

Short Form Order

SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM - PART K-18 QUEENS COUNTY

P R E S E N T: Hon. Sheri S. Roman,  
Justice

THE PEOPLE OF THE STATE OF NEW YORK:	Ind. No.: N11177/05	
	:	
-against-	:	
	:	Motion: <u>Speedy Trial</u>
	:	_____
MARIA GARCIA,	:	
DEFENDANT.	:	Submitted: Oct. 21, 2008
	:	

The following papers numbered  
1 to 4 submitted in this motion:

Lawrence S. Kerben, Esq  
**For the Motion**

Hon. Richard A. Brown, D.A.  
By: Travis Hill, Esq.  
**Opposed**

**Papers  
Numbered**

Notice of Motion and Affidavits/Affirmations Annexed.....1-2

Answering and Reply Affidavits/Affirmations.....3-4

Upon the proceedings held in this matter, and in the opinion of the court herein, defendant's application for an order dismissing the indictment pursuant to Criminal Procedure Law Section 30.30(1)(a) on the ground that the People were not ready for trial within six months, is **denied**.

See the accompanying memorandum of this date.

Sheri S. Roman, J.S.C.

**Date:** November 24, 2008

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Gloria D'Amico  
Clerk

MEMORANDUM

SUPREME COURT QUEENS COUNTY  
CRIMINAL TERM PART K-18

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THE PEOPLE OF THE STATE OF NEW YORK, :  
 :  
 : Ind. No. N11177/05  
 -against- :  
 : By: Sheri S. Roman, J.  
 MARIA GARCIA, :  
 : DEFENDANT. :  
 : Dated: November 24, 2008  
-----X

Defendant, Maria Garcia, by counsel, Lawrence J. Kerben, filed a motion dated September 23, 2008 for an order dismissing the within indictment pursuant to Criminal Procedure Law Section 30.30(1)(a) on the ground that the People were not ready for trial within six months of the date of the filing of the indictment.

The Assistant District Attorney submitted an affirmation in opposition to the motion dated October 21, 2008 and a supplemental affirmation in opposition dated November 6, 2008. Defense counsel submitted a reply dated November 11, 2008.

This court has examined defendant's moving papers, the Assistant District Attorney's answer, the court file and the court records in this matter from which the following findings are made.

It must be noted that in computing the time charged for purposes of this motion, all periods of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his counsel are not charged to the People. C.P.L. Section 30.30(4)(b). Additionally, all reasonable

periods of delay relating to pre-trial motions are excluded pursuant to C.P.L. Section 30.30(4)(a).

In the instant matter, the following is the computation of the time charged:

The defendant and three co-defendants were arrested on December 7, 2005 and charged with Criminal Sale of a Controlled Substance in the Third Degree.

Defendant was arraigned in Queens County Criminal Court, Part AR-3 on December 8, 2005. There was no speedy trial waiver executed by the defendant. The matter was adjourned to December 13, 2005 in Part AP-N. As the defendant did not waive speedy trial time, the time for this adjournment, a period of **6 days**, is chargeable to the People.

On December 13, 2005, the matter was adjourned until January 12, 2006 for grand jury action. As the defendant did not waive speedy trial time, the time for this adjournment, a period of **30 days**, is chargeable to the People.

On January 12, 2006, as the defendant had still not been indicted, the matter was adjourned until February 21, 2006 for grand jury action. The People state, in their response to the motion, that the grand jury proceedings were continued on February 15, 2006 until February 21, 2006 to give co-defendant Alfonso Santos an opportunity to testify. The total period of time for this adjournment is 40 days. However, as the grand jury

proceedings were delayed 6 days at the request of co-defendant, the court will charge the People **34 days** for this adjournment. People v. Muhanimac, 181 A.D. 2d 464(1st Dept. 1992); People v. Sorce, 214 A.D. 2d 756(2d Dept. 1995).

On February 21, 2006, the matter was again adjourned for grand jury action until March 21, 2006. However, on March 2, 2006 the defendant was indicted by the Grand Jury and the People filed a Notice of Readiness for Trial with the court and mailed a copy to defense counsel. The case was advanced on March 7, 2006 and adjourned for arraignment in Supreme Court Part TAP-A on March 27, 2006. Accordingly, a period of **9 days**, from February 21, 2006 until the Notice of Readiness was filed on March 2, 2006, is chargeable to the People for this adjournment. People v. Stirrup, 91 N.Y. 2d 434(1998); People v. Lacey, 260 A.D. 2d 309(1st Dept. 1999). The period of time from March 2, 2006 until March 27, 2006 is not chargeable to the People as the matter was adjourned administratively by the court for purposes of transferring the case to Supreme Court for arraignment. People v. Carter, 91 N.Y.2d 795, 798 (1998); People v. Lindsey, 2008 NY Slip Op 5095, 1 (2d Dept. 2008).

