

DOCKET NO.: CR11-0128328-S : SUPERIOR COURT
: :
STATE OF CONNECTICUT : JUDICIAL DISTRICT OF
: STAMFORD/NORWALK AT G.A. # 20
v. :
: :
DUANE DOUTEL : JULY 14, 2012

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
SECOND SUBSTITUTE INFORMATION**

The Defendant Duane Doutel (“Doutel”), by and through his undersigned counsel, hereby submits this memorandum of law in support of the above-referenced and entitled motions.

Specifically, Doutel moves to dismiss on three grounds:

1. Denial of a Speedy Trial, Conn. Gen. Stat. § 54-82m, P.B. § 41-8(7);
2. Lack of Subject Matter Jurisdiction, P.B. § 41-8(4)(9); and
3. Statute of Limitations, P.B. § 41-8(3).

**ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED**

I. PROCEDURAL BACKGROUND

A. Arrest, Arraignment, and Demand for Jury Trial

The Norwalk Police Department arrested Doutel without a warrant on February 16, 2011, charging him with the Class A misdemeanor of Threatening in the Second Degree, a violation of General Statutes § 53a-62.¹ Doutel appeared at the Superior Court in Norwalk on February 25, 2011, to answer the charge and thereafter filed an application for entry into the Accelerated Rehabilitation program (AR). Undersigned counsel filed an *in lieu of* appearance on or about April 20, 2011, withdrew Doutel's AR application, entered a plea of not guilty, and demanded a jury trial.

B. The May 20, 2011, Court Appearance for a Status Conference

Prior to his next court appearance on May 20, 2011, scheduled as a status conference, Doutel filed a motion to dismiss the charge of Threatening in the Second Degree, a motion for return of seized property, and a motion to suspend court appearances pending trial. Def. Ex. 1, 05/20/2011 Hearing Transcript (hereinafter, "Hr'g Tr."); Def. Ex. 2, Motion to Suspend Court Appearances and/or for Immediate Trial. The Honorable Bruce P. Hudock ("Judge Hudock")

¹ The arrest did not charge a domestic violence or family matter offense.

denied Doutel's motion to suspend court appearances and did not act on the other motions.² Def. Ex. 1, 05/20/2011 Hr'g Tr. at 4:19-24.

The prosecuting authority then requested without prior notice to Doutel that the Court enter as a condition to Doutel's release that he not possess firearms or apply for a temporary permit to carry pistols or revolvers. Judge Hudock granted the prosecuting authority's motion, entered a temporary order over Doutel's objection, then refused to set a date for hearing on Doutel's objection to the temporary order. Def. Ex. 1, 05/20/2011 Hr'g Tr. at 9:16-17.

The prosecuting authority provided no evidence and did not argue that any condition had changed since Doutel's first court appearance on February 25, 2011, to warrant the temporary order issued on May 20, 2011. Def. Ex. 1, 05/20/2011 Hr'g Tr. The only change was that Doutel had withdrawn his application for AR, filed a motion to dismiss, a motion for return of seized property, and a motion to suspend court appearances and/or for immediate trial. The prosecuting authority stated its position on the record that it would object to any future applications for diversionary programs filed by Doutel. Ex. 1, 05/20/2011 Hr'g Tr. at 10:13-16. Doutel filed a motion on May 23, 2011, to vacate the temporary order issued by Judge Hudock on May 20, 2011. Def. Ex. 3, Motion.

² The motions to dismiss and return of seized property remain pending and apparently are scheduled for hearing before a magistrate on July 30, 2012. Def. Ex. 12, 07/05/2012 Hr'g Tr.; Section I(G), infra.

C. The July 5, 2011, Court Appearance for a Status Conference

At the next court appearance on July 5, 2011, the prosecuting authority filed a Substitute Information charging Doutel with the Class C misdemeanor of Harassment in the Second Degree, a violation of General Statutes § 53a-183. The Honorable Maureen D. Dennis (“Judge Dennis”) entered a protective order pursuant to General Statutes § 54-1k which allows a judge to enter such an order when a defendant is charged with harassment. The protective order, among other things, prohibited Doutel from possessing firearms. Def. Ex. 4, 07/05/2011 Hr’g Tr.; Def. Ex. 5, Order of Protection. At an evidentiary hearing on August 22, 2011, the person protected under the protective order, Sandy Staw, testified that she never contacted anyone to request a protective order and that she did not know that a protective order had been entered listing her as the protected person until the order arrived by mail. Def. Ex. 7, 08/22/2011 Hr’g Tr. at 30:17-31:15. Judge Hudock’s May 20, 2011 temporary order remained in effect.

