

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

PRESENT:

HON. SEYMOUR ROTKER
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: N-10653-2000

EYAL LEVY

Motion: TO DISMISS PURSUANT
TO CPL 30.30 (1)

Defendant.

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KYLE WATERS, ESQ

For the Motion

RICHARD A BROWN, DA

BY: BRIAN STAVRIDES, ADA

Opposed

Upon the foregoing papers, and due deliberation had, the motion to dismiss pursuant to CPL 30.30(1) is granted to the extent that an expedited hearing is ordered. See the accompanying memorandum this date.

Kew Gardens, New York

Dated: October 31, 2002

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

-against-

Indictment No. N-10653-
2000

EYAL LEVY,

MEMORANDUM
DECISION

Defendant.

-----X

By indictment dated June 22, 2000, the defendant is charged with criminal possession of a controlled substance in the second degree and related offenses. By motion dated October 18, 2002 filed with the Court on October 22, 2002 and made returnable on November 8, 2002, the defendant seeks an order dismissing the indictment on the grounds that he has been denied his right to a speedy trial pursuant to CPL 30.30.

The People have filed an initial response to the motion contending that the defendant waived his right to make this motion because it was not timely filed. The defendant has filed a reply affirmation.

Procedural history

The defendant's case appeared on the Court's trial calendar on July 22, 2002. It is agreed by the parties that on that date the People were not ready for trial. The Court adjourned the matter to November 21, 2002 with the understanding that if and when the People were ready they could advance the case and add it to the trial calendar on three days notice to the defense. On October 16, 2002 the People filed a statement of readiness with the Clerk of the Court and the case was added to the October 22, 2002 calendar.

On October 17, 2002 all counsel appeared in the Court's chambers for a status conference. Defense counsel advised the Court that the proposed trial date (October 22) was not convenient for him as he expected to be engaged in another county. The prosecutor advised the Court that it was important to him that the case go forward expeditiously as two of his necessary witnesses were about to become unavailable. The Court used its good offices to relieve defense counsel of his scheduling conflict and the matter was adjourned until October 22, 2002¹.

It must be noted at this point that this defendant is charged with two separate indictments. The instant indictment charges him with crimes that allegedly occurred in December of 1999 and a second indictment charges him with crimes that allegedly occurred in November of 1999. The parties agree that during the course of this prosecution they have discussed potential speedy trial issues with respect to one or both of these indictments. The parties do not agree to what extent, if any, the speedy trial issue was discussed at the October 17th conference.

It is clear, however, that at the conference the defense counsel did not request an adjournment to file a speedy trial motion with respect to either case and agreed to the October 22 trial date. On the day following the conference, defense counsel contacted the prosecutor by telephone and advised him that he intended to file a motion to dismiss the December 1999 case which had just been set down for trial.

Defense counsel's contention is that on the day after the conference he was reviewing the matter with his client and he realized that he was not sure which of the defendant's two cases was to be tried on October 22. He called the prosecutor and learned that it was the December 1999 matter that was to go forward. Upon learning this he immediately advised the prosecutor of his intent to file the instant motion. A copy of the motion was faxed to the prosecutor on October 21, 2002 and, as noted, was filed with the Court on October 22, 2002.

On October 22, 2002 the parties appeared before another Justice of this court. The prosecutor, in response to the defense motion to dismiss, raised the issue of waiver of speedy trial

¹. The October 22nd was to be a trial date in the sense that the case would appear in the K-TRP part for a 9:30 a.m. calendar call. If a trial part was available that day the case would be referred out for trial.

rights. The case was adjourned to October 29th be considered by this Court. On that date, the Court heard argument as to whether the defendant had waived his right to make a motion to dismiss the indictment pursuant to CPL 30.30. The prosecutor was directed to file a written response to the procedural issue alone leaving the substantive issue in abeyance. The matter was passed until October 30, 2002. On that date, the People complied with the Court's direction and filed a written response. Defense counsel also filed a reply affirmation addressing this issue. The Court heard additional arguments by the parties and adjourned the matter until November 4, 2002 for decision.

Legal Issues.

