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UPDATE ON SPEEDY TRIAL, DISCOVERY, AND EXCLUDABLE TIME

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INTRODUCTION:

Since January 1st, 2020, motions, arguments, and decisions involving speedy trial can only be made and resolved in the context of discovery because, since then, the People cannot declare their readiness for trial without first (or contemporaneously) certifying that they have met their discovery obligations. (See CPL 30.30 [5], 245.50 [3]).

As noted in People v Lobato, 66 Misc. 3d 1230(A) (Sup. Ct., Kings County 2020), "the provisions of CPL 245.50 (3) and 30.30 (5) interface discovery compliance and trial readiness such that (the former) is a condition precedent to a valid announcement of trial readiness."

No longer can the People simply stand up and declare "ready for trial" (RFT) and be given the benefit of a presumption of accuracy in their pronouncement. (People v Brown, 28 NY3d 392 [2016]). Nor do they only risk "discovery sanctions" (e.g., preclusion of evidence) for not complying with their disclosure obligations (which are now automatic rather than triggered by a discovery demand [CPL 245.10]).

Rather, the court can strike down their claim of readiness as illusory (CPL 30.30[5]), and the speedy trial time bomb will keep on ticking (and eventually explode in a dismissal of the charges upon motion) if the People have not filed a valid certificate of readiness (COC) and properly declared ready (People v Kendzia,64 NY2d 331 [1985]), before their statutory time limit (six months for a felony/90 days for a misdemeanor) has expired (CPL 30.30 [1][a] and [b]), and there is no EXCLUDABLE TIME (CPL 30.30 [4]) to save them.

As recently explained In People v Lewis, 72 Misc3d 686 (Crim Ct City of NY, Kings County, 2021), the new rules have transformed this state's discovery practice into a matter of "open-file discovery" (save for information/evidence for which the People obtain a protective order [CPL 245.70], or cannot obtain through due diligence), and the People must not only provide discovery "*sans* demand," but certify to the court and counsel that "all known material and information subject to discovery (CPL 245.20) has been disclosed/provided to the defense and that they have exercised DUE DILGENCE and made REASONABLE INQUIRIES to ascertain the existence of such material. (CPL 245.50[1]).

As noted above, a proper COC must be filed before the People can be deemed RFT (CPL 245.50[3]. See also People v Berkowitz, 68 Misc3d 1222[A] (Crim Ct City of NY, Kings County, 2020). Once the People have filed the COC, the court must then conduct its own ON-THE-RECORD INQUIRY (and allow the defendant to be heard) to verify that the discovery requirements have indeed been met and the People are REALLY READY FOR TRIAL.

CAN THE PEOPLE STILL BE DEEMED TRIAL READY IF THEY HAVEN'T TURNED OVER ALL DISCOVERABLE MATERIAL?

The answer is, "that depends on whether they have exercised due diligence and made reasonable efforts to obtain discoverable material but have been unsuccessful because the material is lost, destroyed or otherwise unavailable. (CPL 245.50[3]. 30.30[5]). As noted in People v Lewis, *supra,* the People may be deemed ready if special circumstances exist to excuse non-disclosure of particular items of discovery and the People can demonstrate that despite their diligent efforts, (which are reasonable under the circumstances), the material could not be obtained, and that the People are otherwise in a position to bring the case to a point where it can be tried. (Citing, *inter alia*, People v England, 84 NY2d 1, [1994]).

By allowing for a declaration of readiness with discovery still outstanding, the court noted the Legislature's recognition that unavoidable delays and unexpected hurdles may, in certain circumstances, prevent an otherwise diligent prosecutor from complying fully with discovery despite best efforts to obtain and disclose all relevant material in a timely manner. (Citing People v Westin, 66 Misc3d 785 [Crim Ct Bronx County 2020]).

The defendant in Lewis was arraigned on charges of Criminal Trespass (misdemeanor and violation), and Criminal Possession of Stolen Property 5th degree, also a misdemeanor, on 10/13/19. The case was adjourned to 11/19 for the People to "convert" the misdemeanor complaint to an information (CPL 170.65). In the meantime, on 10/18, the People filed a superseding information along with a supporting deposition. Consequently, both sides agreed that those 5 DAYS were chargeable to the People.

