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STATE OF NEW YORK
COUNTY COURT : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND ORDER
Indictment No. 12-209

RAMAL ABDULLAH,
Defendant.

JOSEPH F. CAWLEY, J.

This *pro se* defendant has been charged with Criminal Possession of a Controlled Substance in the Third Degree (PL 220.16(1)) and Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06(5)) on April 2, 2011; Criminal Possession of a Weapon in the Second Degree (PL265.03(3)), Criminal Possession of a Weapon in the Third Degree (PL 265.02(1)), Resisting Arrest (PL 205.30) and Reckless Driving (VTL 1212) on October 31, 2011; Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree (VTL 511(2)(a)(iv)) on December 30, 2010; and three counts of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL511(1)(a)) (on March 7, 2011, April 2, 2011, and October 31, 2011).

Filings

Defendant filed an Omnibus Motion on June 14, 2012. An amendment dated June 18, 2012 was submitted to the Court (although it is unclear whether said amendment was filed with the County Court Clerk) and defendant further sought to amend his Omnibus Motion by affirmation dated July 16, 2012. The People answered on or about July 20, 2012. Defendant filed an additional Affidavit in Support on or about September 7, 2012, seeking to dismiss the Indictment pursuant to CPL 210.20(1)(g) and 30.20. On or about September 14, 2012, defendant sought a bail reduction (one of several such applications), and filed another proposed amendment

to his original Omnibus motion, seeking dismissal or reduction of Counts 3 and 4 of the Indictment, charging Criminal Possession of a Weapon in the Third and Fourth Degree. On September 17, 2012, in response to defendant's motion to dismiss, the People filed minutes from defendant's August 31 and September 28, 2011 court appearances in Binghamton City Court. By letter and Affirmation dated October 9, 2012, defendant again amended the aforementioned Omnibus Motion.

Motions

Defendant moves pursuant to Section 210.30 of the Criminal Procedure Law for an examination of the stenographic minutes of the grand jury proceeding for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charge(s) contained in the indictment, and seeks dismissal or reduction of the indictment for the insufficiency of the evidence or for other defects in the grand jury proceedings. (Criminal Procedure Law §210.20).

The People have interposed no objection to the **Court's** examination of the grand jury minutes and have provided same for Court review. Upon examination of the minutes, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination on the motion. Accordingly, the defendant's request for release of the grand jury minutes is denied.

In reviewing the legal sufficiency of an indictment, the court must view the evidence in the light most favorable to the People and determine whether the evidence, if unexplained or uncontradicted, would be sufficient to support a guilty verdict after trial. The court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, supply proof of each element of the charged crimes.

Upon examination, the evidence before the grand jury was legally sufficient to establish the commission by the defendant of the offenses charged or lesser included offenses thereof. The legal instructions given were sufficient, fair and accurate. The presentation was legal and proper.

The Court finds no defects in the grand jury proceedings warranting dismissal or reduction. The defendant's motion to dismiss or reduce the Indictment is denied.

The defendant also seeks an order of this Court suppressing physical evidence seized at or about the time of his arrest, **as relates to Counts Three and Four** of the pending indictment (Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree). The People oppose said application, denying any illegal or improper conduct on the part of law enforcement. Defendant's motion is granted to the extent that a Mapp hearing will be scheduled by the Court with respect to Counts Three and Four of Indictment No. 12-209.

Additionally, the defendant has requested suppression of statements allegedly made to law enforcement on or about April 2, 2011 or, in the alternative, that a hearing be conducted to determine the admissibility of said statements. The People have opposed suppression. The defendant's motion is granted to the extent that a Huntley hearing will be scheduled by the Court.

The defendant has requested a Sandoval hearing. The People have indicated to the Court that they will seek to cross-examine the defendant, in the event he does testify at trial, with prior convictions and bad acts, together with the underlying facts of said convictions. Based upon the foregoing, a Sandoval hearing will be conducted prior to jury selection.

