis*, 91 N.Y.2d at 504–505, 673 N.Y.S.2d 29, 695 N.E.2d 1110; *People v. Smith*, 88 A.D.3d 749, 930 N.Y.S.2d 489). Where the defendant meets his or her initial burden in establishing that the People exceeded the six-month statutory time period, the burden shifts to the People to prove that certain periods of time should ****172** be excluded in computing the time within which they must be ready for trial (see *People v. Goss*, 87 N.Y.2d at 797, 642 N.Y.S.2d 607, 665 N.E.2d 177; *People v. Cortes*, 80 N.Y.2d 201, 208, 590 N.Y.S.2d 9, 604 N.E.2d 71; *People v. Berkowitz*, 50 N.Y.2d 333, 348–349, 428 N.Y.S.2d 927, 406 N.E.2d 783; *People v. Chardon*, 83 A.D.3d 954, 922 N.Y.S.2d 127). The periods of time that are excludable include "periods of delay occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at

the request of a district attorney if (i) the continuance is granted because of the unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period; or (ii) the continuance is granted to allow the district attorney additional time to prepare the people's case and additional time is justified by the exceptional circumstances of the case" (CPL 30.30[4][g]).

2 Here, the defendant met his initial burden of establishing that the People exceeded the six-month statutory time period and, thus, that the burden shifted to the People to prove that certain periods of time should be excluded in computing the time within which they were required to be ready for trial. The People contend that the 85 days between September 9, 2008, and December 4, 2008, are not chargeable to them because their alleged need to obtain a confirmatory DNA sample from the defendant, conduct genetic testing, and obtain the results, constitute exceptional circumstances within the meaning of CPL 30.30(4)(g). We disagree.

In opposition to the defendant's statutory speedy-trial motion, the People submitted an affirmation from an assistant district attorney (hereinafter the ADA), who averred that she "had previously been informed" that no confirmatory DNA sample was needed from the defendant because he has an identical *538 twin who had previously submitted a DNA sample to CODIS. The ADA's affirmation did not identify the individual who purportedly gave her such information, nor did she specify the date she allegedly received such information. The ADA further averred that, as she prepared for the September 9, 2008, trial date, Noelle Umback, a supervisor at the OCME, informed her on an unspecified date that the OCME would, in fact, need a confirmatory DNA sample from the defendant. The ADA explained that because the defendant refused to consent to the provision of a confirmatory DNA sample at a September 9, 2008, court proceeding, the matter was adjourned, and ultimately a DNA sample from the defendant was provided pursuant to court order on September 23, 2008, but the test results were not yet available when the defendant filed the instant motion on December 4, 2008.

The affirmation of the ADA was insufficient to satisfy the People's burden of establishing that the 85 days between September 9, 2008, and December 4, 2008, should have been excluded in computing the time within which they were required to be ready for trial. Initially, no one from the OCME, including Umback, submitted an affidavit in opposition to the defendant's motion. The ADA asserted that an unidentified person from an unidentified agency told her on an unspecified date that the defendant did not need to provide a confirmatory DNA sample. This assertion and the remainder of the ADA's affirmation do not suffice to explain why the People did not seek a confirmatory DNA sample from the defendant before September 9, 2008, given that the People had knowledge as early as January 2007 **173 that a blood specimen recovered from the crime scene matched a DNA profile of the defendant. The ADA's affirmation does not in any way explain the necessity of obtaining a confirmatory DNA sample from the defendant. Further, the People did not submit any expert evidence in support of this unsubstantiated assertion that a confirmatory DNA sample was needed. As such, the People did not demonstrate that the adjournment granted at their request on September 9, 2008, was needed to obtain evidence that was unavailable despite their exercise of due diligence, or that the continuance was justified by **exceptional circumstances** (see CPL 30.30[4][g]; *People v. Rahim*, 91 A.D.3d 970, 971–972, 937 N.Y.S.2d 325; see also *People v. Titus*, 95 A.D.3d 1042, 945 N.Y.S.2d 323; cf. *People v. Robinson*, 47 A.D.3d 847, 848, 850 N.Y.S.2d 533). Consequently, the 85–day period between September 9, 2008, and December 4, 2008, must be added to the 106 days chargeable to the People. The resulting 191 days exceeds the six-month statutory **speedy trial** period of 181 days (see CPL 30.30[1][a]).

Accordingly, the judgment must be reversed, the defendant's *539 motion pursuant to CPL 30.30 granted, and the indictment dismissed (see *People v. Titus*, 95 A.D.3d 1042, 945 N.Y.S.2d 323; CPL 30.30[1][a]; 210.20[1][g]).

In light of our determination, we do not reach the defendant's remaining contentions.

Parallel Citations

98 A.D.3d 535, 949 N.Y.S.2d 170, 2012 N.Y. Slip Op. 05842

People v Sibblies

Court of Appeals of New York April 08, 2014 22 N.Y.3d 1174 8 N.E.3d 852 (Approx. 5 pages)

Declined to Extend by People v. McLeod, N.Y. City Crim.Ct., May 1, 2014

View National Reporter System version

22 N.Y.3d 1174, 8 N.E.3d 852, 985 N.Y.S.2d 474 (Mem), 2014 N.Y. Slip Op. 02377

The People of the State of New York, Respondent

v

Marsha Sibblies, Appellant

Court of Appeals of New York

Argued February 13, 2014

Decided April 8, 2014

CITE TITLE AS: People v Sibblies

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered August 28, 2012. The Appellate Division affirmed a judgment of the Supreme Court, Bronx County (William Mogulescu, J., at CPL 30.30 motion; Peter J. Benitez, J., at trial and sentence), which had convicted defendant, upon a jury verdict, of obstructing governmental administration in the second degree and resisting arrest.

People v Sibblies, 98 AD3d 458, reversed.

HEADNOTE

Crimes
Right to Speedy Trial

In a criminal prosecution, an order of the Appellate Division, which affirmed a judgment convicting defendant of obstructing governmental administration in the second degree and resisting arrest, was reversed and the information dismissed. Defendant's motion to dismiss the information under CPL 30.30 should have been granted.

APPEARANCES OF COUNSEL

Steven Banks, The Legal Aid Society, Criminal Appeals Bureau, New York City (Jonathan Garelick of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone and Joseph N. Ferdenzi of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

Order reversed and information dismissed. Defendant's motion to dismiss the information under CPL 30.30 should have been granted.

Chief Judge Lippman (concurring). **2 The Court is unanimous in holding that the People did not meet their CPL 30.30 speedy trial obligation to be timely ready for trial and, as a result, the misdemeanor information should be dismissed.

The issue is whether the period of time between an off-calendar declaration of readiness for trial by the People and their statement of unreadiness at the next court appearance may be excluded from the statutory speedy trial period under CPL 30.30. We would hold that such a period of prosecutorial readiness may not be excluded from the speedy trial period unless the People's unreadiness is occasioned by an exceptional fact or circumstance.

