

People v Almonte

2023 NY Slip Op 31193(U)

April 18, 2023

Supreme Court, Bronx County

Docket Number: Indictment No. 135/19

Judge: Ralph Fabrizio

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART TRP

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THE PEOPLE OF THE STATE OF NEW YORK

Indictment No. 135/19

-against-

MARIO ALMONTE,

Defendant.

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On Sunday, January 22, 2023, defendant filed a motion pursuant to CPL 30.20, as well as the United States Constitution and the New York State Constitution, alleging that the People have violated his constitutional right to a speedy trial. The motion was made returnable in this part at 9:30 a.m. the next day, Monday, January 23, 2023. The clerk accepted service on January 24, 2023, the date the case was on this Court's calendar for pre-trial hearings and trial. Defense counsel did not appear on the date the motion was noticed first be heard, due to illness. The Court, alerted to the filing of the motion, ordered the People to respond by March 2, 2023. The Court adjourned the case for its decision to March 29, 2023. On the decision date, the People asked for an extension of time to file their response. The Court granted that application and the People served and filed their response on Sunday, April 2, 2023. Based on its review of the motion papers, the court file, and other court records, the motion to dismiss is denied.

Defendant agrees that this Court should utilize the familiar five-factor test set out in People v. Taranovich, 37 NY2d 442 (1975) in determining whether to grant this motion to dismiss his case. Those factors are: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the charges; (4) whether there has been an extensive period of pre-trial incarceration; and (5) any prejudice to the defendant as a result of the delay. Id. at 445.

The third factor can be dealt with quite simply. Defendant is charged as an accomplice to Murder in the Second Degree, in this case a "felony murder." The People allege that defendant and co-defendant Adames, acting in concert, fought with, took property without permission and by force from, and stomped on victim Angel Reyes-Godoy. The crime is alleged to have occurred on December 16, 2018, more than four years ago. The People also allege that defendant picked up the victim and threw him into the street and into the path of moving cars. A car struck the victim; the victim died a short while later. The grand jury found reasonable cause to charge defendant with acting in concert with co-defendant Adames in committing second degree murder, and other charges. Another judge reviewed the entirety of the evidence presented to the grand jury and found the evidence supported all charges in the indictment. While the

“nature of the charges” cannot be the dispositive factor in a motion to dismiss based on an alleged violation of a defendant’s constitutional right to a speedy trial just because the crime is a homicide, see People v. McDonald, 203 A.D.3d 636 (1st Dept. 2022), it is of course a factor to be weighed as part of the Taranovich formula. As noted, this is a homicide case.

Factor four – the length of defendant’s pre-trial incarceration – cannot be disputed. Defendant has remained continuously incarcerated since the time of his arrest. When defendant filed this motion, he had been held in custody while awaiting trial for nearly 1500 days. Whether this is considered an “extensive” period of pre-trial detention under Taranovich factor four may in some cases be a matter of debate. The extensiveness of the period of pre-trial incarceration is apparently meant to be determined simply by counting the period of time. However, courts have “steadfastly refused to set forth a per se rule beyond which a criminal prosecution may not be pursued” when a defendant is in custody awaiting trial. See People v. Wiggins, 31 N.Y.3d 1, 10-11 (2018) (citing Taranovich, 37 N.Y.3d at 445). Thus, whether a particular period of pre-trial incarceration is considered “extensive” is something that will vary from case to case. Nonetheless, where a defendant has remained in custody for more than four years prior to the filing of a constitutional speedy trial motion, which is the scenario in this case, this factor must be given serious consideration. This Court finds that the length of defendant’s pre-trial incarceration must be given substantial weight in determining this motion.

