

Circuit Court for Harford County
Case No.: C-12-CR-18-000443

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 675

September Term, 2019

WILLIAM BURKINS

v.

STATE OF MARYLAND

Kehoe,
Gould,
Kenney, James A. III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: December 11, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant William Burkins entered a conditional guilty plea in the Circuit Court for Harford County to one count of robbery. The court sentenced him to fifteen years of incarceration, all but four years suspended, to be followed by three years of probation.

Mr. Burkins presents us with the following question: Did the trial court err in denying the defense motion to dismiss for lack of a speedy trial? Finding no error, we affirm.

FACTS AND PROCEEDINGS

Because the facts of the underlying offense are not germane to our analysis of the issues, we do not recite them in detail, other than to note that the charges arose from allegations that Mr. Burkins stole a cash register drawer containing \$795.00 from the drive-thru window of a Taco Bell restaurant.

On February 6, 2019, the day Mr. Burkins's trial was scheduled to begin in the circuit court, Mr. Burkins was not transported to court by the Division of Corrections.

Defense counsel reported to the court:

[DEFENSE COUNSEL]: . . . Mr. Burkins was here on October 10th. I talked to Mr. Burkins. I talked to the Division of Corrections. I said, [h]e'll be coming back for trial on February 6th. I went back to my office. I gave my secretary a note to writ for today's date and, according to Ms. Impallaria, the writ never made it into our computer system. That could have been my secretary's fault. It could have been my fault. But highly unlikely. She's usually pretty good about that kind of thing. So my guess is our computer system has failed us. DOC partly has failed us. But he's not here.

THE COURT: Ok. Any comment, [prosecutor]?

[PROSECUTOR]: No, Your Honor. I believe had he been here we would have been able to work this out.

[DEFENSE COUNSEL]: That's correct, Your Honor.

THE COURT: All right. This is what we're going to do. I'm the designee of the administrative judge for criminal postponement matters today because I am the primary criminal judge. I do find good cause to postpone this matter. We don't have the ability to begin a trial unless the defendant is present. It appears that both sides did what they needed to do to try to ensure Mr. Burkins'[s] presence. The [c]ourt is unable to adequately express the mysteries of computer transmittal of any type of document. Therefore, we are simply going to find good cause for this postponement. I'm going to charge the postponement to neither side, as apparently everyone did what they could do to get Mr. Burkins here. We do have the problem that the *Hicks* date in this case is February 20th, 2019, but that cannot be further addressed without the defendant being present.

So the matter is postponed for good cause and if counsel would agree on a new date.

[DEFENSE COUNSEL]: June 13th, Your Honor.

THE COURT: Okay. So we need to - - I don't know what belt and suspenders approach can be taken to ensuring Mr. Burkins'[s] presence next time but I would suggest everyone do the best they can.

Mr. Burkins's trial was rescheduled for June 13, 2019. On March 4, 2019, Mr. Burkins's counsel filed a motion to dismiss for lack of a speedy trial. On April 8, 2019, Mr. Burkins filed a *pro se* motion to dismiss, accompanied by a letter to the court, explaining his objection to the continuation of his trial beyond the *Hicks* date of February 20, 2019.

Prior to trial, the court held a hearing on the motion to dismiss. Mr. Burkins's counsel argued that Mr. Burkins's case must be dismissed because the delay caused by the rescheduling of his trial violated both *Hicks* and his constitutional right to a speedy trial. Mr. Burkins's counsel explained that Mr. Burkins was not present for the start of trial on February 6, 2019 because a writ had not been issued for his attendance in court. He argued that it was an abuse of discretion for the designee of the administrative judge to find good cause to postpone Mr. Burkins's trial date where Mr. Burkins's absence was due to "the

court system’s negligence,” and the trial could not be scheduled for a date prior to the expiration of the *Hicks* deadline on February 20, 2019.

