

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DENVER DISTRICT ATTORNEY 2009 MAR 31 P 5:01
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO, v. Defendant: TRENTON J. STONE,	♂ COURT USE ONLY ♂ Case Number: 2007CR3194 Div.: 408
ORDER	

THIS MATTER comes before the Court upon the People's Motion to Amend the Information and for Continuance of Trial Date ("Motion"). On March 19, 2009 the Court granted that part of the People's Motion requesting a continuance of the trial date(s) and indicated it would, by separate Order, address the People's request to Amend the Information and toll or extend the speedy trial deadline. This Order supplements the Court's March 19, 2009 Order.

I. SUMMARY OF MOTION AND FACTS

The original Felony Complaint and Information was filed on November 15, 2007 and charges two counts. Count One alleges that on or between December 1, 2003 and October 1, 2005, Mr. Stone unlawfully obtained or exercised control over, or by threat or deception concealed, \$200,569.48 of John Robert Powers International in violation of C.R.S. §18-401(1)(b), 2(d) (a Class 3 Felony). Count Two alleges that on or between January 1, 2004 and July 7, 2005, Mr. Stone unlawfully obtained or exercised control over, or by threat or deception concealed, \$8,333 of Standard Insurance Company in violation of C.R.S. §18-4-401(1)(a), 2(c) (a Class Four Felony).¹ By Minute Order dated December 4, 2008, Judge Pratt severed Counts One and Two for trial.

In their Motion, the People characterize the original Felony Complaint and Information as charging Mr. Stone with one on-going theft pursuant to *Gill v. People*, 339 P.2d 1000 (Colo. 1959). The People move to amend the Felony Complaint and Information to comply with the Colorado Supreme Court's recent opinion in *Roberts v. People*, 07SC430 (March 2, 2009).

The People argue that *Roberts v. People* made sweeping changes in the way theft cases are to be handled. In particular, the People argue there is no longer an on-going crime of "theft-by-deception" and multiple thefts (other than theft from a person or thefts for which the defendant has already been placed in jeopardy), committed by the same person within a six-month period, of things with an aggregate value in the felony range, constitute a single crime of

¹ The foregoing description is intended as a summary only and the actual language of the Felony Complaint and Information controls.

theft, the classification of which is determined by the aggregate value of all things involved. The People also argue that the Colorado Supreme Court did not limit itself to only crimes that had been known as "felony theft-series", and that Section 18-4-401(4) now requires all thefts committed by the same person within a six-month period of time to be joined and prosecuted as a single felony. In light of *Roberts*, the People seek leave to file an Amended Information that joins (or in this case re-joins) all theft counts against Mr. Stone within six month temporal units of prosecution and prosecute them as a single felony offense.²

Defendant argues, among other things, that *Roberts* should not be read or applied literally because to do so would jeopardize his due process rights. The Defendant also argues that this Court should not reconsider Judge Pratt's order severing Counts 1 and 2 for trial.

II. FINDINGS AND ORDER

Amended Information.

In *Roberts* the Colorado Supreme Court noted that Colorado is among the substantial majority of states that have consolidated the crimes of larceny, embezzlement, and theft under false pretenses in a single crime of theft. According to the statute, a person commits the crime of theft when he knowingly obtains or exercise control over anything of value of another without authorization or by threat or deception, and in addition he either intends to permanently deprive the other person of its use or benefit; demands a consideration to which he is not legally entitled to return it; or uses, conceals, or abandons it with the intent to, or at least the knowledge that his conduct will, permanently deprive the other person of its use or benefit. "Whichever way the crime is committed it constitutes the offense of 'theft' ". *Roberts* at *3.

In *Roberts*, the Supreme Court stated that multiple thefts (other than theft from a person or thefts for which the defendant has already been placed in jeopardy), committed by the same person within a six-month period, of things with an aggregate value in the felony range, constitute a single crime of theft, the classification of which is determined by the aggregate value of all of the things involved:

There can be little doubt that this language not only permits, but in fact requires, all thefts committed by the same person within a six-month period (except any for which jeopardy had already

² The proposed Amended Information alleges four counts. Proposed Count One alleges that on or between January 1, 2004 and March 2, 2004, Mr. Stone unlawfully took things of value, namely money with a value of \$500 or more but less than \$15,000 of Standard Insurance Company and John Robert Powers International in violation of C.R.S. §18-4-401(1), (6), (2)(c) (a Class Four Felony). Proposed Count Two alleges that on or between March 3, 2004 and September 2, 2004, Mr. Stone unlawfully took things of value, namely money with a value of \$15,000 or more of Standard Insurance Company and John Robert Powers International in violation of C.R.S. §18-4-401(1), (6), (2)(d) (a Class Three Felony). Proposed Count Three alleges that on or between September 3, 2004 and March 2, 2005, Mr. Stone unlawfully took things of value, namely money with a value of \$15,000 or more of Standard Insurance Company and John Robert Powers International in violation of C.R.S. §18-4-401(1), (6), (2)(d) (a Class Three Felony). Proposed Count Four alleges that on or between March 3, 2005 and September 2, 2005, Mr. Stone unlawfully took things of value, namely money with a value of \$15,000 or more of Standard Insurance Company and John Robert Powers International in violation of C.R.S. §18-4-401(1), (6), (2)(d) (a Class Three Felony). The foregoing description is intended as a summary only and the actual language of the Amended Information controls.

attached before he committed the others), to be joined and prosecuted as a single felony. On its face, this provision speaks to the scope of the crime the legislature intended to create-what we and the United States Supreme court have previously referred to as the "unit of prosecution". (Emphasis added). *Roberts* at *3.

