tion charging such offense may be properly filed in such court.

These offenses are not indictable and there are no charges that can be properly joined with relation to my client that are indictable. No informations, absent a waiver, which will not occur in this case, could be properly filed in County Court and, therefore, the County Court judge does not have trial jurisdiction over this matter. Section 710.50, regarding in what courts the motion to suppress evidence must be made, makes it clear that only this court has trial jurisdiction and that only this court has jurisdiction to determine the motions to suppress and that since Judge Clyne can have only preliminary jurisdiction, sitting as a Police Court Judge, and since the motion to suppress is part of the trial jurisdiction, Judge Clyne has no jurisdiction, no matter what hat he is wearing, to hear the motion to suppress in this case.

Section 710.50 of the Criminal Procedure Law is specific in that if an information is pending in a local criminal court, the motion to suppress must be made in such court, and Subdivision 2 indicates an appellate division annotation. What we are dealing

with here is trial jurisdiction and not preliminary jurisdiction. Under the old Criminal Procedure Law - -.

THE COURT: No, let's deal with the law we have now. Miss Thayer, do you have anything to say?

MISS THAYER: Your Honor, we are ready to proceed with our suppression hearing and with regard to Mr. Oliver's objection to transferring the matter to Judge Clyne, we object and concur in his arguments.

MR. OLIVER: Your Honor, one further comment -- our clients are charged with offenses and the matters Mr. Dorfman is relating to do not concern our clients. Our clients were not in the car when this man was arrested and I think it is an injustice to our clients to associate their case with those in County Court.

THE COURT: You may think that, sir.

MR. DORFMAN: Your Honor, it is the people's contention under the Criminal Procedure Law that Judge Clyne, sitting as a local criminal court judge, has jurisdiction to hear the motion herein and, more importantly, as counsel is aware and the court, there is the necessity of bringing in witnesses from

other areas and which would be repetitive and it is in the interest of all parties to have but one hearing with all of the witnesses available at that time. I think in the interest of justice, time, and expense, that in all fairness, the matter should be heard by Judge Clyne.

THE COURT: First of all, it is my understanding if a superior court judge sits as an acting Police Court judge, he is sitting as a Police Court judge and not a County Court judge.

MR. OLIVER: Your Honor, Section 10.30 specifically provides: A superior court judge sitting as a local criminal court does not have trial jurisdiction of any offense.

THE COURT: He has preliminary jurisdiction. The question is whether or not the hearing of a motion to suppress is preliminary jurisdiction or trial jurisdiction and I am going to leave that to the County Court Judge, because any appeal from this court will go to the County Court Judge anyway and so if he gives an opinion in the first instance, it saves one step.

Secondly, whether or not it is proper is a question for Judge Clyne to determine in his

ultimate wisdom. We all know, having listened to Judge Cook, the courts are overly congested with motions, trials, and hearings and if we can take six cases and hold but one hearing, and as long as the hearing is properly and fairly heard, everyone is best served; so I am going to put the matter over until Tuesday, November 24th, to be heard in County Court, if Judge Clyne accepts jurisdiction, and if not, we will set the case down for here.

MR. OLIVER: Your Honor, let the record show we object on the ground none of these charges with relation to my client are properly joinable with any others under the rule of jointure.

THE COURT: I think you should also mention that to Judge Clyne on Tuesday at two o'clock. Any witnesses under the subpoena power of this court are still under subpoena and are bound to appear next Tuesday afternoon at County Court, second floor, Albany County Courthouse.

****

Supreme Court—Appellate Division
Third Judicial Department

November 24, 1981

41689 - In the Matter of VERA MICHELSON et al.,
Petitioners,

v.

HON. JOHN CLYNE et al., Respondents.

Application, pursuant to CPLR article 78, for judgment in the nature of prohibition granted, without costs.

A superior court judge, even when sitting as a local criminal court, has no trial jurisdiction of a violation (CPL 10.30, subd. 3). A superior court judge is limited to preliminary jurisdiction in such a situation (CPL 10.20, subd. 2). In our view, a suppression hearing falls within the term trial jurisdiction (see CPL 1.20, subds. 24, 25; cf. CPL 170.15, CPL 710.50) which, in the case of a violation, is lodged exclusively in the local criminal court (CPL 10.30, subd. 1, par. [a]). Therefore, the respondent County Court Judge is without jurisdiction to preside at the hearing to be held on petitioners' motion to suppress.

