

STATE OF NEW YORK
COUNTY COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-vs-

Ind. # 2016-0152

DANIE WASHINGTON,

Defendant.

APPEARANCES:

For the People: KARIN INTERMILL, ESQ.
Assistant District Attorney
SANDRA DOORLEY, ESQ.
Monroe County District Attorney
47 S. Fitzhugh Street
Rochester, New York 14614

For the Defendant: THOMAS A. CORLETTA, ESQ.
16 W. Main Street, Suite 240
Rochester, New York 14614

DECISION AND ORDER

CIACCIO, J.

Defendant, charged with two counts of Driving While Intoxicated, moves by Notice of Motion dated August 30, 2016 and Attorney's Affirmation sworn to on August 30, 2016 to dismiss the indictment on the ground that the defendant's right to a speedy trial had been denied pursuant to CPL §§ 210.30(1)(g) and 30.30(1)(a). In opposition the People have submitted a "letter brief" dated September 12, 2016, which as an unsworn submission, raises no issue of fact requiring a hearing. The matter was argued before the court on September 14, 2016. For the

reasons below, the Motion is granted. This Decision and Order supplements what was placed on the record on September 14, 2016.

FINDINGS OF FACT

Defendant was arrested for the offenses charged in the indictment on September 16, 2015. He was held overnight and arraigned in the Rochester City Court on September 17, 2015 on a felony complaint. He appeared *pro se*.

At arraignment the defendant was served with a Grand Jury notice stating that the case would be presented to a Monroe County Grand Jury on September 21, 2015. The presentment never occurred.

On September 22 the matter was adjourned to October 23, 2015 for a felony screen. Defendant at that time rejected the plea offer and the matter was waived to the Grand Jury.

The People filed the indictment on February 24, 2015, along with a "Notice of Readiness for Trial, also known as a "Kendzia" notice (*People v. Kendzia*, 64 NY2d 331[1985]).

Defendant was arraigned on the indictment on March 2, 2016. He appeared in court on four more occasions, during which time plea discussions continued. At a court appearance on May 4, 2016 he again declined a plea offer, and the matter was adjourned to May 11, 2016 for further proceedings. The court then directed the defendant to file his motions by June 22, 2016, with motion argument to occur on July 13, 2016.

Defendant's *omnibus* motions were filed on May 20, 2016, requesting various forms of relief including inspection of the Grand Jury minutes and dismissal of the indictment.

At motion argument the court set a hearing date of August 4, 2016. Prior to the hearing the People requested a new date due to the unavailability of the officer until after August 17,

2016. Defendant did not consent to the adjournment. Thereafter the People in an email said that they would be “generally available” after August 24, 2016. The hearing was rescheduled for September 7, 2016.

CONCLUSIONS OF LAW

In felony cases, Criminal Procedure Law §30.30 requires that the People be ready for trial within six months of the commencement of the action (see CPL § 30.30[1] [a]). “Whether the People have satisfied this obligation is generally determined by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any post-readiness periods of delay that are actually attributable to the People and are ineligible for an exclusion” (*People v. Beasley*, 69 AD3d 741, 742–43 [2010][internal quotations omitted], *aff'd on other grounds* 16 NY3d 289 [2011]).

The action was commenced on September 16, 2016, the date the felony complaint was filed. The People filed their *Kendzia* statement of readiness on February 24, 2016, a period of 157 days. Subtracted from that are 32 days in the pre-indictment period both parties concede are not chargeable to the People, leaving 125 days.

Defendant argues that four days should be added back, counting from the date of arraignment, at which the defendant appeared *pro se*, to the date the defendant appeared with counsel. Criminal Procedure Law § 30.30(4)(f) excludes “the period during which the defendant is without counsel through no fault of the court; except when the defendant is proceeding as his own attorney with the permission of the court ...”

Here, defendant, through his counsel's affirmation, met his burden of establishing that those four days should be charged to the People, and the People have raised no issue of fact in their letter brief.

Accordingly, as of February 24, 2016, the People were charged with 129 days.

Next, in what is the more significant point of contention, the Court must consider whether any period of post-readiness delay must be added to the People's chargeable account.

Defendant asserts that the People were allowed a "reasonable" period of time within which to serve the Grand Jury minutes after he requested them, however, that period cannot exceed 36 days, citing to *People v. Harris* 82 NY2d 409(1993).

In *Harris* the Court of Appeals stated that "... in view of the statutory design, we hold that where the People make no objection to the branch of the CPL 210.30 motion seeking inspection of the Grand Jury minutes, the People's obligation to produce the Grand Jury minutes within a reasonable time begins to run from the date the defendant's CPL 210.30 motion (to inspect the Grand Jury minutes and to dismiss the indictment) is made." (*Harris* at 413). Under the circumstances of the case, the Court held a period of 36 days to be reasonable.

The People respond by arguing that there is no "bright line" number of days by which the People must serve the minutes. That assertion is questionable (*see People v Roscoe*, 210 AD2d 1003 [4th Dept 1994] [limiting the period of time within which to serve the grand jury minutes to 36 days]; *People v Rodriguez*, 214 AD2d 1010 [4th 1995]). Even if it were correct, at a minimum the People must nonetheless demonstrate why they waited more than 36 days to serve the minutes (*People v. Johnson*, 42 AD3d 753 [3rd Dept 2007]). Here, there has been no

showing or excuse. In fact, the People have not established that the Grand Jury minutes have even been served. The People's "letter brief" in opposition references the date the minutes were delivered to the Court, but such a submission has no evidentiary effect or probative value (*see In re Prudential Prop. & Cas. Ins. Co. [Galioto]*, 266 AD2d 926, 926 [4th Dept 1999], citing *Zuckerman v. City of New York*, 49 NY2d 557[1980]).

The People also oppose dismissal by asserting that the delay in producing the grand jury minutes did not "purely" cause the delay in the trial, as there were other matters that needed to be resolved, most notably, a pending suppression hearing. However, "The lack of an identification hearing may impair the defendant's ability to proceed, but it does not impair the People's readiness for trial," (*People v. Roscoe* at 1003, citing to *People v. McKenna*, 76 NY2d 59, 64 [1990]). Whether the People's delay in producing the minutes *actually* delayed the trial is irrelevant. "Regardless of whether other motions are under consideration by the court, the court's inability to determine the threshold motion to dismiss creates a direct impediment to the commencement of the trial" (*People v. Johnson*, 42 AD3d 753, 753 [3rd Dept 2007]).

The People also cite to *People v Felder*, 182 AD2d 1065 (4th Dept 1992), in which a delay of six months in serving the grand jury minutes was not counted against the People because the defendant had consented to numerous adjournments. Since the Court has found that defendant here did not consent to any adjournments, *Felder* does not apply.

Even if the minutes had been served by September 6, 2016, it would not change the result. The reasonable period of time the People within which to deliver the Grand Jury minutes in response to the defendant's motion to inspect expired, in the absence of any good cause for the delay, on June 25, 2016, which was 36 days after the motion was filed. From that date to alleged

delivery on September 6, 2016 is 71 days. Added to the 129 days chargeable to the People prior to the indictment, the total time on their account is 200 days that they have not been ready for trial, thus the period of delay assigned to the People exceeded the six-month readiness period, requiring dismissal of the indictment on speedy trial grounds.

Defendant's motion is granted and the indictment is dismissed.

This constitutes the Decision and Order of the Court.

Dated: Feb 14, 2016
Rochester, New York


HON. CHRISTOPHER S. CIACCIO
Monroe County Court Judge