People v Randolph
2021 NY Slip Op 31985(U)
June 29, 2021
Supreme Court, Bronx County
Docket Number: 2326-2019
Judge: Ralph Fabrizio

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART 11

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THE PEOPLE OF THE STATE OF NEW YORK

Decision and Order
Indictment No. 2326-2019

-against-

BARRY RANDOLPH,

Defendant

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FABRIZIO, J.

On January 1, 2020, sweeping criminal justice reform legislation signed into law as part of a budget bill took effect. One part of the statute directs the People to file a Certificate of Compliance ("C of C") with Article 245 discovery obligations before they can state ready for trial. CPL § 30.30(5). Once the People state ready in the manner directed in CPL § 245.50(1), any post-trial readiness delays are calculated pursuant to pre-existing law. On March 16, 2020, all new jury trials paused in New York State courts due to the COVID pandemic. On March 20, 2020, the Governor, in the first of a series of Executive Orders, suspended all statutory "trial readiness" requirements in CPL Article 30.30. That provision remained in effect until October 19, 2020.

Now, more than six months after those deadlines were reinstated, and as cases such as this have been ordered to proceed to trial, this Court has received several motions[1] to dismiss indictments that allege c of c's served and filed by the People prior

[1] In People v. Jason Williams, Indictment 0011-2019, a case scheduled to begin jury selection on June 14, 2021, defendant sent a 30.30 motion via email to the Court on Sunday, June 13, challenging the validity of the People's service of the c of c on February 13, 2020. People v. Shamel Rodriguez, Indictment 2009-2019, was on for a hearing and trial on June 24, 2021. After the Court denied several request by the defense to adjourn the matter until September, counsel played a c of c card, asserting that long ago another judge had accepted a letter objecting to a March 2020 c of c as a formal motion, but had never made a ruling. These are just two of several examples of eve of trial or day of trial in cases before this one judge in one part in one county.

to the pandemic are invalid. The lawyers raise arguments that could have been raised in written motions months and in most cases more than a year before they were filed. The relief requested is not merely to declare the People's c of c invalid. This defendant, and others, ask this Court to charge hundreds of days of trial readiness delay going back to the People's initial c of c. During the intervening period between the c of c and the motion, this defendant, and others who have filed similar motions, had requisite discussions to resolve outstanding discovery questions with the People, and received additional disclosure. What this Court has pondered, as more and more motions of this type are received as attachments to eve-of-trial emails, is whether, in seeking to level the trial prep playing field by requiring early discovery to defense counsel, the legislature left open the opportunity for defendants to remain silent about discovery compliance for substantial periods of time before filing a written motion seeking to invalidate a c of c.

After providing both parties with an opportunity to be heard on the record on this motion, this Court finds no reason to believe that the Assembly, the Senate, and the Governor intended when they put together their 2019 budget bill that judges would have to dismiss cases based, not on valid, timely arguments about discovery non-compliance, but on legal gamesmanship, which is the situation presented here. For this, and other reasons, this Court denies this motion.

Defendant is charged with two counts Criminal Possession of a Weapon in the Second Degree. Penal Law § 265.03(2). Defendant, who has four prior felony convictions, is alleged to have possessed two loaded and operable firearms and a large cache of ammunition. DNA recovered from one of the weapons has been linked to

defendant's DNA profile on file in the State DNA data bank. The guns and ammunition were discovered during the execution of a search warrant in what is purported to be defendant's Bronx residence. The People have served notice of statements defendant made, captured on a police body worn camera, telling the officer in substance where to look for the guns and ammunition. Defendant was arraigned on the indictment on December 11, 2019. The case was adjourned until March 3, 2020, for decision by a calendar judge on defendant's pre-trial motions. Defendant filed his pre-trial motion on January 14, 2020, and then filed a supplemental motion on March 2, 2020. The calendar judge adjourned the case for decision, this time to April 9, 2020.

Meanwhile, on February 14, 2020, the People filed their c of c and a statement of trial readiness, certifying they exercised due diligence and disclosed and made available all known discovery information. Under the law, the defense then had 30 days to comply with its own discovery obligations and provide their own certificate of compliance under CPL §§ 245.10(2) and 245.50(2); that is, unless they filed a motion seeking to have a judge declare the People's certificate to be invalid. That period expired on March 16, 2020, the same day that the Chief Judge suspended empaneling of new juries and a week prior to the Governor's executive order. Notes from the calendar judge who presided on March 3, 2020 indicate that defendant raised unspecified verbal challenges to the People's certificate of discovery compliance. Then, the case lay dormant for months. The defense omnibus motions were not decided by a calendar judge until October 28, 2020. In the interim, the defense learned that the People had filed, and yet another judge granted, a motion for a discovery protective order relating to the search warrant; upon learning that information, defendant moved to

reargue that decision. It appears that additional discussions concerning modifications to that protective order were entertained by a different judge until March 19, 2021, when that judge approved redactions and revisited the prior judge's order. According to the People, this was at defense counsel's request. Counsel does not deny this is so, and has no recollection that it is not correct.