The People's principle argument is that the defendant waived his right to raise a speedy trial issue at the October 17, 2002 conference when he failed to request an adjournment for that purpose and consented to the October 22, 2002 trial date. The legal authority cited for this proposition is People v. Harvell, 196 AD2d 553 (2nd. Dept., 1993). The People contend that the holding in Harvell is that a defendant waives his speedy trial rights by agreeing to a trial date and failing to request an adjournment for the purpose of making a speedy trial motion. Although the Harvell court did write that "the defendant waived his speedy trial claim by announcing his readiness for trial and by failing to request an adjournment when the People moved the case to trial that morning (see, People v. Weaver, 162 AD2d 486)" the actual holding is more limited.

The waiver which the court found in the Harvell case was based upon the Court of Appeals decision in People v. Lawrence, 64 NY2d 200 (1984) and the Second Department's decision in People v. Weaver, supra.. What these cases actually hold, and what Harvell holds, is that failure to follow the statutory procedures set forth in CPL 220.10(1)(g)(2) and CPL 210.45(1) will result in a waiver of a speedy trial claim, see People v. Lawrence, supra, at page 203. These statutory sections provide that a motion to dismiss pursuant to CPL 30.30 must be made prior to the commencement of trial or the entry of a plea of guilty (CPL 210.20, subd 1, par [g]; subd 2) and that it must be made in writing and upon reasonable notice to the People (CPL 210.45, subd 1).

The facts in Harvell, Weaver and Lawrence differ significantly from the facts here. In Harvell with a panel of prospective jurors waiting outside the courtroom door, defense counsel handed the court and the prosecutor a partially typed, partially handwritten motion to dismiss the indictment pursuant to CPL 30.30. The motion was made returnable that day, and defense counsel admitted that

it had not been filed in the office of the Clerk of the Supreme Court, as required by court rules (see, 22 NYCRR 200.4). In Weaver again with a panel of prospective jurors waiting outside the courtroom door, counsel handed motion papers to the court and served them upon the prosecutor. The motion was returnable for February 21st which date was three days prior to the date on which the motion was served on the People or handed to the court. (February 23rd)². Finally, in Lawrence the defendant's motion was not written. In each of these cases that key fact which resulted in the waiver was not the fact that counsel had answered ready and then made the motion. Rather it was the fact that counsel failed to follow the required statutory procedures.

In this case, unlike the cited cases, the motion was in writing, was made prior to trial and was duly filed with the clerk. The only issue is whether the notice given to the prosecutor was reasonable. There are no cases which define this term. In the cited cases the notice was unreasonable because the defense counsel clearly had an opportunity to give the People time to respond to the motion but intentionally or negligently precluded that opportunity by attempting to file their motions on the eve of trial. That is not what occurred in this case. Defense counsel here learned that this case would be added to the October 22nd calendar on October 16th. On October 17th he learned that the People expected to move the case for trial on the 22nd. Counsel clearly should have raised the speedy trial issue with the court at the October 17, 2002 conference and perhaps should have filed his motion on October 18th. Assuming that he had done this, however, he would have given the People at most four additional days (two of which were weekend days) to respond. Given that this case had been essentially off calendar for three months and that counsel had only three days notice of its restoration to active status it is difficult to see how he could reasonably be expected to give the People more notice of the motion that he actually gave.

Based upon the foregoing the Court holds that the defendant's right to move for dismissal based upon an alleged violation of his speedy trial rights is not waived.

² It is significant that although the parties in this case could have reasonably have expected that they would be referred out for trial on the October 22nd date, it was understood that, unlike the situation in the cited cases, no jury panel would have actually been assembled.

The Court is mindful of the People's need to move this case for trial in the most expeditious manner possible. Although the People have not formally responded to the merits of the defendant's motion it appeared clear based upon the arguments in open court on October 30, 2002 that resolution of the motion will turn on the inclusion or exclusion of the time running from the defendant's arraignment in Criminal Court up to his arraignment on the indictment. If this period of approximately 111 days is excludable from the CPL 30.30 calculation then the indictment stands. If, on the other hand, it is includable dismissal must result. The People's argument for excludability rests upon the alleged waiver of speedy trial time by the defendant.

The Court, therefore, in order to accommodate the People's legitimate desire to move the case promptly, will conduct an expedited hearing on this issue. If the People wish to raise any additional issues with respect to the merits of the motion they may request an adjournment for that purpose or they may file them in writing prior to the hearing

Kew Gardens, New York
Dated: October 31, 2002

SEYMOUR ROTKER, Acting J.S.C.