

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – CRIMINAL TERM, PART 41

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THE PEOPLE OF THE STATE OF NEW YORK,

- against-

Decision and Order
on Defendant's
Omnibus Motion

JOSEPH MAKHANI,

Indictment No. 73324-23

Defendant.

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Michele Rodney, J.

Defendant was indicted on charges of criminal possession of stolen property in the first degree (Penal Law § 165.54), and scheme to defraud in the first degree (Penal Law § 190.65[1][b]), in a case brought by the Office of the Attorney General (OAG). Defendant has filed an omnibus motion seeking dismissal of the indictment as time-barred under the statute of limitations, a *Singer* hearing and dismissal of the indictment for pre-indictment delay, reduction of counts one and two of the indictment, striking of the People's certificate of compliance, and other relief. The People filed a response, consenting to a court review of the grand jury minutes and addressing defendant's other claims.

Defendant's motion is decided as follows:

The Prosecution is Not Barred by the Statute of Limitations.

Defendant first claims that the court should dismiss the indictment because the five-year statute of limitations has run on each count in the indictment. Defendant argues that this court should adopt other states' position that for possession of stolen property counts, the statute of limitations begins to run from the time the defendant comes into possession of the property he is accused of possessing. In response, the People note that New York adheres to the continuing-offense doctrine, and that possession of stolen property is a continuing offense, meaning the statute of limitations begins to run with the termination of the defendant's crimes.

Defendant's motion to dismiss on statute-of-limitations grounds is denied. With some exceptions not relevant here, "a prosecution for [a] felony must be commenced within five years after the commission thereof." CPL § 30.10(2)(b). "Where . . . a crime by its nature as defined in the Penal Law may be committed either by one act or by multiple acts and can be characterized as a continuing offense over time, the indictment may charge the continuing offense in a single count." *People v. First Meridian Planning Corp.*, 86 NY2d 608, 615-616 (1995). "[T]he statute of limitations of a continuous crime is governed by the termination and not the starting date of the offense." *People v. Eastern Ambulance Service, Inc.*, 106 AD2d 867, 868 (4th Dept 1984); *see also People v. Perry*, 114 AD3d 1282, 1283 (4th Dept 2014). Scheme to defraud in the first degree is a continuous crime because it can, "by its very nature, be committed by multiple acts." *People v. First Meridian Planning Corp.*, 86 NY2d at 616. Criminal possession of stolen property is also a continuing crime, because the crime continues as long as the possession of the property continues. *People v. Lawson*, 64 Misc3d 200 (Criminal Court, Richmond Cty 2019). As the *Lawson* court notes, the Court of Appeals has found other possessory crimes – such as criminal possession of a weapon and criminal possession of stolen property – to be continuing crimes for non-statute of limitations purposes, and criminal possession of stolen property relies on the same definition of possession.

Here, defendant is charged with criminally possessing the properties at issue for a period of years, in one instance ending on December 16, 2018, and in the other ending on

June 29, 2023, and with a scheme to defraud that is alleged to have ended on June 29, 2023. Therefore, the July 11, 2023, indictment fell within the five-year statute of limitations, and this prosecution is timely. The court declines defendant's invitation to follow certain other states and run the statute of limitations from the date of the initial possession.

The court also rejects defendant's argument that the statute of limitations has run because defendant obtained legal title to the properties at issue in 2014. The People presented evidence to the grand jury that the default judgments granting defendant title were procured by fraud and deceit. Further, the People – who were not parties to the litigation that resulted in those default judgments – are not bound by that determination.

Any Delay in Prosecution was Not Unreasonable and Did Not Deprive Defendant of Due Process.

Defendant next contends that the court should grant a *Singer* hearing and then dismiss the indictment due to what he calls the People's unreasonable delay in bringing the case. The thefts of the properties at issue here both occurred in 2012, OAG's investigation began in 2015, and they obtained a referral to prosecute the case – later determined to be invalid – in 2016. Therefore, defendant argues, OAG's failure to secure a valid indictment until 2023 constitutes an unreasonable delay that violated defendant's due process rights. In response, the People argue that the complex, long-term nature of the investigation and their good faith in deferring the commencement of the prosecution did not deprive defendant of due process.

