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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-18, QUEENS COUNTY

P R E S E N T: Hon. Sheri S. Roman,
Justice

THE PEOPLE OF THE STATE OF NEW YORK: Ind. No.: 5133/92
:
: Motion: To Dismiss
-against- : Indictment or
: Withdraw Plea
:
DARREN BROWN a/k/a RAKIM KING, :
: Submitted: October 12, 2001
Defendant. :
:

The following papers numbered
1 to 4 submitted in this application. Darren Brown, Pro Se
For the Motion

Hon. Richard A. Brown, D.A.
by Alix Fredrika Kucker-Horland, Esq.
Opposed

	Papers Numbered
Notice of Application & Affirmations Annexed _____1 - 2....
Answering and Reply Affidavits/Affirmations _____3 - 4....

Upon the foregoing papers, and in the opinion of the Court herein, defendant's application for an order dismissing the within indictment is **granted**.

Accordingly, for the reasons stated in the accompanying memorandum of this date, it is hereby ordered that Indictment No. 5133/92 is **dismissed**.

Dated: November 9, 2001
Gloria D'Amico
Clerk

Sheri S. Roman, J.S.C.

MEMORANDUM

SUPREME COURT QUEENS COUNTY
CRIMINAL TERM PART K-18

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THE PEOPLE OF THE STATE OF NEW YORK :
 : Indictment No.: 5133/92
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 :
 : -against- :
 : BY: Sheri S. Roman, J.
 :
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 :
 DARREN BROWN a/k/a RAKIM KING, :
 : DATED: November 9, 2001
 :
 : Defendant :
-----X

Defendant moves by notice of motion dated July 30, 2001 for an order dismissing the within indictment for want of prosecution or, in the alternative, for an order granting defendant leave to withdraw the plea of guilty which he entered on December 14, 1992 in Queens County Supreme Court.

The charge in this indictment arises out of an incident which took place on November 18, 1992 in which the defendant, Darren Brown, was arrested and charged with Unlawful Possession of a Loaded and Operable Firearm and charged with Criminal Possession of a Weapon in the Third Degree, a Class D Violent Felony in violation of Penal Law Section 265.02(4). On December 14, 1992 defendant was arraigned in Supreme Court and pled guilty before Justice Chetta to Criminal Possession of a Weapon in the Third Degree and was promised a sentence of 5 years probation, youthful offender treatment, and immediate release from jail pending sentencing. The Court then adjourned the matter to

January 28, 1993 for sentencing. On January 28, 1993 the defendant failed to appear for sentencing and a bench warrant was issued for his arrest. To date, defendant has not been returned on that warrant and the warrant is still extant.

In her affirmation in opposition to the motion, the Assistant District Attorney, having researched the defendant's criminal record, found that on January 1, 1993, prior to the date set for sentencing, defendant was arrested in Queens County using the name Michael Thomas, and assigned a new NYSID number. He was charged under Indictment No. QN10017/93 with Criminal Possession of a Controlled Substance in the Third Degree, a Class B Felony, in violation of Penal Law Section 220.16. On January 6, 1993, in Part N-60, defendant entered a plea of guilty to the reduced charge of Attempted Criminal Possession of a Controlled Substance in the Fifth Degree, a Class E Felony. The Court, at that time, was unaware of the defendant's plea and pending sentence on the indictment under the name Darren Brown. The agreed upon sentence was five years probation and six months incarceration. On January 27, 1993 defendant was incarcerated on that case. As he was incarcerated, he could not appear for sentencing on the within matter which was scheduled for one day later.

On March 25, 1993, defendant was arrested by Federal Marshals in Richmond, Virginia under the name of Rakim King and charged with Felony Possession of Controlled Substances with the Intent to Distribute same. On August 3, 1993 defendant was

sentenced to 180 months federal incarceration on his conviction for that offense. Defendant will be eligible for release in the late Fall of 2002 to be followed by 96 months of federal parole.

Defendant claims that his outstanding warrant on the instant Indictment is hindering his ability to be placed in special programs offered by the Federal Bureau of Prisons as well as his ability to be placed in a half-way house.