MAHONEY, P.J., SWEENEY, KANE, CASEY and WEISS, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

VERA MICHELSON and AARON ESTES,

Petitioners,

-against-

HON. JOHN CLYNE, HON. THOMAS W. KEEGAN
and HON. SOL GREENBERG,

Respondents.

BRIEF FOR PETITIONERS FOR A WRIT OF PROHIBITION

LEWIS B. OLIVER, JR.
Attorney for Petitioner Estes
31 Barclay Street
Albany, New York 12209
518-463-7962

ANITA THAYER
Attorney for Petitioner Michelson
Thayer and Walter
69 Columbia Street
Albany, New York 12207
518-462-6753

BACKGROUND

On September 21, 1981, John Spearman was arrested in a car near the motel in the City of Albany where the Springboks rugby team were staying and charged with possession of a gun allegedly found in the vehicle. Subsequently, Hon. Thomas W. Keegan, Justice of the Police Court of the City of Albany, issued a search warrant for the apartment of petitioner Vera Michelson.

On September 22, 1981, Michelson's apartment was searched under the authority of the warrant. Based on evidence allegedly found inside his personal luggage, Michael Young was also charged with possession of the gun allegedly found when Spearman was arrested. Both Spearman and Young have been indicted for felony gun possession charges and the indictments are now pending a motion to suppress and trial in Albany County Court.

Also as a result of the search of the apartment, Young and petitioners Aaron Estes and Michelson were charged with information in Albany Police Court with possession of marijuana in violation of PL 221.05 and possession of firecrackers in violation of PL 270(2)(b)(i). Both of these charges are violations (not misdemeanors or felonies) now pending in Albany Police Court, and it is not alleged that petitioners were acting in concert. (A copy of the violation informations are attached to the petition herein).

Counsel for petitioners were advised that a motion to suppress the alleged marijuana and firecrackers would be held

before Hon. Thomas W. Keegan in Albany Police Court on November 17, 1981. Counsel issued various testimonial subpoenas and subpoenas duces tecum, and on November 17, 1981, answered that they were ready to proceed with the hearing on the motion to suppress.

However, the People requested an adjournment in order that Hon. John J. Clyne, Albany County Court Judge, could hear and decide a combined suppression hearing for the felony gun charges against Spearman and Yo ng pending in County Court and for the marijuana violation and firecrackers alleged against petitioners. The People proposed that Judge Clyne would hold one combined hearing sitting as a County Court Judge as to Spearman and Young while at the same time sitting as an Albany Police Court Judge as to petitioner's alleged marijuana violation and firecrackers. The People indicated on the record that Judge Clyne had agreed to conduct this simultaneous hearing, and that the combined hearing would be heard before Judge Clyne on November 24, 1981, at 2:00 P.M. in Albany County Court.

Petitioners objected to the combined hearing of the petty offenses with the felony gun indictment against Spearman and Young on jurisdictional grounds. Jugge Keegan, remarking that petitioners' appeal was to County Court and that a combined motion to suppress would "save a step", overruled petitioners' objections and remitted petitioners' hearing on the motion to suppress to Judge Clyne. (The transcript proceedings in Police Court on November 17, 1981, have been submitted to this Court.)

It is evident that Judge Clyne does not have trial jurisdiction of the subject matter of petitioners' minor violations as a County Court Judge. PL 221.05 and PL 270(2)(b)(i) are both "petty offenses" within the meaning of CPL 1.20(39).[1] Petitioners have not been indicted or otherwise charged with any crime, only these two petty offenses. CPL 10.30(1)(a)[2] is explicit that a local criminal court has "exclusive trial jurisdiction of petty offenses" (emphasis added), except pursuant to CPL 10.20(1)(c). Thus, CPL 10.30(1)(a) explicitly excludes the subject matter of petitioners' petty offenses from the jurisdiction of County Court. People v. Judges of the County Court of the County of Oswego, 56 A.D. 2d 728 (4th Dept. 1977) (County Court has no trial jurisdiction of violations).

