

People v Austin

2007 NY Slip Op 33869(U)

November 26, 2007

Supreme Court, Kings County

Docket Number: 0002656/2006

Judge: Vincent M. Del Giudice

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT: KINGS COUNTY
JUSTICE VINCENT M DEL GIUDICE

Criminal Term, Part 20

-----X

PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

Dated: November 26, 2007

- against -

Ind. No.2656-2006

TERRELL AUSTIN

Defendant.

-----X

The defendant moves to dismiss the indictment, pursuant to CPL 30.30 (1)(a). The People have filed an answer in opposition.

The defense claims the People should be charged with 207 days in delay from Criminal Court arraignment until the filing of the instant motion. The defendant has set forth the dates of various adjournments he contends were granted as a result of the People's lack of readiness.

The People claim 124 days of the delay should be excluded, pursuant to CPL 30.30(4)(g)(i), because of exceptional circumstances.

Pursuant to CPL 30.30 (4):

In computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded:

-
- (g) other periods of delay occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at the request of a district attorney if (i) the continuance is granted because of the unavailability of evidence material to the people's case, when

the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period.

The defendant has the burden of establishing facts, by a preponderance of the evidence, showing the existence of a delay beyond the statutory period of six months (CPL 210.45 [7]). Since the defendant's moving papers are factually sufficient, the burden shifts to the People to allege any applicable period of exclusion (*People v Santos*, 68 NY2d 859; *People v Berkowitz*, 50 NY2d 333).

In support of her opposition to the defendant's motion, the assistant district attorney has submitted three exhibits which purportedly show that the ghost undercover officer was excused from work and or court appearances from March 2007 through July 2007.

Although CPL 30.30 (4)(g) has been held to exclude CPL 30.30 time when a material witness was unavailable as an "exceptional circumstance", the statute also requires a finding that the witness is "unavailable", that the District Attorney has exercised due diligence to obtain the presence of the witness and that the witness can be expected to become available within a reasonable period of time.

To be entitled to the exclusion under CPL 30.30 (4)(g), it must be shown that the People have "exercised due diligence *to obtain*" (*emphasis added*) the presence of the witness. It cannot be assumed that the Police Department would have refused the People's request to allow the undercover to testify or give a sworn deposition. To make this assumption would relieve the People of their CPL 30.30 (4)(g) obligation to make some effort to ascertain the availability of the witness.

In *People v Zirpola* (57 NY2d 706, 708 [1982]), the Court of Appeals stated, "The unavailability of a prosecution witness may be a sufficient justification for delay, provided the People *attempted with due diligence* to make the witness available" (*emphasis added, citations omitted*). In this case, no attempt was made to make the witness available. Instead, the People relied on three police department forms that state that the defendant "can not/should not" be required to make a court appearance on the date in question. These forms are not sworn affidavits, filed under the penalties of perjury, nor do they state the extent and severity of the witness's disability. In addition, no sworn affidavit is set forth from the

unavailable witness. This is not the “due diligence” required by CPL 30.30 (4)(g) to justify an exclusion of this time.

In *People v Khan* (146 AD2d 806, 807 [2nd Dept 1989]), the delay caused by a material witness’s reluctance to come to New York from Florida to testify was excluded, pursuant to CPL 30.30 (4)(g), because the People exercised due diligence in preparing a material witness order to obtain the presence of the witness (*see also People v Belgrade*, 226 AD2d 550 [2nd Dept 1996] [time excluded because prosecutor exercised due diligence in sending a letter directly to the witness who had unexpectedly left the country for Trinidad]; *People v Figaro*, 245 AD2d 300 [2nd Dept 1977] [Kings County conviction reversed because People were not shown to have exercised due diligence to obtain presence of the complaining witness by merely making “a few phone calls and one visit to the complainant’s home” over a two-month period]; *People v Meyers*, 114 AD2d 861 [2nd Dept. 1985] [People did not demonstrate the type of credible, vigorous activity necessary to demonstrate that due diligence was used to make a recalcitrant witness available]; *People v Warren*, 85 AD2d 747 [2d Dept 1981] [Kings County conviction reversed because, despite the People’s claims of a large caseload, the complaining witness was not contacted by investigators from the District Attorney’s Office for almost five months]).

Exceptional circumstances have been found in several appellate cases, but in each of these cases the court was presented with a **factual basis** to justify an exclusion of time (*see People v Woody*, 24 AD3d 1300 [4th Dept 2005] *lv denied* 7 NY3d 852 [delay due to illness of witness excludable]; *People v Lopez*, 2 AD3d 234 [1st Dept 2003] *lv denied* 2 NY3d 742 [purchasing undercover unavailable due to tragic family crisis]; *People v Mack*, 300 AD2d 254 [1st Dept 2002] *lv denied* 100 NY2d 540 [paralyzed and traumatized assault victim unavailable and no amount of diligence would have made victim available at an earlier date]; *People v Hernandez*, 268 AD2d 344 [1st Dept 2000] *lv denied* 95 NY2d 853 [police officer’s broken ankle prevented her from even walking with crutches]).

The People’s opposition papers do not set forth exceptional circumstances for several reasons. Initially, the People have failed to establish that the unavailable ghost undercover was, in fact, a material witness. No facts were alleged that, in any way, would lead this court to believe that this undercover is a crucial witness upon whose testimony the case would likely turn. In addition, the opposition papers fail to establish

that the People exercised due diligence in order to obtain the testimony or deposition of the ghost undercover, in an effort to record the witness's testimony for trial purposes. Finally the opposition papers fail to provide any basis for this court to believe that the undercover ghost will become available to testify within a reasonable period of time.

As a result of the People's failure to establish a factual basis to support its position that time should be excluded due to the unavailability of a material prosecution witness, this court is left with no choice but to grant the defendant's motion and hereby dismisses the indictment.

So ordered.

Hon. Vincent M. Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

VINCENT M DEL GIUDICE
COURT OF CLAIMS
ACTING SUPREME COURT

Dated: November 26, 2007
Brooklyn, New York

ENTERED
NOV 29 2007
NANCY T. SUNSHINE
COUNTY CLERK