

entrance. This witness gave a general description and did not believe he would be able to recognize this individual if he saw him again. The victim was reinterviewed by detectives and after unsuccessfully viewing photo books, she met with a police artist and together, a sketch was prepared. Thereafter, a wanted poster was generated from the sketch and circulated city wide.

Despite these investigative efforts, the single piece of evidence appeared to be the “of value” print recovered from the crime scene. One of the detectives assigned to this investigation, Detective O’Neill of the Latent Print Unit of the NYPD, began a series of attempts to determine the identity of the “of value” fingerprint recovered from the crime scene: On October 25, 1995, he scanned the print into the SAFIS system three times, each with negative results; On November 2, 1995, he scanned the fingerprint into the SAFIS system and recovered nine possible candidates¹, but none of those nine resulted in a positive fingerprint identification with the fingerprint recovered from the crime scene. One week later the detective again ran the fingerprint and recovered nine additional possible candidates², but none resulted in a positive fingerprint identification with the fingerprint recovered from the crime scene. Once again on November 9, 1995, Detective O’Neill scanned the fingerprint into the SAFIS system and two possible candidates resulted³, but neither resulted in a positive fingerprint identification of anyone.

On January 31, 1996, after exhausting all investigative leads, this investigation was closed. However, the case remained active in the NYPD Latent Print Unit and the “of value” fingerprint was periodically run through the SAFIS system. Occasionally, a SAFIS search entry of the “of value” fingerprint resulted in possible candidates⁴, but none ever resulted in a positive fingerprint identification with the fingerprint recovered at the crime scene.

In 1994 New York State passed legislation authorizing the creation of a DNA Databank that was to be maintained by the State and which would preserve DNA profiles of felons convicted of specified designated felonies. Although this legislation authorized only the *prospective* taking of

¹None of these candidates had the same NYSID number as the defendant Sawyer.

²None of these candidates had the same NYSID number as the defendant Sawyer.

³Neither of these candidates had the same NYSID number as the defendant Sawyer.

⁴None of these candidates had the same NYSID number as th defendant Sawyer.

DNA specimens from designated felony offenders convicted *after* the legislation took effect, in December 1999, this legislation was amended and expanded to include *retroactive* application to a wider range of designated felonies that would result in a sentenced defendant having to provide a specimen. To that end, a 1999 “backlog” project was commenced and the crimes underpinning this indictment which were committed on October 18, 1995, fell within the designated felonies of the “backlog” project. As a result, the rape kit collected from the victim on October 18, 1995, and vouchered with the NYPD Property Clerk under voucher #G086056 was analyzed. On November 29, 2000, a profile of a semen donor was generated from that analysis and that profile was then entered into a database. This database was eventually uploaded into the New York State Databank.

On December 17, 2001, a letter was sent from the New York State DNA Databank Unit in Albany, New York, to the Office of the New York City Chief Medical Examiner, stating that a Robert Sawyer had been identified as the semen donor from the evidence garnered from the sexual assault kit vouchered under #G086056. Robert Sawyer was then a New York State inmate serving a twelve (12) year state sentence as a result of a Nassau County burglary conviction. When this information was relayed to the Queens County Special Victims Squad, an investigation of the 1995 crime was reopened. A detective from the Special Victim’s Unit contacted the Latent Print Unit requesting that a fingerprint comparison between the 1995 “of value” fingerprint recovered from the crime scene to be compared with those on file for Robert Sawyer. When such comparison was performed, no identification was made. Nonetheless, upon the basis of the DNA profile that Sawyer was the semen donor in the 1995 sexual assault, the instant indictment was filed charging him with those crimes. When he was fingerprinted pursuant to this indictment, a comparison of his prints and the “of value” print recovered from the crime scene resulted in a positive identification.

CONCLUSIONS OF LAW

Preliminarily, CPL§30.10 provides for the timeliness of prosecutions and the periods of limitations within which those prosecution must be commenced. Specifically, since the counts of rape and robbery charged herein are B felonies, CPL§30.10 (2)(b) mandates that the prosecution for these offenses be commenced within a period of five years after the commission thereof. Inasmuch as the prosecution for these offenses has not been commenced within that five year time period, Defense now seeks dismissal of this indictment.

