Circuit Court for Cecil County
Case No. C-07-CR-17-001143

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0278

September Term, 2020

AARON ORNSTEIN

v.

STATE OF MARYLAND

Kehoe,
Gould,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: December 4, 2020

Appellant Aaron Ornstein committed robbery in both Maryland and Pennsylvania. Pennsylvania obtained physical custody over Mr. Ornstein first, and then convicted and sentenced him to a prison term. Over one year later, pursuant to the Interstate Agreement on Detainers (the "IAD"), Maryland took temporary custody over Mr. Ornstein for trial on the Maryland charges. A Maryland jury convicted him. Mr. Ornstein now argues that the circuit court should have dismissed his charges because he was not tried within the time constraints imposed by the IAD and, in addition, his constitutional right to a speedy trial was violated. We disagree and affirm.

FACTS AND BACKGROUND PROCEEDINGS

On May 10, 2017, the Howard Bank Branch 10 in Rising Sun, Maryland was robbed by two individuals (the "Maryland robbery"). On May 12, Detective Jonathan Wight, who was investigating the robbery, learned that the Southern Regional Police Department in Pennsylvania held two suspects for the robbery of a bank in Pennsylvania (the "Pennsylvania robbery"). The two suspects were Mr. Ornstein and his wife, Andrea Martin.

Detective Wight traveled to Pennsylvania to meet with his counterpart detective, search the suspects' car, and interview the suspects. During her interview, Ms. Martin told Detective Wight that she had stayed in the car while Mr. Ornstein committed the Maryland robbery.

As a result of his investigation, Detective Wight filed an Application for Statement of Charges to charge Mr. Ornstein with armed robbery, robbery, first-degree assault, second-degree assault, theft of more than $1,000 and less than $10,000, and related

charges. Mr. Ornstein was indicted by a Maryland grand jury, and an arrest warrant was issued on July 24, 2017.

On September 1, 2017, Mr. Ornstein signed a Waiver of Extradition in Pennsylvania. The Commonwealth of Pennsylvania issued an Order of Extradition that required Mr. Ornstein to be extradited to the State of Maryland "[a]fter disposition of pending charges and release from all commitments in the Commonwealth of Pennsylvania."

On December 6, 2017, Mr. Ornstein pleaded guilty to the Pennsylvania robbery and was sentenced to a prison term of two to four years.

Over one year later, on January 31, 2019, Mr. Ornstein sent what he called a "Notice of Availability" (the "Notice" or the "January 31 Notice") to the Clerk of the Court for Cecil County and to the State's Attorney for Cecil County.[1] The State's Attorney responded on February 7, 2019 with a letter and a Form V - "Request for Temporary Custody," along with copies of the indictment and warrant.

On March 15, 2019, officials from the Pennsylvania prison met with Mr. Ornstein and provided him with documents to sign, including (1) Form I - "NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT AND OF RIGHT TO REQUEST DISPOSITION"; (2) Form II - "INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR DISPOSITION OF INDICTMENTS, INFORMATIONS OR

[1] Mr. Ornstein contends that, prior to that time, he had been unsuccessfully trying to get help from the Pennsylvania prison system in obtaining information about how to resolve his charges for the Maryland robbery.

COMPLAINTS"; (3) Form III -"CERTIFICATE OF INMATE STATUS"; and (4) Form IV - "OFFER TO DELIVER TEMPORARY CUSTODY." Mr. Ornstein completed and signed all forms.

On May 15, 2019, he was transferred to Maryland for trial. His trial was originally set for August 4 and 5, 2019, but was postponed at the State's request to September 4 and 5, 2019. On August 7, 2019, Mr. Ornstein filed a motion to dismiss, alleging that the State failed to bring the charges against him to trial within the time period required under the IAD. Mr. Ornstein contended that the State was required to try him within 180 days of January 31, 2019, the date of his Notice. The State opposed the motion, arguing that the Notice was "not a proper or formal Request for Disposition" under the IAD, and, therefore, it did not trigger any timetable under the IAD.

A hearing was held on August 12, 2019. In addition to his arguments based on the IAD, Mr. Ornstein argued that the charges should be dismissed because his constitutional right to a speedy trial was violated. The circuit court denied the motion, stating:

> [Mr. Ornstein's counsel] had filed a motion to dismiss. I heard testimony from Mr. Ornstein. He indicated that he was incarcerated in the state of Pennsylvania, that he was sentenced on December 6th, 2017. He indicated that he was then transferred to a facility, Camp Hill in Pennsylvania, where he was then later – I guess that's the diagnostic center. It was determined that he would be sent to Somerset, and that's where he went.
>
> He indicates in his testimony that he had conversations with individuals at that facility who indicated they could not assist him with resolving his outstanding charges in Maryland.
>
> As a result, he sent notice to the State of Maryland, which has been offered into evidence, January 31st, 2019. Then on February 6th, 2019, the State's Attorney's Office forwarded documents to him. And then on March 15th, 2019, he signed documents. As such, custody of his person was

> provided to the State of Maryland. He was located in the State of Maryland in May of 2019.
>
> The Court has had an opportunity to consider the statute and the caselaw presented by [Mr. Ornstein's attorney]. The Court finds that notice was given on January 31. The State properly responded. And Mr. Ornstein indicated – or signed appropriate documents on March 15. That was the start date. His trial date is currently scheduled for September 4 and 5. The Court finds that it's within his speedy trial right. The Court denies the motion.

On September 4, 2019, Mr. Ornstein entered an Alford plea as to the robbery charge and the State nolle prossed the remaining charges. He was sentenced to five years' imprisonment.