The court denied Mr. Burkins’s motion to dismiss on the grounds of a *Hicks* violation, explaining:

Well, notwithstanding the allegation that there was some negligence by the court, by the Clerk’s Office in requesting a writ, Judge Bowen did find good cause and I don’t find that to be an abuse of discretion. In order to sustain a *Hicks* motion, you have to find a lack of good cause either for the postponement itself, which I do not find lack of good cause, or to the extent of the delay after the postponement, and I find that there was good cause for setting the date when it was set as that was the first date that both of you were available to try the case. So I’m going to deny your motion with respect to the lack of speedy trial due to *Hicks*.

Mr. Burkins’s counsel also argued that Mr. Burkins’s constitutional speedy trial rights were violated as a result of the delay of his trial. According to Mr. Burkins, there was a delay of 318 days between the date of Mr. Burkins’s arrest on July 30, 2018, and his scheduled trial date of June 13, 2019. Mr. Burkins’s counsel argued that Mr. Burkins was prejudiced as a result of the delay:

Mr. Burkins was serving a sentence, an 18-month sentence, in the DOC for another matter, I believe, from Baltimore County. Parole approached him and told him but for the pending matter he would be released on parole in that case.

Since the February 6th trial date that was missed, in addition to not being paroled in a timely fashion, Mr. Burkins has also suffered from serious medical issues. He had a broken jaw that he’s just recently recovered from. Prior to that he was stabbed in the head with six stitches on his head. So he suffered a great deal in that intervening time in part due to the fact that he wasn’t brought on February 6th for trial. So I would argue that he has suffered some prejudice as a result of this delay in this trial and I would argue that constitutional speedy trial rights should apply in this case.

The court denied Mr. Burkins’s motion to dismiss, finding that Mr. Burkins’s constitutional speedy trial rights were not violated:

[T]o begin with, the length of delay, in and of itself, is not of constitutional dimension. But as you said, something less could be considered, but in this particular matter I don’t see that the length of the delay here rises to create a constitutional violation.

The second part of that is, you know, what caused the delay. Well, it’s attributable to the State[,] but is it deliberate or is it accidental? I mean, I have to find that the reason for not having him here was accidental. There’s no evidence it was deliberate[,] and I would make that a neutral delay, even though it would be charged to the State. I haven’t heard anything about how and when, except for today, that the defendant has asserted his right to a speedy trial. That is another factor.

And the prejudice that you’re talking about is prejudice that he has suffered because he’s incarcerated on another matter. Well, you know, those things happen when you’re incarcerated, physical altercations and the like . . . So I’m not quite sure I follow how the fact that -- I guess, is it your argument that he would have been tried on that case and found not guilty? I mean, that’s pretty speculative.

I don’t know what the facts are of the case but I can’t give any great weight to any of the factors you’ve raised here today, [defense counsel] . . . So I’ll deny the motion on both bases, both the *Hicks* and the constitutional dimension.

Following the denial of his motion to dismiss, Mr. Burkins entered a conditional guilty plea to one count of robbery.

This appeal followed.

DISCUSSION

I.

THE *HICKS*¹ RULE

Section 6-103(a) of the Criminal Procedure Article (“CP”) of the Maryland Code (2001, 2018 Repl. Vol.) and Maryland Rule 4-271 require that a criminal trial be set within 180 days of the first appearance of defense counsel or the first appearance of the defendant without counsel before the circuit court, whichever occurs first. The 180-day requirement is “mandatory,” and “dismissal of the [case] is the appropriate sanction where the State fails to bring the case to trial” within the 180-day period, absent “‘extraordinary cause’ justifying a trial postponement[.]” *State v. Hicks*, 285 Md. 310, 318 (1979).²

The *Hicks* rule is intended to protect society’s interest in the effective administration of justice; any associated benefits to criminal defendants are merely incidental. *State v. Prince*, 385 Md. 261, 278 (2005). “[U]nlike the Sixth Amendment speedy trial guarantee, the *Hicks* rule is a statement of public policy, not a source of individual rights.” *Choate v. State*, 214 Md. App. 118, 140 (2013).