On March 27, 2006 the defendant was arraigned in Supreme Court and the court set a motion schedule. Defense counsel was scheduled to file his motion by April 28, 2006 and the People were scheduled to file their response by May 12, 2006. The matter was adjourned for decision and hearings until June 1, 2006. This

time, during which motions were under consideration, is **excluded** pursuant to C.P.L. Section 30.30(4)(a).

On June 1, 2006, the court handed down decisions on the omnibus motions. Defendant Garcia was not granted any hearings, however, co-defendant Tomay was granted a Mapp/Dunaway hearing. The matter was adjourned for control purposes and hearings until July 3, 2006.

The Appellate Courts have consistently held that, "after a decision is rendered on a defendant's omnibus motion, the People are entitled to a reasonable period of time to prepare for hearings or trial mandated by such decision (C.P.L. Section 30.30 [4] [a]; People v. Reed, 19 A.D.3d 312, 314 (1st Dept. 2005); People v. Wells, 16 A.D. 3d 174 (1st Dept. 2005); People v. Fleming, 13 A.D.3d 102 (1st Dept. 2004); People v Green, 90 A.D.2d 705 (1<sup>st</sup> Dept. 1995). Accordingly, this court finds that the People's request for an adjournment to prepare for the hearings was reasonable and the time for this adjournment should, therefore, be excluded.

On June 30, 2006 the matter was advanced and adjourned to July 21, 2006 for hearings. As this adjournment was for the purpose of setting a hearing date, the time is not chargeable to the People.

On July 21, 2006, the matter was adjourned for the commencement of hearings, on consent of all parties, until

September 13, 2006 in Part K-12. As the matter was adjourned on consent of all parties, the time for this adjournment is not chargeable to the People.

On September 13, 2006 the People were not ready to proceed with the hearing and the matter was adjourned until September 20, 2006 in Part K-12. As the People were not ready, the time for this adjournment, a period of **7 days**, is chargeable to the People.

On September 20, 2006, the People were again not ready for the hearing because the arresting officer had failed to bring all of the Rosario material. The matter was adjourned until September 27, 2006 for the hearing. As the People were not ready, the time for this adjournment, a period of **7 days**, is chargeable to the People.

On September 27, 2006 the hearing was commenced and continued until October 11, 2006. This time, during which the hearings were continuing, is **excluded** pursuant to C.P.L. Section 30.30(4)(a).

On October 11, 2006 the hearings were completed. The motion to suppress pre-recorded buy money which was found on defendant Tomay was granted by Judge Grosso. The parties agreed upon a trial date of November 27, 2006 in Part K-TRP. The time for this adjournment is excludable as the parties consented to the adjournment and the adjournment was directed by the court. In addition, the courts have held that the People are entitled to a reasonable time from rendition of a suppression decision to

prepare for trial. People v. Campbell, 255 A.D. 2d 229 (1st Dept. 1998).

On November 27, 2006, the People were not ready for trial and requested a two week adjournment. The matter was adjourned to January 10, 2007 at the request of defense counsel. As the People were not ready to proceed on that date, the time that the People requested for this adjournment, a period of **14 days**, is chargeable to the People.

On January 10, 2007 the People were again not ready for trial and requested an adjournment until January 25, 2007. The matter was adjourned until March 7, 2007 at the request of defense counsel. As the People were not ready to proceed on that date, the time that the People requested for this adjournment, a period of **15 days**, is chargeable to the People.

On March 7, 2007 defense counsel Kerben was actually engaged. The matter was adjourned to April 14, 2007 for defense reply to the People's motion to sever defendant Garcia's case from defendant Tomay. As defense counsel was engaged, and as the defense requested time to respond to the motion, the time during which the motion was under consideration is not chargeable to the People.

On April 14, 2007 a decision on the motion had not yet been rendered and the matter was adjourned until April 23, 2007. The time during which the motion was under consideration is not chargeable to the People.

On April 23, 2007, the decision was still under consideration by Judge Wong. The matter was adjourned until June 20, 2007 for decision. The time during which the motion was under consideration is not chargeable to the People.

On May 23, 2007 the People filed a Notice of Appeal in the Appellate Division, Second Department, with respect to the decision of Judge Grosso which granted co-defendant's motion to suppress physical evidence.

