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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART L-1

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PEOPLE OF THE STATE OF NEW YORK, : HON. ROBERT J. McDONALD
: :
- against - : :
: : Date: March 23, 2001
: :
DONOVAN ELLIOTT, : :
: : INDT. NO. 277 / 93
Defendant(s). : :
-----X

Defendant was arrested on January 17, 1993 and charged under Docket Number 93Q001999 with Criminal Possession of a Weapon in the Third Degree [Penal Law §265.02(4)], Criminal Possession of a Forged Instrument in the Second Degree [Penal Law §170.25], Criminal Possession of a Controlled Substance in the Seventh Degree [Penal Law §220.03], Unlawful Possession of a Knife [Administrative Code 10-133(B)], and Disobeying a Traffic Signal [VTL §1111(D)1]. Subsequently, defendant was indicted for Criminal Possession of a Weapon in the Third Degree [Penal Law §265.02(4)], Criminal Possession of a Controlled Substance in the Seventh Degree [Penal Law §220.03], and Failure to Obey a Traffic Control Device [VTL §1110A-1]. Defendant thereafter served a speedy trial motion and a hearing was held to determine whether the instant case should be dismissed on speedy trial grounds.

STATEMENT OF FACTS

It is alleged that on January 17, 1993 in Queens County the defendant went through a red light while driving a 1988 Mazda MX6. After being stopped, the defendant was observed reaching into the rear of the vehicle from where a loaded .380 caliber automatic gun was found. The Mazda defendant was operating bore a forged in-transit permit which was attached to the rear window.

Upon being searched, the defendant was also found to be in possession of a knife and cocaine. It appears from defendant's fingerprint sheet that he gave his date of birth as July 1, 1965.

At the Criminal Court arraignment defendant's bail was set at \$3,500.00 which was subsequently reduced to \$2,000.00 and posted. A bench warrant was issued for defendant's arrest when the court determined that defendant had made bail and failed to appear on February 25, 1993.

Defendant was involuntarily returned on the warrant on February 18, 2000 after his arrest on February 16, 2000 for Criminal Possession of Marihuana in the Fifth Degree under the alias of Boswell Collins for which he gave his birth date as July 7, 1961.

At the hearing the People called Sal Melluso, a retired New York City Detective now living in Florida who was assigned to the Queens Warrant Squad from 1990 until 1993 and who conducted the warrant investigation relating to this defendant. The detective was able to testify that he had been assigned to this case on April 16, 1993 when he was given the warrant and the address defendant gave of 185-05 104th Avenue in St. Albans, Queens, "a private house" [Hearing minutes p 29]. Det. Melluso also had his alleged date of birth of July 1, 1965 along with his picture and description. On April 20, 1993 the detective checked whether the warrant was still active and upon so determining went to the address he had obtained from defendant's records. He went there "in hopes of finding the defendant" [p14]. However, upon going to that address he found that defendant no longer resided there and instead he spoke to the two tenants, a Mrs. Hartley and a Mrs. Gregory, both of whom were shown defendant's photograph, but they were unable to identify the defendant as ever residing there.

Thereafter, on May 10, 1993 the detective checked and found that the warrant was still active and also checked with Corrections to determine whether defendant was in custody.

On May 11, 1993 the detective attempted to call a "S. Jacobs" who was then unknown to him

at 718 - 776 - 8441, the number defendant gave at the time of his arrest, and was informed that the phone was disconnected. The detective then checked the "COLES book." which is a commercial reverse telephone directory and found that the disconnected telephone number, previously used by Jacobs, was now listed to Lucan Forte of 89-17 Mollen Street. He then checked under the name Lucan Forte and was referred to a person named Robert Ellio whose address was 89-08 Mollen Street. Subsequently, the detective visited both addresses and found that neither Mr. Forte or Mr. Ellio were acquainted with the defendant.

The detective also called the telephone number noted on defendant's booking sheet, the Avis Car Rental agency at 212 - 593- 8460, although unknown to the detective, that is where Glennis Williams, the person who posted defendant's bail, was allegedly working. He learned that the car involved was not a rental and the detective was unable to determine anything further about the car or defendant's whereabouts.