Mr. Burkins does not challenge the trial court’s finding of good cause to postpone his trial on February 6, 2019, recognizing that “the court could not go forward with a criminal trial without the defendant.” Mr. Burkins asserts, however, that the postponement of his trial to June 13, 2019 resulted in inordinate delay. Mr. Burkins contends that the

¹ *State v. Hicks*, 285 Md. 310 (1979).

² We shall refer to CP § 6-103(a) and Md. Rule 4-271 collectively as “the *Hicks* rule.”

trial court’s failure to inquire as to the reason the parties proposed a trial date that was four months beyond the *Hicks* date amounted to a failure to exercise its discretion.

The State counters that Mr. Burkins’s “inordinate delay” argument is not preserved because it was not raised below. Even if preserved, the State argues that this Court should not consider Mr. Burkins’s argument because it is inconsistent with the representation made by Mr. Burkins’s counsel before the circuit court. In the alternative, the State contends that the scheduling of Mr. Burkins’s trial beyond the *Hicks* date was not improper because the trial date of June 13, 2019 was agreed upon by both parties, based on counsels’ availability.

Maryland Rule 8-131(a) provides that: “[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]” “The primary purpose of Rule 8-131(a) is to ensure fairness for all parties in a case . . . which is accomplished by requiring [them] to bring [their positions] to the attention of the [trial] court so that the trial court has an opportunity to rule upon the issues presented.” *Wajer v. Baltimore Gas and Elec. Co.*, 157 Md. App. 228, 236-37 (2004) (internal quotations and citation omitted).

Following the rescheduling of his trial, Mr. Burkins notified the court by letter that he objected to the postponement of his trial beyond the *Hicks* date. Mr. Burkins and his counsel each submitted a motion to dismiss arguing that the postponement of the trial was a *Hicks* violation warranting dismissal of all charges. At the hearing on the motions to dismiss, the court stated:

In order to sustain a *Hicks* motion, you have to find a lack of good cause either for the postponement itself, which I do not find lack of good cause, or **to the extent of the delay after the postponement, and I find that there was good cause for setting the date when it was set as that was the first date that the both of you were available to try the case.**

(Emphasis added).

It is evident from the trial court’s ruling that it considered the extent of the delay caused by the postponement of Mr. Burkins’s trial date. Because the issue was both raised in, and decided by, the trial court, it is preserved for our review. *See Tunnell v. State*, 466 Md. 565, 581 (2020) (concluding that the “purpose of the preservation requirement was adequately served” where the parties and the court were aware that the issue of compliance with the *Hicks* rule was a potential appellate issue, and neither the State nor the circuit court were “sandbagged” by the issue).

A decision by the administrative judge to postpone trial beyond the *Hicks* date is afforded “wide discretion” and carries a “heavy presumption of validity.” *Fields v. State*, 172 Md. App. 496, 521 (2007). “The issue of inordinate delay is also reviewed under an abuse of discretion standard.” *Tunnell*, 466 Md. at 589 (citing *State v. Brown*, 355 Md. 89, 98 (1999)). It is the defendant’s burden to demonstrate that that a delay was excessive, in light of all the circumstances in the case. *Id.* (citing *Rosenbach v. State*, 314 Md. 473, 479 (1989)).

Mr. Burkins argues that the circuit court judge abused her discretion by failing to ask the parties why they had proposed a trial date that was four months after the *Hicks* date. We are aware of no authority requiring the administrative judge or her designee to inquire as to the reason for the date selected. Indeed, the authority cited by Mr. Burkins is to the

contrary. *See Rosenbach*, 314 Md. at 478–80 (rejecting the defendant’s argument that the postponing judge must assume “active personal responsibility for resetting the case,” and holding that the *Hicks* rule “do[es] not require that the administrative judge or that judge’s designee to . . . postpone a case to some specific future date”).

