DUE DILIGENCE AND GOOD FAITH COMPLIANCE WITH DISCOVERY OBLIGICATIONS ARE THE KEYS TO A PROPER CERTIFICATE OF COMPLIANCE AND STATEMENT OF TRIAL READINESS

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INTRODUCTION

After a few years of lower courts wrangling over the new and interconnected rules of automatic discovery and speedy trial since January 2020, the Court of Appeals recently weighed in and set a few things straight with *People v Bay* (41 NY3d 200 [2023]).

In *Bay*, the Court reversed a county court’s affirmance of a city court denial of the defendant’s speedy trial motion to dismiss a charge of harassment 2nd. The People’s failed to demonstrate that they exercised due diligence and make reasonable efforts to identify and provide basic discovery items required by CPL 245.20 (1) before filing a certificate of compliance (COC) (CPL 245.50[1]). (See also CPL 30.30[5]).

*BAY* WATCH

The defendant was arraigned on 4/21/21 on a charge of PL 240.26(1) stemming from a confrontation with his mother. The case was adjourned to 4/28 for the defendant to appear with counsel.

On 4/28, defense counsel appeared and advised that no discovery had yet been provided, nor had there been any discussions regarding a possible resolution. The court set a return date of 5/26/21.

On 4/29, the People provided an information, a supporting deposition from the mother, an order of protection (including the mother’s request for same), photographs of her house and a discovery compliance report.

On 5/4, the People served and filed a COC with a discovery report and a statement of trial readiness.

On the 5/26 return date, defense counsel acknowledged receipt of some discovery but said that he was not in receipt of a 911 tape or any police report which prevented the defense from properly evaluating the case. The prosecutor claimed that he had “just checked” and determined that “discovery as it exists has been turned over.” Notably, the ADA did not spell out what efforts had been made to verify the existence of outstanding discovery as required by CPL 240.50(2).

Defense counsel stated that he had received no police report and the ADA pointed out that the defendant had not been arrested to which counsel replied that there should be an incident report. The court then inquired about a domestic incident report (DIR) required by CPL 140.10(5). The prosecutor noted that while a DIR would be required in this case, “they’re not always filed.” As to its actual existence, the prosecutor claimed uncertainty.

When asked about a 911 call/tape, the prosecutor unequivocally stated that there was none, (believing that the victim had reported the incident to the police after the fact). The court then asked, “so have the disclosure obligations been met,” and the ADA replied, “we’re not aware of any evidence not provided to the defendant.” The court accepted the prosecutor’s representation and concluded that that People had met their discovery obligations.

“EVERYTHING” ISN’T ALWAYS EVERYTHING

A week before the trial date, defense counsel spoke to a different prosecutor who advised, “we have a police report, and we’ll check on the 911 call.” The next day, the People served a police report, a 911 tape and a DIR.

On 7/1, the defense moved to dismiss per CPL 30.30, arguing that the COC filed on 5/4 was invalid and the People’s declaration of trial readiness was illusory.

The People filed a supplemental COC on 7/2 declaring that the People have provided “all known material and information subject to Article 245 upon an exercise of due diligence and after making reasonable inquiries into the existence of discoverable material.

On 7/6, the People conceded that the above-listed items had not been provided when they filed their initial COC and statement of readiness. They offered no explanation for the deficiency and claimed that the defendant’s focus on the COC was somehow misguided, since the People could file more serious charges from this incident even if the defendant’s motion was granted.

Despite counsel’s argument that the purpose of a COC is to ensure that reasonable inquiries regarding discoverable materials have already been made (which did not occur here), the lower court denied the defendant’s speedy trial motion but precluded the introduction of the 911 call per CPL 245.80. The defendant was convicted as charged after trial and appealed to County Court.

COUNTY COURT AFFIRMS

Finding no evidence of bad faith in the People’s declaration of trial readiness, the court rejected the defendant’s appeal. The court interpreted the defendant’s position as requiring a rule of strict liability whereby a COC would have to be invalidated whenever new material is provided with a supplemental COC. Rather, the court observed that CPL Article 245.20 provides that no adverse consequence should follow from a good faith filing of a COC which is also reasonable under the circumstances.

The court also concluded that the People were unaware of the disputed items of discovery and promptly turned them over upon learning of their existence. Significant to the court was the defendant’s failure to show any prejudice from the belated disclosure.

COURT OF APPEALS REVERSES

Noting the link between CPL 30.30 and Article 245, the latter of which requires automatic, wide-ranging discovery (CPL 245.20 [1] [a-u]) and good faith, diligent compliance with disclosure requirements (CPL 245.50) as a condition to a valid declaration of trial readiness, the Court of Appeals struck down the COC, declared the People’s readiness statement illusory and granted the defendant’s motion to dismiss.

