

**People v Sylvestre**

2011 NY Slip Op 34189(U)

May 23, 2011

Sup Ct, Kings County

Docket Number: 6343/2009

Judge: John P. Walsh

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS - CRIMINAL TERM - PART 50**

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**THE PEOPLE OF THE STATE OF NEW YORK,**

**By: JOHN P. WALSH  
J.S.C.**

**-against-**

**Dated: May 23, 2011**

**JACQUES SYLVESTRE,**

**Indictment No. 6343/2009**

**DECISION and ORDER**

**Defendant**  
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By Notice of Motion, dated May 2, 2011, and Affirmation, the defendant Jacques Sylvestre seeks dismissal of all charges in the indictment reflecting the defendant's alleged possession of a Weapon on the basis of the alleged violation of the defendant's Due Process rights in an "unjustifiable pre-indictment delay between the Defendant's alleged criminal possession of a weapon on October 8, 2008 and the District Attorney's Office filing of the indictment and felony complaint on October 7, 2009." Characterizing the twelve (12) month delay as "unreasonable" and prejudicial, the defendant, in the alternative, seeks a hearing to determine "the degree to which the defense may be been prejudiced by the delay."

The People responded Affirmation in Opposition, dated May 17, 2011, Memorandum of Law and attached the search warrant which yielded the weapon.

Pursuant to CPL 30.10(2)(b), a prosecution for the particular felonies which the motion addresses must be commenced with five (5) years after the commission of the felony. Clearly, the People were within the statutory period. While the defendant is not relying on the Statute of Limitations - CPL 30.10(2)(b) and CPL 30.10(3)(a) - their underlying rationale are implicated in the defendants' motions regarding preindictment delay.

When there is an unjustified delay in the prosecution of a criminal action, there is a denial of the defendant's due process of law (see *People v. Staley*, 41 NY2d 789, 791-792; *People v. Winfrey*, 20 NY2d 138, 143). Where, as here, there is a prolonged delay, the Court of Appeals has imposed "a burden on the prosecution to establish good cause" (*People v. Lesiuk*, 81 NY2d 485, 490). Where, as here, there has been extended delay, it is the People's burden to establish good cause (*People v. Singer*, 44 NY2d 241, 254).

While the United States Supreme Court distinguishes between “preindictment” delay and “postindictment” delay (see Barker v. Wingo, 407 U.S. 514), New York has not “drawn a fine distinction between due process and speedy trial standards” (People v. Singer, 44 NY2d 241 at 253). The Supreme Court’s evaluation of “postindictment” delay applies the Sixth Amendment’s speedy trial requirement while “preindictment” delay is measured by the due process clause. New York’s “due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute (see CPL 30.20; see, also, CPL 30.30) and the Sixth Amendment (see United States v. Marion, 404 US 307, Klopfers v. North Carolina, 386 US 213)” (Singer, supra).

Under United States Supreme Court standards, “preindictment” delay, governed as it is by the due process clause, “generally requires a showing of actual prejudice before dismissal would be warranted (United States v. Marion, 404 US 307; United States v. Lovasco, 431 US 783)” (Singer, at 252). New York holds that “in a proper case, a lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown” (Singer, 253-254). Even before the expansion of the Federal constitutional right to a speedy trial (see Dillingham v. United States, 423 U.S. 64; United States v. Marion, supra; Klopfers v. North Carolina, supra), New York recognized that an unreasonable delay in the prosecution of a defendant is a denial of due process (People v. Winfrey, 20 NY2d 138, 143; People v. Wilson, 8 NY2d 391, 394-395).

The factors for the determination of a defendant’s claim that there has been a denial of his or her right to a speedy trial (“postindictment) delay), was articulated in People v. Taranovich, 37 NY2d 442. However, these same factors have also been applied to a defendant’s due process denial (“preindictment” delay) (see People v. Vernace, 96 NY2d 886, 887; People v. DeRosario, 74 AD3d 1356). Since the instant matter falls within a claim of “preindictment” delay, the Taranovich factors must be applied. These are “(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pre-trial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay” (Taranovich, supra at 445). Not “determinative” but of “critical importance” to a court evaluating claims of due process or speedy trial violations is “the extent of the delay” (People v. Decker, 13 NY3d 12 at 15) because “all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby” (Taranovich, supra, at 444-445), although there is no specific period considered “presumptively prejudicial” (see People v. Romeo, 12 NY3d 51, 56).

Other considerations also come into play, especially in the present litigation. For instance, the People's failure to conduct a prompt prosecution, "in a proper case, may require dismissal of an indictment even in the absence of prejudice to the defendant" (*People v. Staley*, 41 NY2d 789 citing *Taranovich*, supra; *People v. Blakley*, 34 NY2d 311). On the other hand, although delay may cause some degree of prejudice to a defendant, if the People satisfy their burden of demonstrating that they made a good faith determination not to proceed with the prosecution because of insufficient evidence, no denial of the defendant's due process of law occurs (*People v. Deckler*, supra, at 15).

Essential to any determination of unjustifiable or justifiable delays is the prosecutorial discretion of when to proceed with prosecution (see *People v. Decker*, supra, at 15); here, the People's Response fails to demonstrate that the prosecution was "never dormant and was consistently under investigation" (see *People v. DeRosario*, supra, at 1358).

With these considerations, the defendant's motion is easily disposed of. It is denied.

Some of the cases cited by the defendant defeat his own argument. For instance, *People v. Denzel Allen*, 13 AD3d 639 involved a 57-month pre-indictment delay; *People v. Andine*, 214 AD2d 373 involved a 55-month pre-indictment delay. The twelve (12) month delay here seems comparatively insignificant when measured against those cases.

Moreover, while *People v. Jose Vasquez*, 79 AD2d 621, might have reversed the trial court's denial of the defendant's motion to dismiss on the ground that the defendant failed to allege or show actual prejudice resulting from the delay, *People v. Raranovich*, supra, includes "whether or not there is any indication that the defense has been impaired by reason of the delay." The defendant's motion is bereft of any indication, however slight, of any impairment to his defense.

The disputed counts reflect the seizure of the weapon "as well as all the defendant's high end personal belongings" (whatever that means). While it is true that the defendant's arrest occurred on October 7, 2009, he had been indicted for the gun charges on or about August 6, 2009 with the indictment filed with the court on September 11, 2009. In the seizure of items on October 8, 2008, the search warrants specifically directed the officers "to search for and recover evidence of credit card fraud paraphernalia, evidence of automobile insurance fraud, evidence of mortgage fraud, and firearms."

The evidence recovered required analysis in the People's efforts to secure an indictment. They began presenting their case to the Grand Jury on or about March 19, 2009. That presentation included evidence obtained during the same search which revealed the weapon.

**Far from the twelve (12) month delay between the search warrant and the defendant's arrest, the People used the period of time between October 8, 2008 and March 2009 to sift through, compile and analyze the recovered items before submitting their case to the grand Jury. Had the People done anything less, the defendant would challenge the indictment as a "leap to judgment" and without sufficient evidence.**

**The defendant's motion to dismiss is denied.**

**This constitutes the decision and order of the court.**

**Dated: May 23, 2011  
Brooklyn, New York**

  
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**John P. Walsh, J.S.C.**