The Court of Appeals explained in *Hicks* that, where a defendant or defense counsel has consented to a trial date beyond the *Hicks* date, dismissal is an inappropriate sanction. 285 Md. at 335-36 (noting that it would be “entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation”); *accord Woodlock v. State*, 99 Md. App. 728, 738 (1994) (“Where counsel, being aware of the [*Hicks*] Rule, consents to a trial date beyond the limitations set by the Rule, dismissal would be an inappropriate sanction for non-compliance.”).

The record shows that Mr. Burkins’s counsel consistently represented that June 13, 2019 was the first date that he and the prosecutor were both available for trial. At the April 26, 2019 hearing, Mr. Burkins’s counsel informed the circuit court that June 13, 2019 was selected because “that was the earliest date that [he and the prosecutor] were able to come up with from our calendars.” On May 29, 2019, Mr. Burkins’s counsel again represented to the trial court that he “wanted the matter set as quickly as possible. So June 13th was the earliest we could do it.” Thus, it appears from the record that June 13, 2019 was the first available date agreed upon by both counsels.

Mr. Burkins provides us with no basis to conclude that the delay was excessive under the circumstances of the case. As the delay appears to be the result of the parties’ calendars, Mr. Burkins failed to satisfy his burden of showing that the length of the delay

violated the *Hicks* rule. *See Tunnell*, 466 Md. at 138-39 (holding that a 125-day postponement to a trial date 41 days after the *Hicks* date was not inordinate, where the defense failed to articulate why such a delay was excessive).

II.

THE STATE DID NOT VIOLATE BURKINS'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

Mr. Burkins contends that his constitutional right to a speedy trial was violated due to the delay of 318 days, or almost eleven months, from the date of his arrest until the date of his trial. The State argues that the delay in Mr. Burkins's case did not trigger constitutional scrutiny. Alternatively, the State argues that the circuit court properly denied Mr. Burkins's motion to dismiss because the delay did not violate his constitutional right to a speedy trial.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant's right to a speedy trial. *See* U.S. CONST. amend. VI; MD. CONST., DECL. RIGHTS, art. 21; *see also Phillips v. State*, 246 Md. App. 40, 55-56 (2020). 18; *Divver v. State*, 356 Md. 379, 387-88 (1999).

The United States Supreme Court has established a four-factor balancing test to assess whether a defendant's right to a speedy trial has been violated. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). These four factors include: “[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.” *Id.* at 530; *State v. Kanneh*, 403 Md. 678, 688 (2008). “[N]one of the four factors . . . [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.

Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Jules v. State*, 171 Md. App. 458, 482 (2006) (internal quotations omitted) (quoting *Barker*, 407 U.S. at 533).

In reviewing a claim for a violation of the right to a speedy trial, we make “our own independent constitutional analysis” to determine whether this right has been denied. *Howard v. State*, 440 Md. 427, 447 (2014) (internal quotations omitted) (quoting *Glover v. State*, 368 Md. 211, 220 (2002)). “We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a [trial] court’s findings of fact unless clearly erroneous.” *Glover*, 368 Md. at 221.

Before conducting the analysis using the *Barker* factors, we must first determine whether the length of the delay is so presumptively prejudicial that it warrants constitutional review. *See Barker*, 407 U.S. at 530; *Phillips*, 246 Md. App. at 56. Although there is no specific duration that constitutes a “delay of constitutional dimension,” delays in excess of one year have been considered “presumptively prejudicial” and warranted a full analysis. *See Glover*, 368 Md. at 223-24; *Kanneh*, 403 Md. at 688. Delays of less than six months often fail to meet the threshold for constitutional review. *See e.g., Collins v. State*, 192 Md. App. 192, 213-14 (2010) (delay of five months was not “of constitutional dimension”).

