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Criminal Court, City of New York,
 Kings County.
 The PEOPLE of the State of New York,
 v.
Zahid MAHMOOD, Defendant.
 Sept. 16, 2005.

Background: Defendant was charged with misdemeanor of operating a motor vehicle while intoxicated and traffic infraction of operating a motor vehicle while impaired. After misdemeanor was dismissed, defendant moved to dismiss infraction.

4Holding: The Criminal Court, City of New York, Kings County, [John H. Wilson](#), J., held that 90-day constitutional speedy trial period of misdemeanor, running from time of defendant's arraignment, applied to infraction.

Motion denied.

West Headnotes

[1] Criminal Law 110  **303.15****110** Criminal Law

110XVI Nolle Prosequi or Discontinuance

[110k303.5](#) Dismissal, Nolle Prosequi, or Discontinuance

[110k303.15](#) k. Authority and Discretion of Court or Prosecution. [Most Cited Cases](#)
 It is within the prosecutor's discretion to dismiss a charge or an accusatory instrument in its entirety.

[2] Criminal Law 110  **577.5****110** Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966

[110k577.5](#) k. Restrictions Under Statutes, Rules, or Plans. [Most Cited Cases](#)
 Statute governing speedy trial and time limitations for criminal prosecutions does not apply to a traffic infraction; this exemption applies even when the traffic infraction is included in a complaint that

contains violations, misdemeanors, or felonies. [McKinney's CPL § 30.30](#).

[3] Criminal Law 110  **577.5****110** Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966


[110k577.5](#) k. Restrictions Under Statutes, Rules, or Plans. [Most Cited Cases](#)
 Statutory speedy trial provisions of statute setting forth general speedy trial right in criminal actions do not apply to a traffic infraction. [McKinney's CPL § 30.20](#).

[4] Criminal Law 110  **577.5****110** Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966

[110k577.5](#) k. Restrictions Under Statutes, Rules, or Plans. [Most Cited Cases](#)

Criminal Law 110  **577.8(2)****110** Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966

[110k577.8](#) Computation
[110k577.8\(2\)](#) k. Accrual of Right to Time Restraints. [Most Cited Cases](#)
 After misdemeanor charge against defendant of operating a motor vehicle while intoxicated was dismissed, the 90-day constitutional speedy trial limitation period of that higher charge, running from time of defendant's arraignment, applied to remaining charge of lesser included traffic infraction of operating a motor vehicle while impaired. [U.S.C.A. Const.Amend. 6](#); [McKinney's Vehicle and Traffic Law § 1192\(1\)](#).

[5] Criminal Law 110  **577.8(2)****110** Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966

[110k577.8](#) Computation
[110k577.8\(2\)](#) k. Accrual of Right to Time Restraints. [Most Cited Cases](#)
 Where a misdemeanor charge is present on the docket, and is subsequently dismissed, the

Constitutional speedy trial clock for all charges on the docket begins to run from the arraignment of the defendant. [U.S.C.A. Const.Amend. 6.](#)

*920 [Charles J. Hynes](#), District Attorney, by Craig S. Lanza, Esq., Assistant District Attorney, Kings County, for the People.
[Barry Black](#), Esq., for the Defendant.

[JOHN H. WILSON](#), J.

Defendant is charged with Operating a Motor Vehicle While Intoxicated (VTL Sec. 1192.3), an unclassified misdemeanor, as well as Operating a Motor Vehicle While Impaired (VTL Sec. **1192.1**), a traffic infraction.

By motion dated April 6, 2005, Defendant sought to Dismiss the Criminal Court Complaint on the ground that the People have failed to comply with the time limitations imposed upon the prosecution of misdemeanors by [CPL Sec. 30.30](#). Defendant also sought relief under the Sixth Amendment of the United States Constitution, asserting that his right to a speedy trial had been denied.

Initially, in their Response dated April 27, 2005, the People asserted that they should only be charged with 56 days of includable time. On May 18, 2005, however, the People agreed to the dismissal of VTL Sec. 1192.3, pursuant to [CPL Sec. 30.30](#), and retained VTL Sec. **1192.1**. The Court adopted the People's concession, and ruled from the bench that Defendant's April 6, 2005 motion was denied.

Subsequently, on July 11, 2005, Defendant brought another motion to dismiss, asserting that Defendant had been denied *921 his right to a speedy trial of the VTL Sec. **1192.1** charge, as guaranteed by [CPL Sec. 30.20](#), [30.30](#), and the Sixth Amendment of the United States Constitution.