D. The July 27, 2011, and August 22, 2011, Hearings on the Temporary Order

Hearings were held on July 27, 2011, and August 22, 2011, before Judge Dennis on the May 20, 2011 temporary order issued by Judge Hudock. Def. Ex. 6, 07/27/2011 Hr’g Tr. More than three months later, Judge Dennis issued a three and one-half page Ruling stating:

Considering the weight of the evidence and the nature and totality of the circumstances in this case, the previous orders of the court, temporarily restricting the defendant's right to bear arms to ensure that the safety of any other person will not be endangered, are not unreasonable.

Def. Ex. 8, Ruling.

E. The May 7, 2012, Court Appearance

At the May 7, 2012, court appearance, the court continued Doutel's case until September 18, 2012, over Doutel's objection that his motion filed on May 7, 2012, pursuant to P.B. § 40-13A be heard. Def. Ex. 11, 05/07/2012 Hr'g Tr.

F. The Speedy Trial Motion and the Second Substitute Information

Doutel filed a Motion for Speedy Trial pursuant to General Statutes § 54-82m and P.B. § 43-41 on Friday, June 29, 2012, asserting that over twelve months had elapsed since his arraignment without the commencement of a trial by a jury of his peers. Def. Ex. 9, Motion for Speedy Trial. On Monday, July 2, 2012, the prosecuting authority filed a Second Substitute Information alleging the criminal infraction of Creating a Public Disturbance, a violation of General Statutes § 53a-181. Def. Ex. 10, Second Substitute Information.

G. The July 5, 2012, Court Appearance

Doutel objected to the filing of the Second Substitute Information pursuant to P.B. § 36-17 at a July 5, 2012, court appearance. Judge Hudock referred Doutel's objection, any other motions, and the case to a magistrate for a July 30, 2012, trial.³ Def. Ex. 12, 07/05/2012 Hr'g Tr.

II. LEGAL ARGUMENT

A. Denial of Speedy Trial

Criminal trials of non-incarcerated defendants who plead not guilty must commence within twelve months of the date of arrest, indictment, or information. Conn. Gen. Stat. § 54-82m. If a trial does not commence within thirty days of the filing of a Motion for Speedy Trial, the defendant's charge is to be dismissed. See State v. McCahill, 265 Conn. 437 (Conn. 2003). Doutel filed his motion for speedy trial on June 29, 2012. The prosecuting authority did not respond to the merits of the speedy trial motion but filed a Second Substitute Information alleging a criminal infraction. Doutel is still entitled to a speedy trial because the right to a speedy trial attaches at the time of arrest or the filing of the Information which, in the instant case, occurred on February 25, 2011, at Doutel's first court appearance.

³ Def. Ex. 12, 07/05/2012 Hr'g Tr.:

THE COURT: Well, the speedy trial motion is of no moment at this point because the charge has been reduced to an infraction.

ATTY. BAIRD: I'm prepared to argue that it is of moment.

THE COURT: Well, you'll do that in front of a magistrate.

To allow the prosecuting authority an opportunity to manipulate a defendant's right to a speedy trial by filing a Substitute Information for a criminal infraction over the objection of a defendant is contrary to due process. To avoid this injustice, the applicable speedy trial statute and practice book sections provide that the right to a speedy trial attaches upon an arrest or the filing of an Information, not upon the filing of a Substitute Information, or even more egregiously in this case, a Second Substitute Information. Otherwise, criminal prosecutions with no substance, pursued not with a concern for justice but for less worthy motivations such as retaliation when a defendant refuses to accept AR or to protect a law enforcement agency from a civil lawsuit for a bad arrest, may be extended with impunity by filing substitute informations, *ad infinitum*, to deprive a defendant the protections afforded by the speedy trial and the right to a jury trial.

Also considerable is the waste of the defendant's and the court's resources when the prosecuting authority, more than twelve months after an arrest and having already filed a Substitute Information, again changes its position and files a Second Substitute Information resting on no basis or grounds stated on the record or otherwise disclosed. See Rule 3.8(1) of the Connecticut Rules of Professional Conduct ("The prosecutor in a criminal case shall: (1) Refrain

from prosecuting a charge that the prosecutor knows is not supported by probable cause ...”).⁴ The court did not require the prosecuting authority to state a basis or grounds for filing the Second Substitute Information, to explain why the Second Substitute Information had not been filed sooner, or to explain why the Second Substitute Information was filed only after Doutel filed a motion for speedy trial. Def. Ex. 12, 07/05/2012 Hr’g Tr.

The filing of the Second Substitute Information alleging a criminal infraction is an admission by the prosecuting authority that it never had probable cause to pursue the charges of threatening and harassment. The court at the July 5, 2012, hearing never found or solicited probable cause for the charge of creating a public disturbance as alleged in the Second Substitute Information.

