Circuit Court for Baltimore County
Case No. C-03-CR-19-003254

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 837

September Term, 2021

LARRY C. JOHNSON

v.

STATE OF MARYLAND

Berger,
Arthur,
Shaw,

JJ.

Opinion by Shaw, J.

Filed: June 27, 2022

Appellant was indicted in the Circuit Court for Baltimore County on 11 counts, including attempted murder, home invasion, and burglary, after breaking into his ex-wife's hotel room and attempting to stab her with a box cutter knife. A trial date was set for March 19, 2020, but due to the COVID-19 pandemic, all criminal jury trials were suspended until October 5, 2020.[1] Appellant, pro se, and his counsel filed several motions to dismiss the charges on speedy trial grounds. Following a hearing on October 19, 2020, the circuit court denied the motions, and the next day, Appellant entered a conditional guilty plea to home invasion. He was sentenced to twenty years, all but thirteen years suspended, with four years of supervised probation upon his release. Appellant timely appealed and presents one question for our review:

1. Did the motions court err when it denied Mr. Johnson's motion to dismiss on speedy trial grounds?

For reasons discussed below, we affirm.

BACKGROUND

The facts that gave rise to the case were summarized in the following agreed statement of facts that was read into the record after Appellant's plea of guilty:

> On August 25, 2019 at 12:30 a.m., [Appellant's ex wife] . . . was living at the Colony Inn located . . . [in] Essex, Maryland in Baltimore County with her three children . . . . That night, [her and her children] . . . were sleeping . . . when

[1] *See* https://www.mdcourts.gov/coronavirusorders (administrative orders filed 3/12/20, 4/3/20, and 5/22/20). Administrative orders tolled or suspended "statutory and rules deadlines related to the adjudication of pending criminal matters" "by the number of days the courts were closed to the public by order of the Chief Judge." *Id.* (administrative orders filed 4/3/20, 4/8/20, 4/24/20, and 5/4/20). All criminal jury trials were suspended on an emergency basis until October 5, 2020. *Id.* (administrative order dated 5/22/20).

> they were awakened by a noise at the door. The [Appellant] . . . was attempting to get into the location. He had no permission to be there. He attempted to break in through the door and in the process, destroyed the locks and jammed the door shut. When he was unable to access the room through the door, he took a brick-size piece of concrete and smashed in the glass of the window to [the] [r]oom . . . and climbed inside. He was armed with a knife. He ordered the children, aged 14 and 12, to leave the room so they would not "see this" in his words. He attacked . . . [his ex-wife] on the bed and attempted to stab her. They wrestled over the knife. In the process, [Appellant's ex-wife] . . . sustained cuts to her hands. [One of the children] grabbed the [Appellant] . . . in an effort to pull him away from his mother and [she] . . . was able to gain control of the knife. [Appellant] . . . grabbed [that same child] . . . by the neck, scratching his throat. All three victims were able to escape the room through the broken window. [Appellant] . . . was arrested at the scene. [Appellant's ex-wife] . . . also sustained significant bruising to her legs as a result of the assault . . . . [She] . . . required 12 sutures to her left hand, [3] . . . sutures to her left wrist and [3] . . . sutures to her left foot as a result of the assault and the escape through the broken window. She sustained permanent scars.

On September 9, 2019, Appellant was indicted on charges of attempted first-degree murder, attempted second-degree murder, home invasion, first-degree burglary, third-degree burglary, fourth-degree burglary, first-degree assault, two counts of second-degree assault, carrying a dangerous weapon with the intent to injure, and malicious destruction of property.

Appellant's attorney entered her appearance on October 9, 2019 and filed a demand for a speedy trial. A trial date was set for March 19, 2020. Pursuant to Maryland Rule 16-1003(a), on March 12, 2020, then-Chief Judge Barbera issued an Administrative Order which suspended, on an emergency basis, criminal jury trials that were scheduled to begin on March 16, 2020 through April 3, 2020 because of the COVID-19 emergency. On April

3, 2020, Chief Judge Barbera issued an Administrative Order that continued the suspension of criminal jury trials.