The Mapp, Huntley and Sandoval hearings ordered above are hereby scheduled for Tuesday, November 20, 2012, commencing at 9:30 a.m.

SEVERANCE

Defendant seeks to sever Counts One and Two (Criminal Possession of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance in the Fifth Degree) from the balance of the indictment, arguing that prejudice would result from a jury's considering both drug and weapon possession charges from separate dates, and that "his [defendant's] knowledge of the handgun that was allegedly found in the trunk of the vehicle is highly integral toward's [sic] his defense" (Affidavit in support, at ¶10).

Offenses are joinable if (among other things) they are based upon different criminal transactions but defined by the same or similar statutory provisions, or if proof on either offense would be material and admissible as evidence-in-chief at the trial of the other offense (CPL 220.20(2)(b), (c)). If the offenses were joined in an indictment solely because they were based on similar statutes, a court has discretion to order them separately tried "in the interest of justice and for good cause shown"(CPL 200.20(3)). If the offenses were properly joined on any other basis, however, "the court lack[s] statutory authority to sever" (People v. Rogers, 94 A.D.3d 1246 (3rd Dept. 2012); People v. Bongarzone, 69 N.Y.2d 892 (1987); *see,* People v. Lane, 56 N.Y.2d 1 (1982); *see also,* CPL 200.20(3)).

Chronologically, defendant was charged on December 30, 2010 with Aggravated Unlicensed Operation of a Motor Vehicle (hereinafter "AUO") in the Second Degree; on March 7, 2011 with AUO in the Third Degree; on April 2, 2011 with (among other charges) AUO in the Third Degree; and on October 31, 2011 with (among other charges) AUO in the Third Degree. With regard to each of the foregoing offenses, it is alleged that defendant was operating (or "pushing", as he claims in his grand jury testimony) the same Buick LeSabre vehicle, NY registration # FCJ1709.

Any charge of Aggravated Unlicensed Operation of a Motor Vehicle (First, Second or Third Degree) requires, in pertinent part, proof that defendant was operating the subject vehicle "...while knowing or having reason to know that such person's license or privilege of operating such motor vehicle...is suspended, revoked or otherwise withdrawn by the commissioner" (VTL 511(1)). Evidence that defendant was charged on a prior date with operating a motor vehicle while knowing or having reason to know that his driver's license was suspended, would be admissible in any subsequent AUO charge to establish his knowledge of that license suspension. Therefore, evidence of each arrest herein would be admissible to establish an essential element of each subsequently charged AUO, and as such are properly joined in this indictment (CPL 200.20(b)).

Further, the April 2, 2011 arrest for AUO in the Third Degree provided the basis for law enforcement's search of defendant, and ultimately led to the discovery of controlled substances on defendant's person. This information is necessary to complete the narrative so that the jury can understand how law enforcement came upon this evidence.

Finally, a review of grand jury proceedings related to the October 31, 2011 arrest reflects a prosecution theory that defendant constructively possessed a loaded firearm that was ultimately located in the trunk of said vehicle. Defendant, on the other hand, contends that he was unaware of its existence, as he indicated in his grand jury testimony (in pertinent part), "I don't know nothing about no gun that was in the trunk of the car or whatever" (Grand Jury transcript, April 13, 2012, at p. 227) and again, "So, my whole thing was like, I don't know nothing about no gun that was in the trunk of the car" (Grand Jury transcript, April 13, 2012, at p. 227).

Defendant's knowledge, or lack thereof, of the contents of the subject vehicle become critical to the prosecution of this offense. Proof of his familiarity with, and prior use of the

vehicle, are therefore material and admissible in assessing his knowledge/awareness of its contents.

The facts of each offense are uncomplicated. The proof of each offense may be easily presented, and readily segregated in the minds of the jurors as they evaluate each charge contained within the instant indictment (*see,* People v. Gause, 19 N.Y.3d 390 (2012); People v. Baker, 14 N.Y.3d 266 (2010); People v. Ford, 11 N.Y.3d 875 (2008); People v. Reyes, 60 A.D.3d 873 (2d Dept. 2009), *lv. den.* 12 N.Y.3d 920 (2009); People v. Mathis, 37 A.D.3d 212 (1st Dept. 2007), *lv. den.* 8 N.Y.3d 987 (2001)).

