UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0593

September Term, 2015

BYRON SENTRAL DRUMMOND

v.

STATE OF MARYAND

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

JJ.

Opinion by Kehoe, J.

Filed: December 8, 2016

The Circuit Court for Caroline County, proceeding upon an agreed-upon statement of facts, convicted Byron Sentral Drummond of being a drug kingpin. The circuit court sentenced appellant to a mandatory twenty year term of imprisonment without parole.

On appeal, appellant raises two issues for our review:

1. Whether the trial court erred by denying appellant's motion to dismiss.

2. Whether the trial court erred by denying appellant's motion for removal due to pretrial publicity.

Finding no error, we affirm.

BACKGROUND

On July 18, 2014, appellant was charged in a 21 count indictment on serious felonies relating to being a drug kingpin and the distribution of illegal drugs. On July 25, 2014, a warrant was served on appellant at the Queen Anne's County Detention Center, where he was serving a sentence on an unrelated charge. The following week, when appellant had not yet been scheduled to appear in Caroline County circuit court for a bail review or initial appearance, he contacted the circuit court to inquire as to the reason for the delay. The clerk's office informed him that they had no record of his being served. The warrant, which had remained at the Queen Anne's County Detention Center following service, was ultimately returned to the Caroline County Circuit Court on September 15, 2014. Appellant's initial appearance was then scheduled for September 17, 2014, which was 54 days after he was served with the warrant.

Prior to his scheduled trial date, appellant moved to dismiss the charges for violations of the 180-day *Hicks* rule[1] as well as his constitutional right to a speedy trial, which the court denied. Appellant also moved for removal of his trial due to pretrial publicity, which the court also denied.

I. A *Hicks* Violation?

Appellant first contends that the circuit court erred in denying his motion to dismiss for a violation of the *Hicks* rule because he was not tried within 180 days of the date when he *should have had* his initial circuit court appearance. It was the State's obligation, appellant argues, to schedule his initial appearance on the next practicable court date after he was served with the warrant, which would have been July 28, 2014, and to schedule his trial 180 days from that date. The State responds that the 180-day period began to run on September 14, 2014, the date of appellant's first appearance in circuit court, and therefore appellant's *Hicks* rights were not violated as of the date of the motion hearing on February 2, 2015.

The statutory right to a speedy trial is set forth in the Md. Code (2008 Repl. Vol.) §6–103(a) of the Criminal Procedure Article ("CP"), which provides in pertinent part:

> (a) *Requirements for setting date*. — (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
> (i) the appearance of counsel; or

[1] Pursuant to what is now Criminal Procedure Article § 6-103 and Md. Rule 4-271, the State's failure to bring a criminal case to trial within 180 days of a defendant's first appearance in circuit court can result in the dismissal of charges. *State v. Hicks*, 285 Md. 310 (1979). A defendant's *Hicks* rights are distinct from his constitutionally protected right to a speedy trial. This distinction has been addressed in numerous Maryland appellate decisions. *See, e.g., Collins v. State,* 192 Md. App. 192, 204–14 (2010).

(ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.

(2) The trial date may not be later than 180 days after the earlier of those events.

The right is also reflected Maryland Rule 4-271, which provides in pertinent part:

> (a) Trial Date in circuit court. (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events.

In rejecting appellant's argument that the charges against him should be dismissed due to a *Hicks* violation, the circuit court found that the plain language of Rule 4-271 required that the 180-day period began to run on the actual date of appellant's initial appearance:

> As far as the *Hicks* argument goes, I'm going to deny the Motion to Dismiss on that basis, because I accept [the prosecutor's] argument that the Rule says what it says and that the State has the right to rely on what ... the Rule says. That it, knowing that [appellant] wasn't arraigned until a particular day, the State had a right to rely on the fact that it had 180 days from that period of time to be ready for trial. However, ... again I compliment [defense counsel] for bringing up the argument that, Judge, the date should run from July 28th because that's the date that he, that [appellant] should have been brought here. The State is not, ... as [defense counsel] points out, simply the State's Attorney for Caroline County. The State is the State. It's the State of Maryland, acting through the jurisdiction in the individual counties. So ... that's an argument that gets my attention. Plus the fact, I mean he argues, and I think rightfully so, that in this case if in fact the Indictment isn't dismissed, the State is actually being kind of rewarded for its negligence, again I don't find there was any nefarious conduct that caused [appellant] not to be brought in for his Advice of Rights under 4-212, but the State's being rewarded for its negligence in not doing what it was supposed to do. And I do find that there's some allure to that argument. But I think that the argument that the State makes that it has the right to rely on the Rules just as the Defendant does carries the day and therefore the Court denies the motion to dismiss on those grounds.

