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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

PRESENT:

HON. SEYMOUR ROTKER
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: 1708-2000

MICHAEL WILLIAMS,

Motion: DISMISS PURSUANT TO
CPL 30.30(1)(a), 30.20

Defendant.

-----X

MICHAEL W. WARREN, ESQ.
For the Motion

RICHARD A BROWN, DA

BY: STEVEN CHANG, ADA
Opposed

Upon the foregoing papers, and due deliberation had, the motion is granted and the indictment is dismissed. . See the accompanying memorandum this date.

Kew Gardens, New York
Dated: June 28, 2001

SEYMOUR ROTKER, Acting J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

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THE PEOPLE OF THE STATE OF NEW YORK

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Indictment No. 1708-2000

MICHAEL WILLIAMS,

MEMORANDUM DECISION

Defendant.

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The defendant is charged by indictment filed June 12, 2000, with robbery in the first degree and related crimes. On May 1, 2001, he filed a motion to dismiss the indictment based upon alleged violations of his right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution and by Sections 30.20 and 30.30 of the Criminal Procedure Law of the State of New York. The People have responded to the defendant's motion with an affirmation in opposition also dated May 1, 2001.

Procedural History

The defendant was arraigned in Criminal Court on May 26, 2000. On May 31, 2000, he was indicted by a Grand Jury. The indictment was filed on June 12, 2000. The defendant was arraigned on the indictment on July 25, 2000. No written statement of readiness appears in the file. Although the Judge's endorsement for July 25 indicates "People ready." Neither counsel has addressed this issue in their motion papers.

At arraignment, defense counsel filed a motion to dismiss based upon an alleged violation of the defendant's right to testify before the Grand Jury (CPL 190.50). That motion was denied by decision dated August 22, 2000. Defense Counsel then filed an Omnibus Motion dated September 2, 2000. That motion was resolved by decision dated October 24, 2000 which ordered Wade and Huntley hearings which were conducted on December 12, 2000, a decision was rendered on January 24, 2001.

On January 29, 2001, the matter, now in a trial ready posture , was adjourned to Part K-TRP (Trial Ready Part) for February 26, 2001. On February 23, 2001, the case was advanced at the request of the People. The People advised the Court that a necessary police officer witness would not be available for the February 26, 2001 trial date. The People also, and more significantly, advised the court that this witness had recently advised them that he had a military service commitment which was to begin on March 10, 2001. The Court initially suggested to the prosecutor (dehors the record) that in order to avoid the extraordinary delay in trying the case, efforts should be made to obtain a conditional examination of the witness (see, CPL Article 660). The matter was adjourned until March 26, 2001 for trial or to determine when the witness would be available so that the case could be advanced and moved for trial.

Sometime between February 23 and February 28, 2001, the People learned from official Police channels, that their witness would not, in fact, be available for a March 26 trial date or for any date until his military service was completed in January 2002. Belatedly, on March 3, the People filed what purported to be a “Motion in support of a conditional examination”. This filing though it purported to be a “Motion” had no return date or affidavit of service upon defense counsel. The filing does contain an affirmation by the assigned Assistant District Attorney indicating that the witness was currently in Fort Dix, New Jersey undergoing specialized military training and that he is to be deployed to duty for the Balkans on March 10, 2001 and was not expected to be available to testify until January 2002 .

On April 16, and again on April 25 the matter was adjourned to give the People an opportunity to determine if there was any way that they could proceed to trial. The Court, by letter to the parties dated April 16, 2001, requested written responses to various questions relative to the reasons for the witness’ unavailability.

The People made oral responses to the court’s questions and filed a written response dated April 17, 2001. The defense filed a written response dated April 24, 2001. It now became apparent to all parties that the witness would not be available to be conditionally examined or to testify and that, therefore, the People would not be ready to precede until January of 2002. Armed with this

knowledge defense counsel filed the instant motion to dismiss on May 1, 2001. Subsequent to the filing of the motion this Court on the record, suggested three possible solutions which would allow the matter to be resolved in a timely fashion. First, the Court suggested that the officer might be able to testify by closed circuit television from his assignment in Kosovo. Second, the Court suggested that the officer might be allowed emergency leave from his duties and be able to return to New York for the trial. Third, the Court suggested that the District Attorney should investigate the possibility of actually traveling to Kosovo (at the People's expense) to take the testimony of the absent witness. After consultation with his superiors the Assistant District Attorney assigned to the case reported that none of these options were available or acceptable.

