

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE

v.

DURIHAN P. DOWNS,

Defendant

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Cr.A. No. 1206008325

Submitted: September 2, 2014
Decided: September 26, 2014

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**MEMORANDUM OPINION AND ORDER
ON DEFENDANT'S MOTION TO DISMISS**

Durihan Downs ("Defendant") brings this motion for dismissal of the charges pending against him on the grounds that his right to a speedy trial has been violated by repeated trial delays. Defendant orally raised this motion on April 23, 2014, when his scheduled jury trial was continued to September 15, 2014. The Court ordered briefings on the matter.

On May 12, 2014, Defendant timely noticed and filed the Opening Brief in support of the Motion to Dismiss. On June 13, 2014, the State filed a Response opposing the Motion. On August 29, 2014, the Defendant filed a reply memorandum. After reviewing the parties' briefs, the Court determined that Defendant's Motion to Dismiss would be best addressed by a written opinion. This is the Final Decision of the Court on Defendant's Motion to Dismiss.

PROCEDURAL HISTORY

On June 10, 2012, Defendant was arrested and subsequently charged in Superior Court with Rioting (Class F Felony), Conspiracy in the Second Degree (Class G Felony), Resisting Arrest (Class A Misdemeanor), Menacing (Unclassified Misdemeanor), and Criminal Mischief Less Than \$1,000 (Unclassified Misdemeanor).¹ Defendant executed a preliminary hearing waiver on July 11, 2012, and was indicted on August 13, 2012. Defendant failed to appear for Arraignment on September 7, 2012, and requested a continuance for Arraignment scheduled for September 21, 2013. Arraignment was finally held on September 28, 2012, and Defendant's first case review was held on October 22, 2012. On November 7, 2012, a *nolle prosequi* was entered for each charge, and the case was transferred to this Court.

On November 13, 2012, this Court accepted Defendant's charges as one count of Menacing, in violation of 11 *Del. C.* § 602(a), one count of Resisting Arrest, in violation of 11 *Del. C.* § 1257, and one count of Criminal Mischief, in violation of 11 *Del. C.* § 811. On December 18, 2012, during Arraignment, Defendant pled not guilty and demanded a jury trial.

Trial before this Court was first scheduled for April 15, 2013. The Office of the Public Defender ("PDO") however, requested a continuance in order to obtain conflict counsel for the remaining co-defendants, and trial was rescheduled to August 8, 2013.

On August 8, 2013, the PDO requested a second continuance, again in order to obtain conflict counsel,² and trial was rescheduled to December 5, 2013.

On December 5, 2013, the Court continued the trial to March 5, 2014, due to a lack of available prosecutors.

¹ Defendant is one of five co-defendants involved in the June 10, 2012 events.

² Although Defendant had been assigned counsel at this point in time, other co-defendants involved in the June 10, 2012 did not have counsel.

On March 5, 2014, the Court continued the trial to April 23, 2014, due to a scheduling conflict with the Court of Common Pleas Misdemeanor Trial Unit.

On April 23, 2014, Defendant sought to call multiple witnesses, which the Court could not accommodate without a two-day trial. When the Court continued trial to September 15, 2014, Defendant orally moved to dismiss the charges on the grounds that his constitutional right to a speedy trial under the Sixth Amendment had been deprived. The Court reserved decision, and ordered briefing on the matter.³

On May 12, 2014, Defendant timely noticed and filed the Opening Brief in support of the Motion to Dismiss. On June 13, 2014, the State filed a Response opposing the Motion.

PARTIES' CONTENTIONS

Defendant argues that the repeated trial delays have violated his right to a speedy trial because the length of the delay between the date of his arrest to the date of the present Motion exceeds one year. Defendant maintains that the reason for these delays is not attributable to Defendant, and that as a result, he has suffered prejudice due to the likelihood of fading memories of witnesses; the potential unavailability of witnesses or other evidence, and; the mental and physical health concerns he is experiencing. Defendant also maintains that, as a result of having these pending charges on his criminal history, he has had difficulty in obtaining employment, and has been denied housing.

The State contends that Defendant's right to a speedy trial has not been violated, arguing that the length of the delay is not unreasonable given the nature of the case, the parties involved, and the timeframe in which the case proceeded from Superior Court to this Court. While the

³ At this time, two of the remaining four co-defendants still have pending charges in this Court.

State concedes that three continuances are attributable to the State, such continuances were based on neutral, valid reasons that were not designed to intentionally obstruct the defense. Finally, the State avers that Defendant has not been presumptively prejudiced by this delay, as he is not incarcerated, and has not proffered any evidence to support his claims that he has poor mental and physical health, or has lost employment and housing opportunities.