Finally, defendant has failed to demonstrate that there was substantially more proof of one incident as compared to the other, and/or that there was a substantial likelihood that the jury would be unable to consider separately the proof as it related to each incident (*see* CPL 200.20(3)(a); People v. Hall, 169 A.D.2d 778; People v. Moses, 169 A.D.2d 786), nor has defendant established that he has important testimony to give concerning one incident and a concomitant need to refrain from testifying as to the other (*see,* CPL 200.20(3)(b)).

The Court concludes that all offenses charged within the instant Indictment are properly joined therein. Defendant's request for severance is denied.

STATUTORY SPEEDY TRIAL (CPL 30.30)

Defendant seeks dismissal of the instant indictment pursuant to CPL 30.30(1)(a), alleging a failure by the People to declare trial readiness within the applicable statutory time frame.

A chronological as well as historical analysis is necessary in determining whether defendant has been denied a speedy trial pursuant to CPL 30.30. Based upon uncontested assertions in the motion papers submitted, the Court finds as follows.

On December 30, 2010, defendant was charged with Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree, an Unclassified Misdemeanor with a maximum tern of incarceration of not more than 180 days (VTL 511(2)(b)).

On March 7, 2011, defendant was charged with Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree, an Unclassified Misdemeanor with a maximum term of incarceration of not more than thirty days (VTL 511(1)(b)).

On April 2, 2011, defendant was charged with Criminal Possession of a Controlled Substance in the Third Degree (Class B Felony), Criminal Possession of a Controlled Substance in the Fifth Degree (Class D Felony) and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (Unclassified Misdemeanor).

Although the People indicate that the parties were engaged in plea negotiations *prior* to August 8, 2011, no specifics were offered in that regard. The first documentary evidence of negotiations found by the Court was a letter from the prosecutor to Binghamton City Court and then-defense counsel dated August 8, 2011, wherein defendant was offered the opportunity to enter a plea of guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (Class A Misdemeanor) in full satisfaction of all charges then pending, with an agreed upon sentence of one year in the Broome County Jail. Said disposition was *specifically contingent* upon defendant's waiver of appellate rights *and forfeiture of monies seized* at the time of arrest (Def. Exhibit "E"). In furtherance of the foregoing offer, a court appearance was scheduled for August 31, 2011, for which defendant did not appear. His then-counsel indicated, however, that the pending felony was being reduced to a misdemeanor for disposition, and at said counsel's request, the matter was adjourned to September 28, 2011. On September 28, 2011, defendant appeared with his attorney in Binghamton City Court, at which time counsel indicated agreement

to the foregoing disposition, with the exception of the proposed monetary forfeiture. Defense counsel again requested an adjournment of the proceedings in an effort to resolve the forfeiture issue. Defendant was directed to reappear in City Court on October 5, 2011 for disposition. On October 5, 2011, defendant again appeared with counsel in Binghamton City Court, and the defense again requested an adjournment of the proposed disposition, indicating that the forfeiture issue had not yet been resolved. At that time, defendant, through his attorney, specifically waived his right to a speedy trial pursuant to CPL 30.30 (Defendant's Exhibit "F"), and the matter was adjourned to November 4, 2011.

In the interim, on October 31, 2011, defendant was charged with Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree, Resisting Arrest, Reckless Driving and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree. On November 9, 2011, an appearance was had in Binghamton City Court with respect to the aforementioned misdemeanor disposition. However, in light of the October 31, 2011 arrest, defense counsel requested an adjournment of two weeks so as to permit continued negotiations in hopes of reaching a global disposition.

According to the People's Affidavit in opposition, which is uncontroverted, defense counsel and prosecutor continued to work toward a global resolution of all charges over the next several months. Notably, the defendant never withdrew the waiver of speedy trial which had been proffered on October 5, 2011.