Factor four cannot be read in isolation. Under the second Taranovich factor, this Court must also consider the “reason” for this extensive delay. One reason that exists is beyond the People’s control, beyond the defense control, and beyond any government control. That reason is the out-of-control COVID pandemic, and the still present aftermath. Bronx County Supreme Court has been dealing with a seemingly intractable backlog of cases – a great number of which are homicides – tied in part to the COVID pandemic and its ever-present shadow that shades the effective and efficient operation of the criminal justice system. Between March 2020 and March 2021, no cases could possibly be brought to a trial before a jury in Bronx County Supreme Court, Criminal Division. Although this Court attempted to extend its non-emergency operations and empanel petit juries in November 2020, a surge in COVID outbreaks in this courthouse and within the Bronx community placed that plan on hold for several additional months. That delay of more than an entire year caused a systemic backlog of previously trial ready matters, such as this, that had been pending prior to March 16, 2020. Although the courts never closed, and within days Bronx Supreme Court, Criminal Division transitioned to an almost completely virtual platform, there was no trial possibility. Court staff opened the real courtrooms but litigants, and at first most judges, worked remotely. While judges returned in person to the courthouse in June 2020, and a group of clerks and court officers who had worked in the actual courtrooms and never left remained in the building, the fact remains that until it was deemed safe to bring jurors and attorneys and court reporters into the building, no defendant could have a case brought to trial. Grand juries were empaneled in late 2020, only to be disbanded. It was not until March 2021 that the administrative judges involved believed it was safe to begin to empanel a

petit jury for a single trial in this courthouse. For multiple reasons, the first post-COVID trial in Bronx County Supreme Court did not commence until May 2021. Because of social distancing, courthouse construction, and staffing problems, only one case at a time could be tried for a couple of months after May 2021. However, by the end of 2021, multiple trials were underway in this courthouse, and that number increased steadily throughout 2022. Since the resumption of jury trials, the backlog has been aggressively addressed. In 2022, with fewer judicial, clerical, court officer, court reporter, and other needed resources present than at any prior time, it has been all hands and feet on deck. Nearly every available judge has presided over more than four dozen criminal jury trials in this courthouse, while still processing new cases flooding in because of the well-documented surges in violent and other crimes. The only judges not trying cases are those in a couple of specialized parts.

Thus, there is at least a one-year period of delay in this matter that in this Court's opinion does not implicate any constitutional speedy trial concerns. Defendant was incarcerated for more than a year prior to the COVID pandemic. During that period, both defendant and the co-defendant filed a series of motions. The People filed a cross-motion. This caused a period of delay resulting from defense-initiated motion practice. All motions were finally resolved by August 28, 2019, and the case was adjourned for pre-trial hearings and trial until October 8, 2019. This period between the arrest and the date set for trial also does not, in this Court's opinion, implicate any "reason" for constitutional speedy trial concerns. On October 8, 2019, court records show that defendant's trial counsel did not appear in court and Justice Steven Hornstein had to call counsel by telephone. The reason for that period of delay is based on counsel's non-appearance. The next date, November 22, 2019, counsel was present. The People were not ready for trial because the ADA assigned to the case said they had just completed another trial. The case was adjourned until January 22, 2020, once again for hearing and trial. This is the first pre-COVID period that has constitutional implications. See People v. Johnson, 38 NY2d 271, 277 (1975).

Another issue that amounts to a reason for delay in this matter relates to a significant change in the law that arrived at about the same time as the first deadly coronavirus strain made its way into New York State. On January 1, 2020, the Discovery Reform Act of 2019 took effect. As it relates to a potential "reason for delay" factor for constitutional speedy trial purposes, the People cannot state "ready" for trial unless they file a certificate that they have complied with all their discovery requirements ("C of C"). Although the People had stated "ready" for trial prior to January 1, 2020, and had provided substantial discovery according to some court records, they had not filed a valid C of C and were not ready for trial on January 22, 2020. According to court records, it appears that the parties agreed to adjourn the case for a discovery "conference" to February 19, 2020. Court records also show that defendant's attorney "waived" some time on February 19, 2020, to resolve discovery issues created by the new statute; co-defendant's counsel noted that the People still had outstanding discovery obligations under the new discovery laws and did not agree. The case was adjourned into April 2020. The reason for this period of delay is kind of a mixed bag; on the one hand, the People did not meet their "new" discovery obligations.

On the other hand, defense counsel appears to have agreed to delay the trial to receive whatever disclosure might have still been outstanding. No one could have known that the trial would be delayed for more than a year based on a virus that was lurking in the community.