Prior to 1/1/20, the two statutes were separate entities under which discovery violations generally carried no adverse speedy trial consequences (save for unjustified failure to timely disclose grand jury testimony) but could, within the court’s discretion, result in some sanction such as compelled discovery, a continuance, admission of the evidence with an adverse instruction or preclusion depending on the level of prejudice to the defendant (see *People v McKenna*, 76 NY2d 59 [1993], *People v Anderson*, 66 NY2d 529 [1985], *People v Sutton*, 199 AD2d 878 [ [3d Dept 1993]). Now the two are pretty much joined at the hip.

Enumerated discovery items, the Court observed, are generally deemed to be in the People’s possession, custody or control including information in the possession of state and local police departments with whom the People are required to maintain a continuous flow of information (CPL 240.55) to meet their on-going discovery obligations (CPL 245.60).

To the point, the Court noted that CPL 245.20(1) requires the People to disclose to the defendant ALL ITEMS AND INFORMATION that RELATE TO THE SUBJECT MATTER OF THE CASE and are within their possession … and must make a DILIGENT, GOOD FAITH EFFORT TO ASCERTAIN THE EXISTENCE OF MATERIAL AND INFORMATION SUBJECT TO DISCOVERY (CPL245.20[2]).

Once the People have complied with CPL 245.20, they must SERVE AND FILE A COC (CPL 245.50) which shall IDENTIFY THE ITEMS PROVIDED and state that “after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery,” the People have disclosed and made available all such known material and information.

If the People are unable to timely meet their discovery obligations (20 days if the defendant is in custody or 35 days if at liberty per CPL 250.10), they have the option (not exercised here) of requesting more time upon a showing of good cause or that the material is voluminous or complex (CPL 245.70[3]).

They may also attempt to show special circumstances that prevented them from complying in a timely manner and not suffer a speedy trial consequence despite their inability to file a proper COC (see CPL 245.50 [3] and CPL 30.30 [4][g). They may, however, still face a discovery sanction under CPL 245.80.

As noted in CPL 245.50(3), “notwithstanding any other law, and absent a finding of special circumstance, (e.g., evidence lost or destroyed) … the People shall not be deemed ready for trial…until they have filed a PROPER COC.

Unlike under the predecessor statute (CPL 240.20), the People no longer enjoy a presumption of readiness whenever they say so. Rather, as the Court in Bay noted, the court must MAKE INQUIRY on the record of their ACTUAL READINESS and afford the defense an opportunity to be heard with respect to the People’s alleged failure to fully comply with their discovery obligations.

For its part, the defense should either promptly inform the prosecution of the alleged deficiencies in their discovery compliance or challenge their COC in court by motion to strike. (CPL 245.50 [4][b][c]).

And the Court is expected to facilitate the discovery process by intervening in any discovery disputes, making inquiries to ensure compliance, and issuing protective orders when requested and where appropriate (see CPL 240.35, 245.70).)

THE PEOPLE’S ARGUMENT

The People asserted that they acted reasonably and in good faith, and that their belated delivery of the DIR, police report and 911 tape was inadvertent and non-prejudicial to the defendant. In any event, the lower court addressed possible prejudice by precluding the tape’s admission into evidence.

COURT OF APPEALS SAYS SPEEDY TRIAL VIOLATIONS DON’T REQUIRE A SHOWING OF PREJUDICE

The Court rejected the People’s position as improperly conflating the standards and consequences of a speedy trial violation (i.e., dismissal for not making a valid declaration of trial readiness within the prescribed statutory time frame) with discovery non-compliance (e.g. late discovery with speedy trial time to spare) which prejudices the defendant and calls for a proportionate sanction, the most drastic of which is dismissal (citing *People v Hamilton*, 46 NY2d 932 [1979]; CPL 245.80).

In the Court’s view, the 30.30 rule, while connected to CPL Article 245, is not qualified by CPL 245.80. So, if a court found a COC to be proper under special circumstances (e.g., where due diligence is shown but disclosure is delayed for an excusable reason), a discovery sanction could still be imposed if the defendant suffers prejudice from the delay.

The Court also observed that while belated disclosures upon a showing of good cause or special circumstances (CPL 245.50[3]) won’t necessarily invalidate a COC (see *People v Acquino*, 72 Misc 3d 518 [NY Crim Ct 2021]: “unavoidable delays may prevent a diligent prosecutor from attaining full compliance despite best efforts to obtain all the discoverable material in an timely manner,”), post-filing disclosures and a supplemental COC cannot make up for disclosures that could have and should have been made in the first place upon the exercise of due diligence.