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[1] 39. "Petty offense" means a violation or a traffic infraction.

[2] §20.30. Local criminal courts; jurisdiction.

1. Local criminal courts have trial jurisdiction of all offenses other than felonies. They have:

(a) Exclusive trial jurisdiction of petty offenses except for the superior court jurisdiction thereof prescribed in paragraph (c) of subdivision one of section 10.20; and

It is also evident that Judge Clyne does not have trial jurisdiction of the subject matter of petitioners' minor violations as a County Court Judge pursuant to CPL 10.20(1)(c).[3] Trial jurisdiction is obtained by a court only when an indictment or information charging such offense may "properly" be filed in such court. CPL 1.20(24).[4] An information charging a petty offense may be filed only in a local criminal court, not a superior court. CPL 1.20(4).[5] No indictment may be returned which charges only a petty

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3 § 10.20 Superior courts; jurisdiction.

1. Superior courts have trial jurisdiction of all offenses. They have:

(c) Trial jurisdiction of petty offenses, but only when such an offense is charged in an indictment which also charges a crime.

4 24. "Trial jurisdiction." A criminal court has "trial jurisdiction" of an offense when an indictment or an information charging such offense may properly be filed with such court, and when such court has authority to accept a plea to, try or otherwise finally dispose of such accusatory instrument.

5 4. "Information" means a verified written accusation by a person, more fully defined and described in article one hundred, filed with a local criminal court, which charges one or more defendants with the commission of one or more offenses, none of which is a felony, and which may serve both to commence a criminal action and as a basis for prosecution thereof.

offense, CPL 200.10,[6] so petitioners have not been and can not be indicted for the petty offenses charged herein. CPL 10.20(1)(c) gives a superior court trial jurisdiction of a petty offense only when the offense is charged in an indictment which also charges a crime. Since petitioners have not been and can not be indicted for the petty offenses herein, County Court does not obtain jurisdiction of the subject matter of petitioners' petty offenses by virtue of CPL 10.20(1)(c). People v. Judges of the County Court of the County of Oswego, supra, 56 A.D. 2d 728.

It is evident that Judge Clyne does not have trial jurisdiction of the subject matter of petitioners' minor violations by removal because an information charging petty offenses only can not be removed to County Court. CPL 170.25.

The sole remaining theory by which Judge Clyne might obtain jurisdiction of the subject matter of petitioners' alleged petty offenses is by designating himself as a Police Court Judge and sitting on the hearing to suppress the evidence with "two hats"; as County Court Judge for Spearman and Young on the felony gun indictment, and as a superior court judge sitting as a local criminal court judge for petitioners' petty offenses.

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[6] §200.10 Indictment; definition.

An indictment is a written accusation by a grand jury, filed with a superior court, charging a person, or two or more persons jointly, with the commission of a crime, or with the commission of two or more offenses at least one of which is a crime. Except as used in Article 190, the term indictment shall include a superior court information.

ARGUMENT

POINT I

A HEARING ON THE MOTION TO SUPPRESS EVIDENCE IS PART OF THE TRIAL JURISDICTION OF A COURT BEFORE WHICH CRIMINAL CHARGES ARE PENDING, AND JUDGE CLYNE SITTING AS A LOCAL CRIMINAL COURT JUDGE HAS NO TRIAL JURISDICTION OVER THE SUBJECT MATTER OF PETITIONERS' PETTY OFFENSES.

The Legislature has made a judgment that "petty offenses" are too minor to become the concern or engage the time of superior court judges, and therefore enacted that the local criminal courts have "exclusive" trial jurisdiction of petty offenses. CPL 10.30(1)(a) The Legislature has further enforced this allocation of jurisdiction by providing that a superior court judge even while sitting as a local criminal court, does not have trial jurisdiction of the subject matter of petitioners' petty offenses:

> 3. Notwithstanding the provisions of subdivision one, a superior court judge sitting as a local criminal court does not have trial jurisdiction of any offense, but has preliminary jurisdiction only, as provided in subdivision two.
>
> CPL 10.30(3) (emphasis added)

The sole question, therefore, is whether a hearing on the motion to suppress is part of the trial jurisdiction, or the preliminary jurisdiction, of the local criminal courts.

