Short Form Order

Indict. No: 02730-2005
Superseded by: 00261-1972

SUPREME COURT-STATE OF NEW YORK

CRIMINAL TERM, SUFFOLK COUNTY

P R E S E N T:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE: 2-16-06
RELIEF: OMNIBUS

X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FRANK NELSON,

Defendant.

X

THOMAS J. SPOTA, SUFFOLK COUNTY DISTRICT ATTORNEY
By: Nancy B. Clifford, Esq.
200 Center Drive
Riverhead, New York 11901

DEFENDANT'S ATTY:
LEGAL AID SOCIETY OF SUFFOLK COUNTY
By: Stephen N. Preziosi, Esq.
300 Center Drive
Riverhead, New York 11901

Defendant, charged with one count of Assault in the First Degree, one count of Criminal Possession of a Weapon in the Third Degree, one count of Criminal Trespass in the First Degree and one count of Escape in the Third Degree has moved for omnibus pretrial relief. The People have submitted an affirmation in opposition to the motion and have provided the Court with a copy of the minutes of the Grand Jury proceedings that resulted in this indictment.

The Court has inspected the minutes of the Grand Jury proceedings and finds the evidence legally sufficient to support the charges contained in the indictment (People v Jennings, 69 NY2d 103). There is no basis for disclosure of the Grand Jury minutes to defendant and that application is denied. The Court further finds that the instructions to the Grand Jury were complete and proper and that the appropriate rules of evidence were observed during the course of the proceedings. The Court finds no basis for dismissal of the indictment in the interests of justice. The fact that some of what defendant considers to be important evidence was lost, including the minutes of the original Grand Jury proceedings, is not the fault of the People. The primary reason why evidence is not available at this time is the lapse of 34 years since the crime was committed during which defendant was a fugitive from justice. However, given the fact that the original Grand Jury minutes are not available for use by defendant, the Court will entertain requests by defendant for additional and appropriate discovery (*see*, People v Earl, 168 AD2d 510, 562 NYS2d 751).

In denying defendant's motion to dismiss the indictment in the interests of justice, the Court has considered the seriousness of this offense, involving the use of a weapon, as well as the serious injury to the victim (CPL 210.40 subd 1 [a] and [b]). The Court has also considered that there is strong evidence of guilt, including the testimony of the two eyewitnesses to the crime (subd [c]), as well as the evidence that defendant has been a fugitive from justice for the 34 years following the commission of the crime (subd [d]). While it is true that some of the evidence, including the Grand Jury minutes of the original indictment, has been lost, there is no evidence to suggest that it is the result of misconduct of law enforcement personnel (subd [e]). Finally, given the fact that this crime involved a serious assault on a campus security guard at the State University of New York at Stony Brook and that defendant has sought to evade capture for 34 years, the Court considers it particularly important that defendant stand trial for the crimes he is accused of committing (subds [f], [g], and [h]). For all of the reasons, the Court finds that dismissal of this indictment in the interests of justice is clearly not warranted.

Defendant's application for an order requiring the People to provide a bill of particulars and discovery is granted to the extent that the People have provided defendant with a bill of particulars and numerous items of discovery.

Defendant's request for an order limiting the cross examination of defendant, should he testify at trial, regarding any prior criminal acts or any violent, immoral or vicious acts or conduct he may have committed is granted solely to the extent that a hearing shall be held prior to trial to determine the scope and limits of any cross examination of defendant should he testify at trial.

Defendant's application for the disclosure of all exculpatory material is granted solely to the extent that the People represent that they are aware of their continuing obligation to provide defendant with exculpatory material pursuant to Brady v Maryland (373 US 83). The People also acknowledge their obligation to provide "Rosario" material (*see*, People v Rosario, 9 NY 2d 286) at the appropriate time.

Defendant's application to suppress testimony regarding any out of court identifications of defendant as well as an in court identification of defendant is granted to the extent that a hearing shall be held immediately prior to trial to determine whether such testimony will be permitted. In this regard it should be noted that the People have consented to a Wade hearing (U.S. v Wade, 388 US 218, 87 S Ct 1926). Any issue regarding the People's failure to preserve the photo array will be addressed during this hearing (*see*, People v Davis, 172 AD2d 555, 567 NYS2d 880).