The legal issue raised by defendant's motion, while it may be difficult to resolve is simple to define. CPL 30.30 (3)(b) specifically addresses the problem of witness unavailability. In relevant part it reads as follows:

(B) A motion (to dismiss) made pursuant to subdivision(s) one...may be denied where the People are not ready for trial if the People were ready for trial prior to the expectation of the specified period and their present unreadiness is due to some exceptional fact or circumstance, including, ... the sudden unavailability of evidence material to the People's case, when the District Attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable time period.

Findings of Fact

The defendant was arraigned in the local Criminal Court on May 26, 2000. Because he is charged with a felony offense, CPL 30.30(1)(a) gives the People six months to be ready for trial. Measuring from May 26, 2000 this comes to a period of 184 days. Based upon the trial court's endorsement of July 25, 2000, the Court finds that the people announced readiness on July 25, 2000. The defendant does not allege that the People are chargeable for any time prior to that date, but the People concede and the Court finds that People are charged with a total of 35 days of pre-readiness

delay.

The People concede that the case was delayed by their default on two occasions following their announcement of readiness. They acknowledge that they did not meet their continuing obligation to be ready to proceed on the following two occasions dates: October 27 (14 days) and February 25 (29 days). Based upon these concessions the court finds that an additional 43 days of delay are chargeable to the People. Subtracting 35 and 43 from the 184 days allowed by statute the People contend that they have 106 days remaining to be ready for trial.

The Court finds that, unless the exception set forth in CPL 30.30(3)(b) applies to these facts, the People were not ready to proceed from February 26 forward because of the unavailability of their necessary witness. Assuming that no other delay is charged to the People, the time allowed for them to be ready expired on June 12, 2001.

Based upon the People's affirmation in opposition and upon their written response to the Court's inquiries filed April 17, 2001, the Court finds that the Prosecutor's office sent a notification to the witness' Police command on February 7, 2001, advising him that he would be needed to testify at the trial of this matter then set for February 26, 2001. At this point the People maintain that they were unaware of the witness' impending unavailability.

In mid February, the assistant assigned to try the case personally contacted the witness and learned for the first time of the witness' military commitment. The witness assured the assistant that he would be available to testify on February 26 because he would not be leaving the country until March 15. Following this conversation the assigned assistant notified the witness to appear in his office on February 20, 2001 for trial preparation. On or about February 20, 2001, the assigned assistant learned to his surprise that the witness had already entered government service. At this point, however, the assistant believed that the only obstacle to readiness was that the witness would be unavailable on February 26. He apparently believed that the witness could be made available before he was to leave the country. The assistant advanced the case to the Court's February 23 calendar and agreed to a March 26 date for trial. Following the adjournment the assistant learned that his assumption regarding the future availability of his witness was erroneous and that, in fact, the

witness left for overseas duty on March 10 he would not be available until January, 2002. Upon learning this information the assistant filed the so-called “motion” seeking to obtain to preserve the witness’ testimony.

When the case appeared on the Court’s calendar for March 26, 2001, the witness had already left the country for duty overseas. Thereafter, this Court suggested to the prosecutor several options which would have allowed the trial to proceed through a conditional examination of the witness prior to his anticipated availability date in January, 2002. The prosecutor declined to adopt any of these suggestions and the defense filed the instant motion to dismiss.

Conclusions of Law

The first question presented by the facts herein is whether compulsory military service by a material witness is an “exceptional circumstance” pursuant to CPL 30.30 (3)(b). The answer depends upon the facts. One Appellate Court, People v. Grady, 111 AD2nd. 932 (2nd. Dept., 1985) has addressed the issue and several lower court cases have held that military service in a time of national emergency is an “exceptional circumstance”, see, People v. Lawton, 11/22/91 NYLJ 22, (col. 4), People v. Brown, 3/24/92 NYLJ 25, (col. 1), People v. Rosario, 11/30/95 NYLJ 32, (col. 5). The Grady case holds that “the People’s statement of readiness was not thereafter vitiated by their subsequent inability to proceed to trial due to the unavailability of the key prosecution witness due to military service”. Beyond that, however, the Grady court does not address the issue of the meaning of the phrase “exceptional circumstances”. The three lower court cases all conclude that military service does constitute an “exceptional circumstance”, however, in all three cases the call up of the individual in question resulted from a sudden and unexpected national emergency.¹

People v. Mims, 155 Misc. 2d 163 (Sup Ct. NY Co., 1992) and People v. Blakley, 34 NY2d 311 (1974), both suggest that military service which is not in response to a sudden emergency but which instead is anticipated or not in a combat situation (for example, summer training for a reservist or national guardsman) is not automatically an “exceptional circumstance”. Whether or not this type

¹. In Brown and Lawton the witnesses were involved in the Gulf War and in Rosario the witness was called up for the Haitian invasion.

of service, as distinguished for service in a national emergency, depends upon how much advance notice of the obligation and how flexible the commitment may be.

