

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: July 21, 2016]

STATE OF RHODE ISLAND

:

V.

:

P2-2012-1403A

:

FRANCISCO PACHECO

:

:

DECISION

VAN COUYGHEN, J. This matter is before the Court on remand from the Supreme Court for further findings regarding whether Defendant Francisco Pacheco’s (Defendant) delay in filing his Motion to Dismiss the Criminal Information pursuant to Super. R. Crim. P. 12(b)(2) was for good cause. After considering the facts presented, the appropriate law, and the arguments of counsel, this Court finds that good cause has been shown regarding Defendant’s failure to comply with the temporal requirements of Rule 12(b)(3).

I

Facts and Travel

The parties agreed to certain stipulated facts and, in addition, a hearing was conducted on April 11, 2016. The relevant facts are as follows. On June 20, 2012, Defendant was arraigned in superior court on Criminal Information P2-2012-1403A, which charged him with: Count I, second offense possession of marijuana; Count II, reckless driving; Count III, simple assault; Count IV, resisting arrest; and Count V, second offense refusal to submit to a breathalyzer test. On the same date, Defendant entered a plea of not guilty. On June 26, 2012, Assistant Public Defender Richard Brousseau (Attorney Brousseau) entered his appearance on behalf of

Defendant. Attorney Brousseau filed a motion for discovery on July 17, 2012, and the State responded to that request on August 3, 2012.

On July 3, 2013, Defendant was arraigned on an additional Criminal Information unrelated to this case, P2-2013-1073ADV, which charged him with domestic assault, third offense, and a violation of a no-contact order to which he entered a plea of not guilty. The domestic assault had a minimum mandatory sentence of one year imprisonment at the Adult Correctional Institution.

On July 15, 2013, Defendant appeared at the Rhode Island Traffic Tribunal for a hearing on an alleged refusal to submit to a preliminary breathalyzer test arising out of the events relevant to Criminal Information P2-2012-1403A. Defendant appeared *pro se* at that hearing. At the conclusion of the hearing, a Magistrate of the Traffic Tribunal dismissed the refusal charge against Defendant after finding that the State had failed to meet its burden of proof.¹ On August 13, 2013, less than one month after the Traffic Tribunal hearing, Attorney Brousseau suffered a debilitating medical event that precluded him from returning to work and rendered him unavailable to successor counsel.

As a result of this debilitating medical event, on September 3, 2013, Attorney Brousseau's cases were reassigned to Assistant Public Defender John Cotoia (Attorney Cotoia). Attorney Cotoia, who was previously assigned to the prearrest calendar, was transferred to

¹ Defendant alleges that the State did not supplement its answer to Defendant's discovery request in connection to P2-2012-1403A to include information about the testimony at the July 15, 2013 hearing. Specifically, the State did not notify defense counsel that Officer Sarasin of the Warren Police Department, who was a proposed witness for the upcoming trial associated with P2-2012-1403A, had also testified at the July 15, 2013 hearing that had resulted in the dismissal of the refusal of the preliminary breathalyzer charge. However, the basis for the dismissal, as represented by Defendant when arguing his pretrial motion, is that Officer Sarasin completely omitted testimony relevant to the preliminary refusal during his testimony at the Traffic Tribunal. See Tr. Vol. I, 28:8-29:14, Mar. 4-6, 2014.

the felony trial calendar in order to assume Attorney Brousseau's cases. Attorney Brousseau's caseload at the time consisted of more than eighty cases, including sixteen cases that had been placed on the felony trial calendar. Many of these cases were capital cases—including several murder cases—and were scheduled to go to trial in the fall of 2013.

Matthew Toro, the Director of the Rhode Island Public Defender's Office (Director Toro), testified regarding the standard procedure when an attorney's caseload is reassigned to another attorney within the office. Director Toro stated that the outgoing attorney is required to meet with his supervisor to discuss the reassigned cases. In addition, the outgoing attorney prepares a transfer memorandum outlining the strengths and weaknesses of each case. In this case, Attorney Cotoia did not have the benefit of any transfer memoranda, nor was he or his supervisor able to communicate with Attorney Brousseau regarding any of the reassigned cases. The outgoing attorney would also be expected to send a letter notifying each client of the new attorney's name and contact information. Additionally, Attorney Cotoia was still expected to comply with the requirements of stepping into the shoes as the new attorney of record. Attorney Cotoia was obligated to review all new case files, meet with any incarcerated clients within seventy-two hours, and schedule appointments with those clients whose cases had been passed for trial.

In preparing for the two pending felony cases against Defendant, Attorney Cotoia initially focused on the case that had a mandatory minimum sentence of one year in prison with the intention that the other pending case could be disposed of at the same time. In late January of 2014, Attorney Cotoia met with Defendant to prepare for trial and learned for the first time of the July 15, 2013 Traffic Tribunal hearing. Also at that meeting, Defendant provided Attorney Cotoia with a digital recording of the July 15, 2013 hearing. After reviewing the testimony,

Attorney Cotoia became aware of the potential for the dismissal of Count V, which was the refusal to submit to a breathalyzer, based on collateral estoppel grounds.

On February 25, 2014, Attorney Cotoia filed a Motion to Dismiss Count V of the original Criminal Information based upon collateral estoppel. The State filed its objection on February 27, 2014. On March 5, 2014, the day the trial was set to begin before this Court, the State filed a Motion to Sever Count II of the Criminal Information. The Court heard argument on both parties' motions that morning. The Court granted the State's Motion to Sever Count II. The Court denied Defendant's Motion to Dismiss Count V of the Criminal Information. The Court's decision was based upon the merits of the case as well as Defendant's failure to comply with the temporal requirements of Rule 12(b)(3). After conviction, Defendant timely appealed this Court's denial of his Motion to Dismiss and the Supreme Court remanded the matter for additional findings regarding whether Defendant's failure to comply with the temporal requirements of Rule 12(b)(3) was for good cause.

