People v Lorenzo

2018 NY Slip Op 32436(U)

September 24, 2018

Criminal Court of the City of New York, Kings County

Docket Number: 2018KN000837

Judge: Consuelo Mallafre-Melendez

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CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: TL1
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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Dkt. #: 2018KN000837

-against-

EDWIN LORENZO

Defendant.
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Consuelo Mallafre-Melendez, J.

Defendant was arraigned on a misdemeanor complaint on January 3, 2018, charging him with Assault in the Third Degree (Penal Law (PL) § 120.00[1]), Attempted Assault in the Third Degree (PL §§ 110/120.00[1]), Menacing in the Third Degree (PL § 120.15), Harassment in the Second Degree (PL § 240.26[1]) and Endangering the Welfare of a Child (PL § 260.10[1]). Defendant now moves to dismiss this matter on speedy trial grounds pursuant to Criminal Procedure Law (CPL) 30.30. The People oppose the motion. For the reasons set forth, Defendant's motion is **granted**.

Speedy Trial Motion

Pursuant to CPL 30.30(1), the applicable speedy trial time is determined based on the highest charge in the accusatory instrument (*People v. Walton*, 165 Misc 2d 672, 674 [Crim Ct, Richmond County 1995]). Where, as here, the highest charge against Defendant is a class A misdemeanor, the People are required to state their readiness for trial within ninety (90) days of commencing the criminal action (CPL 30.30 [1] [b]; Penal Law § 55.10). In order to be ready for trial pursuant to CPL 30.30, the statement of readiness (SOR) must appear on the record, and it must declare a present readiness to proceed to trial (*People v. Kenzia*, 64 NY2d 331 [1985]). A request for an adjournment, however, does not necessarily invalidate a prior valid statement of readiness (*People v. Anderson*, 66 NY2d 529 [1985]).

[* 2]

The defendant has the burden of demonstrating the existence of a delay in excess of ninety (90) days from filing of the misdemeanor complaint (*People v. Santos,* 68 NY2d 859, 861 (1986); *People v. Khachiyan,* 194 Misc 2d 161, 166 [Crim Ct, Kings County 2002]). Once the defendant has alleged that more than the statutorily prescribed time has elapsed without the People's declaration of readiness, the burden shifts to the People to establish that certain periods within that time should be excluded (*Santos* at 861; *Khachiyan* at 166). "It is the People's burden to ensure, in the first instance, that the record of the proceedings at which the adjournment was actually granted is sufficiently clear to enable the court considering the subsequent CPL 30.30 motion to make an informed decision as to whether the People should be charged" (*People v. Cortes*, 80 NY2d 201, 215-216 [1992]). Calendar notations by the court, are, in themselves, insufficient to meet the People's burden (*People v. Berkowitz*, 50 NY2d 333, 349 [1980]).

<u>Parties' Contentions</u>

Defendant asserts that 101 days of chargeable time has elapsed from the date of arraignment on January 3, 2018, until the filing of Defendant's motion on August 22, 2018. The People counter that at most only 48 days of chargeable time has elapsed. The primary dispute turns on two separate issues: (1) whether the People are entitled to an exclusion under CPL 30.30(4)(g) for the time period between April 11 through June 8 due to the complaining witness's temporary relocation to Florida; and (2) whether the People properly filed and served their off-calendar SOR via an email on August 2, 2018.

CPLR 30.30(4)(g)

In their Affirmation dated September 4, 2018, the People for the first time, inform the court that the complaining witness "went" to Florida on March 25, 2018 and that the Administration for Children Services of New York City (ACS) advised her to remain there as part of the "child's

safety plan" (Pros. Aff. para. 6). The People further explain that the complaining witness "relocated" to Florida in order "to receive financial and emotional support from family members in the aftermath of Defendant's alleged actions" (Pros. Memo. pg. 6).

The People contend that the complaining witness's presence in Florida from March 25, 2018 through June 2, 2018 constituted an exceptional circumstance pursuant to CPLR 30.30(4)(g) and that the two adjournments they requested during her absence should be excluded from the speedy trial clock.[1]

In reply papers filed on September 19, 2018, Defendant argues that the complaining witness's presence in Florida does not constitute an "exceptional circumstance" under CPLR 30.30(4)(g). The fact that ACS took the complaining witness's resources in Florida into account when devising the child safety plan did not create a physical or legal impediment to her presence in court. Defendant asserts that this is evident from the fact that the complaining witness was free to return to New York on June 2 without modification to the ACS plan. Defendant contends that even if the ACS plan was the reason for the complaining witness's absence, the People failed to establish that they made any diligent efforts to contact ACS or the complaining witness in order to secure her presence in court.