With regard to defendant's request for a hearing pursuant to People v Huntley (15 NY2d 72, 255 NYS2d 838) to determine the voluntariness of any statements made by defendant to law enforcement personnel, that application is granted to the extent that a hearing shall be held prior to trial to determine whether statements given by defendant

were voluntary within the meaning of CPL 60.45. Insofar as defendant seeks to have a hearing to determine the legality of his arrest or to determine whether items of physical evidence should be suppressed, that application is denied. Defendant, in support of his request for these hearings, has not raised a factual issue which would require a hearing (*see*, CPL 710.60 subd 3 [b]).

Defendant moves to dismiss the indictment upon the ground that the criminal action was not brought within the appropriate statute of limitations. Under CPL 30.10 subd 2 (b), the statute of limitations for all felonies, other than Class A felonies, is five years. In this instance, the prosecution for these offenses was clearly commenced within five years. The crimes defendant is charged with were committed on December 24, 1971 and a Grand Jury warrant was issued on March 21, 1972, approximately three months later. The fact that a superceding indictment was voted in 2005 does not negate the fact that the original criminal action was commenced in a timely manner.

Finally, defendant moves to dismiss this indictment upon the ground that he has been denied his right to a speedy trial under both the Criminal Procedure Law and the United States Constitution.

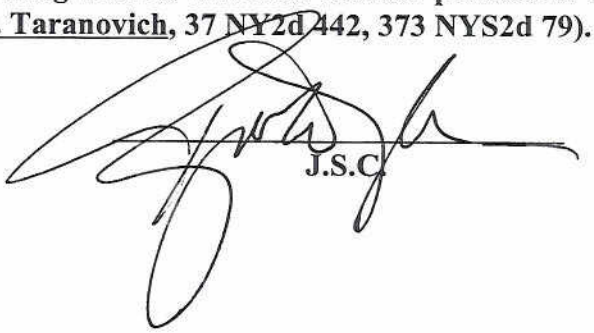
Turning first to defendant's argument that his statutory right to a speedy trial has been violated, CPL 30.20 provides that after a criminal action is commenced, a defendant is entitled to a speedy trial. Pursuant to CPL 30.30 subd 1 (a), the People are required to be ready for trial within six months of the commencement of the criminal action where, as here, defendant is accused of a felony. In computing the time within which the People must be ready for trial, certain periods of time may be excluded, including "the period of delay resulting from the absence or unavailability of the defendant (CPL 30.30 subd 4 c [I]). Here, defendant was indicted on March 20, 1972 and a Grand Jury warrant issued on March 21, 1972. The People contend that until defendant's arrest on September 29, 2005, they had made a diligent effort to locate defendant including repeated visits to defendant's family members in Suffolk County as well as neighboring counties and boroughs of New York City. The police made regular state and federal databank checks for defendant, issued nationwide bulletins, and corresponded with jurisdictions across the United States. The People point out that shortly after the date of the original indictment, defendant discarded the name Frank Nelson and assumed a number of Muslim names as aliases.

Defendant argues, however, that the People did not exercise due diligence in attempting to locate him. He notes that until 1988, he resided in New York City under the name Frank Nelson, collected Medicare and Medicaid payments under that name and obtained a passport. According to defendant, due diligence on the part of the People could have resulted in defendant being found.

Given the fact that there are factual issues regarding the due diligence of the People in attempting to locate defendant, a hearing must be held to determine whether due diligence was exercised by the People (*see*, People v Gruden, 42 NY2d 214, 397 NYS2d 704).

While defendant also raises issues with respect to violation of his Constitutional right to a speedy trial, the Court will defer its decision on that aspect of defendant's application until the conclusion of the hearing when it will be in a better position to address the appropriate considerations (People v. Taranovich, 37 NY2d 442, 373 NYS2d 79).

Dated: MAY 8, 2006



J.S.C.