Circuit Court for Harford County
Case No. C-12-CR-19-000044

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1197

September Term, 2020

EDMUND GORTON, II,

v.

STATE OF MARYLAND

Reed,
Ripken,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: July 5, 2022

On September 7, 2018, Edmund Gorton, II ("Appellant") and Brian Greb ("Mr. Greb")[1] entered a Sheetz gas station in Joppatowne, MD ("gas station"). After Mr. Greb selected and paid for his items, Appellant pushed Mr. Greb from behind with enough force to knock out his headphones. In response, Mr. Greb asked Appellant "what his problem was." Mr. Greb observed that Appellant was "clenching his fists" and had a "blank look on his face." After the store employees asked both parties to leave, Mr. Greb walked out to his vehicle and observed Appellant get into his truck. Mr. Greb watched Appellant "play chicken" with three cars entering the parking lot, explaining that when cars would pull into the gas station lot, Appellant would "go at them" and back up.

Mr. Greb called the Maryland State Police ("MSP"). At the MSP's request, Mr. Greb followed Appellant. Mr. Greb observed Appellant drive his entire vehicle in the wrong lane and eventually drive through a residence's lawn, located on a corner lot at an intersection. When Appellant neared what appeared to be Appellant's residence, MSP instructed Mr. Greb to back off. Moments later, an MSP squad car arrived.

MSP Trooper, Tyrez Braxton ("officer"), parked his squad car behind Appellant's truck as Appellant was exiting his vehicle. Officer observed as Appellant walked to his front door, swaying from side to side as he walked.

The officer approached Appellant and instructed Appellant to stop. In response, Appellant said that he wanted to go inside. Appellant opened the screen door, proceeding

[1] Appellant, in his brief, consistently spells Mr. Greb's name with two "b's" (i.e. "Mr. Grebb"), but Mr. Greb on the record during trial on October 14, 2020 spelled it with one "b".

to stumble and fall into it. Appellant then went through several keys to try to get the front door open. The officer tried to talk to Appellant but could not understand Appellant because he was mumbling and slurring his speech. Appellant was able to eventually open the door. The officer tried to grab Appellant but was pushed away. Before the officer was able to stop Appellant, Appellant went inside and closed the door shut behind him.

According to the officer, Appellant continued to sway during his interaction, smelled of alcohol, and his eyes were glassy, red, and bloodshot. The officer testified that based on his observations, he believed Appellant to be "definitely intoxicated."

The officer waited outside Appellant's residence for back up to arrive. While he waited, the officer observed an empty vodka bottle on the floor of Appellant's car and a cup in the cup holder. Officer and his colleague, Trooper First Class Glenn M. Henry,[2] later testified that the cup contained a liquid that smelled of alcohol.

Eventually, a woman let the officer into the house and the officer arrested Appellant. The officer read Appellant his *Miranda*[3] rights. While transporting Appellant to the barracks, Appellant called the officer a racial slur. Once Appellant was placed in a cell, the officer read the DR-015 form[4] and Appellant talked over him. After reading the form, the

[2] Trooper Henry's first name was not provided when he testified on October 14, 2020. However, it was provided in a subpoena issued by the circuit court on May 3, 2019.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] TR §16-205.1(b)(2) requires an "arresting officer to advise the detainee or the possible administrative sanctions for a refusal to take the breath test and for results that show blood alcohol concentration above certain levels." *Motor Vehicle Admin. v. Deering*, 438 Md. 611, 617 (2014). The DR-015 Form is the "Advice of Rights" Form ("Form") that is read to detainees that precedes an alcohol, substance, or drug test when a person has been

officer asked if Appellant was going to "agree with it," and Appellant gave a non-responsive answer that included profanity, so the officer marked the form as a refusal.

After Appellant was taken to the detention center, the officer ran a record check and discovered an alcohol restriction on Appellant's license. The officer found that Appellant had two previous convictions for alcohol-related driving offenses from March 3, 2005 for driving while under the influence of alcohol per se and August 8, 2013 driving while impaired by alcohol.

