Circuit Court for Baltimore City
Case No. 116124001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2257

September Term, 2016

STATE OF MARYLAND

v.

QUANITA JOHNSON

Arthur,
Wright,
Albright, Anne K.
(Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: December 12, 2017

Appellant, the State of Maryland, challenges the Circuit Court for Baltimore City's dismissal of first degree assault and related charges against appellee Quanita Johnson for violation of her constitutional right to a speedy trial. We affirm.

BACKGROUND

On July 21, 2015 Ms. Johnson was charged by statement of charges in the District Court of Maryland for Baltimore City with first degree assault, conspiracy to commit first degree assault and lesser related offenses. The court issued a warrant for her arrest and she was arrested on November 11, 2015. She posted bail and was released the next day.

On December 10, 2015, 29 days after her arrest, Ms. Johnson appeared with defense counsel Ericka King for a preliminary hearing. The State nolle prossed the first degree assault charge. A January 21, 2016 trial was scheduled in the district court for the remainder of the charges. On entering her appearance, defense counsel filed an omnibus motion on behalf for Ms. Johnson. In it, she requested a speedy trial and discovery.

On January 21, 2016, 71 days after her arrest, Ms. Johnson appeared with Ms. King. Even though the alleged victim was present, the State wanted additional time to prepare for trial. The State represented that it was unaware of Ms. Johnson's discovery request and had not turned over discovery as yet, including the application for statement of charges, photographs, and Twitter posts received from the alleged victim. Further, the State wanted to subpoena the victim's medical records to determine "how severe" the injury to the victim's eye was. In the face of this request, Ms. Johnson "moved for a discovery violation," and prayed a jury trial. The State objected to the jury trial prayer and reiterated

that it was requesting a postponement to obtain the records. Thereafter, the case was transferred to the Circuit Court for Baltimore City for jury trial on February 22, 2016.

On February 22, 2016, 103 days after her arrest, Ms. Johnson appeared with Ms. King. The State indicated that its witnesses were present. That morning, it had produced "documents of standing witnesses," including the first responding officer, the incident report, and lab report, the "CAD report,"[1] and the "mobile run sheets." Nonetheless, the State represented that it was not seeking a postponement.

When Ms. Johnson moved to dismiss for discovery violations, the State indicated it was considering re-indicting Ms. Johnson for first degree assault. At the conclusion of a bench conference, the court declined to postpone the case or admit discovery produced that morning. About an hour later, after conferring with supervisors, the State nolle prossed the charges against Ms. Johnson, who asserted her right to a speedy trial.

On May 2, 2016, 173 days after Ms. Johnson's arrest, the State secured an indictment against Ms. Johnson, charging her again with first degree assault, conspiracy to commit first degree assault and lesser related charges. A warrant for her arrest was issued the next day. This indictment stemmed from the same underlying crime as was alleged in the original statement of charges. On August 4, 2016, the warrant was quashed in favor of a summons.

[1] A "CAD report" is a computer aid dispatch report used by police departments. *Prince George's Cty. v. Brent*, 414 Md. 334, 351 (2010).

On October 1, 2016, 325 days after Ms. Johnson's arrest, Ms. King entered her appearance again on behalf of Ms. Johnson. A November 1, 2016, trial date was scheduled, though it is not clear when.

On October 26, 2016, 350 days after Ms. Johnson's arrest, Ms. Johnson, through Ms. King, filed a motion to dismiss for violation of her constitutional rights to speedy trial. On October 28, 2016, the State requested a hearing, representing that it had not produced discovery because defendant had not retained counsel. But, Ms. King had signed the October 26, 2016 motion as "Attorney for Defendant," and the State's certificate of service certified that a copy had been mailed to Ms. King.

On November 1, 2016, 356 days after Ms. Johnson's arrest, Ms. Johnson appeared with Ms. King. The State was not prepared for trial. Ms. Johnson's speedy trial motion was referred to Judge Barry G. Williams. After hearing argument from the State and Ms. Johnson, Judge Williams granted the motion. The court said

> . . .[the] Court has had the opportunity to review the writings of both the State and the Defense that have been filed, or presented to the Court. Court will note a number of facts in order to make its assessment.
>
> And State, you're acknowledging that you're not ready for trial today; is that correct?
>
> Mr. Malik: Yes, Your honor.
>
> The Court: Okay. All right. All right. The Court has already made the determination that the period from, not the indictment itself, but the time frame from when the Defendant was arrested, November 11th, 2011 – I'm sorry, November 11th, 2015 – to this date is presumptively prejudicial. This Court does find that the length of that is of constitutional dimensions.
>
> Court will note that the reasons for the delay as follows based on what has been presented from the parties. That the Defendant went in front of the district court in December of 2015 facing felony charges. Those charges were reduced on that day, and the matter did

not proceed on that date but was postponed to November – I'm sorry, January 21st, 2016, where the Defendant was facing the charge of assault, second degree assault, and a deadly weapon.