On March 22, 2012, notices of grand jury presentation were sent to defense counsel, scheduling same for March 27, 2012. Prior to presentation, the defendant advised that he wished to have a witness identified as "Dominick" called to testify; however, he [defendant] was unable to provide a last name or address. Notwithstanding, investigators from the District

Attorneys Office were able to locate "Dominick" in Canada, and advised of him of the request for his testimony. "Dominick" indicated, however, that he would be in Canada until the beginning of April. The grand jury did, at defendant's request, elect to hear from "Dominick", whose appearance was adjourned until April 13, 2012 to accommodate the witness' schedule.

On April 13, 2012, testimony resumed before the grand jury. On April 20, 2012, defendant was indicted and charged with each of the foregoing offenses, and the People answered "ready" for trial.

A defendant seeking a speedy trial dismissal pursuant to CPL 30.30 meets his initial burden on the motion simply "by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period" (People v. Goode, 87 N.Y. 2d 1045, *citing* People v. Luperon, 85 N.Y.2d 71). The People then have the burden of identifying the various statutory provisions pursuant to which sufficient days may be excluded from the total period of delay so that the time chargeable to them does not exceed the limit (*see,* People v. Luperon, 85 N.Y.2d 71, 77-78). In the case of **post**-readiness delay, unlike pre-readiness delay (where the People must show that the time charged is excludable), the burden is on the **defendant** to show that such delay is chargeable to the People.

CPL 30.30 requires that the People be prepared to proceed to trial within a specified time, **plus excludable time**, from the commencement of the criminal action. The statute is purely a "readiness rule". It was enacted to serve the narrow purpose of ensuring prompt prosecutorial readiness for trial, and its provisions must be interpreted accordingly (*see*, People v. Anderson, 66 N.Y.2d 529; People v. Worley, 66 N.Y.2d 523). Excludable time must be accounted for in any prosecution, and a felony indictment must be dismissed if the People are not ready for trial within six months after commencement of the action; a misdemeanor punishable by a sentence of

more than three months must be dismissed if the People are not ready for trial within ninety days after commencement of the action; and a misdemeanor punishable by a sentence of not more than three months must be dismissed if the People are not ready for trial within sixty days of the commencement of the action.

A criminal action is typically commenced when an accusatory instrument is filed against a defendant in criminal court (see CPL 1.20(16)). Where a defendant has been served with an appearance ticket, the statute deems the commencement date of the action to be the date of defendant's first criminal court appearance in response to the ticket (*see* CPL 30.30(5)(b); People v. Stirrup, 91 N.Y.2d 434 (1998)). Once the action has commenced, it includes the filing of all further accusatory instruments *directly derived from the initial one* (CPL 1.20(16)(b); People v. Farkas, 16 N.Y.3d 190). Although the term "directly derived" is not defined in the Criminal Procedure Law, it should be accorded its plain meaning - in other words, whether the indictment can be traced to or originates from the prior accusatory instrument (*see,* People v. Osgood, 52 N.Y.2d 37).

Several "criminal transactions" are charged within the present indictment, and although, as previously determined, all are properly joined therein (*see*, CPL 200.20(2)(b)(c)), all are not directly derived from the first charges levied against this defendant, and as such do not relate back to the filing of the very first accusatory instrument for speedy trial purposes.