The People's motion to sever was denied by Judge Wong by decision dated May 30, 2007.

On June 20, 2007 the matter was adjourned until June 28, 2007 for control purposes as the People's appeal of the suppression decision was pending in the Appellate Division. In addition, defense counsel Murray was unable to appear due to a death in the family. As the matter was not able to proceed, the time for this adjournment is not chargeable to the People. C.P.L. Section 30.30(4)(a).

On June 28, 2007 the matter was adjourned for control purposes to Part K-18 for July 30, 2007. As the People had filed an appeal, the time for this adjournment is not chargeable to the People pursuant to C.P.L. Section 30.30(4)(a).

On July 30, 2007, September 5, 2007, October 11, 2007, December 12, 2007, and February 26, 2008, the matter was adjourned in Part K-18 for control purposes while awaiting the decision by the Appellate Division. As the appeal was pending, the time for

these adjournments are not chargeable to the People pursuant to C.P.L. Section 30.30(4)(a).

On March 25, 2008 the Appellate Division, Second Department, rendered a decision affirming Judge Grosso's decision suppressing buy money found in the pocket of co-defendant Ruben Tomay. See People v. Ruben Tomay, 49 A.D. 3d 907(2d Dept. 2008).

On April 16, 2008 the matter was on for control purposes awaiting the decision of the Appellate Division. The People were not ready for trial on that date because the case had been scheduled for control purposes only awaiting an update on the status of the pending appeal. In addition, as indicated by the Assistant District Attorney in his supplemental affirmation in opposition to the motion, the Appeals Bureau of the Queens District Attorney's Office was appealing the decision of the Second Department to the Court of Appeals. Accordingly, the time for this adjournment is excluded. The court's have held in this regard that the People are entitled to a reasonable time to perfect an appeal. See People v. Aaron, 201 A.D. 2d 574(2d dept. 1999).

On May 21, 2008 the matter was adjourned as the People's motion for leave to appeal to the Court of Appeals was pending. The case was adjourned for control purposes to June 26, 2008. As the motion for leave to appeal was pending, the time for this adjournment is not chargeable to the People pursuant to C.P.L. Section 30.30(4)(a).

On June 26, 2008, the People announced that their motion for leave to appeal to the Court of Appeals was denied. See People v. Tomay, 10 N.Y.3d 940(2008). The matter was then adjourned for trial to July 28, 2008. As the matter was on for control purposes, the People were entitled to a reasonable time to prepare for trial from the time the Court of Appeals denied leave to appeal. See People v. Campbell, supra. Accordingly, the time for this adjournment is not chargeable to the People.

On July 28, 2008, the People announced that they were not ready for trial and the matter was adjourned to August 13, 2008. As the People were not ready for trial, the time for this adjournment, a period of **16 days**, is chargeable to the People.

On August 12, 2008 the People were not ready for trial and the matter was adjourned until September 10, 2008 for trial. As the People requested August 29, 2008, the time until August 29<sup>th</sup>, a period of **17 days**, is chargeable to the People.

On September 10, 2008 the People were not ready due to a witness that was on vacation. The matter was adjourned to September 23, 2008. As the people were not ready for trial, the time for the adjournment, a period of **13 days**, is chargeable to the People.

On September 23, 2008, the People were not ready as their main witness, an undercover officer, was on medical leave. The matter was adjourned to October 7, 2008 for trial. The People provided satisfactory documentary proof of the officer's medical

condition. Accordingly, the time for this adjournment is not chargeable pursuant to C.P.L. Section 30.30(4)(g) due to exceptional circumstances.

On October 7, 2008, defense counsel Kerben filed the within 30.30 motion. The People were given until October 21, 2008 to respond and the matter was adjourned until November 6, 2008 for decision on the motion. The filing of the speedy trial motion tolled the speedy trial time. People v. Shannon, 143 A.D.2d 572, (1<sup>st</sup> Dept. 1988); People v. Lacey, 260 A.D. 2d 309(1st Dept. 1999). Therefore, the time for this adjournment is **excluded**. In addition, the time during which the 30.30 motion was under consideration is **excluded** pursuant to C.P.L. Section 30.30(4)(a).

Therefore, in calculating the total amount of time, this court finds that the total number of days charged to the People is **168 days**, which is within the 182 days afforded to the People under C.P.L. Section 30.30(1)(a) to bring the matter to trial.

Defendant's application to dismiss the indictment is, therefore, **denied**.

Order entered accordingly.

The clerk of the court is directed to forward a copy of this decision and order to the District Attorney and to the attorney for the defendant.

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**Sheri S. Roman, J.S.C.**