In her affirmation in opposition to the motion, the Assistant District Attorney contends that the motion should be denied on the ground that there is no reasonable legal mechanism which would permit defendant to be extradited from his current place of incarceration within the Federal Bureau of Prisons prior to the completion of his federal sentence and on the ground that defendant cannot be sentenced at this time as he cannot be committed to the New York State Department of Correctional Services as required by law for incarceratory sentences.

The People first contend that the within motion must be summarily dismissed on the ground that the courts have held that no court proceeding may be taken on behalf of a felony defendant unless the defendant is within the court's actual or constructive custody while out on bail in the jurisdiction. They contend that while defendant is in federal custody he is not within this Court's actual or constructive possession. The People cite the cases of People v. Del Rio, 14 N.Y. 2d 165, 169(1964) cert. denied 379 US 939 and People v. Sullivan, 28 N.Y. 2d 900(1971) in

which the court of Appeals stated that, "no court proceeding on behalf of a person charged with a felony may be taken unless he be in actual custody or in constructive custody after having been let to bail." However, those cases are inapposite to the within proceeding as they are derived from the holding in People v. Genet, 59 N.Y. 80(1874) wherein the court refused to hear the appeal of a defendant who had escaped from the jurisdiction. The court reasoned that an absconding defendant may not have his appeal heard since if a new trial were ordered, the defendant would not be before the court to answer further. Also see People v. Hampton, 226 A.D. 2d 824(3rd Dept. 1996). In this case, the defendant has not absconded, his whereabouts are known and he can be brought within the jurisdiction of this court upon the application of the People for a writ of habeas corpus ad prosequendum pursuant to C.P.L. Section 580.30(2).

However, the People contend that there is no legal mechanism provided by law to have the defendant produced in court at this time in order to proceed with sentencing.

Section 580.10 of the Criminal Procedure Law sets out the three methods which are available to secure the attendance of defendants confined in other jurisdictions. This encompasses the Uniform Criminal Extradition Act under Criminal Procedure Law Section 570.12; the Agreement on Detainers under Criminal Procedure Law Section 580.20; and Criminal Procedure Law Section 580.30 which applies to securing the attendance of defendants confined to federal prisons. As this defendant is now in federal

custody, Criminal Procedure Law Section 580.30 is applicable to this case.

Under that provision, the court, upon application of the District Attorney, may issue a writ of habeas corpus ad prosequendum requesting that the Attorney General of the United States produce the defendant for the purpose of criminal prosecution for the period of time necessary to complete the prosecution. That provision states that the attendance of a defendant may be secured by writ of habeas corpus ad prosequendum where the attendance of the defendant is necessary for the purpose of criminal prosecution. The People contend that this provision may not be utilized herein because the language, "for the purpose of criminal prosecution," means only for a proceeding for the determination of guilt or innocence and not for carrying out a sentence" citing State of New York by Coughlin v. Poe, 835 F.Supp. 585 (1993). However, that case does not apply herein in that it dealt with an interpretation of the Interstate Agreement on Detainers under C.P.L. Section 580.20 wherein a defendant is in the custody of another state and needs to be extradited for trial in this state. C.P.L. Section 580.20 specifically states that it applies only to untried indictments, informations, and complaints, and would not include sentences. See People v. Nosek, 236 A.D. 2d 892 (4th Dept. 1997). The courts have held, however, that a writ of habeas corpus ad prosequendum is not limited only to untried indictments and can be utilized in order to produce a prisoner in federal custody for sentencing. See People v.

Newcombe, 18 A.D. 2d 1087 (2d Dept. 1963); People v. Jordan, 149 Misc. 2d 332 (N.Y. Sup. Ct. 1990).

The People further contend that even if the defendant were produced before this Court on a writ of habeas corpus ad prosequendum, he could not presently be sentenced on his plea because under C.P.L. Section 430.20(1) a defendant sentenced in this state must immediately be committed to the custody of the New York State Department of Correctional Services, and, as this defendant is still serving his Federal term, this Court could not comply with that statute. However, that statute actually states that "the defendant must be forthwith committed to the appropriate public servant and detained until the sentence is complied with." In this case there is no reason that the mandates of that statute would not be satisfied if the defendant was sentenced to a period of incarceration in the within case which was to be served either concurrently with the federal sentence or to be served consecutively after completion of the federal sentence. See People ex rel Jones v. Portuondo, 268 A.D. 2d 807 (3rd Dept. 2000).