On 11/19, the People served partial discovery, and the matter was adjourned to 12/18. Per a "voluntary disclosure agreement" in Kings County at the time, adjournments for "discovery by stipulation" were deemed EXCLUDABLE. Hence, no additional time through 12/18 was chargeable to the People. (This would no longer fly after the automatic discovery rules came into effect on 1/1/20).

On 12/18, the People were not ready and requested a 15-day adjournment. Then, on 12/30, they moved for a GOOD CAUSE EXTENSION to file discovery in accordance with the new discovery rules. They withdrew that motion, however, on 1/24/20 (the next adjournment date) and said that they were still not ready for trial. The court adjourned the case until 2/26/20 for the People to file a COC.

The court considered the period from 12/30/19 to 1/24/20 EXCLUDABLE because of the People's motion. (Citing, *inter alia*, 30.30 [4][a] People v Sivano, 74 Misc. 2d 427 [App Term 2d Dept. 1997]). The court noted that the new speedy trial law did not change CPL 30.30 (4) and the fact that the motion was withdrawn (provided it was made in good faith) did not vitiate the exclusion. (People v James, 170 AD3d 477 [1st Dept. 2019]). Consequently, the People were charged with 12 DAYS from 12/18/19 to 12/30/19 when the motion was filed.

Since the People were not ready on 1/24/20, an additional 33 days to 2/26 (the next adjourn date) was charged to them, bringing the chargeable time to 50 days.

The People were again not ready on 2/26 and though the case was adjourned to 4/1/20, they were only charged up to 3/17/20 because the courts closed due to Covid-19 and an Executive Order (EO 202.8) suspended the speedy trial rules on 3/20/20. (The parties agreed that 3/20 to 4/1/20 were excludable). Factoring in an additional 23 days, the court found 73 days chargeable to the People through 3/20/20.

From 4/1/20 through 3/19/21, the case was adjourned administratively several times.

On 6/25/20, the People filed a COC and declared RFT. They served notice of same on the defense on 7/3/20. The court noted that the Speedy Trial clock resumed per EO 202.67 on 10/4/20 and several months later, on 3/19/21, the court held a virtual conference and set a motion schedule per the defendant's request.

On 4/6/21, the defendant moved to DISMISS per CPL 30.30(1)(b) and (5-a). The People replied on 5/4/21 and the defendant submitted a sur-reply on 5/12/21.

The defendant argued that the People's 7/3/20 declaration of trial readiness was invalid because the People had not provided certain items of discovery including a detective's "scratch complaint" and memo book (the existence of which the People acknowledged) and other items including Giglio material pertaining to other (non-testifying) officers, and Family Court records (which the court found non-discoverable, citing, *inter alia*, People v Fishman, 72 NY2d 84 [1988]).

COURT FINDS DUE DILIGENCE:

The court was satisfied that the People had exercised due diligence (including multiple requests by phone and email to the detective and to the precinct operations coordinator) to obtain the items but to no avail because the detective was on "extended medical leave" and the items could not be located. The court concluded that their non-disclosure was due to EXCEPTIONAL CIRCUMSTANCES (CPL 30.30 [4][g]). Consequently, this omission did NOT invalidate their COC. In the Court's view, the People were only chargeable with 73 DAYS of speedy trial time.

But in PEOPLE v CLARKE…

In contrast, see People v Clarke, 28 NY3d 48 (2016) where the Court of Appeals held that the People's 15-month delay in seeking a court order to obtain the defendant's buccal swab to compare his DNA with DNA identified by the Office of the Chief Medical Examiner (OCME) on a gun did not allow them to have that time excluded from the speedy trial assessment as an exceptional circumstance.

The defendant was arraigned on 12/3/07 on Attempted Murder 2d degree and Criminal Possession of a Weapon 2d degree (pertaining to the gun on which a DNA profile was located). An indictment was reported out on 8/18/08, six months after the OCME DNA lab report was created. It recommended further testing upon submission of blood or saliva from a suspect and that such testing would take about 60 days.