That is why CPL 245.50, as amended in 2022, requires the People to set forth the basis for the delayed disclosure so that the court can properly assess the validity of the initial COC. If it was filed in good faith upon the exercise of due diligence and reasonable inquiries, then the original COC should survive scrutiny.

DUE DILIGENCE

Since the statute does not define the phrase, the Court looked to case law for guidance (see *People v Bolden*, 81 NY2d 146 [1993]: “a reasonable effort to comply with statutory obligations and directives.”; and Black’s Law Dictionary [11th ed.2019]: “the diligence reasonably exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation.”).

Factors to be considered in assessing whether the People have exercised due diligence include: 1. the People’s efforts to comply with statutory requirements; 2. the volume of discovery provided and still outstanding; 3. the complexity of the case; 4.the obviousness of any missing material to a prosecutor using due diligence; 5. the explanation for any disclosure delay and 6. the People’s response to notice of the missing material.

COURT HOLDING

The Court held that the People had not met their burden to demonstrate that they had exercised due diligence and made reasonable inquires to identify and disclose what amounted to routine discovery items which were readily called out by the defense and labeled as missing from the discovery provided.

The Court pointed out that People missed multiple opportunities to comply with their statutory obligation and when asked to account, gave perfunctory, ineffectual, and inaccurate explanations of their alleged efforts (e.g., “I checked,” “there’s no 911 tape,” “all discovery has been turned over.”). Even when confronted with the defendant’s 30.30 motion, the People made no effort to explain what efforts they had made to identify and obtain the discovery materials before filing their original COC.

Consequently, since the COC was not proper, the People’s declaration of trial readiness rang hollow. And since the 30-day speedy trial deadline had come and gone without a meaningful statement of readiness, the charge should, in the Court’s view, have been dismissed by the lower court.

NON-DISCLOSURE OF GRAND JURY MINUTES RENDERS A COC INVALID

In *People v Scales* (2023 NY Slip Op 23200 [Sup Ct, Queens County 2023]), the People filed a COC declaring that they had turned over all known material subject to discovery even though the grand jury minutes were not included with the discovery provided.

When pressed, they claimed that the grand jury transcripts had not been generated as of the date of the COC, so, in their view, they were not yet subject to discovery. The People also erroneously argued that a proper COC could be filed preindictment.

Flatly rejecting the People’s arguments, the court noted that grand jury minutes (unlike lab reports) are created in real time and are in the People’s exclusive possession (citing *People v Aguayza*, 72 Misc 3d 482 [Sup Ct, Queens County 2022]). The court also pointed out that a valid statement of readiness (SOR) presumes the existence of a triable accusatory instrument. (Citing People v England, 84 NY2d 1 [1994]).

Moreover, CPL 245.20 (1)(b) requires the People to disclose “all transcripts of the testimony of a person who has testified before a grand jury” (and)… “if in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is not available for disclosure within the time period specified in section 250.10(1),…such time period may be stayed for an additional thirty days without need for a motion pursuant to… (section 245.70[2]).”

Here, however, the People did not claim special circumstances allowing them to file a COC and declare trial ready without the minutes, nor did they demonstrate the existence of any impediments to the creation of a transcript.

In the court’s view, to accept the COC under these circumstances would vitiate the Legislature’s plan for full discovery compliance as a pre-requisite to a valid COC and statement of readiness (SOR).

See also People v Sanchez (2024 NY Slip Op 50059(U) [Sup Ct, Kings County 2024]: People’s failure to provide second grand jury transcript, after first indictment was dismissed, within the speedy trial time period [184 days from the filing of the first accusatory instrument] along with the failure to spell out efforts made to expedite production of the minutes before filing the COC rendered it invalid and the SOR illusory).

Here, the People made only one request for the minutes before filing the COC (followed by multiple after-the-fact requests), they asked for no additional time under CPL 245.20 (1)(b) and their claim of exceptional circumstances was conclusory.

But see *People v Dalrymple* (2024 NY Slip Op 5010(U) [Sup Ct, Queens County 2024]: In this felony DWI case, the People filed a COC and SOR on 1//31/23 followed by a supplemental COC on 1/26/24).

The defendant stated that the People had failed to provide certain materials including a prisoner movement slip, OCME lab reports, the defendant’s hospital records, a search warrant return (pertaining to the defendant’s hospital blood sample) and a police activity log (which the People claimed lacked any entries for the day in question).