In this case it is unclear exactly when the witness learned of his military commitment but it is clear that the prosecutor was not advised of the situation until the eve of trial. The prosecutor avers that the witness' military orders do not allow for any flexibility.

Based upon the above, the Court finds that the witness' military commitment is an exceptional circumstance within the meaning of CPL 30.30(3)(b). Not every delay caused by an exceptional circumstance, however, is automatically excused. The People still have the burden to show that they exercised "due diligence" to avoid the delay. Put another way, the People cannot benefit from a situation which is caused by their failure to employ reasonable care to maintain readiness at all times.

On this issue, one paragraph from the Mims case is particularly instructive. It reads as follows:

The court must narrowly construe CPL 30.30(4)(g)², let alone any CPL 30.30 provision granting the People excludable time. The various authorities subscribe to strict construction, particularly and pertinently as to the requirement that the People exercise due diligence to procure a witness *before* he/she becomes unavailable

The Mims court does not specifically state upon which authority it relies. The Court of Appeals in People v. Zirpola, 57 NY2d 706 (1982) placed the burden upon the People to establish due diligence. In People v. Washington, 43 NY2d 888 (1978), the Court further defined the concept by limiting the statutory exemption contained in CPL 30.30(4)(g) to those circumstances where the prosecution's inability to proceed occurs in spite of credible and vigorous efforts to go forward reasoning that only in this way can the statute be given "reasonable effect (to)...fulfill the legislative purpose".

Were the People's attempts to move this case to trial "credible and vigorous"? With respect

². The statutory language in CPL 30.30(4)(g) is essentially the same as CPL 30.30(3)(b).

to this issue , the facts in this case are similar to the facts in People v. Mims, supra. In Mims, the court charged time to the People during which police witnesses were unavailable to testify due to planned vacations. The Mims court correctly reasoned that if the prosecutors can anticipate a future problem with respect to their ability to proceed to trial in a timely fashion, the due diligence requirement of CPL 30.30(4)(g) requires that they take reasonable steps to avoid the delay.

In this case, it is clear that the People had some advance notice of the future unavailability of their witness. Unlike the prosecutor in Mims, however, the prosecutor here did notify the witness in advance of the trial date and did attempt to avoid the problem by attempting to secure the witness's testimony before he became unavailable. The lack of diligence in this case, to the extent that there is any, lies in three areas. First, the People's failure to proceed by order to show cause to perpetuate the witness' testimony during the period after they learned of his pending departure but before he actually left. Although this window of opportunity was relatively brief, the Court believes that if more aggressive action had been taken it is likely that the problem of the witness' unavailability could have been avoided. Second, had the witness who, significantly, is a New York City Police Detective, been more diligent in advising the prosecutor regarding the terms of his service, the case could almost certainly have been tried before his departure. Although the Court realizes that the prosecutor's office cannot be said to have absolute control over the employees of the New York City Police Department, due diligence requires that these two arms of the government work together and with courts to secure the efficient administration of justice. The People's relationship with the employees of the Police Department is such that they cannot blame their failure to be ready on the failure of Police witnesses to communicate critical information. Third, although the Court cannot minimize the importance of military service, neither can it minimize the defendant's right to have this matter resolved in an expeditious fashion or, indeed, the public's right to the efficient and speedy administration of justice. The People have a burden to establish that their prosecution of this important matter is "credible and vigorous". The People have failed to demonstrate to the Court's satisfaction that, in this age of modern communication and the internet, there is no possible way to make this witness available before his scheduled return to the United States.

The Court is aware that the requirements of "due diligence" as defined in the case law are

fairly minimal, see, People v. Khan, 146 AD2d 806 (2nd Dept., 1989). However, what constitutes “due diligence” in a particular case is a judgment call based on particular facts and circumstances. The Court must measure the interests of the State and the defendant in the speedy administration of justice against the reasons for delay asserted by the People. In this case, based upon no single factor but based upon a combination of the factors discussed above the Court finds that the People’s diligence was less than due.

The final consideration posed by CPL 30.30(4)(g) is whether the evidence will be available in a “reasonable” period of time. In Rosario, supra, the Supreme Court held that a delay of seven months based upon the witness service in a national emergency and where the defendant was not in custody and showed no prejudice was reasonable. In People v. Spadafora, 131 AD2d 40 (1st Dept, 1987), the appellate division held that in a situation where the People could not identify a time when or even if a witness would be available, the speedy trial time ran and the defendant was entitled to dismissal. Neither case is exactly on point with the case at bar.

