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SUPREME COURT : QUEENS COUNTY  
CRIMINAL TERM, PART K-11

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

GEORGE BAER

Defendant

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By:  
HON. ANTHONY I. GIACOBBE,  
J.S.C.

Date: September 5, 2000

Indictment No.: N11676/97

The defendant has moved pursuant to C.P.L. § 30.30(2)(a) to be released on bail or on his own recognizance contending that the People did not answer ready for trial within ninety days of his commitment to custody. For the reasons hereinafter stated, this motion is denied.

#### **Procedural History**

On August 16, 2000, the People and the defendant answered ready for trial in Part K-TRP and the case was sent forthwith to this court in Part K-11 for trial. At that time, Part K-11 was engaged in trial and the case was adjourned on consent to August 17. On August 17, Part K-11 was still engaged and the case was again adjourned on consent, to August 21, 2000.

On August 21, 2000, jury selection herein began. Approximately 60 jurors were brought into the courtroom and sworn in. At the conclusion of the court day on August 22 eleven jurors had been sworn with eight potential jurors from the panel of 60 remaining to select from to complete the panel. Due to reasons not relevant to this opinion, on the morning of August 23 one sworn juror was discharged with the defendant's consent, over the objection of the people. No other jurors were selected from the remaining eight and jury selection was adjourned to continue on August 24 with a panel of forty new potential jurors.

On August 24 the people notified the court that a witness critical to the People's case was unavailable. This witness had allegedly notified the prosecutor that morning that he was going to leave on vacation and would be unavailable to testify until August 31. The witness further told the prosecutor that he would be out of New York State but did not inform the prosecutor as to his specific location. Without this witness' testimony the People would be unable to establish a *prima facie* case. The court thereupon granted the People's motion for a mistrial, ruling that it would be unconscionable to hold the ten sworn jurors, plus the two jurors that remained to be selected, and the alternates for an additional week or so to await the testimony of this witness. If the court had granted a continuance, the adjournment would have placed the case on the court's calendar on August 31, the Thursday before Labor Day weekend to resume the trial. Due to the defendant's religious beliefs, no proceedings could be conducted on Friday, September 1, so the case would have to have been adjourned to Tuesday, September 5. By the time the trial would have concluded the ten sworn jurors would had to have served three weeks on jury duty with a long interval of "down time" between commencement of trial and resumption thereof at which trial the People intended to call only two witnesses and enter into a stipulation for a third.

On August 25, the defendant submitted to the court a proposed order to show cause why the defendant should not be released pursuant to C.P.L.. § 30.30(2)(a). The order had not been signed by a judge, and upon consent of the parties the court deemed that these papers be treated as a motion and afforded the people an opportunity to respond on August 30, 2000. Prior to August 25 no other papers concerning this issue were filed.

## Legal Discussion

The issue presented to this court is whether the swearing in of the jurors prior to the Court granting a mistrial constituted a “trial” such that the halting of the proceedings was a “mistrial” under C.P.L. § 30.30(5)(a) for which the calculations of chargeable time under C.P.L. § 30.30 began anew.

Procedurally, motions made pursuant to C.P.L. § 30.30(2) for bail or release are treated the same as motions made under C.P.L. § 30.30(1) for dismissal. N.Y. C.P.L. § 30.30(6) (McKinney’s 1992). The court must therefore follow the procedures outlined in C.P.L. § 210.45 entitled “Motion to dismiss indictment; procedure,” which procedure incorporates C.P.L. § 210.20. See N.Y. C.P.L. § 210.45(1) (McKinney’s 1992).

Under C.P.L. § 210.45(1), a motion to dismiss an indictment pursuant to C.P.L. § 210.20 “must be made in writing and upon reasonable notice to the People.” C.P.L. § 210.20(g) specifically incorporates motions to dismiss an indictment where “[t]he defendant has been denied the right to a speedy trial.” These motions “*must* be made prior to the commencement of trial or entry of a guilty plea.” N.Y. C.P.L. § 210.20(2)(emphasis added). The significant language are the words “commencement of trial.” In *People v. Harvall*, 196 A.D.2d 553 (2d Dept.), *appeal denied*, 82 N.Y.2d 896 (1993) , both the People and the defendant had answered ready for trial the morning of January 14, 1991. When court resumed in the afternoon, with a panel of prospective jurors just outside the court room, the defendant submitted a half typed, half hand written motion to dismiss under C.P.L. § 30.30(1), to the prosecutor. The Appellate Division affirmed the trial court’s denial of the motion, concluding that the defendant’s motion

was untimely and that he had waived his speedy trial claim when he answered ready for trial. Motions made pursuant to C.P.L. § 30.30 have no constitutional implications. Such motions are purely a matter of “legislative grace.” *People v. Lawrence*, 64 N.Y.2d 200, 205 (1984). As the Court of Appeals has emphasized, where a defendant seeks the benefits of C.P.L. § 30.30, statutory requirements must be complied with. *Id.* Failure to file these statutory requirements precludes the motion.