On June 23, 1993 the detective again checked the defendant's status with Corrections and learned that he had not been re-arrested. Although he occasionally used the CJA form in the past, he did not do so in this instance, so no further checks were made on the information contained in the CJA form which defendant moved into evidence. At the time of defendant's initial arrest the "rapsheet" indicates that the defendant's date of birth was July 1, 1965. The CJA interview report bears the notation under "CJA RECOMMENDATION", "QUALIFIED UNVERIFIED COMMUNITY TIES" and states that the date of birth defendant gave the CJA representative was July 1, 1963. The CJA form reveals that the address which defendant gave as his home was not an apartment building.

On July 2, 1993 the detective again checked the status of the warrant and found that it was

still active and did a check of defendant's NYSID number and checked with the New York State Department of Motor Vehicles without any success.

On July 26, 1993 the detective conducted yet another unsuccessful record search and stating that he had no other leads to pursue requested that the search be marked "FPFI" which is "filed pending further investigation." What this designates is that the unsuccessful active search for defendant ceases until further information is received, at which time the search can be re-activated. This was approved by the detective's superiors and the warrant remained open until defendant's re-arrest.

The defendant called Shernette Jacobs, Defendant's common law wife. She is the mother of his two children and testified that she lived with him on January 17, 1993 at 185-05 104th Avenue. She had lived there for about five years but did not give a commencement date of her occupancy. Ms. Jacobs did not say whether there was a lease, nor gave any information about the date she ended her occupancy. Ms. Jacobs testified that defendant and she continuously resided at that address along with a Velroy Henri and her small child at that time [p 36, p 53]. She testified that after looking at her address book she could testify that her telephone number was 718 - 776 - 8441, but, she could not recall what her zip code was. She testified that her telephone was operable on January 17, 1993, although the CJA report indicates that the reason for the unverified designation was that no one could be reached. Although she said the phone was operable she did admit that the telephone may have been disconnected for non-payment during the year, particularly on May 11, 1993, the date the detective called [p 53].

Ms. Jacobs testified that the defendant's birthday was July 1, 1963 and not July 1, 1965 or July 7, 1961 as indicated on the "Mugshot Pedigree" sheet issued by the New York City Police

Department for Boswell Collins, the name and date of birth used by defendant on his recent arrest. Ms. Jacobs also testified that she did not know what defendant was arrested for on February 16, 2000 or any alias used by defendant for his most recent arrest [p 40].

The defendant failed to introduce any documentary evidence of his occupancy at 185-04 104th Avenue such as a lease, phone bill, utility bill, or drivers license, for any time period in question.

This court finds the testimony of retired Detective Melluso credible because, if for no other reason, he is totally indifferent about the outcome of this case. On the other hand, this court finds that Ms. Jacobs, who is romantically involved with the defendant, did not impress this court with the recall she had of the facts which one would expect from her relationship with defendant.

CONCLUSIONS OF LAW

The initial question is whether the defendant attempted to avoid apprehension because, if he did, the People are relieved from their burden of demonstrating due diligence (*People v Torres*, 88 NY2d 928; *People v Luperon*, 85 NY2d 71; *People v Johnson*, 271 AD2d 457 *app denied* 95 NY2d 854; *People v Chisolm* 232 AD2d 264 *app denied* 89 NY2d 920; *People v Quiles*, 176 AD2d 164; *People v Garrett*, 146 Misc2d 919 *rev'd* 171 AD2d 153 *app denied* 79 NY2d 827; *People v Rodriguez*, 132 Misc2d 1044). This court finds that the defendant, through the use of an alias and three different dates of birth, did attempt to avoid apprehension and the People are therefore relieved of the burden of demonstrating due diligence. However, in any case, the court finds that the People did demonstrate due diligence at this hearing.

If due diligence is required this case is controlled by CPL 30.30 (4)(c)(i) which excludes:

The period of delay resulting from the absence or unavailability of the defendant. A defendant must be considered

absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

Whether the detective exercised due diligence in attempting to locate the defendant is a mixed question of law and fact (*People v Luperon, supra; People v Mayhew*, 263 AD2d 546 *app denied* 94 NY2d 826 *after reconsideration, app denied* 94 NY2d 729). The instant “statute emphasizes the difficulty of apprehending a defendant who is outside the State or whose whereabouts are unknown, without regard to a showing of any specific intent of the defendant to thwart the prosecution by fleeing or hiding” (*People v Seda*, 93 NY2d 307, 312)

