Circuit Court for Baltimore County
Case No. C-03-CR-20-002801

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 149

September Term, 2022

KELLY BRANCH

v.

STATE OF MARYLAND

Reed,
Friedman,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: February 16, 2023

*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. R. 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Following a bench trial in the Circuit Court for Baltimore County, the Honorable Dennis M. Robinson, Jr., presiding, convicted appellant Kelly Branch of attempted second-degree rape and related offenses. Branch was sentenced to a total prison term of 25 years. He noted a timely appeal. Branch now asks us to consider whether the circuit court erred in denying a motion that Judge Robinson recuse himself, and whether the circuit court erred in denying the motion to dismiss the indictment on constitutional speedy trial grounds. For the reasons that follow, we affirm the circuit court's judgment.

BACKGROUND

Branch was charged with assaulting and attempting to rape a woman he had hired to clean his house. The housecleaner testified that she fought back and was able to talk Branch into letting her out of the house, escaping with only minor injuries.

Branch testified that the housecleaner became angry after he told her that he could not pay for her services because his expected unemployment benefits had not yet come through. Branch stated that the housecleaner struck him and a struggle ensued, during which "it was possible that ... she could have had her pants come down a slight bit[.]" He denied lowering his own pants or attempting penetration and insisted that he did nothing more than defend himself from her attack.

Because of the "he said/she said" nature of the charged crimes and the lack of witnesses aside from the accused and the accuser, the credibility of the witnesses was crucial to the circuit court's verdict. Judge Robinson found the complaining witness to be more credible based on the evidence, her consistent version of events provided to multiple interviewers, and the fact that she had nothing to gain from creating "a long and detailed

version of events[.]" Judge Robinson "simply did not believe Mr. Branch's version of events."

DISCUSSION

I. MOTION TO RECUSE

Branch first argues that the circuit court erred in denying his motion requesting that Judge Robinson recuse himself from presiding over the trial. He contends that because he was on active probation in another case assigned to Judge Robinson that related to a previous offense, recusal was appropriate.

At the start of the trial, defense counsel advised Judge Robinson that Branch requested his recusal, on the ground that Branch "is on active probation to the court" and "there's a detainer in the jail from Your Honor on him." Acknowledging that there is "no bright line rule" that a judge cannot hear a subsequent case of a defendant on probation to that judge, defense counsel stated that he didn't think recusal was "an unreasonable request." Branch believed that he might be unfairly judged if, during the trial, Judge Robinson remembered Branch.

Judge Robinson stated that he understood why Branch was making the request, but explained that after he had been assigned the case and told the defendant's name, "[n]othing registered with me whatsoever, certainly not about the case number, but not about the Defendant's name." Judge Robinson was assigned to preside over Branch's bench trial the day before it was set to begin. Judge Robinson denied any recollection of Branch's prior charges, due to the likely "north of a thousand" people whom he had put on probation over the past five years. Judge Robinson assured counsel that he had done nothing to learn

anything about Branch's prior case and that he would not do so during the pendency of the trial.

Judge Robinson ruled on the motion:

> And this really does boil down to whether or not I feel I can be fair and impartial. And as we have discussed, there is no bright line rule that prevents me from hearing this trial simply because a Defendant was on probation to me. And I have no concerns whatsoever about my ability to be fair and impartial in this case based on Mr. Branch being on probation to me in another case.
>
> Frankly, I don't know whether it was pot possession, DUI, armed robbery or something more or less serious than the types of charges that are involved in this case. You know, sitting here this morning I looked at Mr. Branch, there's nothing about Mr. Branch's appearance that strikes me as somebody that I've seen before or had an opportunity to interact with in the past. And I really don't see how it would be any different, you know, in a bench trial, again, if he's going to testify and there's going to be some discussion or argument about what's fair game for impeachment purposes if counsel was to tell me all about the prior convictions, and then I would know about [t]hem.
>
> So, I mean, we might get to that point any way. So it's really not clear to me, you know, what the—I understand that there can be a perceived concern here and I think it is within my discretion whether or not I can be fair and impartial. I also think that I do have the discretion at some point in time during the course of this trial if I see or hear something and say oh, my gosh, that reminds me of some terrible facts and circumstances that I've heard of before and it occurs to me that that was Mr. Branch's case, which I think would be highly unlikely given the number of pleas that I've taken over the past five years.
>
> I understand a restart would not be ideal in terms of, you know, having this case get to a fair, final and efficient resolution but, you know, having said that it really does distill down to whether or not I feel I can be fair and impartial.
>
> As of now, I have no concerns about my ability to be fair and impartial. I think if something does come up that causes me concern about my ability to be fair and impartial, I have an obligation to inform counsel and

