SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 14

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THE PEOPLE OF THE STATE OF NEW YORK

:

-against- Ind. No. 2457/2013

:

Cherrod Dobson,

Defendant

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Dineen A. Riviezzo, J. S.C.:

Defendant moves to dismiss the indictment pursuant to CPL § 30.30.

Defendant was charged with possession of a Stallard Arms 9 mm semiautomatic hand gun, and indicted based on possession of that weapon. The People realized, as the case neared trial, that the wrong weapon had been attributed to the defendant. The case was re-presented, and a superceding indictment filed based on defendant's alleged possession of a .40 caliber pistol.

Defendant now concedes that for 30.30 purposes, the new indictment relates back to the date of filing of the original criminal court instrument. People v. Lomax, 50 N.Y.2d 351, 406 N.E.2d 793, 428 N.Y.S.2d 937 (1980) ("there can be only one criminal action for each set of criminal charges brought against a particular defendant, notwithstanding that the original accusatory instrument may be replaced or superseded during the course of the action... there also can be only one date which marks the 'commencement' of the action, the date on which the first accusatory paper is filed.")

The Court of Appeals has held that when an indictment "relates back" for 30.30 purposes, the excludeable time under the first indictment also "relates back:"

> "We perceive no logical reason why, when a subsequent indictment is related back to the commencement of the proceeding for purposes of applying the six-month limitation prescribed by CPL 30.30 (1) (a), it should not also be related back for the purpose of computing the time to be excluded from that limitation. A contrary holding -- treating the subsequent indictment as part of the original criminal action for imposing the time limit under CPL 30.30 (1) (a), but not permitting theapplicable exclusions under CPL 30.30 (4) -- would offend the accepted rule of construction that parts of a statute should be read together to determine the fair meaning of the whole (McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 98). It would, in effect, afford different treatment to a subsequent indictment under subdivision (4) than that given under subdivision (1) (a). Such fragmenting of the statute in its application should be avoided. As we have recently emphasized, CPL 30.30, which should be implemented as one integral statutory scheme, must be interpreted "so as to harmonize its various provisions" *(People v Anderson, supra*, at p 535)." People v. Sinistaj, 67 N.Y.2d 236, 492 N.E.2d 1209, 501 N.Y.S.2d 793 (1986)

More recently, in People v. Farkas, 16 N.Y.3d 190, 944 N.E.2d 1127, 919 N.Y.S.2d 488 (2011), the complainant was allegedly punched in the face several times by a complainant, who also took his camera. The police issued defendant a desk appearance ticket, charging him with assault in the third degree; approximately one month later, the People filed a misdemeanor complaint charging defendant with assault in the third degree, menacing in the third degree and harassment in the second degree. Some time later the People filed an indictment, also based on the same incident,

charging defendant with robbery, assault and other charges. Defendant moved to dismiss the theft-related counts in the indictment on CPL 30.30 speedy trial grounds, arguing that the time began accruing for speedy trial purposes when defendant appeared on the desk appearance ticket, but that all delay in pursuing the indictment was solely attributable to the People. In deciding that the indictment as well as the excludeable time related back, the Court held:

> "There is some question as to whether this indictment was "directly derived" from the initial accusatory instrument within the meaning of CPL 1.20 (16) (b). The term "directly derived" is not defined in the Criminal Procedure Law and we have determined that it should be accorded its plain meaning—specifically, whether the indictment can be traced to or originates from the prior accusatory instrument (see People v Osgood, 52 NY2d 37, 44, 417 NE2d 507, 436 NYS2d 213 [1980]). Here, the indictment appears to satisfy that test because the charges, including the theft-based charges, originate from the prior accusatory instrument, incorporating the same physical injury component. However, it is unnecessary to make that determination in this case because, as noted above, if the charges are sufficiently related to apply the same commencement date, they are likewise sufficiently related for purposes of applying excludable time.
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> "Nor would it benefit defendant if we were to determine that the indictment was not directly derived from the initial accusatory instrument. In that situation, the indictment would not relate back for the purpose of any speedy trial calculation, including determination of a commencement date (*see Sinistaj*, 67 NY2d at 241 n 4). In short, the speedy trial statute should be applied as a rational, integral whole." (Id at 193 - 194) (Emphasis added).

While acknowledging that the action was commenced for speedy trial purposes

on March 25, 2011, defendant nevertheless argues that the excludeable time should not relate back. As stated in People v. Farkas, if the commencement date relates back, then so should the excludeable time. Moreover, and in any event, it is clear that there is in fact only one incident here, and one possession of a weapon. The fact that the wrong weapon was attributed does not alter the fact that there was only one criminal incident, at the same place and time as alleged in the original criminal court complaint. The present charges were "directly derived" from the first accusatory instrument.[1]

As defendant acknowledges that there is excludeable time, the court must engage in the usual calculation. The instant criminal action was commenced for speedy trial purposes on March 25, 2011, when a felony complaint was filed. People v. Lomax, 50 N.Y.2d 351, 406 N.E.2d 793, 428 N.Y.S.2d 937 (1980) (starting point for analysis of defendant's speedy trial claim must be the date upon which defendant was first arraigned and the first accusatory instrument in the criminal proceeding presumably was filed.) The People have six months (here, 184 days) to be ready for trial.