The People only learned of the report in May 2009 at which point they moved for a buccal swab order to which the defendant consented on 6/5/09. The DNA report was produced on 11/13/09.

The defendant moved to dismiss the indictment, alleging that the several month delay was due entirely to the People's failure to obtain the DNA report and act upon it. The People argued that it was OCME'S

duty to inform them of the report and that the delay should be excluded as an exceptional circumstance under CPL 30.30 4(g). The trial court denied the motion without a hearing. The defendant was subsequently convicted of CPW 2d degree and Reckless Endangerment.

The Second Department REVERSED finding that the 161days were chargeable to the People for not exercising due diligence to obtain the defendant's DNA sample. When combined with other chargeable time, the People were beyond the speedy trial time limit. The indictment, therefore, was dismissed.

The Court of Appeals AFFIRMED, noting preliminarily, that the purpose of CPL 30.30 (enacted in 1972) is to address delays occasioned by prosecutorial inaction (People v McKenna, 76 NY2d 59 [1990]) and to promote prompt trials for criminal defendants. (People v Anderson, 66 NY2d 529 [1985]).

The Court also observed that while 30.30 (4)(g) can provide for excludable time for exceptional circumstances, the People must demonstrate that they have exercised DUE DILIGENCE to obtain evidence. As the Court stated, "if the statute is to be given a reasonable effect and… to fulfill its purpose, it must be limited to instances in which the prosecution's inability to proceed is JUSTIFIED by the purposes of the investigation and CREDIBLE, VIGOROUS ACTIVITY in pursuing it." (Citing People v Washington, 43 NY2d 772 [1971]).

And, while there is no precise definition of EXCEPTIONAL CIRCUMSTANCES, the Court pointed to the purpose of the statute which is to DISCOURAGE PROSECUTORIAL INACTION (citing, *inter alia*, People v Smietana, 98 NY2d 336 [2002]) which was exactly what happened in this case.

The Court soundly rejected the People's attempt to blame OCME for not forwarding the DNA report of its own accord, remarking that "it is the People alone who have (and did not meet) the burden of …showing that they exercised due diligence sufficient to exclude the delay. (Citing People v Berkowitz, 50 NY2d 333 [1980]).

In contrast, see People v Cruz, 136 AD3d 440 (1st Dept. 2016) where the court credited the People with excludable time for the time that they were waiting for the OCME to provide the results of its DNA analysis.

SUFFICIENCY OF THE PEOPLE'S COC IN MISDEMEANOR CASES:

CPL 30.30 (5-a), effective 1/1/20, states:

Upon a LOCAL COURT ACCUSATORY INSTRUMENT, a statement of readiness SHALL NOT BE VALID unless the prosecuting attorney CERTIFIES THAT ALL COUNTS CHARGED IN THE ACCUSATORY INSTRUMENT MEET THE REQUIREMENTS OF CPL 100.15 AND 100.40 and that THOSE COUNTS NOT MEETING THE REQUIREMENTS OF THOSE STATUTES HAVE BEEN DISMISSED.

This statute is based on the premise that a legally sufficient accusatory instrument (i.e., one that provides reasonable cause, and which contains non-hearsay factual allegations to support every element of the crime[s] charged as required by CPL 100.40 and 100.15) is a JURISDICTIONAL PREREQUISITE to the Court's authority to adjudicate the case (by plea or trial) as well as the People's ability to prosecute the case to conclusion. (People v Alejandro, 70 NY2d 133 [1987]).

It used to be that the People could declare trial ready only on those counts that were legally sufficient (People v Dion, 93 NY2d 893 [1999]) but the new statute did away with the notion of partial readiness. Now, the People are either "ready on everything" or not at all.

Beyond assuring that the People have read their own accusatory paperwork and have satisfied themselves that the charges are legally sufficient, it is not entirely clear why the statute requires them to certify as much as a condition to trial readiness when, ultimately, it is for the court to determine upon its own review of the charging papers. (Save for patently insufficient accusatory instruments, prosecutors and defense attorneys often argue over whether charges meet statutory requirements and the courts rule one way or the other).