This Court has held that a hearing on a motion to suppress evidence is within the jurisdiction of a court in which criminal proceedings are pending "as trial court". DeJoy v. Zittel, 67 A.D. 2d 1076 (3rd Dept. 1979). The statutory structure of the CPL makes it absolutely clear that the same principle applies here, and that the hearing on the motion to suppress herein is

within the exclusive jurisdiction of the Albany Police Court "as trial court".

Trial jurisdiction and preliminary jurisdiction are defined by CPL 1.20(24), (25), respectively, as follows:

> 24. "Trial jurisdiction." A criminal court has"trial jurisdiction" of an offense when an indictment or an information charging such offense may properly be filed with such court, and when such court has authority to accept a plea to, try or otherwise finally dispose of such accusatory instrument.
>
> 25. "Preliminary jurisdiction." A criminal court has "preliminary jurisdiction" of an offense when, regardless of whether it has trial jurisdiction thereof, a criminal action for such offense may be commenced therein, and when such court may conduct proceedings with respect thereto which lead or may lead to prosecution and final disposition of the action in a court having trial jurisdiction thereof.
>
> (emphasis added)

Preliminary jurisdiction of a superior court judge sitting as a local criminal court as to an offense is defined by PL 170.15(2). The statute states the jurisdiction of the superior court judge sitting as a local criminal court ceases when the defendant is arraigned on the petty offense. After arraignment a superior court judge sitting as a local criminal court

> "must then remit the action, together with all pertinent papers and documents, to a local criminal court having trial jurisdiction thereof. The latter court must then conduct such action to judgment or other final disposition."
>
> CPL 170.15(2) (emphasis added)

The Practice Commentary makes it absolutely clear that a superior court judge sitting as a local criminal court must after arraignment remit the matter to a local criminal court because preliminary jurisdiction ceases at that point:

> "Since he does not have trial jurisdiction of the offense (§10.30[3]), he is required to remit the case to a local criminal court that does."
>
> McKinney's, Practice Commentary, CPL 170.15

The definition in CPL 1.20(25) makes it clear that preliminary jurisdiction does not include "prosecution and final disposition", because these phases of the case are to be held in the "court having trial jurisdiction thereof". In the CPL preliminary jurisdiction of local criminal courts is governed by Part 2, Title H, 170.10 - 170.75, entitled "Preliminary Proceedings in Local Criminal Court." CPL 170.15(2) which is included within Part 2, Title H, and 10.30(3) are consistent with New York's traditional dichotomy between a judge as "magistrate" and a judge as a "court of special sessions". A judge acting as magistrate can act "in the preliminary stages of a criminal action when an information has laid before him, when he issued a warrant of arrest or a summons, when he conducted a preliminary hearing upon a felony charge, when he held a defendant for the action of a grand jury and the like". McKinney's, Practice Commentary, CPL 10.10.

Beyond arraignment or preliminary hearing, only the trial court in this case Albany Police Court, has jurisdiction. The courts have consistently rejected arguments to expand the power of County Court beyond preliminary jurisdiction in relation to matters pending in criminal court. See People v. Smith, 93 Misc. 2d 326 (Renns. Co. 1978); People v. Berg, 76 Misc. 2d 430 (Dutchess Co., 1974).

Once a petty offense information is beyond arraignment the case is within the trial jurisdiction of the local criminal court. In the CPL "prosecution" in local criminal courts is governed by Part II, Title K, 340.10-370.10, entitled "Prosecution of Information in Local Criminal Courts - Plea to Sentence." This "prosecution" phrase is specifically exempted by the definition of preliminary jurisdiction in CPL 1.20(25). Discovery, omnibus motions, pre-trial hearings and the like are part of the trial jurisdiction of the local criminal court. Discovery and motions are specifically within the trial jurisdiction of local criminal courts. CPL 340.30.