At the same time, defendant engaged in ongoing discussions with the People to resolve discovery disputes. The People filed a supplemental c of c on December 16, 2020, and additional ones on March 19, 2021, April 29, 2021 and June 4, 2021. Defendant admits only making verbal inquiries about discovery still believed to be outstanding to the calendar judge who presided in the matter in February and March 2021. Counsel admits she never asked that judge to conduct an inquiry during this period about the People's readiness for trial, pursuant to CPL § 30.30(5). Notably, the case was never adjourned for trial during this period. When all issues concerning the protective order were resolved on March 19, 2021, the calendar judge adjourned the case to April 30, 2020. The judge's notations state that the case was adjourned for a discovery conference. The case was then administratively transferred to this Court.

On April 30, 2020, this Court was scheduling cases for jury trials. Defendant made a record that day that some discovery was still outstanding. Defendant conceded that no written motion to strike the People's c of c had ever been submitted as required by CPL § 245.50(4). This Court heard from both parties, and ruled, pursuant to CPL § 30.30(5), that the People were in fact ready to proceed. This Court ordered both sides to appear for an in-person hearing on May 11, 2021, with an eye towards beginning the trial on May 19, 2021, when petit jurors had next been summoned to appear.

On May 6, 2020, defense counsel sent the Court an email stating, in substance, that for personal reasons counsel was unable to appear in person and requesting that the next appearance be done via Microsoft Teams.[2] On May 11, 2021, at the now virtual calendar call, the matter was adjourned until June 2, 2021 for pre-trial hearing in anticipation of a June trial. Defendant was still not ready to proceed on June 2, 2021, and the case was adjourned until June 23, 2021 for an in person hearing, with an eye toward jury selection on June 28, 2021.

On June 14, 2021, defendant served this motion, asking this Court to find that the People have not been ready for trial since October 28, 2020, based on a challenge to the February 2020 certificate of compliance. Defendant proffers no reason for this delay. In fact, defendant asserts that the motion is timely, and that the People must be charged with the 241 day period between October 28, 2020, when the prior executive orders expired, and May 11, 2021. This Court does not make that finding.

CPL § 245.50(1) provides that the People may state ready for trial after providing automatic disclosure of items in CPL § 245.20 and certifying that what they have turned over is everything that they have uncovered "after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to [automatic] discovery." After a c of c is filed, there are a series of remedies available to a defendant to facilitate discovery if there is a question about whether anything is outstanding. Of course, sanctions can be sought for late disclosure. CPL § 245.80 itself prescribes "Remedies or Sanctions for Non-Compliance with Discovery," and covers situations where discovery is never provided or is "disclosed belatedly." Where there is

[2] The email noting counsel's reason is in the court file.

belated disclosure, an appropriate sanction may be imposed only if "the party entitled to disclosure shows it was prejudiced." The remedy, or sanction, defendant now seeks is a court ruling about the validity of the People's c of c. If granted, that would relieve defendant of any sanction based on his obligation to have filed his certificate of compliance prior to the COVID pause. It makes sense that the legislature intended this challenge be made where a defendant seeks to be relieved, by court order, of his or her own discovery requirements. When such a motion is granted, the People are on notice by the Court at the earliest possible time that they are not in compliance with the statute and must provide more discovery. There is no reason to believe that the goal of moving cases to trial based on complete discovery by both sides is met by allowing a defendant not to seek court intervention within that 30 day period where that remedy is selected.[3]

Instead, as is relevant to this motion, defendant chose another path to compel discovery compliance which is wholly inconsistent with 30.30 dismissal: the statutory remedy of engaging in hopefully collegial conversations to resolve discovery disputes. This remedy is chosen as a means "to reduce or streamline litigation of any disputes about discovery" via motion practice. CPL § 245.35(1). A court can, and in this case apparently did, direct the parties to resolve discovery issues on their own. The insertion of that provision into the law is at odds with defendant's argument that the People can be charged time for discovery non-compliance after he agreed to and benefitted from this other remedy. After all, there is no point in having conversations aimed at resolving discovery disputes without the need for litigation and then litigate the same issue that a