Defendant's motion to dismiss the indictment on the grounds that his statutory and constitutional rights to a speedy trial and prompt prosecution have been violated is denied. "By statute and constitutional law, New York guarantees criminal defendants the right to a speedy trial and prompt prosecution." *People v. Regan*, 39 NY3d 459, 464 (2023). Constitutional speedy trial claims are analyzed using the five factors outlined in *People v. Taranovich*, 37 NY2d 442 (1975). See *People v. Wiggins*, 31 NY3d 1, 9 (2018). Those five factors are: the extent of the delay; the reason for the delay; the nature of the underlying charge; whether or not there has been an extended period of incarceration; and whether or

not there is any indication that the defense has been impaired by the delay. *Id.* at 9-10. No one factor is necessarily determinative. *Id.* A defendant is not deprived of due process by a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, even if some prejudice to the defendant results. *Id.* at 13; see also *People v. Singer*, 44 NY2d 241, 254 (1978). At the same time, a lengthy delay without good cause may result in dismissal even without a showing of prejudice. See *People v. Regan*, 39 NY3d at 466.

Applying the five factors in this case, the court finds that the delay in prosecuting defendant on the current charges does not constitute a due process or prompt prosecution violation.¹ As for the first factor, the extent of the delay in this case between the initiation of the investigation into defendant and the current indictment is lengthy, at approximately seven years. However, the Court of Appeals has “steadfastly refused to set forth a per se period beyond which a criminal prosecution may not be pursued.” *People v. Wiggins*, 31 NY3d at 10-11. In *People v. Nazario*, 85 AD3d 577 (1st Dept 2011), the Appellate Division found an almost twelve-year delay reasonable under the circumstances and not due to bad faith.

As for the second factor, the reason for the delay, the affirmation of AAG Nazy Modiri attached to the People’s response outlines the multiple extensive investigative steps taken by OAG from the time OAG began investigating this case in February 2016 and when it was indicted. The affidavit shows that, although ultimately defendant was only charged with the possession of two properties, the investigation of defendant involved fifty-two additional properties. During the investigation, OAG subpoenaed records, executed search warrants, located and interviewed witnesses. The affidavit outlines the steps OAG took in the investigation and makes clear that the investigation was always advancing. This was not a situation where the investigation lay idle while OAG concentrated on other matters or delayed the indictment to gain some tactical advantage.

¹ In *Singer*, the Court ordered a hearing because it was unable to determine the cause of the delay on the record before it. Here, no such hearing is necessary because the record is sufficient for this court to determine that the delay in bringing the indictment was not unreasonable.

The affidavit also notes that OAG was scheduled to present the case to the grand jury on March 25, 2020, but the COVID-19 pandemic caused the Chief Administrative Judge to halt the empaneling of new grand juries. Even when new grand juries were starting to be empaneled, there were limits on the types of cases that could be presented. Despite the delay, OAG kept investigating other properties that defendant may have stolen. Ultimately in June 2021, the grand jury indicted defendant. That indictment was dismissed by the Appellate Division on November 17, 2022. *Matter of Makhani v. Kiesel*, 211 AD3d 132 (1st Dept 2022). On March 28, 2023, the Appellate Division granted OAG's request to resubmit the charges to a new grand jury, which OAG did in June 2023. Given the reasons for the delay – the extensive and complex nature of the investigation, the COVID-19 pandemic, and the dismissal of the original indictment – the delay in this case was not unreasonable.

As for the third factor, the nature of the charges, defendant here is charged with two class B non-violent felony offenses, and one class E non-violent felony offense. While certainly not the most serious crimes contained in the Penal Law, defendant is charged with criminally possessing two homes worth over one-million dollars each. Further, the maximum sentence for a class B non-violent felony offense is an indeterminate sentence of eight and one-third to twenty-five years in prison. So the nature of the charges does not weigh in favor of defendant.

As for the fourth factor, defendant has not been incarcerated for any of the time that OAG was investigating or after the indictment was secured. And while defendant claims that he has suffered both “anguish” and “public opprobrium,” as a result of the first indictment, the delay between the two indictments was due to the litigation of legal issues and the dismissal of the indictment on “an issue of apparent first impression,” see *Matter of Makhani v. Kiesel*, 211 AD3d at 134. Further, the fact that defendant's travel was restricted, the People note that the restriction was due to defendant's unwillingness to turn over his passport. Additionally, OAG did not object to any of defendant's travel requests.

Finally, as for the fifth factor, defendant contends that the delay prejudiced him because Steven Masef – a witness defendant claims would have supported his defense –

has died and is therefore unable to testify for defendant at trial. But Masef died in August 2018, only two and one-half years after the investigation started.

In sum, a review of the five *Taranovich* factors establishes that any delay in prosecuting this case was caused by the expansive nature of the investigation and factors outside of defendant's control. Further, defendant has not established that he has suffered any real prejudice from the delay. Therefore, his motion to dismiss is denied.