The CPL explicitly provides that a motion to suppress regarding an information must be made and determined in the local criminal court where the case is pending. CPL 710.50(1)(c), (2) state that the requirement of hearing the motion in local criminal court is part of the trial jurisdiction of said court:

> §710.50 Motion to suppress evidence; in what courts made.
>
> 1. The particular courts in which motions to suppress evidence must be made are as follows:
>
> .....
>
> (c) If an information, a simplified information, a prosecutor's information or a misdemeanor complaint is pending in a local criminal court, the motion must be made in such court.
>
> 2. If after a motion has been made in and determined by a superior court a local criminal court acquires trial jurisdiction of the action by reason of an information, a prosecutor's information or a misdemeanor complaint filed therewith, such superior court's determination is binding upon such local criminal court. If, however, the motion has been made in but not yet determined by the superior court at the time of the filing of such information, prosecutor's information or misdemeanor complaint, the superior court may not determine the motion

but must refer it to the local criminal court of trial jurisdiction.

(emphasis added)

Under the former Code of Criminal Procedure it was quite clear that the proper jurisdiction for a motion to suppress was in the court having "trial jurisdiction". C.C.P. §813-e (repealed):

> §18-3. In what courts made
>
> When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

A court without trial jurisdiction was without jurisdiction to entertain a suppression motion. People v. Kellog, 53 Misc. 2d 560, 561 (onond. Co., 1967). See also People v. Gatti, 16 N.Y. 2d 251, 254 (1965);People v. Guenther, 77 Misc. 2d 643 (Monroe Co., 1974); People v. DeCicco, 37 Misc. 2d 937 West. Co., 1962). Since the allocation of jurisdiction in CPL 710.50 was not intended to change the former destinction between magistrates and courts of general sessions, a motion to suppress is clearly within the trial jurisdiction of the local criminal court.

DeJoy v. Zitell, supra, 67 A.D. 2d 1076, and the statutory structure making the motion to suppress part of trial jurisdiction of a court make common sense. The motion to suppress determines what evidence will be admissible at trial. Only a competent court with trial jurisdiction over an offense can make that determination.

In conclusion, it is submitted that the Legislature has removed the prosecution of petty offenses from the subject matter jurisdiction of superior court judges sitting as a local criminal court. Judge Clyne sitting as a local criminal court has no jurisdiction of the subject matter of petitioners' alleged petty offenses, because the motion to suppress is beyond arraignment and part of trial jurisdiction, not preliminary jurisdiction.

Dear Mr. Mackelson,

I was one of the inmates at the Albany County jail while you were held. I'm the tall blond Joan McTo[illegible] and I would be happy to be a witness if you need me. I live at 20 Sparkill Ave Albany 12209.

I can testify you were locked away from the rest of us and not allowed any phone calls over your arrest until the next day.

Sincerely
Joan McTo[illegible]

436096

Cross References

Designation of marihuana as schedule I controlled substance, see Public Health Law § 3306.

Library References

Drugs and Narcotics ⇐46. C.J.S. Drugs and Narcotics §§ 2 to 4, 102, 105, 106.

§ 221.05 Unlawful possession of marihuana

A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana.

Unlawful possession of marihuana is a violation punishable only by a fine of not more than one hundred dollars. However, where the defendant has previously been convicted of an offense defined in this article or article 220 of this chapter, committed within the three years immediately preceding such violation, it shall be punishable (a) only by a fine of not more than two hundred dollars, if the defendant was previously convicted of one such offense committed during such period, and (b) by a fine of not more than two hundred fifty dollars or a term of imprisonment not in excess of fifteen days or both, if the defendant was previously convicted of two such offenses committed during such period.

Added L.1977, c. 360, § 3.

Historical Note

Effective Date; Applicability. Section effective on the 30th day after June 29, 1977, and applicable to acts committed on or after such date, pursuant to L.1977, c. 360, § 12.

Practice Commentary

By Arnold D. Hechtman

This is the key section of the Marihuana Reform Act (L. 1977, c. 360). It defines the offense of "unlawful," as distinguished from "criminal," possession of marihuana and constitutes the so-called "decriminalization" of possession of 25 grams or less of marihuana since the penalty upon conviction is a "violation," which is a noncriminal offense.