It is well settled that it is the State's responsibility to bring a criminal defendant to trial within the proscribed period. *Dorsey v. State*, 349 Md. 688, 702 (1998) (citations omitted). In this case, although the delay in the scheduling of appellant's initial appearance was due to a clerical or administrative error on the part of the State, the dates set forth in CP § 6–103(a) and Rule 4–271 are mandatory dates, and there is no provision in the statute or the Rule permitting the dates to be altered for cause.

Appellant recognizes that this Court reached the same result in *McCallum v. State,* 81 Md. App. 403, 409-10 (1990), *cert. granted and aff'd on other grounds*, 321 Md. 451 (1991). In *McCallum*, the defendant was serving a sentence in the county detention center when new charges were filed in the circuit court. *Id*. at 408-09. The court scheduled defendant's preliminary hearing, but for reasons not explained at the hearing, defendant was not transported to court that day. *Id*. at 409. The hearing was postponed and no action was taken until counsel entered an appearance two months later. *Id*. McCallum argued that the *Hicks* date should have begun to run on the date he was originally scheduled to appear since it was the State's responsibility to bring him to court and the State failed to do so. *Id*. In rejecting McCallum's argument and ruling that counsel's appearance triggered the start of the 180-day period, this Court held that "[t]he fact that the State may by its neglect have caused the preliminary hearing to have been postponed is irrelevant." *Id*. at 409-10.

Here, appellant's first court appearance was September 17, 2014, and pursuant to the express terms of CP § 6–103(a) and Rule 4–271, the 180-day period began to run on

that day. The circuit court did not err in finding that appellant's statutory right to a speedy trial was not violated because as of the hearing on February 2, 2015, the 180-day deadline of March 16, 2015 had not yet expired.[2] Appellant's remedy, if one exists, lies in his constitutional right to a speedy trial.

II. A Violation of Appellant's Right to a Speedy Trial?

Appellant contends that he was deprived of his constitutional right to a speedy trial due to the delay between the date he was served with the warrant on July 25, 2014, and the date of his argument on the motion to dismiss on February 2, 2015—a delay of six months and nine days. The State asserts that the delay in appellant's case does not meet the minimum constitutional threshold, and even if it did, the delay was largely attributable to the administration of justice in the pretrial stage, and therefore survives constitutional scrutiny.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant's right to a speedy trial. *See* U.S. Const. amend. VI; Md. Const. Decl. Rights, art. 21. *See also Divver v. State*, 356 Md. 379, 387-88 (1999). In reviewing a claim for a violation of the right to a speedy trial, we make "our own independent constitutional analysis" to determine whether this right has been denied. *Howard v. State,* 440 Md. 427, 446-47 (2014) (citing *Glover v. State,* 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional appraisal in light

[2] Appellant's trial was eventually postponed beyond the 180-day deadline of March 16, 2015 but appellant does not challenge the postponement.

of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Glover*, 368 Md. at 221.

The United States Supreme Court has established a "four factor balancing test" to assess whether a defendant's right to a speedy trial has been violated by evaluating: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972); *State v. Kanneh*, 403 Md. 678, 687 (2008). Maryland courts have consistently applied the *Barker* factors when reviewing an alleged violation of the right to a speedy trial. *Kanneh,* 403 Md. at 687*; Glover*, 368 Md. at 221.

The "threshold consideration is whether the delay is deemed to be of constitutional dimension." *Smart v. State*, 58 Md. App. 127, 131 (1984). If the delay is not of a "constitutional dimension", there is no need to apply the *Barker* four-factor analysis. *Id*. The length of delay is measured from the date of arrest to the date of trial or hearing on the motion. *Ratchford v. State,* 141 Md. App. 354, 360 (2001). Although there are no fixed rules as to what is a constitutionally significant delay, the Court of Appeals has consistently held that delays of more than one year are presumptively prejudicial and thus warrant a full *Barker* analysis. *State v. Kanneh,* 403 Md. 678, 688 (2008); *Glover v. State,* 368 Md. 211, 223 (2002). Additionally, Maryland appellate courts have recognized that a delay of less than six months is almost never "of constitutional dimension." *See, e.g., State v. Gee*, 298 Md. 565, 579 (1984); *Collins v. State*, 192 Md. App. 192, 213–14 (2010).