Appellant was then charged with second degree assault, resisting arrest, malicious destruction of property, driving while under the influence of alcohol, driving while impaired with alcohol, reckless driving, negligent driving, and driving in violation of a license restriction. Appellant's trial was scheduled for October 9, 2018. In his initial appearance report, Appellant signed and dated a notice receipt that, in bold letters, states, "I have been informed that the Trial/Hearing date is on 10/09/2018 at 8:30AM in Room 01, at 2 S[.] Bond St. Suite 100, Bel Air, Maryland 21014." The following day, after his initial appearance, Appellant was released on his recognizance.

On September 18, 2018, the State mailed Appellant a notice of its intention to seek a subsequent offender penalty. The notice listed two prior convictions the officer uncovered when he was arrested relating to alcohol driving offenses: (1) driving while under the

stopped or detained on reasonable grounds to believe that they have been driving under the influence. The Form lists the rights and outcomes that occur when a driver's license or privilege is suspended and states that the detainee is being asked to submit a test to measure the alcohol concentration, drug, or controlled dangerous substance content in the driver's system under MD. TRANS. §16-205.1.

influence of alcohol per se, convicted on March 3, 2005; and (2) driving while impaired by alcohol, convicted on August 8, 2013.

Appellant failed to appear for his trial on October 9, 2018 and a bench warrant was issued and executed. Appellant was arrested on October 11, 2018, and he was released on his own recognizance. On October 24, 2018, Appellant's counsel entered his appearance in the case.

A. Postponements and Waiver

On January 6, 2019, both Appellant and State requested a postponement. During the hearing, the circuit court addressed the Motion for a Speedy Trial and *Hicks*[5] issue. After being advised by his counsel, Appellant waived his rights to a speedy trial. On January 10, 2019, Appellant prayed a jury trial and the case was transferred to the Circuit Court for Harford County. On January 23, 2019, in a MD. RULE §4-252 motion, Appellant argued that his "right to a speedy trial has been violated," and filed a Motion for Speedy Trial in which he asked to set the case for trial "at [the court's] earliest convenience."

Trial was scheduled for June 27, 2019. However, on the date of the trial, Appellant's counsel was unavailable because he was selecting a jury that day in an unrelated case older than Appellant's case.[6] In response to Appellant's counsel being unavailable, the circuit court described this case as "relatively new" in comparison to the other case and observed

[5] *State v. Hicks*, 285 Md. 310 (1979).

[6] The case cited in the transcript was *State of Maryland v. Jason Eli Madison*, No. 12-K-17-1035 (Cir. Ct. Harford Cnty. 2019).

that no jury or judge would be available to try the case. Both Appellant and State selected the date of August 21, 2019 to reschedule. The circuit court acknowledged that the date both parties agreed upon would take the case beyond the *Hicks*[7] date[8] but found good cause to postpone the case. Finally, the circuit court noted that it would not "charge" the postponement to either side.

Trial was rescheduled from August 21, 2019 to January 6, 2020 because the responding officer was on medical leave until the end of the month. The circuit court found good cause existed to postpone the trial to the agreed upon date of January 6, 2020 and charged the postponement to the State. On January 6, 2020, both sides requested a postponement to April 24, 2020 because Appellant's counsel had a personal family issue and the State prosecutor was ill. Notably, in an exchange between the court, defense counsel, and Appellant, Appellant waived his rights to a speedy trial. The circuit court postponed the trial to the agreed upon date of April 24, 2020. In early April of 2020, trials were suspended due to the COVID-19 pandemic. The trial was rescheduled to October 13-14, 2020.

On May 15, 2020, Appellant's counsel moved to strike his appearance because Appellant had not paid him since October 2018. On June 1, 2020, the circuit court granted that motion and struck counsel's appearance. On September 23, 2020, an assigned public defender entered his appearance on Appellant's behalf.

[7] *State v. Hicks*, 285 Md. 310 (1979).

[8] The new *Hicks* date was July 22, 2019.