II

Analysis

Defendant filed his Motion to Dismiss the Criminal Information based on collateral estoppel grounds pursuant to Super. R. Crim. P. 12(b)(2). Rule 12(b)(2) states, in pertinent part:

“(2) Defenses and Objections Which Must Be Raised. The defense of double jeopardy and all other defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment,

information, or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.”

The temporal requirements of Rule 12(b)(3) apply to motions brought pursuant to Rule 12(b)(2). See State v. Hightower, 661 A.2d 948, 963 (R.I. 1995). Rule 12(b)(2) motions “shall be made no later than thirty (30) after the [defendant’s] plea is entered. . . .” Super. R. Crim. P. 12(b)(3). Although Rule 12 expressly states that a motion to dismiss should be filed within thirty (30) days, Rule 12(b)(3) permits “a trial justice, in his discretion, to rule on such motions filed out of time for cause.” State v. Byrnes, 433 A.2d 658, 678 (R.I. 1981); see also State v. Thomas, 654 A.2d 327, 330 (R.I. 1995) (“trial justice, in his discretion, [may] permit[] an untimely but otherwise proper assertion of the defense”); State v. Lee, 502 A.2d 332, 334 (R.I. 1985); State v. Sharbuno, 120 R.I. 714, 722, 390 A.2d 915, 920 (1978). The Court may “grant relief from the harsh effects of waiver if a defendant can demonstrate why relief should be granted, notwithstanding the untimely assertion of the challenge.” State v. Concannon, 457 A.2d 1350, 1355 (R.I. 1983).

Here, Defendant filed the instant Motion to Dismiss the Criminal Information as to Count V on February 25, 2014, which was approximately one year and eight months after he entered his plea, and one year and seven months past the thirty-day filing deadline. However, the basis for Defendant’s collateral estoppel argument did not accrue until the dismissal of the preliminary refusal charge by the Magistrate of the Traffic Tribunal at the July 15, 2013 hearing. See State v. Gautier, 871 A.2d 347, 358 (R.I. 2005) (holding that “[t]he doctrine of collateral estoppel provides that ‘when an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit.’”) (emphasis in original) (quoting State v. Werner, 865 A.2d 1049, 1055 (R.I. 2005)) (citation omitted). Nevertheless, Defendant’s 12(b)(2) motion was still filed seven months after that

hearing, and thus, was untimely. Because Defendant's motion was filed well beyond the thirty-day time limit, the Court will assess whether he has shown sufficient cause to warrant such a delay. See Byrnes, 433 A.2d at 678.

Defendant asserts that the extraordinary circumstances surrounding the matter presently before the Court constitute good cause, and thus, justify his failure to file within the thirty-day period set forth in Rule 12(b)(3). The Court finds Defendant's argument persuasive. It is clear to the Court that Defendant's delay in filing was not due to a lack of diligence on behalf of either Attorney Brousseau or Attorney Cotoia. Rather, at the time of his medical emergency, Attorney Brousseau was assigned eighty felony cases with sixteen of those cases having the status "ready for trial." Further, according to the testimony of Director Toro, Attorney Brousseau's subsequent unavailability resulted in a complete departure from the Public Defender's best practices with regard to reassigning cases.

It is clear that Attorney Cotoia faced a substantial task of familiarizing himself with Attorney Brousseau's caseload, which was unexpectedly thrust upon him. As Defendant's new attorney, Attorney Cotoia was diligent in trying to prepare for all eighty of his newly inherited cases without the benefit of any transfer memoranda from Attorney Brousseau or the opportunity to consult with him about the status of each case. "In failing to make [his] claim . . . , [the defendant] clearly was not deliberately bypassing it or employing dilatory tactics." State v. O'Coin, 417 A.2d 310, 313 (R.I. 1980). Rather, when Defendant informed Attorney Cotoia of the result of the previous hearing in front of the Traffic Tribunal, Attorney Cotoia ordered a transcript of the hearing in a timely fashion and subsequently filed the instant motion.

Accordingly, the Court finds that Defendant's delay in bringing his Motion to Dismiss the Criminal Information was for good cause. Therefore, the Court, in its discretion, "grant[s]

relief from the harsh effects of waiver” and is of the opinion that the merits of Defendant’s 12(b)(2) motion should be considered. Concannon, 457 A.2d at 1355.

III

Conclusion

Based on the extraordinary circumstances surrounding Defendant’s failure to file his Rule 12(b)(2) motion pursuant to the thirty-day filing requirement set forth in Rule 12(b)(3), the Court finds that Defendant has shown good cause as to why Defendant’s Rule 12(b)(2) motion was not timely filed. Therefore, the portion of the Court’s previous opinion regarding the untimely filing of Defendant’s 12(b)(2) motion is vacated. This matter shall be forwarded to the Supreme Court consistent with its decision remanding the case. Counsel shall prepare the appropriate order.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: State of Rhode Island v. Francisco Pacheco

CASE NO: P2-2012-1403A

COURT: Providence County Superior Court

DATE DECISION FILED: July 21, 2016

JUSTICE/MAGISTRATE: Van Couyghen, J.

ATTORNEYS:

For Plaintiff: Jeffrey Q. Morin, Esq.

For Defendant: Megan F. Jackson, Esq.