SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: CRIMINAL TERM: PART 30

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THE PEOPLE OF THE STATE OF NEW YORK,

v.

BILLY DIXON,

Defendant.

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Present:
Hon. Elizabeth A. Foley

INDICTMENT
NO. 8225/12

DECISION
AND ORDER

Defendant moves for an order directing that defendant be released from custody pursuant to CPL §30.30(2)(a) due to the People's failure to be ready for trial within ninety days from the commencement of his commitment following his September 13, 2012 arrest. After a review of the moving papers, the People's opposition, the pertinent Supreme Court file and relevant statutory and caselaw authority, defendant's motion is denied.

As a preliminary matter, the Court points out that upon defendant's arraignment in the local Criminal Court on the felony complaint September 14, 2012, bail was set at $50,000.00 bond or $50,000.00 cash. Such bail conditions were continued by this Court upon defendant's arraignment on the instant Indictment October 25, 2012, and remain in force.

The Court will focus upon the specific periods identified by defendant

which he claims as chargeable to the People, and for which the People have particularized a response. In summary, defendant asserts that the periods from: September 13 through October 25, 2012 (42 days); October 25 through December 6, 2012 (42 days); July 11 through July 18, 2013 (7 days) and July 18 through July 23, 2013 (5 days), amount to a total of 96 days of non-excludable time since the commencement of his commitment, while the People claim only 32 days are chargeable to the prosecution for purposes of "speedy trial" calculations, covering the specific periods identified by defendant.

Although defendant highlights only these four time periods, specifying there is "a total of 96 days of includable time charged to the People," defendant also states he "does not consent to any other adjournments" which occurred in this matter. In order to allay any concern about whether or not there is any includable time from the period of December 6, 2012 through July 11, 2013, and to ensure the Court's "speedy trial" calculation of includable time is comprehensive, the Court has examined the several adjournments covering this period, and finds its entirety is excludable. *See*, CPL §30.30(4)(a). Specifically: the period from December 6, 2012 through January 17, 2013 covers the ongoing Open File Discovery process and adjournment for conference; on January 17, 2013 a plea offer was conveyed, the matter was adjourned to March 7, 2013 for conference

and the continuation of Open File Discovery; on March 7, 2013 the matter was adjourned to April 11, 2013 for conference and the continuation of Open File Discovery; on April 11, 2013 a disclosure dispute arose, and the matter was adjourned to May 23, 2013 for completion of Open File Discovery; on May 23, 2013 the Court set a motion schedule with regard to the unresolved disclosure dispute, and adjourned the matter to July 11, 2013 for the Court's decision thereon.

In pertinent part, CPL §30.30(2)(a) provides:

> ... where a defendant has been committed to the custody of the sheriff in a criminal action he must be released on bail or on his own recognizance, upon such conditions as may be just and reasonable, if the People are not ready for trial in that criminal action within [] ninety days from the commencement of his commitment to the custody of the sheriff in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony ***.

Defendant was arrested September 13, 2012 and thereafter arraigned September 14, 2012 in Criminal Court on a felony complaint charging him with, *inter alia*, the D felony of Sexual Abuse in the First Degree as well as other related charges, and the matter was adjourned to June 19, 2012 for Grand Jury action.

The People subsequently filed an Indictment containing counts of, *inter alia*, Sexual Abuse in the First Degree, as well as a Statement of Readiness for Trial, on October 4, 2012, and the case was calendared for arraignment in Supreme Court on October 25, 2012. Defendant contends this entire 42-day period is chargeable to the People, because notice of such Statement of Readiness was not served upon his attorney of record, while the People, acknowledging that service was made upon a different defense attorney, nevertheless argue the chargeable period ended upon their filing of a Statement of Readiness.

That "the statement of readiness [filed with the Criminal Term Clerk October 4, 2012] accurately conveyed the People's readiness to proceed with their case against the defendant" is not in dispute. However, as the Court of Appeals made clear in *People v. Kendzia*, 64 NY2d 331 (1985), where such a filing method is employed, trial readiness must be communicated to defense counsel. Here, casting their error as a "good faith mistake," the People served their Statement of Readiness upon an attorney associated with Brooklyn Defender Services, who is "listed in the District Attorney's records as counsel to the Defendant," even though the Notice of Appearance in the Supreme Court file, dated September 14, 2012 (and associated with defendant's Criminal Court arraignment), was filed by a different attorney associated with The Legal Aid Society, a separate and distinct

institutional legal defender residing at a different address. There is no evidence that a Notice of Appearance was filed by Brooklyn Defender Services in this case. In consequence of the People's unexplained mistake, defendant's attorney of record did not receive notice of the People's trial readiness. The People aver such mistake should be excused, principally because it does not signify an "insurmountable impediment to the trial's very commencement," and a determination otherwise would allow a "minor technical discrepancy" to result in defendant's release from custody. The People also point out notice of defendant's Supreme Court arraignment was sent by the Court to the same Brooklyn Defender Services attorney on October 15, 2012; this apparent error on the Court's part is equally inexplicable in light of the prior Notice of Appearance filed by The Legal Aid Society attorney, except that the Statement of Readiness filed by the People indicates personal service thereof was made upon the attorney associated with Brooklyn Defender Services on October 5, 2013, in apparent conflict with the information supplied by the Notice of Appearance. In any event, the Court cannot, under these circumstances, agree with the position taken by the People. The People were clearly on notice of the name and contact information of defendant's attorney of record, and, having failed to notify the correct attorney of their Statement of Readiness, such Statement is ineffectual insofar as it purports to

serve as proper notice to defense counsel. *See, generally, People v. Kendzia, supra*; *People v. Starkey*, 4 Misc3d 1002(A) (S. Ct. Kings Co. 2004); *People v. Chittumuri*, 189 Misc2d 743 (Crim. Ct. Queens Co. 2001); *People v. Stewart*, 21 Misc3d 1109(A) (Crim. Ct. N.Y. Co. 2008); *compare, People v. Carter*, 91 NY2d 795 (1998); *People v. Osorio*, 39 AD3d 400 (1st Dept.), *lv denied*, 9 NY3d 925 (2007); *People v. Vaughn*, 36 AD3d 434 (1st Dept.), *lv denied*, 9 NY3d 870 (2007); *People v. Sutton*, 199 AD2d 878 (3rd Dept. 1993).