I

Defendant Marsha Sibblies was arrested on November 27, 2006 and charged with various felony and misdemeanor offenses arising out of an altercation during a traffic

SELECTED TOPICS**Appeal and Error**

Review

Appellate Division Unanimous Affirmance
of Trial Court Findings of Fact

Secondary Sources**§ 904.Theory or grounds of ver-**

5 C.J.S. Appeal and Error § 904

...Generally, it will be presumed that a general verdict has been based on that theory or ground supported by the evidence which properly sustains the verdict. It will not be assumed that the verdict has ...

Special Verdicts

6 Am. Jur. Trials 1043 (Originally pul 1967)

...The special verdict, or "special issues" as the procedure is sometimes denoted, was used at common law and is now specifically provided for by rule in the federal courts and in most state jurisdictions...

§ 776.General verdicts

5 Am. Jur. 2d Appellate Review § 77

...General verdicts supported by one ground generally may be affirmed without an appellate court having to speculate on which ground the jury found persuasive, if several counts are tried at once, the "ge...

See More Secondary Sources

Briefs**Brief in Opposition**

2012 WL 707059
Crews v. Lime Rock Associates, Inc.
Supreme Court of the United States.
March 02, 2012

...FN* Counsel of Record The respondent, Lime Rock Associates, Inc., respectfully requests that the Writ of Certiorari in this matter be denied. First, petitioner here is raising his contention that the C...

Brief in Opposition

2008 WL 543039
Sparton Technology, Inc. v. National Rural Telecommunications Co-op.
Supreme Court of the United States.
February 25, 2008

...National Rural Telecommunications Cooperative ("NRTC") is a District of Columbia cooperative corporation. It is not a stock corporation, does not have a publicly-held or private parent corporation, and...

Petition for a Writ of Certiorari with Appendix

2012 WL 313322
Crews v. Lime Rock Associates, Inc.
Supreme Court of the United States.
January 30, 2012

...FN* Counsel of Record Petitioner, Charles R. Crews II, is a resident of Frisco, Texas. Petitioner was the plaintiff in the proceeding in the Superior Court for the judicial district of Hartford, at Har...

See More Briefs

Trial Court Documents

Community Counseling & Mediation Services v. Richard Chera, Next Generation Chera, LLC

2013 WL 7862393
Community Counseling & Mediation Services v. Richard Chera, Next Generation Chera,

stop. On February 8, 2007, the People moved to dismiss the only felony charge and replaced the felony complaint with a misdemeanor information, charging, among other offenses, assault in the third degree. The filing of the misdemeanor information started the 90-day statutory speedy trial period for the People to declare readiness for trial (see CPL 30.30 [5] [c]). On February 22, 2007, the People filed an off-calendar certificate of readiness and a supporting deposition.

Eight days later, on March 2, 2007, the People requested the medical records of the officer injured in the altercation. On *1176 March 28, 2007, the next scheduled control date, the People told the court that they were not ready: "Your honor, the People are not ready at this time. The People are continuing to investigate and are awaiting medical records [of the officer injured in the altercation]." The People indicated that they expected to receive the records within a week, which they apparently did.

The People did not file a second certificate of readiness until May 23, 2007, 104 days after the speedy trial period began to run. At the following control date, the case was adjourned so that counsel could file the motion to dismiss the misdemeanor information under CPL 30.30 that is the subject of this appeal.

Supreme Court denied the motion, apparently excluding the 34 days between the People's declaration of readiness and the March 28 appearance from the 104-day period. The case proceeded to trial, at which the People offered the testimony of the injured police officer as well as his medical records. Defendant was convicted of obstructing governmental administration in the second degree and resisting arrest but was acquitted of assault in the third degree. The Appellate Division affirmed, rejecting defendant's speedy trial argument (98 AD3d 458 [1st Dept 2012]). It reasoned that the People were ready for trial on February 22 because they could have made out a prima facie case for assault in the third degree even in the absence of the officer's medical records.

A Judge of this Court granted defendant leave to appeal (20 NY3d 1104 [2013]).

¶ **3

By the early 1970s, the legislature had become concerned with the backlog of cases in the criminal courts that caused lengthy delays in bringing defendants to trial (*People v Anderson*, 66 NY2d 529, 535 n 1 [1985], citing Mem of State Exec Dept, Crime Control Council, 1972 McKinney's Session Laws of NY at 3259). These delays deprived defendants of their right to a prompt trial, hindered the People's ability to try cases effectively, and undermined public confidence in the criminal justice system (see *id.*). The legislature passed CPL 30.30 in 1972 in an effort to remedy these problems (*id.*).

CPL 30.30 seeks to accomplish its goal by obligating the People to prepare promptly for trial (*id.*; *People v Price*, 14 NY3d 61, 63 [2010]). To that end, the People must be ready to try a defendant accused of a misdemeanor within 90 days of commencement of the action and maintain readiness thereafter *1177 (CPL 30.30 [1] [b]; *People v Stirrup*, 91 NY2d 434, 440 [1998]). To be ready, the People must (1) declare in open court that they are ready or file an off-calendar certificate of readiness and serve it on defense counsel, and (2) "in fact be ready to proceed at the time they declare readiness" (*People v Chavis*, 91 NY2d 500, 505 [1998]).

As to the first requirement, the off-calendar certificate allows the People to declare readiness in a timely manner, even where the statutory period expires before the next court date. In *Stirrup* we explained that when the People's lack of readiness necessitates an adjournment, "a subsequent [off-calendar] statement of readiness can save the People from liability for the remainder of the adjournment period" (91 NY2d at 436).

As to the second requirement, readiness requires more than simply "mouthing" the words (*People v England*, 84 NY2d 1, 4-5 [1994]). "The inquiry is whether the People have done all that is required of them to bring the case to a point where it may be tried" (*id.* at 4).

Where the People fail to declare readiness within the statutory period, a defendant may move to dismiss the accusatory instrument (CPL 170.30 [1] [e]). The defendant bears the initial burden of demonstrating that the People were not ready within 90 days (see *People v Santos*, 68 NY2d 859, 861 [1986]). The burden then shifts to the People to establish that a period should be excluded in computing the time within which they were required to be prepared for trial (*id.*). Time may be excluded for numerous reasons, including, for example, delays resulting from appeals, delays at the request of the defendant, or where the defendant has absconded (CPL 30.30 [4]).

LLC
Supreme Court, New York, New York County
March 26, 2013

...THE SUPREME COURT : NEW YORK COUNTY IAS PART 85R By decisions and orders, dated April 1, 2011 and July 6, 2011. Hon., Debra James granted defendants Richard Chera, Next Generation Chera, LLC d/b/a Next...

Matthew ANTUNES, and infant by his natural parent and guardian, Anna Marie Antunes, and Anna Marie Antunes, individually, Plaintiffs, v. THE NASSAU COUNTY MEDICAL CENTER, Nassau County and Tanya Leykin, M.D., Defendants.