The following time periods are to be considered. Since neither side proffered any minutes of calendar calls, or made any arguments as to specific time periods as to

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[1]Defendant relies on People v. Cintron, 161 Misc2d 335 (Sup. Ct., NY CO 1994. That case applied the original commencement date but not the excludeable time under the original accusatory instrument. To the extent this is permissible under Farkas (it does not appear to be), that case is also distinguishable on the ground that the subsequent indictment involved drug charges not previously presented to the Grand Jury, and thus involved arguably different criminal incidents.

inclusion or exclusion, the Court is relying upon the hearing file only:

- March 25, 2011 to April 25, 2011: The People filed a statement of readiness on March 25, and served it the following day. A valid certificate of readiness is effective as of the date it is filed with the court, as long as defense counsel is promptly notified. See People v. Anderson, 252 A.D.2d 399, 400 (1st Dept 1998). The case was adjourned for arraignment to May 11, 2011. The time up to the filing of the statement of readiness is includeable. 31 days charged.
- May 11, 2011 to June 22, 2011: The case was adjourned for the People to hand up the Grand Jury minutes. See People v. Beasley, 893 N.Y.S.2d 201, 2010 (2d Dep't 2010). 0 days charged.
- June 22, 2011 to August 2, 2011: Case adjourned for court's decision on sufficiency of Grand Jury minutes (motion practice). 0 days charged.
- August 2, 2011 to Sept. 20, 2011: Court announced a decision on the sufficiency of the Grand Jury minutes. The court's notes indicate that September 20, the next appearance, was a "control date." See People v. Matthews, 227 AD2d 313 (1st Dept. 1995) (record reflected an understanding by both counsel that the case was on as a control date, and that defense counsel actively participated in selecting the adjourned date, rendering the adjournment "on consent"). 0 days charged.

- September 20, 2011 to November 16, 2011: Case set down for first time for hearing and trial. The People are entitled to a reasonable time to prepare for a hearing following a judge's decision on a pre-trial motion. People v. Wells, 16 AD3d 174 (1st Dept. 2005). 0 days charged.
- Nov. 16, 2011 to December 7, 2011: Hearing adjourned due to defense counsels's failure to appear until a few minutes before 1:00 pm. 0 days charged.
- Dec. 7, 2011 to January 25, 2012: The case was adjourned for motion practice, due to the People's motion for a buccal swab. People v. Colon, 61 AD3d 772 (2d Dept. 2009) (motion practice by People excludeable). 0 days charged.
- January 25, 2012 to March 26, 2012: Defendant consented to a buccal swab. A delay for the purpose of obtaining DNA results has been held to be an exceptional circumstance, excludable under CPL 30.30(4)(g), if the People exercise due diligence. People v. Williams, 244 AD2d 587, 665 N.Y.S.2d 87 (2d Dept 1997) (four and one half month delay toobtain blood and saliva samples, perform genetic tests and obtain the written results of such testing was an exceptional circumstance within the meaning of CPL 30.30(4)(g). 0 days charged.
- March 26, 2012 to May 7, 2012: Awaiting DNA results. 0 days charged.
- May 7, 2012 to June 18, 2012: Counsel relieved and new counsel assigned. See

People v. Lassiter, 240 A.D.2d 293, 658 N.Y.S.2d 317 (1st Dep't 1997) (people not charged with delay when defense counsel was absent); People v Brown, 195 AD2d 310, lv denied 82 NY2d 891. 0 days charged.

- June 18, 2012 to August 6, 2012: Swab results announced by People. Court's notes indicate that a motion schedule was set, but not the subject of the motion. 0 days charged.
- August 6, 2012 to August 27, 2012: August 6 was the date for decision on the motion schedule set on June 18, 2012. No defense motion was filed, and the Court noted that defense counsel withdrew a motion for a Mapp hearing. Hearings adjourned. (People v. Brown, 99 N.Y.2d 488, 788 N.E.2d 1030, 758 N.Y.S.2d 602 [2003] [People are entitled to a reasonable period of time to prepare for trial even where the Defendant requests a motions schedule but fails to file any motions]). 0 days charged.
- August 27, 2012 to August 30, 2012: People not ready. 3 days charged.
- August 30, 2012 to September 12, 2012: People not ready. 13 days charged.
- September 12, 2012 to September 13, 2012: Case administratively adjourned. 0 days charged.
- September 13, 2012: Parties ostensibly agree to September 21 date for hearings; but case is advanced by court to September 14. 0 days charged.

- September 14, 2012 to September 28, 2012: Case is adjourned to September 28 for hearings, evidently on consent. 0 days charged.
- September 28, 2012 to October 26, 2012: Defense counsel not present; actually engaged in other part as per affirmation of engagement in court file. 0 days charged.
- October 26, 2012 to November 9, 2012: People announce ready. 0 days charged.
- November 9, 2012 to December 3, 2012: Case sent to Part 90, ostensibly to handle a VOP, on consent. 0 days charged.
- December 3, 2012 to January 17, 2013: Hearing held, and decision rendered January 17. Trial set for February 13, 2013. 0 days charged.
- February 13, 2013 to March 6, 2013: People not ready. 21 days charged.
- March 6, 2013 to April 2, 2013: Trial adjourned for reasons not clear in the court file. Having no minutes, for purposes of this motion only, the time will be charged to the People. 27 days charged.
- April 2, 2013 to April 15, 2013: Defense counsel not present, as he was engaged in a trial in another part. The court was alerted that the defendant had been re-indicted. 0 days charged.
- April 3, 2013: Case is advanced from April 15. Defense counsel indicates that he will make a motion to dismiss the new indictment. Present 30.30 motion is

dated May 15, 2013. 0 days charged.

It is clear that no more than 95 days should be charged to the People.

The motion is denied.

This is the Order of the Court.

Dated: 6-17-2013

J.S.C.

HON. DINEEN A. RIVIEZZO