The matter on that date was not postponed, and this Court does not need to get into the assessment as to whether or not there was a request for a postponement by the State, by the Defense. The Court will simply note that there was a request for a jury trial. That jury trial request was granted. And then, on February 22nd, 2016, matter came before the Circuit Court.

So as far as the reasons for postponement, Court is satisfied that on December 10th, 2015, by the State reducing the charges and placing it in front of a district court judge at some point, that the matter was postponed because of the action of the State, not the actions of the Defense. That postponement will be charged to the State.

On January 21st, 2016, Court does not consider that a postponement necessarily, but the matter was sent up to the circuit court at the request of the Defense, and the State had no control over that.

So on February 22nd, 2016, in front of the circuit court, the evidence that has been presented to this Court is that the State sought a postponement, and the postponement was denied. The information presented is that the victim was available. The issue is really whether or not the State was able to proceed. State was able to proceed. They chose not to. And they nolle prossed the case, which they had every right to do.

The Court is mindful of the fact that when there's a termination or reinstatement of prosecution, generally, it's , as far as the timing of it, the delay is from the time of the new charging document is considered. That's generally when the Defense is the reason for the dismissal of the charges. And when the State terminates a prosecution by entering a nolle prose and filing the new charge, the rule generally applies only if the State acted in good faith in entering the nolle prose.

Even if the State did act in good faith in entering the nolle prose, the time proceeding the new arrest and charging document can be considered in the due process analysis. Court is not necessarily at this point required to assess whether or not it was done – the actions of the State – were done in good faith, and I'll explain that in a moment.

This Court is satisfied that the State had the ability, and still has the ability, to charge any individual the way they choose. But on December 10th, 2015, they charged this Defendant with a felony and

made the determination to reduce those charges on December 10th 2015.

Between December 10th, 2015, and – yes, between December 10th, 2015, and February 22nd, 2016, there was no discussion of the State reinstating any felony charges. The Court does find it curious that, again, between December 10th, 2015, when this same State's Attorney's Office made the determination that the charges should be reduced, that it wasn't until May 3rd of 2016, after the circuit court did not allow a postponement and that the State did not have medical records, the State entered a nolle prose, that they determined not only to bring the misdemeanor charges back, but to reinstate the felony charges that they, on their own, dismissed. Court does not find that quite curious.

The Defendant, in February of 2016, was ready to go to trial on the misdemeanor charges, and the State elected, as their right to do, they elected to not proceed on those charges, and it wasn't again until May that now the Defendant is faced with felony charges once again. And the Court doesn't necessarily see how the State can reduce the charges of their own choosing, nolle prose the charges because they didn't get a postponement, reinstate charges, and then ask for felony charges to be added again. And they may have a right to do that, but the Court does find that aspect of it curious.

I do find clearly that on, at least in February of 2016, there was an assertion of the Defendant's right to a speedy trial, and I also note that on October 26th, 2016, another motion for a speedy trial was filed, and it was asserted.

As far as the actual prejudice to the Defendant, the information presented to the Court is that the Defendant, after having the charges dismissed in February, was placed on notice that new charges would be presented – were presented – in May, and that because of that, her cosmetology license – there's been a flag put on her cosmetology license. I do, certainly, consider that a prejudice to the Defendant.

Furthermore, in the – for over a year since the warrant was issued, but, certainly, since the arrest, almost a full year, certainly minds and memory of witnesses can change, can fade. It may be difficult to find witnesses. This court is satisfied that having looked at the information presented, that with the exception of the request for a jury trial, that there are no postponement requests by the Defense, and the reasons for delay – all reasons for delay in this case – are all on the State.

A period of effectively 355 days from the date of arrest to going to court, to having the charges dismissed, having the charges brought up, certainly, is a prejudice to the Defendant. And this Court,

> looking at the length of delay, the reasons for delay, they're all attributed to the State. The assertion of the speedy trial right and the actual prejudice from the delay on the part of the State, this Court is satisfied that the motion for a speedy trial is granted.

This timely appeal followed.