The handling of charges and punishment upon conviction under this section introduce a number of concepts that are new to New York criminal law. First, conviction hereunder is punishable "only by a fine" and, second, upon arrest the defendant may be subjected to the jurisdiction of the court only by the issuance to him of an appearance ticket. This

devices and where the total storage on any one premise does not exceed one hundred devices.

2. Offense. (a) Except as herein otherwise provided, or except where a permit is obtained pursuant to section 405.00, any person who shall offer or expose for sale, sell or furnish, any fireworks is guilty of a class B misdemeanor.

(b) (i) Except as herein otherwise stated, or except where a permit is obtained pursuant to section 405.00, any person who shall possess, use, explode or cause to explode any fireworks is guilty of a violation.

(ii) Possession of fireworks valued at fifty dollars or more shall be a presumption that such fireworks were intended to be offered or exposed for sale.

3. The provisions of this section shall not apply to articles of the kind and nature herein mentioned, while in possession of railroads and transportation agencies for the purpose of transportation, the shipment of which is not prohibited by the interstate commerce commission regulations as formulated and published from time to time, unless the same be held voluntarily by such railroads or transportation companies as warehousemen; provided, that none of the provisions of this section shall apply to signaling devices used by railroad companies or motor vehicles referred to in subdivision seventeen of section three hundred seventy-five of the vehicle and traffic law, or to high explosives for blasting or similar purposes; provided that none of the provisions of this section shall apply to fireworks and the use thereof by the army and navy departments of the state and federal government; nor shall anything in this act contained be construed to prohibit any manufacturer, wholesaler, dealer or jobber from manufacturing, possessing or selling at wholesale such fireworks to municipalities, religious or civic organizations, fair associations, amusement parks, or other organizations or groups of individuals authorized to possess and use fireworks under this act, or the sale or use of blank cartridges for a show or theatre, or for signal purposes in athletic sports, or for dog trials or dog training, or the use, or the storage, transportation or sale for use of fireworks in the preparation for or in connection with television broadcasts; nor shall anything in this act contained be construed to prohibit the manufacture of fireworks, nor the sale of any kind of fireworks, provided the same are to be shipped directly out of the state.

4. Sales of ammunition not prohibited. Nothing contained in this section shall be construed to prevent, or interfere in any

ay with, the sale of ammunition for revolvers or pistols of any ind, or for rifles, shot guns, or other arms, belonging or which ay belong to any persons whether as sporting or hunting eapons or for the purpose of protection to them in their homes, r, as they may go abroad; and manufacturers are authorized to ntinue to manufacture, and wholesalers and dealers to contin- e to deal in and freely to sell ammunition to all such persons r such purposes.

5. Notwithstanding the provisions of subdivision four of this ection, it shall be unlawful for any dealer in firearms to sell y ammunition designed exclusively for use in a pistol or re- olver to any person, not authorized to possess a pistol or re- olver. The violation of this section shall constitute a class B isdemeanor.

L.1965, c. 1030; amended L.1967, c. 791, § 48; L.1969, c. 709, § 1; L.1975, c. 840, § 1; L.1978, c. 286, § 1.

Historical Note

1978 Amendment. Subd. 1. L.1978, c. 286, § 1, eff. June 19, 1978, in sen- ce beginning "The provisions of" erred clause (3).

1975 Amendment. Subd. 2, par. (a). L.1975, c. 840, § 1, eff. Sept. 1, 1975, designated existing text as par. (a) and substituted "sell or furnish" for "possess or sell, or furnish, use, ex- plode or cause to explode".

Subd. 2, par. (b). L.1975, c. 840, § 1, eff. Sept. 1, 1975, added par. (b).

1969 Amendment. Subd. 5. L.1969, c. 709, eff. Sept. 1, 1969, added subd. 5.

1967 Amendment. Subd. 3. L.1967, c. 791, § 48, eff. Sept. 1, 1967, inserted "or for dog trials or dog training".

Derivation. Penal Law 1909 § 1894-a, added L.1940, c. 387; amended L.1941, c. 731, §§ 1 to 4; L.1942 c. 280; L.1942, c. 745, § 1; L.1943, c. 105, § 6; L.1948, c. 387; L.1950, c. 765; L.1953, c. 105; L.1955, c. 457; L.1959, c. 851; L.1965, c. 272.