2001 WL 35816650
Matthew ANTUNES, and infant by his natural parent and guardian, Anna Marie Antunes, and Anna Marie Antunes, individually, Plaintiffs, v. THE NASSAU COUNTY MEDICAL CENTER, Nassau County and Tanya Leykin, M.D., Defendants.
Supreme Court of New York, Nassau County
February 15, 2001

...The following papers having been read on the motion: [numbered 1-3] Defendant's Notice of Motion. 1 (with Memorandum of Law in Support of Motion). Plaintiff's Affirmation in Opposition. 2 (with memoran...

Adams v. Genie Industries, Inc.

2007 WL 7134910
Adams v. Genie Industries, Inc.
Supreme Court of New York, New York County
January 08, 2007

...[This opinion is uncorrected and not selected for official publication.] The following papers, numbered 1 to _ were read on this motion to/for _ C2PAPERS NUMBERED Notice of Motion/ Order to Show Cause-...

See More Trial Court Documents

In this case, defendant has met her burden; the People were not ready within 90 days. The burden therefore is on the People to establish that at least 14 days of the 104-day period should be excluded. The People contend that the 34 days between their February 22 off-calendar declaration of readiness and their March 28 in-court statement of unreadiness should be excluded.

The People's argument is supported superficially by our holding in *Stirrup* that an off-calendar statement of readiness allows the People to avoid having an entire adjournment charged to them. *Stirrup*, however, appeared to address the situation where the People declare ****4** readiness off-calendar and remain ready at the next appearance, not where, as here, the People declare readiness off-calendar only to declare themselves unready at the next appearance. ***1178**

In the latter situation, the defendant is prevented from availing herself of the People's readiness. If the People are not ready at the court appearance, the defendant cannot ask the court to set the matter for trial. This would be readiness in the air, without readiness on the ground. If the defendant cannot ask for a trial, the People's readiness has served effectively to harm the defendant by delaying the running of the statutory period. But CPL 30.30 demands prosecutorial readiness, not for its own sake, but to reduce delays in criminal prosecutions.

Where the People file an off-calendar certificate of readiness and subsequently declare at the next court appearance that they are not ready, a defendant understandably may be perturbed by the People's prior claim of readiness. The defendant can, as here, challenge the propriety of the declarations. This case, however, illustrates the need for clarification of what the People must show in response to such a challenge.

We would hold that, if challenged, the People must demonstrate that some exceptional fact or circumstance arose after their declaration of readiness so as to render them presently not ready for trial. The requirement of an exceptional fact or circumstance should be the same as that contained in CPL 30.30 (3) (b), which

"preserves for the People such portion of the readiness period . . . as remained available when readiness was originally declared, in the limited situation where 'some exceptional fact or circumstance,' [including, but not limited to, the sudden unavailability of evidence material to the People's case,] occurring after the initial readiness response, makes it impossible for the People to proceed" (*Anderson*, 66 NY2d at 534, quoting CPL 30.30 [3] [b]).

The court may hold a hearing on the issue. If the People cannot demonstrate an exceptional fact or circumstance, then the People should be considered not to have been ready when they filed the off-calendar certificate, and the time between the filing and the following appearance cannot be excluded and should be charged to them.

This rule flows from the purpose of the statute. It is intended to expedite, not delay the defendant's ability to seek resolution of a case. Indeed, allowing, without scrutiny, declarations of readiness off-calendar and subsequent declarations of unreadiness at the next appearance creates the possibility that this scenario could be reenacted ad seriatim. But CPL 30.30 is not a mechanism for filibustering trials. ***1179**

In this case, the People's unreadiness, while declared in good faith, was not due to the type of "exceptional fact or circumstance" contemplated by CPL 30.30 (3) (b). It was not occasioned by, for example, the sudden unavailability of a material witness or material evidence, merely the People's desire to strengthen their case. As a result, the 34-day period from the People's off-calendar declaration of readiness to their in-court statement of unreadiness is chargeable to the People. The People therefore did not declare readiness within the 90-day ****5** statutory period.

No injustice is worked upon the People here. Even with the 34 days charged against them, the People received the officer's medical records well before the 90-day period expired and could have filed a timely off-calendar certificate of readiness.

In an appropriate case the People may avail themselves of the statutory mechanism for ensuring that an adjournment be excluded from the speedy trial period. They may seek a continuance under CPL 30.30 (4) (g) (ii), which allows a court to grant the People an excluded continuance when they need "additional time to prepare [their] case and additional time is justified by the exceptional circumstances of the case."

For these reasons, we would reverse the order of the Appellate Division, grant

defendant's motion, and dismiss the misdemeanor information.

Graffeo, J. (concurring). I agree that the order of the Appellate Division should be reversed and the information dismissed. But I write separately because I would decide this case on a narrower basis than the one proposed by Chief Judge Lippman.

In November 2006, defendant Marsha Sibblies was arrested following a physical altercation with police officers during a traffic stop. Based on this incident, defendant was originally charged with felony assault and various misdemeanors, but on February 8, 2007, the People dropped the felony charge and replaced the felony complaint with an information, which left pending only the misdemeanor charges, including assault in the third degree. As a result, the parties agree that the 90-day period for the People to declare readiness for trial began to run on February 8 (see CPL 30.30 [5] [c]). The People filed an off-calendar statement of readiness 14 days later on February 22. Less than 10 days after declaring readiness, however, the People ordered a copy of the injured police officer's medical records. At a March 28 calendar call, the prosecutor stated: "[T]he People ***1180** are not ready at this time. The People are continuing to investigate and are awaiting medical records. It was a cop assault." The court scheduled the case for trial on June 7 and informed the prosecutor that the ensuing time would be charged to the People until a new certificate of readiness was filed.

On May 23, the People filed a second off-calendar statement of readiness. Defendant moved to dismiss under CPL 170.30 (1) (e), asserting that the People were not ready ****6** within 90 days because the entire 104-day period between February 8 and May 23 was chargeable to the People. She contended that the February 22 statement of readiness was illusory based on the People's decision to pursue further investigation and the request on March 28 for an adjournment.

Supreme Court denied the motion and the case proceeded to trial, at which the People offered the testimony of the injured police officer as well as his medical records. Defendant was convicted of obstructing governmental administration in the second degree and resisting arrest but was acquitted of assault in the third degree. The Appellate Division affirmed, rejecting defendant's CPL 30.30 claim on the basis that the People could have presented a prima facie case of assault on February 22 even without the officer's medical records (98 AD3d 458 [1st Dept 2012]). A Judge of this Court granted defendant leave to appeal (20 NY3d 1104 [2013]).

The "ready for trial" requirement of CPL 30.30 has two distinct elements. First, there must be "either a statement of readiness by the prosecutor in open court . . . or a written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk" (*People v Kendzia*, 64 NY2d 331, 337 [1985])—the latter being referred to as an off-calendar statement of readiness. And second, the People "must in fact be ready to proceed at the time they declare readiness" (*People v Chavis*, 91 NY2d 500, 505 [1998]). Only the second prerequisite is at issue here.

