CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK
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PEOPLE OF THE STATE OF NEW YORK,

-against- DECISION & ORDER
Dockets. CR-2556-22

CRAIG D. ARSCOTT,
Defendant.
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For the Defendant: Legal Aid Society (Patricia Petrosky, Esq.)

For the People: Miriam Rocah, Westchester County District Attorney
(ADA Zachary Hommel)

Reginald J. Johnson, J.

I. Procedural History

On August 5, 2022, the defendant was charged with one count of Making a threat of Mass Harm in violation of New York Penal Law (PL) §490.07[1], one count of Driving While Ability Impaired by Drugs in violation of PL §1192.4 ["A" misdemeanor], one count of Menacing in the Third Degree in violation of PL §120.15 ["B" misdemeanor], one count of Unlicensed Operator in violation of Vehicle and Traffic Law (VTL) §509.1, and one count of No Right Side Mirror in violation of VTL§375.10(b). On August 6, 2022, the defendant was arraigned by Mount Vernon City Court Judge Peter Davis[2] and released on his own recognizance with a temporary order of

[1] The defendant was charged by felony complaint with Making a threat of Mass Harm in violation of PL §490.07 which is a nonexistent crime.
[2] Judge Davis was sitting as a Peekskill City Court Judge in the Centralized Arraignment Part.

protection in favor of the complainants. Defendant was represented by Mary Pat Long, Esq. of the Legal Aid Society, who requested an adjournment of the proceedings to Monday, August 8, 2022.[3]

On August 8, 2022, further proceedings were heard in the Peekskill City Court, after which the case was adjourned to September 19, 2022, at the People's request.

On September 19, 2022, the defendant requested a felony hearing which was scheduled for November 7, 2022.

On November 7, 2022, the People served and filed its Certificate of Compliance and Statement of Readiness, and the case was adjourned on consent to January 3, 2023.

On January 3, 2023, the defendant failed to appear, and the Court issued a warning letter and scheduled appearances for February 27, 2023.

On February 27, 2023, all parties were present when the court proceedings were adjourned by the Court to April 10, 2023, due to a bomb threat.

On April 10, 2023, the defendant requested a felony hearing which was scheduled for April 17, 2023.

On April 17, 2023, the People withdrew the purported felony charge of Making a Threat of Mass Harm, and the matter was adjourned on consent to June 12, 2023.

On June 12, 2023, the defendant requested a jury trial which was scheduled for July 17, 2023.

On June 27, 2023, the defendant requested pre-trial hearings which were scheduled for July 7, 2023.

On July 7, 2023, the Court rescheduled the pre-trial hearings for July 17 and, at defendant's request, set a CPL §30.30 motion schedule as follows: motion to be served and filed on or before

[3] A review of Judge Davis's arraignment sheet indicates that he marked the adjournment of the case from August 6 to August 8 at the defendant's request. However, "Calendar and file jacket notations" do not constitute unquestionable proof to meet the People's "burden of demonstrating sufficient excludable time," for "such notations simply represent one person's interpretation of the proceedings" [*People v. Matteson,* 166 A.D.3d 1300, 1302 (3d Dept 2018)]. However, defense counsel stated that the clerk of the Mt Vernon City Court replayed the audio transcript of the arraignment proceeding in which she heard defendant's counsel, Mary Pat Long, Esq., request August 8, 2022, as the next adjourned date. There is no legal requirement that defense counsel use formulaic language to state that the adjournment is at her request, if she is, in fact, the party requesting the adjournment [*People v. Worley,* 66 N.Y.2d 523 (1985); see also, *People v. Kopciowski,* 68 N.Y.2d 615, 617 (1986) (Where adjournments are allowed at defendant's request, those periods of delay are expressly waived in calculating the prosecution's trial readiness, without need for the People to tract their lack of readiness to defendant's actions); *People v. Liotta,* 79 N.Y.2d 841 (1992) (defendant will be deemed to have consented to or requested the adjournment if the request or consent was "clearly expressed by the defendant or defense counsel"), *People v.* Collins, 82 N.Y.2d 177 (1993)].