In cases, such as the present one, where the length of delay is more than six months but less than a year, we have sometimes undertaken the *Barker* analysis. *See, e.g., Lloyd v. State,* 207 Md. App. 322, 329 (2012), *cert denied*, 430 Md. 12 (2013) (An eight-month and fifteen-day delay triggered constitutional scrutiny because it "might" be presumptively prejudicial), *State v. Ruben*, 127 Md. App. 430, 440 (1999) (A delay of eleven months, though "barely" of constitutional dimension, was sufficient to trigger constitutional analysis), *cert. denied,* 356 Md. 496 (1999); *Carter v. State*, 77 Md. App. 462, 466 n.3 (1988) (A seven-month and twenty-five-day delay was presumptively prejudicial.). In the present case, we will undertake a constitutional review in order to fully evaluate appellant's contentions.

In addressing the four factors of the *Barker* test, the length of delay is but one factor, and it is the least determinative of the four factors to be considered. *Howard,* 440 Md. at 447-48 (citing *Kanneh*, 403 Md. at 690). Nonetheless, the overall length of the delay of six months and nine days is not excessive and does not weigh in appellant's favor.

The reasons for delay are closely related to the length of delay. *Bailey*, 319 Md. at 412. The period between the arrest and the first scheduled trial date is generally considered pre-trial preparation, which is neutral and is not weighed against either party. *See Malik v. State*, 152 Md. App. 305, 318 (2003) (citations omitted). Additionally, "[t]he nature of the charges levied also affects the permissible delay: the more complex and serious the crime, the longer a delay might be tolerated because society also has an

interest in ensuring that longer sentences are rendered upon the most exact verdicts possible." *Lloyd,* 207 Md. App. at 328–29 (quotation marks and citations omitted)). As the United States Supreme Court explained when assessing the reasons for delay:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

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

Appellant's first scheduled trial date was February 9, 2015. The initial delay of 54 days was attributable to the State but it was a clerical error, as opposed to the sort of deliberate foot-dragging identified in *Barker*. This period counts against the State but "less heavily" than would a deliberate delay. The remaining four months and 17 days from September 17, 2014, to February 9, 2015, was consistent with standard pre-trial preparation, particularly in light of the gravity of the charges against appellant. Accordingly, we deem the reasons for that delay to be neutral, and therefore not weighted in favor of either party.

The third factor concerns the "defendant's responsibility to assert his right." *Henry v. State*, 204 Md. App. 509, 554 (2012) (quoting *Barker*, 407 U.S. at 531). Whether and how a defendant asserts his right to a speedy trial is indicative of the degree of the deprivation since "[t]he more serious the deprivation, the more likely the defendant is to complain." *Bailey*, 319 Md. at 409 (citing *Barker*, 407 U.S. at 531-32). Appellant

promptly asserted his right to a speedy trial during the initial 54-day delay period, by contacting the court when his initial appearance was not scheduled promptly.

"Finally, the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Henry*, 204 Md. App. at 554. Actual prejudice exists when there is oppressive pretrial incarceration; pretrial anxiety; and impairment of the defendant's ability to prepare his defense. *Barker*, 407 U.S. at 532 (footnote omitted). The burden is on the defendant to show actual prejudice. *Henry*, 204 Md. App. at 554 (citing *Ratchford*, 141 Md. App. at 361). Appellant claims that he was prejudiced because "some of his co-defendants' cases were resolved prior to his," and those witnesses could now testify against him. Appellant is correct in one sense but, as the trial court aptly stated, appellant's argument "is one that is based on the vagaries of chance more than any sound legal principle." The actual prejudice prong of the *Barker* test is focused on matters like the unavailability of witnesses because of the passage of time or the destruction of physical evidence. Appellant failed to establish any prejudice in this sense.

In summary, the duration of the delay was minimal (at least in the context of *Barker* and its numerous progeny); the State was responsible for only 54 days of that delay; appellant promptly asserted his speedy trial rights; but appellant was not able to demonstrate substantive prejudice to his ability to defend himself against the State's case. We conclude that, on balance, the *Barker* factors do not weigh in favor of a finding that appellant's constitutional right to a speedy trial was violated. *Accord Howard*, 440 Md. at

449-50 (holding that defendant's constitutional right to a speedy trial was not violated where the lack of actual prejudice and the neutral reasons for the delay outweighed the length of delay and defendant's assertion of his right to a speedy trial).

