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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.:N10988-98

DAVID GUTTIEREZ,

Motion:TO DISMISS PURSUANT
TO CPL 30.30 (1)

Defendant.

-----X

LAWRENCE S. KERBEN, ESQ
For the Motion

RICHARD A BROWN, DA

BY: DANIEL CHU, ADA
Opposed

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

Kew Gardens, New York
Dated: March 22 , 2001.

SEYMOUR ROTKER, Acting J.S.C.

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

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.N-10988-98

DAVID GUTTIEREZ,

MEMORANDUM
DECISION

Defendant.

-----X

The defendant was charged by Indictment with criminal sale of a controlled substance in the third degree and related crimes. The case against him had been commenced with his arrest on May 2, 1998 and with his subsequent arraignment in Criminal Court on the same day. The indictment was filed on June 18, 1998. Before he could be arraigned on the indictment the defendant absconded and a warrant was issued for his arrest. On January 3, 2000, he was involuntarily returned to court on the warrant. On January 6, 2000, he was arraigned on the indictment and plead not guilty. At the arraignment the People announced their readiness for trial.

On February 28, 2000, following numerous adjournments of the case for various reasons, the defendant filed a motion to dismiss pursuant to CPL 30.30(1) alleging a violation of his statutory right to a speedy trial. The people have responded with an affirmation in opposition dated February 28, 2000. The decision of the court with respect to the defendant's motion follows.

The court may deny a motion to dismiss made pursuant to CPL 30.30 if:

The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations supporting the essential facts, CPL 210.45 (4)(c)

Upon review of the defendants moving papers, the court concludes that the defendant's motion fails to assert essential facts sufficient to entitle him to dismissal as a matter of law. The essential facts required differ depending upon whether the delay complained of occurred prior to or subsequent to the People's effective communication of readiness for trial. With respect to pre-readiness delay, the defendant must allege that the People have failed to be and/or to effectively communicate and announce readiness within the specified time (here 6 months). If the defendant can establish this allegation, he is entitled to dismissal of the charges unless the People can establish that sufficient time is excludable to make their declaration of readiness timely, People v. Giordano, 56 NY2d. 524 (1982)..

If, on the other hand, the defendant alleges that he is entitled to dismissal based upon post readiness delay the required "essential facts" are different. In this case, the defendant must allege that the delay or, more properly, the People's failure to maintain readiness constitutes a direct impediment to commencement of trial. The defendant must also establish that no lesser sanction is available, People v. Anderson, 66 NY2d. 529 (1985).

Applying this analysis to the facts of this case both pre and post readiness delays are alleged.

Pre readiness delay

It is uncontroverted that the defendant was arraigned on the initial accusatory instrument on May 2, 1998. This then is the start date from which the People have six months to be ready and to communicate that fact. It is likewise undisputed that the People communicated their readiness for trial, People v. Kendzia, 64 NY2d 331 (1985), at the time of the defendant's arraignment in Supreme Court which occurred on January 6, 2000. This date is more than six months subsequent to the commencement of the action and, therefore, the defendant, as a matter of law, is entitled to dismissal unless the People can establish that sufficient time periods are excludable under CPL 30.30 (4) (a-f).

In this case the People rely on CPL 30.30 (4) (b) and (4) (c)(ii). CPL 30.30 (4) (b) exempts from the period in which the People must be ready any delay which the defendant requests or consents to. The People, allege that the provisions of CPL 30.30 were waived by defense counsel from May 2, 1998 up to June 2, 1998. This allegation is supported by the official court endorsement and not specifically denied by the defendant. The court finds , therefore, that this period is excludable.

It is undisputed that the defendant failed to appear in court on June 4, 1998 and that a warrant was issued for his arrest. This situation is specifically covered by CPL 30.30 (4) (c)(ii) which, absent certain circumstances not alleged here, allows the period during which the defendant is at large on a warrant to be excluded.¹

Thus the defendant has established only two days of includable pre readiness delay.