STANDARD OF REVIEW

In analyzing the dismissal of an indictment for violations of a defendant's constitutional right to a speedy trial, we use the "four factor balancing test announced by the U.S. Supreme Court in *Barker,*" *State v. Kanneh*, 403 Md. 678, 687 (2008) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). The four factors announced in *Barker* are the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant . . . . [None] of these factors are either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id*. at 688. They should be analyzed together considering relevant circumstances. *Id*. Before we reach these factors, however, "we must first determine whether the delay was of sufficient length to be deemed 'presumptively prejudicial,' because, unless 'there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.'" *Nottingham v. State*, 227 Md. App. 592, 613 (2016) (quoting *Barker*, 407 U.S. 514 at 530).

We review factual findings under a clearly erroneous standard. Facts in the record are viewed in the light most favorable to the party prevailing at the motions court level. *State v. Green*, 375 Md. 597, 607 (2003). Ultimately, we perform an independent constitutional appraisal. *Glover v. State*, 368 Md. 211, 220-221 (2002).

DISCUSSION

The State contends that dismissal was not warranted by the length of the delay or the reasons for it, that Ms. Johnson's speedy trial demand only "mildly" supported her claim, and that she was not actually prejudiced by the delay. On independent review of the record, however, including the above factors, we conclude that the length of the delay was presumptively prejudicial and that Ms. Johnson's speedy trial rights were violated.

I. Length of Delay

a. Calculating the Length of the Delay

To calculate the length of the delay, we must determine when Ms. Johnson's speedy trial right originally started and whether the May 2, 2016 renewal of the charges restarted the speedy trial clock. The motions court determined that Ms. Johnson's speedy trial right first started on November 11, 2015, the date of her arrest. Nonetheless, the State argues that the length of delay should be calculated from May 2, 2016. The State is incorrect.

Ordinarily, "for purposes of a speedy trial analysis, the length of the delay is measured from the date of arrest." *Kanneh*, 403 Md. at 688 (citing *Divver v. State*, 356 Md. 379, 388 (1999)). Where the State acted in good faith in deciding to terminate the charges in the first case, the speedy trial clock is deemed to restart with the resumption of charges in the second case. *See United States v. MacDonald*, 456, U.S. 1, 7 (1982); *State v. Henson*, 335 Md. 326, 329 (1994). On the other hand, if the State's decision to terminate the first case was not made in good faith, then the speedy trial clock begins at the outset of the first case. *Henson*, 335 Md. at 329.

Here, the motions court did not find good faith in the State's February 22, 2016 decision to nolle prose the first case and re-indict Ms. Johnson on May 2, 2016 in the second case. Instead, the motions court found it "curious" that after the State reduced the assault charge from felony first degree to misdemeanor second degree, it then re-charged Ms. Johnson on the felony assault that had been off the table for five months, and did so after it could not secure a postponement or avoid discovery sanctions. Thus, the motions court measured the length of the delay as 355 days[2], commencing with Ms. Johnson's arrest, not the day of her re-indictment.

That the motions court did not use the precise words "bad faith" in its estimation of the State's conduct is of no consequence, as we have concluded several times that circumvention of the court's rulings of the kind apparent here warrants starting the speedy trial clock at the outset of the case. *See, e.g., State v. Price*, 152 Md. App. 640, 655 (2003), *aff'd* 385 Md. 261 (2005)(affirming start of speedy trial clock at first appearance where nolle prose was entered to circumvent administrative judge's denial of good cause extension beyond *Hicks* and discovery sanction); *Alther v. State*, 157 Md. App. 316, 319-320, 336-37, *cert. denied*, 383 Md. 213 (2004)(finding circumvention and bad faith where the State nolle prossed two cases and refiled as one case after trial court denied State's motion to consolidate); *Wheeler v. State,* 165 Md. App. 210, 232-33 (2005)(finding circumvention and bad faith where State nolle prossed and recharged after judge had refused to grant the State's postponement request for more time to complete DNA

[2] As below, we calculate the date as 356 days. This one-day difference is immaterial.

analysis). Thus, whether the motions court termed the State's conduct "curious" or in "bad faith," its decision to start the speedy trial clock with Ms. Johnson's arrest on November 11, 2015 was not error.

b. Weighing the Length of the Delay

In weighing the length of the delay, " . . . '[t]here is no specific duration of delay that constitutes a per se delay of constitutional dimension.' *Lloyd v. State*, 207 Md. App. 322, 328 (2012) (citation omitted). Nonetheless, "a pre-trial delay greater than one year and fourteen days [has been found to be] 'presumptively prejudicial' on several occasions." *Glover*, 368 Md. at 223 (citing *Divver*, 356 Md. at 389-90); *See, e.g., State v. Ruben*, 127 Md. App. 430, 440 (1999) (deeming eleven-month delay in bringing charges, including those for attempted murder, to trial to be "of constitutional dimension"); *State v. Hiken*, 43 Md. App. 259, 272 (1979) ("firmly reject[ing] the State's contention" that a delay of nine months and 23 days in trying arson charges was "not of constitutional dimension").