With respect to defendant's motion to dismiss the proceeding, the courts have held that C.P.L. Section 380.30(1) requires that a sentence must be pronounced without unreasonable delay and that a lengthy, unjustified delay in sentencing has been held to result in a loss of the court's jurisdiction. See People v. Marshall, 228 A.D. 2d 15 (2d Dept. 1997); People v. Monaghan, 34 A.D. 2d 815 (2d Dept. 1970); People v. Matias, 182

Misc 2d. 599(N.Y. Co. Sup Crt. 1999). In this case a period of over 8 years has elapsed since the plea in this case was taken without the defendant having been sentenced.

However, the courts have also held that "where the delay between a guilty plea and the pronouncement of sentencing is caused by legal proceedings or other conduct of the defendant which frustrates the entry of judgment, it is excusable. "People v. Drake, 61 N.Y. 2d 359(1984). Also see People v. Sostre, 233 A.D. 2d 243(1st Dept. 1996); People v. Purtell, 225 A.D. 2d 496(1st Dept. 1996); People v. Monaghan, 34 A.D. 2d 815 (2d Dept. 1970) and People v. Lopez, 228 A.D. 2d 395(1st Dept. 1996), in which the courts all held that a delay in sentencing which is attributable to the defendant's evasive conduct would not be considered unreasonable. Such evasive conduct includes absconding and conviction of crimes in other jurisdictions using aliases and false pedigrees.

In People v. Drake, supra. The Court of Appeals held that whether dismissal is warranted for failure to sentence a defendant promptly depends on the length of the delay and the reasons therefore. Where a delay is long and unexplained the courts have found the delay unreasonable. In Drake, the court dismissed an indictment where there was an unexplained delay of 39 months. In People v. Monaghan, supra, the court dismissed an indictment where a defendant was serving time in another state and the prosecutor with knowledge of same, made no attempt to extradite him for seven years. Similarly, in People v. Newcombe,

supra, a four year delay was held to be unreasonable where a defendant known to be in Federal custody could have been produced in New York for sentencing.

In this case, it is clear that the defendant used three different names and pedigrees beginning with his arrest in this case on November 18, 1992 under "Darren Brown" and following with his next arrest in Queens county on January 1, 1993 using the name "Michael Thomas" and following with his last arrest on March 25, 1993 by United States Marshals under the name "Rakim King." Under those circumstances, as defendant was being evasive the People were not under any obligation to make efforts to locate the defendant to return him for sentencing in order to avoid the loss of jurisdiction.

However, in People v. Reyes, 214 A.D. 2d 233,236(1st Dept. 1995) the court stated that, "In the context of C.P.L. 380.30(1) cases, knowledge of an absconded defendant's whereabouts has been effectively equated with incarceration, and the People have been held to have a duty to exercise due diligence where they knew or should have known the defendant was incarcerated." The court stated that the rationale is that the People can usually produce an incarcerated defendant with little effort and the defendant is incapable of appearing in court by his own effort.

In this case, the People concede in their affirmation in opposition to the motion (page 6) that they were aware the defendant was in Federal custody in July, 1993. They detailed his aliases and declare "Nor would anyone connect the two until July

1993, when it was discovered that he was in Federal custody." As the People knew that defendant was in Federal custody they then had an obligation to have him produced for sentencing. As stated in People v. Newcombe, supra., the mere fact that defendant was being held in a federal penitentiary outside the State of New York affords neither an explanation for the delay nor an excuse, since he could have been produced in the State court upon request, provided that he was thereafter returned to Federal custody." Also see People v. Jordan, supra., wherein the court dismissed an indictment of defendant who was known to be in Federal custody for 27 months and not produced for sentencing.

Therefore, this court finds, that the People had knowledge that the defendant was in federal custody since 1993, a period of over 8 years and that they made no efforts to produce defendant since that time. The court finds that such a protracted delay without any explanation for the failure of the people to produce the defendant is unreasonable and as such pursuant to C.P.L. Section 380.30(1), the indictment must be dismissed.

Order entered accordingly.

Date: November 9, 2001

Sheri S. Roman, J.S.C.

Gloria D'Amico
Clerk