Post readiness delay

The defendant asserts no facts challenging the People's announcement of readiness made in open court on January 6, 2000, People v. Kendzia, supra². What the defendant does allege is that the People were not ready on the nine subsequent adjourned dates and that because of their unreadiness this time must be counted against them and that because the inclusion of these time periods puts the People outside the statutory limit, the case must be dismissed. As noted previously, the standard for post readiness dismissal differs from the pre readiness standard. In a post readiness posture, the defendant must establish not just that the People were not ready but also that there

¹. The five days from January 1 to January 6, 2000 constitute a reasonable time to produce the absconding defendant and are also excludable.

². In People v. Anderson, supra, the Court of Appeals noted that the failure of the People to have in the possession necessary Rosario material on the eve of trial did not , *per se*, invalidate their announcement of readiness made long before . This case might be decided differently if defendant could establish that People's announcement of readiness was not genuine.

unreadiness is of such a nature as to “constitute a direct impediment to the commencement of the trial and that no remedy other than dismissal is available” , People v. Anderson [Jones], supra, 66 NY2d at 540, People v. McKenna, 76 NY2d 59 (1990); see, also, Preiser, Practice Commentary, McKinney’s Cons Laws of NY, Book 11A, CPL 30.30, page 174. To win dismissal as a matter of law on the basis of moving papers these facts must be established by uncontroverted sworn allegations or uncontroverted documentary evidence, CPL 210.45. The defendant’s mere allegation that the “People were not ready” will not suffice.

The allegations in this case are much like those in People v. Lomax 50 NY2d. 351 (1980). In Lomax, defendant’s moving papers “contained averments which indicated that there were several periods of time...during which the criminal action against him was delayed due to pre trial motions made by the defense”. The court reasoned that while these periods of time might be includable for CPL 30.30 purposes they also might be excludable based upon 30.30 (4) (a). The court ruled that without more specific allegations of fact it was “impossible for the trial judge who heard the defendant’s motion to ascertain from the submitted papers the extent to which the People’s failure to be ready within the statutory period was attributable to delays resulting from the defendant’s motions” and was therefore “left without a means to compute relevant excludable periods”.

In this case, the defendant simply alleges that virtually all of the post readiness delay was due to the People’s failure to be ready. It must be noted that the People deny this allegation and maintain that they were, in fact, ready on all of the relevant dates. It is not necessary, however, to decide this issue of fact in order to dispose of the motion.

The defendant does not challenge the People’s actual readiness at the time of the arraignment in Supreme Court nor does he allege in what respect they subsequently became unready. Without this information the court cannot draw the necessary inference that the People alleged unreadiness, even if established, constituted a direct impediment to the commencement of the trial or that no other relief short of dismissal would be appropriate, People v. Daniels, 217 AD2d 448 (1st. Dept., 1995). The Court could, therefore, deny the motion on procedural grounds alone. The Court has, however, obtained the minutes for most of the relevant dates in dispute and will decide the issue on the merits.

Based upon an arraignment date of May 2, 1998 the people have 184 days to bring the matter to trial. Given that only two chargeable days were expended prior to their announcement of readiness there remains 182 days of available time. The defendant claims that 291 days were expended in connection with nine post readiness adjournments and that, therefore, the matter must be dismissed. The People concede that two of those adjournments (February 23, 2000 and July 6, 2000) are chargeable to them for a total of twenty-five days of unexcused delay. One adjournment of 23 days (February 28, 2000) was clearly for motion practice and is therefore excludable by law. This leaves six adjourn dates (243 total days) in dispute. In order to prevail, defendant must establish at least 157 days of unexcused delay.

The court has obtained and reviewed the minutes of five adjournment dates and is able to conclude that at least 166 of the 243 disputed days are excludable leaving a maximum of 77 days of includable delay which falls well short of the 157 days needed by the defendant.