It is well settled that, under the second prong, a statement of readiness made "at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock" (*People v England*, 84 NY2d 1, 4 [1994]). We have explained that the second requirement will be met unless there is "proof that the readiness statement did not accurately reflect the People's position" (*People v Carter*, 91 NY2d 795, 799 [1998]). In other words, there is a presumption that a statement of readiness is truthful and accurate (see ***1181** *People v Miller*, 113 AD3d 885, 887 [3d Dept 2014]; *People v Acosta*, 249 AD2d 161, 161 [1st Dept 1998]).

In *People v Bonilla* (94 AD3d 633 [1st Dept 2012]), the Appellate Division held the presumption rebutted under circumstances very similar to the present case. There, the People answered ready for trial but later requested two adjournments so that they could further investigate the case. The Appellate Division concluded that the People's requests rendered the initial statement of readiness illusory, noting that "the record does not support an inference that the People made an initial strategic decision to proceed, if necessary, with a minimal prima facie case, but later determined to present additional evidence" (*id.* at 633 [citation omitted]).

So too here. The People initially declared that they were ready for trial on February 22 but within days sought copies of the injured officer's medical records. And at the next calendar call, the prosecutor admitted that the People were not in fact ready to proceed ****7** because they were continuing their investigation. The prosecutor indicated that the People needed to examine the medical records to decide if they would pursue

introduction of the records into evidence at trial (which they later did). Significantly, the prosecutor gave no explanation for the change in circumstances between the initial statement of readiness and the subsequent admission that the People were not ready to proceed without the medical records. The February 22 statement of readiness therefore did not accurately reflect the People's position (*compare Carter*, 91 NY2d at 799). As a result, the People are chargeable with the entire period from February 8 to May 23, exceeding the 90-day limit.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Rivera concur; Chief Judge Lippman concurs in an opinion in which Judges Smith and Rivera concur; Judge Graffeo concurs in an opinion in which Judges Read and Pigott concur; Judge Abdus-Salaam taking no part. *1182

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between the initial statement of readiness and the[ir] subsequent admission that the[y] ... were not ready to proceed without the medical records" (22 NY3d at 1181).

*2 Following analogous precedent pertaining to plurality opinions by the United States Supreme Court, we apply the narrower approach of Judge Graffeo, which leaves intact well-settled law that a post-certificate assertion that the **People** are not ready does not, by itself, vitiate the previously filed certificate of readiness (see *Marks v. United States*, 430 U.S. 188, 193 [1977] ["wher a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"] [internal quotation marks omitted]; see also *For the People Theatres of N.Y., Inc. v. City of New York*, 6 NY3d 63, 79 [2005]).

The record shows that on July 9, 2007, the court stated that "defense counsel is currently on trial" and asked the prosecution about alternative dates. The prosecutor responded, "7/23 is good. The week of 7/30 is bad." The court adjourned the case to August 8, 2007. On July 17, the **People** filed and served the certificate of readiness.

On August 8, the prosecutor stated that the **People** were not ready for trial. The court noted that defense counsel was on trial and defendant voiced his dissatisfaction and requested new counsel. Noting that defense counsel was "very busy" and that he had been "on trial [the] last time" as well, the court granted defendant's request for new counsel and declared that, because of defendant's multiple requests for new counsel, his speedy trial time would stop running.

On the speedy trial motion, defendant's new counsel argued that even if the certificate of readiness had been filed and served properly on July 17, it was illusory because the **People** were not actually ready on the next court date. The court disagreed, stating that this was not a case where the **People** filed their certificate even though their witnesses were not ready. The court then denied defense counsel's request for a hearing.

On this record, unlike, *Sibblies*, there is no "proof that the readiness statement did not accurately reflect the **People's** position," so as to render the prior statement of readiness illusory (*Sibblies*, 22 NY3d at 1180 [Graffeo, J., concurring] [internal quotation marks omitted]). Rather, defense counsel merely speculated that the certificate of readiness was illusory because the **People** announced that they were not ready at the next court appearance after it was filed, which is insufficient to rebut the presumption that the certificate of readiness was accurate and truthful (see e.g. *People v. Acosta*, 249 A.D.2d 161, 161-162 [1st Dept 1998] [the defendant did not submit evidence to contradict court's findings and failed to demonstrate that the **People's** readiness statements were illusory], *lv denied* 92 N.Y.2d 892 [1998]).

Indeed, the record supports an inference that the **People** made an initial strategic decision to proceed, if necessary, with a minimal prima facie case. At the calendar call on July 9, the prosecutor stated that July 23 was "good" for the **People** for hearing and trial. The filing of the certificate of readiness on July 17 was consistent with that statement. In contrast, in *Sibblies*, the **People** sought the injured officer's medical records within days of filing the certificate and admitted at the next court appearance that they were not ready to proceed without them. Thus, the prosecutor was required to explain the change in circumstances because if the **People** needed the medical records to be ready on March 28, then they could not have been ready on February 22 when the certificate of readiness was filed.

*3 Defendant's conviction for first-degree robbery under Penal Law § 160.15(3) is supported by legally sufficient evidence and is not against the weight of the evidence. There is no reason to disturb the jury's determination that the hypodermic needle used to threaten one victim during the robbery was a dangerous instrument under PL § 10.00(13)(see *People v. Nelson*, 215 A.D.2d 782 [2d Dept 1995]). Contrary to defendant's contention that some showing of actual injury was required, the needle may be a dangerous instrument, "regardless of the level of injury actually inflicted" (*Matter of Markquel S.*, 93 AD3d 505, 506 [1st Dept 2012], *lv denied* 19 NY3d 806 [2012]; see also *People v. Molnar*, 234 A.D.2d 988 [4th Dept 1996], *lv denied* 89 N.Y.2d 1038 [1997]). Even if the needle was uncontaminated and was threatened to be used by the non-HIV positive defendant, the jury could have found that it was capable of causing serious puncture wounds or transmitting any harmful disease.

Since defendant did not request a second independent source hearing for one of the victims, his claim that the court should have conducted a de novo hearing is unpreserved

*2 THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur.

Parallel Citations

2015 WL 753413 (Table), 2015 N.Y. Slip Op. 50135(U)

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People v. NaimSupreme Court, Appellate Term, First Department, New York. March 4, 2015 Slip Copy 46 Misc.3d 150(A) 2015 N.Y. Slip Op. 50270(U) (Approved for Slip Copy) **SELECTED TOPICS**

View New York Official Reports version

46 Misc.3d 150(A)

Unreported Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.

Supreme Court, Appellate Term, First Department, New York.

The PEOPLE of the State of New York, Appellant,
v.
Mohammed NAIM, Defendant–Respondent.

No. 570839/14. March 4, 2015.

The People appeal from an order of the Criminal Court of the City of New York, Bronx County (Linda Poust–Lopez, J.), dated February 18, 2014, which granted defendant's motion to dismiss the accusatory instrument pursuant to CPL 30.30.

Present: LOWE, III, P.J., SCHOENFELD, SHULMAN, JJ.

Opinion

PER CURIAM.