Doutel’s trial must commence on or before July 30, 2012.⁵ Doutel objected to the filing of the Second Substitute Information on July 5, 2012, citing P.B. § 36-17, and thereby objected to any referral to a magistrate. Judge Hudock stated: “First of all, you can argue, you can make a motion to the magistrate to have the proceedings recorded. You can file whatever motions you

⁴ In the instant case, more than six firearms were seized as evidence and have been held since February 16, 2011, by the prosecuting authority as evidence despite a motion for return of seized property that has been pending since May 20, 2011. A prosecuting authority holding more than six firearms as evidence would not file a Second Substitute Information alleging an infraction having as a penalty no more than \$90.00 if the prosecuting authority believed there was probable cause to pursue a criminal offense. All of the prosecuting authority’s witnesses testified on July 27, 2011, and August 22, 2011, at a hearing. Nothing occurred between August 27, 2011, and July 2, 2012, to explain the decision by the prosecuting authority to file the Second Substitute Information on July 2, 2012, other than Doutel’s motion for speedy trial filed on June 29, 2012.

⁵ July 29, 2012, is a Sunday.

feel are appropriate to be heard by the magistrate.” Def. Ex. 12, 07/05/2012 Hr’g. Tr. 4:13-17. Doutel cannot argue his objection to the filing of the Second Substitute Information before a magistrate when the magistrate’s jurisdiction arises from the court’s denial of Doutel’s objection to the filing. The court’s referral to the magistrate forecloses Doutel’s objection to the referral. When the next scheduled court date of July 30, 2012, arrives the magistrate will lack jurisdiction to hear the case, pending a hearing and resolution by the court of Doutel’s objection to the Second Substitute Information, and unless the prosecuting authority is ready to proceed with a trial by jury on July 30, 2012, Doutel will be entitled to a dismissal for failure to grant him a speedy trial.

B. Doutel Did Not Enter a Not Guilty Plea as Required For a Magistrate Hearing

General Statutes § 51-193u(b) provides that magistrates may hear cases of violations or infractions in which a plea of not guilty has been entered. Doutel objected to the filing of the Second Substitute Information. Judge Hudock referred that objection to the magistrate for hearing. Therefore no valid plea may enter until a ruling on Doutel’s objection to the filing is made. At the July 7, 2012, hearing, the court said that it would enter a plea of not guilty to the Second Substitute Information for creating a public disturbance “if that’s what you [the undersigned] wish.”⁶ Def. Ex. 12, 07/05/2012 Hr’g Tr. 2:11-16. Doutel never indicated that is

⁶Def. Ex. 12, 07/05/2012 Hr’g Tr.:

what he wished; to the contrary, he continued to argue against the filing of the Second Substitute Information as unduly prejudicial. A referral to the magistrate in this case is premature as Doutel has not entered a plea of not guilty or made any representation to the prosecuting authority or the court that it was his intention to enter a plea to the infraction when he objected to filing of the Second Substitute Information. In the absence of a valid not guilty plea by Doutel, the magistrate lacks subject matter jurisdiction to hear the case.

C. Statute of Limitations

The prosecuting authority's Second Substitute Information is untimely and improper as it was filed over twelve months from the date of the alleged offense, in violation of General Statutes § 54-193c ("No person may be prosecuted for any offense, other than [a felony] except within one year next after the offense has been committed"). The prosecuting authority filed the Second Substitute Information alleging the criminal infraction of Creating a Public Disturbance on July 2, 2012, nearly seventeen months after Doutel's February 16, 2011, arrest.

The Norwalk Police Department charged Doutel with the Class A misdemeanor of Threatening in the First Degree. The prosecuting authority filed a Substitute Information charging Doutel with Harassment, which is a Class C misdemeanor and substantively different

THE COURT: Well, I—first of all, I'll enter a not guilty plea to the infraction if that's what you wish. And at this point, you're entitled to a magistrate's trial and my purpose today upon hearing from the clerk that this was the case to set this down for a trial before a magistrate.

enough from the Class A misdemeanor of Threatening to allow for a protective order to enter. Currently, the prosecuting authority is pursuing a charge of a criminal infraction against Doutel which is so substantively different from the charge of threatening that the new charge does not allow for a trial by jury or a bench trial by a judge unless a trial *de novo* is demanded.

Therefore, because the substitute informations substantially amended the initial charge, the original February 25, 2011, Information charging Threatening tolled the statute of limitations. See State v. Jennings, 928 A.2d 541 (Conn.App 2007) and United States v. Grady, 544 F.2d 598 (2d Cir. 1976). The current criminal infraction charge of Creating a Public Disturbance, because it constitutes a substantial amendment of both the original charge and the Substitute Information and was issued more than a year from the date of the original February 25, 2011 Information, must be dismissed as having been filed outside the statute of limitations. See State v. Golodner, No. SC 18826 (Conn. 2012) (Overturning defendant's conviction due to the trial court's error in failing to grant his motion to dismiss based on the grounds that a substitute information against him was filed after the statute of limitations had expired). Def. Ex. 13, State v. Golodner.

