

People v Hennis

2009 NY Slip Op 30811(U)

January 8, 2009

Supreme Court, Kings County

Docket Number: 4496/2006

Judge: Patricia M. DiMango

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM: PART 30

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THE PEOPLE OF THE STATE OF NEW YORK :
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:
-against- :
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ANTONIO HENNIS, :
:
:
Defendant. :

DECISION AND ORDER

Indictment No. 4496/2006

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HON. PATRICIA M. Di MANGO:

Upon papers dated and filed December 15, 2008, the People are seeking to obtain reargument of this court’s determination rendered in the instant matter on December 4, 2008 in which the court found the People chargeable with 178 days of speedy trial time. The defense has not responded in writing to this application.

Previously, the defendant had moved for an order dismissing the instant indictment pursuant to CPL §§ 210.20(1)(g) and 30.30(1)(a), urging that he had been denied his statutory right to a speedy trial. Upon review of both parties’ submissions as well as of the official court file, this court determined that the People had not yet surpassed their allowance of 183 days of trial readiness time for this matter insofar as the court found a total of 178 days were chargeable to the People. Thus, by decision and order dated December 4, 2008, the court denied the defendant’s motion to dismiss the indictment on this basis.

It is the court’s finding of 178 days of chargeable time which the People wish to have this court reconsider and revise downward. However, for the reasons which follow, the court herein has determined that the People’s application must be denied. In deciding the reargument application, the court has considered only the People’s papers and the prior motion papers and decision.

To put the instant application in its proper procedural and factual context, the court sets forth the following summary of the relevant aspects of the motion practice.

Defense counsel had served and filed his original motion to dismiss herein on or about July 24, 2008¹. Upon the return date of September 9, 2008, the People had not yet responded to the motion as of the time the matter was called in court. According to the Assistant District Attorney (ADA) who answered the motion (who was not the ADA to whom the case was originally assigned nor upon whom the motion was served²), the court had ordered the People to respond to the motion on September 9, 2008³ and the People did file their papers with the court that same afternoon, on September 9th.

As the court noted in its original decision, neither party submitted any minutes for any of the court appearance dates here in contention. However unlike the typical CPL 30.30 dismissal motion, in his moving papers the instant defendant raised specific claims regarding the chargeability of particular time periods, rather than simply asserting that the People had surpassed their allotted time, *i.e.*, the mere passage of more than six months from the commencement of this criminal action. Thus, it was not necessary for the People to analyze and discuss the chargeability of each adjournment which took place during the two-year pendency of this case; but rather, it was incumbent upon them to address the defendant's claims regarding the specific adjournments in question.

Given the time frames noted above, the People had well over six weeks to prepare their original response to the defendant's motion. Now, in their reargument papers, the People are contesting the court's findings as to only one particular adjournment period, namely, the adjournment from September 28, 2007 through to November 8, 2007, which the court concluded was chargeable to the People.

Regarding this adjournment date, the defense had asserted in its moving papers that "[o]n September 28, 2007 the People indicated that they were not ready for trial

¹ While the official, filed copy of the motion was received in the Criminal Term Arraignments and Motions office on July 24, 2008, based upon notations in the court file and upon the face of the courtesy copy of the motion papers, it appears that the motion was served upon the People and the court on July 23rd, in court upon a calendar appearance date in this matter.

² It appears that, during the course of these proceedings, this case had been assigned to various successive Assistant District Attorneys. Ultimately, it was ADA Ron Carny who prepared the People's response to defendant's CPL 30.30 motion.

³ While ADA Carny intimates that the People were directed on September 9th to file their responsive papers that same day, this does not appear to be accurate. It is true that, on July 23, 2008, the People were directed to respond to defendant's motion on (or before) September 9, 2008. However, when the matter was called in court on September 9th, the court gave the People until "Monday," *i.e.*, September 15, to serve and file their opposition papers off-calendar.

because a new ADA had been assigned and the case was adjourned to November 8, 2007 for hearing and trial.” Accordingly, the defense maintained the People were chargeable with 41 days for this period.

In the People’s responding affirmation, ADA Carny stated that “[o]n September 28, 2008⁴ [sic], the People informed the Court that a new ADA would take over the case. The Court adjourned the case to November 8, 2008 [sic], for hearings and trial.”

This was the extent of the People’s discussion of the adjournment in question. The People did not specifically argue that this particular adjournment should be deemed excludable time, much less explain why that would be the case. Indeed, the People did not address the chargeability of this adjournment at all.

