SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION, PART DV
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THE PEOPLE OF THE STATE OF NEW YORK

Docket No. 42357C2011
Decision and Order

-against-

JACQUELINE BURROUGHS,

Defendant
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FABRIZIO, J.

In this CPL § 30.30 decision, the issue is whether the People failed to state ready for trial in a legally correct manner when they served a superseding information and a certificate of readiness on The Legal Aid Society on November 28, 2011. Defendant concedes that The Legal Aid Society was assigned by the arraignment judge to be her attorney, and that this case was being prosecuted as a felony at that time. She also concedes that, in compliance with 22NYCRR 200.5, an attorney from The Legal Aid Society filed a written notice of their appearance as counsel on this case. Defendant also concedes that The Legal Aid Society never asked to be relieved of that representation, and that no judge ever relieved that organization from their assignment as her counsel. She further acknowledges that although two different attorneys from The Bronx Defenders appeared in court on two occasions, no one from The Bronx Defenders asked for court permission to be assigned to represent her on this case. The Bronx Defenders did not file a "notice of appearance" on this case until March 2, 2012, one month after filing this motion. Yet, defendant argues that the People should have served The Bronx Defenders with their certificate of readiness. The motion to dismiss is denied.

On July 30, 2011, defendant was arraigned on a felony complaint charging her, *inter alia*, with rape in the second degree (PL § 130.30(1). After the court assigned The Legal Aid Society to represent the defendant, an attorney from that organization filed a written notice of appearance with the clerk of the court, stating "you are hereby notified that I represent the defendant in the above-entitled action." The People served notice that they would be presenting the case to the grand jury. According to the markings on the Court file, the attorney from The Legal Aid Society served written notice on the People that their client would appear before the grand jury. The case was adjourned until September 12, 2011 for Grand Jury action.

On the next date, when the case was called into the record in Part B, an attorney from the office of The Bronx Defenders apparently asked to have this case called. The defendant had a separate case then pending, which involved completely different charges and was already scheduled to be on the calendar in the Domestic Violence part on November 15, 2011. The Bronx Defenders had been assigned to represent the defendant on that matter, which was a misdemeanor. According to the minutes of the court appearance, the People announced that there had been no grand jury action. The judge in that part granted the People's application to dismiss the felony counts, and the accusatory instrument in this matter was now a misdemeanor compliant. The attorney from The Bronx Defenders asked the court only to adjourn this case to join the "DV matter" on November 15, 2011. The attorney never asked the court to assign The Bronx Defenders to represent the defendant on this entirely separate matter. There is no record that an attorney from The Legal Aid Society ever appeared at all that day, or were ever relieved of their court-appointed representation.

. On November 15, 2011, a different attorney from The Bronx Defenders appeared in court. This case, as well as the other pending matter, were called into the record at the same time. The attorney engaged in an off the record plea discussion with a different judge about the earlier case. The People asked for this case to be adjourned to file a superseding information. Once again, there was no request made to have The Bronx Defenders assigned to be defendant's counsel of record in this case, and The Legal Aid Society did not appear. Both cases were adjourned until December 15, 2011.

On November 28, 2011, the People filed a superseding information with the Court, charging the defendant with, *inter alia*, sexual misconduct (PL § 130.20(2)), stalking (PL §120.45(1)) and assault in the third degree (PL § 120.00(1)). They also filed a certificate of readiness. Both the superseding information and the certificate of readiness were served on the attorney from The Legal Aid Society. On February 8, 2012, defense counsel from The Bronx Defenders filed a written motion to dismiss the case, arguing that the People had failed to state ready within the ninety day period required by statute. The People responded to that motion on February 27, 2012, arguing that they had properly answered ready when they notified the court as well as the only attorney who had filed a notice of appearance in this case of their readiness. On March 2, 2012, an attorney from The Bronx Defenders filed, for the first time, a written notice of appearance on behalf of the defendant in this matter. And, on March 26, 2012, the attorney filed an affirmation in reply to the People's response. This Court has been assigned to write the decision, and was never present at any of the calendar calls involved. However, the Court does have the minutes of the September 12, and November 15, 2011 calendar calls.