Equally unclear is the obligation to certify that all non-sufficient counts have been dismissed when, presumably, it was the court that already dismissed them on motion by one side or the other. Nevertheless, that statute says what it says but that does not mean that different courts haven't already interpreted it differently.

For example, in People v Lewis*, supra*, when the People filed a superseding information and supporting deposition, the prosecutor averred that the People are ready for trial per CPL 30.30(5) (which requires the court to inquire into actual readiness and invalidate any illusory claims), and CPL 245.50(1).

The court noted that while the defense contested the People's non-compliance with 5-a, they did NOT challenge the SUBSTANTIVE SUFFICIENCY of the accusatory instrument. Moreover, once the People asserted their compliance with subdivision 5, it triggered the court's obligation to test their claim of readiness which includes a determination (by the court) of legal sufficiency. In the court's view, the People are not constrained to certify legal sufficiency before the court makes its own inquiry into the matter.

To require dismissal for not reciting the language of 5-a verbatim, in the court's estimation, would be to elevate procedural formality over substance and permit a dismissal of an otherwise legally sufficient accusatory instrument. The court did not agree, therefore, that 5-a was intended to imperil a case that meets all the substantive requirements of trial readiness.

A more literal (and less-prosecution friendly) interpretation of CPL 30.30 (5-a) was adopted by the court in People v Lavrik, 2021 NY Slip Op 21110 (Crim Ct City of NY, 4/22/21), resulting in dismissal of the charges on speedy trial grounds.

The court denied the defendant's first dismissal motion on 1/4/21 finding 86 days chargeable to the People. Thereafter, the People filed subsequent statements of readiness (on 1/15, 1/16 and1/23), certifying that the "People are ready for trial and that all counts currently charged met CPL 100.15."

The court held, however, that these claims of readiness were insufficient because there was no statement that any unconverted counts (i.e., misdemeanor complaint to an information) had been dismissed.

Thereafter, on 2/20/21, the People filed another certificate of readiness, alleging that the People were ready, all counts satisfied CPL 100.15 and there are no counts which did not meet the requirements of CPL 100.15 and 100.40.

The court deemed the People's attempt at retroactive readiness to be too little too late because CPL 30.30 requires a statement of present readiness rather than a declaration of future or past readiness. (Citing People v Kendzia, *supra*). As the court saw it, CPL 30.30 (5-a) clearly sets forth the People's dual obligation to certify legal sufficiency of all counts and dismissal of any counts that did not measure up to the requirements of CPL 100.15 and 100.40. Accordingly, since the People's proper declaration of readiness was made only after the speedy trial time clock expired (CPL 30.30 [1][b]), the defendant's motion to dismiss was granted. (See also People v Ramirez-Correa, 71 Misc3d 570 [Crim Ct City of NY, Queens County 2021).

As with many instances of statutory interpretation, different courts analyze the same statutes differently even when the language (however pro forma it may seem) seems reasonably clear. If the People do NOT certify BOTH that all counts meet the pleading requirements of the CPL AND that all insufficient counts HAVE BEEN DISMISSED (even if the court already knows this), defense counsel should not hesitate to point out the deficiency in such representation and move to strike the declaration of readiness as invalid under CPL 30.30 (5-a).

PERIODS WHEN THE DEFENDANT IS WITHOUT COUNSEL: EXCLUDABLE OR NOT?

In two recent cases from Town of Spring Valley Justice Court, Rockland County (People v Pinto-Alas. 1/11/22 and People v Nahmani 1/11/22), the same judge granted the defendant's speedy trial motion, ruling in each case that the periods of time in which the defendant was not represented by counsel (84 days and 136 days, respectively), were NOT excludable under 30.30 (4)(b) because the record did not reflect that the defendant had been advised of his rights with respect to speedy trial and of the consequences of consenting to an adjournment in terms of stopping the speedy trial time clock. (Citing, *inter alia*, People v Liotta, 79 NY2d 841 [1992]: absence of objection does not mean consent to an adjournment).