In this case, the delay of almost eleven months from the date of Mr. Burkins’s arrest to trial was sufficient to trigger the speedy trial balancing analysis. *See, e.g., Lloyd v. State*, 207 Md. App. 322, 329 (2012) (delay of eight months and fifteen days triggered constitutional scrutiny because it “might” be presumptively prejudicial); *Icgoren v. State*,

103 Md. App. 407, 423 (1995) (delay of eleven months and thirteen days was “barely” of constitutional dimension); *State v. Ruben*, 127 Md. App. 430, 440 (1990) (delay of nearly eleven months was of constitutional dimension, “albeit barely so”).

A.

THE LENGTH OF DELAY

“[T]he length of delay plays a dual role ‘because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis.’” *Phillips*, 246 Md. App. at 56-57 (quoting *Kanneh*, 403 Md. at 688). Length of the delay is but one factor, and it is the least determinative of the four factors of the analysis. *Howard*, 440 Md. at 447-48 (citing *Kanneh*, 403 Md. at 690).

The nature of the case is also a consideration in determining the significance of the length of delay. *See Divver*, 356 Md. at 390-91. In *Divver v. State*, the Court of Appeals found that a delay of one year and sixteen days constituted a speedy trial violation. *Id.* at 389, 395. With respect to the length of that delay, the Court noted that the defendant’s charge of driving while intoxicated was “a relatively run-of-the-mill District Court case,” involving two witnesses: the police officer and the defendant. *Id.* at 390-91. Therefore, the delay weighed more heavily in the defendant’s favor than would ordinarily be the case in a circuit court criminal trials. *Id.* at 391; *see also State v. Bailey*, 319 Md. 392, 411 (quoting *Barker*, 407 U.S. at 531) (“the delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex . . . charge”).

This case is distinguishable from *Divver* because it involved robbery charges in the circuit court with multiple witnesses. Mr. Burkins’s case was more than a “run-of-the-mill District Court case,” but less than a complex circuit court case. In this case, the delay of almost eleven months does not mandate a finding of a speedy trial violation. *See Glover*, 368 Md. at 224-25 (a fourteen-month delay requires constitutional scrutiny, but “is not so overwhelming . . . as to potentially override the other factors”). Accordingly, the overall length of the delay is not excessive and weighs only slightly against the State. *See id.* at 225 (“The length of delay, in and of itself, is not a weighty factor[.]”).

B.

REASON FOR DELAY

Mr. Burkins asserts that the reason for delay bears little weight in his case, as the reason for his absence from court was the result of negligence. In assessing the reasons for the delay, the Supreme Court explained:

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 the defendant.

Barker, 407 U.S. at 531 (footnote omitted).

Here, trial was postponed because the State failed to issue a writ to transport Mr. Burkins from the Department of Corrections to the courthouse. It is the State’s responsibility to bring a defendant who is in custody to trial. *Dorsey v. State*, 349 Md. 688, 702 (1998); *see also Randall v. State*, 223 Md. App. 519, 546 (2015) (citing *Doggett v. United States*, 505 U.S. 647, 656 (1992) and reiterating that the State must act with

reasonable diligence in bringing a defendant to trial). Because the postponement of Mr. Burkins’s trial was due to an omission on the part of the State, this “more neutral reason” weighs minimally against the State. *See Barker*, 407 U.S. at 531.

C.

ASSERTION OF THE RIGHT

The third factor concerns the “defendant’s responsibility to assert his right [to a speedy trial].” *Henry v. State*, 204 Md. App. 509, 554 (2012) (internal quotations omitted) (quoting *Barker*, 407 U.S. at 531). The diligence of the defendant in asserting his right to a speedy trial is an important consideration because “[t]he more serious the deprivation, the more likely the defendant is to complain.” *Bailey*, 319 Md. at 409 (internal quotations omitted) (quoting *Barker*, 407 U.S. at 531-32). “Because the strength of the defendant’s efforts will be affected by the length of the delay, asserting the speedy trial right weighs heavily in determining if the right has been denied.” *Dalton v. State*, 87 Md. App. 673, 688 (1991) (citing *Bailey*, 319 Md. at 409-10).