DISCUSSION

The Sixth Amendment to the United States Constitution, as applied to the States through the Due Process Clause of the Fourteenth Amendment,⁴ provides, in pertinent part, that “the accused shall enjoy the right to a speedy and public trial” in all criminal prosecutions.⁵ This constitutional right is also included in Article I, Section VII of the Delaware Constitution.⁶

In *Barker v. Wingo*, the United States Supreme Court set forth a balancing test for courts to use when determining speedy trial claims.⁷ Under the *Barker* test, courts analyze and weigh the conduct of both the prosecution and the defendant by considering four factors: “(1) the length of delay; (2) the reason for the delay; (3) the defendant’s assertion of the right to a speedy trial, and; (4) prejudice to the defendant.”⁸ No single factor is dispositive, “[r]ather, they ‘are related factors and must be considered together’” with the specific facts that are relevant to the case.⁹ Therefore, the Court will analyze each factor separately, and then carefully balance the factors to determine whether Defendant’s right to a speedy trial was violated.

⁴ *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967).

⁵ U.S. CONST. amend. VI.

⁶ DEL. CONST. art. I, § 7.

⁷ *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

⁸ *Id.* at 407 U.S. at 530.

⁹ *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker*, 407 U.S. at 533).

A. Length of Delay

The first factor that the Court must consider is the length of delay. A defendant's right to a speedy trial attaches when the defendant is either arrested or indicted, whichever occurs first.¹⁰ Unless the amount of time between the arrest (or indictment) and the trial is "lengthy enough to be presumptively prejudicial," the Court does not have to consider the remaining *Barker* factors.¹¹ The Delaware Supreme Court has found that "if the delay between arrest or indictment and trial exceeds one year, the Court generally should consider the other *Barker* factors."¹²

In the present case, Defendant was arrested on June 10, 2012. Trial, which has recently been continued, was last scheduled for September 15, 2014. Although the case originated in Superior Court, and this Court did not accept Defendant's charges until November 13, 2012, the delay of more than two years is presumptively prejudicial. Even if the Court were to only consider the time from the charges being accepted in this Court to trial, the delay exceeds one year. Therefore, this first factor weighs in favor of Defendant, and triggers a full *Barker* analysis.

B. Reason for Delay

Next, the Court considers the reason for delay, which is critical to the *Barker* analysis because it is often indicative of whether the defendant will prevail on the speedy trial claim.¹³ In considering and assigning weight to the reason for delay, the Court looks at the parties' conduct and the particular circumstances of the case.¹⁴ If the State causes a delay in order to intentionally

¹⁰ *Id.* at 273.

¹¹ *Hicks v. State*, 26 A.3d 214 at *2 (Del. 2011) (TABLE).

¹² *State v. Sells*, 2013 WL 1654317 at *2 (Del. Com. Pl. April 17, 2013) (citing *Cooper v. State*, 32 A.3d 988 at *7 (Del. 2011) (TABLE)).

¹³ *Id.* at *3 (citing *Bailey v. State*, 521 A.2d 1069, 1081 (Del. 1987)).

¹⁴ *Id.* at *3.

obstruct the defense, the reason for delay will weigh heavily against the State.¹⁵ Delays caused by “negligence, overcrowded courts, or excessive caseloads on prosecutors” are also attributable to the State because “the defendant has no influence over the decisions necessary to reduce a backlog in the courts or the caseloads of individual prosecutors.”¹⁶ Although these delays are considered to be neutral,¹⁷ they still “[fall] on the wrong side of the divide between acceptable and unacceptable reasons for delaying criminal prosecution once it has begun.”¹⁸

The first six months of the present case proceeded with ordinary pre-trial activity, as the case was transferred to this Court after a *nolle prosequi* was entered for Defendant’s charges. As such, this ordinary pre-trial activity cannot be weighed against the State. Upon the scheduling of the first, and subsequently the second, trial date, the PDO moved for a continuance so that conflict counsel could be obtained for co-defendants. The PDO’s first two continuances are considered to be “granted for good cause,” and as such, should not weigh against Defendant.¹⁹ The State concedes that the last three continuances, as requested by the Court, are attributable to the State. These delays, which were caused by a lack of available prosecutors, a scheduling conflict, and the Court’s inability to accommodate a two-day trial, are neutral but weigh against the State. Therefore, the second factor weighs in favor of Defendant, albeit to a minor degree.

C. Defendant’s Assertion of the Right to a Speedy Trial

“If and when a defendant asserts his rights are factors of considerable significance in determining whether there has been a speedy trial violation.”²⁰ A defendant’s failure to assert

¹⁵ *Middlebrook*, 802 A.2d at 274 (quoting *Barker*, 407 U.S. at 531).

¹⁶ *Key v. State*, 463 A.2d 633, 636 (Del. 1983).

¹⁷ *Middlebrook*, 802 A.2d at 274.

¹⁸ *Id.* at 274 (quoting *Doggett v. United States*, 505 U.S. 647, 657 (1992)).

¹⁹ *Hicks*, 26 A.3d 214 at *2.

