Circuit Court for Caroline County
Case No. C-05-CR-18-000283

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 107

September Term, 2019

BRITTANY RENA WILSON

v.

STATE OF MARYLAND

Graeff,
Reed,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 27, 2020

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

On March 28, 2019, following a bench trial in the Circuit Court for Caroline County, Brittany Wilson, appellant, was convicted of possession of fentanyl and possession of paraphernalia. The court sentenced her to six months, all but one day suspended, with supervised probation including drug treatment.

On appeal, appellant raises one question for this Court's review, which we have rephrased as follows:

> Was appellant denied her right to a speedy trial?

For the reasons set forth below, we answer that question in the negative, and therefore, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts relating to the crimes are not relevant to the sole issue on appeal. Accordingly, we note only that appellant was arrested with two other individuals after the car she was driving matched the description of one used by perpetrators of a burglary. A search of the vehicle revealed gel capsules, which were originally believed to be heroin but later determined to be fentanyl.

On January 15, 2018, appellant was arrested and charged in the District Court of Maryland for Caroline County in Case No. D-036-CR-18-000033 ("first case"), with

multiple counts, including controlled dangerous substance offenses.[1] She spent one night in jail and was released on bond.

On March 15, 2018, the District Court held a preliminary hearing. It dismissed the first-degree burglary count as not supported by probable cause.

On April 17, 2018, appellant appeared for trial with assigned counsel and asserted her right to a speedy trial. Because the State recently had determined that the gel capsules contained fentanyl, not heroin, it sought to amend the criminal information. Appellant opposed the motion, and the State entered a *nolle prosequi* ("first *nol pros*") of all the charges.

On April 30, 2018, thirteen days later, the State filed a new criminal information, District Court Case No. D-036-CR-18-000307 ("second case"), charging appellant with, among other things, possession of fentanyl and possession of paraphernalia. Appellant appeared for a preliminary hearing on June 5, 2018.

At the July 9, 2018, trial date, appellant appeared with assigned counsel and asserted her right to a speedy trial. The State, for reasons explained *infra*, entered a *nolle prosequi* ("second *nol pros*") as to all the charges.

On August 16, 2018, thirty-eight days later, the State again charged appellant, District Court Case No. D-036-CR-18-000582 ("current case"), with possession of fentanyl

[1] We draw the procedural facts from the background section of the defense speedy trial motion to dismiss, as supplemented in the State's opposition to the motion to dismiss, the docket entries on Maryland Judiciary Case Search, and the record of the hearing on the speedy trial motion. The parties do not dispute any of these underlying facts and proceeded by proffer at the hearing.

and possession of paraphernalia. The court held a preliminary hearing on September 25, 2018, and scheduled trial for October 29, 2018.

On her trial date, appellant appeared without counsel and prayed a jury trial. The case was transferred to the Circuit Court for Caroline County, where a status hearing was scheduled for February 13, 2019, and trial was set for February 22, 2019. Appellant appeared for the status hearing without counsel and was advised that she would need to reapply to the Office of the Public Defender. The February 22, 2019, trial date was converted to a status hearing, and trial was postponed until March 28, 2019.

On March 6, 2019, appellant, through counsel, moved to dismiss the charges based on a violation of her right to a speedy trial. The State opposed the motion.

On March 14, 2019, the court held a hearing on the motion. Defense counsel argued that the 287-day delay between appellant's initial appearance in the District Court in the first case (March 15, 2018) and the trial date in the District Court in the current case (October 29, 2018) was an unconstitutional delay in violation of the Sixth Amendment to the United States Constitution, requiring dismissal of the charges.

The prosecutor disagreed. She stated that the first *nol pros* was due to the criminal information charging appellant with possession of heroin, which was incorrect, and defense counsel declining to agree to an amendment. With respect to the second *nol pros*, the prosecutor acknowledged that it was "more troublesome" because the State recharged the drug counts without any change. She represented that she had intended to *nol pros* the theft and malicious destruction counts because an investigation had revealed that it would

be difficult for the State to meet its burden on those charges, but she "accidentally *nolle prosed*" the drug charges as well. The prosecutor stated that she had been "ready to go" on the drug charges on that date.