The key to the court’s decision must lie in its analysis of the legislative intent behind CPL 30.30. CPL 30.30 is not a “speedy trial” statute in the constitutional sense although it is, in large part, designed to serve the same purposes. The statute is directed to but one cause of delay, prosecutorial unreadiness. As noted in the lead case on post readiness delays, People v. Anderson, 66 NY2d 529 (1985), however, the statute requires more than that the People announce readiness within six months. The People are also required to remain ready and to cooperate in moving cases for trial or disposition. Post readiness delay caused by the People’s actions or omissions³ may lead to a dismissal of charges. It is significant that Anderson holds that no amount of good faith will excuse delays that could have been avoided by vigorous prosecution, see, Anderson, supra, page 5.

Applying this rational to the case at bar, the Court must consider whether a delay of over nine months because of witness unavailability justifies a denial of defendant’s motion pursuant to

³. For example, failure to produce the defendant from custody, People v. Anderson(Jones) 66 NY2d. At 540, or failure to produce transcripts of Grand Jury testimony for inspection by the court, People v. McKenna, 76 NY2d. 59 (1990).

CPL 30.30(1)(a)⁴ or whether instead it constitutes an unexcused post readiness delay that violates the defendant's right to a speedy trial and so mandates dismissal of the charges.

The court's research has uncovered no cases other than People v. Spaforda, supra, and People v. Rosario, supra, (which are distinguishable and not on point) that define the term "reasonable" as it appears in CPL 30.30(3)(b). The Court will look to the analysis presented in People v. Blakey, supra, which is basically a constitutional speedy trial analysis, to determine if the delay in this case is "reasonable".

In Blakey, the court considered four factors in determining the reasonableness of delay. The four factors were (1) the length of the delay, (2) the reasons for the delay (3) the defendant's assertion of his right to a speedy trial; and (4) the degree of prejudice caused to the defendant. Considering the factors in order the court rules as follows. Calculating from the date of arrest until the date of potential readiness, the Court is faced with an overall delay of nineteen months. At least since February 26, 2001 the defendant has not acquiesced in the delay. Although the defendant has no prior criminal record, his licence to practice his trade as a cab driver has been suspended pending the outcome of this case. He claims, without dispute, that the suspension severely hampers his ability to support his family. He has denied the allegations in the Indictment against him and claims to be "emotionally devastated" by the pending charges. Although this "prejudice" may not be prejudice in the traditional sense of some factor which adversely effects the truth determination process, it is still a valid consideration in determining what is a "reasonable" time to await a witness' availability under CPL 30.30 (3)(b).

Finally the court must consider the reasons for the delay. It is this factor which is the most

⁴ Significantly, CPL 30.30(3)(b) states that a motion to dismiss made because the People are not ready for trial within the appropriate time "may" be dismissed if the present unreadiness is due to an exceptional fact or circumstance, etc. The wording of the statute seems to give the court discretion to evaluate the merits of the People's reasons for delay.

troubling. The Court finds that the reasons for the long delay requested by the People for the trial of this matter are not satisfactory when weighted against the prejudice to the defendant and this State's sound policy requiring effective, not just good faith, efforts on the part of the People to resolve criminal matters in an expeditious manner.

Unlike the situation in the other cases involving military service, the witness' unavailability in this case is not due to some unforeseen national emergency. The fact that the witness in question here is a New York City Police Detective is significant to the Court's analysis. It is not unreasonable to expect that a Police Officer witness, realizing that a matter in which he would be a necessary witness, was scheduled for imminent trial would inform the prosecutor regarding his military obligation. Had this been done is likely that the interests of the People, the defendant and the public at large could have been satisfied by a timely resolution of this case. The Court also finds it relevant that, beyond his apparent failure to make a timely disclosure of his impending absence, the witness also mislead the prosecutor as to his availability for trial in late February and early March. This misinformation was a contributing cause effecting the delay of this case. Finally, the People have failed to convince this Court that there is no realistic and impossibly burdensome way that the testimony of a witness in military service but not in actual combat cannot be made available in some manner short of waiting nine months for the witness' return to the United States.

Although none of these factors taken in isolation may be sufficient to make the delay in production of this witness unreasonable, taken together they do. For these reasons, the Court finds that a witness who is not available until January , 2001 will not, under the circumstances of this case, be available within a "reasonable" time as that term is defined in CPL 30.30(3)(b).

Unless, therefore, the People can propose a method to proceed with this trial well before the witness' expected return in January, 2001, the time subsequent to February 26, 2001 is charged to the People and the case is dismissed pursuant to CPL 30.30(1)(a).

Kew Gardens, New York
Dated: June 28, 2001

SEYMOUR ROTKER, Acting J.S.C.