In terms of chargeable time, the Court makes the following findings. Defendant was arraigned on a felony complaint, and the felony charges were dismissed on September 12, 2011. On that date, the People did not answer ready for trial, and the case was adjourned for the People to file a superseding information. As the top count was an A misdemeanor, the People had ninety days to answer ready for trial after September 21, 2011.CPL §§ 30.30(1)(b); 5(c). The case was adjourned until November 15, 2011. The People did not state ready during this period. Accordingly, they are charged with sixty four days of pre-readiness delay. On November 15, 2011, the People once again stated that they were not ready for trial. The case was adjourned until December 15, 2011. The People then served and filed a certificate of readiness with a superseding information on November 28, 2011. The question before the Court is whether they should be charged with thirteen days, representing the period from November 15, 2011 until November 28, 2011, or thirty days, based on the fact that they apparently stated ready in court on December 15, 2011.

In order to have stated ready in a valid manner on November 28, 2011, the People were required to have a "written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk, to be placed in the original record." *People v. Kendzia,* 64 NY2d 331, 337 (1985). They complied with the requirement of serving the court with the certificate of readiness. In terms of service on an attorney, the People must serve someone who actually represents the defendant. *People v. Todd,* 184 Misc. 2d 381, 382 (Crim Ct NY Cty 2000) (defense counsel appeared at defendant's arraignment and filed a notice of appearance). When the People are on notice that a new attorney has been assigned to represent a defendant,

or a new attorney was retained and has appeared and become the attorney of record and filed a "notice of appearance," service of the certificate or readiness on the prior attorney will not automatically satisfy the *Kendzia* requirement that "defense counsel" be promptly notified of the People's readiness. *See, e.g People v. Chittumuri*, 189 Misc 2d 743, 744 (Crim Ct Queens Cty 2001) (court had "minutes of notice of appearance" of new counsel);

In this case, the People were only on notice that The Legal Aid Society represented the defendant on November 28, 2011. 22 NYCRR 200.5 provides that "Each attorney appearing in a criminal action is required to file a written notice of appearance on or before the time of the attorney's first appearance in court or not later that 10 days after appointment or retainer." (Emphasis added). This requirement not only places the court on notice of who represents a particular defendant for its own very important administrative purposes, which includes notifying the correct attorney of court decisions, or other action, but it also provides the same notice to the People. Moreover, 22 NYCRR 606.5(a), promulgated as part of the rules of practice in the Appellate Division, First Department, provides that "[i]t shall be the duty of the counsel assigned to or retained for the defense of a defendant in a criminal action or proceeding to represent defendant in the trial court until the action or proceeding has been terminated."

Under these rules, defendant's attorney of record on November 28, 2011 was The Legal Aid Society. Since the criminal case is still pending, and they apparently were never formally relieved, they continue to have that obligation. While this Court, as part of the local practice, hears applications from assigned attorneys to be relieved from their assignment as counsel where there is another action pending and the defendant has a

different assigned counsel in that action, that is still an application that must be made, and approved, by a judge. There is no presumption that an attorney is relieved of representation until such application is made and granted. And, a notice of appearance in terms of an assigned counsel case is required to be made in this situation after there has been assignment by the court of that attorney.

Here, none of the procedural requirements were observed. It is a non-starter that an attorney from a different public defender organization stood up during the calendar call on two other occasions. The Bronx Defenders were the defendant's attorney of record on one of two cases pending in the courthouse at the time; this was not that case. As the People correctly note in their affirmation, "[in] this jurisdiction, it is common practice to have attorneys for each other stand in for one another on cases." *Cf. People v. Cristin,* 30 Misc. 2d 383, 389 - 90(Sup Ct Bronx Cty 2010). That unfortunate practice, which this Court frequently witnesses in various calendar parts, does not constitute actual or constructive notice to the People that new counsel has been assigned on a particular case, or that a former assigned counsel has been relieved. The People should not have to presume, or maybe more appropriately guess, as the defense now argues, that the attorney appearing has been assigned to the case when there has been no application seeking the assignment, and different counsel had already been assigned, and especially where there is not a written notice filed following assignment by the court, or retention of counsel of choice, as required by 22 NYCRR 200.5.