Defendant further argues that if the People were in fact uncertain of the complaining witness's return date, then they should be retroactively charged 31 days between May 2, the date they requested a three-week adjournment, and June 2, the date the complaining witness returned to New York. Defendant asserts that the People's request for a three-week adjournment was illusory because there was no indication that they knew whether the complaining witness would return within this time period. Had the People acknowledged this uncertainty in court, they would

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[1] The People requested two post-readiness three-week adjournments due to the complaining witness's unavailability on April 11, 2018 and May 2, 2018, totaling 42 days.

have requested to be charged until the complaining witness returned and an SOR could be filed. Accordingly, Defendant requests that the People be charged with the additional ten-days until June 2, the date the complaining witness returned and the People could file a valid off-calendar SOR.

August 2, 2018 SOR

On August 2, 2018 at 5:58 p.m., the People emailed defense counsel and the supervising court attorney to the administrative judge of Brooklyn Criminal Court a PDF attachment of their off-calendar SOR. Defendant argues that this did not constitute proper service and the off-calendar SOR was not properly filed until the next day, August 3, 2018. The People, in turn, argue that the email constituted sufficient written notice as they had previously communicated with defense counsel by email. The People maintain that filing and serving the SOR via email was permissible under §200.4 of the Uniform Rules for the New York State Trial Courts which provides that a party may submit papers to the judge with the clerk when "the clerk is unavailable or the judge so directs at the first available opportunity." The People further argue that the timing of their email is irrelevant as an "after-business-hours exception" to an SOR is an "arbitrary time delineation" not permitted under CPL 30.30 (Pros. Memo. pg. 7).

Analysis

CPLR 30.30(4)(g)

Pursuant to CPLR 30.30(4)(g), the People may request that a period of delay be excluded if it is caused by "exceptional circumstances." Although the statute does not precisely define "exceptional circumstances," the Court of Appeals has found that such circumstances exist "where the People are truly unable to take necessary steps to prepare for trial and announce readiness due to circumstances which are beyond their control…" (*People v. Smietana*, 98 NY2d 336 [2002]).

"The unavailability of a prosecution witness may be a sufficient justification for the delay…provided that the People attempted with due diligence to make the witness available" (*People v. Zirpola*, 57 NY2d 706, [1982]).

The People failed to establish that the time period during which the complaining witness remained in Florida was an exceptional circumstance excludable under CPLR 30.30(4)(g). Whether a witness is unavailable within the meaning of CPLR 30.30(4)(g) is a question of fact to which the People bear the burden of proof (*People v. Zirpola*, 57 NY2d 706; *People v. Stanley*, 275 AD2d 423, [2d Dept. 2000])). The People have failed to provide the court with any documentation from ACS or to plead facts which demonstrate that the ACS directive prevented the complaining witness from returning to New York and appearing in court.

The safety of the complaining witness is of paramount concern and weighs heavily in this court's analysis. However, there is no indication that the complaining witness went to or remained in Florida for safety concerns. Rather, as the People state, she relocated to Florida "to receive financial and emotional support from family members in the aftermath of Defendant's alleged actions" (Pros. Memo. pg. 6).[2] Furthermore, the complaining witness returned to New York on June 2, which provided the People with enough time to secure her presence in court within the speedy trial clock. However, the People still requested an additional adjournment due to her unavailability on June 8 and an additional adjournment on July 12, the two subsequent court appearance dates. This further serves to indicate that the complaining witness's presence in Florida was not an "exceptional circumstance" which prevented the People from being ready for trial or warrants exclusion under CPLR 30.30(4)(g). "[T]he People may not rely on factors which do not

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[2] On this matter, this court notes that an order of protection was issued for the complaining witness's safety and there is no indication that Defendant violated that order.

actually prevent them from being ready to proceed to trial to justify a failure to timely announce readiness" (*Smietana*, 98 NY2d at 341).

Accordingly, this court finds that the time period between April 11 to June 2 is not excludable under CPLR 30.30(4)(g). However, this court will not retroactively charge the People with 31 days between the May 2 and June 8 court appearance dates. As the People allege, they remained in constant communication with the complaining witness during her time in Florida in an effort to secure her return to New York and prepare for trial. Therefore, the People's expectation that the complaining witness would return within three weeks was not unreasonable. The complaining witness's return to New York ten days later, further demonstrates that the People's request for a three-week adjournment was not illusory.

