

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

ROY R. MOSES

a/k/a Joshua Roy Moses

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CRIMINAL NO. 01-491

MEMORANDUM AND ORDER

BUCKWALTER, J.

September 26, 2002

The defendant has filed a motion to dismiss, alleging his rights under the Speedy Trial Act, 18 U.S.C. § 3161, have been violated.

On August 16, 2001, a federal grand jury charged defendant with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). At his arraignment on October 3, the defendant plead not guilty. No trial date was set at that time. The government moved for pretrial detention and on October 11, 2001, Magistrate Judge Charles B. Smith approved detention. No trial date was set at that time.

On November 27, 2001, defense counsel filed an *ex parte* motion with the court which was granted. To what extent that order was complied with does not appear of record. In any event, defense counsel then filed an unopposed motion for continuance on December 11, 2001, which the court granted on the same day in order to give defendant reasonable time to prepare. The court's order was "open-ended"; that is, it did not specify a particular date for trial.

At the hearing held by the court in connection with this motion, the government attorney stated that she was going to contact defense counsel to set a trial date, but received information that Joyce Webb-Eubanks, counsel for defendant, was unavailable because she was on an extended leave of absence. Ms. Webb-Eubanks responded that she was indeed scheduled for surgery on June 6, 2002 and was on sick leave from June 6 to June 28, 2002, returning to work on July 1, 2002. The first time that government counsel heard anything about this case was on July 16, 2002, when the present motion to dismiss was filed. Counsel for defendant points out that a defense attorney's absence does not waive the Speedy Trial Act's protection. Exclusion for counsel's absence could only be accomplished through a granting of a continuance under the standards set forth in 18 U.S.C. § 3161(h)(8)(A). Counsel is substantially correct.

The real issue in this case has to do with the "open-ended" continuance. Both counsel have cited and agree that U.S. v. Lattany, 982 F.2d 866 (3d Cir. 1992) is the applicable law in this circuit. In Lattany, after referring to a section of this court's Speedy Trial Act Plan which provided in part:

"If the continuance [granted under 18 U.S.C. § 3161(h)(8)] is to a date not certain, the Court shall require one or both parties to inform the Court promptly when and if the circumstances that justify the continuance no longer exist."

the court went on to say:

It is thus apparent that a need for some open-ended continuances was foreseen by the drafters of the district court's Speedy Trial Act Plan. In that circumstance, we, like the Court of Appeals for the First Circuit, are hesitant to prohibit them entirely. We think such continuances can be reconciled with the Speedy Trial Act provided they are not permitted to continue for an unreasonably long period of time. Subsection (h)(8) of the Act is designed to make the Speedy Trial Act "flexible enough to accommodate the practicalities of our adversary system." *Rush* 738 F.2d

at 508 (quoting *United States v. Mitchell*, 723 F.2d at 1044). A rule altogether barring open-ended continuances would be inappropriate as contrary to that purpose.

Under Lattany, an open-ended continuance may not be unreasonably long. In that case, there was a six-month delay between the original open-end continuance and its extension as well as a delay from May 21, 1990 to January 28, 1991. Under the facts of Lattany, this was not considered unreasonable.

In the present case, neither party notified the court that the circumstances which justified the continuance no longer existed. Indeed, in view of defense counsel's surgery, it is reasonable to infer that the need for time to prepare which prompted the continuance in the first place might still exist.

Finding the delay was not unreasonable under the circumstances, I enter the following

ORDER

AND NOW, this 26th day of September, 2002, it is hereby ORDERED that the Motion to Dismiss is DENIED. By agreement of counsel, **TRIAL** is set for Tuesday, November 19, 2002 at 9:30 a.m. in Courtroom 14A.

BY THE COURT:

RONALD L. BUCKWALTER, J.