Although the COVID pandemic is the primary reason for the delay in bringing the case to trial prior to March 2021, there was additional defense litigation in this matter that amounts to additional reasons for delay. The parties appeared via SKPE to conference the case on July 6, 2020. Defendant also filed a motion to sever. The motion court delayed a final decision and held that motion in abeyance until after a pre-trial Huntley hearing. The case was optimistically placed on an in-person trial calendar for January 22, 2021. However, not only were trials postponed, but all non-emergency "in person" appearances were cancelled due to a COVID uptick. The case was next on for hearing and trial on May 13, 2021. On that date, defendant's attorney told the judge he had a trip planned and would be unavailable for most of the rest of the month of May. The parties next selected June 22, 2021, for the trial. The Court finds that the "reason" for this part of the delay was not due to the People or a backlog, but because of defense counsel's schedule.

However, because of the discovery reform act, the People are also responsible for much delay during this period, even though this is not the sole reason for this period of delay. As it turned out, the People still could not be "ready" for trial under the discovery reform act because they did not file their valid C of C until December 17, 2021. While trial "readiness" is a creature of statute, and the discovery statutes are tied to trial "readiness" under CPL Article 30, which does not apply for homicide cases, the short and voluminous discovery deadlines apply to all cases. An extensive delay caused solely by the People's failure to provide CPL Article 245 disclosure is something that in this Court's opinion now implicates constitutional speedy trial concerns, even though most discovery is not constitutionally required. Thus, based on its review, a discovery based "reason" for the delay between June 22, 2021, and December 17, 2021, based on the failure to complete discovery obligations and file a C of C, could still be considered a matter of constitutional concern.

There is a flip side to discovery-reform "reason for delay" under Article 245. Under the discovery reform law, once the People have filed a valid C of C, then the defense must, by the same reform law, file their own "reciprocal C of C." The failure to do so in a timely manner will result in a delay that does not have constitutional speedy trial implications in terms of the People. But the failure of a defendant to do so still is a discovery based "reason" for delay.

On December 17, 2021, the case was adjourned to February 7, 2022, and that is when it first appeared on this Court's calendar. The parties asked for an adjournment to negotiate a plea, and the case was adjourned for one week for either a disposition or for hearing and trial. The People stated ready for trial on February 17, 2022. According to court records, defendant's attorney did not appear when the case was called; the People argue that they understood defendant was appearing in another case in another

county. No matter the reason, there was no part available to try the case. This case was adjourned for trial to March 10, 2022. On that date, defense counsel informed the Court that he was on trial in Queens County. On March 30, 2022, the co-defendant was ill and did not appear. Defense counsel had a planned vacation in April 2022, and the case was next on May 4, 2022. On that day, defense counsel appeared and left before the case was called. On May 23, 2022, co-defendant's counsel had an emergency. In this Court's opinion, the reasons for the delay between December 17, 2021 and June 1, 2022 do not implicate any constitutional concerns.

On June 1, 2022, the People were not ready. The case was adjourned to June 21, 2022. On June 21, 2022, the clerk's notes indicate that defense counsel indicated he was "engaged" on another matter. The Court learned that defendant's attorney would be on vacation between July 13 and 17, 2022, and then between August 1 and 14th, 2022. This Court adjourned the case for trial until September 13, 2022. The reason for the delay again during this period is tied more to the defense.

More significantly, as it turned out, court records show that defendant did not file a defense C of C within the period required by statute. Defendant ultimately filed the requisite defense C of C on August 24, 2022. Again, the discovery reform act, and the lack of any legislative guidance about what this means in terms of a murder case and constitutional "reason for delay" analysis, would seemingly support a finding that the failure of the defense to have filed a reciprocal "C of C" would remove the entire period between the People's having certified their compliance and defendant filing his own certification from a prosecution-based "reason for delay" in a constitutional analysis.