On April 10, 2020, the parties filed a joint postponement request with a future trial date to be set for October 20, 2020. Separately, Appellant filed a pro se motion to dismiss his case, based on the denial of his right to a speedy trial. On May 22, 2020, Chief Judge Barbera issued two Administrative Orders, which resumed criminal bench trials beginning on July 20, 2020 and criminal jury trials beginning on October 5, 2020.

The circuit court granted a postponement in Appellant's case for good cause on June 16, 2020, observing that courts would be closed through October 5, 2020. His trial was rescheduled for October 20, 2020. On September 23, 2020, Appellant, pro se, again filed a motion to dismiss based on violations of his right to a speedy trial and *Hicks*.[2] Appellant's counsel, on October 15, 2020, filed a motion to dismiss the charges based on speedy trial grounds.

Several days later, the court heard argument on Appellant's motion to dismiss. Appellant argued that he had been incarcerated for approximately 14 months and the length of trial delay was of constitutional dimension. He asserted that the State was responsible for the delay and that state and national leaders had been negligent in handling the COVID-19 crisis. He also argued that his defense had been prejudiced because his brother died during the delay, and he planned to call him as a witness in his defense.

[2] *See State v. Hicks*, 285 Md. 310, *on motion for reconsideration*, 285 Md. 334 (1979) (describing mandatory nature of deadlines set under the Maryland Code and Maryland Rules). During a hearing on Johnson's motion, his counsel informed the court that he was not arguing that there was a violation of *Hicks*, nor does he raise that issue on appeal.

The State argued that the length of delay was due to a global pandemic and Chief Judge Barbera's subsequent order to close state courts was not of constitutional dimension. The State asserted that Appellant's brother was a character witness and would have testified, "that [he] . . . had seen the victim assault the [Appellant] . . . in the past." The defense listed other witnesses who would have testified similarly.

Following arguments of counsel, the court denied the motion:

> [F]or the record . . . the original speedy trial date in this case, if, if the pandemic had not happened . . . would have run on April 6th and this matter was set for trial in March, on March 19th . . . . When we closed down, Judge Barbera then issued a series of Administrative Orders and those Orders extended the *Hicks* deadline in this, in every case. With the extensions in your case, your new *Hicks* speedy trial deadline is November 29th of this year. So, this case that's being set in, that is coming for trial prior to that date that's been extended.
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> *** * ***
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> [W]e have an enormous backlog of people . . . . I, I get the frustration of sitting there and not knowing, but we're . . . dealing with a global pandemic that has closed down operations in this state. It is certainly not attributable to the State, the reason for delay. The time of delay, I don't actually believe rises to a constitutional magnitude and even if it did, I would have to then balance that against the other factors under the constitutional analysis.

On October 20, Appellant entered a conditional guilty plea to home invasion and the court found him guilty. He was sentenced to twenty years, all but thirteen years suspended, with four years of supervised probation upon his release. He timely appealed.

STANDARD OF REVIEW

In reviewing a ruling on a motion to dismiss for infringement of the constitutional right to a speedy trial, this Court "make[s] our own independent constitutional analysis" to determine whether the right was violated. *Glover v. State*, 368 Md. 211, 220 (2002) (citations omitted). This Court "perform[s] a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in doing so, we accept a lower court's finding of fact unless clearly erroneous." *Id.* at 221. "Appellate review should be practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case." *Peters v. State*, 224 Md. App. 306, 359 (2015) (quoting *Brown v. State*, 153 Md. App. 544, 556 (2003) and *State v. Bailey*, 319 Md. 392, 415 (1990)) (internal quotation marks omitted).

DISCUSSION

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. Amend. VI. The Amendment protects the defendant from unnecessary delay between indictment and trial. Article 21 of the Maryland Declaration of Rights also provides that "in all criminal prosecutions, every man hath a right . . . to a speedy trial[.]"

Maryland courts apply a four-part balancing test, articulated by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the right to speedy trial has been violated. The factors to be examined include the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. The Supreme Court explained that none of the factors are "a necessary or sufficient condition to the finding of a deprivation of the right of [a] speedy trial." *Id.* at 533. Instead,

the factors "must be considered together with such other circumstances as may be relevant," which requires the reviewing court to "engage in a difficult and sensitive balancing process." *Id.* "[T]here is no bright-line rule to determine whether a defendant's right to a speedy trial had been violated" therefore, we are to apply a balancing test. *Phillips v. State*, 246 Md. App. 40, 56 (2020). The threshold inquiry is "whether the delay is deemed to be of constitutional dimension." *Smart v. State*, 58 Md. App. 127, 131 (1984).

