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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Index Number : 100807/2010
MALUF, ET. AL., PAULO
VS.
VANCE, JR., CYRUS R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this ~~motion~~ to/for petition writ of prohibition

	PAPERS NUMBERED
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ... Pet + Pet	1; 1a
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is denied per decision/order dated April 24, 2012.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
APR 25 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/24/12

MARCY S. FRIEDMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

In the Matter of PAULO MALUF and FLAVIO MALUF,

Petitioners,

For a Judgment Pursuant to Article 78 of the CPLR

- against -

CYRUS R. VANCE, JR., District Attorney of the County of New York,

Respondent.

Index No.: 100807/2010

DECISION/ORDER

In this Article 78 proceeding petitioners seek a writ of prohibition directing the District Attorney of New York County to dismiss an indictment against them (Superseding Indictment 1268/2007 filed in New York County on March 23, 2007) (the Indictment, Ex. A to Petition) and to lift INTERPOL "red notices" that the District Attorney sought in connection with the indictment.

Petitioners and three other defendants are charged with one count of conspiracy in the fourth degree to commit both grand larceny in the first and second degree and criminal possession of stolen property in the first and second degree. (Penal Law § 105.10[1].) (Indictment at 1.) They are further charged with five counts of criminal possession of stolen property in the first degree (Penal Law §165.54) and eleven counts of criminal possession of stolen property in the second degree. (Penal Law §165.52.) Petitioners, a member of the

Brazilian Congress and his son, are citizens and residents of Brazil. It appears to be undisputed that they have not entered the New York jurisdiction at any time at which it is alleged they committed criminal acts here. Nor have they voluntarily submitted to the jurisdiction of the court in the criminal action. They therefore have not been arraigned for the crimes with which they are charged. The notices filed with INTERPOL request that, should petitioners travel outside of Brazil, they be arrested by member law enforcement agencies with a view to extradition. As a result, petitioners have been unable to travel outside of Brazil without risk of interception and possible extradition to New York.

Petitioners seek a writ of prohibition to enjoin this prosecution which they assert is in excess of respondent's jurisdiction. (Petition, ¶ 4.) More particularly, petitioners assert that prosecution should be prohibited on the grounds that respondent District Attorney violated their rights to a speedy trial by failing to declare his readiness for trial within the time limits imposed by Criminal Procedure Law § 30.30; that respondent District Attorney violated petitioners' due process rights by his unreasonable delay in bringing the charges; that the court lacks territorial jurisdiction over the conspiracy charge; that the prosecution violates principles of international comity; and that the criminal action should be dismissed in the interests of justice. (Petition at 2.)

Respondent objects to the petition on a number of procedural grounds, among them that the petition is barred by the statute of limitations for an Article 78 proceeding, is fatally defective because unverified, and is not maintainable in Supreme Court.[1] Respondent contends that an

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[1]On September 30, 2010, this court issued an order (Interim Order) denying a motion to dismiss the petition on these grounds. Although the court's decision was not the subject of a motion to renew or reargue pursuant to CPLR 2221, respondent now reiterates and amplifies these contentions.

Article 78 proceeding affords no relief to petitioners because their objections to the prosecution can and must be addressed in the criminal action. (Answer, ¶¶ 45.)

The indictment at issue alleges that, beginning in 1993, petitioners and co-defendants caused inflated and false invoices to be submitted for work on a municipal construction project in Sao Paulo, Brazil; that contractors paid kick-backs to petitioners and others; and that the funds were then transmitted through "illegal black market money transmission operations, known in Brazil as 'doleiros,' to accounts that [petitioners] controlled in New York County and elsewhere." (Indictment at 3-4.)

One account, in Safra National Bank in New York (the New York account), was opened in the name of a British Virgin Islands company that is identified as a black market money transmitter. (Indictment at 3; Answer, ¶ 33.) The indictment itemizes fifteen deposits into that account between January 9, 1998 and August 20, 1998, allegedly made on behalf of petitioners. (Indictment, ¶¶ 11-25.) The indictment further alleges that between November 5, 1998 and April 20, 1999, petitioner Paulo Maluf made four purchases from an auction house located in New York with funds from the New York account (Indictment ¶¶ 26-29); that from January 14, 1998 through November 4, 1998, funds were transferred from the New York account to an account located in the Channel Islands (Indictment ¶¶ 30-36); that from April 24, 1998 through December 9, 1998, funds were transferred from the New York account "to pay for expenses relating to political campaigns in Brazil" (Indictment, ¶¶ 37- 49); and that from February 18, 1998 to May 11, 1999, petitioners "repatriated" funds from New York to Brazil via money transfers to Brazilian doleiros accounts. (Indictment, ¶ 50.)

(Respondent's Memorandum in Support of Answer at 4-8.) The court declines to revisit these issues.