On September 13, 2022, the People stated they were not ready to proceed to trial. However, defense counsel had become engaged on another trial on September 10, 2022. Counsel was on trial in that matter until early December 2022. Because that trial had unpredictable delays, this Court kept adjourning this matter for trial, first to October 18, 2022, and then to November 15, 2022. On both of those dates, defendant's counsel was on trial. On December 6, 2022, the People were not ready because the assigned ADA was out on medical leave. The attorney for the co-defendant advised the Court that he would not be available from January 3 until January 23, 2023. On January 23, 2023, defendant's attorney filed this motion.

The case is decidedly old. The reason for the delay, as it pertains specifically to the People in this matter, involves a two-month period beginning November 22, 2019, when, following motion practice, they were not ready for trial because the prosecutor had just completed one trial and was scheduled to start another case. That period is de minimus for overall constitutional speedy trial/reason for delay analysis. The Court recognizes that there are constitutional implications of a later, lengthier period of delay attributed, not to the pandemic, but to the People's failure to have complied with all their time-sensitive discovery obligations. There are two months of discovery related delay pre-pandemic – from January 22 to March 16, 2020 – and then from June 22, 2021, until December 17, 2021. But, as it appears from court records that defense counsel consented to delay during all or part of the period from January 22, 2020, that period in

this Court's opinion should not factor into a "reason for delay" analysis of any constitutional significance. There is concern about the six-month post-pandemic period prior to the People's failure to provide all required discovery. Although this Court is unaware of what discovery remained outstanding, the legislature has also provided that a defendant must show "prejudice" to justify a "late disclosure" sanction that can include dismissal. Based on the statute as drafted, this Court believes it is required to weigh the People's failure to have certified compliance in a timely manner in determining whether his constitutional right to a speedy trial has been violated.

Still, the basic "reason" for the majority of the delay after the resumption of jury trials does not lie with the prosecution. In calendar year 2022, documented reasons showing the absence of defense counsel, defense counsel's being on trial in other matters, and counsel's failure to have filed a defense C of C are significant reasons for delay. Delays attributable to the People due to their prioritizing other cases in their office are of course serious concerns when it comes to constitutional speedy trial analysis; a significant period delay that is "primarily attributable to 'case backlog in the District Attorney's Office'" is a matter of constitutional concern. See Johnson, 38 NY2d at 277 – 280. However, delays due to a backlog of criminal matters on a defense attorney's personal calendar do not implicate constitutional speedy trial concerns. Counsel's claim that "for most of the dates [after June 2020] the defense remained ready to proceed to trial" (Affirmation dated January 22, 2022, at ¶ 17) is simply not supported by the records reviewed by this Court. As noted, counsel was on trial from September 12, 2022, until December 16, 2022, in another Bronx County matter. Records made show counsel did not appear on May 13, 2021, October 19, 2021, February 15, 2022, March 10, 2022, and June 21, 2022, and some of these adjournments are attributed to his appearing for other clients on other matters as well. Thus, in terms of its determination for the reason for the extensive delays in this case at this time and for this motion, this Court finds the reason is mostly due to the pandemic and defense counsel's lack of availability.

The extent of the delay, a separate Taranovich factor, is tied to the overall period the case has remained unresolved, either by plea or trial. In determining the weight to be given to the "extent of the delay" factor, courts must examine all "the circumstances of each particular case." People v. Prosser, 309 N.Y. 353, 357 (1955). Simple cases with uncomplicated evidence may require less time to prepare for and bring to trial than complex matters. This case is believed to be built in large part on a foundation of direct and circumstantial evidence. As far as the Court can tell, much of the People's trial evidence will consist of video surveillance, crime scene investigation, the testimony of a Medical Examiner, and police and civilian witnesses. Thus, it does not appear that this matter is at all complex.

There is no specific prejudice claimed by defendant in terms of Taranovich factor five. Indeed, defendant states he "cannot at this point identify a specific impairment of his defense." (Affirmation dated January 22, 2023, at ¶ 21). Of course, a defendant will suffer "presumptive prejudice" where there is "an extraordinary length of delay" and especially where a "defendant was incarcerated during the entirety of the delay."