The People's Response, dated August 2, 2005, asserts that [CPL Sec. 30.20](#) and [30.30](#) do not apply to VTL Sec. **1192.1** because it is a traffic infraction. In his Reply dated August 18, 2005, Defendant argues two points; first, when VTL Sec. 1192.3 was dismissed, VTL Sec. **1192.1** should have also been dismissed, since it is a "lesser included" of VTL Sec. 1192.3; and Second, by allowing the People to retain the VTL Sec. **1192.1** charge, the Court has allowed the People to circumvent the Defendant's right to a speedy trial.

On August 19, 2005, this Court heard Oral arguments on Defendant's second motion to dismiss. During

oral arguments, the People conceded that VTL Sec. **1192.1** is a lesser included of VTL Sec. 1192.3. Nevertheless, the People declined to dismiss this count, and argued that the CPL did not apply to traffic infractions.

For the reasons that follow, Defendant's July 11, 2005 motion is denied. The Court finds that to date, the People are only charged with 63 days in this matter. Further, this Court finds that the speedy trial guarantee of the United States Constitution applies to traffic infractions; however, since the People had initially charged the Defendant with VTL Sec. 1192.3, the time period that applies to this matter is 90 days.

PROCEDURAL HISTORY

Defendant was arrested on July 19, 2004 and arraigned on the same date. At that time, the Criminal Court Complaint was deemed an information, and the matter was adjourned to August 5, 2004 for Discovery By Stipulation at the request of the Defense. This time is excluded.

On August 5, 2004, the People filed Discovery By Stipulation, and *announced their readiness for trial on the record*. The matter was then adjourned 3 times between August 5, 2004 and November 18, 2004 for possible disposition. All this time is excluded.

On November 18, 2004, when it was clear that the matter would not be resolved, the Court ordered pre-trial hearings, and adjourned the case to January 13, 2005 for hearings and trial. Since the People are afforded a reasonable opportunity to be ready for hearings and trial, this time is excluded. See [People v. Fleming](#), 13 A.D.3d 102, 785 N.Y.S.2d 333 (1st Dept., 2004), and cases cited therein.

On January 13, 2005, the People answered not ready for trial. The People's Response dated April 27, 2005 indicates that the People had requested 2 weeks, however, the record is devoid of any such request. The matter was adjourned to February 24, 2005. The Court Action Sheet indicates that the People were to be charged until they filed and served a Statement of Readiness. Since no Statement of Readiness was filed by the People during this adjournment, the entire time from January 13, 2005 to February 24, 2005 (42 days) is charged to the People.

On February 24, 2005, the People again announced not ready, but this time the record indicates that the People requested two weeks. The matter was adjourned until March 24, 2005. Since there was a prior statement of readiness for trial made by the People in open court on August 5, 2005, the People are only charged 14 days for this adjournment. ^{FN1}

FN1. It is well settled that post readiness, the People are to be charged only with the amount of time they request. See, People ex rel. Sykes v. Mitchell, 184 A.D.2d 466, 586 N.Y.S.2d 937 (1st Dept., 1992); People v. Urraea, 214 A.D.2d 378, 625 N.Y.S.2d 163 (1st Dept., 1995).

*922 On March 24, 2005, the People again stated not ready. The People requested one week, and the matter was adjourned to April 7, 2005. Again, since there is a prior statement of readiness, the People are only charged with 7 days for this adjournment.

On April 7, 2005, Defendant filed his initial motion to dismiss. Since all subsequent adjournments have been for the purpose of considering either Defendant's initial motion, dated April 6, 2005, or his subsequent motion dated July 11, 2005, under CPL Sec. 30.30(4)(a) this motion time is excluded in its entirety. See, People v. Hodges, 12 A.D.3d 527, 784 N.Y.S.2d 638 (2nd Dept., 2004); People v. Sivano, 174 Misc.2d 427, 429, 666 N.Y.S.2d 875 (App.Term, 2d Dept., 1997).

LEGAL ISSUES

A) Defendant's April 7, 2005 motion to dismiss, and the People's May 18, 2005 concession to dismissal of VTL Sec. 1192.3 pursuant to CPL Sec. 30.30.

Operating a Motor Vehicle While Intoxicated, though an unclassified misdemeanor, is subject to the 90 day time limitation of CPL Sec. 30.30(1)(b). The Court's review indicates that only 63 days are charged to the People in this matter. Thus, it would appear that the People miscalculated the applicable amount of includable time when they dismissed the VTL Sec. 1192.3 charge.

[1] Under the facts of this case, however, this Court will not make such an assumption on the People's behalf. It is within the prosecutor's discretion to dismiss a charge or an accusatory instrument in its

entirety. See, People v. Eboli, 34 N.Y.2d 281, 289, 357 N.Y.S.2d 435, 313 N.E.2d 746 (1974).

