

People v Wallace

2017 NY Slip Op 31851(U)

August 16, 2017

City Court of Rye, Westchester County

Docket Number: 16-02623

Judge: Joseph L. Latwin

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This opinion is uncorrected and not selected for official publication.

CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

No. 16-02623

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER

HENRY WALLACE,

Defendant.

APPEARANCES:

*The People by Anthony A. Scarpino, District Attorney (Courtney Johnson,
Assistant District Attorney)*

Defendant by Richard A. Portale, Portale & Randazzo, LLP, White Plains, NY

I can't wait forever
Even though you want me to
I can't wait forever
To know if you'll be true
Time won't let me
Time won't let me
Time won't let me wait too long

The Outsiders, *Time Won't Let Me* [1965].

Defendant has been in custody for over a year. This case raises the questions of whether CPL §180.85 requires dismissal and whether a superseding misdemeanor information may be filed after a motion under CPL § 180.85 has been filed. The crux of this case revolves around the warrant issued against the defendant. As long as the warrant is extant, the Court is informed that the Immigration and Customs Enforcement (“ICE”) will not consider a bail application. If the felony charge is dismissed, the warrant will vanish and presumably, defendant may be bailed out.

Defendant was arraigned in Rye City Court on June 21, 2016 upon charges of Grand Larceny (Penal Law § 155.30), CPFI 2nd (Penal Law § 170.25), and CPSP 4th (Penal Law § 165.40) and was remanded to the custody of the Westchester County Department of Corrections. On August 9, 2016, a Superseding Felony Complaint was filed and an SCI was offered and was executed on September 9, 2016. The case was thereafter adjourned several times for SCI control until April 25, 2017. Defendant demanded a felony hearing and it was scheduled for May 2, 2017. On that day, the People did not proceed with the felony hearing and the defendant was released on his own recognizance pursuant to CPL § 180.80. Upon his release by this Court, defendant was taken into Federal custody by ICE, and the Court is informed that he remains in Federal custody to this day. The defendant has not appeared since June 27, 2017, nor have the People produced him since then. While the Court has not done a precise computation, the Court believes that CPL 30.30 time has not yet expired. Defendant has been in custody for a year and two months and has not been indicted.

On June 30, 2017, defendant filed a motion to terminate pursuant to CPL § 180.85. Pursuant to CPL § 180.85(2), the Court fixed a return date of August 8, 2017 and provided the parties with written notice of the return date.

CPL § 180.85 was enacted by Chapter 518 of the Laws of 2004 on the request of the Chief Administrative Judge on the recommendation of his Advisory Committee on Criminal Law and Procedure. There had been a New York State Commission of Investigation report in 2003 that examined the pendency of thousands of “stale felony complaint” cases and the ongoing efforts to deal with the backlog. The “stale” cases were impacting arrestees’ employment, licensing, benefits, and availability of services, especially due to the increased fingerprinting regimen imposed by the State. CPL § 180.85 authorizes dismissal of felony complaints held for Grand Jury action but not presented for months or years.

The enactment of CPL § 180.85 partially closed a technical gap in criminal procedure exposed by the opinion in *Morgenthau v. Roberts*, 65 NY2d 749, 492 NYS2d 21 [1985]. Where a defendant charged by felony complaint has been held for the Grand Jury after arraignment in a local criminal court the pertinent papers are transferred to the superior court and upon arrival there the matter no longer is pending in the local criminal court. Meanwhile, the speedy

trial statutory time clock requiring the People to announce readiness for trial continues to tick (CPL § 30.30) and the time for the People's announcement of readiness may expire even though the matter has lain fallow without presentment to a Grand Jury. Nevertheless, the superior court where the charge is pending had no statutory or supervisory authority to dismiss the felony complaint (*see Morgenthau v. Roberts, supra*, at 751-752), notwithstanding that defendant would have a *prima facie* statutory right for dismissal of the action by that court due to expiration of the People's time for announcement of readiness, if the case had been presented to the Grand Jury. Thus, the matter remains pending in the superior court but in limbo until the People present the case to a Grand Jury.

Until enactment of this CPL § 180.85, there was no procedure for dismissal of the case where the People have failed to present the matter to the Grand Jury for a lengthy period of time extending well beyond the speedy trial requirement, even after factoring out allowable periods of delay to be excluded from the deadline (see CPL § 30.30[4]). Meanwhile the charge remains in suspension and defendant is burdened with the impediment of a pending felony charge while his or her background is investigated for any number of licenses and employment clearances.

CPL § 180.85, while clearly not a panacea, provides a limited window for disposing of stale charges where the People have no present intention of continuing the prosecution. It is a carefully drafted compromise that inures to the benefit of defendants without unreasonably imposing upon either the People's right to prosecute or public safety. *See*, Preiser, McKinneys Practice Commentaries to CPL 180.85.