At first blush, Defense may seem to be correct in his interpretation of the law: six and a half

years have passed between the crime and the filing of the accusatory instrument. However, this general period of limitations is subject to a number of tolling exceptions, including that of CPL §30.10(4)(a), which provides [in calculating the time limitation applicable to the commencement to a criminal action, the following periods shall not be included] “(a) any period following the commission of the offense during which (i) the defendant was continuously outside this state, or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence. However, in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision (2).”

While Defense is most certainly correct that the People did not commence their prosecution of the defendant until approximately six and a half years after the commission of the crimes charged herein, they have failed to take into account the tolling provisions of CPL §30.10(4)(a)(i)(ii). It is apparent from the arrest record contained within Defense Counsel’s moving papers that subsequent to October 1995, the defendant was not continuously outside the State of New York⁵, thus CPL §30.10(4)(a)(i) does not apply. However, CPL §30.10(4)(a)(ii), which provides that tolling may apply if the defendant’s whereabouts are unknown and unascertainable by the exercise of due diligence, may apply to the facts and circumstances of this case.

In 1999, the New York Court of Appeals, in deciding the “Zodiac” case, *People v. Seda* (93 NY2d 307), held that the tolling provision of CPL§30.10 (4)(a)(ii) “is not conditioned on the People’s knowledge of the defendant’s identity. The police may be ignorant of the whereabouts of a perpetrator of a crime where they have identified the perpetrator but lack knowledge of his or her physical location, *or where they have not identified the perpetrator at all and thus cannot determine where he or she is* (emphasis supplied). The phrase “whereabouts of the defendant” must be deemed to include both situations”(supra at 311). The Court of Appeals, however, cautions that the People may only benefit from the tolling provisions for those periods during which the defendant’s whereabouts remain unknown and *were unascertainable through the exercise of reasonable diligence* (emphasis supplied).

Thus, it is incumbent upon this Court to determine whether or not the People exercised due diligence in their attempt to determine the identity of the perpetrator who committed the crimes on

⁵ On January 27, 1996, the defendant was arrested in Nassau County on burglary charges. The defendant was subsequently convicted after a bench trial and sentenced to a twelve year sentence. The defendant continues to be incarcerated on that sentence.

October 18, 1995. To that end, this Court has reviewed the efforts listed by the People in their Responding Papers and finds that upon the basis of the scant evidence that was in existence at that time, there was a suitable showing of the diligent and lengthy efforts made by law enforcement to identify the perpetrator (see, *People v. Seda*, 246 AD2d 675 [2d. Dept.], affirmed 93 NY2d 307; *People v. Jones*, 751 NYS2d 173, 2002 NY App. Div. LEXIS 11523 [1st. Dept.]). The single piece of evidence garnered by law enforcement appeared to be the “of value” fingerprint recovered from the crime scene. During the six and a half intervening years, this print was routinely run through the SAFIS system and each search concluded with negative results. Indeed, so difficult was it to determine the identity of the assailant, that but for the DNA profiling analysis, a suspect in this case may never have been ascertainable⁶.

Accordingly, and for the reasons stated herein, inasmuch as the People have demonstrated the diligent and extended efforts made by law enforcement to identify the perpetrator of these crimes, the defendant’s motion to dismiss upon the grounds that the prosecution of these crimes is time-barred pursuant to CPL§30.10, is denied.

The foregoing constitutes the decision of the Court.

Order entered accordingly.

A copy of this decision and order forwarded to Counsel for the defendant and to the District Attorney.

JOSEPH ROSENZWEIG, J.S.C.

⁶ Notwithstanding that the defendant herein has been charged with these crimes as a result of his DNA profiling, New York Courts are still guarded with respect to the admissibility of DNA evidence. The Court of Appeals in *People v. Wesley* (83 NY2d 417) cautions that DNA evidence is properly admissible in evidence at trial *only if* it was admissible under customary foundation procedures. The Court further warns that “The foundation.....should not include a determination of the court that such evidence is true. That function should be left to the jury (supra at 425) (see, *United States v. Jakobetz*, 955 F2d, 785, 796-797)”.