B. Trial and Sentencing

At a pretrial conference on October 13, 2020, Appellant addressed the court and asserted that he had not received a speedy trial and elected a bench trial. At the bench trial on October 14, 2020, Appellant made an oral motion to dismiss the case on speedy trial grounds. Appellant asked the court to measure the length of the delay from September 2018 to the previous trial date of January 2020 because the delay from April 2020 to October 2020 was attributable to the COVID pandemic. The State asserted that Appellant waived his right to a speedy trial in a hearing to postpone the trial to a later date. After balancing the *Barker v. Wingo*[9] factors, the Court denied the motion to dismiss for violation of his speedy trial rights.

Appellant was acquitted of malicious destruction but was convicted of: (1) second-degree assault for his offensive physical contact with an individual at the gas station, (2) driving while under the influence of alcohol, (3) reckless driving, and (4) driving in violation of a license restriction. Sentencing was scheduled for December 10, 2020. Finally, before the court adjourned, the circuit court asked Appellant's counsel to advise Appellant of his post-trial right to request a new trial for any procedural defect within ten days.

Appellant filed a motion for a new trial on October 19, 2020. On November 4, 2020, Appellant's motion was scheduled to be heard at the sentencing hearing.[10]

[9] 407 U.S. 514 (1972).

[10] The record does not indicate any reason for the postponement. This Court surmises that they had scheduled it on that date for administrative efficiency.

On December 10, 2020, the circuit court first addressed the motion for a new trial. Appellant argued that there was no probable cause for the arrest and a motion for a new trial was warranted. The court disagreed, stating that the arrest was legal because Appellant, as observed by the officer, was intoxicated while exiting his vehicle and during officer's interaction with Appellant. Thus, the officer had probable cause to believe Appellant drove while intoxicated. The circuit court denied the motion for a new trial.

Appellant was sentenced to ten years, all but six months suspended for the second-degree assault conviction, with three years of supervised probation. Appellant was also sentenced to two consecutive years, all but six months suspended, with three years of supervised probation, for driving while under the influence of alcohol, and three years of supervised probation. Appellant was also fined $250 for reckless driving and $70 for driving in violation of a license restriction, which were both suspended by the circuit court.

Appellant timely filed an appeal on December 22, 2020. In bringing this appeal, Appellant presents two questions for appellate review:

I. Did the [circuit] court impose an illegal sentence when it sentenced [Appellant] to two years, all but six months suspended, for driving while under the influence of alcohol?
II. Did the [circuit] court err when it denied [Appellant]'s motion to dismiss for violation of his speedy trial rights?

For the following reasons, we reverse and remand the circuit court's decision on sentencing to align Appellant's sentencing for driving while under the influence of alcohol with the current version of MD CODE ANN., TRANSP.§21-902. However, this Court holds

that the circuit court did not err when it denied Appellant's motion to dismiss for violation of his speedy trial rights.

I. Imposition of an Illegal Sentence

Appellant was convicted and sentenced to two consecutive years, all but six months suspended, for driving while under the influence of alcohol. During sentencing, Appellant argued that the prior convictions were outside of the five-year statutory time period which would allow for the subsequent offender sentence enhancement, but the circuit court disagreed.

STANDARD OF REVIEW

In *Ridenour v. State*, 142 Md. App. 1, 11–12 (2001), this Court discussed the circuit court judge's broad powers over sentencing and the appellate courts' scope of review, stating:

> [Circuit court] judges are vested with broad discretion in sentencing. In exercising this discretion, the sentencing judge should consider "the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." The judge's consideration should be undertaken with the aim of furthering the goals of the criminal justice system: punishment, deterrence, and rehabilitation.
>
> A sentence is subject to appellate review on three bases: (1) whether it is in violation of federal or state constitutional guarantees; (2) whether the sentencing judge was motivated by ill-will, prejudice, or other impermissible considerations; and (3) whether the sentence is within statutory limits.