OAG Did Not Improperly Rely on Materials Obtained During the First Grand Jury Investigation.

Defendant next contends that OAG improperly relied in their new grand jury presentment on tainted, inadmissible evidence from their prior investigation. Specifically, defendant contends that in dismissing the first indictment, the Appellate Division held that the referral underlying OAG's investigation was invalid. Therefore, OAG was precluded from using the evidence it obtained during their initial investigation in its subsequent grand jury presentment. Defendant cites to *People v. Codina (Codina I)*, 297 AD2d 539 (1st Dept 2002), in support of this claim. In response, the People argue that *Codina I* held that, because OAG did not have the power to conduct a criminal investigation prior to obtaining a statutory referral, any evidence seized pursuant to a search warrant should have been inadmissible at trial. However, the Court allowed the prosecutor in that case to rely on other information obtained during the investigation. The People note that the Court in *Codina II* opined that it would not even be required to exclude testimony from witnesses whose identities were derived from the prior search warrants.

Defendant has not established that OAG improperly used any materials obtained through search warrants executed during their first grand jury investigation. OAG represents that it did not use in their grand jury presentment materials obtained during the initial investigation from search warrants of defendant's emails. Moreover, even though nothing in *Codina I* would have prevented it from using information obtained via subpoenas served during their first investigation, OAG issued new grand jury subpoenas for the materials after they received the appropriate referral for their investigation.

Although defendant speculates that that some of the materials may not have been retained by the recipients of those subpoenas without preservation letters OAG sent during their initial investigation, the court reads nothing in Codina I to warrant their preclusion.

The Evidence Presented to the Grand Jury was Sufficient to Support the Charges in the Indictment.

Defendant next claims that the evidence presented to the grand jury was insufficient to sustain the two counts of criminal possession of stolen property in the first degree, because the evidence did not establish that the two properties were worth more than one-million dollars. In response, the People argue that the evidence was sufficient to support the counts, because the evidence established that during the time defendant illegally possessed the properties, they were worth well over one-million dollars.

Defendant's motion to reduce those counts to second-degree criminal possession of stolen property is denied. Upon review of the grand jury minutes, if the court finds the evidence insufficient to establish the commission of any offense charged in a count of the indictment, but sufficient to support a lesser-included offense, the court must reduce the count accordingly. *See* CPL § 210.20(1-a). "To dismiss an indictment [or a count therein] based on insufficient evidence before a Grand Jury, a reviewing court must consider 'whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury.'" *People v. Bello*, 92 NY2d 523, 525 (1998), quoting *People v. Jennings*, 69 NY2d 103, 114 (1986); *see also People v. Gaworecki*, 37 NY3d 225, 230 (2021); *People v. Grant*, 17 NY3d 613, 616 (2011). Legally sufficient evidence means "competent evidence which, if accepted as true, would establish every element of an offense charged." CPL § 70.10(1); *see also People v. Bello*, 92 NY2d at 525-526. "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt." *People v. Bello*, 92 NY2d at 526.

Here, the evidence was sufficient to establish defendant's commission of the charged counts of first-degree criminal possession of stolen property. "A person is guilty of criminal possession of stolen property in the first degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner, and when the value of the property exceeds one million dollars." PL § 165.54. "[V]alue means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime." PL § 155.20(1). OAG presented evidence to the grand jury that in June 2023 – during defendant's alleged unlawful possession – the value of the 118th Street property was just under three-million dollars, and in December 2018 – during defendant's alleged unlawful possession – the value of the West 131st Street property was just under two-million dollars. The evidence was sufficient to sustain those charges in the indictment.

Defendant cites to *People v. Rivera*, 114 AD2d 305 (1st Dept 1985), *People v. Harold*, 22 NY2d 727 (1968), and *People v. Oakley*, 95 AD2d 944 (3d Dept 1983). However, in *Rivera*, the testimony concerning the value of the car did not take into account the condition of the car at the time the defendant – who was not accused of stealing it – possessed it, instead relying simply on a description of its pre-theft condition. *Harold* involved a water pump that had sold for just over \$100.00 but had been damaged prior to it being stolen. And in *Oakley*, the People did not establish that the car had a value of more than \$1500.00 at any time when the defendant possessed it. The substantial improvements to the car that raised its value to over \$1500 were made by a subsequent possessor. Therefore, none of these cases are dispositive on the point defendant is trying to make. Further, any issues regarding what accounted for the increase in market value of the properties, and whether defendant made improvements that contributed to it, will be determined by the trial jury.

Defendant is Not Entitled to a Hearing to Determine Whether OAG is Relying on Tainted Fruits of a Search Warrant.

