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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

PRESENT:

HON. SEYMOUR ROTKER  
Justice.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.:3851-2000

ANDREW BRATHWAITE,

Motion: TO PRECLUDE ALIBI  
UNTIMELY NOTICE

Defendant.

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RICHARD A BROWN, DA

BY: MARYAM N'HA MARGO  
LIPKANSKY, ADA

For the Motion

MICHELE MAXIAN, ESQ

BY: ALLEN S. POPPER, ESQ.  
For the Defendant Brathwaithe

Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York  
Dated: December 20, 2001

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SEYMOUR ROTKER, Acting J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No. 3851-2000

ANDREW BRATHWAITE

MEMORANDUM DECISION

Defendant.

-----X

The defendant is accused by Indictment filed on December 15, 2000 of multiple counts of robbery in the first degree and related crimes. All preliminary matters have been completed and the case is in a trial ready posture.

By motion dated November 30, 2001 the People seek to preclude the testimony of the defendant's proffered alibi witness. The basis of the motion is that the defendant's notice of an alibi was not served in a timely fashion and that it is incomplete. The defendant has responded with an affirmation in opposition dated December 3, 2001.

It is undisputed that the People demanded notice of alibi on January 10, 2001. CPL 250.20 requires that the defendant, absent good cause, respond to the People's demand within eight (8) days. The defendant here did not respond until November 28, 2001, over eleven months late. The defendant's explanation for the delay is contained in his reply affirmation.

He offers that the reason was law office failure. Counsel "believed that he (had) served ...notice" but, upon reviewing his file in preparation for trial, it was discovered that he had not. Upon discovery of the error, untimely notice was served to which the People responded with the motion to preclude<sup>1</sup>.

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<sup>1</sup>. This is a motion by the People to preclude and not by the defense to authorize late service of notice for "good cause" shown. Based upon defense counsel's affirmation it appears that there is no "good cause" shown.

The court's power to preclude proffered defense testimony is limited by considerations of constitutional law, notably the confrontation clause contained in the Sixth Amendment to the United States Constitution. The leading case on the subject is Taylor v. Illinois, 484 US 400 (1988). In Taylor, the United States Supreme Court established two important principles of law. First, it established that preclusion of material defense evidence was, in an appropriate circumstance, available to the court as a remedy for failure to comply with discovery rules. Second, and just as important, it established that the court's power to preclude was circumscribed by the defendant's Sixth Amendment right to confrontation.

Taylor recognizes that even the important due process right of any defendant to present exculpatory evidence is limited. The state has the power and the obligation to fashion procedural rules designed to protect the integrity of the fact finding process. The Notice of Alibi rule contained in CPL 250.20 is one such rule. That statute clearly purports to give the court the power to preclude relevant defense testimony if the notice requirement is not complied with. Taylor, however, holds that any implementation of the drastic remedy of preclusion must be considered in the context of the statutory reasons for the notice requirement.

The purpose of the notice requirement is not to limit material evidence based upon the application of arbitrary procedural rules. Rather, it is to protect the integrity of the fact finding process by not all evidence but only that which is "incomplete, misleading, or even deliberately false", Taylor v Illinois, supra, at page 411-12<sup>2</sup>.

Pretrial discovery is not a game played without reference to considerations of substantial justice. When deciding whether to preclude evidence based upon a violation of the CPL 250.20 notice requirement, the key question for the court is whether the delay caused by the failure to

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<sup>2</sup>. As an aside to this opinion, the Court notes that a secondary purpose of the rule is to assure early case preparation and speedy resolution of criminal matters. There are circumstances in which the merely inadvertent or negligent delay by defense counsel in serving notice could necessitate a delay in the trial of a case in order to allow the People time to investigate the defense. The court regrets that there appears to be no readily available sanction short of preclusion to deter this defense caused and unnecessary delay.

comply actually undermined the ability of the People to present their case. The court must look to the explanation for the failure to comply with the notice requirement. If the explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the proffered evidence, Taylor v. Illinois, supra, citing United States v. Nobles, 422 US 225 (1975).

Even assuming that the explanation for the failure to comply with the notice statute was not willfulness but rather was merely inadvertence or negligence on the part of defense counsel, preclusion might be authorized if the People could demonstrate concrete prejudice to their ability to present their case<sup>3</sup>.

Absent a showing of wilfulness or of substantial prejudice, however, it may well be constitutionally impermissible to preclude proffered alibi testimony as a sanction for failure to comply with the notice requirements of CPL 250.20.

The United States District Court for the Southern District of New York New York recently addressed the proper application of the preclusion aspect of CPL 250.20 in the case of Noble v. Kelly, 89 Fed Sup 2d. 443 (2000). In Noble, the New York courts had precluded the defendant's proffered alibi testimony based upon a violation of the CPL 250.20. Specifically the New York trial court found that the defense counsel had failed to provide an "acceptable reason" for his failure to serve timely notice of alibi and precluded the testimony. The ruling was affirmed on appeal. . The United States District Court, however, granted the defendant's habeas corpus petition holding that to preclude the alibi testimony in the absence of any finding of bad faith or willful misconduct violated the defendant's rights under the Compulsory Process Clause of the Sixth Amendment. Significantly for purposes of this case, the Noble court wrote that "the absence of a good excuse is not necessarily commensurate with wilful conduct, quoting the Second Circuit in Escalera v. Coome, 852 F.2d 45 (2d Cir, 1988).

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<sup>3</sup>. This situation is not specifically addressed in Taylor.

Applying these standards to the case at bar, the Court notes that the People's motion alleges neither wilful misconduct on the part of defense counsel nor prejudice to them based upon late service of notice. The Court further notes that the notice was served on or about November 28, 2001 and that the case is not scheduled for trial until January 22, 2002. This provides the People with ample time to investigate the potential witness and to fully prepare their case.

The People's allegation that the notice as served is incomplete is without merit. Although CPL 250.20 (1) requires that the notice contain the residential address of the proffered witness, defense counsel has provided what he has, to wit, the witness' business address. He has explained that the witness is a government employee who declined to provide him with her home address. It is assumed, of course, that if the People have any difficulty in locating the witness and that the defendant has any other information that would be helpful in this regard it will be promptly disclosed.

Based upon the foregoing and assuming that the proffered witness is still available to the People's investigators, the motion to preclude is denied.

Kew Gardens, New York  
Dated: December 20, 2001

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SEYMOUR ROTKER, Acting J.S.C.