CITY COURT : CITY OF RYE
WESTCHESTER COUNTY
---------- No. 16-02623

THE PEOPLE OF THE STATE OF NEW YORK,

-against- DECISION AND ORDER

HENRY WALLACE,

Defendant.

APPEARANCES:
The People by Anthony A. Scarpino, District Attorney (Courtney Johnson, Assistant District Attorney)
Defendant by Richard A. Portale, Portale & Randazzo, LLP, White Plains, NY

This is a CPL 30.30 motion in a case that has lingered too long. The issue is whether the delays are chargeable to the People and whether the period set forth in the statute has expired or not.

Defendant was arraigned in Rye City Court on June 21, 2016 upon charges of Grand Larceny (Penal Law § 155.30), CPFI 2nd (Penal Law § 170.25), and CPSP 4th (Penal Law § 165.40), the matter was adjourned to July 5, and defendant was remanded to the custody of the Westchester County Department of Corrections. On July 5, defendant failed to appear and the case was adjourned to August 2 and to August 9 on consent.

By July 21, the People became aware that defendant was being held in custody of the Immigration Customs & Enforcement ("ICE"). On August 9, 2016, a Superseding Felony Complaint was filed and an SCI was offered and was executed on September 9, 2016. The case was thereafter adjourned several times for SCI control until April 25, 2017.[1] On April 25, Defendant demanded a felony hearing and it was scheduled for May 2, 2017. On that day, the People did not proceed with the felony hearing and the defendant was released on his own

[1] December 13, January 24, February 28, March 28, & April 18.

recognizance pursuant to CPL § 180.80. Upon his release by this Court, defendant was returned into Federal custody by ICE, and the Court is informed that he remains in Federal custody to this day. On May 2, the People requested an adjournment of the Felony hearing. The defendant did not appear and the People did not secure his attendance from ICE custody. On May 16, a bench warrant was issued. The case was adjourned until July 11 for a Felony hearing.

On June 30, 2017, defendant moved to terminate the prosecution pursuant to CPL 180.85. On July 3, the Court fixed a return date of August 8. On August 8, 2017, a Superseding Misdemeanor information was filed charging defendant with CPFI 3rd, Petit Larceny, and CPSP 5th – all arising out of the same incident that had been the subject of the Felony complaint.

By decision dated August 16, the Court denied the motion, dismissed the felony complaint, withdrew the felony warrant, accepted filing of the misdemeanor complaint, and issued the warrant of the misdemeanor charges.

On September 19, the case was adjourned at the People's request to October 17. On October 17, defendant made this motion returnable on October 24.

On October 24, defendant was produce and arraigned on the misdemeanor complaint

The defendant had not appeared from June 27, 2016 to October 24, 2017, nor have the People produced him during that period.

The time clock for the dismissal remedy (CPL 30.30 subd. 1) starts ticking on the day following commencement of the criminal action. *People v. Stiles*, 70 NY2d 765, 520 NYS2d 745 [1987]. That date is ascertained by reference to the fact that a criminal action commences when the first accusatory instrument is filed (see CPL§ 1.20[16]). Here, the action was commenced June 21, 2016. That date is the starting date for computation of 30.30 time.

To toll the running of time under CPL 30.30, the People must announce present readiness for trial. The People did not declare readiness until October 24, 2017. The question is how much of the time between June 21, 2017 and October 24, 2017 is excludable.

Successor accusatory instrument

The felony charges were filed against defendant on June 21,2016. A superseding misdemeanor information was filed August 8, 2017. Both accusatory instruments arise out of the same crimes.

If "charges are sufficiently related to apply the same commencement date, they are likewise sufficiently related for purposes of applying excludable time." *People v. Farkas*, 16 NY3d 190, 194, 919 NYS2d 488 [2011]. Thus, in *Farkas*, because the People were ready within the meaning of CPL 30.30 on a misdemeanor assault charge when, a year after the commencement of the assault prosecution, they filed an indictment for that assault plus theft crimes which allegedly arose out of the assault incident, dismissal of the theft charges was not required. *See also*, *People v. Sinistaj*, 67 NY2d 236, 501 NYS2d 793 [1986]; & *People v. Lomax*, 50 NY2d 351, 428 NYS2d 937 [1980] (a new indictment, returned after the original one had been dismissed, should be related back to the commencement of the criminal proceeding for purposes of the six-month readiness period under CPL 30.30(1)(a)).

