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. 063350C2011
Decision and Order

-against-

DAVID GIBBS,
Defendant
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FABRIZIO, J.

Defendant moves to dismiss this case pursuant to CPL § 30.30, alleging that the People have exceeded their statutory time to state ready for trial on a valid information. The motion is granted.

The prosecution began on November 24, 2011, when defendant was arraigned on a felony complaint. The accusatory instrument contained three separate felony counts charging criminal possession of a weapon in the third degree (Penal Law § 265.02(8)), along with six misdemeanor counts charging possession of ammunition (AC § 10-131(i)(3)), and two counts charging harassment in the second degree (Penal Law § 240.26(1)).The arresting officer alleges defendant was in possession of "three large capacity ammunition feeding devices, which is a magazine that had the capacity to accept more than ten rounds of ammunition," found in an orange tool box on November 23, 2011 at 12:15 am inside Apartment 9D at 128 West 228th Street in Bronx County. The arresting officer further alleges he found thirty two rounds of .220 caliber ammunition, forty nine rounds of .32 caliber ammunition, fifty rounds of 9mm ammunition, seventeen rounds of .22 caliber ammunition, three rounds of .38 caliber

ammunition, and twenty-five rounds of .357 caliber ammunition, inside this same toolbox, and that all one hundred twenty-seven rounds of ammunition were live and operable. Two different women, Natalie Pitts and Frances Murphy, allege that they had a verbal altercation with defendant at the time, and he said things to them which made then fear for their safety.

On November 28, 2011, the case was before a judge for grand jury action. The judge presiding apparently granted the People's application to dismiss the felony charges. The People then filed what they purported to be a "superseding information." This document charged defendant with criminal trespass in the second degree (Penal Law § 140.15(1)), five counts of possession of ammunition (AC § 10-131(i)(3)), and four counts of harassment in the second degree (Penal Law §§ 240.26(1) and (3)). The People filed supporting depositions from Ms. Pitts and Ms. Murphy, which stated they had read this accusatory instrument. However, the People did not file a ballistics report. The People stated ready for trial on all counts in this accusatory instrument except those charging possession of ammunition.

When the felony counts were dismissed, the People were left with a misdemeanor complaint. Defendant argues that the accusatory instrument upon which the People stated ready for trial – the purported superseding information – is jurisdictionally defective because it was not an information in its entirety and therefore did not validly supersede the misdemeanor complaint. The issue facing this Court is whether the partially converted misdemeanor complaint can be considered a valid superseding information, as far as the corroborated counts are concerned.

By now, the legal requirements for a facially sufficient information have been

exhaustively explored and clarified by the Court of Appeals. See e.g. People v. Kalin, 12 NY3d 225 (2009); People v. Casey, 95 NY2d 354, 359-60 (2000) ; People v. Alejandro, 70 NY2d 133 (1987). The People have conceded that, as far as the ammunition counts are concerned, they did not have a facially sufficient accusatory instrument, since they never filed a ballistics report or provided any competent proof that the ammunition was "live." See e.g. People v. Volkes, 1 Misc 3d 829, 830 - 32 (Crim Ct Richmond Cty 2003). The People stated they were "not ready" to proceed to trial on this charge on November 28, 2011, when they filed the partially converted misdemeanor complaint, and stated they were not ready once again to proceed to trial on January 30, 2012, since they still did not have a ballistics report. They themselves moved to dismiss the possession of ammunition counts on March 29, 2012 pursuant to CPL § 30.30.

The types of accusatory instruments which may be filed in criminal proceedings are limited to those provided for by the legislature in the Criminal Procedure Law. See People v. Flood, 25 Misc 3d 843 (Dist Ct Nass Cty 2009); People v. Kaid, 165 Misc 2d 489 (Crim Ct Kings Cty 1995). According to the Criminal Procedure Law, a misdemeanor complaint can only be superseded by an information or a prosecutor's information. Criminal Procedure Law §§ 100.50(3) and 170.65(1). As relevant to this case, CPL § 170.65(1) requires that a misdemeanor complaint "must" be replaced by "an" information; a "superseding complaint" is not a valid accusatory instrument. People v. Torres, 151 Misc 2d 682 (Crim Ct Bx Cty 1991). This makes perfect sense. A misdemeanor complaint "serves merely as a basis for commencement of a criminal action, permitting court arraignment and temporary control over a defendant's person where there is as yet no prima facie case . . . it is not designed for prosecution

purposes." People v. Weinberg, 34 NY2d 429, 431 (1974). On the other hand, an information is "designed for prosecution purposes." Id, Thus, the legislature mandated that a misdemeanor complaint can only be superseded by a pleading which serves as a vehicle for immediate prosecution. There is simply no reason for the legislature to allow an accusatory instrument which can only commence a criminal action to be superseded by a second one which, in part, can perform only that same non-prosecution function.