Petitioners' demand for a writ of prohibition requires an initial determination as to whether the issues raised are of the type for which the remedy may be granted. (Matter of Holtzman v Goldman, 71 NY2d 564, 568 [1988].) CPLR 7803(2) provides that a writ of prohibition may lie when a "body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." It is an extraordinary remedy that is "never available merely to correct or prevent trial errors of substantive law or procedure, however grievous, because '[t]he orderly administration of justice requires that correction of litigation errors merely be left to the ordinary channels of appeal or review'. . . ." (Matter of Neal v White, 46 AD3d 156,159 [1st Dept 2007] [internal citation and quotation marks omitted] [emphasis in original], quoting LaRocca v Lane, 37 NY2d 575, 579 [1975], cert denied 424 US 968 [1976]; Matter of Rush v Mordue, 68 NY2d 348, 353 [1986].) As this court noted in its prior order, prohibition may be available even though the ordinary channels of review are "technically available," if such channels "would be inadequate to prevent the harm and prohibition would furnish a more complete and efficacious remedy." (Matter of Dondi v Jones, 40 NY2d 8, 14 [1976].) The Court of Appeals has, however, "stressed [that prohibition] should be available only when a court exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding, as for example, the prosecution of a crime committed beyond the county's geographic jurisdiction." (Rush, 68 NY2d at 353.)

"Prohibition may lie against a prosecutor (as well as against a court) in performing the quasi-judicial role of 'represent[ing] the public in bringing those accused of crime to justice'." (Matter of Haggerty v Himelein, 89 NY2d 431, 435 [1997], quoting Matter of Schumer v Holtzman, 60 NY2d 46, 51 [1983].) Where judicial review of a claim on direct appeal from a

judgment of conviction is available, however, "it is impermissible to disrupt the criminal proceedings by resort to [an] extraordinary writ . . . ." (Matter of Veloz v Rothwax, 65 NY2d 902, 904 [1985]; see also Reed v Littleton, 275 NY150, 153 [1937].)

Petitioners contend that a writ of prohibition is appropriate because there is no other procedural remedy available to them. They assert that they are prevented from raising the procedural and jurisdictional defects in their prosecution because to obtain such review, they would have to travel to New York and be arraigned on the charges against them.

In its prior order, this court determined that respondent had not demonstrated, based on petitioners' refusal, without more, to submit to prosecution in New York, that petitioners are fugitives within the meaning of the fugitive disentitlement doctrine, and are therefore barred from maintaining this civil proceeding. (Interim Order at 5, citing Matter of Hijazi, 589 F3d 401, 407 [7th Cir 2009]; see also United States v Kashamu, 2010 US Dist LEXIS 72859 [ND Ill 2010], affd 656 F3d 679 [7th Cir 2011].)

The related issue now before this court is whether petitioners may claim, based on their refusal to submit to the criminal prosecution, that the only remedy available to them to challenge the prosecution is the extraordinary remedy of a writ of prohibition. Petitioners do not contest that the issues that they raise in this proceeding could be raised, after arraignment, pursuant to Criminal Procedure Law § 210.20, which authorizes a motion before the Criminal Court to dismiss an indictment on the grounds, among others, that the defendant has been denied the right to a speedy trial, that there is a jurisdictional or other impediment to conviction of the defendant for the offense charged, or that dismissal is required in the interest of justice. Moreover, petitioners acknowledge that no authority has held that an Article 78 proceeding is available

where the defendant elects not to appear in the criminal action. (Pets.' Memo. of Law in Further Support of Pets.'Art. 78 Petition at 10.)

It is clear that prosecution cannot begin until such time as petitioners submit to jurisdiction and that, in failing to do so, petitioners frustrate the prosecution. (See Degen v United States, 517 US 820, 826 [1996].) The fact that petitioners control their own access to the rights afforded them under New York's criminal procedure law cannot be ignored in determining whether ordinary pretrial, trial, and appellate procedures available in the criminal action that they eschew would address their objections to prosecution.

The impact of avoidance of jurisdiction on a defendant's rights has been considered in a number of contexts. (See United States v Paul, 326 F Supp 2d 382, 387 [ED NY 2004] [defendant resisting extradition charged with the resulting delay under federal speedy trial act]; Collazos v United States, 368 F3d 190, 202 [2nd Cir 2004] [defendant barred, under 28 USC § 2466, from opposing civil forfeiture action based on refusal to appear in a related criminal case]; United States v Zedner, 555 F3d 68 [2nd Cir 2008], cert denied ___ US ___, 130 SCt 67 [2009] [dismissing appeal under fugitive entitlement doctrine where defendant failed to return to U.S. during pendency of his appeal].)

