Circuit Court for Caroline County
Case No. 05-K-15-010723

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1158

September Term, 2016

DAYRIUS GARCIA

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 29, 2017

*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.

Proceeding by way of a not guilty agreed statement of facts, the Circuit Court for Caroline County convicted Dayrius Garcia, appellant, of first-degree murder. The court subsequently imposed a life sentence. Appellant raises two issues on appeal: 1) whether the circuit court erred in denying his motion to suppress the results of DNA testing; and 2) whether the court erred in denying his motion to dismiss on the basis of a violation of his constitutional right to a speedy trial. For the reasons stated below, we discern no error, and we affirm.

BACKGROUND

Briefly recounted, the agreed statement of facts related that on November 24, 2014, around 6:30 P.M., Travon Farrow was shot in his apartment in Federalsburg during a robbery. He later died from this wound. Travon's wife, Amanda Farrow, said that there had been two robbers wearing masks. Amanda told police that one of the robbers was wearing a "Scream"-type mask and pointing a shotgun at Travon.[1] She was "80% sure" that she recognized that robber's voice as appellant's. A "Scream"-type mask was recovered on the ground outside the Farrows' residence, and police took swabs from it to test for DNA. Amanda also stated that William Willis knew that Travon kept a stash of marijuana hidden in a console in the living room, and that the console had been "ransacked" during the robbery.

[1] The "Scream"-type mask is so-called because it resembles the Ghostface mask worn by the killers in the movie *Scream* and its sequels. *See Scream*, IMDB, http://www.imdb.com/title/tt0117571/ (last visited Dec. 20, 2017).

The police investigation focused on appellant and four other individuals, one of whom was Willis. Initially, appellant and the four men claimed that they were playing basketball at the time of the robbery. Later, DNA testing of the recovered mask could not exclude appellant as the "major" contributor to the DNA profile on the mask, and he was subsequently arrested. In later interviews with police, appellant and the other four men gave statements implicating themselves in the robbery and the shooting. As to the shooting, appellant claimed that the gun discharged when Travon tried to grab it out of his hands.

At the conclusion of the prosecution's recitation of the not guilty agreed statement of facts – with no modifications or corrections from defense counsel – the court convicted appellant of first-degree murder, based on the killing of Travon during the commission of the robbery. We will recite more facts as necessary below.

DISCUSSION

I. The Motion to Suppress

On November 30, 2015, the court conducted a suppression hearing concerning appellant's motion to suppress the DNA evidence. At that proceeding, Maryland State Police Detective Sergeant Chasity Blades, the lead investigator into the robbery, testified that on the day after the crime, appellant voluntarily came to the police station to speak with police because he had learned from social media that his name was associated with the shooting. Detective Sergeant Blades testified that at the time of the interview she was aware that the mask had been recovered, and swabs had been taken of items touched within the apartment.

The State played some of the recorded interview for the court. Pertinent to this proceeding, the State played the following colloquy:

> SERGEANT BLADES: Okay. Um, like I said what we do and the easiest way to kind of clear people is to get a timeline, and we (unintelligible) and um, would you have any issues giving me your DNA so I can compare it [to] stuff that came out of the house?
>
> MR. GARCIA: No. Yeah, ah no.
>
> [Q]: Okay. And then that way, cause what will happen is, we'll send up, you know whatever swabs that were taken out of the house, we'll send that up.
>
> [A]: Send it yeah . . .
>
> [Q]: And then um, we'll um, go from there. This is the consent form, we don't really necessarily have one that just does DNA, so it says remove, you know papers, blah, blah. I'm not going to search your person, I'm not going to take anything from you. All I'm going to do is actually you're going to do this your self, it's an oral DNA.
>
> [A]: All right.

Detective Sergeant Blades also testified that she read the consent form to appellant prior to him signing it. The form authorized Detective Sergeant Blades to take an oral DNA swab from appellant. The form also stated that the signer had "knowingly and voluntarily given my consent to search the above described location without fear, threat, or promise either expressed or implied. Further, I understand that I have a Constitutional right to refuse to consent to this search and that any items seized may be used against me in a court of law."

The court denied appellant's motion to suppress, ruling that he had consented to providing his DNA. The court concluded that appellant "had to understand" that police would compare his DNA with other evidence, no matter its origin.

On appeal, appellant contends that the court erred in denying the motion to suppress because the police violated his Fourth Amendment rights in obtaining the DNA evidence.[2] Appellant concedes that he appeared to consent to the search, but he maintains that Detective Sergeant Blades limited the scope of consent in her conversation with him. He argues that a reasonable person would have understood Detective Sergeant Blades's statements to limit the comparison of the DNA to evidence recovered from within the apartment, which would have excluded the mask because it was recovered outside the residence. He, therefore, argues that comparing his DNA to the swab from the mask exceeded the scope of consent.