The *Roberts* Court further stated that Section 18-4-401(4) treats as a single theft all thefts committed by the same person in a six-month period:

The statute itself permits any other theft committed by the same person within six months to be joined as part of the same felony offense with the seriousness of that offense being determined by the aggregate value of all of the things involved. By the same token, no other crime of theft committed by that same person in the same time frame (and before jeopardy attaches) can support a separate conviction for theft. (Emphasis added). *Roberts* at *5.

Although *Roberts* involved a case of multiple takings from the same owner, the language in *Roberts* is not limited to those circumstances. Rather, *Roberts* appears to require all thefts by the same person within six month units of prosecution (including multiple takings from different owners) be joined as part of the same felony offense.³

The undersigned judge is reluctant to reconsider or modify the prior ruling of Judge Pratt severing Counts One and Two for purposes of trial. However, Judge Pratt's decision was made prior to, and without the benefit of, the Supreme's Court announcement in *Roberts*. The undersigned judge believes the language in *Roberts* now warrants, and may actually require, this Court granting the People's motion to amend the Felony Complaint and Information.

The Court therefore grants the People's Motion to amend the Felony Complaint and Information as requested. The Court also finds that the People's Amended Information dated March 13, 2009 does not present new, different, or additional offenses from those contained in the original Felony Complaint and Information and that Mr. Stone need not be re-arraigned, nor the Information re-verified. *People v. Buckner*, 504 P.2d 669 (Colo. 1972) and Crim. P. Rule 7(e). However, if Mr. Stone believes that re-verification or re-arraignment is necessary, he may so move this Court within ten (10) days from the date of this Order. In that event, the People will have five (5) days to respond. Furthermore, in the event Mr. Stone claims prejudice or unfair surprise as a result of the Amended Information he should, within ten (10) days from the date of this Order, move this Court for a continuance of the trial date. *People v. Cervantes*, 677 P.2d 403, 405 (Colo. App. 1983); *People v. Marion*, 514 P.2d 327, (Colo. 1973) (In order to claim prejudice or unfair surprise the defendant must request a continuance.).

³ This Court has reviewed the *Roberts* trial court file and Supreme Court briefs to determine if there is a basis to limit or distinguish theft cases involving one owner from theft cases involving multiple owners but no such distinction was discernible to this Court.

Speedy Trial Date.

At the request of the People, trial has been continued to May 18, 2009. Although trial has been reset within the speedy trial deadline the People have also requested an extension of that deadline. C.R.S. §18-1-405 (6) (g) permits an extension of the speedy trial deadline (for up to six months) at the request of the prosecuting attorney, and without the consent of the defendant, if:

- (I) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that this evidence will be available at the later date; or
- (II) The continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of exceptional circumstances of the case and the court enters specific findings with respect to the justification.

C.R.S. §18-1-405(6)(g)(I).

In order for Section 18-1-405(6)(g)(I) to apply the prosecutor must show: (i) unavailability of evidence material to the state's case; (2) due diligence by the People to make the evidence available and (3) reason to believe that the evidence will be available on the new trial date. This Court may rely upon the prosecutor's good-faith offer of proof to establish its due diligence. *People v. Roberts*, 146 P.3d 589, 595 (Colo. App. 2006).

The prosecution argues that the alleged victims Susan and Jacob Sisitki only recently provided the prosecuting attorneys: (i) "new" and "voluminous" evidence; (ii) "information regarding a bank account listed to John Robert Powers International that the Defendant was ordered to close by the Sisitkis", and (iii) a password-protected "QuickBooks program" the Sisitkis believe contains information regarding John Roberts Powers International's business accounts. The prosecution represents this information was first discovered on about February 20, 2009 and that notice and an opportunity to review the information were promptly provided to the Defendant. The prosecution also represents that diligent efforts have been made to decipher the QuickBooks password.

The Defendant responds that the "new" and "voluminous" records as well as the "bank statements" should have been discovered earlier and that as late as March 16, 2009 the defense received an additional 341 pages of new documents from the People. The Defendant also represents he does not have the "password" for the "QuickBooks account" and is not impeding the People's efforts.