Beyond the specific length of the delay, the court must also consider the nature of the charges. Thus, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. In cases involving less severe charges, shorter delays have been weighed against the State. *See, e.g., Divver*, 356 Md. at 390 (finding that a delay of one year and sixteen days for trying charges under the Traffic Article weighed against the State because "the delay is of uniquely inordinate length for a relatively run-of-the-mill District Court Case, [and trial] of the case to verdict on guilt or innocence presented little, if any, complexity."); *Carter v. State*, 77 Md. App. 462, 466 (1988) (finding that a delay of seven months and 25 days was

presumptively prejudicial in uncomplicated credit card misuse case); *Dorsey v. State*, 34 Md. App. 525, 533 (finding that an eleven-month delay in an uncomplicated drug case was prejudicial), *cert. denied*, 280 Md. 730 (1977).

Finally, the length of the delay is not to be weighed more heavily than the other factors. "[T]he duration of the delay is closely correlated to the other factors, such as the reasonableness of the State's explanation for the delay, the likelihood that the delay may cause the defendant to more pronouncedly assert his speedy trial right, and the presumption that a longer delay may" be more harmful. *Lloyd,* 207 Md. App. at 329 (citation omitted).

Here, 356 days elapsed between Ms. Johnson's arrest and the November 1, 2016 trial date. In the case, the State alleged that Ms. Johnson assaulted the victim, an acquaintance of Ms. Johnson's, by hitting her in the eye with a baseball bat. By the preliminary hearing, the State determined that the felony assault charge should be reduced to a misdemeanor. Thus, while medically serious, the case was not complex. It presented no issue of identification, and the State evaluated it for charge reduction rapidly.

Over the coming months, however, the State's explanation for the delay deteriorated. Notwithstanding its decision on February 22, 2016 to nolle pros the charges in the face of discovery sanctions, by November, the State had not produced discovery, instead representing that it could not identify Ms. Johnson's counsel even though she appeared with Ms. Johnson on three occasions between December 10, 2015 and February 22, 2016 and entered a line on October 1, 2016. Moreover, and whether as a consequence of the discovery failure or another reason, the State was no longer prepared for trial on November 1, 2016, unlike it had been months before. As a consequence, there was no

indication when the delay, already nearly a year and growing, was reasonably likely to cease.

Under these circumstances, the motions court concluded that the length of the delay was of constitutional dimension. On independent review, we do as well, and proceed to examine the reason for it.

II. Reason for the Delay

The *Barker* Court explained the reason-for-delay factor as follows:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531 (footnote omitted). To properly weigh this factor, we must address each postponement in turn.

December 10, 2015 to January 21, 2016

On December 10, 2015, at a preliminary hearing, the State reduced the charge from felony to misdemeanor assault. Ms. King entered her appearance on behalf of Ms. Johnson that day and represented that she was then prepared for trial. The Court then scheduled the matter for trial in the district court on January 21, 2016. The motion court attributed this delay to the State, finding that "[b]y the State reducing the charges and placing it in front of a district court judge at some point, . . . the matter was postponed because of the action of the State, not the actions of the Defense. That postponement will be charged to the State."

Given that December 10, 2015 was the preliminary hearing, we cannot conclude that this period of delay was attributable to the State. The matter was not scheduled for trial. Ms. Johnson asks us to infer that the case could have been moved to a trial calendar that day, but that inference, even if reasonable, does not mean the State should have anticipated a trial that day. Ultimately, this period of delay was due to ordinary case scheduling and not attributable to the State or Ms. Johnson.

January 22, 2016 to February 22, 2016

The motion court attributed this period of delay to Ms. Johnson as it was on January 21, 2016 that she prayed a jury trial. Ms. Johnson does not dispute this conclusion, and we adopt it.

