

People v Rodriguez
2011 NY Slip Op 34293(U)
May 25, 2011
Supreme Court, New York County
Docket Number: 5471/09
Judge: Richard D. Carruthers
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 81

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. No. 10344
5471/09

DECISION
AND
ORDER

WILLIAM RODRIGUEZ,

Defendant.

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RICHARD D. CARRUTHERS, J.:

The defendant has moved this Court, pursuant to C.P.L. §30.30, for an order dismissing the indictment. In addition to the motion filed by the defendant, the Court has reviewed the People's response, the defendant's reply, and its own records.

Section 30.30(1)(a) of the Criminal Procedure Law requires the People to be ready for trial within six months of the commencement of a criminal action when a defendant is charged with a felony. The six month period in which the People are required to be ready is computed on the basis of six calendar months rather than on a 180 day basis. See, e.g., *People v. Roebuck*, 279 A.D.2d 350 (1st Dept. 2001); *People v. Collado*, 249 A.D.2d 322 (1st Dept. 1998). The six month statutory time period is calculated from the date on which the first accusatory instrument is filed in criminal court against the defendant. C.P.L. §1.20(17); *People v. Cortes*, 80 N.Y.2d 201 (1992). In this case, the felony complaint was filed on

November 5, 2009, and the People were required to be ready for trial within 181 days.

The defendant was scheduled for arraignment on the indictment in Supreme Court on December 9, 2009, but was not arraigned until December 18, 2009. The People admit to 34 days of delay from November 5 to December 9, but state that they should not be charged with the 9 days between December 9 and December 18, labeling this an "adjournment by the Court." According to the Court of Appeals, in such circumstances, the delay is chargeable to the People. See, *People v. Cortes*, 80 N.Y.2d 201, 213 (1992); *People v. Correa*, 77 N.Y.2d 930 (1991). See also, *People v. Lourens*, 208 A.D.2d 768 (2nd Dept. 1994) (one day adjournment by Court for judicial conference no chargeable to the People after their declaration of trial readiness). In this case, the People had not declared their readiness for trial, so the 43 day period of time from the filing of the felony complaint until the defendant's arraignment will be charged to them.¹

Motion practice ensued, and the Court's decision on the omnibus motion was rendered on February 24, 2010. The case was adjourned until April 14, 2010 for a further motion to sever the

¹In a footnote, the defendant notes that the case was "administratively adjourned" on December 9 and advances two theories concerning whether the People should be charged with the 9 day adjournment until December 18. However, he cites no case law to support his arguments, and the Court finds them to be without merit.

counts of the indictment. The defense consented to this adjournment. This period of time is excludable. C.P.L. §30.30(4)(a), (b).

On April 14, the motion to sever was denied, and the case was adjourned for hearings and trial to June 2.² This time period is not chargeable to the People. C.P.L. §30.30(a); *People v. Wells*, 16 A.D.3d 174 (1st Dept. 2005); *People v. Fleming*, 13 A.D.3d 102 (1st Dept. 2004). On June 2, the People stated they were not ready for hearings and trial, and concede that 55 days of delay until the next trial date of July 28 is chargeable to them. The defense admits that on July 28, they consented to an adjournment until September 29.

On September 29, the People requested that a buccal swab be taken from the defendant for DNA testing. When the defense announced its opposition to this request, a motion schedule was set, and the case was adjourned until October 15 for the defense to file motions opposing a swab order. On that date, the case was adjourned for the Court's decision, which was issued on October 28, and which granted the People's motion. The case was adjourned

²The defense motions and the People's response indicate that the case was scheduled for June 3. However, according to the court file and the Court's own records, the case was on the calendar on June 2. Since the People have provided no evidence to support their claim of the June 3 date, the Court finds that June 2 was in fact the date when the case appeared on the Part 81 calendar.

until December 1, 2010 for DNA results. These adjournments are excludable because of motion practice. C.P.L. §30.30(4)(a).

The People were not ready on December 1 because they were awaiting DNA testing results. According to *People v. Robinson*, 47 A.D.3d 847, 848 (2nd Dept. 2008), delays caused by DNA testing are an exceptional circumstance under C.P.L. §30.30(4)(g), and the time is not chargeable to the People. The case was adjourned until January 26, 2011, and on that date, the test results were still not available. A further adjournment, until March 30, was given. On that date, the defendant filed his speedy trial motion.

The defendant argues that the People were dilatory in moving for a buccal swab order for DNA testing, and point out that they waited eleven months, from the filing of the felony complaint on November 5, 2009 until making their motion on September 29, 2010. The defense claims that since there is no discernable reason for this lengthy delay, the People should be charged with the period of delay from October 15, 2010 to March 30, 2011 for their failure to act with due diligence in pursuing DNA testing.

In their response, the People state that none of the time until March 30 should be charged to them under *People v. Robinson, supra*, 47 A.D.3d 847. They claim that it was necessary to wait until the defendant's motion to sever the counts of the indictment was decided before making a determination on the necessity of DNA testing.

The Court finds that the People were dilatory in proceeding with DNA testing. While the People claim that they could not make a decision on DNA testing until a decision on the defendant's severance motion was rendered, the Court fails to see a nexus between the severance motion and a decision to proceed with DNA testing. Other than the assertion in the People's response, there is no explanation of how these two events are linked. Furthermore, the People waited from April 14, 2010, when the Court's decision on severance was rendered, until September 29, 2010 to move for DNA testing. No explanation is given for this period of delay.

The defendant has provided the Court with a decision in the case of *People v. Miguel Rodriguez*, Ind. No. 4661/09, New York County Supreme Court (J. Solomon), which concerns a similar situation. In that case, the court found the People had been dilatory, and relied on *People v. Ellison*, 28 Misc.3d 1223(A) (NY Sup. Co. 2010) in charging them with part of the delay necessitated by the wait for testing results. Accordingly, in this case, the Court will charge the People with the delay caused by the adjournment from January 26, 2011 until March 30, 2011, a period of 63 days.

According to the calculations set forth above, the People are chargeable with 161 days of delay. Therefore, the defendant's motion is denied. This constitutes the order and decision of the Court.

Dated: New York, New York
May 25, 2011


Richard D. Carruthers
A.J.S.C.