> Mr. Branch about that. And I would of course take that obligation seriously and would err on the side of caution in doing that.
>
> And so for those reasons the motion to recuse is denied.

Defense counsel voiced an objection to the ruling, "in order to preserve that issue should he be convicted." The matter then proceeded to trial.

Before rendering his verdict, Judge Robinson again addressed Branch's motion to recuse:

> And I just want to make it abundantly clear that throughout the course of this trial there was absolutely nothing that I saw or heard that gave me any reason to recall whatever the case is that Mr. Branch is on probation to me for.
>
> So I said at the outset that I didn't do any independent research to remind myself or find out what that was, that remains true. And I also said that if during the trial there was something that came up that reminded me of those circumstances I would let you all know. I obviously did not let you all know because that never happened and I still have absolutely no recollection of why it was that Mr. Branch was before me in the past.

Maryland Rule 18-102.11(a)(1) provides that a judge must "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including where the "judge has a personal bias or prejudice concerning a party[.]" "Generally speaking, [judges are] required to recuse [themselves] from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question [their] impartiality." *Matter of Russell*, 464 Md. 390, 402 (2019).[1]

[1] In opposition to this, judges also have a responsibility to "hear and decide matters assigned to the judge unless recusal is appropriate." MD. R. 18-102.7.

The Maryland Code of Judicial Conduct, however, "has not been interpreted to require a trial judge, who has presided over a prior case, involving the same defendant or incident, automatically to recuse him or herself from presiding over a subsequent trial involving the defendant." *Jefferson-El v. State*, 330 Md. 99, 106-07 (1993). That is because "there is a strong presumption in Maryland ... that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Id.* at 107. Consequently, the party requesting recusal "has a heavy burden to overcome the presumption of impartiality," and "[t]he decision to recuse oneself ordinarily is discretionary and will not be overturned except for abuse." *Att'y Grievance Comm'n v. Shaw*, 363 Md. 1, 11 (2001).

Branch did not make any showing of personal bias or prejudice on the part of Judge Robinson. Although Judge Robinson did not dispute that Branch may have been on probation or under a detainer to him, that was because the judge said he did not remember Branch at all—not his name, appearance, or his prior charges—due to the hundreds of defendants upon whom he had imposed probation, and he agreed not to perform any type of research that might refresh his recollection. Judge Robinson further indicated that he had no doubt of his ability to be fair and impartial in rendering a verdict in Branch's bench trial.

Moreover, Judge Robinson assured the parties that if something during the course of the trial triggered a memory that might prejudice Branch, he would recuse himself at that time. At the close of all the evidence, Judge Robinson stated that nothing revealed in the trial caused him to recall why Branch had previously appeared before him, even when

the State listed his prior impeachable offenses. Under these facts, no reasonable person who understood all the relevant facts would question Judge Robinson's impartiality in this case simply because he had placed Branch on probation in a prior case.

We are not persuaded that Branch overcame the strong presumption of Judge Robinson's impartiality such that recusal was warranted. Accordingly, we conclude that Branch has failed to demonstrate that Judge Robinson abused his discretion when he declined to recuse himself from presiding over Branch's criminal trial.