Given the defendant’s assertion of chargeability in the moving papers; the parties’ agreement that a new ADA had been assigned to the case; the People’s failure to refute the defendant’s contention that this was an adjournment properly charged to the People; and there being no indicia before this court that the defense consented to this adjournment, and no evidence of any adjournment request by the defense pertaining to this same time period, nor anything else to indicate that the chargeability of this period should be prorated, the court found the People chargeable for the entirety of this adjournment period, namely, 41 days.

Now, upon papers entitled “Affirmation in Support of Motion to Reargue” (with annexed exhibits, but containing no notice of motion), the People indicate that they are seeking to reargue the decision dated December 4, 2008 to the extent that the court held the People chargeable with 178 days. Specifically, the People wish the court to reconsider its determination that the adjournment of September 28, 2007 was chargeable time, and instead find upon reargument that it should be deemed excludable time and that the court revise its decision accordingly to hold that only 137 days of speedy trial time had elapsed.

In furtherance of the instant application the People have submitted the transcribed minutes for the on-the-record proceedings which took place in court on September 28, 2007 in this matter. However, the People proffer no explanation as to why they did not and could not have provided these minutes upon their original opposition to the defendant’s motion to dismiss. Furthermore, and of great significance, is the fact that the People never alleged anywhere in their papers in opposition to the original speedy trial dismissal motion that they required the transcribed minutes for any court proceedings in order to adequately respond to the defendant’s motion.

⁴ There is no question that this is a typographical error and that the correct year as well as the date intended by the People, was “2007.”

Turning to the application currently pending before the court, this court must observe that, while the People intend their papers to serve as an application for reargument, nowhere therein do the People address the threshold matter of seeking leave to reargue, that is, to make their case in the first instance for why this court should even grant the People permission to reargue the court's prior decision in order to ultimately reach the merits of the relief sought upon reargument. Rather, the People's papers are directed solely to the chargeability of the time period in issue and they ignore their obligation to demonstrate why reargument should even be entertained here at all, prior to presenting their legal argument on the underlying issue.

Notwithstanding the People's characterization of their application as a motion to reargue, the court herein concludes that the instant motion does not qualify as either a proper motion for leave to reargue, nor as one for leave to renew. Accordingly, it must be denied outright and this court shall not reach the merits of the People's arguments with respect to the adjournment in question.

As provided in the CPLR, a "motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d][2]).

The People here do not cite to any legal authorities which they contend the court overlooked or misapprehended. Rather, they seek to simply rely upon the content of the transcribed minutes for the September 28th court appearance, which minutes they believe demonstrate that the adjournment should be attributable to the defense and hence constitute excludable time.

Patently, on its face, the People's application is not one for reargument. Furthermore, according to both the statute and the case law, it is not appropriate to present new facts upon a motion to reargue (CPLR 2221 [d][2]; (see, People v Sigl, 158 AD2d 940, 941, lv. denied, 75 NY2d 970). And, to the extent the People's papers present additional facts, their "motion for reargument" may be treated as a motion to renew (see, Puntino v Chin 288 AD2d 202).

However, while the People's motion relies upon facts not before the court upon the original motion, the instant motion is also not properly deemed one for renewal either, because a "motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . ;" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]).

On a motion to renew, the movant must show that “new facts” exist that could not have been discovered with due diligence at the time of the original decision (People v Killings, 191 AD2d 586, 587, lv. denied, 81 NY2d 1075; People v Vizzari, 160 AD2d 611, lv. denied, 76 NY2d 867; People v Sigl, supra).

Where the new facts were available upon the original application but were not presented because of the movant’s lack of diligence, renewal will not lie (see, Allstate Ins. Co. v Davis, 23 AD3d 418).

The People here have failed to show why the content of the September 28 minutes could not have been presented in their original opposition papers, and, indeed, there appears to be no “reasonable justification” for their omission upon the prior motion (see, Yarde v New York City Tr. Auth., 4 AD3d 352; Ireland v Wilenzik, 296 AD2d 771, 773; Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636, 638). Thus, there is no ground for the court to exercise its discretion and entertain the People’s motion on any basis (see, Greene v New York City Hous. Auth., 283 AD2d 458, 459).

Accordingly, this court finds that the pending application by the People, although denominated as one for reargument, is neither a proper motion for reargument nor one for renewal. Moreover, as a threshold matter, the People also failed to demonstrate to this court why it should grant the People leave for either.

In conclusion, this court declines to grant reconsideration in any manner (be it renewal or reargument) to the People of its prior decision rendered on December 4, 2008, the motion for leave to reargue is denied, and the court will not pass upon the merits of the substance of the People’s application. The People’s application is, therefore, denied in all respects.

The foregoing constitutes the decision of the court.

Dated: Brooklyn, New York
January 8, 2009


J.S.C.

