SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION: PART DV
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THE PEOPLE OF THE STATE OF NEW YORK

Docket No. 016204C2011
Decision and Order

-against-

RAUL SANTIAGO,

Defendant
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FABRIZIO, J.

In this decision addressing the merits of a motion to dismiss pursuant to CPL § 30.30, the narrow issue is whether the People are entitled to claim an exemption pursuant to CPL § 30.30(4)(a) stemming from an adjournment on a date for which a prior judge had set the case down for to both issue a decision on an outstanding defense motion to dismiss counts of the accusatory instrument as well as for a trial. In the circumstances of this case, based on the record, the answer is no.

Defendant is charged with a class A misdemeanor, assault in the third degree, and other crimes. Therefore, the People have ninety days following defendant's arraignment to state ready, or face dismissal. CPL § 30.30(1)(b). The People and the defendant agree on the "chargeability" of the vast majority of adjournments. The People stated ready for trial at the criminal court arraignment on March 22, 2011, and any time calculations relating to adjournments since that date must be viewed through the legal lens of post-readiness delay, requiring the People be charged only with time they specifically request when they later answer not ready for trial. See e.g. People v. Urraea, 214 AD2d 378 (1st Dept 1995).

Thus, the People are charged with the twelve day period they requested on June

3, 2011, and the seven day period they requested on July 13, 2011, when they stated they were not ready on each of those days and asked for an adjournment. In addition, the are charged with the entire period between December 1, 2011 and January 31, 2012. On December 1, 2011, they stated that they were not ready for trial, and indicated that they would file a certificate of readiness whenever they would once again be ready for trial. They never served or filed such a certificate during this period. On January 31, 2012, the People once again stated they were not ready, but this time requested only an adjournment of seven days. The defendant agrees that this is all the time that should be charged, even though the case was adjourned until April 1, 2012. The People and defendant agree that the time charged based on these adjournments totals eighty-eight days.

The one contested period relates to the adjournment from October 18, 2011 to December 1, 2011. On September 14, 2011, the People stated ready for trial on the record, and the defense asked for an adjournment in order to file a motion to dismiss two counts of the accusatory instrument, both charging the defendant with aggravated harassment. When the judge presiding adjourned that case that day until October 18, 2011, it was set down for two purposes: first, for the judge to issue a decision on the defense motion, and, second, for an immediate trial. The People did not object to that dual marking. The defense filed its motion to dismiss on September 15, 2011, arguing the accusatory instrument was facially insufficient only with respect to the two aggravated harassment counts. When the People responded to that motion on September 29, 2011, they conceded that the pleading was facially insufficient for both contested counts. They also took the additional steps of unilaterally moving to dismiss

those charges and "stating ready [for trial] as to all remaining counts of the accusatory instrument."

The judge formally decided that motion in a written decision dated October 18, 2011. The judge found independent legal grounds to dismiss the two counts, but not mention the People's concession and independent application to dismiss them. After the decision was given to the parties in the courtroom, the People made the following record: "This matter was apparently on for decision and trial today, although obviously our position is that with the receipt of your Honor's decision today our trial readiness is not an issue. I have a note from the [assistant district attorney] assigned that the complaining witness is unavailable today, so we would be requesting one week."

The People now argue that their statement that they were not ready for trial on the record and the request for a seven day adjournment should not be considered in this Court's CPL § 30.30 calculations. They cite CPL § 30.30(4)(a), which states unequivocally that the time during which motions are under consideration should not be included in trial readiness calculations, no matter who makes the motion. See People v. Osorio, 297 AD2d 231, 232 - 33 (1st Dept 2002) . Since the defense motion was still under consideration on October 18, 2011, as it was not decided until that day, the People claim that the statute allows them a per se exemption from having to be ready for trial, and their on the record statement that they were not ready is a nullity.

In many circumstances, the People's current position could be viewed as meritorious. The People need not be ready for trial until a decision is reached on all outstanding motions, including those that may be considered "pro forma." People v. Douglas, 209 AD2d 161, 162 (1st Dept 1994). And, the People are in general afforded a

reasonable time to prepare for trial following receipt of a decision on a pre-trial motion. See People v. Roebuck, 279 AD2d 350. 351 (1st Dept 2001). Moreover, when an exclusion is sought pursuant to CPL § 30.30(4)(a), "it is not necessary that 'the People demonstrate that the defendant's motions actually caused the People's lack of readiness.'"People v. Pani, 138 AD2d 532 (2nd Dept 1988) citing People v. Heller, 120 AD2d 612, 613 (2nd Dept. 1986). However, when the focus of the record made at the time a decision on an outstanding motion is rendered indicates that the People's request for the adjournment was not "caused by the pending motion," the relevant time period may be charged to the People. See People v. Bruno, 300 AD2d 93, 95 (1st Dept 2002).

Here, the record supports the defense position that an additional seven day period of post-readiness delay should be charged to the People. Although the People stated their belief that "their readiness was not in issue" on October 18, 2011 since they just that day received the judge's ruling on the defense motion, they voluntarily made an additional record that they could not proceed to trial because a necessary witness was unavailable. Thus, the People acknowledged that the reason they were asking for an adjournment was not due to motion practice, making the time they requested to once again answer ready for trial includable in this Court's time calculations. Bruno, 300 AD2d at 95 (People charged where, despite the existence of unresolved pretrial motions, they stated on the record they "were unable to produce police witnesses and the complainant may have recanted" on date in question).

Even without this particular in-court record, the People would still not be entitled to an exclusion of time following this adjournment under CPL § 30.30 (4)(a). They, themselves, had already moved to dismiss the aggravated harassment counts and

indicated their readiness for trial on the remaining charges to the both the Court and defense counsel when they filed their response to the defense motion nearly three weeks prior to October 18, 2011. People v. Kendzia, 64 NY2d 331, 337 (1985). While it might have been technically possible for the judge considering the defense motion to deny it, the People had absolute discretion to dismiss those charges despite such an unlikely ruling and proceed to trial on the charges they knew were viable, since it was being prosecuted by a misdemeanor information and not an indictment. See People v. Extale, ____ NY3d ____, 2012 N.Y. Slip. Op. 2247 (March 27, 2012, NY Ct of Appeals); People v. Urbaez, 10 NY3d 773 (2008). Thus, it is quite disingenuous for the People to argue in this case that they were entitled to a "reasonable adjournment to prepare for trial" on October 18, 2011 because they had just received the decision on a motion that placed the case in the posture it had been when they answered ready for trial as part of their September 29, 2011 motion response. There was nothing for them to prepare for that would have been addressed in the decision they awaited in this case for which they had not already acknowledged they were prepared.

Finally, while it is not this Court's practice to adjourn a case to the same day to both render a decision on an outstanding motion and to commence a trial, the People did not object to the record made by the judge in this instance setting it down for both purposes. This provides an additional basis for granting the motion. However, this decision is not concerned with any situation other than the one presented here. There may be occasions where, on application to dismiss pursuant to CPL § 30.30, a court making a ruling on the merits of that motion may find the period following a judge's ruling on a motion to be excluded from trial readiness calculations, even if such a dual-purpose

adjournment is ordered, based on the particular motion involved and/or the record made at the time the decision is rendered. See People v. Berkowitz, 50 NY2d 333 (1980). Nonetheless, in this case, the People are charged with the seven day period they requested on October 18, 2011. Therefore, the total time charged to the People is ninety five days, in excess of the ninety days in which they are required by statute to state ready, and the case is dismissed.

This constitutes the Decision and Order of the Court.

Dated: April 2, 2012

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Hon. Ralph Fabrizio