II. SPEEDY TRIAL

Branch also contends that Judge Robinson erred in denying his motion to dismiss the charges on constitutional speedy trial grounds. In his view, the 18-month delay between his arrest and the start of his trial was presumptively prejudicial, and the circuit court should have granted his motion.

Branch was arrested on September 8, 2020, indicted on October 14, 2020, and arraigned on December 21, 2020.[2] Defense counsel entered his appearance on February 2, 2021, and Branch's trial was scheduled for July 20, 2021. That trial was postponed to November 9, 2021, at the request of the defense for additional time to prepare for trial.

On November 9, 2021, the State requested a postponement because the Assistant State's Attorney was beginning a trial the next day. Branch objected, asserting his right to

[2] As a result of the continuing COVID-19 pandemic, the original *Hicks* date, the last day that the trial could occur pursuant to MD. R. 4-271, was extended by Administrative Order of the Chief Justice of the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland, *see* footnote 6, *infra*) until October 23, 2021. That is not challenged here.

speedy trial, and waived his right to a jury trial. The circuit court granted the State's postponement request and a bench trial was rescheduled for December 7, 2021, "the earliest conceivable date."

On December 7, 2021, however, the State requested a postponement due to delays in forensic testing caused by pandemic-related restrictions in the crime lab. Defense counsel, stating he was prepared for trial that day, again objected and asserted Branch's constitutional right to a speedy trial. Noting that it would be the last postponement granted to the State, the circuit court re-set the trial for March 1, 2022, which is when it began.

Branch filed a written motion to dismiss based on speedy trial grounds on February 23, 2022.[3] The circuit court addressed the motion just prior to the start of trial.

Judge Robinson explained that the issue of the delay had to be considered "against the backdrop of a pandemic that began approximately two years ago that resulted in reduced operations of the judicial system" and a months-long inability to conduct jury trials. Since Branch's request for a bench trial on November 9, 2021, the circuit court had done what it could to accommodate scheduling the trial, but cases "that have much more age" than Branch's were still awaiting trial, there was only one location being used for jury selection[4] and only a limited number of courtrooms were available in the courthouse. Under the circumstances, Judge Robinson found the reasons for the delay to be reasonable

[3] The February 23, 2022, motion was filed by defense counsel. Branch, *pro se*, had filed his own motion to dismiss on speedy trial grounds on January 6, 2022.

[4] To improve the social distancing during the COVID-19 pandemic, the Circuit Court for Baltimore County moved all jury selection activities to a single, large facility at the American Legion hall in Towson.

and the prejudice to Branch to be insufficient and denied the motion to dismiss on the ground of a violation of the right to a speedy trial.

In reviewing a motion to dismiss for violation of the right to a speedy trial, we make "our own independent constitutional analysis" to determine whether this right has been denied. *Glover v. State*, 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id*. 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. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972).[5] These four factors include: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530; *See also State v. Kanneh*, 403 Md. 678, 688 (2008). None of these factors is "'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.'" *Barker*, 407 U.S. at 533.

[5] A defendant's speedy trial right is guaranteed both by the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights. The Supreme Court of Maryland has adopted and applied the same test under Article 21 that the United States Supreme Court applies under the Sixth Amendment, *Divver v. State*, 356 Md. 379, 388 (1999), and Branch has not argued that we should apply any different standard.

The Supreme Court of Maryland[6] has noted that, for purposes of a speedy trial analysis, the length of the delay is generally measured from the date of the defendant's "arrest or filing of indictment, information, or other formal charges to the date of trial." *Divver v. State*, 356 Md. 379, 388-89 (1999). The time between Branch's arrest on September 8, 2020 and the start of his trial on March 1, 2022, approximately 18 months, was more than sufficient to trigger the speedy trial balancing analysis. *See Epps v. State*, 276 Md. 96, 111 (1975) (holding that one year and fourteen days was a sufficiently inordinate delay). Therefore, the first factor, the length of the delay, tips in favor of Branch. While important, this factor is the least determinative of the four factors. *Howard v. State*, 440 Md. 427, 447-48 (2014).