"In reviewing a trial court's decision to grant or deny a motion to suppress, an appellate court ordinarily limits its review to the record of the motions hearing." *Sinclair v. State*, 444 Md. 16, 27 (2015). We review the evidence in the light most favorable to the prevailing party, and we make our own "'independent determination'" as to whether there was a constitutional violation. *Id.* (quoting *Belote v. State*, 411 Md. 104, 120 (2009)).

[2] The Fourth Amendment of the United States Constitution provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

We determine whether law enforcement exceeded the scope of consent pursuant to a standard of objective reasonableness, *i.e.*, "'what would the typical reasonable person have understood by the exchange between the officer and [the person giving consent]?'" *Redmond v. State*, 213 Md. App. 163, 186 (2013) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). "[D]etermining what is reasonable requires a factual analysis, 'examining the totality of the circumstances.'" *State v. Green*, 375 Md. 595, 621 (2003) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

Varriale v. State, 444 Md. 400 (2015), controls this case. In that case, Varriale consented to providing his DNA to police for the purpose of comparing his DNA to that recovered in a rape investigation. *Id.* at 403. DNA comparison indicated that Varriale had not committed the rape, but his DNA connected him to an earlier, unsolved burglary, to which he pled guilty. *Id.* at 403-04. On appeal, Varriale argued that his consent was limited to the rape investigation and that use of his DNA in other investigations exceeded the scope of his consent. *Id.* at 411.

The Court of Appeals concluded that the police had lawfully obtained Varriale's DNA for comparison in the burglary case. *Id.* at 413-14. The consent form Varriale signed did not limit the use of his DNA to the rape investigation: "Although the form does not specify precisely what the police would do with the swabs once the evidence was furnished, '[i]t is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched.'" *Id.* (quoting *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013)). The Court also noted that the consent form explicitly informed Varriale that any evidence could be used

in a future criminal prosecution. *Id.* at 414. The Court reasoned that once Varriale had provided his DNA to police, a reasonable person would have understood that law enforcement would use it in an attempt to identify criminals. *Id.* at 415-16. Ultimately, the Court held that "absent an express limitation placed on the use or storage of the DNA evidence by [the defendant], the State, or by law, we cannot conclude that it was unreasonable for the State to maintain and utilize Varriale's DNA for subsequent unrelated investigations." *Id.* at 418-19.

Here, there was no express limitation placed on the collection of appellant's DNA by appellant or Detective Sergeant Blades. Appellant did not provide a limitation, and the consent form he signed clearly indicated that the "items seized may be used against me in a court of law." Moreover, we are not persuaded that Detective Sergeant Blades limited the scope of consent concerning the DNA in her conversation with appellant. A reasonable person would have believed that police would not search for items on appellant's person because Detective Sergeant Blades expressly said that. A reasonable person would also have understood that by providing DNA to the police, law enforcement would compare that DNA to any evidence in the investigation, no matter its origin. Accordingly, the court properly denied appellant's motion to suppress.[3]

[3] We also agree with the logic of the Supreme Court of Georgia, which explained that the burden of the search is the initial procurement of the DNA, not the uses to which it is put, and that "[i]t would not be reasonable to require law enforcement personnel to obtain additional consent or another search warrant every time a validly-obtained DNA profile is used for comparison in another investigation." *Pace v. State*, 524 S.E.2d 490, 498 (Ga. 1999).

II. The Right to a Speedy Trial

Appellant also contends that his Sixth Amendment right to a speedy trial was violated.[4] He argues that a delay of trial from April 5, 2015 – the date of indictment – to June 6, 2016 – the scheduled date of a jury trial – constitutes a violation of his constitutional right to a speedy trial.[5] Appellant, therefore, filed a motion to dismiss the charges against him for violating this right, but, at a hearing on April 6, 2016, the court denied this motion. Prior to the scheduled trial date, appellant proceeded by way of a not guilty agreed statement of facts.

This Court has observed that in reviewing a claimed violation of the constitutional right to a speedy trial, we apply a four-factor test analyzing: "(1) the '[l]ength of delay'; (2) the 'reason for the delay'; (3) the 'defendant's assertion of' his speedy trial right; and (4) 'prejudice to the defendant.'" *Nottingham v. State*, 227 Md. App. 592, 613 (2016) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). We stated that "[n]one of these factors is, in itself, either necessary or sufficient to find a violation of the speedy trial

[4] The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" Notably, the constitutional right to a speedy trial is different from Maryland's statutory right to a speedy trial, the so-called *Hicks* rule. *See Dalton v. State*, 87 Md. App. 673, 681-82 (1991) (explaining that "[t]he fundamental goal served by the statutory right is furthering the public interest in avoiding harm resulting from unjustifiable delays and excessive postponements in criminal trials[,]" while the constitutional right to a speedy trial "focuses more upon the prejudice an accused may suffer as a result of a delay" (footnote omitted)). Appellant makes no argument as to his statutory right to a speedy trial in this appeal.