Id. at 11–12 (citing *Gary v. State*, 341 Md. 513, 516 (1996)) (internal citations omitted); *Phillips v. State*, 219 Md. App. 624, 634–35 (2014).

DISCUSSION

A. Parties' Contentions

Both Appellant and the State agree that the sentence imposed is illegal, but for differing reasons. Appellant contends that the circuit court imposed an illegal sentence when Appellant was sentenced to two years, all but six months suspended for driving while under the influence of alcohol in violation of MD. TRANS. §21-902(A) because Appellant believes the term of the sentence was enhanced using the current version of the statute that had been amended since Appellant's arrest in 2018. Appellant alleges the circuit court's sentence violates the United States Constitution's Ex Post Facto Clause because

> the statute in effect at the time [Appellant] was sentenced in 2020 for driving while under the influence of alcohol in violation of §21-902(a) permitted a maximum sentence of two years for someone like [Appellant] who had a fifteen-year-old conviction on his record for violating the same subsection. In contrast, the statute in effect at the time [Appellant] was charged in 2018 with driving while under the influence of alcohol in violation of §21-902(a) permitted a maximum sentence of only one year for someone with the same conviction on his record.

Appellant asserts that the appropriate statute for Appellant to be charged under is the statute in effect at the time in 2018 instead of the statute's most current counterpart. Appellant reads the amended 2019 statute to have the effect of removing the five-year limitation for prior convictions under MD. TRANS. §21-902 (b), (c), or (d), thus allowing the court to enhance his sentence for his 2005 conviction to allow for a two-year maximum sentence.

The State agrees that the sentence imposed by the circuit court was illegal, but for different reasons than stated by Appellant. Instead, the State alleges that an amendment to MD. TRANS. §21-902(a)(1)(iv) eliminated the 2013 predicate offense that would allow for the State's sentence enhancement. The amendment to MD. TRANS. §21-902(a)(1)(iv)

became effective on March 27, 2019 and remained in effect through a subsequent amendment effective on October 1, 2019. The State asserts that the amendment eliminated predicate convictions made under the same subsection of MD. TRANS. §21-902(a) in which Appellant was convicted. As a result of the amendment, the State asserts that Appellant's sentence exposure was reduced and that Appellant had a right to be sentenced to a lighter penalty under §21-902(a)(1)(iv). Moreover, Appellant's prior convictions were time barred under the statute.

We agree with the conclusions of both parties – that Appellant's sentence is illegal. First, we will deal with Appellant's argument that the sentence is illegal.

B. Analysis

i. Ex Post Facto Law

MD CODE ANN., TRANSP.§21-902(a)(1) sets forth the statutory limitations regarding fines and penalties for driving while under the influence of alcohol. Appellant argues that his sentence of two years, all but six months suspended, for driving while under the influence of alcohol under the most current version of MD. TRANS. §21-902(a)(1) was illegal because Appellant believes his sentence violates the United States Constitution's Article 1, §10, cl. 1 Ex Post Facto Clause. The United States Constitution's Article 1, §10, cl. 1 Ex Post Facto Clause prohibits ex post facto laws. An ex post facto law, as explained by this Court in *Campbell v. Cushwa*, 133 Md. App. 519 (2000),

> is one that punishes acts committed before a law was passed, or "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *Collins v. Youngblood*, 497 U.S. 37, 41–42 (1990); *Plyler v. Moore*, 129 F.3d 728, 733 (4th Cir.1997), cert. denied, 524 U.S. 945 (1998). A law violates

> the Ex Post Facto Clause when it applies retroactively to punish conduct that predates its enactment, to the detriment of those to whom it applies. *Lynce*, 519 U.S. at 439–42. A provision may also violate the Ex Post Facto Clause when the punishment for a crime is made more burdensome after the crime was committed. *Plyler*, 129 F.3d at 734.

Id. at 540 (emphasis added). However, this Court does not view the application of the most current statutory version of MD CODE ANN., TRANSP.§21-902(a)(1) to Appellant's case at bar as an impermissible ex post facto law when reviewing the chronological revisions of the construction of the statute.