July 24, 2023; opposition papers to be served and filed on or before July 31, 2023; reply papers, if any, to be served and filed on or before August 4, 2023; and a decision would be rendered on or before August 11, 2023. Pre-trial hearings and the jury trial were rescheduled for August 14, 2023.

On July 17, 2023, the People served and filed a Supplemental Certificate of Compliance and Statement of Readiness.

On July 24, 2023, the defendant served and filed his §30.30 motion.

On July 31, 2023, the People filed an affidavit in opposition.

On August 4, 2023, the Court marked the motion fully submitted.

II. Arguments of the Parties

The defendant argues that the charges should be dismissed because the People announced readiness more than ninety (90) days after commencement of the criminal proceedings against him in violation of CPL §30.30(1)(b) [Petrosky Affirmation at ¶ 16]. Specifically, the defendant argues that the "claimed" charge of Making a threat of Mass Harm in violation of New York Penal Law (PL) §490.07 is a nonexistent charge, not a felony, which meant that the People had to announce readiness no later than ninety (90) days after commencement of the criminal proceedings against the defendant, because the highest charged crime against him was Driving While Ability Impaired by Drugs—an "A" misdemeanor [Id. at ¶ 14; CPL §30.30(1)(a) and (b)]. Defendant further argues that the adjournment of his case from August 6 to August 8 was without his consent [Petrosky Affirmation at ¶ 3]. By the defendant's calculations, August 6, 2022, to November 7, 2022[4], is ninety-four (94) days warranting dismissal of the charges based on a violation of the speedy trial limitations [Id. at ¶ 15; CPL §30.30(1)(b)].

The People oppose the defendant's motion to dismiss on speedy trial grounds and argue that the adjournment from August 6 to August 8 was requested by defendant, and that therefore those days should not be charged to the People [Hommel Affid. in Opp. at p. 2; Hommel Memorandum of Law, Point I. (a)]. Specifically, the People argue that since defendant's attorney consented to and selected the adjourned date without input from the Court or the People, the defendant effectively consented to the August 8 adjourned date [Hommel Memorandum of Law, Point I. (a)]. The People further argue that the adjourn date from September 19, 2022, to November

[4] Defendant incorrectly argues that the People filed their Certificate of Compliance and Statement of Readiness on November 7, 2023, and that the People had to have announced ready on November 4, 2023, and that all the time was chargeable to the People presumably from August 6, 2022, to November 7, 2023 [Petrosky Affirmation at ¶ 15].

7, 2022, was at the defendant's request for a felony hearing, and therefore not chargeable to the People [Hommel Memorandum of Law at Point I. (b)]. By the People's calculations, the time chargeable to them runs from August 8 to November 5, 2022, and since November 5 was a Saturday, the speedy trial expiration date was extended to Monday, November 7, 2022 [Hommel Memorandum of Law, Point I.(a)].