Here, Mr. Burkins made his first demand for a speedy trial at the time defense counsel entered his appearance. These formal demands are afforded little weight, as they are “not calculated to forcefully bring the harsh consequences of the deprivation of a constitutional right to the attention of the circuit court.” *Ruben*, 127 Md. App. at 443. At the time the case was postponed on February 6, 2019, Mr. Burkins’s counsel did not object, understanding that the trial could not go forward without Mr. Burkins. Mr. Burkins’s counsel jointly proposed the date of June 13, 2019 as “the earliest date” that he and the prosecutor were available. It was not until after Mr. Burkins’s trial was postponed to this

agreed-upon date that Mr. Burkins and his counsel moved to dismiss the charges against him. Upon review of the record, Mr. Burkins’s assertion of his right to a speedy trial is a factor that weighs slightly against him, as his counsel only objected to the new trial date after having already agreed to it.

D.

PREJUDICE

“Finally, the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice.” *Peters v. State*, 224 Md. App. 306, 364 (2015) (citing *Henry*, 204 Md. App. at 554). Actual prejudice to the defendant must be assessed in light of the three interests that the right to a speedy trial was intended to protect: “(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.” *Barker*, 407 U.S. at 532. “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.” *Id.*; see also *Glover*, 368 Md. at 230. Particular forms of impairment, such as witnesses becoming unavailable, the loss or destruction of records, and fading memories, may create prejudice. See *Glover*, 368 Md. at 230; *Fraidin v. State*, 85 Md. App. 231, 268 (1991).

Mr. Burkins’s essential claim of prejudice is that he remained incarcerated during the entire pretrial period. Mr. Burkins contends that his prolonged pretrial incarceration kept him from being released on parole on another matter and caused him to suffer injuries while incarcerated. As the circuit court noted, whether Mr. Burkins would have been

released on parole and avoided injury while incarcerated, but for his pretrial incarceration in this case, was speculative.

Mr. Burkins did not contend that he suffered anxiety or that his ability to prepare his defense was impaired by the unavailability of witnesses or the destruction of evidence due to the length of the delay. *See Vaise v. State*, 246 Md. App. 188, 235 (2020) (finding no prejudice where defendant did not argue that his defense was impaired and the record failed to support a finding of prejudice based on length of incarceration); *White v. State*, 223 Md. App. 353, 385-86 (2015). Mr. Burkins does not contend that his defense was hindered or impaired, the most important form of prejudice. *See Wilson v. State*, 148 Md. App. 601, 639 (2002) (“The most important factor establishing prejudice . . . is the inability to prepare one’s defense[,]” and “we accord great weight to the lack of any significant prejudice resulting from the delay.”).

The burden is on the defendant to show actual prejudice. *Henry*, 204 Md. App. at 555 (citing *Ratchford v. State*, 141 Md. App. 354, 361 (2001)). Here, although Mr. Burkins has shown some prejudice from being incarcerated when he would otherwise have been eligible for parole, as the State pointed out at the May 29 motions’ hearing, that wasn’t brought to the trial court’s attention until after Mr. Burkins’s counsel had agreed to the new trial date. **[T 5/29/19 at 8]** As such, and because we agree with the trial court that we can only speculate whether Mr. Burkins would actually have been released on parole, this factor weighs only slightly in Mr. Burkins’ favor, at most.

E.

BALANCING

Balancing all of these factors, we conclude that Mr. Burkins’s constitutional right to a speedy trial was not violated. The length of the delay in this case was barely of constitutional significance, and the reason for the delay was neutral or weighed minimally against the State. Though Mr. Burkins did assert his right to a speedy trial, it was only after his counsel agreed to the new trial date, and his slight and speculative showing of prejudice was not sufficient to carry the day. Accordingly, we conclude that the trial court did not err in denying Mr. Burkins’s motion to dismiss.

**JUDGMENT OF THE CIRCUIT COURT
FOR HARFORD COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**