February 23, 2016 to November 1, 2016

On February 22, 2016, the State represented that it was prepared for trial. The victim was present. When the State indicated it had discovery to turn over and Ms. Johnson objected to its use at trial as untimely, the State upped the ante by suggesting that it intended to reinstate the felony charge against her. After the court indicated it would neither admit evidence based on untimely discovery nor postpone the trial, the State nolle prossed the charges. The motion court attributed the period of delay that followed to the State. Here, the State correctly conceded that this period of delay should be attributed to it. Thus, of the 356-day delay between Ms. Johnson's arrest and November 1, 2016, all but the first 103 days is attributed to the State.

III. Ms. Johnson's Assertion of Her Speedy Trial Right

In evaluating claims for deprivation of the right to speedy trial, "[w]hether and how a defendant asserts his right is closely related to the other factors[.]" *Barker*, 407 U.S. at 531. The strength of a defendant's assertion, and not just its occurrence, may "indicate whether the delay has been lengthy and whether the defendant begins to experience prejudice from the delay." *Glover*, 368 Md. at 228 (citation omitted). A "defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 531–32.

Here, although the State contends that Ms. Johnson only asserted her right to a speedy trial once, the record discloses otherwise. On December 11, 2015, Ms. Johnson included a demand for a speedy trial in her omnibus motion in the district court. Then, on February 17, 2016, she filed a motion for a speedy trial in the circuit court.

Beyond these explicit assertions of her speedy trial rights, Ms. Johnson implicitly asserted her speedy trial right over and over. In *Lloyd*, the defendant only asserted his right to a speedy trial in a pretrial omnibus motion. 207 Md. App. at 332. The Court noted that he did not object to the State's request for a postponement and that the explicit assertion therefore only slightly weighed in his favor. *Id*. Here, by contrast, Ms. Johnson was ready for trial on the preliminary hearing date, then demanded a jury trial when the court was about to postpone the case, then opposed postponement in circuit court (in February and in

November) and moved for dismissal. In short, because Ms. Johnson asserted her speedy trial right repeatedly, this factor weighs in her favor.

IV. Prejudice to the Defendant

In evaluating speedy trial claims, we consider presumptive and actual prejudice. The presumptive prejudice that triggered constitutional review " . . . always remains a factor to be weighed in the balance, because no one circumstance, such as the lack of actual prejudice, is controlling in deciding whether the defendant has been denied a speedy trial. All pertinent factors, including the presumption of prejudice, must be considered." *State v. Bailey*, 319 Md. 392, 415 (1990). Actual prejudice, by contrast, " . . . encompasses three interests that the right to a speedy trial was designed to preserve." *Kanneh*, 403 Md. at 693. These are

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532 (footnote omitted). While the court may accept a detailed proffer to establish actual prejudice, bald allegations are insufficient. *Bailey*, 319 Md. at 417. Here, the court found that Ms. Johnson was prejudiced because her cosmetology license had been flagged and that memories had faded.

As to Ms. Johnson's cosmetology license, the State contends that without more detail about the consequences, a "flag" does not amount to actual prejudice. Of course, " . . . anxiety suffered by an accused . . . ." can constitute actual prejudice in the speedy trial context. *See Lewis v. State*, 71 Md. App. 402, 419 (1987). Ms. Johnson's counsel

represented that " . . . she has a license of cosmetology. A flag has been placed against her license, because this case was reopened. So she is not able to practice right now as a licensed cosmetologist because the State of Maryland has placed a flag against her license." Based on this proffer, which was more than a bald allegation, the motion court's inference that Ms. Johnson was actually prejudiced was not clearly erroneous.

With regard to "faded memories," however, the answer is different. Ms. Johnson's counsel represented that " . . . [m]ore than that, there has been no communication between the complaining witness and my client. There was no relationship. There's still no relationship. Over a year has passed. Memories are not as accurate. Witnesses aren't as readily available." What Ms. Johnson did not make clear was how the testimony changed, who the unavailable witnesses were, or what they might say. Nor was it clear, given Ms. Johnson's lack of contact with the complainant, how Ms. Johnson would have known the complainant's memory was not as accurate. Without these details, Ms. Johnson's proffer amounted to no more than a bald allegation of actual prejudice and should not have factored into the motion court's analysis.

Notwithstanding the motion's court error, we conclude that, along with the presumptive prejudice outlined above, Ms. Johnson was also actually prejudiced by the delay. Accordingly, we weigh this factor against the State.

V. Balancing the Factors

On independent review, all four *Barker* factors weigh in favor of dismissal. The 356-day delay was long enough to trigger constitutional scrutiny and weighs in favor of Ms. Johnson. The reasons for the delay were correctly charged to the State. Ms. Johnson

asserted her right to a speedy trial and she was prejudiced by the State's ultimate inability to prosecute these charges in a timely manner.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.