Practice Commentary

By Arnold D. Hechtman

1969

In 1969, subdivision 5 was added (L.1969, c. 709) for the apparent purpose of prohibiting a dealer in firearms from selling handgun ammunition to persons not authorized to possess handguns. The provision exhibits a number of deficiencies. First, the prohibition is directed against a "dealer in firearms," a term not defined in Article 270. (Though the term is defined in § 265.00[9], that definition is applicable only to Articles 265 and 400). Second, the subdivision does not expressly require a culpable mental state, *i. e.*, there is no stated requirement that the dealer "know" that the buyer is not authorized to possess a handgun. However,

STATE OF NEW YORK
POLICE COURT: CITY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

NOTICE OF MOTION

VERA MICHELSON,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ANITA THAYER, of counsel to Walter and Thayer, attorney for defendant, the attached exhibits, and all the papers and proceedings herein a motion will be made on the 8th day of December 1981 at 1 p.m. or as soon as counsel can be heard at Albany City Police Court to be held at the Courthouse located at Morton and Broad Streets in the City and County of Albany, for an an order pursuant to C.P.L. § 170.30(1)(d) and § 170.30(1)(e) dismissing the violation informations lodged against the defendant on September 22, 1981 because the defendant has been denied a speedy trial and prosecution is now unlawful (C.P.L. § 30.10(1)(d) and Civil Rights Law § 10) and for such other and further relief as the Court deems just and proper.

DATED: December 8, 1981

Yours, etc.

ANITA THAYER, of counsel
WALTER & THAYER
Attorney for Defendant
69 Columbia Street
Albany, New York 12207
(518) 462-6753

TO: HON. SOL GRLENBERG
District Attorney of Albany County

CLERK, Police Court
City of Albany

STATE OF NEW YORK
POLICE COURT: CITY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

VERA MICHELSON,

Defendant.

AFFIDAVIT IN SUPPORT OF SPEEDY TRIAL MOTION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ANITA THAYER, being duly sworn deposes and says that the following statements are true:

1. I am an attorney duly admitted to the practice of law in the Courts of New York. My law firm has been retained to represent the defendant in this case. I am familiar with all the papers and proceedings in this case and I make this affidavit in support of defendant's speedy trial motion.

2. The defendant is charged with possession of fireworks in violation of P.L. § 270.00(2)(b)(i) and possession of marijuana in violation of P.L. § 221.05. Both charges are classified as violations.

3. C.P.L. § 30.30(1)(d) provides that a motion to dismiss must be granted if the people are not ready for trial within 30 days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation and none of which is a crime.

4. The charges against defendant must be dismissed because the People were not ready for trial within 30 days from the commencement of this criminal action for a violation pursuant to C.P.L. § 30.30(1)(d).

5. Defendant was arrested on September 22, 1981 and the criminal action was commenced on said date by the filing of two informations.

6. Defendant was arraigned without counsel on September 22, 1981. At arraignment defendant requested that she be allowed to make a phone call to retain counsel. This request was not granted.

7. Defendant did not appear in this Court again until October 6, 1981 when she made her first appearnace in this matter with counsel.

8. The period of time from September 22, 1981 to October 6, 1981 (15 days) is chargeable against the People. C.P.L. § 30.30(4)(b).

9. During this period defendant was illegally imprisoned in Albany County Jail from September 22, 1981 to September 24, 1981 without bail having been set at arraignment. His detention was a violation of C.P.L. § 170.10(7) and §530.20(1).

10. On October 6, 1981 defendant appeared by her attorney and directed to file any pre-trial motions by October 13, 1981. This period of time is not chargeable against the People.

11. On October 13, 1981 the People requested and received an adjournment for two weeks to respond to the motions. This period of time from October 13, 1981 to October 29, 1981 (17 days) is chargeable against the People.

12. On October 29, 1981 the defendant's case was adjourned upon the request of both parties.

13. A suppression hearing was scheduled for November 17, 1981. The period of time from October 29, 1981 to November 17th is not chargeable to the People.