From October 1, 2017 to March 26, 2019, the applicable statute, MD CODE ANN., TRANSP.§21-902(a)(1), stated

> (a)(1)(i) A person may not drive or attempt to drive any vehicle while under the influence of alcohol.
> (ii) A person may not drive or attempt to drive any vehicle while the person is under the influence of alcohol per se.
> (iii) A person convicted of a violation of this paragraph is subject to:
>
> 1. For a first offense, imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both;
> 2. For a second offense, imprisonment not exceeding 2 years or a fine not exceeding $2,000 or both; and
> 3. For a third or subsequent offense, imprisonment not exceeding 3 years or a fine not exceeding $3,000 or both.
>
> (iv) For the purpose of determining subsequent offender penalties for a violation of this paragraph, **a prior conviction under *this subsection or* subsection (b), (c), or (d) of this section,** within 5 years before the conviction for a violation of this paragraph, shall be considered a prior conviction.

MD CODE ANN., TRANSP.§21-902(a)(1) (emphasis added). From March 27, 2019, to September 30, 2019, MD CODE ANN., TRANSP.§21-902(a)(1)(iv), was amended to read

> (a)(1)(iv) For the purpose of determining subsequent offender penalties for a violation of this paragraph, **a prior conviction under subsection (b), (c), or (d) of this section,** within 5 years before the conviction for a violation of this paragraph, shall be considered a prior conviction.

Id. The amended version deleted the phrase "this subsection or", which eliminated a whole subsection of convictions under subsection MD CODE ANN., TRANSP.§21-902(a)(1)(iv) which otherwise would have been considered prior convictions. Indeed, the Maryland Legislature changed the sentencing enhancement requirements. However, the Maryland Legislature did not violate the Ex Post Facto Clause because the amended punishment did not make the sentencing enhancement requirements more burdensome, nor did it apply retroactively to punish conduct that predates its enactment of the amendment. Overall, the Maryland Legislature lessened the penalty. Thus, this statute as amended is not an Ex Post Facto Clause violation.

Moreover, because the two previous offenses used to enhance Appellant's sentence are time barred under every iteration of the statute, as discussed further in the following section, the section in which changes were made is not materially applicable in Appellant's case at bar. Thus, this Court finds no violation in the Ex Post Facto Clause as contended by Appellant.

ii. Previous Convictions Were Time Barred

As of, October 1, 2019, MD CODE ANN., TRANSP.§21-902(a)(1) statute states

> (a)(1)(i) A person may not drive or attempt to drive any vehicle while under the influence of alcohol.
> (ii) A person may not drive or attempt to drive any vehicle while the person is under the influence of alcohol per se.
> (iii) A person convicted of a violation of this paragraph is subject to:
> *1. For a first offense, imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both; and*
> 2. For a second offense, imprisonment not exceeding 2 years or a fine not exceeding $2,000 or both.
> (iv) For the purpose of determining subsequent offender penalties for a

> violation of this paragraph, a prior conviction under subsection (b), (c), or (d) of this section, *within 5 years before the conviction for a violation of this paragraph, shall be considered a prior conviction.*

Id. (emphasis added). The sentence should not have been enhanced because both previous convictions were time barred. Appellant was convicted on October 14, 2020. Under MD CODE ANN., TRANSP.§21-902(iv), only convictions within five years of the conviction in violation of MD CODE ANN., TRANSP.§21-902 shall be considered a "qualified" prior conviction to apply the sentence enhancement for subsequent offenses. However, the convictions from 2005 and 2013 in which the State cited to seek the subsequent offender penalty clearly did not fall within five years of the current 2020 conviction. Thus, the sentence enhancement does not apply to Appellant's conviction.

iii. Correction of the Conviction

The court may correct an illegal sentence at any time. MD. RULE §4-345. Under MD. RULE §8-604(d)(2), "in a criminal case, if the appellate court reverses the judgement for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." Remand is thus required for the trial court to resentence Appellant on this count. *See Taylor v. State*, 224 Md. App. 476, 500-01 (2015), *aff'd* 448 Md. 242 (2016). However, we limit remand to resentence Appellant only on the sentence related to the amended MD CODE ANN., TRANSP.§21-902(a)(1).