Regarding the movement slip, the court was satisfied with the People’s recitation of numerous attempts to obtain the document sufficient to establish due diligence. As for the lab reports, the court noted that while the People turned over what they did receive (short of the full litigation package), OCME is not a law enforcement agency, nor is it under the control of the DA’s office. Hence, their reports are not under the People’s control (citing *People v Washington*, 86 NY2d 189 [1995]). Moreover, per CPL 245.20 (2), the people are not required to obtain by subpoena what the defense can obtain by the same means.

The court determined that the defendant’s own hospital records did not constitute discoverable material in the People’s possession and the People disclosed the search warrant return (which was belatedly created on 12/24/23 with their supplemental COC). The court also accepted the People’s representation that the officer’s activity log was devoid of entries.

Factoring in that the defendant had waived 54 days of speedy trial time, the court found that 178 were chargeable to the People leaving them six days to the good. Therefore, the defendant’s motion to dismiss was denied.

FAILURE TO DISCLOSE REPORTS OF POLICE OFFICER MISCONDUCT DEEMED TO VIOLATE CPL 245.20(1)(K)(iv)

In *People v Edwards* (2021 NY Slip Op 50944 [NY Crim Ct 2021]), the defendant was charged with Assault 3rd stemming from an altercation with his roommate in a hotel/shelter for the homeless.

At the arraignment on 2/20/21, the People, acting out of an “abundance of caution”, turned over a disclosure form summarizing substantiated allegations of misconduct against one of the officers in an unrelated motor vehicle incident.

The People filed a COC on 5/24 and the defendant moved to strike it claiming, inter alia, that the People had failed to disclose the names of all security personnel on duty on the day of the alleged assault (the People provided the name of the only person they could identify). The defendant also argued that the People had not provided the officer’s IAB file detailing the allegations against him (including any unsubstantiated claims as well).

The People argued that allegations of police misconduct in a matter unrelated to the case at hand were not discoverable. The court rejected this argument.

Noting the sweeping nature of the new discovery rules, the court said that to interpret CPL Article 245 narrowly would flout the Legislature’s unmistakable intent that it be construed broadly in favor of disclosure (citing *People v Kelly*, 71 Misc 3d 1202[A] [Crim. Ct. NY Co. 2021]).

The court also noted that CPL 245.20 (1) (k) (iv) exceeds the mandate of *Brady v Maryland* (373 US 83 [1963]) to disclose material evidence that tends to exculpate the defendant by requiring the People to turn over impeachment evidence regardless of its materiality (citing *People v Garrett*, 27 NY3d 875 [2014], *People v McKinney*, 71 Misc 3d 122 [NY Crim Ct, Kings County 2021], *People v Soto*, 72 Misc 3d 1153 [NY County Crim Ct 2012]: since impeachment is relevant to whether the jury should believe the witness, the evidence necessarily relates to the subject matter of the case and the prosecution of a charge).

The court further stated that police disciplinary records, including unsubstantiated claims (i.e., neither proven nor disproven) are deemed to be in the People’s possession (and relevant to the subject matter of the case). As such, they should be disclosed to the defense (but see *People v Perez*, 73 Misc 3d 171 [Sup Ct, Queens County 2021]): The People are not required to obtain and disclose all personnel records in possession of NYPD including IAB records since they do not relate to the prosecution of a charge and therefore, should not be deemed to be in the People’s possession (citing *People v Garrett*, supra).

Noting that lower courts have split over the discoverability of unsubstantiated allegations of misconduct, (see, for example, *People v Randolph*, 69 Misc 3d 770 [Sup Ct, Suffolk County 2020], *People v Perez*, supra and People v McKinney, supra) the court in Edwards held that in keeping with the broad legislative mandate of Article 245, the People must disclose even unsubstantiated allegations of police misconduct which includes not just a sanitized summary but all underlying records pertaining to same (citing *People v Barralaga*, 2021 NY Slip Op 21248 [Crim. Ct. NY Co. 2021], *People v Porter*, 71 Misc 3d 187 [Crim. Ct. NY Co. 2020]).

Consequently, in the court’s view, where the People are aware and in possession of discoverable material not disclosed, their COC declaring otherwise is invalid (citing *People v Soto*, supra at 1163).

FINAL TOUGHT

When scrutinizing the People’s COCs, defense counsel should not hesitate to have the court put their feet to the fire and demonstrate on the record (not in mere conclusory terms) the steps they have taken to establish due diligence and reasonable inquiries to ascertain the existence of discoverable material required by CPL 245.20 (1).

If they fall short, absent a showing of voluminous or complex discovery, or some special circumstance justifying late (or non-) disclosure, the court should strike the COC and invalidate the claim of readiness. In such case, counsel should keep a careful calendar of the chargeable time to see whether the People’s opportunity to make a meaningful claim of trial readiness has passed them by.