August 2, 2018 SOR

There is currently no rule, statute, or precedent that permits the People to "serve and file" an SOR via email. An off-calendar SOR must be "sent to the appropriate court clerk, to be placed in the record" (*Kenzia*, 64 NY2d at 337). The People's reliance on §200.4 of the Uniform Rules for the New York State Trial Courts is entirely without merit. This rule explicitly states that all papers requiring a court stamp must be "presented to the clerk of the trial court in the appropriate courtroom or clerk's office*, except where the clerk is unavailable or the judge so directs*, papers may be submitted to the judge with the clerk at the first available opportunity" (emphasis added). The People did not email the SOR under a judge's instruction or because the clerk was unavailable. Instead, this was clearly the People's failed attempt to timely serve and file their SOR via email after court closed for the day. The People's off-calendar SOR was not served and filed until the following day, August 3, 2018, when it was stamped by the court clerk.

Calculating Includable and Excludable Time

Based upon review of the case file and the parties' moving papers, the court finds that 91 days are chargeable to the People.

January 3, 2018 to February 6, 2018

On January 3, Defendant was arraigned and the case was adjourned to February 6 for conversion. However, on January 16, the People filed a superseding information with a supporting deposition and an SOR which converted the complaint. Accordingly, the court finds and the parties agree that the People are charged with 13-days for the period from January 3 to February 6. **[13 days charged, 13 total days]**.

February 6, 2018 to March 1, 2018

On February 6, the case was adjourned to March 1 for discovery by stipulation (DBS). In Kings County, DBS stands in lieu of motion practice. Accordingly, adjournments for DBS are excluded from speedy trial calculations, regardless of the People's readiness for trial (CPL 30.30 [4] [a]; *People v. Dorilas*, 19 Misc 3d 75 [Sup Ct, Appellate term, 2nd and 11th Judicial Districts, 2008]; *Khachiyan* at 166; *People v. Smalls*, 163 Misc 2d 369, 371 [Crim Ct, Kings County 1994]). Accordingly, the court finds and the parties agree that the period from February 6 to March 1 is excluded. **[0 days charged, 13 total days]**.

March 1, 2018 to April 11, 2018

On March 1, the People served DBS and the case was adjourned to April 11 for Hearing and Trial. The court finds and the parties agree that the period from March 1 to April 11 is excluded. **[0 days charged, 13 total days]**.

April 11, 2018 to May 2, 2018

On April 11, the case was on for its first Hearing and Trial date. The People announced that they were not ready because the complaining witness was unavailable. The People requested

a three-week adjournment and the court adjourned the case to May 2 for Hearing and Trial. When the People request an adjournment after announcing ready, they can be charged only for the period of time requested, not the entire adjournment (*People v. Williams*, 32 AD2d 403, 404-405 [2d Dept 2006]). Accordingly, the People are charged 21 days for the period from April 11 to May 2. **[21 days charged, 34 total days]**.

May 2, 2018 to June 8, 2018

On May 2, the case was on for its second Hearing and Trial date. However, the People again announced not ready because the complaining witness was unavailable. The People requested a three-week adjournment and the court adjourned the case to June 8 for Hearing and Trial. As this court found in its analysis, the People's request for a three-week adjournment was not illusory. Accordingly, the People are charged 21 days for the period from May 2 to June 8. **[21 days charged, 55 total days]**.

June 8, 2018 to July 12, 2018

On June 8, the case was on for its third Hearing and Trial date. However, the People again announced that they were not ready because the complaining witness was unavailable. The People requested two-weeks and the case was adjourned to July 12 for Hearing and Trial. Accordingly, the People are charged 14 days for the period from June 8 to July 12. **[14 days charged, 69 total days]**.

July 12, 2018 to August 22, 2018

On July 12, the case was on for its fourth Hearing and Trial date. The People announced not ready and requested to be charged until they filed an off-calendar SOR. The case was adjourned to August 22 for Hearing and Trial. As explained in the court's analysis, the People did not properly serve and file their off-calendar SOR until August 3, 2018. Accordingly, the People

are charged with 22 days for the period from July 12 to August 22. **[22 day charged, 91 total days]**.

July 12, 2018 to August 22, 2018

On August 22, the case was on for its fifth Hearing and Trial date and the People announced ready. However, Defendant filed the instant Motion to Dismiss and the case was adjourned to September 25 for Decision and Hearing and Trial. Defendant's filing of a speedy trial motion tolls the speedy trial clock (*People v. Aragon*, 177 Misc2d 316 [1998]). Accordingly, the period from August 22 to September 25 is excluded. **[0 day charged, 91 total days]**.

Conclusion

Based on the foregoing, this Court finds that 91 days are charged to the People, which exceeds the speedy trial time for PL §§ 120.00(1), 110/120.00(1), 120.15, 240.26(1) and 260.10(1). Accordingly, Defendant's motion to dismiss pursuant to CPL 30.30 is **GRANTED**.

This constitutes the Decision and Order of the Court.

Dated: September 24, 2018
Kings County, New York

Hon. Consuelo Mallafre-Melendez
J.C.C.