The purported "superseding information" in this case was never an information in its entirety. At best, it was filed as a partially converted misdemeanor complaint. The Criminal Procedure Law does not provide that a misdemeanor complaint can be superseded by another misdemeanor complaint, even a partially converted one. Therefore, the People's attempt to supersede the misdemeanor compliant with an accusatory instrument containing uncorroborated hearsay, another misdemeanor complaint, is a "nullity." People v. Hussein, 177 Misc 2d 139, 145 (Crim Ct Kings Cty 1998).

In addressing the "speedy trial" argument, the People assert they should be charged no time following the filing of their second accusatory instrument, since, pursuant to People ex.rel Ortiz v. Commissioner, 253 AD2d 688, 689 (1st Dept 1998), "each count of an accusatory instrument is deemed as a matter of law to be a separate and distinct accusatory instrument." That case had nothing to do with the validity of superseding accusatory instruments. There, the issue was whether the defendant was required to be released from custody pursuant to CPL § 170.70 because the misdemeanor complaint filed at the arraignment had only been partially converted into an information within the statutory time period. The Court held that when the legislature

enacted CPL § 170.70, and included the words that the judge had to consider whether "any information" was before it at the time an application was made to release a defendant from custody under that statute, the judge had to determine whether "any" count in the accusatory instrument was an information. If so, then the judge could deny the CPL § 170.70 release application. As noted, CPL 170.65(1), the controlling statute for the main issue in this case, mandates that a misdemeanor complaint be superseded not just by "any" information, but only by "an" information. This plain language has to be read to mean that the superseding accusatory instrument filed must be "an" information in its entirety, as opposed to a misdemeanor complaint which is filed along with supporting deposition that converts some, but not all, of the counts of that new pleading into an information.

Nor is People v. Brooks, 190 Misc 2d 247, 249 (App Term 1st Dept) relevant, or controlling, as the People argue. In Brooks, the court held that the People validly stated ready for trial on converted counts of a properly filed misdemeanor complaint, even though some other counts were supported by hearsay based allegations. The court found it was improper to dismiss the entire case pursuant to CPL § 30.30, ruling each count of that accusatory instrument was subject to its own "speedy trial" calculations. There, as in Ortiz, the People only filed one accusatory instrument. The defendant in Brooks did not argue that the accusatory instrument was not properly filed – it was initially a misdemeanor complaint. The challenge was to the facial sufficiency of certain counts. While CPL § 170.30(e) provides that a defendant can move to dismiss "an information . . . or a misdemeanor complaint . . . or any count thereof" on the grounds that the "defendant has been denied the right to a speedy trial," that presupposes the

accusatory instrument in question was recognized to be one properly filed and valid in form and substance under the Criminal Procedure Law.

The only valid accusatory instrument in this case at the time the current motion was filed is the misdemeanor complaint charging possession of ammunition and harassment, the charges that remained after the felony counts were dismissed. The People never stated ready on that accusatory instrument. The ammunition counts were never converted to an information by the filing of a ballistics report. The People did file supporting depositions from Ms. Pitts and Ms. Murphy dated November 25, 2011. However, those documents were filed in connection with a new misdemeanor complaint that contained additional criminal charges and additional facts which differed from those in the felony complaint, which was drafted earlier. The People do not claim that these supporting depositions could be read to convert the harassment charges pled in the reduced felony complaint. Since the two accusatory instruments are not identical in terms of the facts and charges, which are matter of substance, these supporting depositions would not be accepted by this Court as "converting" the harassment counts in the reduced felony complaint into an information. Cf. People v. Markowitz, 148 Misc 2d 117 (Crim Ct NY Cty 1990).

Since the Court rejects the partially converted misdemeanor complaint as being a statutorily unauthorized superseding accusatory instrument, the Court also rejects the People's statement of trial readiness on the partially converted counts. Therefore, the People are charged with all time from the dismissal of the felony charges until the filing of the instant motion on April 2, 2012, a total of one hundred thirty-one days. This is more than the ninety days within which the People must state ready for trial in this

matter, CPL § 30.30(1)(b), and the case is dismissed.

This constitutes the Decision and Order of the Court.

Dated: June 15, 2012
Bronx, New York

Hon. Ralph Fabrizio