Thus, the filing of the superseding misdemeanor charge has no effect on the 30.30 calculation.

SCI time

A Superior Court Information process is an adjournment to conference the case with a Superior Court judge. When a plea disposition is worked out in the Supreme or County Court, the case proceeds by way of a Superior Court Information, known as an SCI. Hence, the adjournment is often called an SCI adjournment.

What occurs in the lower court is an agreement between the district attorney and defense counsel that the matter is one for which a felony plea may be taken. The matter is adjourned in the local court, which would have no jurisdiction to take a felony plea. A date is set for the matter to be placed back on the local court calendar if no agreement is reached in the superior court. The written agreement offered by the district attorney provides that the defendant has his right to a felony hearing and other local court procedures should no accommodation be reached in the superior court. However, since the adjournment is at the defendant's request, the speedy trial time is tolled pursuant to CPL § 30.30, as is the timeframe for the scheduling of a felony hearing.

Accordingly, the time from the SCI agreement – September 16, 2016 – to return to the City Court – April 19, 2017 – is excluded from 30.30 calculation.

Warrant time

A bench warrant was issued May 15, 2017. CPL 30.30(4) provides that certain periods are exclude from calculation. Those periods include:

(a) a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: . . . trial of other charges; and the period during which such matters are under consideration by the court; or . . .

(c)(i) the period of delay resulting from the absence or unavailability of the defendant. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence; or . . .

(ii) where the defendant has either escaped from custody or has failed to appear when required after having previously been released on bail or on his own recognizance, and provided the defendant is not in custody on another matter, the period extending from the day the court issues a bench warrant pursuant to section 530.70 because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court pursuant to a bench warrant or voluntarily or otherwise. . . .

Neither exclusion under 30.30(4)(c) appears to apply. Under (4)(c)(1), the period of delay must result from the absence or unavailability of the defendant. Defendant was absent from July, 2016 to October 24, 2017. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. Here, defendant's location was known to the People during the entire period. He was in the custody of ICE. Since his location was known, the exclusion under 30.30(4)(c)(i) does not apply.

The exclusion period under 30.30(4)(c)(ii) also does not apply. By its terms, (c)(ii) applies only "provided the defendant is not in custody on another matter". Defendant was in the custody of ICE.

Motion time

Defendant made a motion to dismiss on June 30, 2017. That motion was decided on August 16, 2017.

CPL 30.30(4) says, "In computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded:

(a) a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: . . . pre-trial motions. . . and the period during which such matters are under consideration by the court . . . .

See also, People v South, 29 Misc3d 92, 912 NYS2d 837 [App Term 2nd Dept 2010]. Accordingly, the period from June 30, 2017 to August 16, 2017 wile defendant's motion was pending is excludable.

Conclusion

If one adds just the time between the rejection of the SCI (April 19) and the making of the motion (June 30) – a total of 68 days – to the period from the decision on the motion (August 16) to the arraignment on the superseding misdemeanor information at which the People announced readiness (October 24, 2017) – 68 days – that total time is 140 days. This exceeds the 90-day period allowed by CPL 30.30. There is no need to further determine if any other time is excludable or not.

Accordingly,

IT IS HEREBY

ORDERED and ADJUDGED that the defendant's motion to dismiss the superseding misdemeanor information in this case pursuant to CPL 30.30 be and hereby is granted.

Dated: Rye, New York
November 3, 2017

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JOSEPH L. LATWIN

Papers:
-Affirmation of Richard A. Portale dated October 20, 2017;
-Affirmation of Courtney L. Johnson dated October 27, 2017
-Reply Affirmation of Richard A. Portale dated October 30, 2017;