The court held the matter *sub curia* and scheduled a status hearing for March 21, 2019. On that date, the court denied the motion to dismiss. After recounting the procedural history, the court first addressed the length of delay. Although defense counsel suggested that it was 287 days, from the date of arrest on January 15, 2018, until October 29, 2018, when appellant prayed a jury trial, the court found that, at the "very longest," the "period of delay" was from April 17, 2018 (the date the first *nol pros* was entered) to October 29, 2018 (the date appellant prayed a jury trial in the current case), which was 195 days.[2]

With respect to the reasons for the delay, the court found that the portion of delay from April 17, 2018, to July 9, 2018, was "attributable to the policy of recharging," when drug analysis revealed the drugs seized were fentanyl, and the entry of the first *nol pros* was "the only available route at that point." The delay from July 9 to October 29, 2018, was "the most troublesome" because "there presumably could have been a trial on the now correct drug charges and there was not." The court found that three-and-one-half months weighed against the State, but it found that there was no evidence that the State entered the *nol pros* for any "nefarious" reason or that it was "recharging just to harass [appellant] or to cost her money or to get her to lose her bond[.]"

[2] The court stated that defense counsel conceded that any delay after October 29, 2018, was not chargeable to the State.

With respect to appellant's assertion of her right to a speedy trial, the court found that appellant had asserted her right at the trial date in the first case and the second case, which weighed in her favor. In terms of prejudice to appellant, however, the court found that she spent less than 24 hours in jail, there was no evidence that her defense had been impaired by the delay, and although she may have suffered some anxiety about the pending charges, the prejudice to her was minimal. On balance, the court concluded that appellant failed to meet her burden to show that her request to a speedy trial was violated. Accordingly, the court denied the motion to dismiss.

DISCUSSION

Appellant contends that the circuit court erred in denying her motion to dismiss based on a violation of her right to a speedy trial. The State disagrees, asserting that appellant was not denied her constitutional right to a speedy trial.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Supreme Court adopted "a balancing test . . . in which the conduct of both the prosecution and the defendant are weighed[,]" and enunciated four factors to be balanced by a court: "[l]ength of delay, the reason for the delay, the defendant's assertion of his [or her] right, and prejudice to the defendant." (Footnote omitted.) The Court explained that the first factor "is to some extent a triggering mechanism" because, "[u]ntil there is some delay which is presumptively

prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id*.

On review of the denial of a speedy trial motion, this Court accepts the trial court's findings of fact unless clearly erroneous. *Glover v. State*, 368 Md. 211, 221 (2002). We conduct "our own independent constitutional analysis[,]" however, of the trial court's application of the balancing test to those facts. *Id*. at 220.

A.

Length of delay

To assess the length of the delay, we must identify when the right to a speedy trial was triggered. The length of delay generally is measured from the date of arrest or the filing of formal charges, whichever comes first. *See Wheeler v. State*, 88 Md. App. 512, 518 (1991). The end date is the first day of trial. *See Ratchford v. State*, 141 Md. App. 354, 358 (2001) (discussing the bookends for a "length of delay" analysis). Using this analysis, appellant contends that, based on her arrest on January 15, 2018, and her trial on March 28, 2019, there was a "delay exceeding thirteen months."

Where, however, as here, the State *nol prosses* charges and later recharges the defendant with the same crimes, the length of delay calculation is more nuanced. In that situation, "so long as the State acts in good faith, the *nolle prosequi* terminates the original prosecution, and the speedy trial clock starts anew from the date of the filing of the new charging document." *Nottingham v. State*, 227 Md. App. 592, 614 (2016). *Accord State v. Henson*, 335 Md. 326, 338 (1994). The State terminates a prosecution in "good faith"

when it "does not intend to circumvent the speedy trial right, and the termination does not have that effect." *Henson*, 335 Md. at 338. *Accord Greene v. State*, 237 Md. App. 502, 514 (2018).

In addressing the length of delay in this case, we set forth the pertinent dates as follows:

January 15, 2018	Appellant arrested and charged in first case
April 17, 2018	State enters first *nol pros*
April 30, 2018	Appellant charged in second case
July 9, 2018	State enters second *nol pros*
August 16, 2018	Appellant charged in current case
October 29, 2018	Appellant prays a jury trial; case transferred to circuit court
February 22, 2019	Appellant's trial date continued because she is unrepresented
March 21, 2019	Speedy trial motion denied
March 28, 2019	Appellant tried and convicted at bench trial

The first time period to consider is the three-and-a-half months between appellant's arrest on January 15, 2018, and the charges in the second case, after the State's first *nol pros*, on April 17, 2018. The parties agree that the court implicitly found that this *nol pros* was made in good faith because, at that time, the labs showed that the State had charged appellant with possessing the wrong substance, and the State needed to recharge for possession of fentanyl rather than heroin.

The record supports the circuit court's finding in this regard. Accordingly, the period of time from appellant's arrest on January 15, 2018, to the charges in the second case on April 30, 2018, is not included in the speedy trial analysis.

As indicated, the State again *nol prossed* the charges on July 9, 2018. The prosecutor stated that she intended to *nol pros* only the non-CDS charges, but she accidentally *nol prossed* the entire case. The trial court did not make an explicit finding of good faith with respect to the second *nol pros*.