Length of Delay

The first *Barker* factor, the length of delay, serves a dual role as the triggering mechanism that must be met before there is a further *Barker* inquiry and is also one of the factors. "[T]he length of delay cannot be computed unless it is known when the period of delays starts." *Clarke v. State*, 97 Md. App. 381, 387 (1993). For a speedy trial analysis, "the length of delay is measured from the date of arrest or filing of the indictment . . . to the date of trial." *Divver v. State*, 356 Md. 379, 388-89 (1999) (citing *State v. Gee*, 298 Md. 565, 569 (1984)). Although, "no specific duration of delay constitutes a *per se* delay of constitutional dimension, . . . we have employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial' on several occasions." *Glover*, 368 Md. at 223 (emphasis in original). *But see Divver*, 356 Md. at 390 (quoting *Gee*, 298 Md. at 579 (noting that "a six month delay [is] . . . 'not presumptively prejudicial [and therefore] there is no necessity for inquiry into the other factors which go into the balance.'")) (footnote omitted). When the delay is "one of constitutional dimension, then a presumption arises that the defendant has been deprived of his right to a speedy trial." *Bailey*, 319 Md. at 416 (citations omitted). In *Epps v. State*,

276 Md. 96, 98 (1975), the Court of Appeals held that a delay of one year and fourteen days was "presumptively prejudicial" and observed that the length of delay that provokes a constitutional inquiry is "necessarily dependent upon the peculiar circumstances of the case." *Id.* at 111.

Appellant argues the court erred in denying his motion to dismiss on speedy trial grounds. He contends the 14-month delay was "presumptively prejudicial," and as a result, the Court was required to analyze the *Barker* factors. The State counters that a significant portion of the delay was because of the suspension of trials due to the COVID-19 global pandemic and asserts, that even if the almost 14-month delay is considered of constitutional dimension, the length of delay is not a determinative factor weighing in appellant's favor.

Appellant was arrested on August 25, 2019 and was held without bail until he entered a conditional guilty plea on October 20, 2020. The parties agree August 25, 2019 marks the starting point for considering the length of the delay and October 20, 2020 is the end point. We hold the delay of nearly 14 months is "presumptively prejudicial," and therefore triggers constitutional analysis.[3]

We next examine whether the length of delay should be weighed in favor of Appellant. We note that the length of delay factor itself, is the "least determinative of the four factors." *Howard v. State*, 440 Md. 427, 447-48 (2014) (citation omitted).

In *Divver*, the Court of Appeals held that a one-year "delay [was] . . . of uniquely inordinate length for a relatively run-of-the-mill [d]istrict [c]ourt case," which involved

[3] The total length of time was 13 months and 25 days.

traffic-violations, including driving under the influence. 356 Md. at 390. Because the case presented "little, if any, complexity" and involved only two witnesses, the Court explained that "the length of . . . delay . . . operates more heavily in Divver's favor than would usually be the case in many circuit court prosecutions." *Id.* at 390-91. *See also State v. Kanneh*, 403 Md. 678, 689 (2008) (recognizing that "the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted").

Here, Appellant was charged with various felony offenses, including counts of attempted murder, home invasion, burglary, and assault. Given the nature of the crimes, the need for trial preparation and the amount of incarceration that Appellant faced, if convicted, the delay was not extraordinary. As such, the length of delay does not weigh in favor of appellant.

We note that the State argues that the length of delay was caused by the pandemic, a unique circumstance, and thus, was not presumptively prejudicial. We determine that the pandemic's impact on Appellant's right to a speedy trial is more appropriately examined as a reason for the delay.

Reason for Delay

"Closely related to [the] length of delay is the reason the government assigns to justify the delay." *Barker*, 407 U.S. at 531. Not all delays are accorded equal treatment, hence "the delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex conspiracy charge." *Bailey*, 319 Md. at 411. The Court of Appeals, in *Kanneh*, noted that when balancing the reasons for delay, the court should address each postponement of the trial date individually. *See* 403 Md. at 690.