CPL § 180.85(1) says

After arraignment of a defendant upon a felony complaint . . . , either party or the local criminal court or superior court before which the action is pending, on its own motion, may move in accordance with the provisions of this section for an order terminating prosecution of the charges contained in such felony complaint on consent of the parties.

Defendant has made such a motion.

CPL § 180.85(2) says

A motion to terminate a prosecution pursuant to this section may only be made where the count or counts of the felony complaint have not been presented to a grand jury or otherwise disposed of in accordance with this chapter. Such motion shall be filed in writing with the local criminal court or superior court in which the felony complaint is pending not earlier than twelve months following the date of arraignment on such felony complaint. Upon the filing of such motion, the court shall fix a return date and provide the parties with at least thirty days' written notice of the motion and return date.

Defendant was arraigned on a felony count that has not been presented to a Grand Jury for more than twelve months.

CPL § 180.85(3) says

Where, upon motion to terminate a prosecution pursuant to this section, both parties consent to such termination, the court, on the return date of such motion, shall enter an order terminating such prosecution. For purposes of this subdivision, a party that is given written notice of a motion to terminate a prosecution shall be deemed to consent to such termination unless, prior to the return date of such motion, such party files a notice of opposition thereto with the court. Except as otherwise provided in subdivision four, where such a notice of opposition is filed, the court, on the return date of the motion, shall enter an order denying the motion to terminate the prosecution.

Here, the People have not consented to termination. While the People have not filed a notice of opposition to the termination motion, they have sought to file a superseding misdemeanor information. Does the superseding information constitute notice of objection? The Legislative history offers no guidance how to treat this situation. No reported case illuminates the issue. The language of the statute does not say what form the notice of objection is to take – whether it must be in writing, oral, or by implication. The superseding information evinces the People's present intention of continuing the prosecution disposing of stale felony charge here by pursuing the misdemeanor charge. This comports with the statute's purpose of disposing of stale felony charges.

The Court chooses to treat the superseding information as a request by the People pursuant to CPL § 180.50(2) and reduces the felony charge to a misdemeanor charge. In offering the superseding information, the People consent to the reduction. Here, the People's offering for filing of a superseding misdemeanor information itself would appear to satisfy the court that there is reasonable cause to believe that the defendant committed an offense rather than a felony under CPL § 180.50(2). "Section 180.50 does, of course, permit an inferior court judge, with the consent of the prosecutor, to reduce or convert a felony complaint to one charging a non-felony offense. But, this section is not, as defendant suggests, a plea-bargaining statute. It is nothing more than a safety-valve, so to speak, designed to take care of the instance where the charge of Any felony is unwarranted." *People v Gardner*, 78 Misc2d 744, 359 NYS2d 196 [Supreme Ct, Westchester County 1974].

Alternatively, the Court may defer the disposition of this motion pursuant to CPL § 180.85(4). This would keep the felony charge alive and permit the People during the forty-five day deferral period to indict or supersede.

CPL § 180.85(4) says

Notwithstanding any other provision of this section, where the people file a notice of opposition pursuant to subdivision three, the court, on the return date of the motion, may defer disposition of such motion for a period of forty-five days. In such event, if the count or counts of such felony complaint are presented to a grand jury or otherwise disposed of within such period, the court, upon the expiration thereof, shall enter an order denying the motion to terminate the prosecution. If such count or counts are not presented to a grand jury or otherwise disposed of within such period, the court, upon the expiration thereof, shall enter an order terminating the prosecution unless, within the forty-five day period, the people, on at least five days' written notice to the defendant, show good cause for their failure to present or otherwise dispose of such count or counts. If such good cause is shown, the court, upon expiration of the forty-five day period, shall enter an order denying the motion to terminate the prosecution.

This subsection appears to allow a grace period in which the People may "otherwise dispose" of the felony count. That would appear to include superseding the felony count with a reduced charge.

The Court intends that this case be promptly resolved. It has been pending too long. The Court will try this case at the end of November, beginning of December, unless earlier resolved. A pre-trial conference will be scheduled for October 27, 2017 at 0900.

IT IS HEREBY

ORDERED and ADJUDGED that the superseding misdemeanor information is accepted for filing; and it is further

ORDERED and ADJUDGED that the defendant's motion to terminate the prosecution pursuant to CPL 180.85 is denied; and it is further,

ORDERED and ADJUDGED that upon the filing of the superseding misdemeanor information, the felony complaint is hereby dismissed; and it is further

ORDERED that the People secure the defendant's appearance so that he may be arraigned on the superseding misdemeanor information on or before September 12, 2017; and it is further

ORDERED that a misdemeanor warrant be issued, and the existing felony warrant shall be withdrawn upon the issuance of a misdemeanor warrant.

Dated: Rye, New York
August 16, 2017

JOSEPH L. LATWIN

Papers:

- Affirmation of Richard A. Portale dated June 30, 2017
- the Court's CPL 180.85 Notice
- Superseding misdemeanor information
- Letter of Richard A. Portale dated August 10, 2017
- Letter of Courtney L. Johnson dated August 11, 2017