Ignoring the time period between Branch's arrest and the assignment of the first trial date of July 20, 2021—*see Jules v. State*, 171 Md. App. 458, 484 (2006) (holding that the time between arrest and the first trial date is usually accorded neutral status)—it was the defense that requested the first postponement, amounting to approximately four months of the delay. The next two postponement requests were made by the State, first because the prosecutor would not be available for trial and second because the DNA testing had not been completed, at least partly due to delays necessitated by the COVID-19 pandemic.

Although two delays were attributable to the State, we do not weigh these administrative delays heavily against it. *See Butler v. State*, 214 Md. App. 635, 659-60

[6] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

(2013) (quoting *Strunk v. United States,* 412 U.S. 434, 436 (1973)) ("'Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but ... they must 'nevertheless ... be considered [because] the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'"); *Glover,* 368 Md. at 226 (requirement of more time to allow for completion of DNA tests "is a valid justification in these circumstances"); *United States v. Pair*, 522 F. Supp. 3d 185, 194 (E.D. Va. 2021), *appeal docketed,* No. 21-4269 (4th Cir. June 1, 2021) (the COVID-19 pandemic was a valid reason for delay, and the court rejected any suggestion that the delay should weigh heavily, or at all, against the government); *United States v. Akhavan*, 523 F. Supp. 3d 443, 451 (S.D.N.Y. 2021) ("[T]he three-month delay thereafter is not attributable to the Government but rather to the pandemic, a neutral reason outside of the Government's control."). Thus, the second factor—the reason for the delays—weighs against the State, but only slightly.

"Often the strength and timeliness of a defendant's assertion of his speedy trial right indicate whether the delay has been lengthy and whether the defendant begins to experience prejudice from that delay." *Glover,* 368 Md. at 228 (citing *Barker,* 407 U.S. at 531-32). The defendant's assertion of his speedy trial right is therefore "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker,* 407 U.S. at 531-32.

Here, Branch moved in writing for a speedy trial when his attorney entered an appearance in February 2021. He asserted his speedy trial right in opposing the State's

requests for postponement on November 9, 2021, and December 7, 2021. He then, on his own, filed a motion to dismiss on speedy trial grounds on January 6, 2022, and through counsel on February 23, 2022. Thus, the third factor—assertion of the right—weighs in Branch's favor.

Regarding the final factor, prejudice to the appellant, we note that whether a defendant has suffered prejudice because of the pre-trial delay is the most significant factor in our analysis. *Jules,* 171 Md. App. at 487. And impairment of a defense is considered the most serious form of prejudice to a defendant. *Howard v. State,* 440 Md. 427, 449 (2014) (citing *Doggett v. U.S.*, 505 U.S. 647, 654 (1992)).

Branch contends generally that he was presumptively prejudiced based on the trial delay and his lengthy pre-trial incarceration. Branch has not asserted, either in the circuit court or on appeal, that the delay caused any evidence to go missing, any witnesses to become unavailable, or any memory to fade. Moreover, he makes no specific claim of heightened anxiety or concern, only the general claim of stress attendant to anyone incarcerated prior to trial.[7] Branch's claim that his prejudice was exacerbated by the fact that the delay enabled the State to bolster its case with DNA evidence is entirely unavailing. As mentioned above, the postponement allowed for the completion of DNA testing that was delayed by the limitations imposed upon the crime lab by the pandemic. There is no evidence that, during the delay, the State obtained new evidence it should have collected

[7] We do not minimize the anxiety Branch suffered from being incarcerated during the COVID-19 pandemic.

sooner. Moreover, it didn't matter: Judge Robinson found that the DNA evidence against Branch was "not conclusive." Thus, the fourth factor—prejudice to the defendant—does not weigh in Branch's favor.

A balancing of the *Barker* factors is case specific. *See Glover* 368 Md. at 231-32. Although some factors weigh in Branch's favor, on balance we conclude that his right to a speedy trial was not violated.

JUDGMENT AFFIRMED; COSTS ASSESSED TO APPELLANT.