*1 Order (Linda Poust–Lopez, J.), dated February 18, 2014, reversed, on the law, motion denied, information reinstated and matter remitted to Criminal Court for further proceedings.

Criminal Court erred in dismissing the accusatory instrument on speedy trial grounds. The People's July 26, 2013 statement of readiness to proceed to trial on charges of aggravated unlicensed operation of a motor vehicle (Vehicle and Traffic Law § 511[1][a] and § 511[2][a][iv]) and unlicensed driving (Vehicle and Traffic Law § 509[1]) effectively stopped the "speedy trial" clock, inasmuch as the counts of the accusatory instrument pertaining to those charges were "deemed" converted to an information on that date (CPL 170.65 [1]), and no basis is shown to conclude that the People were not then actually ready to proceed on the converted charges (see *People v. Kendzia*, 64 N.Y.2d 331, 337 [1985]; *People v. Carter*, 91 N.Y.2d 795, 798 [1988]). Any pleading defect relating to the subsequently dismissed charge of fifth-degree criminal possession of stolen property (Penal Law § 165.40) did not signify a lack of readiness to proceed on the property converted counts, concerning which the People were "technically positioned" to go to trial (*People v. Terry*, 225 A.D.2d 306, 307 [1996], *lv denied* 88 N.Y. 886 [1996]; see also *People v. Dion*, 93 N.Y.2d 893 [1999]). We once again emphasize that speedy trial analysis "must, as a matter of course, often involve distinct considerations with respect to individual counts of a single accusatory instrument" (*People v. Gonzalez*, 168 Misc.2d 136, 137 [1996], *lv denied* 88 N.Y.2d 936 [1996]; *People v. Ausby*, 46 Misc.3d 126[A], 2014 N.Y. Slip Op 51763 [App Term, 1st Dept 2014]; each quoting from *People v. Minor*, 149 Misc.2d 846, 848 [1989], *lv denied* 74 N.Y.2d 666 [1989]). Giving proper effect to the People's July 26, 2013 readiness statement, it is indisputable that the People complied with their speedy trial obligations with respect to the properly converted counts.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur.

Parallel Citations

2015 WL 921554 (Table), 2015 N.Y. Slip Op. 50270(U)

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Criminal Law

Purposes of Speedy Trial Act Analysis

Secondary Sources**§ 30:1.Case law developments**

18 West's McKinney's Forms Criminal Procedure Law § 30:1

...In *People v. Lomax*, 50 N.Y.2d 351, 428 N.Y.S.2d 937, 406 N.E.2d 793 (1980), the court of appeals held that the criminal action must be deemed to have been commenced for purposes of N.Y. Crim. Proc. Law...

Prejudice Resulting from Unre: Delay in Trial

7 Am. Jur. Proof of Facts 2d 477 (Oreg., published in 1975)

...A person accused of a crime has the right to a speedy trial, which right is guaranteed by various sources and is considered fundamental in nature. This right exists regardless of whether the person is ...

§ 963.Generally

21A Am. Jur. 2d Criminal Law § 963

...The constitutional right to speedy trial is a personal one and may be waived by the accused or by his or her counsel, in some circumstances. The same generally is true of speedy trial rights under impl...

See More Secondary Sources

Briefs**Brief for Respondent**

2012 WL 6694054

Boyer v. State of Louisiana
Supreme Court of the United States.
December 19, 2012

...FN* Counsel of Record 1. The State of Louisiana (the "State") has long made the vigorous and effective representation of indigent capital defendants a priority. To this end, in 1994, the Louisiana Supr...

Brief of Petitioner

2012 WL 5894897

Boyer v. State of Louisiana
Supreme Court of the United States.
November 19, 2012

...The opinion of the Louisiana Third Circuit Court of Appeal affirming Mr. Boyer's conviction is reported at *State v. Boyer*, 10-693 (La. App. 3 Cir. 2/2/2011); 56 So. 3d 1119. JA 88-184. The Louisiana Su...

Reply of Petitioner

2013 WL 75400

Boyer v. State of Louisiana
Supreme Court of the United States.
January 04, 2013

...Respondent seeks to rewrite the question presented to frame the case around allegations of fact and legal arguments that it did not present in either of the courts below, are beyond the scope of the qu...

See More Briefs

Trial Court Documents**The People of the State of New York v. Douglas**

2005 WL 6184305

The People of the State of New York v. Douglas
Supreme Court, New York, Queens County
March 29, 2005

...On May 14, 2003, the defendant was

People v Ausby

Supreme Court, Appellate Term, First Department December 17, 2014 Slip Copy 46 Misc.3d 126(A) (Approx. 2 pages)

Unreported Disposition

Slip Copy, 46 Misc.3d 126(A), 2014 WL 7177512 (Table), 2014 N.Y. Slip Op. 51763(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

The People of the State of New York, Appellant,
v.
Donnell Ausby, Defendant-Respondent.

570213/2014
Supreme Court, Appellate Term, First Department
Decided on December 17, 2014

CITE TITLE AS: People v Ausby

ABSTRACT

Crimes
Right to Speedy Trial
People's Readiness to Proceed on Properly Converted Common-Law Driving while Intoxicated Charge

People v Ausby (Donnell), 2014 NY Slip Op 51763(U). Crimes—Right to Speedy Trial—People's Readiness to Proceed on Properly Converted Common-Law Driving while Intoxicated Charge. (App Term, 1st Dept, Dec. 17, 2014)

PRESENT: Schoenfeld, J.P., Shulman, Ling-Cohan, JJ.

The People appeal from an order of the Criminal Court of the City of New York, Bronx County (Linda Poust Lopez, J.), dated July 12, 2013, which granted defendant's motion to dismiss the accusatory instrument pursuant to CPL 30.30.

OPINION OF THE COURT

Per Curiam.

Order (Linda Poust Lopez, J.), dated July 12, 2013, reversed, on the law, motion denied, and superseding information reinstated.

The People's November 26, 2011 record statement of readiness to proceed to trial on the common law driving while intoxicated charge (see Vehicle and Traffic Law § 1192[3]) effectively stopped the "speedy trial" clock, inasmuch as the count of the accusatory instrument pertaining to that charge was "deemed" converted to an information on that date (CPL 170.65[1]) and no basis is shown to conclude that the People were not then actually ready to proceed on the converted charge (see *People v Kendzia*, 64 NY2d 331, 337 [1985]; *People v Carter*, 91 NY2d 795, 798 [1988]). That the accusatory instrument may have contained what the motion court characterized as a "careless" drafting error with respect to the defendant's claimed blood alcohol level -- an error solely affecting a subsequently dismissed per se driving while intoxicated charge (see Vehicle and Traffic Law § 1192[2]) -- did not signify a lack of readiness to proceed on the properly converted common law intoxication charge, concerning which the People were "technically positioned" to go to trial (*People v Terry*, 225 AD2d 306, 307 [1996], *lv denied* 88 NY 886 [1996]; see also *People v Dion*, 93 NY2d 893 [1999]). As has been stated in analogous circumstances: "Speedy trial [analysis] must, as a matter of course, often involve distinct considerations with respect to individual counts of a single accusatory instrument" (*People v Gonzalez*, 168 Misc 2d 136, 137 [1996], *lv denied* 88 NY2d 936 [1996], quoting *People v Minor*, 144 Misc 2d 846, 848 [1989], *lv denied* 74 NY2d 666 [1989]). With the exclusion of the subsequent time periods, it is indisputable that the People did not exceed the 90-day statutory speed trial limit applicable to the common law intoxication charge (CPL 170.30[1][b]). The remaining count of the accusatory instrument, charging defendant with driving while impaired (see Vehicle and Traffic Law § 1192[1]), involves a traffic infraction which triggers no statutory speedy trial rights under CPL 30.30 (see *People v*