Thus, the People are chargeable for this time period, from September 13 through October 25, 2012, a total of 42 days.

With regard to the period from October 25 through December 6, 2012, defendant asserts 42 days are chargeable to the People, while the People counter this entire period is not includable for purposes of "speedy trial" calculations.

On October 25, 2012, defendant was brought before the Court for arraignment on the instant Indictment. Standing with him was an attorney from Brooklyn Defender Services, though not the same one to whom notice of the People's Statement of Readiness and notice of Supreme Court arraignment were sent. Such defense counsel -- with whom defendant conferred -- after acknowledging receipt of the Indictment, waived its public reading, and stated, "my client enters a plea of not guilty." Thereafter, the People stated their

readiness for trial on the record in open court in the presence of defendant and counsel from Brooklyn Defender Services, and the Court requested that defense counsel "[t]alk to your client about video conference," and through such counsel, was assured defendant had consented to appear in court on the next date via video conference, and the matter was adjourned to December 6, 2012.

Here too, defendant does not dispute the People's actual state of trial readiness, challenging the People's open court declaration solely upon the ground that it was "not made to defense counsel" nor thereafter communicated to defendant's attorney of record, and is therefore ineffectual to stop the "speedy trial clock." In this instance, the Court disagrees with defendant.

In the Court's view, that it was not actually defendant's attorney of record from The Legal Aid Society who was present, but rather an attorney from Brooklyn Defender Services, does not operate to vitiate the otherwise valid open court statement of readiness, and the requirements and objectives which must be adhered to -- while perhaps not perfectly here -- have been met. *See, generally, People v. Kendzia, supra*; *compare, People v. Almarales*, __ Misc2d __, 2002 WL 31995811 (S. Ct. Kings Co.); *People v. Burroughs*, 35 Misc3d 1209(A) (S. Ct. Bronx Co. 2012); *People v. Telemaque*, 36 Misc3d 1239(A) (Crim. Ct. Kings Co. 2012). The misconception concerning the identity of defendant's attorney of

record was reinforced upon defendant's courtroom appearance on October 25, 2012 with the Brooklyn Defender Services attorney, even though defendant had previously appeared with his attorney of record at the time of his Criminal Court arraignment little more than one month earlier.[1] Notably, defendant, did not disavow or voice any objection to the legal representation afforded to him at the time of his arraignment on the Indictment, and certainly no grounds have been advanced upon which to found any colorable claim that defendant's right to counsel was abridged. Indeed, upon the papers before the Court, no issue has been raised with respect to any actions taken or record statements made by the Brooklyn Defender Services attorney, who actively participated in the calendar proceedings with defendant and where defendant's status was certainly discussed, nor has a claim been asserted that defendant's legal representation at that time was deficient or invalid in any way.

Moreover, the time from October 25 through December 6, 2012 is independently excludable because this period marks the start of Open File Discovery, and an adjournment for conference. In addition, this period is

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[1] Parenthetically, defendant's attorney of record does not indicate when, or how, he became aware that defendant's case was on the Court's calendar December 6, 2012, nor when he communicated with defendant during the period from the arraignment in Criminal Court to December 6, 2012.

concurrently excludable based upon the Court's oral request that the pertinent Grand Jury minutes be submitted for an *in camera* inspection and resultant written Decision and Order dated December 6, 2012 sustaining all counts of the instant Indictment. *See*, CPL §30.30(4)(a).

In the Court's opinion, the People are not chargeable for the period from October 25 through December 6, 2012.

On July 11, 2013, the People were not ready to proceed with consented-to hearings, and the matter was adjourned to July 18, 2013; as the People concede, 7 days for this time period are chargeable to the prosecution. On July 18, 2013, the People were again not ready, and the matter was adjourned to July 23, 2103; as the People concede, 5 days for this time period are chargeable to the prosecution. On July 23, 2013, the matter was put over to the next day, for hearings, which were then held and decided. The instant motion was filed by defendant's attorney of record on July 22, 2013.[2]

The Court concludes that no more than 54 days of delay are chargeable to

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[2] The Court merely notes that, in general, a period of time is excludable as resulting from a defendant's pre-trial motion (see, CPL §30.30[4][a]). Here, although defendant's prior motion filed May 31, 2013 was then under consideration and ultimately decided by Decision and Order dated July 25, 2013, the parties and the Court were endeavoring to schedule and conduct hearings so as to prevent delay relative to any motion practice.

the People. Consequently, as less than 90 days of includable time have elapsed since the commencement of his commitment to custody, defendant has failed to establish a violation of CPL §30.30(2)(a), and the Court therefore finds defendant is not being illegally detained.

Accordingly, it is hereby

ORDERED, that defendant's motion for an order directing his immediate release is denied.

ENTER

Dated: August 19, 2013

ELIZABETH A. FOLEY, J.S.C.