People v Scott
2018 NY Slip Op 33532(U)
October 17, 2018
County Court, Westchester County
Docket Number: 17-0584
Judge: Larry J. Schwartz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY SCOTT,

Defendant.

---X

FILED
OCT 19 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER

Indict. No. 17-0584

SCHWARTZ, J.,

The defendant ANTHONY SCOTT, having been indicted on or about September 26, 2017 for robbery in the third degree, as a felony (PL § 160.05) and petit larceny, as a misdemeanor (PL § 155.25), has moved this court, pursuant to CPL § 30.30 for an order dismissing the within indictment on grounds of an alleged statutory speedy trial violation. The defendant also moves to renew and reargue his motion to reduce/dismiss the charges in the indictment. The People oppose both motions.

For the reasons below, the defendant's motions are denied.

A. MOTION TO DISMISS INDICTMENT PURSUANT TO CPL 30.30

A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court (see, CPL § 1.20[1] and [17]). The within criminal action was commenced on February 2, 2017 when the defendant was charged and arraigned in the White Plains City Court (see CPL 30.30[5][b]).

The defendant is entitled to a "speedy trial". By definition, as the within defendant is charged in a criminal action, which includes at least one felony offense, the People were required to be ready to commence trial within six (6) months of the commencement of the criminal action (CPL 30.30[1][a]).

The day the criminal action was commenced is excluded from the speedy trial calculation (see, People v. Stiles, 70 NY2d 765 [1987]). As such, the six-month time period began to run on February 3, 2017. Accounting for months with 31 days, and presuming no exclusions from the speedy trial calculation, the People would have had to announce their readiness for trial within 182 days or by August 3, 2017.

However, the six-month requirement pronounced by CPL § 30.30 is not absolute. The following are each excluded from the calculation of speedy trial: time which is set aside for motion practice, "the period during which such matters are under consideration by the court" and any "period of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his counsel" (CPL §§ 30.30[4](a) and (b)].

The People declared their readiness for trial on October 4, 2017 which was 244 days after the prosecution had commenced. To establish readiness, the People are required to fulfill two elements. "First, there must be a communication of readiness by the People which appears on the trial court's record. [Second,] the prosecutor must make his statement of readiness when the People are in fact ready to proceed." (People v Kendzia, 64 NY2d 331, 337 [1985]); see also, People v Hamilton, 46 NY2d 932 [1979].

"[T]he People bear the burden of establishing which time periods should be excluded from the statutory six months, with no burden being placed on the defendant" (People v Barden, 27 NY3d 550, 556 [2016]). "The inquiry on a speedy trial motion is whether the People have done all that is required of them to bring the case to a point where it may be tried (see People v England, 84 N.Y.2d 1, 4, 613 N.Y.S.2d 854, 636 N.E.2d 1387 [1994]). "The People are not presently ready where they fail to produce an incarcerated defendant for trial" People v Brewer, 63 AD3d 402, 403 [1st Dept 2009]. Here, the People concede they have the burden of demonstrating that at least 63 days should be excluded from the statutory six months.

In fact, the Defendant concedes that of the days that elapsed after the commencement of this action through May 2, 2017 (89 days), those days are excludable due to defense-requested adjournments. Thus, only 155 days through the October 4, 2017 declaration of readiness are chargeable to the People.

The defendant argues, however, that the October 4, 2017 declaration of readiness was, in effect, illusory. The defendant contends this is so because on that October 4, 2017 appearance, the People requested that the defendant submit a buccal swab for DNA testing. Since DNA is the only piece of evidence that could potentially link him to the crime, the defendant contends, the People could not have been actually ready to proceed to trial absent confirmatory lab testing after the requested buccal swab. Thus, it is the defendant's view the time from October 4, 2017 to May 10, 2018 when the results were provided to the defendant's counsel should be chargeable to the People.

The defendant also argues that the time from July 9, 2018 through August 23, 2018 should also be chargeable to the People. He argues that on May 10, 2018 the Court advised the People to check with their witness and expect the case to be sent to trial at the next scheduled appearance date of July 12, 2018. Three days before that appearance date, the People filed an order to show cause requesting the defendant submit to his palm prints being tested for comparison.

On the July 12, 2018 appearance date, the Court set a decision date of August 23, 2018 for that motion. The People withdrew their motion when the Court, a day after receiving the defendant's opposition, wrote to the People and requested good cause for their late motion. In response, the People withdrew their motion. Thus, in the defendant's view, the time from July 12, 2018 through August 23, 2018 should be chargeable to the People.

[* 3]

The defendant also argues that the period from August 23, 2018 through September 17, 2018 should be chargeable to the People because it was due to the unavailability of the People's witnesses.

