

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25212
W/kmg

_____AD3d_____

Argued - November 5, 2009

WILLIAM F. MASTRO, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
LEONARD B. AUSTIN, JJ.

2008-04540

DECISION & ORDER

The People, etc., appellant,
v Leroy Whitley, respondent.

(Ind. No. 3930/06)

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

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

Appeal by the People, as limited by their brief, from so much of an order of the Supreme Court, Kings County (D'Emic, J.), entered May 7, 2008, as, upon reargument, adhered to its determination in an order of the same court dated November 19, 2007, granting 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 order entered May 7, 2008, is reversed insofar as appealed from, on the law, upon reargument, the determination in the order dated November 19, 2007, granting the defendant's motion to dismiss the indictment is vacated, the defendant's motion to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to the Supreme Court, Kings County, for further proceedings on the indictment.

The People failed to preserve for appellate review their contention that a separate speedy trial period should have been applied to each of three accusatory instruments filed against the defendant, including the indictment that is the subject of the instant appeal (*see* CPL 470.05[2]), and we decline to reach the argument in the exercise of our interest of justice jurisdiction (*see* CPL

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470.15[3][c]). Since, accordingly, we must measure the six-month speedy trial period from the filing of Indictment No. 3930/06 on May 20, 2006, the six-month period referable to this case, measured from May 20, 2006, to November 20, 2006, consisted of 184 days (*see People v Allen*, 172 AD2d 542). The Supreme Court determined that 192 days were chargeable to the People. We disagree.

Contrary to the determination of the Supreme Court, the People should not have been charged with the 27-day period of delay between September 6, 2007, and October 3, 2007, since a newly appointed defense counsel requested an adjournment over that period to familiarize himself with the case (*see People v Worley*, 66 NY2d 523, 527; *People v Alvarado*, 281 AD2d 318, 319). The People should also not have been charged with the 14-day period of delay between October 3, 2007, and October 17, 2007, since this was a reasonable period within which to respond to the defendant's pro se motion to reargue the court's denial of a prior CPL 30.30 motion (*see People v Gonzalez*, 266 AD2d 562, 563). Additionally, the People should not have been charged with the five-day period of delay between October 17, 2007, and October 22, 2007, because the defendant was without counsel during that time through no fault of the court (*see People v Mannino*, 306 AD2d 157, 158; CPL 30.30[4][f]). Further, the People should not have been charged with the seven-day period of delay between October 22, 2007, and October 29, 2007, because the adjournment covering that period was granted at defense counsel's request (*see People v Brown*, 195 AD2d 310, 311). Finally, the People should not have been charged with the 14-day period of delay between October 29, 2007, and November 12, 2007, since this was a reasonable period within which to respond to the defendant's motion for release pursuant to CPL 30.30(2).

Accordingly, the People should only have been charged with 125 days, rather the 192 days determined by the Supreme Court. Since the amount of time chargeable to the People does not exceed 184 days, upon reargument, the defendant's motion to dismiss the indictment should have been denied.

MASTRO, J.P., BELEN, HALL and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court