

**People v Henderson**

2010 NY Slip Op 33192(U)

May 20, 2010

Sup Ct, Kings County

Docket Number: 10931/08

Judge: Martin P. Murphy

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SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY: PART 40

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

STEVEN HENDERSON  
TREYMAINE SONGSTER

Defendants

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JUSTICE MARTIN P. MURPHY

*Decision and Order  
Speedy Trial and Severance*

Indictment 10931/08

It is alleged that on or about *October 18, 2008*, the victim, who had known defendant *Henderson* for several months, arranged to meet him that day, ostensibly for the defendant to film a pornographic video that starred the victim and for which she was to be paid a sum of money. The victim was fourteen years of age at the time. The victim and *Henderson* proceeded to the home of defendant *Songster*, located at *388 Midwood Street* in *Kings County* where it is alleged that the defendants, while acting in concert with one or more un-apprehended others, engaged in forcible sexual intercourse as well as forcible oral and anal sexual conduct.

The victim was held at the apartment until the following afternoon when she managed to use a phone, call her family for help and escape the location. The victim also notified the police that same day. The victim was treated at a local hospital where a sexual assault evidence collection kit was completed ; the *Office of the Chief Medical Examiner (OCME)* tested the evidence kit and determined that semen was present..

The defendants were arrested on *October 24, 2008* at the home of defendant *Songster* and charged *inter alia* with rape in the first degree and criminal sexual act in the first degree.

Both men gave post-arrest statements to the authorities regarding their involvement in the crimes.

On *October 26, 2008*, the defendants were arraigned in local criminal court on a rape charge, among other crimes.

The instant indictment was voted against the defendants in conjunction with the rape on *October 30, 2008*. Specifically, the defendants were charged as acting in concert with numerous counts of rape in the first degree; criminal sexual act in the first degree; compelling prostitution; promoting prostitution in the second degree; use of a child in a sexual performance; rape in the second degree; criminal sexual act in the second degree; sexual abuse in the first degree; rape in the third degree; criminal sexual act in the third degree; sexual misconduct; sexual abuse in the third degree and endangering the welfare of a child.

Indictment *10931/08* was filed and served on each defendant, along with a statement of readiness, on *November 28, 2008*.

The defendants were arraigned in supreme court (*Mullens, J.*) on *January 7, 2009*.

There have been a total of *fourteen (14)* supreme court appearances , including the date of arraignment, to the filing of the present speedy trial motion. One or both of the defendants were present on each of those dates.

#### *The Instant Motion*

On or about *April 19, 2010* , defendant *Henderson* filed a motion that urges that the present indictment should be dismissed since the People have exceeded the statutorily permissible period of time in which to bring him to trial. In addition, defendant requests a separate trial from that of the co-defendant.

On or about *April 23, 2010*, defendant *Songster* filed a motion in which he requests dismissal premised on a denial of a speedy trial.

The People filed a response in opposition on or about *May 3, 2010* in which they assert that a total of only *one hundred forty-seven (147) days* of chargeable time have elapsed since the commencement of the case, thus not entitling either defendant to dismissal of indictment.

After a review of the files in this case, consideration of the arguments of both counsel and the relevant decisional law, this court *DENIES* prongs of each defendant's speedy trial claim and finds that the People are charged with a total of *one hundred forty-five (145) days* of chargeable time.

In addition, defendant *Henderson's* motion for a separate trial is at present *DENIED* as premature but may be subsequently renewed should defendants' post-arrest statements be deemed admissible following a hearing.

*Neither Defendant Has Been Denied His Right to a Speedy Trial*

*CPL 30.30 (1)(a)* provides that the People must be ready for trial within *six months* of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony. Since the defendants here are charged with one or more felonies, the People were required to be ready within six calendar months of the commencement of this case or *one hundred eighty two (182) days* from *October 26, 2008*, the date of each defendant's arraignment on the felony complaint. *People v Cortes*, 80 NY2d 201 [1992]); *People v Sinistaj*, 67 NY2d 236 [1986].

This court must determine whether the excludable time reduces the chargeable period to less than *182 days*. Since the defendant has alleged a delay beyond the permissible time, the People have the burden of demonstrating that recognized exclusions reduce the chargeable time to less than *182 days*. *People v Santos*, 68 NY2d 859 [1986]; *People v*

*Berkowitz*, 50 NY2d 333 [1980].

Based on a review of the official court files and the submissions of the parties, this court makes the following findings:

As to the period of time between *October 26, 2008*, the criminal court arraignment date and *November 28, 2008*, the date the indictment and a statement of readiness were filed and served, a period of *33 days*, the People concede that this period of time is chargeable to them. *Thirty-three (33) days are chargeable.*

Moreover, it is well-established that the filing and service of the indictment and statement of readiness on *November 28, 2008* effectively tolled further speedy time computation. *People v Kendzia*, 64 NY2d 331 [1985].