II. Denial of Appellant's Motion to Dismiss

STANDARD OF REVIEW

In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we must make our own independent constitutional analysis. *Glover*

v. State, 368 Md. 211, 224 (2002) (citing *State v. Bailey*, 319 Md. 392, 415 (1990)). We perform a *de novo* constitutional review of the particular facts of the case at hand. *Id.* In doing so, we defer to the circuit court's first level of findings of fact unless clearly erroneous. Lastly, "the review of a speedy trial motion should be 'practical, not illusory, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case.'" *Henry v. State*, 204 Md. App. 509, 549 (2012) (quoting *Brown v. State*, 153 Md. App. 544, 556 (2003)).

DISCUSSION

A. Parties' Contentions

Appellant contends that the circuit court erred when it denied Appellant's motion to dismiss on speedy trial grounds. Appellant argues that when balancing the factors outlined in *Barker v. Wingo*, 407 U.S. 514 (1972), the two-year delay in a "run of the mill" case violated Appellant's rights to a speedy trial under the Sixth Amendment of the United States Constitution.

The State contends that the circuit court did not err in denying Appellant's motion to dismiss because Appellant's claim is waived, or in the alternative, unavailing. The State cites the trial transcript where in support of a postponement request, Appellant waived his speedy trial claim. Lastly, the State argues that if Appellant did not waive his rights to a speedy trial, Appellant's claim would fail on its merits because "much of that delay was attributable to the defense . . . " and on balance, the *Barker*[11] factors would weigh against

[11] *Barker v. Wingo*, 407 U.S. 514 (1972).

dismissal.

B. Analysis

At the start of trial on October 14, 2020, Appellant made an oral motion to dismiss the case on speedy trial grounds. Appellant asked the court to measure the length of the delay from September 2018 to the previous trial date of January 2020 because the delay from April 2020 to October 2020 was attributable to the COVID pandemic. The circuit court stated that the delays triggered the evaluation of the factors enumerated in *Barker v. Wingo.*[12]

There are four factors to be used in determining whether a defendant's right to a speedy trial has been violated: "'[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *State v. Kanneh*, 403 Md. at 688 (quoting *Barker*, 407 U.S. at 530). None of these factors are "'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.'" *Id.* at 688 (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990), in turn quoting *Barker*, 407 U.S. at 533).

We will address the delays and Appellant's waiver of the right to a speedy trial chronologically.

i. Appellant's Failure to Appear

(September 2018- January 2019)

[12] *Id.*

The original trial was a scheduled for the month following Appellant's arrest on October 9, 2018. However, Appellant failed to appear for his trial and a bench warrant was issued. On October 24, 2018, Appellant's counsel entered his appearance in the case. The trial was rescheduled for January 10, 2019. When Appellant's motion for a speedy trial was filed on January 23, 2019, no other postponements were charged to the State or court.

During the pretrial conference and trial on October 13-14, 2020, Appellant stated that following his initial appearance after his arrest, he failed to appear in court for his first scheduled trial because he lacked notice, thus resulting in the failure to appear. On October 13, 2020, Appellant while addressing the circuit court, alleged that before the October 9, 2018 trial, he "had his attorney", and his attorney was "asking for more money", so he "dropped him" and went "right to the Public Defender's Office right then." This Court knows Appellant's statement – whether intentionally or unintentionally misleading – is false in this context.[13]

Upon hearing Appellant's explanation, the circuit court, at first, attributed the confusion to being in-between attorneys. However, after reviewing the electronic files for Appellant's case, the circuit court noticed the Initial Appearance Report. The Initial Appearance Report included the Notice Receipt, which was signed and dated by Appellant on September 8, 2018. The Notice Receipt states, in bold letters, "I have been informed that the Trial/Hearing date is on October 9, 2018 at 8:30AM in Room 01, at 2 S[.] Bond

[13] Appellant's attorney entered his appearance after Appellant's October 9, 2018 trial on October 24, 2018. On May 15, 2020, Appellant's counsel moved to strike his appearance because Appellant had not paid him since October 2018. On September 23, 2020, an assigned public defender entered his appearance on Appellant's behalf.