The court was unpersuaded by the People's claim of excludable time under CPL 30.30 (4)(f) (the period of time during which the defendant is without counsel through no fault of the court) because the People did not address whether the periods in question were related to any fault on the part of the court. In each case, the People were deemed to have failed to meet their burden to establish sufficient excludable time to keep them out of 30.30 jeopardy and the charges (DWI and other V&T'S in Pinto-Alas and Aggravated Harassment in Nahmani) were dismissed.

DELAY IN FILING A MISDEMEANOR INFORMATION WHICH REPLACES A FELONY COMPLAINT:

In People v Williams, 2021 NY Slip Op 50924(U) (Mt Vernon City Court 9/30/21), the court held that the People waited too long (10 months) to replace a felony complaint with a superseding misdemeanor information (charging multiple counts of Assault 3d degree and CPW 4th degree) and could not claim safe harbor in a Covid Executive Order (EO) suspending speedy trial when a grand jury was hearing cases during the period in question.

The defendant was arraigned on the felony complaint on 9/11/2020, and despite repeated assurances of an expected grand jury presentation, no such action was ever taken. Finally, on 7/8/21, the People filed the misdemeanor information in the local court.

The parties conceded that 73 days from 9/11/20 to 11/23/20 were excludable and that 29 days from 11/23 (when the People were not ready) to 12/22/20 were chargeable to the People. They were also not ready on 12/22 and the case was adjourned to 1/28/21. However, the People claimed that they should only be charged nine more days to 12/30/20 when EO 202.87 (extending 30.30 suspension for unindicted felonies) went into effect. By their calculation, the People figured that they were only chargeable with 84 days of speedy trial time.

The court took a different view. In noted that under CPL 30.30 (7)(c), when felony charges contained in a felony complaint are reduced to misdemeanors or replaced by a misdemeanor information, the People must declare trial readiness either within six months of the filing of the felony complaint (CPL 30.30 [1][a]) or within the period applicable to the filing of the new charges (30.30[1][b]), whichever is shorter. Put another way, the appliable time period is the lesser of the remainder of the original six-month period or the period pertaining to the new charge. (People v Cooper, 98 NY2d 541 [2002]).

The court determined that the case commenced with the filing of the felony complaint on 9/11/20 (People v Smietana, 98 NY2s 336 [2002]), but the time through 11/23 was excludable. The People were repeatedly unready on 1/28/21 through 2/18, 3/4, 3/18, 4/1, 4/19. 5/6, 5/19, 6/7 and 6/30. They were never ready to conduct a felony hearing and, as noted above, they did not take the case to the grand jury despite repeated representations to the contrary.

After going through all the pandemic related EO's from March 2020 through May 2021, the court concluded that the People had not met their burden to establish excludable time (People v Santos, 68 NY2d 859 [1986], and that the EO's did NOT apply because a grand jury was always available to them during this period and there was nothing stopping them from filing a superseding information sooner than later. Accordingly, since 227 days were chargeable to the People (well beyond the time allowed by CPL 30.30 [7][c]), the court granted the defendant's motion to dismiss the information.

SPEEDY TRIAL ARGUMENT ABANDONED BY GUILTY PLEA WHERE DEFENDANT DID NOT OBTAIN A RULING ON HIS SPEEDY TRIAL MOTION:

In People v Goodison, 2021 NY Slip Op 04296 (4th Dept. 2021), the Fourth Department held that even though the defendant's waiver of appeal was invalid because the lower court did not distinguish it from the rights automatically forfeited by a guilty plea (People v Lopez, 6 NY3d 248 [2006]), the defendant gave up his 30.30 claim by pleading guilty BEFORE the court issued a ruling on his speedy trial dismissal motion.

Although the court strongly hinted at oral argument that it was likely to deny the motion, defense counsel submitted a further letter-brief in support of the motion which the court agreed to consider before deciding the matter.