McDonald, 203 AD3d at 636 (six-year period of delay). Nonetheless, defendant opines that there is some specific prejudice “due to an almost two-year delay in receiving discovery materials,” and that because of this “such an articulation is unnecessary to a finding of prejudice.” (Affirmation dated January 22, 2023, at ¶ 21). As noted, the People’s compliance with the entirety of their discovery obligations was untimely. However, as also noted, CPL § 245.80(1)(a) provides that, in terms of belated discovery, which is at most the case here, “the court shall impose a remedy or sanction that is appropriate and proportionate to the party entitled to disclosure.” There is a document in the court file from January 2020, called a C of C, in which the People enumerate significant evidentiary discovery they already provided. While it does not appear that anyone made a formal motion challenging that document, it does appear from court notes that there were all sorts of records made by co-defendant’s counsel about what items of “automatic” discovery remained outstanding. Whatever they might have been, it is also undisputed that the December 17, 2021 C of C, filed before the case reached this part, has not been formally challenged.

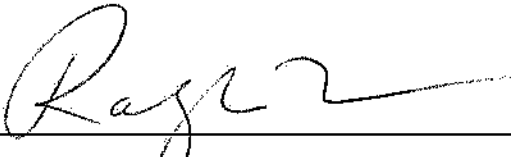
In January 2020, there were inconsistent rulings on discovery compliance, and what might or might not constitute adequate “due diligence” to justify the People’s filing a C of C that did not have all of the voluminous items of disclosure. Now, it seems more settled that the People can file a C of C and can claim they have exercised due diligence and there may still be some outstanding disclosure, such that the C of C would not be ruled invalid. However, without any specific claim raised by defendant of what the People failed to turn over prior to December 2021, that would merit a discovery-based remedy of dismissal, there is no reason for this Court to find the type of automatic constitutional discovery-based prejudice urged by counsel. This Court believes that, when it comes to homicide cases, which have no Article 30 “trial readiness” clock, because the People do not actually have to “state ready” in the manner prescribed by the law under that statute in non-homicide cases, a defendant must articulate exactly what late disclosure prejudice actually amounted to when it comes to a discovery-based dismissal sanction. There is no record that defendant sought any “belated discovery” sanction prior to filing this motion seeking dismissal, with late discovery now being the prejudice alleged under Taranovich. When it comes to homicide cases and statutory discovery-based sanctions, the legislature still provided that dismissal for late disclosure is a remedy of last resort, and this remedy could be appropriate only “after considering all other remedies” and based on a finding that “dismissal is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure.” CPL § 245.80(2). Thus, even though the passage of time creates presumptive prejudice in a constitutional sense, defendant’s argument that late disclosure itself creates definitive prejudice under Taranovich is without merit in this case based on defendant’s motion.

There is no question that a virus did not suspend the constitution. It changed a lot of things. As far as the criminal justice system is concerned, the virus made it infinitely more difficult for our courts to meet the pressing needs of all who are entitled to be afforded their constitutional right to a speedy trial. The resources needed for a court to resolve all the backlog cases are thin and stretched. Violent crime continues adding more cases, and old case parts, such as the one where this case has landed, must

perform legal triage to match cases, lawyers, and scheduling concerns that arise in every case. In some situations, where pre-pandemic and post-pandemic delays stretch into a constitutionally intolerable period and the “reason” for the delay lies mainly with the People, dismissal will be required. See Johnson, 38 NY2d at 277-80. In this case, defendant has been incarcerated for more than four years and four months. That is a period of delay that commands judicial attention. But in this case, this Court does not find that judicial action consisting of dismissal is yet warranted. Given its consideration in carefully weighing of all of the Taranovich factors in this matter, this Court denies this motion to dismiss this case based on defendant's claim that his right to a constitutional speedy trial has been violated at this time. This Court understands that, should there be any conviction, even by plea, this ruling will be litigated on appeal, as it should be. This Court also directs the People to be ready to try this case within one month of this decision. If the reason for any further delay lies solely with the People, defendant can of course move once again for the same remedy.

This is the Decision and Order of the Court.

Dated: April 18, 2023



Hon. Ralph Fabrizio