Here, petitioners' procedural challenges to the indictment may be raised and addressed in a pre-trial motion to dismiss or at a trial, the occurrence of which petitioners control. On the general authority that a writ of prohibition is not available for claims that may be adequately addressed in the context of a pending criminal case (supra at 4), the court holds that petitioners may not avail themselves of a writ of prohibition to the extent that it is brought to protect their rights to a speedy trial or to timely prosecution. The court accordingly does not reach the merits

of petitioners' claims on these issues.[2]

The court does not reach petitioners' further claim that the prosecution should be dismissed in the interests of justice. That claim may be also addressed on a motion in the criminal action pursuant to Criminal Procedure Law §§ 210.20 (1)(i) and 210.40, which provide for dismissal of an indictment in the interest of justice as a matter of judicial discretion, upon the court's consideration of the statutorily enumerated factors.

Petitioners also claim that the charge of conspiracy to commit grand larceny in the first and second degree exceeds the territorial jurisdiction of the New York court. The scope of the state's territorial jurisdiction addresses the "question of the sovereign's power to prosecute and punish an accused for conduct which is allegedly criminal." (People v McLaughlin, 80 NY2d 466, 471 [1992].) As the State "only has power to enact and enforce criminal laws within its territorial borders," there is no criminal offense absent territorial jurisdiction. (Id.) Thus, "for the State to have criminal jurisdiction, either the alleged conduct or some consequence of it must have occurred within the State." (Id.)

CPL §20.20, which codifies the territorial jurisdiction of the court over criminal offenses, provides in relevant part:

> "[A] person may be convicted in the criminal courts of this state of an offense defined by the laws of this state, committed either by his own conduct or by the conduct of another for which he is legally accountable pursuant to section 20.00 of the penal law, when:
> 1. Conduct occurred within this state sufficient to establish:
> (a) An element of such offense; or
> . . .
> 2. Even though none of the conduct constituting such offense may have occurred

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[2]In view of this disposition, the court does not address the impact of respondent's failure to seek extradiction of petitioners from Brazil – an issue relevant to petitioners' speedy trial claim.

within this state:

. . .

d) The offense committed was conspiracy to commit a crime within this state and an overt act in furtherance of such conspiracy occurred within this state. . . ."

Petitioners contend that because no element of conspiracy to commit larceny is alleged to have occurred in New York, they cannot be prosecuted here for that offense. As defined in Penal Law § 155.05, a person "commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." The allegations of the indictment do not state whether deposit of funds into the New York bank account operated as the means by which funds were taken from the control of rightful owners or whether, at the time funds were deposited into the New York account, they had previously been permanently taken in a completed larceny. Were the charge of conspiracy to commit larceny the only charge petitioners face, substantive review of the merits of this jurisdictional objection might therefore be warranted.

However, the complaint also alleges conspiracy to possess stolen property. The court is unpersuaded by petitioners' contention that the conspiracy count must be dismissed in its entirety because one of the objects of the alleged conspiracy (larceny) is not supported by the factual allegations of the indictment. Petitioners' sole support for this contention, People v Conroy (53 AD3d 438 [1st Dept 2008], appeal denied 11 NY3d 735 [2008], cert denied 555 US 1013 [2008]) is inapposite. That case addresses not the sufficiency of an indictment but, rather, the quantum of evidence necessary to sustain a jury's verdict of guilty where disjunctive theories of criminality are submitted to the jury.

Significantly, petitioners voice no jurisdictional objection to the 16 counts of criminal

possession of stolen property that are alleged to have occurred in New York, nor to the conspiracy charge to the extent that it alleges that its object was criminal possession of stolen property. The court finds that the jurisdictional defect that petitioners raise to one element of one of the 17 counts of the indictment does not "implicate the legality of the entire proceeding." (See generally Rush, 68 NY2d at 353.) The jurisdictional challenge is accordingly without merit.

Petitioners also urge that the prosecution should be barred in the interests of comity because Brazilian laws will be interpreted and applied. Comity is a voluntary determination to defer to the policy of another jurisdiction, often made in response to an assertion of interest by the other jurisdiction. (Boudreaux v State of La., Dept. of Transp., 11 NY3d 321, 326 [2008], cert denied __ US __, 129 S Ct 2864 [2009] quoting Ehrlich-Bober & Co. v Univ. of Houston, 49 NY2d 574 [1980].) Petitioners make no showing that such restraint is either warranted or has been sought by Brazilian authorities. Contrary to petitioners' assertion, the challenged indictment seeks to prosecute petitioners not for crimes committed in Brazil but for crimes committed in New York. It does not seek to enforce Brazilian law. Nor does the alleged commencement in Brazil of criminal proceedings against petitioners render prosecution for crimes in New York inimical to principles of comity.

For the foregoing reasons, petitioners have failed to establish that they are entitled to extraordinary relief. It is accordingly hereby

ORDERED that the petition for a writ of prohibition is dismissed.

This constitutes the decision, order, and judgment of this court.

Dated: New York, New York
April 24, 2012

MARCY FRIEDMAN, J.S.C.