To illustrate, defendant was charged with Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree on or about December 30, 2010, upon which defendant was arraigned on January 14, 2011. This incident, for purposes of speedy trial, stands alone, with none of the other charges in the indictment deriving therefrom. As such, the People were required to answer "ready" **on that charge** within ninety days of the commencement of that

action, that being the date of defendant's arraignment on January 14, 2011. From the motion papers submitted, there is no indication that the People timely answered "ready" on that charge, nor were they engaged in any conduct within ninety days of the commencement of the criminal action that would toll the time calculations. Inasmuch as the People did not answer "ready" within ninety days from the commencement of that action, **defendant's motion to dismiss Count 7 of Indictment No. 12-209 is granted.**

Similarly, defendant was charged with Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree on March 7, 2011. He was arraigned on that charge on March 16, 2011, which, from the People's perspective, represents the most favorable starting point for CPL 30.30 analysis. As with the charge from December 30, 3011, this charge too stands alone for speedy trial purposes, inasmuch as no other charge(s) within the instant indictment are derived therefrom. This charge, which carried with it a maximum term of incarceration of thirty days (VTL 511(1)(b)), required that the People answer "ready"within sixty days from the commencement of the action; in other words, sixty days from March 16, 2011. From the motion papers submitted, there is no indication that the People timely answered "ready", nor was there any conduct within sixty days of commencement of the criminal action that would toll the running of the statutory time. Inasmuch as the People did not answer "ready" within sixty days from the commencement of this action, **defendant's motion to dismiss Count 8 of Indictment No. 12-209 is also granted.**

On April 2, 2011 defendant was charged with Criminal Possession of a Controlled Substance in the Third Degree (PL 220.16(1) (Count 1 of the indictment), Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06 (5)) (Count 2), and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511(1)(a)) (Count 9).

Defendant was arraigned on said charges on April 4, 2011. The People were required to answer "ready" within six months of the commencement of the criminal action (CPL 30.30(1)(a)) **plus excludable time**; in other words, within six months, exclusive of days chargeable to the defense.

With the commencement of the criminal action as relates to the above mentioned charges (upon arraignment on April 2, 2011), the People would have been mandated to answer "ready" on or before October 2, 2011, **plus** any time properly excluded therefrom.

A review of the instant motion reflects a lack of activity on this prosecution between April 2, 2011 and August 8, 2011. Again, although the People have indicated that the parties were negotiating prior to August 8, 2011, no specifics or documentary evidence of such negotiations were submitted in response to the motions herein. The People's letter to defendant and the local court dated August 8, 2011 setting forth the offer to defendant resulted in a court appearance scheduled in Binghamton City Court on August 31, 2011. The People argue that the time between August 8, 2011 and August 31, 2011 is properly excludable due to defendant's consideration of the plea offer. However, the People's reliance upon People v. Crogan (237 A.D.2d 745 (1997)) in this regard is misplaced. Although time during plea negotiations is excludable for speedy trial purposes, it is so **only** if the defendant requests or acquiesces in the delay of the proceedings (*see,* People v. Waldron, 6 N.Y.3d 463 (2006)); People v. Dickinson ,18 N.Y.3d 835 (2011); People v. Delvalle, 265 A.D.2d 174, *lv. den.* 94 N.Y.2d 879). No such proof has been set forth on this record.

That said, however, a request by or consent of defendant ***or his counsel*** for an adjournment of the proceedings ***will*** result in excludable time for speedy trial purposes (CPL 30.30 (4)(b)). It is uncontroverted that a court appearance was scheduled for August 31, 2011, for which defendant failed to appear. The minutes of that appearance clearly indicate defense

counsel's request for an adjournment to produce defendant. The request was granted and the matter rescheduled to September 28, 2011, at which time defendant did appear. Although defendant argues that he "accepted the plea in part" (Defendant's Affidavit in support, at p.12, ¶ 6), it is undisputed that an unresolved issue remained regarding whether he would be required to forfeit monies seized at or about the time of his arrest as part of the negotiated disposition. As such, no agreement had yet been reached to dispose of these charges. In an effort to resolve the forfeiture issue, defense counsel again requested an adjournment, which was granted until October 5, 2011. On October 5, 2011, defendant again appeared with counsel in Binghamton City Court, wherein the following colloquy took place [*with emphasis added*]:

> "**The Court**: All right, now, Mr. Abdullah, you'll recall that we had adjourned a possible disposition on all three matters that I have before me till today's date. We did appear - correction; there was an appearance on 8/31 and then again on 9/28. We adjourned till today's date because there was still some concern regarding the money that was referenced in Ms. Grace's letter from the district attorney's office in regard to possible forfeiture. It's my understanding that that matter has still not been resolved, and that you are requesting additional time and that **the defendant will be waiving his right to speedy trial** in order to pursue that.
>
> **Mr. Battisti**: That's all absolutely correct, your honor.
>
> **The Court**: All right.
>
> **Mr. Battisti**: **We do waive speedy trial pursuant to section 30.30** while we resolve this monetary situation. Judge, I apologize on behalf of my client for having his phone on.
>
> **The Court**: All right. Mr. Abdullah, you have the right to have the case presented to the grand jury within a certain period of time.
>
> **The Defendant**: Mm-hmm.
>
> **The Court**: Your attorney is still working with the district attorney's office on trying to work out a disposition which he believes to be favorable. There's only one bone of contention that they still have to work out, and he wants additional time, and he has indicated to the Court that you want additional time to be able

to work that out; **that would require you to waive your speedy trial rights and to allow it to be worked out past that time frame. Is that what you want to do?**

The Defendant: Yeah. Yes.

The Court: All right. I will grant that application. The speedy trial is waived on the record, and as soon as it's worked out we will - what I'm gonna do is, I'm gonna give this an actual date though, Mr. Battisti.

Mr. Battisti: Okay

The Court: I don't want this to languish.

Mr. Battisti: No; I understand.

The Court: Today's the fifth; I'm gonna make it to November 4th, so that gives you about a month.

Mr. Battisti: Thank you, Judge."

(Defendant's Exhibit "F", Minutes from October 5, 2011 appearance, Binghamton City Court).

Prior to the next scheduled court appearance, specifically on October 31, 2011, defendant was arrested and charged with Criminal Possession of a Weapon in the Second Degree (PL 265.03(3) (Count 3 of the Indictment), Criminal Possession of a Weapon in the Third Degree (PL 265.02(1) (Count 4), Resisting Arrest (PL 205.30) (Count 5), Reckless Driving (VTL 1212) (Count 6), and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511(1)(a) (Count 10). No specific explanation has been provided in the instant application, but it is apparent that defendant's November 4, 2011 appearance was adjourned to November 9, 2011, at which time defendant again appeared with counsel in Binghamton City Court. At that time, counsel again requested an adjournment of the proceedings, stating, in pertinent part:

"When he [defendant] last appeared, my client was out of custody. Your Honor, last week my client was arrested on an allegation of Criminal Possession of a Weapon in the Second Degree. So I am requesting at this point in time is that

> [sic] this proposed disposition be adjourned out two weeks, that my client's present status remain as it is, allow me the opportunity to get the new police reports because the new facts and circumstances surrounding the new charge, based on what I know at this point in time, seem weak. So I do want the opportunity to sit down with the district attorney's office and discuss the new facts and the present matter before your honor's court, and hopefully reach a global resolution of this unfortunate situation." (Defendant's Exhibit "G")

Apparently no resolution of charges was subsequently agreed upon, as each of the charges from each of the foregoing dates of incident were thereafter presented to a grand jury, resulting in the instant indictment.

It is undisputed that the defendant did not, at any time subsequent to its tender, withdraw the waiver of speedy trial that he had previously tendered. As such, his waiver of speedy trial pursuant to CPL 30.30 continued in effect. All adjournments subsequent to August 31, 2011 were at defense counsel's request. The People ultimately answered "ready" on April 20, 2012. Excluding the delay resulting from adjournments requested by the defense and the time post-waiver, the People's readiness declaration was timely with respect to the April 2, 2011 charges.