St. Suite 100, Bel Air, Maryland 21014. I agree to any conditions of the release and agree to appear as directed." Appellant's signature appears directly underneath the statement. Upon further review of the electronic files, the circuit court stated that "the court has provided you and your attorney documentation at each stage," which this Court has found the record supports.

The next day, on October 14, 2020, before a different judge, Appellant argued that Appellant had "addressed this yesterday with [the pretrial conference judge]" and Appellant did not have notice of the court date. Appellant failed to mention that the pretrial conference judge had, on the record, addressed how Appellant signed and dated a notice that informed him of his trial date, and had been informed of each of his trial dates and postponements on the record and through written documentation. The circuit court, however, still credited this postponement to Appellant because Appellant failed to appear.

Thus, we hold that Appellant had adequate notice of his trial date and failed to appear on that date on his own accord. By failing to appear for the originally scheduled trial, the delay of the trial at that junction in the case was attributable to Appellant and thus, when the motion was filed, Appellant was not denied his right to a speedy trial.

ii. Waiving the Right to a Speedy Trial

(January 2019 - January 2020)

A series of postponements from Appellant's previous counsel, the Circuit Court of Harford County, and State occurred from January 2019 to January 2020. Trial was rescheduled from June 27, 2019 to August 21, 2019 because Appellant's counsel was

unavailable on that day due to another unrelated case and no jury or judge was available to try the case on that date. The circuit court attributed it as a neutral postponement.

Trial was rescheduled from August 21, 2019 to January 6, 2020 because the responding officer was on medical leave until the end of the month. The circuit court attributed it as a State postponement.

On January 6, 2020, both sides requested a postponement to April 24, 2020 because Appellant's counsel had a personal family issue and the State's attorney was ill. The circuit court attributed it as a neutral postponement. However, Appellant explicitly waived his right to a speedy trial on January 6, 2020. This Court, in *Brice v. State*, 225 Md. App. 666, 679 (2015) (quoting *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2005)) explained that waiver is

> "the intentional relinquishment of a known right, or conduct that warrants such an inference." Waiver "extinguishes the waiving party's ability to raise any claim of error based upon that right. Thus, a party who validly waives a right may not complain on appeal that the court erred in denying him the right he waived, in part because, in that situation, the court's denial of the right was not error."

Id. at 679 (internal citations omitted). Appellant waived his right in the following exchange between the circuit court, Appellant, Appellant's counsel and State:

> [COURT]: All right. And through counsel, with respect to his *Hicks*[14] or speedy trial rights, counsel, can you advise?
>
> [APPELLANT'S COUNSEL]: Yes, Your Honor.

[14] *State v. Hicks*, 285 Md. 310 (1979).

[APPELLANT'S COUNSEL TO APPELLANT]: There may be certain rights that apply to this case because there's a speedy trial issue, which we filed a motion for a speedy trial some time ago. There's also a *Hicks* issue which may apply to this case, may not, but if you want to have a postponement, we need to waive these rights today. Your (sic) understand that?

[APPELLANT]: Right.

[APPELLANT'S COUNSEL]: So we need to review all that. *So if we postpone it we can't come back later and claim that we wanted it to be tried today because I think we need a postponement. Is that agreeable with you?*

[APPELLANT]: *Yes.*

[APPELLANT'S COUNSEL]: Is your mind clear today?

[APPELLANT]: Yes.

[APPELLANT'S COUNSEL]: Nothing would effect (sic) your understanding [of] what we're doing? You haven't had any alcohol, drugs, nothing of that nature?

[APPELLANT]: No. No.