Both parties agree that the delay from the Appellant's arrest on August 25, 2019 to his first scheduled trial date on March 19, 2020 should be accorded neutral weight. *See Howell v. State*, 87 Md. App. 57, 82 (1991) ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status."). The next period of delay occurred between March 19, 2020[4] and October 20, 2020; all but 15 days of this time frame occurred when courts were not permitted to hold jury trials due to the pandemic. Appellant argues this delay should be attributed to the State. He asserts the extended court closure was because State and national leaders were negligent in failing to have a comprehensive action plan, given that "the nation had faced close calls in the past, such as Ebola, swine flu, and bird flu." He contends the State is the entity that ultimately bears the weight of bringing a defendant to trial. The State contends that the second delay should not be attributed to it.

Appellant cites *Kurtenbach v. Howell* as support for his argument. 509 F. Supp. 3d 1145, 1151-52 (D.S.D. 2020). In *Kurtenbach*, the United States District Court for the District of South Dakota found that the defendant's right to a speedy trial in state court had been violated because of an 18-month delay as a result of that state Supreme Court's COVID-19 suspension of the speedy trial rule. *See id.* at 1148-50. The U.S. District Court noted that South Dakota courts chose to delay trials in criminal cases due to COVID-19 for a period of time, and failed to put safeguards in place to address the pandemic, stating, South Dakota "cannot 'take advantage' of its own failures to follow scientific facts and

[4] The second period of delay could be constructed to start on March 16, 2020 when trials were suspended according to Judge Barbera's orders.

safeguards in entering blanket denials of the rights of speedy trials." *See id.* at 1152. The court also noted that the federal courts had continued to operate with "guidance from the Centers for Disease Control."

We observe that while state officials in South Dakota may have failed to act, Maryland officials were quite proactive. The Governor issued a statewide mask mandate, barred large gatherings, and took various other steps to mitigate the effects of the pandemic.[5] The Maryland judiciary was proactive as well, as evidenced by the numerous administrative orders addressing courtroom closures, remote hearings, and limited courtroom openings.

Appellant also cites *State v. Labrecque*, 249 A.3d 671, 680 (Vt. 2020), stating "the government bears the responsibility of bringing [the] defendant to trial, even when it is delayed . . . by a public health emergency." In *Labrecque*, the Supreme Court of Vermont considered whether a 25-month long pretrial detention due to "defense counsel's withdrawal and the COVID-19 pandemic" violated due process. The court analyzed due process claims and speedy trial issues and while it attributed "a portion of the delay" in the case to the government, and the court held that the COVID-19 delay was neither "intentional" nor "unwarranted" and thus the factor weighed against a finding of a due process violation. *Id.* at 681.

[5] A full list of the Maryland Governor Larry Hogan's orders during the pandemic, including those that have since been rescinded, can be found at https://governor.maryland.gov/covid-19-pandemic-orders-and-guidance.

Many courts have considered the impact of the coronavirus pandemic and have determined that the global emergency requires a balancing of the right to a speedy trial against public health and safety. *See, e.g., United States v. Olsen*, 995 F.3d 683, 693 (9th Cir. 2021) (observing, in a case under the Federal Speedy Trial Act, 18 U.S.C. § 3161 et seq, that "surely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health"). A majority of courts considering this issue have given neutral or little weight to delays caused by the pandemic. *See United States v. Macken*, No. 2:20-CR-00023-KJM, 2021 WL 2711250, at *3 (E.D. Cal. July 1, 2021) (denying motion to dismiss for alleged violation of Sixth Amendment right to speedy trial and observing that one of several reasons for delay was "the impossibility of a safe jury trial during the pandemic" and that "[t]he government was neither negligent nor deliberately slow. Neither party is to blame"); *United States v. Akhavan*, 523 F.Supp.3d 443, 451 (S.D.N.Y. Mar. 1, 2021) ("[T]he three-month delay thereafter is not attributable to the Government but rather to the pandemic, a neutral reason outside of the Government's control"); *State v. Brown*, 964 N.W. 2d 682, 693 (Neb. 2021) (observing that there was "no indication that the State was deliberately attempting to delay the trial" to hinder the defense when it dismissed a speedy trial challenge raise during the pandemic).