III. Legal Analysis

The purpose of the CPL §30.30 ("the speedy trial statute") is to ensure the prompt resolution of criminal charges by addressing prosecutorial readiness for trial (*People v. Anderson,* 66 N.Y.2d 529 [1985]), and is intended only to address delays occasioned by prosecutorial inaction (*People v Bruno,* 300 A.D.2d 93 [1st Dept. 2002]). The People must declare readiness within the applicable statutory time periods for all but the unusual case (*People v. Berkowitz,* 50 N.Y.2d 333 [1980]). Any adjournment alleged to be on defendant's consent will be strictly construed against the People, which has the burden of making the record clear (*People v. Collins,* 82 N.Y.2d 177 [1993]); *People v. Jamison,* 87 N.Y.2d 1048 [1996]). If the People fail to ensure that a clear record has been made as to who requested the adjournment, they fail to sustain their burden and will be required to assume responsibility for the delay [*People v. Cortes,* 80 N.Y.2d 201 (1992); see *People v. Notholt,* 242 A.D.2d 251 (1st Dept 1997)]. However, where the defendant has requested or consented to an adjournment, the defendant waives charging the prosecution with the delay, regardless of whether the adjournment causes the prosecution's delay in readiness [see CPL §30.30(4)(b)], because the excludable time provision under CPL §30.30(4)(b) rests on the theory of estoppel or waiver [*People v. Worley,* 66 N.Y.2d 523 (1985]. If the last day for the People to announce readiness falls on a holiday or Saturday or Sunday, then the People's time to announce their readiness is extended to the next business day [*People v. Powell,* 179 Misc.2d 1047 (App. Term 2d Dept 1999), *People v. Mandela,* 142 A.D.3d 81 (3d Dept 2016); see also General Construction Law §25-a].

For computational purposes, the speedy trial clock starts on the day the action is commenced and stops on the date the People announce its readiness for trial (CPL §1.20[17]; *People v. Osgood,* 52 N.Y.2d 37 [1980]; *People v. Cortes,* 80 N.Y.2d 201[1992]; *People v. Kendzia,* 64 N.Y.2d 331 [1985]). The actual day an action was commenced is excluded from the computation of speedy trial time [*People v. Stiles,* 70 N.Y.2d 765 (1987); *People v. Stirrup,* 91 N.Y.2d 434, 438 n 2 (1998); *People v. Page,* 240 A.D.2d 765 (2d Dept 1997)], while the last day

is counted [*People v. DiMeglio,* 294 A.D.2d 239 (1st Dept 2002)]; see also General Construction Law §20. The People are not charged with periods of reasonable delay attributable to "other proceedings concerning the defendant," such as periods of reasonable delay due to defendant's request for a preliminary hearing [*People v. Pressley,* 115 A.D.2d 228 (4th Dept 1985); CPL §30.30(4)(a)].

In the case at bar, the People commenced this criminal action against the defendant by filing a Misdemeanor Information charging him with Operating a Motor Vehicle While under the Influence of Drugs [VTL 1192.4], which is an "A" Misdemeanor and the highest crime charged, on August 6, 2022. Defendant was arraigned on August 6, 2022, and requested an adjournment to August 8, 2022[5]. Since the first day of the arraignment is not counted for speedy trial purposes [see *People v. Stiles,* supra] and since the adjournment was at defendant's request until August 8, 2022, it appears to the Court that the first day chargeable to the People is August 8, 2022. Judge Davis marked the adjournment at the defendant's request to August 8, 2022 [*People v. Daniels,* 217 A.D.2d 448 (1st Dept 1995) (the whole period of the adjournment is attributed to the party requesting it, not just the specific time requested)].

Having found that defendant requested the adjournment from August 6 to August 8, the Court now turns to the issue of whether the People timely served and filed their Certificate of Compliance and Statement of Readiness. In determining whether a defendant's §30.30 rights have been violated, the Court must look to the statute's provisions, as well as case law interpreting the provisions [see e.g., *People v. Parris,* 79 N.Y.2d 69 (1992)]; *People v. Sturgis,* 38 N.Y.2d 625 (1976)]. The People argue that the adjourned date from August 8, 2022, to November 5, 2022, is properly chargeable to them. By the Court's calculations, the period chargeable to the People runs from August 8, 2022, to November 6, 2022, Sunday, which is 90 days. Because November 6 is a