Further, while this Court has the inherent power to correct mistakes, and in proper cases, set them aside at any time, this power is to be exercised only upon a proper showing that said mistake is the result of trickery, deceit, coercion, or fraud and misrepresentation. See, People v. Farina, 65 Misc.2d 970, 971, 319 N.Y.S.2d 166 (Dist. Ct., Suffolk Cty., 1971). In the absence of any showing in this case of any of the above-stated actors, it would not be appropriate for this Court to conduct any further review of this issue.

Therefore, the People's May 18, 2005 decision to dismiss VTL Sec. 1192.3, the unclassified misdemeanor, pursuant to CPL Sec. 30.30 will remain the law of this case.

B) Defendant's July 11, 2005 motion to dismiss VTL Sec. 1192.1

Defendant asserts that the VTL Sec. 1192.1 charge should have been dismissed at the same time as the VTL Sec. 1192.3 charge, since the traffic infraction is a "lesser included" of the unclassified misdemeanor. For their part, the People believe that VTL Sec. 1192.1 survives the dismissal of VTL Sec. 1192.3 since it is a traffic infraction, and as such, is not subject to the restrictions of CPL Sec. 30.30 or CPL 30.20.

As the People conceded during oral arguments, VTL Sec. 1192.1 is a lesser included of VTL Sec. 1192.3. However, in this matter, it is also a separate charge on the docket. As was stated in People v. Minor, 144 Misc.2d 846, 848, 549 N.Y.S.2d 897 (App.Term, 2d Dept., 1989) any analysis of speedy trial "must, as a matter of course, often involve distinct consideration with respect to individual counts of a single*923 accusatory instrument." See, also, People ex rel. Mack v. Warden, 145 Misc.2d 1016, 1017, 549 N.Y.S.2d 558 (S.Ct., Kings Cty., 1989) ("It is well settled that each count contained in an accusatory instrument is deemed as a matter of law a separate and distinct accusatory instrument.")

Thus, even if VTL Sec. 1192.1 is a "lesser included" of VTL Sec. 1192.3, as a separate charge on the docket, VTL Sec. 1192.1 is entitled to a separate speedy trial review.

[2] The People's assertion that CPL Sec. 30.30 does

not apply to a traffic infraction is correct. See, [People v. Gonzalez](#), 168 Misc.2d 136, 645 N.Y.S.2d 978 (App.Term, 1st Dept., 1996), *app. den.*, 88 N.Y.2d 936, 647 N.Y.S.2d 170, 670 N.E.2d 454 (1996); [People v. Howell](#), 158 Misc.2d 653, 601 N.Y.S.2d 778 (Crim. Ct., Kings Cty., 1993). This exemption applies even when the traffic infraction is included in a Complaint that contains violations, misdemeanors, and/or felonies. See, [People v. Brooks](#), 190 Misc.2d 247, 736 N.Y.S.2d 823 (App.Term, 1st Dept., 2001)

[3] Further, it is equally true that the statutory speedy trial provisions of [CPL Sec. 30.20](#) do not apply to a traffic infraction. [CPL Sec. 30.20](#) specifically provides that “(a)fter a *criminal action* is commenced, the defendant is entitled to a speedy trial.” (Emphasis added.)

In [People v. Fisher](#), 167 Misc.2d 850, 635 N.Y.S.2d 1002 (Crim. Ct., Richmond Cty., 1995), Judge Maltese reviewed the statutory definition of a “criminal action” as provided in [General Construction Law Sec. 18-a](#). There, a “criminal action” is described as one which is “is prosecuted ... against a party charged with a *crime*.” [167 Misc.2d at 855, 635 N.Y.S.2d 1002](#) (emphasis in original). Since a traffic infraction is not a crime, “a criminal action has not taken place. Therefore, Defendant may not avail himself of the speedy trial rule contained in [CPL 30.20](#).” *Id.* at 855, 635 N.Y.S.2d 1002.

Judge Maltese continued his analysis by finding that a defendant charged with a traffic infraction did have a right to a speedy trial under the United States Constitution. As so cogently stated in [Fisher](#), “due process itself gives a defendant a right to a swift resolution of any matter where his liberty or property are at stake ... these events cannot languish without end. While a defendant charged with a traffic infraction may not have a statutory right to a speedy trial, he or she does have a constitutional right to a speedy trial.” [167 Misc.2d at 855, 635 N.Y.S.2d 1002](#), citing [People v. Attie](#), 131 Misc.2d 921, 502 N.Y.S.2d 342 (City Ct., Long Beach, 1986).

Where a Defendant has been initially charged with the traffic infraction *alone*, the proper time limitation to be placed on the Constitutional right to a speedy trial can be quite broad. In [People v. Gordon](#), 2 Misc.3d 134(A), 784 N.Y.S.2d 922 (App.Term, 9th and 10th Dist., 2004) and [People v. Taylor](#), 189 Misc.2d 313, 731 N.Y.S.2d 324 (App.Term, 2d Dept., 2001) the Court held that up to 14 months was

allowed.