In *United States v. Pair*, 522 F.Supp.3d 185, 194 (E.D. Va. Feb. 26, 2011), the U.S. District Court for the Eastern District of Virginia found that the COVID-19 pandemic was a valid reason for delay and rejected any suggestion that the delay should weigh heavily,

or at all, against the government stating, "[i]n the case of the COVID-19 pandemic, the [g]overnment does not bear the ultimate responsibility for the pandemic; the pandemic is outside the control of either the parties or the courts." *Id.* *See also United States v. Akhavan*, 523 F.Supp.3d 443, 451 (S.D.N.Y. 2021).

We agree with these courts and hold that the unusual circumstances of the pandemic warrant consideration as a neutral reason for delay in the speedy trial analysis. Here, we find the reason for the delay is not attributable to either side. As the court stated in its ruling, "we're . . . dealing with a global pandemic." That pandemic has claimed more than half a million lives in this country and "closed down operations in this state" and many others for the interest of public health and safety.

Assertion of Right

A defendant's assertion of his speedy trial right is given "strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. Trial courts are permitted to exercise "judicial discretion based on the circumstances" when evaluating a defendant's assertion of his right to a speedy trial. *Id.* at 529.

Both Appellant and the State agree that he filed several motions where he asserted his right to a speedy trial. On October 9, 2019, defense counsel entered her appearance and filed a speedy trial motion. Appellant, pro se, filed three additional speedy trial motions on April 10, 2020, September 17, 2020, and September 29, 2020. Defense counsel filed an additional motion to dismiss on speedy trial grounds on October 15, 2020. Given Appellant's multiple motions, we weigh this factor in his favor.

Prejudice

The fourth and most important *Barker* factor examines whether the defendant "suffered actual prejudice." *Phillips v. State*, 246 Md. App. 40, 67 (2020) (quoting *Henry v. State*, 204 Md. App. 509, 554 (2012)). We analyze claims of prejudice to the defendant "with respect to the three interests that the right to a speedy trial is intended 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).

Although a defendant's right to a speedy trial can be violated absent an affirmative showing of prejudice, "[i]f a defendant can show prejudice, of course, he has a stronger case for dismissal." *Jones v. State*, 279 Md. 1, 17 (1976). A merely plausible "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *Glover*, 368 Md. at 231 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971)).

Appellant contends he was prejudiced and that his incarceration had a "detrimental impact" on him because inmates' access to the outside world during the pandemic was significantly curtailed. He explained at the motions hearing that he was "stressed" and "depressed," "trying to figure out what's going on[.]" He asserts that he was also prejudiced because his brother died during this delay, and he would have testified about appellant's relationship with his ex-wife.

We note that actual prejudice "requires more than an assertion that the accused has been living in a state of constant anxiety due to the pre-trial delay. Some indicia, more than a naked assertion, is needed to support the dismissal of an indictment for prejudice." *Glover*, 368 Md. at 230. Further, in the analysis, this factor is "generally afforded only slight weight." *Hallowell v. State*, 235 Md. App. 484, 518 (2018); *see also Glover v. State*, 369 Md. 212, 230 (2002).

As to appellant's argument regarding impairment of his defense, the trial court explained:

> [T]o the extent that there's an argument that there is a witness to talk about prior assaultive behavior, apparently three witnesses on that topic were named. While I'm sorry for your brother's death, I don't find it in balancing all the factors that that factor alone warrants dismissal based on a speedy trial violation.

We agree. Appellant's brother was not an eyewitness to the incident and several other witnesses were scheduled to testify to prior incidents between Appellant and his ex-wife.

Based on our independent review and analysis, we hold Appellant's right to a speedy trial was not violated. While there was delay, it did not weigh heavily in favor of Appellant and the reasons for delay do not weigh for or against the State or Defense. It is undisputed that Appellant repeatedly asserted his rights; however, he has shown no prejudice or impairment of his defense. On this record, the circuit court did not err in denying Appellant's motion to dismiss based on a violation of his right to a speedy trial.

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