The time period between *November 28, 2008* and *January 7, 2009*, the date scheduled for the defendant's supreme court arraignment, is excludable as a post-readiness delay, not attributable to the People's conduct and thus not chargeable to them. The Court of Appeals in *People v Goss*, 87 NY2d 792 [1996] determined, that in cases such as the present one, where a felony complaint was previously filed in local criminal court, the Criminal Procedure Law imposes a non-delegable duty on the trial court to arraign the defendant. *See CPL 210.10, 210.15, 210.10[1], [2]*. The Court continued: "Neither local practice violative of *CPL 210.10 [2]* nor consent of the parties can divest the court of this responsibility. Consequently, any delay in arraignment is attributable solely to the court and not charged to the prosecution". Accordingly, this time period is excludable. *Thirty-three (33) days are chargeable.*

On *January 7, 2009*, following the defendants' arraignment, the court adjourned the defendants' case to *March 4, 2009* for open file discovery and submission of the grand jury

minutes to the court for its review. This time period is excludable as a period of delay resulting from pre-trial proceedings concerning or benefitting the defendant. *CPL 30.30 (4) (a)*. *Thirty-three (33) days are chargeable.*

On *March 4, 2009*, the People provided discovery materials to the defendants and the case was adjourned to this court for a decision on the legal sufficiency of the minutes to *April 15, 2009*. *Thirty-three (33) days remain chargeable.*

On *April 15, 2009*, a decision rendered by *Justice Mullens* finding the grand jury minutes to be legally sufficient, with the exception of counts *12, 37, 59* and *72* which were dismissed at the People's request, was issued by this court. The case was adjourned to *May 18, 2009* for the People to provide the court and the defense with the results of the *DNA* testing. *Thirty-three (33) days are chargeable.*

On *May 18, 2009*, the People informed the court of the *DNA* test results and the case was adjourned to *June 24, 2009* for the parties to conference the case and for the People to provide defendants with a written *DNA* report. *CPL 30.30 (4) (a) and CPL 30.30 (4) (g)*. See *People v Robinson*, 2008 NY Slip Op 547 [2<sup>nd</sup> Dept., 2008] [lengthy process of *DNA* testing found to be an exceptional circumstance for speedy trial computation]. *Thirty-three (33) days are chargeable.*

On *June 24, 2009*, the written *DNA* Report was still not available. The matter was adjourned to *August 13, 2009* for the People to provide additional discovery materials, including the written *DNA* Report. *CPL 30.30 (4) (a) and CPL 30.30 (4) (g)*. *Thirty-three (33) days are chargeable.*

On *August 13, 2009*, the case was adjourned to *September 18, 2009* for a final conference and for the prosecutor to provide the written *DNA* Report. See *People v Robinson, supra* [lengthy process of *DNA* testing found to be an exceptional circumstance for speedy trial computation]. *Thirty-three (33) days remain chargeable.*

On *September 18, 2009*, the case was adjourned to *October 29, 2009* for the parties to prepare for hearings and trial; this time period is excludable. *Thirty-three (33) days are chargeable.*

On *October 29, 2009*, the People indicated they were not ready to proceed; they requested an adjourn date of *November 19, 2009*. The case was adjourned to *December 9, 2009*. The People were charged with *twenty-one (21) days* of this time period. *Fifty-four (54) days are now chargeable.*

On *December 9, 2009*, the People again were not ready and they requested an adjournment to *December 23, 2009*. Defendants' case was adjourned to *January 5, 2010*. *Fourteen (14) days* of this time period are chargeable to the People. *Sixty-eight (68) days are chargeable.*

On *January 5, 2010*, the People were not ready to proceed and requested an adjourn date of *January 26, 2010*. The case was adjourned to the following day of *January 27, 2010* and the People are charged with *twenty-one (21) days* of this time period. *Eighty-nine (89) days are chargeable.*

On *January 27, 2010* the People asked for a *two-week* adjournment as a result of scheduling difficulties. The case was adjourned to *February 10, 2010* for hearing and trial and the People are charged with *two-weeks* of this time period. *One hundred three (103) days are*

*chargeable.*

On *February 10, 2010*, the courts were closed as a result of a snow emergency. The present case was adjourned for hearing and trial to *March 1, 2010*. This time period is excludable. *One hundred three (103) days are chargeable.*

On *March 1, 2010*, the People indicated they were not ready to proceed, since a new *Assistant DA* had recently been assigned to handle the prosecution. The People requested a *two-week* adjournment. The case was adjourned to *March 15, 2010* and this *fourteen (14) day* time period is chargeable to the People. *One hundred seventeen (117) days are now chargeable.*

On *March 15, 2010*, the People were not ready to proceed, since the assigned *Assistant* was on leave until the following day or *March 16, 2010*. The case was adjourned for hearings and trial to *May 3, 2010*. The People filed a statement of readiness on *April 12, 2010*. Accordingly, the People are charged with *twenty-eight (28) days* of this time period. *One hundred forty-five (145) days are chargeable.*

Defendant *Henderson* filed the instant motion on *April 19, 2010*, thus tolling the speedy trial clock.. Defendant *Songster's* speedy trial motion was filed on *April 23, 2010*.

Based on the foregoing, the total chargeable time is *one hundred forty-five (145) days*.

Accordingly, since *one hundred forty-five(145)* chargeable days have elapsed since the commencement of defendants' case, defendants' motion to dismiss the indictment for failure to provide a speedy trial pursuant to *CPL 30.30* is *DENIED* in its entirety.

*Defendant Henderson's Motion for a Separate Trial*

As previously noted, defendant *Henderson* has also asked for a separate trial based upon an assertion of "irreconcilable defenses" and trial strategies with his co-defendant.

Defendant's motion for severance is at present *DENIED* as premature. Hearings have been previously ordered for this defendant as well as his co-defendant. If at the conclusion of the hearings the statements are determined to be admissible at trial, and the prosecutor indicates an intent to proffer them at trial, the defendant has leave to renew the application for severance on the papers presently submitted.

The foregoing constitutes the decision and order of the court.

Dated: May 20, 2010  
Brooklyn, New York

  
MARTIN P. MURPHY J. S. C.