It did ask defense counsel at the March 14, 2019, hearing if he was arguing that the prosecutor entered the second *nol pros* "for some malicious purpose" or "to gain some advantage over [appellant.]" Defense counsel replied that he was "not arguing . . . [i]t was done maliciously." The court found that the second *nol pros* was entered by accident in conjunction with the *nol pros* of the theft and malicious destruction of property counts, and although the "details were a little murky" as to why the prosecutor did not immediately recognize her mistake, it found that the second *nol pros* was not entered for a "nefarious" purpose. The court stated, however, that the "accidental *nolle prose* . . . certainly starts the clock ticking."

We agree with the circuit court's analysis. Although there was no evidence that the second *nol pros* was entered to subvert appellant's speedy trial rights, the trial court implicitly found that the State was negligent in dismissing the drug charges. As this Court stated in *Lee v. State*, 61 Md. App. 169, 175–76, *cert. denied*, 303 Md. 115 (1985), "good faith" in the context of bringing a case to trial presupposes diligence, and negligence is

relevant in addressing whether a prosecutor acted in good faith. The trial court properly found that the State's negligence was sufficient to "start the clock ticking."

Thus, the length of the delay for speedy trial purposes runs from April 30, 2018 (the date appellant was charged in the second case) to March 28, 2019 (the date she was tried in the current case), which amounts to almost 11 months. Given the relatively uncomplicated charges, this length of delay is of constitutional dimensions, but only barely so. *See Barker*, 407 U.S. at 530–31 (reasoning that "the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case" and that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"); *Carter v. State*, 77 Md. App. 462, 466 (1988) (7 month, 25 day delay in credit card misuse case was of constitutional dimension); *State v. Statchuk*, 38 Md. App. 175, 177 (1977) (10-month, 21-day delay in a false reporting case is "borderline" but sufficiently lengthy to trigger analysis of the remaining *Barker* factors), *cert denied*, 282 Md. 739 (1978).

This length of delay, although triggering the *Barker* balancing analysis, is not an unduly long delay. And as noted, the length of delay often is "the least conclusive of the four factors." *Glover*, 328 Md. at 225. We thus turn to the other factors.

B.

Reasons for the Delay

> The reasons for delay are assigned different weights.
>
> 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.

State v. Kanneh, 403 Md. 678, 690 (2008) (quoting *Barker*, 407 U.S. at 531 (footnote omitted)).

Here, the time from April 30, 2018, the filing of the criminal information in the second case, to October 29, 2018, when appellant prayed a jury trial, weighs against the State, based on its accidental *nol pros* of the drug charges. Because this six-month delay was a result of negligence, however, it is weighted less heavily.

With respect to the remainder of the delay, we agree with the trial court that this delay was not attributable to the State. The five-month delay between October 29, 2018, when appellant requested a jury trial, and the circuit court bench trial on March 28, 2019, weighs against appellant.

Ultimately, this factor is given little weight because the delay caused by the State and the appellant was similar.

C.

Assertion of the Right to a Speedy Trial

"The defendant's assertion of his [or her] speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531–32. We must "weigh [both] the frequency and force of the objections." *Id.* at 529. Here, the parties stipulated, and the trial court found, that appellant

asserted her right to a speedy trial. Appellant's actions, however, in causing a delay by requesting a jury trial, and then waiving her right to a jury trial in circuit court, "casts some doubt upon the sincerity of appellant's demand for a speedy trial." *Carter*, 77 Md. App. at 469. This factor weighs in appellant's favor, but only slightly.

D.

Prejudice to Appellant

Prejudice is weighed in light of the following "interests that the right to a speedy trial was designed to preserve:"

> (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.

Kanneh, 403 Md. at 693 (quoting *Barker*, 407 U.S. at 532).

Here, the circuit court found that appellant spent one night in jail, and she does not argue this as prejudice in her brief. There was no evidence that the delay in any way hampered her defense, which turned on testimony of the police officers who arrested her and searched her vehicle, as well as lab results. The trial court found that the only prejudice to appellant arose from anxiety and/or inconvenience caused by the recharging. Allegations of generalized anxiety are accorded little weight. *See Wheeler*, 88 Md. App. at 525. The circuit court properly found that any prejudice to appellant was minimal. This factor carries little weight.

E.

Balancing

The circuit court properly determined that, on balance, appellant has not met her burden of showing a speedy trial violation. The total delay was not long and barely of constitutional dimension, the parties were almost equally responsible for the delay, and there was minimal evidence of prejudice to appellant. The circuit court did not err in denying appellant's motion to dismiss the charges for violation of her right to a speedy trial.

JUDGMENTS OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.