SELECTED TOPICS

Criminal Law

Purposes of Six Month Speedy Trial Statute

Secondary Sources

§ 186:40. Constitutional speedy trial statute; speedy trial rule

33A Carmody-Wait 2d § 186:40

...A defendant's right to a speedy trial under statute is separate and distinct from his or her right to a speedy trial on constitutional grounds. By statute, New York has implemented the constitutional r...

§ 186:84. Generally

33A Carmody-Wait 2d § 186:84

...The time encompassed by pretrial motions is excludable from the statutory speedy trial period, as constituting other proceedings involving the defendant. Since the legislature intended that the speedy ...

§ 30:1. Case law developments

18 West's McKinney's Forms Criminal Procedure Law § 30:1

...In *People v. Lomax*, 50 N.Y.2d 351, 428 N.Y.S.2d 937, 406 N.E.2d 793 (1980), the court of appeals held that the criminal action must be deemed to have been commenced for purposes of N.Y. Crim. Proc. Law...

See More Secondary Sources

Briefs**Brief of Petitioner**

2012 WL 5884897
Boyer v. State of Louisiana
Supreme Court of the United States.
November 19, 2012

...The opinion of the Louisiana Third Circuit Court of Appeal affirming Mr. Boyer's conviction is reported at *State v. Boyer*, 10-693 (La. App. 3 Cir. 2/2/2011); 56 So. 3d 1119. JA 88-184. The Louisiana Su...

Respondent's Brief on the Merits

2008 WL 5266420
State of Vermont v. Brillon
Supreme Court of the United States.
December 17, 2008

...The nearly three years between Brillon's July 30, 2001 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of ina...

Brief for Respondent

2012 WL 6694054
Boyer v. State of Louisiana
Supreme Court of the United States.
December 19, 2012

...FN* Counsel of Record 1. The State of Louisiana (the "State") has long made the vigorous and effective representation of indigent capital defendants a priority. To this end, in 1994, the Louisiana Supr...

See More Briefs

**People v. Ausby**

Criminal Court of the City of New York, Bronx County July 12, 2013 40 Misc.3d 1219(A) 975 N.Y.S.2d 711975 N.Y.S.2d 711 (Table) (Approximate Page)

SELECTED TOPICS **Order Reversed** by People v. Ausby, N.Y.Sup.App.Term, December 17, 2014

Criminal Law

Speedy Trial Motion

Unreported Disposition

40 Misc.3d 1219(A), 975 N.Y.S.2d 711 (Table), 2013 WL 3927852 (N.Y. City Crim.Ct.), 2013 N.Y. Slip Op. 51238(U)

Secondary Sources**§ 1863.Assertion of speedy trial claim**

33 N.Y. Jur. 2d Criminal Law: Procedure § 1863

...The defendant must raise a speedy trial claim by pretrial motion, which must be in writing and upon reasonable notice. Since the motion must be brought on reasonable notice to the prosecution, the pros...

§ 960.Pleas or motions filed by accused; retention or scheduling problems of defense counsel

21A Am. Jur. 2d Criminal Law § 960

...A defendant may not assert violation of his or her right to speedy trial where the delay in question was attributable to motions or proceedings instituted in his or her own behalf prior to or during tr...

§ 856.Generally

22A C.J.S. Criminal Law § 856

...Under various state speedy trial statutes or rules, where the delay in bringing the defendant to trial is excusable, as where the delay is occasioned by exceptional circumstances, or there is good caus...

See More Secondary Sources

Briefs**Respondent's Brief on the Merits**2008 WL 5266420
State of Vermont v. Brillon
Supreme Court of the United States.
December 17, 2008

...The nearly three years between Brillon's July 30, 2001 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of ina...

Brief for the United States as Amicus Curiae Supporting Petitioner2008 WL 5009268
State of Vermont v. Brillon
Supreme Court of the United States.
November 24, 2008

...This case presents issues surrounding whether pretrial delays caused solely by an indigent defendant's appointed counsel are attributable to the government in determining whether the defendant has been...

Petitioner's Brief on the Merits2008 WL 5264661
State of Vermont v. Brillon
Supreme Court of the United States.
November 17, 2008

...FN1. We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. See Pet. App. 4. The ord...

See More Briefs

Trial Court Documents**The People of the State of New York v. Ramos**2001 WL 36191846
The People of the State of New York v. Ramos
County Court of New York, Fulton County
December 03, 2001**This opinion is uncorrected and will not be published in the printed Official Reports.**

The People of the State of New York,

v.

Donnell Ausby, Defendant.

2011BX063659

Criminal Court of the City of New York, Bronx County

Decided on July 12, 2013

CITE TITLE AS: People v Ausby

ABSTRACT

Crimes

Right to Speedy Trial

Court Rejected Partial Readiness Theory and Dismissed Traffic Infraction Along with Misdemeanors

People v Ausby (Donnell), 2013 NY Slip Op 51238(U). Crimes—Right to Speedy Trial—Court Rejected Partial Readiness Theory and Dismissed Traffic Infraction Along with Misdemeanors. (Crim Ct, Bronx County, July 12, 2013, Poust-Lopez, J.)**APPEARANCES OF COUNSEL**

Defendant is represented by

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The People are represented by

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Bronx District Attorney's office

718-838-7190

OPINION OF THE COURT

Linda Poust-Lopez, J.

Defendant Donnell Ausby was arrested on November 25, 2011 and charged with two counts of Driving While Intoxicated (V.T.L. §1192.2 and §1192.3) and one count of Driving While Impaired (V.T.L. §1192.1). He was arraigned on November 26, 2011.

Defendant moved, on May 22, 2012, for dismissal pursuant to C.P.L. §30.30, as well as on the grounds of facial insufficiency. He also moved for suppression of statements and of all evidence stemming from the arrest, and for other relief. The People responded, and defendant submitted a reply. By decision dated December 12, 2012, the judge sitting in this part at the time denied dismissal on the facial insufficiency motion and granted hearings on the suppression issues, but did not reach the C.P.L. §30.30 motion. This decision therefore addresses the 30.30 issue alone. *2

Procedural History

The Criminal Court complaint filed at defendant's arraignment charged defendant with Driving While Intoxicated under V.T.L. §1192.2, an element of which is a blood alcohol level of at least .08 of one percent. It also charged him with the so-called "common-law intoxication" statute, Driving While Intoxicated, under V.T.L. §1192.3, which does not

for some time accepting the validity of the accusatory instrument. Here, defendant objected vehemently from the beginning to prosecution on an unconverted complaint, and both the court and the People recognized the deficiency, and the case was put over for the People to supply a valid information, and for no other purpose.