The prosecuting authority's latest information was issued without any offer, understanding, or negotiation with Doutel, any consent by Doutel to the substituted charge, or any waiver by Doutel of the statute of limitations.

III. CONCLUSION

At the July 7, 2012, hearing, by his counsel, Doutel attempted to raise all of these objections and grounds for dismissal. Def. Ex. 12, 07/05/2012 Hr'g Tr. 7:1—3.⁷ The Court denied Doutel his right to object under the Practice Book to the filing of the Second Substitute Information. The Court further denied Doutel his right to state his grounds for dismissal based on the tolling of the statute of limitations prior to the filing of the Second Substitute Information.

⁷ Excerpt from transcript of July 7, 2012, hearing before Judge Hudock: “ATTY BAIRD: I have a three page argument prepared here. THE COURT: Counsel, I’m asking you to be quiet.” The Court also prevented undersigned counsel from expounding upon the undue prejudice pertinent to P.B. § 36-17 already incurred by Doutel in relation to consideration given the Threatening charge by a federal court judge in a matter pending in federal court. The fact that Doutel was charged with Threatening has impacted Doutel as evidenced by a teleconference in a case filed by his spouse Barbara Doutel related to the warrantless seizure of her firearms on the date of Doutel’s arrest in which the discussion presumed that the arrest was warranted, the protective order was warranted, and probable cause existed to pursue the charge. See U.S. District Court Civil Docket Doutel v. Norwalk, No. 3:11cv1164(VLB) (D. Conn.)

06/05/2012	Minute Entry for proceedings held before Judge Vanessa L. Bryant: Conference call held on 6/5/2012. 25 minutes (LaLone, L.) (Entered: 07/03/2012)
------------	---

See Def. Ex. 12, 07/05/2012 Hr'g Tr. 5:27-6:9: “ ATTY. BAIRD: I had a conversation with a federal court judge the other day, Judge Bryant and she was -- THE COURT: I am not going to hear you discuss an opinion by some other judge. ATTY. BAIRD: Your Honor. THE COURT: No. ATTY. BAIRD: We ... THE COURT: No. I will say this to you counsel.”

For the foregoing reasons the prosecution against Doutel must be dismissed in its entirety as justice aptly requires in this appalling example of the government's abuse of the authority entrusted to it by the people it is intended to serve.

DEFENDANT
DUANE DOUTEL

BY: _____

Rachel M. Baird
Law Office of Rachel M. Baird
379 Prospect Street
Torrington CT 06790-5238
Tel: (860) 626-9991
Fax: (860) 626-9992

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Memorandum and its Appendix with exhibits listed in the enclosed Table of Contents was mailed United States first-class mail on July 14, 2012, to the following counsel of record:

Office of the State's Attorney
17 Belden Ave
Norwalk CT 06850

and a courtesy copy mailed on July 14, 2012, to:

Magistrate (G.A. #20)
c/o The Honorable Barbara M. Quinn⁸
Chief Court Administrator
Office of the Chief Court Administrator
Supreme Court Building
231 Capitol Ave
Hartford CT 06106

The Honorable Bruce P. Hudock
Superior Court Judge
Judicial District of Stamford/Norwalk at G.A. #20
17 Belden Ave
Norwalk CT 06850

Rachel M. Baird
Commissioner of the Superior Court

⁸ Pursuant to General Statutes §§ 51-193u, 348.

APPENDIX

TABLE OF CONTENTS

MAY 20, 2011, TRANSCRIPT OF HEARING (JUDGE HUDOCK) Ex. 1

MOTION TO SUSPEND APPEARANCES AND/OR FOR IMMEDIATE TRIAL Ex. 2

MOTION TO VACATE ORDER Ex. 3

JULY 5, 2011, TRANSCRIPT OF HEARING (JUDGE DENNIS) Ex. 4

ORDER OF PROTECTION Ex. 5

JULY 27, 2011, TRANSCRIPT OF HEARING (JUDGE DENNIS) Ex. 6

AUGUST 22, 2011, TRANSCRIPT OF HEARING (JUDGE DENNIS)..... Ex. 7

MEMORANDUM OF DECISION RE: MOTION TO VACATE ORDER Ex. 8

MOTION FOR SPEEDY TRIAL..... Ex. 9

SUBSTITUTED CHARGE OF CREATING A PUBLIC DISTURBANCE..... Ex. 10

MAY 7, 2012, TRANSCRIPT OF HEARING (JUDGE HUDOCK) Ex. 11

JULY 5, 2012, TRANSCRIPT OF HEARING (JUDGE HUDOCK)..... Ex. 12

STATE v. GOLODNER, SC 18826 (CONN. JUNE 12, 2012) Ex. 13