[3] CPL § 30.30 (5) permits a verbal inquiry by a judge about the People's "actual readiness." A decision to strike a c of c must be based on a motion filed by an attorney.

defendant claims existed at the start in order to impose a 30.30 sanction. Where continuing compliance by conversation is sought, as happened here, and continues for a lengthy period, waiting until trial to seek dismissal of a case based on a long ago and now moot question can hardly be called good faith litigation. It sounds like a good old fashioned waiver through choice of remedies situation. See Albert J. Schiff Assoc. Inc. v. Flack, 51 N.Y.2d 692, 698 (1980); Kiernan v. Duchess County Mut. Ins. Co., 150 N.Y. 190, 195 (1896) (a claim is deemed abandoned when "words or actions . . . reasonably justify" that a particular remedy is selected and the party later tries to assert the abandoned claim); Cf. CPL §§ 260.20(2) (court need not entertain belated motion unless the ground is based on something about which the defendant could not have been aware after due diligence) and 190.50 (5)(c) (motion to dismiss indictment based on allegations that defendant not afforded right to testify must be made within 5 days of arraignment; if not, argument is waived); 22 NYCRR § 202.21(e) (motion to strike certificate of compliance and note of issue designating plaintiff ready for trial must be made within 20 days of service and filing of civil certificate of compliance).

When the remedy of compliance by conversation is selected, no time that should be charged during the period when a defendant evidences an intent to resolve discovery disputes without litigation, the same way that formal motion practice to compel discovery would be excluded from CPL § 30.30 calculations. For 30.30 purposes, these would either be continuances granted by the court at the request of or the consent of the defendant, CPL § 30.30(4)(b), or reasonable periods of delay where the court has this type of matter – resolving discovery disputes without litigation -- under consideration under the broad provisions contemplated for exclusion from

chargeable time calculations as other "proceedings" in CPL § 30.30(4)(a). This Court believes that period should be brief; if significant amounts of discovery are outstanding and not provided, then litigation should begin immediately.

The fact that a waiver through choice of remedies can itself toll trial readiness periods is consistent with other parts of the criminal justice reform legislation. CPL § 30.30(5) itself does not state a hard and fast rule that requires full discovery compliance by the People before they can state ready; it provides that defendants may waive "disclosure requirements." The statute does not provide a procedure for such a waiver. While CPL § 245.75 outlines procedures for the execution of a "waiver of discovery," and is interpreted as being required when a plea of guilty is entered, that statute is not linked through statutory language to the "waiver of disclosure" language in CPL § 30.30(5). Here, this Court has considered whether defendant waived disclosure in this case such that the People would not be charged with trial readiness delay for having failed to provide all disclosure when they filed their initial certificate of compliance, and finds he did.

While there is no contemporaneous legislative history that accompanies the 2019 budget bill and all the criminal justice reform statutes that flow from that bill, many judges have found, and this Court agrees, that the new discovery statutes themselves provide a blueprint for what the legislature had in mind in terms of discovery compliance. See e.g. People v. Whitehead, 2021 N.Y. Misc. LEXIS 2638 at * 9-10 (Utica City Court, May 25, 2021); People v. Bruni, 2021 N.Y. Misc. LEXIS 1369 at *5-7 (Albany County Court, March 30, 2021); People v. Askin, 2020 N.Y.L.J. LEXIS 852 (Nassau County Court, April 28, 2020). The overarching goal of Article 245 is to provide

a defendant, expeditiously, with all discovery required to be provided by law. Among other things, early disclosure allows defendants to meaningfully consider plea options with eyes open about the strengths or weaknesses of the People's case. It is aimed at preventing what is colloquially referred to as "trial by ambush." As such, there is no reason to find that the goal of this legislation is to have judges dismiss cases on trial readiness grounds where the People have made diligent good faith efforts to obtain all existing discovery before filing a c of c, they keep the "flow of Information" between the law enforcement and non-law enforcement agencies and witnesses moving forward in an effort to continue to find potential other items to disclose, and defendant agrees to benefits from this elected remedy.

Of course, a goal of CPL § 245.50(3) is also to prevent bad faith, illusory statements of trial readiness based, for example, on continuing substantive investigations of the case by the People after stating ready for trial. See People v. Brown, 28 N.Y.3d 392, 400 (2016).[4] Thus, to the extent that a court finds that the People have not made diligent efforts to obtain discovery, a c of c filed under these circumstances should be ruled invalid. See People v. Saul Morales, Indictment 925-2020, Decision dated June 25, 2021 (Sup. Ct. Bronx County, Fabrizio, J.); People v. Jennifer Roberts, Indictment 1409-2019, decision dated January 7, 2021 (Sup. Ct. Bronx County, Fabrizio, J.). It is, however, unfair for a court to grant a motion to challenge a c of c for this first time as a means to secure a 30.30 dismissal where a

[4] The legislative intent in requiring a good faith c of c is also clear: the People can no longer state ready merely because they have the correct accusatory instrument, a practice which was prevalent in this county and when it was abused led to a series of cases condemning these instances as bad-faith, illusory readiness. See People v. Sibblies, 22 NY3d 1174 (2014).

defendant has deliberately waited until six months or more have passed in order to secure dismissal.