The record was silent, however, with respect to the court's determination of the motion and the defendant went ahead and pled guilty with the issue unresolved. The AD added that even if the motion

was deemed to have been denied, it had no basis to consider the merits without a decision before it. In the court's view the defendant (i.e., counsel) FAILED in his obligation to PREPARE A PROPER RECORD. (Citing People v Smith, 187 AD3d 1652 [4th Dept. 2020]).

LESSON LEARNED: OBTAIN A RULING ON THE MOTION (whether speedy trial or suppression of evidence) BEFORE PLEADING GUILTY TO PRESERVE THE CLAIMED ERROR IN THE DENIAL OF THE MOTION.

MORE ON PRESERVATION:

In People v O'Day, Docket 111252, Sup Ct App Div. (3rd Dept. 12/30/21), the Third Department held that the local court (Town of Ulster Justice Court) case file notations were too cryptic to determine the chargeability of certain adjournment periods, so the matter was remanded to sort the matter out before other pending issues were addressed on appeal.

On appeal, the defendant conceded that his statutory and constitutional speedy trial arguments were NOT PRESERVED for failing to raise them in County Court. (People v Beasley, 16 NY3d 289 [2011]). The court agreed nevertheless to consider his arguments, noting that even a "single error of failing to raise a meritorious speedy trial claim is sufficiently egregious to amount to INEFECTIVE ASSISTANCE OF COUNSEL." (Citing, inter alia, People v Pentalow, 196 AD3d 871 [2021]). The purpose of such consideration was to determine whether the failure to seek dismissal on speedy trial grounds amounted to ineffective assistance of counsel.

The court noted that since the defendant was charged with felonies (DWI and AUO 1st degree), the People had six months from the commencement of the case (3/27/17 when the felony complaint was filed in the town court), to declare ready for trial. (CPL 30.30 [1][a]). The case was presented to the grand jury and the indictment was reported in April of 2018. Thereafter, a suppression hearing was held in Superior Court (the motion was denied) after which a trial was conducted, the defendant was convicted and then sentenced to a "6/5 split" term of jail and probation.

With respect to speedy trial, the People argued on appeal that while more than a year had elapsed before they declared ready for trial, the defendant had expressly waived several months of speedy trial time in consideration of a plea offer which he had accepted and later rejected.

Specifically, the People noted that on July 13, 2017 (two months before the 30.30 deadline), the defendant signed a written waiver of speedy trial rights which defense counsel forwarded by letter to the prosecutor, noting that the plea offer was acceptable to the defendant. The waiver, by its terms, was to remain in effect until 30 days following the date on which defense counsel notified the People in writing that the defendant was no longer waiving his speedy trial rights.

During a court appearance on 9/21/17, the defendant revoked his earlier acceptance of the plea on the record. Contrary to the People's position, the court deemed the defendant's plea rejection as marking the end of his waiver of speedy trial rights since such waiver had been directly tied to his ACCEPTANCE of the plea offer. Consequently, all the time after 9/21/17 was NOT (as the People argued) necessarily excludable. Instead, the excludable time was confined to the period between July 13th and 9/21/17.

However, since the local court's file notations with respect to subsequent adjournments could not be deciphered, the case was returned for time assessments pending consideration of that and the other remaining issues on appeal.

STILL MORE ON PRESERVATION, DUE DILIGENCE (AND DEFENDANTS ON THE LAM):

PEOPLE V MINWALKULER, 2021 NY SLIP OP 05195 (4TH DEPT. 10/1/21):

On 6/8/02, the defendant was indicted and arraigned in Ontario County on felony drug charges (multiple sales to an undercover state trooper) after which he promptly absconded and remained AWOL for 14 years. He was arrested on 5/15/16 in Pennsylvania and Monroe County prosecutors who had other charges against him moved to extradite him. (The defendant eventually waived extradition).

Six months later, the State Police learned of the defendant's whereabouts in Pennsylvania (by searching a national law enforcement data base) and so informed Ontario County prosecutors on 11/22/16. The defendant was returned to Ontario County to face the old drug charges on 3/20/17.