Defendant's motion to dismiss Count 1 (Criminal Possession of a Controlled Substance in the Third Degree), **Count 2** (Criminal Possession of a Controlled Substance in the Fifth Degree) **and Count 9** (Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree) **is denied.**

As previously noted, on October 31, 2011, defendant was charged with Criminal Possession of a Weapon in the Second Degree (Count 3), Criminal Possession of a Weapon in the Third Degree (Count 4), Resisting Arrest (Count 5), Reckless Driving (Count 6) and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (Count 10). As previously stated, and again recognizing that excludable time must be accounted for in any prosecution, a felony indictment must be dismissed if the People are not ready for trial within six months after

commencement of the action. Therefore, without taking into consideration any tolling periods, the People had until May 1, 2012 to answer "ready" for trial.

Each of the foregoing offenses was presented to a grand jury which returned an indictment on April 20, 2012, at which time the People answered "ready" for trial (Exhibit attached to People's responding papers).

Defendant makes no claim, nor offers any evidence of, "post-readiness" delays attributable to the People.

The People having answered "ready" within six months from the commencement of the criminal action, **defendant's motion to dismiss the aforesaid Counts 3, 4, 5, 6 and 10 is denied.**

Defendant argues that CPL 180.50 is controlling, alleging that due to the People's failure to file "the reduction of charge motion pursuant to CPL 180.50(3)(A)(I), the contractual waiver of speedy trial time period from October 5th through November 4th is jurisdictionally invalid and should rightfully be charged as time against the People..." (Def. Affidavit in Support, at p.11) Defendant's reliance thereon is misplaced. CPL 180.50 provides statutory authority for a court to make inquiry into the facts of an underlying complaint for the purpose of determining whether a reduction of the charges would be in order, *contingent upon consent of the People.* There is no indication that consent was sought from the People, nor does that fact in any way limit the People's decision to offer a misdemeanor plea offer in satisfaction of pending felony charges.

CONSTITUTIONAL SPEEDY TRIAL (CPL 30.20)

In a Notice of Motion dated September 4, 2012 and filed September 7, 2012, defendant seeks dismissal of Counts One (Criminal Possession of a Controlled Substance in the Third

Degree) and Two (Criminal Possession of a Controlled Substance in the Fifth Degree) based upon an alleged violation of CPL 30.20.

In People v. Taranovich, 37 N.Y.2d 442 (1975), the Court of Appeals identified five factors to be considered in determining whether a defendant's constitutional right to a speedy trial has been violated. Those factors 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 instructs the trial court to "...engage in a sensitive weighing process of the diversified factors present in the particular case," while noting that "...no one factor or combination of the factors... is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it" (*Id.* at 445). Taranovich further instructs that where the "...delay is great enough there need be neither proof nor fact of prejudice to the defendant" (*id.* at 447). The Court hereby considers the specified factors, as follows:

(1) The extent of the delay

The time line of events throughout this prosecution has been examined in detail above. To summarize, charges of Criminal Possession of a Controlled Substance in the Third Degree (Class B Felony) and Criminal Possession of a Controlled Substance in the Fifth Degree (Class D felony) were filed on April 2, 2011. In August 2011, negotiations resulted in an offer to resolve each of the foregoing charges. Although a misdemeanor disposition had been proposed, numerous adjournments were granted at defense request in an effort to resolve an outstanding issue regarding forfeiture of monies seized. In October, 2011, defendant was again charged with, among other things, Criminal Possession of a Weapon in the Second Degree (Class C Violent

Felony) and Criminal Possession of a Weapon in the Third Degree (Class D Felony).

It is apparent that defense counsel and the prosecutor continued their plea negotiations (Def. Affidavit in support, at p. 7), without reaching agreement. The matter was presented to a grand jury commencing in March, 2012, which proceeding was extended to April in an effort to partially accommodate a defense witness' schedule. That proceeding resulted in the instant Indictment on April 20, 2012, which Indictment includes counts charging both the earlier and latter referenced offenses.

Motions were first filed by this defendant in June 2012, with amendments thereto as recently as October 9, 2012. As is the practice, hearings are being scheduled with the filing of this decision and a trial at the next available date.

2. The reason for the delay

The reasons for the delay are amply set forth in the foregoing time line and previous discussion of the defendant's CPL 30.30 motion. As previously noted, no period of post-readiness delay is alleged nor charged to the People in connection with this Indictment.