“Trial” is defined under C.P.L. § 1.20(11): “[a] trial commences with the selection of a jury.” The term “selection of a jury” has two possible interpretations: the commencement of jury selection or the completion of jury selection. As noted, *supra*, the standard for *filing* a C.P.L. § 30.30 motion is before the “commencement of trial” which term includes answering ready for trial and having the potential jurors waiting outside the door. *Harvall*, 196 A.D.2d at 553. In *People v. Blowe*, 130 A.D.2d 668 (2d Dept. 1987), the word “trial” was defined as the commencement of jury selection in the context of C.P.L. § 710.40(3). In *Blowe* a motion had been made pursuant to C.P.L. § 710.40 to suppress an identification. The court began the *Wade* hearing on August 30, 1984. On August 31 the prosecutor informed the court that he was unable to locate his civilian witness to complete the hearing and requested an adjournment to September 4, the Tuesday after the Labor Day weekend. The court denied the prosecutor’s request and ordered that jury selection begin immediately. Over the objection of the defendant, the Court began *voir dire*. On September 4 the civilian witness appeared and the judge continued the *Wade* hearing, rendered a decision, and then resumed jury selection.

According to C.P.L. § 710.40(3), “[w]hen [the motion to suppress] is made before trial, the trial may not be commenced.” The pivotal factor in *Blowe*, therefore, was whether a trial had

in fact commenced under C.P.L. § 1.20(11). The Second Department concluded that the trial commenced with the selection of the jury and that the court should not have started jury selection until completion of the *Wade* hearing. *Blowe*, 130 A.D.2d at 670 (citing *People v. Sanchez*, 65 N.Y.2d 436(1985)). In fact, the only instances in which a trial has been held to commence *after* a complete twelve member jury panel has been chosen and sworn is in the context of double jeopardy (*People v. Innis*, 182 A.D.2d 641 (2d Dept., 1982)) and waiver of a jury (*People v. McCarthy*, 121 Misc.2d 1086 (Sup. Ct., N.Y. Co. 1983)).

The closest case on point appears to be *People v. Jamal*, 181 Misc.2d 936 (Sup. Ct., Queens Co. 1999). In *Jamal* the trial Judge had commenced jury selection with the swearing in of the panel of prospective jurors to answer questions to be posed to them by the court, and then addressed the array. During the *voir dire* the trial judge made a *Molineaux* ruling. Based on the *Molineaux* ruling, defendant Jamal was granted a mistrial and severance from his co-defendant for reasons not relevant to the case at bar. Subsequently, the defendant moved for his release pursuant to C.P.L. § 30.30(2). The court denied defendant's C.P.L. § 30.30(2) motion, holding that the trial commenced when the jury panel was sworn and that the trial judge's termination of the proceedings constituted a mistrial. The court's reasoning in *Jamal* is sound and persuasive and is adopted by this court as explained *supra*.

Accordingly, defendant's motion for his release herein pursuant to C.P.L. § 30.30(2) is denied. Defendant's motion is untimely in that it was not made prior to commencement of jury selection. This court concludes that the trial commenced when jury selection began. The trial then ended with a mistrial. As per C.P.L. § 30.30(5): "where the defendant is to be tried following . . . a mistrial, . . . the criminal action *and the commitment of custody to the sheriff*, if

any, must be deemed to have commenced on . . . the date the order occasioning a retrial becomes final.” N.Y. C.P.L. § 30.30(5)(emphasis added). Accordingly, C.P.L. § 30.30 began running again when the court declared a mistrial on August 24, 2000, and the defendant waived his rights to be released pursuant to C.P.L. § 30.30(2) by announcing his readiness and commencing jury selection. It is therefore unnecessary to address chargeable time before declaration of the mistrial.

The defendant’s motion for his release pursuant to C.P.L. § 30.30(2) is denied. This constitutes the decision and order of the Court.

The clerk of the court is directed to mail copies of the decision and order to the attorney for the defendant and to the District Attorney.

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ANTHONY I. GIACOBBE, J.S.C.