[APPELLANT'S COUNSEL]: Any questions about what we're doing here?

[APPELLANT]: Uh-uh.

[APPELLANT'S COUNSEL]: Thank you, Judge.

Thus, where Appellant explicitly waived his right to a speedy trial on January 6, 2020, this Court finds no violation.

iii. COVID-19 Pandemic Delays

(April 2020-October 2020)

After the trial was postponed and Appellant waived his right to a speedy trial, the circuit court rescheduled the trial to April 24, 2020, as agreed upon by both parties. However, in early April of 2020, trials were suspended due to the COVID-19 pandemic. As explained by the Court of Appeals in *Tengeres v. State*, 474 Md. 126 (2021):

> The Chief Judge of the Court of Appeals issued administrative orders in early 2020 that governed court proceedings during the pandemic emergency and its aftermath and that instructed the State's courts how to manage their dockets. Those orders initially postponed most court proceedings and envisioned a gradual return to normal court proceedings with precautions as the public health permitted.
>
> The administrative orders described five phases and the types of court proceedings that would be conducted during each phase. Phase I, which began March 16, 2020, required the postponement of all but a few categories of matters. Phase II, which began on June 5, 2020, marked the beginning of the resumption of some court operations, but did not include criminal trials in the circuit courts. During Phase III, which began on July 20, 2020, circuit courts would hold, among other proceedings . . . non-jury trials in criminal cases. During Phase IV, the courts would open for additional categories of proceedings not pertinent to this case. In Phase V, scheduled to begin on October 5, 2020, courts would commence full operations, including jury trials.

At a pretrial conference on October 13, 2020, Appellant, through his newly appointed public defender,[15] addressed the court and asserted that he had not received a speedy trial and elected a bench trial at that time. At the bench trial on October 14, 2020, the circuit court noted that the trial was set for the "second week of the court actually

[15] On September 23, 2020, an assigned public defender entered his appearance on Appellant's behalf.

opening in Phase V." The circuit court found the COVID-19 pandemic delay as a neutral postponement "because of the fact that it was impossible to try [Appellant's] case."

Finally, on the issue of prejudice, the circuit court found that Appellant was not prejudiced. The circuit court cited that while the delays caused Appellant some anxiety, Appellant's rights were not impacted because Appellant was not incarcerated, was able to work, and was able to "go about his life. [Appellant] was released on his own recognizance, so there were very few restrictions on [Appellant's movement]. [Appellant] was not on home detention." Moreover, despite Appellant's arguments that he wanted to cross examine two of the State's witnesses that were absent,[16] the circuit court held that the State's witnesses' absence prejudiced the State and not Appellant. The circuit court concluded Appellant's counsel was not prejudiced and was able to adequately prepare for Appellant's case.

Ultimately, the circuit court denied Appellant's oral motion to dismiss on speedy trial grounds because other than the delay caused by Appellant's failure to appear and when the officer was unavailable, the postponements over the twenty-four months were "neutral".

This Court finds no violation and affirms the circuit court's decision to deny Appellant's motion to dismiss. Appellant failed to appear for his trial on October 9, 2018, though he had adequate notice of the trial date, which was attributed to Appellant, and the officer was unavailable for trial on another date which was attributed to the State. We agree

[16] Appellant failed to subpoena the witnesses.

with the circuit court that the other postponements were neutral. Moreover, Appellant originally asserted his right to a speedy trial, but on January 6, 2020, Appellant explicitly waived his right to a speedy trial. While Appellant expressed frustration at the delay, Appellant was not prejudiced by the delays in his case. Finally, the COVID-19 pandemic suspended Maryland court operations in unforeseeable ways. Thus, this Court holds that Appellant was not denied his right to a speedy trial.

CONCLUSION

Accordingly, we reverse and remand the circuit court's sentencing to align Appellant's sentencing for driving while under the influence of alcohol with the applicable statute at the time of his sentencing. However, this Court holds that Appellant was not denied his right to a speedy trial.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE HALF BY EACH PARTY.