[5] We note that the delay should actually be measured to May 27, 2016, the date appellant appeared in court for the not guilty agreed statement of facts proceeding.

right; instead, 'they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id.* (quoting *Barker*, 407 U.S. at 533). In this analysis, we "defer to the circuit court's first-level findings of fact, unless clearly erroneous." *Peters v. State*, 224 Md. App. 306, 359, *cert. denied*, 445 Md. 127 (2015). Additionally, "we make our own independent constitutional analysis[,] . . . . perform[ing] a *de novo* constitutional appraisal in light of the particular facts of the case at hand[.]" *Randall v. State*, 223 Md. App. 519, 538 (2015) (internal citations and quotation marks omitted). This Court has remarked that "[a]ppellate review [of the constitutional right to a speedy trial] 'should be practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case.'" *Peters*, 224 Md. App. at 359 (quoting *Brown v. State*, 153 Md. App. 544, 556 (2003)).

In this case, we are not persuaded that appellant's constitutional right to a speedy trial was violated. We explain. As to the length of delay, the Court of Appeals has held that "[w]hile 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 v. State*, 368 Md. 211, 223 (2002) (internal citations omitted). Accordingly, the delay in this case of over a year and two weeks was "presumptively prejudicial." The Court of Appeals has observed, however, that "the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted." *Id.* at 224. The delay in this case was not intolerable, considering that appellant was charged with a bevy of

serious offenses, including first-degree murder, and there were, essentially, four co-defendants, who were to be tried separately.

Turning to the reasons for delay in this case, the Court of Appeals has noted that deliberate attempts to delay the trial "'should be weighted heavily against the government[,]'" while "'more neutral reason[s] such as negligence or overcrowded courts should be weighted less heavily but nevertheless should [be] considered[.]'" *Id.* at 225 (quoting *State v. Bailey*, 319 Md. 392, 412 (1990)). Trial was initially delayed when new defense counsel entered his appearance for appellant as a result of a conflict of interest in the Office of the Public Defender. *See Howard v. State*, 440 Md. 427, 448 (2014) (finding neutral cause for delay where new counsel needed time to prepare for trial). Trial was then delayed following a hearing on September 8, 2015, where defense counsel raised lack of notice of DNA evidence as a grounds to exclude the evidence. The State had given notice to defense counsel, but it was not on a separate document, which the court observed would have been the better practice. Trial was delayed again when it was revealed that the State had disclosed an outdated "standard operating procedure" for the DNA analysis.

The circuit court concluded that these were neutral reasons for delay because the State was not deliberately attempting to delay trial. Indeed, the court concluded that the failure to include separate notice and the incorrect procedures were "honest mistake[s]." We concur. Even if we agreed with appellant that these delays should be attributed to the State, however, we would not find a violation of his constitutional right to a speedy trial.

As to appellant's assertion of his right to a speedy trial, he maintains that he "continuously" asserted his right. The State, however, contends that appellant's motions to dismiss were *pro forma* and "boilerplate" until February 17, 2016. The Court of Appeals has remarked that an assertion of the right to a speedy trial "'is entitled to strong evidentiary weight[,]'" and "'that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" *State v. Kanneh*, 403 Md. 678, 692-93 (2008) (quoting *Barker*, 407 U.S. at 531-32). Furthermore, "courts should 'weigh the frequency and force of the objections[,]'" in making the four-factor analysis. *Id.* at 693 (quoting *Barker*, 407 U.S. at 529). We agree with the State. *See Lloyd v. State*, 207 Md. App. 322, 332 (2012) (remarking that "a perfunctory motion for a speedy trial . . . as part of an omnibus motion" was "little more than the avoidance of waiver" and should be given little weight).

Finally, the circuit court concluded that appellant had not demonstrated prejudice, as that term is understood in this analysis. Rather, appellant had merely demonstrated that he had been incarcerated awaiting trial, which the court concluded "in [and] of itself is not sufficient grounds" to show prejudice. Indeed, the Court of Appeals has observed that the prejudice prong of the analysis "consider[s] the harms against which the speedy trial right seeks to protect: (i) **oppressive** pre-trial incarceration; (ii) anxiety and concern of the accused; and (iii) impairment of the accused's defense." *Glover*, 368 Md. at 229 (emphasis added). As to the second harm, the Court remarked that a defendant must show "[s]ome indicia, more than a naked assertion . . . to support the dismissal of an indictment for prejudice." *Id.* at 230. Addressing the third harm, the Court observed that

a delay "can result in the impairment of one's defense due to both tangible factors, such as the unavailability of witnesses or loss or destruction of records, and intangible factors, including fading memories about the incident in question[.]" *Id.*

We do not minimize appellant's pre-trial incarceration, but we also are not persuaded that he demonstrated either anxiety or concern or an impairment to his defense. At the hearing addressing appellant's motion, defense counsel argued that the delay in trial prejudiced appellant because the State's witnesses would need to have their recollections refreshed. The court observed that this is routine practice in criminal trials, and any prosecutor would similarly prepare witnesses prior to trial. We agree. We do not perceive that appellant suffered prejudice sufficient to impinge on his speedy trial right.

Accordingly, after analyzing the four-factor test, we are not persuaded that appellant's constitutional right to a speedy trial was violated.

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