III. Pretrial Publicity

Appellant contends that the trial court abused its discretion in denying his motion for a change of venue due to extensive pretrial publicity surrounding his case. The State responds that, because appellant was "mentioned in but a few lines of text buried within each [media] report," he failed to satisfy the heavy burden of demonstrating that the community was so saturated with prejudicial information that it would make *voir dire* meaningless.[3]

"Whether a case should be removed is a decision that rests within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 675 (2003) (citation omitted). A trial court's decision on removal will not be reversed absent a showing of abuse of discretion. *Muhammad v. State*, 177 Md. App. 188, 300 (2007) (citation omitted). "[T]he party seeking removal has the burden of showing that 'he ha[s] been prejudiced by adverse publicity and that the voir dire examination of prospective jurors, available to him, would not be adequate to assure him a fair and impartial trial.'" *Simms*

[3] The State notes that although appellant moved to remove the case on the basis of pretrial publicity, his counsel raised a different argument at the hearing on the motion, taking the position that that once empaneled, there would be no way to prevent the jury from investigating media reports of appellant (short of sequestration) once the trial began. The State does not contend, however, that appellant failed to preserve the argument that he raises on appeal regarding removal.

v. State, 49 Md. App. 515, 518 (1981) (quoting *Waine v. State*, 27 Md. App. 222, 227 (1977)). In fact, the publicity must be so massive and widespread or inherently prejudicial that it "saturated the community" in order for *voir dire* to be utterly meaningless. *Id*. (quoting *Sheppard v. Maxwell*, 354 U.S. 333, 363 (1960)).

In his brief, appellant asserts that damaging pretrial publicity tainted the jury pool and denied him the right to a fair trial. The two articles submitted to support this contention were an article in the August 2014 edition of *Chesapeake Tod*ay[4] titled, "Heroin, From Shore to Shore, Maryland's Black Plague of Death," and an online news story from the *Caroline Times Record*[5] captioned, "Hughes' Grandson Charged with Stealing From Him."

The August 2014 edition of *Chesapeake Today* contains several stories about law enforcement efforts to break up a heroin distribution ring on Maryland's Eastern Shore. One article, which began on page 10 of that issue, focused on "heroin kingpins" who had recently been arrested as part of this effort. Appellant is identified as one such kingpin and is further described as a "hardened criminal" who had successfully manipulated the court system in Caroline County for years. The subject of the September 10, 2014, online

[4] *Chesapeake Today* is a tabloid newspaper covering crime issues in the Chesapeake region of Virginia, Maryland, Delaware and the District of Columbia. *See* http://www.the-chesapeake.com/, visited November 22, 2016. Its website indicates that it currently has 246 on-line subscribers. During the hearing on appellant's motion to remove his case, the prosecutor stated that *Chesapeake Today* was published in St. Mary's, Maryland and sold through newsstands.

[5] The *Caroline Times Record* is a weekly newspaper published in Caroline County.

article in the *Caroline Times Record* was Andrew Douglas White, a grandson of former Maryland Governor Harry Hughes, who was charged with theft and conspiracy to distribute heroin and numerous related charges. The article identified appellant as White's "co-conspirator."

Although appellant's pre-trial motion sought removal on the basis of pretrial publicity, his counsel presented a different argument at the hearing. Counsel asserted that, once empaneled, there would be no way to prevent the jury from investigating media reports of appellant (short of sequestration) once the trial began.

The trial court found that the two news stories fell short of the threshold for establishing the degree of prejudice that would warrant transfer of the case to another venue:

> [T]he Defense's Exhibit 2, which may very well have come off the internet mentions [appellant] in three lines of print. The article on the Chesapeake Today, Exhibit 1, is a multi-paged article and [appellant] is first mentioned on page ten, I believe, in about 20 or so ... lines of print ... and then again on page 12 with another 20 or so lines of print. So I do not find as a matter of fact that ... this mention in the article would preclude him from receiving a fair trial here in Caroline County, in Denton. There's a difference between pretrial publicity that, as it affects the matters of jurors who are in a binary panel, that is, a case like the Boston Marathon bombing in which everybody, not only in Boston but in the whole country knows about the bombing. There's a difference between that kind of prejudice to the Defendant versus what might happen during the trial. *If this is the sole sum of the information that's out to the public, I don't believe that ... what's included in Defense Exhibits 1 and 2 for the purpose of this proceeding, would preclude [appellant] from receiving a fair trial if the trial is administered according to the Maryland Rules of Procedure*.

(Emphasis added.)

As the motions court noted, appellant was mentioned briefly in one article and more thoroughly in another. No evidence was presented as to the circulation of either publication or how widely-read either was in Caroline County. The evidence before the motions court fell far short of the sort of media saturation that would render *voir dire* meaningless. *Simms*, 49 Md. App. at 518. The motions court did not abuse its discretion in denying the motion to remove.

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