The People argue that the time from October 4, 2017 to January 10, 2018 is not chargeable to the People because a pre-trial motion schedule was set with a decision date schedule for January 10, 2018 (CPL 30.30[4][a]). The People also argue the time from January 10, 2018 to May 10, 2018 is not chargeable to the People because the defendant consented to the adjournments while waiting for confirmatory DNA testing (CPL 30.30[4][b]).

As to the time period from July 12, 2018 through August 23, 2018, the People contend that the defendant consented to an adjournment for this period and thus, it is not chargeable to the People (id.). The People argue that the time from August 23, 2018 through September 17, 2018 is not chargeable to the People as the September 20, 2017 date for hearings was set by the Court and not at the People's request.

At the outset, it is not in dispute that the time period from October 4, 2017 to January 10, 2018 was set by the Court to be the period of time for the omnibus motion to be made and decided. I find this period of time to have been for a pre-trial motion and decision and thus must be excluded from the time within which the People must be ready for trial (CPL 30.30[4][a]).

Turning to January 10, 2018 through May 10, 2018, the record demonstrates the defendant consented to all the adjournments that were granted. Thus, I find this period of delay granted with the consent of the defendant must be excluded from the time within which the People must be ready for trial (CPL 30.30[4][b]). The same is true for July 12, 2018 through August 23, 2018.

The defendant's argument that the October 4, 2017 declaration of readiness was illusory because of then-outstanding buccal swab confirmatory lab testing is unpersuasive. Here, even without the confirmatory testing, the People had a prima facie case to proceed to trial based on the CODIS match for the defendant's DNA and surveillance footage from the bank (see People v Zale, 137 AD3d 634 [1st Dept 2016]). Thus, I find that the October 4, 2017 declaration of readiness was not illusory.

The defendant's conclusory argument that the People's pre-trial motion seeking the defendant's palm prints was frivolous and made in bad faith is without merit. Since this was a pre-trial motion, the time from July 12, 2018 to August 23, 2018 set by the Court for motion papers and decision is not chargeable to the People (CPL 30.30[4][a]). That the People ultimately withdrew their motion after the court inquired as to good cause, without more, does not require a finding that the motion was *per se* frivolous or made in bad faith. Nor does CPL 30.30 "... contain any provision where the excludability of the time provisions of the speedy trial rules is contingent on whether the moving party is successful in obtaining the relief sought" (People v Sivano, 174 Misc2d 427, 429 [App Term 1997] citing People v Buckmon,109 AD2d 846 [2d Dept 1985]).

Finally, the period from August 23, 2018 through September 17, 2018 is not post-readiness time chargeable to the People. The Court set the September 20, 2018 date for hearings and there is no dispute the Court did not do so at the People's request (People v Rivera, 223 AD2d 476 [1st Dept 1996]). Thus, I find there is no post-readiness time chargeable to the People.

Accordingly, since only 155 days are chargeable to the People, the defendant has not been denied his right to a speedy trial and this motion is denied.

B. MOTION TO RENEW AND REARGUE

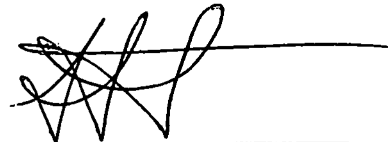
Although the defendant's motion is captioned as one to renew and reargue, it is in effect, a motion to reargue that portion of his omnibus motion seeking to dismiss the indictment on the grounds that the grand jury proceeding was defective. The defendant's motion to reargue is denied as the defendant does not point to any misapprehended relevant facts or misapplied controlling principle of law. It essentially argues once again the very question previously decided—the sufficiency of the grand jury proceedings (Ahmed v. Pannone, 116 AD3d 802, 984 [2d Dept 2010]).

If the court were to consider the motion to reargue, it would find the evidence presented (including the security video), if accepted as true, is legally sufficient to establish that the defendant threatened the use of force and that said threat was "...implicit in the defendant's conduct or when viewed under the totality of the facts attendant to the incident" (People v Lopez, 161 AD2d 670, 671 [2d Dept 1990]; see also People v Zagorski, 135 AD2d 594, 595 [2d Dept 1987]).

To the extent the defendant's motion could be read as one to renew, it is also denied as there are no new facts not offered on the prior motion, nor a change in the law, that would change the Court's prior determination (CPLR 2221[e]).

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
October 17, 2018



Hon. Larry J. Schwartz
Westchester County Court Judge

To:

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601

CLARE J. DEGNAN, ESQ.
Attorney for Defendant
Legal Aid Society of Westchester County
One North Broadway
White Plains, NY 10601