[5] As previously stated, Judge Davis's arraignment sheet indicated that he adjourned the case to August 8, 2022, at the defendant's request. Further, defense counsel stated in her affirmation that she contacted the Mt Vernon City Court and listened to the recording of the arraignment, in which Mary Pat Long, Esq. requested an adjournment to August 8, 2022. This Court does not perceive any ambiguity or lack of clarity as to which party requested the adjournment, and apparently neither did Judge Davis. Where the defendant not only agrees to but chooses the adjourned date and there is no input from the Court or People as to the adjourned date, that may be sufficient to find he consented to the adjourned date [see *People v. Barden,* 27 N.Y.3d 550, 554 (2016), citing *People v. Smith, 82 N.Y.2d 676 (1993)*]. In *Barden,* the Court of Appeals, citing *Smith,* gave weight to the fact that defendant did not formally consent to the adjourned dates proposed by the Court or the People, and did not participate in the setting of the adjourned dates. Here, unlike in *Barden and Smith,* this Court finds that not only did Ms. Long consent to the adjourned date, but that she was the sole participant in choosing the adjourned date without input from the Court or the People.

Sunday, the People's time to establish their readiness is extended to the next business day, which is November 7, 2022 [*People v. Powell,* supra, *People v. Mandela,* supra; see also General Construction Law §25-a]. Since the People filed their Certificate of Compliance and Statement of Readiness on November 7, 2022 [CPL §245.20], the People timely announced readiness [*People v. Smith,* 82 N.Y.2d 676 (1993)]. The inquiry on a speedy trial motion is whether the People have done all that is required of them to bring the case to a point where it may be tried [*People v. England,* 84 N.Y.2d 1, 4 (1994)]. The Court concludes that the People have done so.

The Court now considers, for academic purposes, whether the defendant's request for a preliminary hearing was the functional equivalent of a request for a continuance [*People v. Pressley,* supra]. On September 19, 2022, the defendant requested a felony hearing and consented to the scheduled hearing date of November 7, 2022—48 days**.** CPL §30.30[4][a] provides that a reasonable delay resulting from "other proceedings" are excludable from speedy trial calculations. In *People v. Pressley, supra,* the Court stated "[w]e reject defendant's argument that because the District Attorney was empowered to present the case directly to a Grand Jury, the adjournment of the proceedings in City Court for the purpose of scheduling a preliminary hearing is not the equivalent of a continuance; it is" [115 A.D.2d 228]. Later, the same Court stated that excludable time for "other proceedings" is permissible only to the extent that the prosecution's delay in readiness results from the other proceedings (see e.g. *People v. Roscoe,* 210 A.D.2d 1003, 1004 (4th Dept 1994)] [where the People were not ready because they failed to provide grand jury minutes to the court for inspection, the period during which the defendant's Wade motion was pending was not excludable as it did not cause the delay in the People's readiness]; *People v. Rodriguez,* 214 A.D.2d 1010, 1010 [4th Dept 1995]). Here, the People did not proffer any evidence that the defendant's request for a felony hearing impeded or delayed their ability to announce readiness. Nevertheless, as previously stated, the Court finds that the defendant consented to the November 7 hearing date, so the period from September 19 to November 7 would be excludable for this reason [*People v. Worley,* supra].

Based on the Court's calculations, the following appears to be true:

- August 8-Sept.19, 2022 People's time 42 days chargeable
- Sept. 19-Nov. 7, 2022 defendant's time 48 days excluded

Since the People declared readiness on November 7, 2022 (42 days within the 90-day statutory period), the defendant's speedy trial rights under CPL 30.30(1)(b) were not violated.

Further the Court finds that even if the People were charged with all the time from August 8, 2022, to November 6, 2022, the People would still be timely, since November 6 is a Sunday and the People's time to announce readiness was extended to the next business day, Monday, November 7, 2022. Accordingly, the defendant's motion to dismiss the accusatory instrument in this action is denied.

Based on the foregoing, it is

Ordered that the defendant's motion to dismiss the accusatory instrument pursuant to CPL §30.30(1)(b) is denied.

This constitutes the decision and order of the Court.

Enter,

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Hon. Reginald J. Johnson

Peekskill City Court

Dated: Peekskill, New York

August 4, 2023