Defendant does not believe his own tardiness in bringing this motion to challenge the validity of a February 2020 certificate of compliance by filing it in June 2021 is an issue. But the fact basis for this motion and the representations about the records made before other judges paint a different story. He argues, for example, that when he received additional Giglio material in December 2020, that fact demonstrates that the initial certificate was invalid, and this Court should now make that finding. He claims that he was under no obligation to do, and that it was fair to wait seven additional months to move for dismissal of the indictment based trial readiness delay for this same period based on this specific allegation. This Court does not agree.

This Court understands that there is no statutory time limit for making a stand-alone motion to dismiss and indictment based on 30.30 grounds. But this is not just a 30.30 motion. This is a motion which first seeks as a remedy a ruling to have the Court deem "the prosecution's certificate of compliance filed on February 14, 2020 to be improper;" it then asks this Court in the same motion for a second remedy: to "dismiss the accusatory instrument pursuant to CPL § 30.30." If the legislature meant to condone this type of motion practice they should have made that clear. This Court does not find an invitation for a defendant to wait 15 months to file this motion in the statute.

There is also no reason to find that the pandemic, and the 30.30 and other tolling provisions in the Executive Orders, prevented defendant from making this motion on these grounds. The best evidence of that is that the cases defendant cites to support his legal arguments concerning the statutory interpretation of good faith compliance are

all decisions were issued in calendar year 2020 based on motions filed during the period when the Executive Order was still in place. See People v. Adrovic, 69 Misc. 3d 563 (Crim. Ct. Kings County September 20, 2020); People v. Rosario, 70 Misc. 3d 753 (Albany County Ct, November 20, 2020). While this Court respectfully disagrees with defendant's interpretations of the holdings in those decisions, and Rosario in particular is not a 30.30 motion decision, nonetheless, the record here is that defendant purposely chose a path where he agreed to continue having discussions with the People about outstanding discovery items for more than six months after these rulings were issued.[5] This case was never put on a trial calendar; it was adjourned, without objection, for continuing discovery conferences and rulings on a motion to reargue in February, March and April 2021. It was only after the People provided defendant with additional discovery and filed multiple certificates of compliance, and this Court set the case down for hearing and trial for the first time, with defendant declaring that he was not ready to proceed for personal reasons not related to discovery, that defendant filed this motion.

Defendant makes no argument that he asked for, or was afforded, a finding that the People were not ready at any time prior to making that motion. Under CPL § 30.30(5), no such inquiry is required where defendant "has waived disclosure requirements" attendant to a certificate of good faith compliance with discovery. Defendant did not argue, and does not claim, that he challenged the good faith of the People's c of c. This Court cannot speculate on what another judge would have done if that request were made at the same time defendant agreed to pursue discussions with

[5] He also sought an "alternative to incarceration" disposition which, given his predicate felony status, would necessitate a plea to a misdemeanor. As is the practice, the Bronx District Attorney's Office agreed to entertain this defense request.

the People to resolve discovery disputes and possibly have them provide additional discovery. Thus, there are no judicial rulings referenced that would bind this Court in this regard, save its own April 30, 2021 ruling. [6]

Moreover, the Court finds that defendant's claims that a few items of discovery remain outstanding is without merit. The Court was somewhat concerned that 35 DD5s compiled by the arresting officer, Detective Steven Douglas, who would be testifying at the pre-trial hearing, were not provided until April 30, 2021. The People clarified that they had the documents and were granted a discovery protective order at the time the c of c was filed based on a finding that the contents of the DD5s would reveal the identity of a confidential informant. When the need for that order was no longer present, the People turned the documents over. This does not make the c of c invalid. Defendant's claim that the People failed to provide memo book entries of four named police officers is based on mere speculation that such items even exist. During oral argument, defendant admitted he made no request for any memo book entries in the many discovery conferences he had with the People. And the People represented that the only named officer who worked on this matter is Detective Douglas, who does not keep a memo book. This Court finds that they People not only complied with their discovery obligations, but they continued to make efforts to ascertain the existence of relevant and discoverable memo book even when there was no basis to find they existed. The Court reaches a similar conclusion about the alleged proficiency testing results and "non-