The Felony Complaint and Information was filed November 15, 2007, more than a year ago. Although it may be true that Mr. Stone misled the Sisitkis regarding the "bank account"

and that the password protected "QuickBooks program" is presently unreadable, nevertheless there has been no showing the Sisitikis were wholly unaware of the "bank account" or could not have earlier discovered the "QuickBooks program" (albeit password protected). Therefore, the Court finds the People have not, at this time, carried their burden to show due diligence sufficient to satisfy C.R.S. §18-1-405(6)(g)(I).

C.R.S. §18-1-405(6)(g)(II).

Under Section 18-1-405(6)(g)(II) a continuance of the speedy trial deadline may be granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and such additional time is justified because of exceptional circumstances. Although the People have failed, at this time, to carry their burden under Section 18-1-405(6)(g)(I), the Court does find there are exceptional circumstances justifying an extension or tolling of the speedy trial deadline under Section 18-1-405(6)(g)(II).

In this case, the People argue that the *Roberts* decision has made sweeping changes in the way theft cases are to be handled in Colorado, and that as a result the Felony Complaint and Information as currently drafted is not in compliance with the new law and must be amended. People's Motion at ¶¶ 2, 4. *Compare: People v. Zuniga*, 80 P.3d 965, 969 (Colo. App. 2003) (theft by receiving held to be a continuing offense); *People v. Gill*, 339 P.2d 1000, 1001 (Colo. 1959) (treating crime of larceny over occurring between June 1957 and September 1955 as a single embezzlement).

This Court has permitted that amendment, and now specifically finds that the timing (March 2, 2009) and effect of the *Roberts* decision, as noted above in this Order, constitute exceptional circumstances justifying a sixty (60) day extension of the speedy trial deadline under the statute. *People v. Runningbear*, 753 P.2d 764 (Colo. App. 1988) (where a Defendant's motion for severance was granted shortly before trial, exceptional circumstances existed for a reasonable period of delay to toll the speedy trial statute.). *See also: People v. Goodpastor*, 742 P.2d 965, 968 (Colo. App. 1987) (appointment of a special prosecutor approximately two months prior to the trial date constituted exceptional circumstances warranting extension of speedy trial date).

Colorado's speedy trial statute is intended to implement the constitutional right to a speedy trial. Nonetheless, the Court also separately and additionally finds that the extension or tolling of the speedy trial date is consistent with the Defendant's constitutional speedy trial right. The reason for the delay is the Colorado Supreme Court's recent decision in *Roberts*, an event outside the control of the People and for which they are not responsible. The length of the delay is not excessive and is only sixty (60) days after the June 4, 2009 speedy trial date agreed to by the Defendant on December 4, 2008. There also should be no prejudice to the out-of-custody Defendant and the only prejudice asserted is the cost of non-refundable airline tickets for an out-of-state witness that this Court will order the People to pay.

THE COURT HEREBY GRANTS the People's Motion to Amend the Information. Any motion by the Defendant for a Bill of Particulars shall be filed within ten (10) days from the date of this Order and the People shall have five (5) days to respond. Trial on all Counts of the

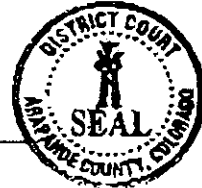
Amended Information dated March 13, 2009 shall commence on May 18, 2009 at 8:45 o'clock a.m. Although this trial date is within the speedy trial deadline the Court also specifically finds that exceptional circumstances justify extension or tolling of the June 4, 2009 speedy trial deadline sixty (60) days to August 3, 2009. The Defendant shall be entitled to reimbursement for the costs of any and all non-refundable airline tickets paid for but unused for the March 23, 2009 trial date. Defendant shall submit his request for reimbursement (with backup information) within ten (10) days from the date of this Order.

SO ORDERED this March 31, 2009.

BY THE COURT:

Kurt A. Horton

Kurt A. Horton
District Court Judge



A copy of this Order was sent to all counsel of record.

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO, v.	<u>σ COURT USE ONLY σ</u> Case Number: 2007CR3194 Div.: 408
Defendant: TRENTON J. STONE, SCHEDULING ORDER	

Trial is set to commence on May 18, 2009 at 8:45 o'clock a.m.

A Pretrial Readiness Conference is scheduled for May 1, 2009 at 1:30 p.m. and shall continue, if necessary, on May 8, 2009 at 1:30 p.m.

The Court has ordered counsel to contact the Division Clerk for Courtroom 408 to set a status conference to be held no later than April 10, 2009.

The Court heard motions on December 4, 2008. However, since that time the Defendant filed a Motion *in Limine*; the People filed a Notice of Intent to Introduce Other Acts Evidence Pursuant to Crim. P. 404(b); and the Court granted the Peoples' Motion to Amend Information and for Continuance of Trial Date. Any outstanding motions shall be heard at the Status Conference.

The People shall submit their initial, proposed jury instructions to the Court and counsel for the Defendant no later than May 1, 2009.

SO ORDERED this March 31, 2009.

BY THE COURT:

Kurt A. Horton

Kurt A. Horton
District Court Judge