Next, defendant seeks a hearing to determine whether OAG is relying on evidence that constitutes tainted fruits of an illegal search warrant and if so, suppression of that evidence. In response, the People – without conceding the illegality of any search warrant – represent that the search warrant materials were not relied on in the investigation of the properties. Defendant’s motion for a hearing is denied. Defendant has not identified any materials provided to him by OAG that he can allege were the result of the search warrant.

The People’s Certificate of Compliance is not Invalid.

Defendant next contends that the court should strike OAG’s certificate of compliance and order OAG to comply with CPL § 245.20(1)(o). According to defendant, OAG has not designated what items or documents they plan on using at trial, in contravention of the discovery statute. In response, OAG argues that the statute cited by defendant requires the People to designate the tangible property they intend to introduce at trial, not all of their trial exhibits.

Defendant’s motion to strike AOG’s Certificate of Compliance is denied. CPL § 245.20(1)(o) requires the People to “disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test . . . [a]ll tangible property that relates to the subject matter of the case, along with a designation of which items the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing.”

The statute at issue on its face relates to tangible property, which does not encompass every exhibit either obtained or created by the People for use at trial. The court does not believe that they statute would require the People not only to turn over all of the materials but also to have developed – and disclose – their entire trial schedule and strategy as a part of their initial discovery obligations. The court recognizes that in *People v. Trump Corporation, et al*, Ind 1472/2021, Judge Merchan, in an oral colloquy, stated that the People “must identify which exhibits they intend to introduce in their case in chief.” (August 12, 2022, transcript at 8). However, in doing so Judge Merchan did not invalidate

a certificate of compliance or determine that the People had violated any discovery provisions prior to that ruling. Instead, Judge Merchan presented the order as a matter of fairness, stating “[i]n a case such as this where the discovery has been voluminous, to say the least, it is fair that the People should inform defendants which of those many documents they intend to introduce into evidence.” *Id.*

Here, OAG has agreed that, prior to trial, they will communicate with counsel about what exhibits they intend to introduce in their case-in-chief. The timeline for that disclosure can be discussed at a future court date. The court views that as sufficient and agrees with Judge Merchan that anything more than that – such as numbering the exhibits or identifying the order in which they will be used at trial – would unfairly commit them to a specific schedule and hinder their ability to manage their own trial strategy.

The People are Not Required to Provide Defendant with a Bill of Particulars.

Finally, defendant seeks a bill of particulars with respect to count three of the indictment. Specifically, defendant seeks to “clarify whether the people are alleging that fraudulent acts other than those included in Counts 1 and 2 are part of the alleged scheme to defraud.” In response, OAG contends that it has adequately informed defendant as to the nature of the charges through the statement of facts and discovery it provided to defendant.


Defendant’s request that the court order OAG to provide a bill of particulars for count three of the indictment is denied. “Upon a timely request for a bill of particulars by a defendant against whom an indictment is pending, the prosecutor shall within fifteen days of the service of the request or as soon thereafter as is practicable, serve upon the defendant or his attorney, and file with the court, the bill of particulars.” CPL § 200.95(2). A “[b]ill of particulars’ is a written statement by the prosecutor specifying, as required by this section, items of factual information which are not recited in the indictment and which pertain to the offense charged and including the substance of each defendant’s conduct encompassed by the charge which the people intend to prove at trial on their direct case, and whether the people intend to prove that the defendant acted as principal or accomplice

or both.” CPL § 200.95(1). “[T]he prosecutor shall not be required to include in the bill of particulars matters of evidence relating to how the people intend to prove the elements of the offense charged or how the people intend to prove any item of factual information included in the bill of particulars.” *Id.* Defendant is entitled to sufficient particulars to enable him to be able to prepare a defense. *See People v. Cobey*, 184 AD2d 1002 (4th Dept 1992).

On the date of defendant’s arraignment on the indictment, July 31, 2023, OAG filed with the court and served on defendant the indictment, as well as a Notice of Discovery, which included a multi-paragraph factual summary of the actions defendant is alleged to have taken in furtherance of the charged crimes. OAG has also provided defendant with the grand jury minutes, which show the evidence on which the charges in the indictment are based, as well as thousands of pages of discovery. The indictment and other materials OAG has provided to defendant are sufficient to satisfy its obligations under section 200.95. Any additional materials would constitute information on how OAG intends to prove the elements of the crimes charged in the indictment, which the People are not required to provide as part of a bill of particulars.

This constitutes the decision and order of the court.

Dated: New York, New York
September 30, 2024



Michele Rodney
Acting Supreme Court Justice

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