The defendant claims that on May 4, May 25, September 27 and October 10, 2000, the People were not ready and implies that any adjournment was due to that fact. The court has reviewed the minutes for those dates with the following results. On May 4, 2000, the defendant appeared in TAP -A for this case and two other pending matters. The defendant was arraigned on one of the companion matters and requested a tolling of his motion time on that matter for a possible disposition of all of the pending matters before the court (minutes, Page 5 and 6). The minutes reflect the People's readiness for trial in this matter and the fact that all parties agreed to May 25, 2000 as a control date for possible disposition. The minutes establish that it was not the People's unreadiness that was the reason for this adjournment. The parties mutually agreed that the trial of this matter would be held in abeyance until the status of another matter involving the defendant could be clarified and a possible disposition reached. Since this adjournment was not due to the People's unreadiness it is excludable.

On May 25, 2000, the case again appeared in TAP - A. The minutes reflect that this was an agreed upon control date for possible disposition of this case and of defendant's other matters (minutes, Page 2). On that date, the People consented to a dismissal of a companion indictment based on a violation of defendant's rights under CPL 190.50. The defendant then requested a forty-

five day adjournment for both matters for possible disposition (minutes, Page 4). Again, the adjournment was not due to the People's unreadiness but was on consent to clarify the status of the companion indictment with a view to possible disposition of all matters involving the defendant..

On September 27, 2000, multiple cases involving the defendant again appeared on the calendar. The People answered ready for a Wade hearing on a related matter. The hearing and this case were both adjourned until October 10, 2000 on consent (minutes, Page 3). Specifically, a attorney appearing on trial counsel's behalf agreed to the October 10th date for a "Wade" hearing on the companion indictment and also agreed that the indictment which is the subject of this motion would also be put over to that date (minutes, Page 3) for "control" purposes. The minutes reflect the understanding of the parties that the trial of Indictment N-10988-98 would be held in abeyance until after the hearing in the companion matter.

On October 10, 2000, the companion case was sent to a JHO for hearing and this case followed for a trial date to be set (minutes, Page 2) following the hearing.

It is unclear what transpired in the JHO part on October 10, 2000. The defendant claims the matter was adjourned until December 12, 2000 and that 63 days are chargeable to the People. Minutes and court records establish, however, that the case appeared on the calendar for October 19 and again on November 6 and on both occasions was adjourned at defendant's requests making those periods excludeable. On October 19, a "Wade" hearing was held in connection with the companion matter and decision was reserved. On November 6, a decision was handed up on the "Wade" issue and defense counsel specifically consented an adjournment of both matters until December 12 for "trial or disposition"(minutes, Page 2). Only the nine days from October 10 to October 19 are potentially includable and in dispute.

On December 12, 2000, the matter was adjourned on consent until January 18, 2001 for trial (minutes, Page 3). The court and counsel mutually selected and agreed to that date. The court, without objection by the parties, indicated that the adjournment was "on consent".

The record clearly establishes that, contrary to the defendant's allegations, virtually none of the post readiness delay in this case was due to the People's failure to maintain the readiness for trial which the announced at the arraignment. Since the adjournments on May 4 (21 days), May 25 (42

days) and September 27 (13 days) and December 12 (37 days) were clearly not due to the People's unreadiness they are excludable. Of the 62 days from October 10, 2000 to December 12, 2000 at least 53 are excludable for the same reason..

Minutes have not been received for the July 20 to September 27, 2000 adjournment and that period which amounts to 66 days remains in dispute. Even if these 66 disputed days are added to the nine days from October 10 to October 19, 2000, however, and are all charged to the People defendant has established a maximum of 75 post arraignment days which added to the two pre arraignment days establishes a delay of at most 77 days of unexcused delay. This falls far short of the 182 days of delay which must be established in order to win dismissal³.

Therefore, the defendant having failed to establish a violation of his right to a speedy trial pursuant to CPL 30.30(1), the motion is denied.

Kew Gardens, New York
Dated: March 22, 2001.

SEYMOUR ROTKER, Acting J.S.C.

³. In short, the even if all of the disputed time is charged to the People they still have one hundred and five days within which to bring the defendant to trial.