[6] Defendant's repeated citation to People v. Berkowitz, 50 N.Y.2d 333, 349 (1980) for the proposition that this Court can make rulings on discovery-based readiness despite the presence or absence of prior rulings under CPL §30.30(5) are misguided. A ruling based on a contemporaneous challenge to the People's "actual" readiness following an inquiry relating to fulfillment of discovery obligations is the law of the case, and may not be revisited when a written "30.30" motion is filed.

conformity" reports for a criminalist employed by the Office of the Chief Medical Examiner. These materials are not within the custody and control of the People, and, as with personal memo book entries, the People cannot access them electronically. The People made diligent, good faith efforts to locate such reports which does not invalidate their initial c of c.

In terms of the claimed missing Giglio materials for police and non-police witnesses, the People acknowledged they had not yet obtained, despite good faith efforts expended to have done so, all these materials prior to February 14, 2021. Defendant knew this to be true then; in his own motion papers he acknowledges receiving this information on December 16, 2020. The People represent that there is no Giglio material for other officers named in defendant's current c of c challenge. Once again, the Court has no reason to question the sincerity of the People's statement that despite their good faith efforts, existing CCRB and other materials were simply not available to them to provide when they first certified their readiness for trial.

Given all this, the Court finds that either the People's initial c of c was submitted in good faith based on the current arguments raised for the first time, or defendant waived his opportunity to challenge the c of c as the reason for 30.30 dismissal. Accordingly, the Court finds that the People are not charged with any period of trial readiness delay from February 14, 2020 until the present time.

This Court makes additional findings that other Article 30.30 exclusions are properly supported by the record, following the oral argument. Since the Governor's Executive Order expired, there was no practical way for a case to proceed to a trial before a jury in Bronx County Supreme Court, Criminal Division, until March 22, 2021.

At the time that jury trials were authorized to resume statewide in November 2020, a COVID cluster emerged in the Bronx County Hall of Justice. Jurors who responded to summonses were sent home, and all in-person proceedings ground to an abrupt halt in this venue. Only emergency, in person proceedings were authorized to take place, and none involved empaneling a petit jury, for several months. Juries were brought into the courthouse in March, April, May and now June 2021. However, only one jury trial was authorized to commence in March, April and May, due to social distancing requirements that still remain in place through the Office of Court Administration. This was never one of those cases. The "exceptional circumstances" that existed in this particular courthouse between October 2020 and March 19, 2021, as a prudent response to a pandemic that has claimed the lives of more than half a million Americans, would without question be as exceptional a circumstance as this Court has ever witnessed, and constitutes a period of delay not attributable to the People. CPL § 30.30(4)(g).

Moreover, since defendant requested continuances to obtain discovery, until April 30, 2021, the period of delay for that reason is excludable under CPL § 30.30 (4)(b). Then, when this Court adjourned this matter on April 30, 2021 until May 11, 2021 for an in-person hearing to be followed by a trial, defendant did not wait until May 11, 2021 to tell the Court that counsel would not be ready that day; counsel sent an email to the Court saying that counsel would not be even be in court in person on the day this Court set down for a pre-trial hearing. Notably, in the same email containing that information, counsel requested an adjournment to review discovery that had previously been subject to a protective order and which the People had now provided. Accordingly, no time would be chargeable after May 6, 2021, under any circumstances. Thus, this

Court agrees that the People must be charged with a period of pre-readiness delay that lasted from October 26, 2020 until December 11, 2020, a period of 46 days. The time between that date, and decision on the motion to reargue the earlier discovery protective order ruling issued March 19, 2021, is excludable. CPL § 30.30 (4)(a).

Finally, while this Court has already determined that defendant waived his right to challenge the February 14, 2021 c of c as ground for 30.30 dismissal, this Court makes the following alternative finding should that ruling be found to be wrong and that the People's initial certificate is deemed invalid on appeal. The period between the filing of that certificate and March 19, 2021 is still excludable as a "motion practice" period. Assuming that the People were required to be ready on March 19, 2021, and were not because of an invalid certificate of compliance, they are charged with the period between March 19, 2021 and May 6, 2021, a total of 48 additional days. When that is added to the 46 days of delay prior to motion practice, the People are charged with 94 days of trial readiness delay, far below the six months the People have in this matter to state and maintain their readiness.

For all the aforementioned reasons, the People's motion to dismiss is denied in its entirety.

So ordered.

Dated: June 29, 2021

Hon. Ralph Fabrizio