14. On November 17, 1981 the defendant was ready to proceed with the suppression hearing. The People requested an adjournment over the objections of defendant to November 24, 1981. The People did this to deny defendant a court of proper jurisdiction and further, to deny defendant a speedy trial. This period of 8 days is chargeable against the People.

15. On November 24, 1981 the defendant and her attorney appeared in court and stated that she was ready to proceed with the suppression hearing. The matter was set down for December 8, 1981. This is a period of 14 days chargeable against the People.

16. The periods from November 17 to December 8, 1981, are clearly chargeable against the People. The convenience factor argued by the People for a joint suppression hearing before a County Court judge was clearly illegal and improper and does not fall within any of the excludable grounds in C.P.L. § 30.30(3), (4). It is black letter law that a writ of prohibition cannot be granted unless the petitioner has a "clear right to relief." See the decision of the Appellate

Division, Third Department, dated November 24, 1981, granting defendant a writ of prohibition against the joint hearing, a copy of which is attached hereto as Exhibit A, conclusively establishes and is res judicate that the adjournment during these periods of delay were occasional by the People for reasons which were clearly and completely meritless.

17. The periods chargeable against the People are summarized as follows:

Period of Time	No. of Days	Cummulative Days
9/22 - 10/6	15	15
10/13 - 10/29	16	31
11/17 - 11/24	8	39
11/24 - 12/8	13	52

18. No period of time stated above to be chargeable against the People are excludable pursuant to either C.P.L. § 30.30(3) or C.P.L. § 30.30(4).

19. Since more than 30 days chargeable against the People have passed since the commencement of the within action, the violation informations must be dismissed. This dismissal is mandatory. People v. Hamilton, 46 N.Y.2d 932 (1979).

20. Defendant further requests that if the computations within these motion papers are disputed by the People that the Court hold a fact-finding hearing. People v. Dean, 45 N.Y.2d 651 (1978).

Anita Thayer
ANITA THAYER

Sworn to before me this
8th day of December, 1981

NOTARY PUBLIC

Supreme Court--Appellate Division
Third Judicial Department

November 24, 1981

41689 - In the Matter of VERA MICHELSON et al.,
Petitioners,

v.

HON. JOHN CLYNE et al., Respondents.

Application, pursuant to CPLR article 78, for judgment in the nature of prohibition granted, without costs.

A superior court judge, even when sitting as a local criminal court, has no trial jurisdiction of a violation (CPL 10.30, subd. 3). A superior court judge is limited to preliminary jurisdiction in such a situation (CPL 10.20, subd. 2). In our view, a suppression hearing falls within the term trial jurisdiction (see CPL 1.20, subds. 24, 25; cf. CPL 170.15, CPL 710.50) which, in the case of a violation, is lodged exclusively in the local criminal court (CPL 10.30, subd. 1, par. [a]). Therefore, the respondent County Court Judge is without jurisdiction to preside at the hearing to be held on petitioners' motion to suppress.

MAHONEY, P.J., SWEENEY, KANE, CASEY and WEISS, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

VERA MICHELSON and AARON ESTIS,

Petitioners,

-against-

HON. JOHN CLYNE, HON. THOMAS W. KEEGAN, and HON. SOL GREENBERG,

Respondents.

ORDER TO SHOW CAUSE WITH APPLICATION FOR A STAY

Upon reading the annexed petition verified by Anita Thayer, Esq. and Lewis B. Oliver, Esq. for a writ of prohibition sworn to on the 19th day of November, 1981, the violation informations, and upon all proceedings had herein, let the respondents show cause before this Court at a motion term thereof to be held at the Justice Building, State Street, Albany, New York, on the 23rd day of November, 1981, why an order should not be made:

1. Prohibiting Hon. John Clyne from presiding at the suppression hearing of petitioners Michelson and Estis.

2. Directing Hon. Thomas W. Keegan to proceed in his Court with regard to defendants Michelson and Estis.

SUFFICIENT CAUSE THEREFOR APPEARING, it is hereby

ORDERED, that service of a copy of this order and supporting papers upon Hon. John Clyne, Hon. Thomas W. Keegan, and the office of the Albany County District Attorney, on or before the 20th day of November, 1981 at 5 o'clock shall be deemed good and sufficient service; and it is further