3. The nature of the underlying charges.

The charges for which defendant seeks dismissal consist of Criminal Possession of a Controlled Substance in the Third Degree, (Possession with Intent to Sell) a Class B Felony and Criminal Possession of a Controlled Substance in the Fifth Degree, (Possession of More Than 500 Milligrams of Cocaine) a Class D Felony.

4. Whether or not there has been an extended period of pretrial incarceration.

Defendant was charged with the instant offenses on April 2, 2011, arraigned on April 4, 2011, and posted bail on April 7, 2011. He remained at liberty until his rearrest on October 31, at which time bail was set. Defendant has remained incarcerated since that time, having been

unable to post bail.

5. Whether or not there is any indication that the defense has been impaired by reason of the delay.

Defendant argues that he has been prejudiced by the enhanced sentence which the People now attach to any plea offer, and further, in conclusory terms, that he has lost touch with potential witnesses. The enhancement of plea offers is based upon the seriousness of charges pending, as well as defendant's past criminal record. He has offered no specifics as to any witness(es) that may now be unavailable, or any efforts made to contact such witness(es) or obstacles to such efforts.

Having duly reviewed and considered the specific circumstances herein in light of the Taranovich factors, this court finds that such factors do not, in this case, support the defendant's claim of an unreasonable delay and/or establish a violation of the defendant's constitutional right to a speedy trial. The Delay here has not been extensive, as less than nine months elapsed from the filing of the felony complaint until the filing of the instant motion. The delay which DID occur was caused in part by motion practice, including at least two separate sets of motions filed by the defense prior to the instant motion, and cannot be attributed to the prosecution (*see,* People v. Crown, 124 A.D.2d 898 (3rd Dept. 1986). Some delay is also attributed to the availability of judicial resources, which delay does not weigh as heavily against the People as prosecutorial inaction (*see,* People v. Rogers, 8 A.D.3d 888 (3rd Dept. 2004)). This Court finds there has been an insufficient showing of any significant delays properly chargeable to the People in this case (*see,* People v. Rouse, 4 A.D.3d 553 (3rd Dept. 2004), *lv. den.* 2 N.Y.3d 805 (2004). Although defendant has been incarcerated over this time period, the charges against him are serious. He also now has two additional felony charges, specifically Criminal Possession of a

Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree. Finally, the Court finds no showing of significant impairment in the defense of this Indictment occasioned by any delay.

Balancing all the Taranovich factors, this Court finds defendant was not deprived of his constitutional or statutory right to a speedy trial. **Defendant's motion to dismiss Counts 1 and 2 of the Indictment pursuant to CPL 30.20 is denied.**

MOTION FOR DISMISSAL IN THE INTEREST OF JUSTICE

Finally, defendant seeks dismissal in the interests of justice pursuant to CPL 170.40(1) in his most recent amendment to the Omnibus Motion, dated October 9, 2012.

It is well established that a dismissal in the interest of justice is to be "exercised sparingly" and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations (People v. Insignares, 109 A.D.2d 221, *lv. den.* 65 N.Y.2d 928). The Court finds that the circumstances of this case do not warrant the extraordinary measure of a dismissal in the interest of justice.

Defendant's motion to dismiss pursuant to CPL 170.40(1) is denied.

TRIAL SCHEDULE

The parties are hereby notified that the trial of those Counts of Indictment No. 12-209 which remain, specifically Counts 1, 2, 3, 4, 5, 6, 9 and 10 thereof, is now scheduled to commence on Monday, November 26, 2012, at 10:30 a.m., and the parties are directed to

contact necessary witnesses forthwith. Should adjournment be necessary due to the unavailability of critical witnesses, the Court will schedule for the next open trial date.

This constitutes the Decision and Order of the Court.

It is so Ordered.

DATED: November 8, 2012
Binghamton, NY

HON. JOSEPH F. CAWLEY
Broome County Court Judge

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