The defendant brought a 30.30 motion which County Court denied. The defendant was eventually convicted, and the Fourth Department held that while the defendant met his initial burden of showing that the People had not declared trial readiness in the statutory time frame, (citing People v Allard, 28 NY3d 41[2016]), the People met their burden to demonstrate sufficient excludable time to bring them within the statute.

The People initially argued that there was no need to show due diligence (to locate the defendant) because the defendant's LOCATION WAS UNKNOWN, and he was attempting to AVOID APPREHENSION AND PROSECUTION. (CPL 330.30 [4][c][i], People v Torres, 88 NY2d 587 [1989]).

However, as the court noted, the People FAILED TO PRESERVE this argument because they did not raise it before the lower court. Consequently, since the issue of the defendant's absconding was NOT before the court, a showing of DUE DILIGENCE was necessary to overcome the motion to dismiss. (People v Anderson, 188 AD3d 1699 [4th Dept. 2020]).

The court concluded that while the People could have found out sooner about the defendant's location with more frequent data base searches, the police are "not obliged to search for a defendant indefinitely as long as they exhaust all reasonable leads." (Citing People v Petrianni, 24 AD3d at 1724).

To that end, the court found that the state police routinely checked police data bases, investigated the defendant's last known addresses, interviewed his wife and mother-in-law, and sought information from the FBI and Canadian law enforcement authorities. Under the circumstances, the court was satisfied that while greater efforts could have been taken, enough had been done to meet the requirements of due diligence. And, even if the four-month period between 11/22/16-3/20/17 was charged to the People, they would still be within the six-month time frame of CPL 30.30 (1)(a).

The court also rejected the defendant's CONSTITUTIONAL speedy trial claim (CPL 30.20), finding that even though a significant amount of time had passed, most of it was DIRECTLY ATTRIBUTABLE to the defendant's having left the state (and possibly the country) before being apprehended in Pennsylvania.

(Citing People v Lara, 165 AD3d 563 [1st Dept. 208]). Further, the defendant's interim period of incarceration was relatively brief (People v Vernace, 96 NY2d 886 [2001]), and he failed to demonstrate prejudice on account of the delay. (See People v Taranovich, 37 NY2d 442 [1975]).

Finally, since the constitutional argument, in the court's estimation, had minimal chance of success, the defendant's claim of INEFFECTIVE ASSISTANCE OF COUNSEL was also rejected.

A COUPLE MORE CASES:

In People v Lumpkin, 2021 NY Slip Op 50365 (Sup Ct Kings County 4/27/21), the court held that even though the speedy trial rules changed on 1/1/20, they did not invalidate pre-2020 declarations of readiness (made under the old rules), nor did they rescind the allowances for excludable time under CPL 30.30 (4). (See also People v Reynoso, 2022 NY Slip Op 50002 [Sup Ct App Term 1st Dept. 1/4/22]).

Although, it should be noted, some cases, (e.g., People v Roland, 67 Misc3d 330 [Crim Ct City of NY 2/28/20], People v Mashiyach, 2020 NY Slip Op 20288 [Crim Ct Kings County 10/27/20) have held that after 1/1/20, the People reverted to state of non-readiness that required a valid COC and new declaration of readiness to get "back in the black" for speedy trial purposes. (See also People v Dobrzenski, 2020 NY Slip Op 20107 [Utica City Ct 7/30/20).

The defendant in Lumpkin was arraigned on a felony complaint on 7/11/19. He was later indicted, and the People declared ready on 9/26/19. At arraignment on the indictment on 10/15/19, the defendant moved for (i.e., demanded) discovery and review of the grand jury minutes.

The case was adjourned to 12/3/19 for further proceedings on discovery and decision on the minutes. On that date, proceedings were adjourned to 1/15/20 for the same purpose. In that date court issued a written decision (dated 1/6/20) upholding the grand jury minutes. The case was then adjourned by consent to 2/13/20 for further proceedings with respect to discovery and to set dates for hearings and trial.

On 2/13, the matter was adjourned to 4/16 for a hearing and trial. The court advised that the People would be charged with 30.30 time until they filed a COC.