There is also another important difference between this case and *Brooks*. Here, the defect in the complaint was of a different character than that in *Brooks*. In *Brooks* the defect was that one of the elements of a charged offense was supported by a conclusory statement. In other words, in *Brooks* the deponent police officer apparently had first-hand knowledge that the defendant was not a police officer, but did not articulate the basis for his knowledge in the complaint, just as the officer in *Dumas* did not articulate the basis for his conclusion that the substance recovered there was marijuana. The defect in the instant case, on the other hand, was that an element of the charge- the blood alcohol level- was not within the firsthand knowledge of the deponent officer, but was only supported by hearsay- the un-filed (and apparently nonexistent) chemical test analysis. It was not a matter, in this case, of the deponent elaborating more on what he knew - as the officer in *People v. Kalin* did, in describing how he knew the substance in that case to be marijuana, in contrast to the officer in *Dumas*, who did not indicate how he knew it to be marijuana. (compare *People v. Kalin*, 12 NY3d 225 [2009] with *Dumas*, 68 NY2d 729). Instead, it was a matter of whether the allegation (of a blood alcohol level of .13), which was not within the first hand knowledge of the deponent officer, had any reliable basis at all.

And, as it turns out, the allegation did not have any reliable basis at all. There never was a chemical test analysis, or any basis to think that defendant had a blood alcohol level of .13. The charge was in the complaint apparently only because of a careless error which occurred in the complaint room.

This case is therefore distinguishable from *Brooks*, both by the differences in the type of defect in the accusatory instrument, and by the presence in this case of immediate and continued objection to prosecution by an unconverted instrument. To the extent that *Brooks* subscribes to a theory of "partial conversion," and as that case is both distinguishable from this and contradicts both the plain wording of the statutes involved and Court of Appeals precedent, this court is not bound to follow it.⁵

The Information and Partial Conversion

We return, then, to the question of the information. We have already established that the People cannot be ready for trial in a case where the highest charge is a misdemeanor unless they have a jurisdictionally sufficient information. C.P.L. §100.10[1]; C.P.L. §100.15[3]; 100.40[1][c]; *People v. Colon*, 59 NY2d 921 (1983), rev'g for reasons stated at 110 Misc 2d 917, 919-920 (Crim. Ct. NY County 1981); *People v. Caussade*, 162 AD2d 4, 8 (2nd Dept. 1990).

What then, is an information? And even though the facts in *Brooks* are distinguishable from those here, and hence that case is not binding precedent, is there any other legal or practical basis for the idea that each count of an accusatory instrument can be viewed independently for C.P.L. §30.30 purposes?

Brooks relied upon *People v. Dion*, 93 NY2d 893 (1999) in its discussion of partial conversion. In *Dion* the initial felony complaint contained both a felony and a misdemeanor. Approximately 45 days after the commencement of the action, the People moved to dismiss the felony charge and stated "ready" on the misdemeanor charge, which was established by a supporting deposition. *Dion*, 93 NY2d at 894; *Dion, defendant appellant's brief at p. 4*. The court and the defendant consented to the reduction, but the court, apparently inadvertently and unbeknownst to the parties, did not properly complete the reduction as required by C.P.L. §180.50. The case continued, and the proper 180.50 reduction was finally accomplished 7 months after the commencement of the action.

Mr. Dion argued that, as the case proceeded for more than 6 months- the 30.30 time limit for a felony- without the People validly stating ready on the felony (which they would not have been able to do without an indictment) the case should be dismissed pursuant to C.P.L. §30.30. The court denied the motion, and the Court of Appeals upheld the denial, "in view of defendant's numerous pretrial motions and five changes of attorney." *Dion* at 894. In *Dion*, then, as in *Brooks*, the fact that the defendant consented to or caused some of the adjournments, bringing the People's chargeable time to within their 30.30 limit, was the reason the defendant did not prevail. *Dion* does not stand for any kind of "partial conversion," but only re-asserts the principle that when a defendant

the name of the court with which it is filed and the title of the action, and must be subscribed and verified by a person known as the "complainant." The complainant may be any person having knowledge, whether personal or upon information and belief, of the commission of the offense or offenses charged. Each instrument must contain an accusatory part and a factual part. The complainant's verification of the instrument is deemed to apply only to the factual part thereof and not to the accusatory part.

2. The accusatory part of each such instrument must designate the offense or offenses charged. *10 As in the case of an indictment, and subject to the rules of joinder applicable to indictments, two or more offenses may be charged in separate counts. Also as in the case of an indictment, such instrument may charge two or more defendants provided that all such defendants are jointly charged with every offense alleged therein.

3. The factual part of such instrument must contain a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges. Where more than one offense is charged, the factual part should consist of a single factual account applicable to all the counts of the accusatory part. The factual allegations may be based either upon personal knowledge of the complainant or upon information and belief. Nothing contained in this section, however, limits or affects the requirement prescribed in subdivision one of section 100.40 that in order for an information or a count thereof to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must be supported by non-hearsay allegations of such information and/or any supporting depositions.

Read as a whole, C.P.L. §100.15 defines an "information" as *one instrument* containing one or more counts. The instrument must have a caption, with the title of the *action* (not *actions*), and the name of the court. C.P.L. §100.15(1). The information may *contain* one or more counts-but even with several counts it is still one instrument. C.P.L. §100.15(2). The instrument must contain a factual narrative applicable to all counts. C.P.L. §100.15(3). The statute does not in any way describe the individual counts of the instrument as informations themselves. In fact, it distinguishes between the two in the section dealing with sufficiency: "in order for an information *or a count thereof* to be sufficient on its face . . ." C.P.L. §100.15(3).

In spite of this clear and workable definition of an information, some courts have interpreted C.P.L. §170.30(e) as authorizing separate 30.30 treatment for each count of an information. *See, e.g. People v. Minor*, 144 Misc 2d 846 (App. Term, 2nd Dept. 1989); *People v. Vela*, 36 Misc 3d 1212A (Crim. Ct. Bronx Cty 2012). This is not a clear reading of the statute, however.

Section 170.30 of the Criminal Procedure Law states:

1. After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that:

- (a) It is defective, within the meaning of section 170.35; or
- (b) The defendant has received immunity from prosecution for the offense charged, pursuant to sections 50.20 or 190.40; or
- (c) The prosecution is barred by reason of a previous prosecution, pursuant to section 40.20; or
- (d) The prosecution is untimely, pursuant to section 30.10; or
- (e) *The defendant has been denied the right to a speedy trial; or*
- (f) There exists some other jurisdictional or legal impediment to conviction of the defendant for *11 the offense charged; or
- (g) Dismissal is required in furtherance of justice, within the meaning of section 170.40.