The Appellate Division, First Department, strictly construes rules concerning assigned representation when presented with a question of whether the correct individual was served in an appellate context, and, where the rules about representation

are clear and are not complied with, the party who is not in compliance suffers the appropriate consequence. *See e.g. People v. Fernandez,* 198 AD2d 96 (1st Dept 1993); *People v Gonzalez*, 191 AD2d 292 (1st Dept 1993) (People's service of appellate brief on defendant's trial attorney, who no longer represented defendant upon termination of the trial proceeding, and not the defendant, insufficient to satisfy requirements for service on attorney of record under 22 NYCRR 606.5(a)(1), and appeals were dismissed). *Cf. People v. Hernandez,* 210 AD2d 504, 505 - 506 (2nd Dept 1994) (recognizing that rules in Second Department providing for continued representation of defendant affords more flexibility in context of service of appellate brief). Here, the rule has only been complied with by The Legal Aid Society's filing of the notice of appearance after assignment. If substitution of counsel were contemplated, no rules were complied with. The People – and the victim of this alleged crime – should not suffer any penalty based on the allegation that a substitute assigned counsel appeared in court without prior appointment and without filing of a notice of appearance and were therefore the proper attorneys to serve with the certificate of readiness on November 28, 2012.

The court does not make any finding of bad faith on the part of the attorneys who appeared in court or who were assigned to represent the defendant in this case. In a busy courthouse, on a busy calendar day, during the inevitable blur of applications made, granted and denied, the specifics of the procedural rules are not always complied with. But they are rules. And they were not complied with in this case. A clerk may call a case because a lawyer placed his or her name on a "sign up" list for the sometimes hundreds of cases to be heard that day without realizing that the person who "signed up the case" is not the attorney of record. That attorney may be covering a case for another

lawyer and may not know that there has been no assignment of counsel made, and notice of appearance filed. The judges will likely only deal with the specific applications before them, without realizing that the attorney appearing is not the assigned counsel.

All of this appears to have taken place in this case, and none of it is the People's responsibility. The lack of any compliance with the rules should not be held against the prosecution. The People complied with the letter of *Kendzia.* And therefore their communication of readiness to the Legal Aid Society on November 28, 2011 was proper.*See e.g. People v. Almares*, 2002 NY Misc LEXIS 1774 (Sup Ct Kings Cty 2002); *People v. Brady*, 196 Misc 2d 993, 998 (Dist Ct Nass Cty 2003); *Cf. People v. Mack*, 39 AD3d 882 (3rd Dept 2007) (court' s failure to have pro bono counsel who filed notice of appearance pursuant to 22 NYCRR 200.5 represent defendant at later competency hearing deprived defendant of right of counsel of choice). The People would be charged in a case where the defendant's counsel has complied with the legal requirements of New York's Rules of Court. *See People v. Corley*, 30 Misc 2d 1232A (Crim Ct NY Cty 2011) (People charged when they served The Legal Aid Society with notice of trial readiness, where The Legal Aid Society had never filed a Notice Of Appearance and defendant's actual attorney had filed a written notice of appearance); *Cf. People v. Stewart,* 21 Misc 3d 1109A (Crim Ct NY Cty 2008) (People charged where New York County Defender Services relieved by judge, on the record, and court assigned The Legal Aid Society as defense counsel). This is not one of those cases.

The People are therefore charged with the thirteen day period between November 15 and November 28, 2011. The total time charged is seventy seven days, less than the ninety days within which the People have to state ready in this case.

Alternatively, given the facts of this case, the Court also finds that the People's in court notification of their readiness on December 15, 2011 met the second *Kendzia* requirement of prompt notification to counsel present after informing the Court that they were ready in this case, no matter which attorney appeared on the record that day. And the time calculation is exactly the same. Accordingly, the motion to dismiss is denied.

Defendant has also requested permission to file additional pre-trial motions. The People oppose that application, pointing to the fact that more than 45 days have passed since they stated ready. The Court is unaware of whether there are any pretrial motions to be filed in this case. However, since none of the chaos in this matter can be attributed in any way to the defendant, her attorney can file whatever pretrial motions are deemed necessary.

This constitutes the Decision and Order of the Court.

Dated: April 12, 2012

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Hon. Ralph Fabrizio