In [Fisher](#), however, Judge Maltese determined that since VTL Sec. 1192.1, the traffic infraction, is a lesser included of VTL Sec. 1192.2 and 1192.3, the unclassified misdemeanors, “it would be inappropriate to extend to the lesser driving while ability impaired by alcohol charge the same time period as the driving while intoxicated 90 day period ... it is reasonable to expect the People to be ‘ready for trial’ within 60 days from arraignment.” [167 Misc.2d at 856, 635 N.Y.S.2d 1002](#).

[4] Adopting this reasoning, and in light of the People's admission during oral arguments that VTL Sec. 1192.1 is a lesser *924 included of VTL Sec. 1192.3, it is reasonable and appropriate to hold that where the docket includes charges of both misdemeanor and traffic infractions, the Constitutional Speedy Trial time for the traffic infraction is 60 days.

If we keep in mind that VTL Sec. 1192.1 is a separate charge on the docket, entitled to a separate and distinct speedy trial analysis, the question then arises; *when* does the Constitutional Speedy Trial clock begin to run for the lesser included, separately charged traffic infraction which is on the same docket as a misdemeanor?

[5] The law answers this question quite clearly—where a misdemeanor charge is present on the docket, and is subsequently dismissed, the time *for all charges* on the docket begins to run from the arraignment of the Defendant. See, [Fisher](#), [167 Misc.2d at 856, 635 N.Y.S.2d 1002](#); [People v. Matute](#), 141 Misc.2d 988, 990, 535 N.Y.S.2d 524 (Crim. Ct., Bx. Cty., 1988) (“People's readiness obligation was fixed by the nature of the accusations at the commencement of the action”). To hold otherwise would allow the time limitations of the lesser charge to control the entire docket. Due Process will not permit this result.

At the institution of the charges in this matter, the Defendant was charged with both the VTL Sec. 1192.1 infraction, as well as VTL Sec. 1192.3, the unclassified misdemeanor. Under these circumstances, the People are bound by the 90 day time limitation of the higher charge. Thus, the People cannot assert that once they have dismissed the VTL Sec. 1192.3 charge, the People have either a limitless amount of time in which to prosecute a Defendant for the traffic infraction, nor can they assert that the Constitutional 60 day limitation period

begins anew. To do so would be an “obvious and blatant attempt to circumvent the speedy trial provisions.” See, [People v. Faison, 171 Misc.2d 68, 662 N.Y.S.2d 973 \(Crim. Ct., Bx. Cty., 1996\)](#).

In [Faison](#), the People moved to dismiss an unclassified misdemeanor charge of [VTL Sec. 511\(1\)\(a\)](#), and add the traffic infraction of [VTL Sec. 509](#) to the docket. Judge Webber ruled that even if the People were allowed to make such an amendment, the People do not have “an infinite period in which to prosecute ... the People are bound by the speedy trial time in effect at Defendant's arraignment.” [171 Misc.2d at 72, 662 N.Y.S.2d 973, FN2](#)

[FN2](#). Judge Webber also adopted the [Fisher](#) 60 days Constitutional Speedy Trial time for lesser included traffic infractions. [171 Misc.2d at 71, 662 N.Y.S.2d 973](#).

In [Matute, supra](#), Judge Obus came to a similar conclusion when the People attempted to dismiss the unclassified misdemeanors of VTL Sec. 1192.2 and 1192.3 and retain the VTL Sec. **1192.1** infraction; “to permit the reduced charges to govern in this context would not limit the People's allotted preparation time, but would completely remove the prosecution from the requirements of the statute ... (such a result) would undermine the defendant's legitimate expectation ... of a speedy disposition of this matter. And it would increase the potential for unfair manipulation ...” [141 Misc.2d at 992, 535 N.Y.S.2d 524](#).

Thus, as in [Matute](#), even if the People here dismiss the misdemeanor charge, for whatever reason, and retain the traffic infraction, the 90 day limitation period of the higher charge applies to the entire docket. In many cases, this would mean the entire matter is dismissed, particularly where the People have never converted the Criminal Court Complaint to an information. In this case, however, the Court has found *925 that the People are only charged with 63 days.

Therefore, since the People's 90 period has not yet expired, the Defendant's July 11, 2005 motion to dismiss the remaining count of VTL Sec. **1192.1** is denied.

All other arguments advanced by Defendant have been reviewed and rejected by this court as being without merit.

This shall constitute the opinion, decision, and order of the Court.

N.Y.City Crim.Ct.,2005.
People v. Mahmood
10 Misc.3d 198, 800 N.Y.S.2d 919, 2005 N.Y. Slip Op. 25393

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