According to Black’s Law Dictionary, due diligence is also termed reasonable diligence which is defined as “ A fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue” (Black’s Law Dictionary 468 [7th ed 1999]). This equation between due diligence and reasonable diligence is also found in case law (*People v Seda, supra*, 311). The test as to what constitutes due diligence is a determination as to whether the police acted in a reasonable and expeditious manner to locate the defendant based upon the information available to it or readily ascertainable (*People v Chi Keung Seto*, 162 Misc2d 255). In order to meet this standard the police must conduct a reasonable investigation of leads as to defendant’s whereabouts, but is not required to track down every possible lead. The standard of due diligence can be met even though “greater efforts could have been undertaken” (*People v Grey*, 259 AD2d 246, 249 *app denied* 94 NY2d 880). The fact that the police went to defendant’s alleged residence only once is

understandable because the defendant was no longer living at that address (*People v Davis*, 205 AD2d 697, 701; *People v Lugo*, 140 AD2d 715 *app denied* 72 NY2d 1047).

The prosecution posits that the time period between February 25, 1993 through February 18, 2000 is tolled because defendant's whereabouts was continuously unknown and unascertainable by the exercise of reasonable diligence.

This is not a case where a defendant fails to appear because he is incarcerated. Under those circumstances, the People have been held to a clear duty to determine whether his absence is due to his incarceration because the People can determine this with little effort and the defendant "is incapable of appearing in court by his own effort" (*see, People v Reyes*, 214 AD2d 233, 236 *app denied* 87 NY2d 850). One way of determining whether the state has demonstrated due diligence is based upon whether the People actually knew of defendant's whereabouts during this period of time (*People v Davis*, 184 AD2d 575).

The chief argument the defendant makes is that the police could have pursued other areas of investigation in order to determine defendant's whereabouts and their failure to do so constituted a failure to exercise due diligence in their search for him. "The police may well be criticized in this case for lack of diligence in apprehending the defendant, but certainly the defendant is in no position to complain of it. A defendant who successfully evades arrest for a prolonged period cannot take advantage of the resulting delay in prosecution as a ground for dismissal of the criminal charge" (*People v Tower*, 18 AD2d 284, 287 *app dismissed* 13 NY2d 1125; *People v Cruz*, 155 AD2d 683). While minimal attempts to locate the defendant will not satisfy the due diligence standard there was no indication that the police shirked their obligation to attempt to locate the defendant (*People v Duncan*, 230 AD2d 750 *app denied* 89 NY2d 921; *People v Marrin*, 187 AD2d 284 *app denied* 81

NY2d 843). The due diligence standard is met as long as the police employ all reasonable investigative leads as to defendant's whereabouts (*People v Delaronde*, 201 AD2d 846). Clearly, the three month investigation by the detective meets that standard. Also, the seven year delay during which defendant intentionally avoided apprehension cannot now be used to his advantage.

Defendant relies on *People v Taylor* which this court finds inapposite (*People v Taylor*, 139 AD2d 543). In *Taylor* the Appellate Court found that the reason why that defendant had allegedly used an alias was explainable by the fact that he had not been raised by his natural parents. The use of different names, therefore was not assignable to deception or any intent to avoid prosecution. The police were also unable to locate that defendant because they did not have his correct address, unlike the case at bar. In the instant case, the use of aliases was part of a "comprehensive pattern of deception aimed at avoiding prosecution" (*People v Minors*, 189 AD2d 899).

Contrary to defendant's position, of critical importance is the defendant's use of an alias after his re-arrest, together with a different date of birth, which this court considers as a clear indication that defendant knew he had an outstanding warrant and was attempting to avoid apprehension and prosecution (*People v Chisolm, supra; People v Garrett, supra; People v Walker*, 133 AD2d 2). Further, defendant has failed to show any facts which would cause this court to conclude that there was a failure on the part of Det. Melluso to exercise due diligence in his search for the defendant.

This court finds that the efforts made by Det. Melluso to find and return defendant on the warrant constituted due diligence under CPL 30.30(4)(c)(i). "Surely logic dictates that defendants who voluntarily evade the court process should not reap any rewards from their absence. Such a result [as dismissal of the instant indictment] would only encourage defendants to flee the court's

jurisdiction” (*People v Rodriguez, supra*, 1047).

Accordingly, the defendant’s motion is denied..

The Clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant and to the District Attorney.

Elliott2.wpd

ROBERT J. McDONALD, J.S.C.