On 3/20/30, EO 202.8 suspending speed trial was handed down (follow by subsequent orders) and the case next returned on 10/28/20 at which time the People served and filed their COC and declared ready for trial. The court then adjourned the case until 10/29 for the defense to file its COC. The case was further adjourned to 12/3/20.

In the meantime, on 11/25/20, the defense filed a motion contesting the People's COC. The defendant was arrested on a new matter on 12/3 and did not appear in court. The case was adjourned to 1/12/21. On 12/15/20, the People filed a supplemental COC.

On 1/1/21, the case was put off until 2/23 on which date the court ruled that the People's first COC on 10/28/20 was invalid (because they had not yet disclosed the grand jury minutes to the defense) but found the supplemental COC (filed on 12/15/20) to be sufficient. The case was then adjourned to 4/5/21 for the defendant's COC and further proceedings. On that date, the defendant brought the motion to dismiss on speedy trial grounds.

The court began its analysis by citing People v Beasley, 16 NY3d 28 (2011) which notes that an assessment of whether the People have met their speedy trial obligation is generally determined by "computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of trial readiness, subtracting any periods of delay that are excludable under the statute and adding in any post-readiness periods of delay that are actually attributable to the People and ineligible for exclusion." (Citing People v Cortes, 80 NY2d 201 [1992]).

The court found (and the People conceded) that the People were chargeable with 147 days between the defendant's arraignment on the felony complaint and the People's first declaration of trial readiness on 9/26/19. The court then added on 35 days between 2/13/20 (when the court warned the People about filing a COC) and 3/20/30 when the first Covid EO went into effect. The People were also charged with nine days between 10/20 and 10/29/20, and then 27 more days between 10/29 and 11/25/20 (when the defendant filed the motion to challenge the People's COC).

The court held that the period between 9/26/19 (when the People declared ready) and 10/15/19 was not chargeable to the People. Likewise, the time between 10/15/19 and 1/15/20 was excludable because the defendant had moved for review of the grand jury minutes which remained under court consideration until the latter date.

The defendant argued that the speedy trial clock resumed ticking on 1/1/20 and continued until the People filed a valid COC (on 12/15/20).

The court found that the period during which motions were pending was excludable despite the "intervening efflorescence" of the new discovery rules. (Citing People v Erby, 66 Misc3d 625 [Sup Ct Bronx County, 2020]).

The court also excluded the period from 1/15/20 to 2/13/20 because the defendant had also filed a suppression motion and a hearing had yet to be scheduled. (Citing People v Shannon, 143 AD2d 572 [1st Dept. 1988]). For the same reason the period from 11/25/20 (when the defendant filed his motion challenging the People's COC) to 2/24/21 was also excluded. Thereafter, the time for the defense to file its COC was excluded.

According to the court's calculation, since fewer than six months were chargeable to the People, the defendant's motion to dismiss was denied.

FINAL TOUGHT:

As is evident, analyzing and litigating speedy trial issues require a knowledge of the law (and its changing landscape) as well as mathematics, in particular addition and subtraction of days depending on the demonstrable presence or absence of excludable time. (See People v Regan, 196 AD3d 735 [2021]).

While the purpose of the speedy trial rules is to ensure that criminal cases are prosecuted diligently and expeditiously, rather than with sloth-like speed (especially when the accused is in custody pending trial), the rules requiring a COC conditioned upon discovery compliance and, in the case of misdemeanors, a certification of legal sufficiency (and dismissal of insufficient counts) may seem formalistic if not unduly burdensome to some, in particular prosecutors who are under the gun of automatic discovery deadlines. (CPL 245.10).

For defense attorneys, especially those handling cases arising before and after 1/1/20, and which have been caught in the Covid quagmire of multiple adjournments, it is important not only to understand the legal rules regarding chargeable and excludable periods of CPL 30.30 (including the effect of Covid EO's) and their relationship with CPL Article 245, but to consult a calculator and "do the math" in every case.

*This article is a follow-up to the 1/5/21 monograph, "DISCOVERY/TRIAL READINESS AND EXCLUDABLE TIME IN THE AGE OF COVID-19" which is accessible at the ACP website at assigned.org.