²⁰ *Bailey*, 521 A.2d at 1082.

the right “will make it difficult for a defendant to prove that he was denied a speedy trial.”²¹ Therefore, while there is no statutory proscribed time frame that precludes a defendant from asserting his right to a speedy trial, the defendant nonetheless has “some responsibility to call attention to what he views as an unfair postponement.”²²

In this case, Defendant asserted his right to a speedy trial on April 23, 2014, when the Court continued trial for the fifth time. This was over one year and ten months after his arrest. At no point prior to this last continuance did Defendant raise the issue of an unfair postponement, and while he and his attorney had been prepared for trial each time it was continued, his “apparent acquiescence to the delays and his silence until *this* [continuance] are significant.”²³ Therefore, this third factor weighs against Defendant.

D. Prejudice to the Defendant

Finally, in considering the fourth factor, the Court weighs the prejudice to the defendant in light of the interests that the speedy trial right aims to protect: “(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.”²⁴ Although the Defendant in this case has only raised two interests in her motion, the Court will address all three.²⁵

First, a defendant’s constitutional right to a speedy trial is intended to protect an unjust, lengthy pretrial incarceration.²⁶ “[T]ime spent in jail awaiting trial by one presumed innocent until proven guilty often means loss of a job, disrupts family life, and enforces idleness,” and

²¹ *Middlebrook*, 802 A.2d at 275.

²² *Id.*

²³ *Page v. State*, 934 A.2d 891, 898 (Del. 2007) (emphasis added).

²⁴ *Sells*, 2013 WL 1654317 at *4 (quoting *Middlebrook*, 802 A.2d at 276).

²⁵ See *Middlebrook*, 802 A.2d at 276; see also *Bailey*, 521 A.2d at 1082.

²⁶ *Middlebrook*, 802 A.2d at 276.

“subjecting a defendant to these consequences is a serious matter.”²⁷ In this matter, although Defendant was incarcerated for nine days until his release on secured bail, he does not take issue with his incarceration on his motion. Therefore, the Court cannot find that this first interest has been impaired.

Second, the right to a speedy trial is also designed to minimize the anxiety of the defendant. Even if the defendant is not incarcerated prior to trial, he is presumed to be prejudiced “by living under a cloud of anxiety, suspicion, and often hostility” when there is a delay of trial.²⁸ However, the anxiety that the delay may have caused will not weigh in a defendant’s favor unless the defendant has alleged “*excessive* concern or anxiety.”²⁹

Here, Defendant has not asserted that he is experiencing anxiety while awaiting trial. Moreover, in comparing Defendant’s present charges to the felony charges he could have faced in Superior Court, the level of anxiety that Defendant could be experiencing is minimal. However, Defendant also maintains that, as a result of having these pending charges on his criminal history, he has had difficulty in obtaining employment, and has been denied housing. Since the delay has created this ‘cloud of suspicion’ over Defendant, which is presumptively prejudicial, this second protected interest has been impaired.

Finally, a defendant’s right to a speedy trial limits the possibility that the delay will impair the defense. This is the “most serious” interest that the Sixth Amendment safeguards “because the inability of a defendant [to] adequately prepare his case skews the fairness of the entire system.”³⁰ Moreover, this type of prejudice is particularly difficult to prove because

²⁷ *Sells*, 2013 WL 1654317 at *4 (citations omitted).

²⁸ *Middlebrook*, 802 A.2d at 277 (quoting *Barker*, 407 U.S. at 533).

²⁹ *Cooper*, 32 A.3d 988 at *8.

³⁰ *Barker*, 407 U.S. at 532.

“time’s erosion of exculpatory evidence and testimony can rarely be shown” by the record.³¹

Thus, a delay that prejudices the defendant’s defense “is not a point to be resolved with mathematical certainty.”³²

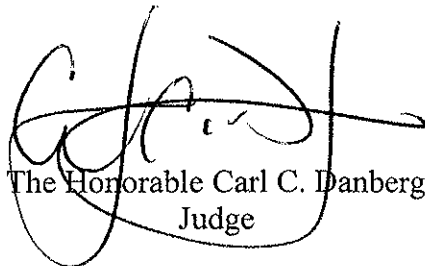
Here, while Defendant maintains that the memories of witnesses, including Defendant, are likely to have faded, he has failed to make any specific showing of how he would be prejudiced by a witness’s fading memory. In a similar vein, although Defendant asserts that the delay has negatively impacted his mental and physical health, he again has failed to provide any specific facts detailing what kind of condition he currently faces. Therefore, the Court cannot find that this third interest has been impaired.

E. Balancing of Factors

In carefully balancing the *Barker* factors, the Court finds that Defendant’s right to a speedy trial was violated, as three out of the four factors weigh in Defendant’s favor, albeit slightly. When considering the specific facts of the case, the length delay, reasons for delay, and prejudice to the Defendant all support Defendant’s argument.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** this 26th day of September, 2014, that Defendant’s Motion to Dismiss is **GRANTED**.


The Honorable Carl C. Danberg
Judge

cc: Faye Holmes, Judicial Case Manager

³¹ *Doggett*, 505 U.S. at 655.

³² *Middlebrook*, 802 A.2d at 277 (citations omitted).