Because the section allows a court to dismiss an information "or a count thereof" for any of the enumerated reasons, including speedy trial under subsection (e), these courts reason that it is possible to apply C.P.L. §30.30 to some counts, but not all, of an information.

However, 170.30 lists several grounds on which a court may dismiss, only one of which is a speedy trial violation. The other grounds are all those which could apply to either the

complete information "or a count thereof." Because 170.30 several reasons a court may dismiss- some of which may apply to a single count, and at least one of which can only apply to the full information- it has the language "such instrument or any count thereof," depending on which grounds apply in a particular case.

Subsection (g), for example, deals with a dismissal pursuant to C.P.L. §170.40- a dismissal in the interests of justice. This can easily apply to a single count, or to the whole information. How do we know this? Not just because it makes sense, but because the statute says so: "An information . . . or any count thereof, may be dismissed in the interest of justice, as provided in paragraph (g) of paragraph one of section 170.30 . . ." C.P.L. §170.40 (emphasis supplied).

Similarly, C.P.L. §170.35(1) states that "[a]n information . . . or a count thereof, is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when . . ." (emphasis supplied).

In contrast, C.P.L. §30.30(1)(b) says: ". . . a motion made pursuant to paragraph (e) of subdivision one of section 170.30 . . . must be granted where the people are not ready for trial within . . . ninety days of the commencement of a criminal action, wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony."

So while sections 170.35 and 170.40 provide for the dismissal of the entire information or one or more of the counts therein, section 30.30 provides *only* for the dismissal of the entire information. And just in case that is not clear enough, 30.30 describes the "criminal action" that can be dismissed as containing "one or more offenses" therein. So, the counts are contained in the action; they are not actions themselves. And under 30.30, if the people have not met their time limit, the entire action can be dismissed.

Pure statutory construction, then, supports the conclusion that a dismissal under C.P.L. §30.30 applies to the entire "action;" that the People cannot be ready for trial until they have an "information;" and that an "information" is one instrument containing one or more counts. The Court of Appeals has supported this interpretation of C.P.L. §30.30 in *People v. Lomax*, 50 NY2d 351 (1980), where it held that, under 30.30, "there can be only one criminal action for each set of criminal charges brought against a particular defendant." *Id.* at 356.

The People here seem to contend that they could be "ready" on two counts of the instrument but *12 "not ready" on a third. But, first of all, as the Court of Appeals said, there is only one criminal action, so either they are ready on the whole action, or they are not. But also, the People's reasoning does not make any sense: how would the People begin a trial on the common law intoxication and Driving While Impaired charges, yet continue to adjourn the Driving while Intoxicated charge for conversion? Justice Suarez in his concurring opinion in *Brooks* pointed out this impossibility, and his practical analysis was dismissed by the majority. *Brooks* at 254, 250. Yet not only does "partial readiness" contradict established caselaw and the clear reading of the statutes, it is actually impossible.

Let us look at how "partial readiness" would be applied in this case. The People said at arraignment that they were ready for trial on the common law and Impaired charges, but "not ready" on the DWI charge. So assuming there was an available jury trial part that day, and giving a reasonable amount of time for the prosecution witnesses to get a phone call from the assigned A.D.A and work out a day and time they could get to court, the trial could begin on the impaired and common-law charges in short order. At this point we have to suspend logical legal analysis, because the "information" is not an information at all, but still contains a count which claims that the defendant had a blood alcohol level of .13, and that is not confirmed by any chemical test. But, following the idea that each count is an information unto itself, the trial could begin on the other two charges. Now, let's say that trial is completed within less than 90 days of arraignment. What happens to the DWI charge? It is still pending, as it's own accusatory instrument, according to the People. But does it have its own docket number? And after a verdict on the other two charges, are not the People precluded from prosecuting that charge under double jeopardy principles?

Of course this does not make any sense. The People would be the first to object to this scenario, as they would lose the chance, under constitutional and statutory double jeopardy principles, to prosecute defendant on the DWI charge. C.P.L. §40.40(1); *Troy v.*

Jones, 61 AD2d 802 (2nd Dept. 1978).

In the end, "ready for trial" means "ready for trial." It is not just words. To meet their deadline under C.P.L. §30.30, the People must have a sufficient information where all counts are supported by non-hearsay allegations, and then they must do more than just mouth the word "ready." They must be actually, presently ready for trial. *People v. Kendzia*, 64 NY2d 331 (1985). The People here did not have a sufficient information until more than 90 days had elapsed, and were therefore not "ready" for trial within their 30.30 time limit.

Driving While Impaired Under V.T.L. §1192.1

The People claim that, even if the misdemeanor charges should be dismissed pursuant to C.P.L. §30.30, that V.T.L. §1192.1 "is not subject to Criminal Procedure Law Speedy Trial Limits" (People's response at 5). And while it is true that any action which is commenced with traffic infractions alone can find no place in the C.P.L. §30.30 strictures, it is not a fair reading of the statute to say that a traffic infraction can survive dismissal when the crimes charged with it can not. *13

The People cite a number of cases in their papers in support of their argument, but in fact there is only one appellate case in the First Department that supports their position- *People v. Gonzalez*, 168 Misc 2d 136 (App. Term 1st Dept. 1996). Decided almost 20 years ago, Gonzalez bears re-visiting, as it overlooked the definition section of the Penal Law, and hence misinterpreted the plain meaning of C.P.L. §30.30.

Gonzalez dealt with a similar situation where the case originally contained a misdemeanor as well as the traffic infraction of Driving While Impaired under V.T.L. §1192.1. The misdemeanor was dismissed, and the Criminal Court held that the traffic infraction should be dismissed under C.P.L. §30.30. The Appellate Term reversed, holding that the statute excluded traffic infractions from its applicability by the its use of the term "offense". The court held: "The use of the generic term offenses' is critical, inasmuch as the Legislature, in recognition of the fact that a traffic infraction is not a violation,' created the term petty offense' for the purpose of referring to noncriminal offenses when traffic infractions are intended for inclusion. " *Id* at 136.

However, the Penal Law, whose definitions are applicable to the Criminal Procedure Law, C.P.L. §1.20, contains the following definitions in P.L. §10.00:

1. "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.
2. "Traffic infraction" means any offense defined as "traffic infraction" by section one hundred fifty-five of the vehicle and traffic law.
3. "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.
4. "Misdemeanor" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

(emphasis supplied).

By the plain reading of the Penal Law, then, which is applicable to C.P.L. §30.30 by virtue of C.P.L. §1.20, a traffic infraction is an offense. Simply because the C.P.L. defines the term "petty offense," which is used in other provisions of the chapter, does not alter the fact that the Penal Law says that a *traffic infraction is an offense*.

Returning to C.P.L. §30.30 (1)(b), then:

a motion [to dismiss pursuant to C.P.L. §170.30(e)] must be granted when the People are not ready for trial within . . . ninety days of the commencement of a *criminal action wherein a defendant is accused of one or more offenses*, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months, and none of which is a felony.

(emphasis supplied). *14