This timely appeal followed.

DISCUSSION

Mr. Ornstein presents two questions on appeal:

1. Did the trial court err in denying his motion to dismiss for failure to comply with the IAD?

2. Did the trial court err in denying his motion to dismiss for failure to comply with his constitutional speedy trial rights?

We answer both questions in the negative and affirm.

I.

STANDARD OF REVIEW

A trial court's interpretation of a statute, such as the IAD, is considered a question of law that we review de novo. *Harrison-Solomon v. State*, 442 Md. 254, 265 (2015); *Pitts v. State*, 205 Md. App. 477, 586 (2012). When we review a court's decision denying a motion for a speedy trial, "we make our own independent constitutional analysis." *Vaise v. State*, 246 Md. App. 188, 216 (2020) (quoting *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 facts unless clearly erroneous." *Id.* (quoting *Glover*, 368 Md. at 221).

II.

The IAD

We recently described the history and framework of the IAD, so rather than reinvent the wheel, we shall quote from our opinion at length:

> A "detainer" is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." State v. Pair, 416 Md. 157, 161 n.2, 5 A.3d 1090 (2010) (citing Stone v. State, 344 Md. 97, 108, 685 A.2d 441 (1996)). Prior to the IAD, unresolved detainers were known to complicate the prisoner's ability to fully participate in the rehabilitative, educational, and vocational services and programs offered by the incarcerating institution. State v. Jefferson, 319 Md. 674, 679-80, 574 A.2d 918 (1990) (citing Carchman v. Nash, 473 U.S. 716, 730, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985)). Such problems were described by the Court of Appeals in Jefferson:
>
> > [T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [him] to additional good time credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process

> since he cannot take maximum advantage of his institutional opportunities.
>
> Id.
>
> In 1956, the Council of State Governments drafted what would become the IAD to address such problems. Pair, 416 Md. at 160, 5 A.3d 1090. The IAD took the form of a congressionally-sanctioned compact between its member states.[] Id. Maryland adopted the IAD in 1965, and it has been adopted by forty-eight states, the Federal Government, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia. Id. Under the IAD, the states agreed to limit their authority over certain prisoners in exchange for the right to quickly dispose of untried indictments of defendants serving time in other states. See Thomas R. Clark, The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction, 54 Fordham L. Rev. 1209, 1218 n.46 (1986) ("The IAD is a limitation on the receiving state.").
>
> The IAD is triggered by the filing of a detainer. Once filed, the incarcerating state (the "**sending state**") must notify the prisoner that the detainer has been filed and advise him of his right to a speedy disposition of the underlying charges in the state that filed the detainer (the "**receiving state**"). See, e.g., Md. Code Ann., Corr. Servs. ("**CS**") § 8-405(c) (1999, 2017 Repl. Vol.).
>
> The IAD has two mechanisms by which the prisoner may be transferred to the receiving state. First, Article III (codified in Maryland as CS § 8-405) gives the prisoner the right to demand a speedy disposition of the pending charges. Pair, 416 Md. at 162, 5 A.3d 1090 (citing Carchman, 473 U.S. at 718-19, 105 S.Ct. 3401). If the receiving state does not bring the prisoner to trial within 180 days of his request, the IAD requires the receiving state to dismiss the charges with prejudice. See CS § 8-405(a).
>
> Second, Article IV (CS § 8-406) permits the receiving state to request the transfer of the prisoner to stand trial. Pair, 416 Md. at 162, 5 A.3d 1090 (citing Reed v. Farley, 512 U.S. 339, 341, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994)). Under this provision, the receiving state must start the trial within 120 days of the prisoner's arrival in the receiving state or risk dismissal of the charges. See CS § 8-406(c).

Aleman v. State, 242 Md. App. 632, 637–39 *aff'd*, 469 Md. 397 (2020) (internal footnote omitted).

Mr. Ornstein advances two theories for his contention that his rights under the IAD were violated. First, he argues that the IAD's transfer mechanism was triggered when, on July 26, 2017, the State of Maryland filed what Mr. Ornstein describes as a detainer. At that moment, according to Mr. Ornstein, Maryland had "a burden to see the person is returned [to Maryland] to resolve the detainer." He claims that "Pennsylvania did not notify him of his rights under the IAD until March 15, 2019," and that "the State of Maryland did not have him delivered into Maryland until on or about May 25, 2019." On that basis, Mr. Ornstein contends that "[f]ailure to act in a timely manner to resolve a detainer can result in a violation of a person's constitutional speedy trial right."

Second, Mr. Ornstein argues that he triggered the IAD no later than January 31, 2019, when he sent the Notice to the clerk's office and the State's Attorney's office. Mr. Ornstein contends that this Notice gave the State "actual notice of [his] request to dispose of his outstanding charges in Maryland[,]" and therefore, triggered the 180-day timetable for his trial. Because his trial was held more than 180 days after January 31, 2019, he contends that the State violated the IAD and his case should have been dismissed.

We will address both arguments in turn.

A.

JULY 2017

We reject Mr. Ornstein's argument that the gears of the IAD were engaged by the issuance of his arrest warrant on July 26, 2017. As set forth above, the IAD is initiated when the receiving state files a detainer with the sending state. Md. Code Ann., Corr. Servs. ("CS") § 8-405(c) (1999, 2017 Repl. Vol.). "As pertains to the IAD, an interstate

detainer has been described as a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *Aleman v. State*, 469 Md. 397, 403-04 (2020) (cleaned up). Thus, the terms of the IAD don't kick in until the defendant is sentenced to a prison term in the sending state.[2] Mr. Ornstein wasn't sentenced for the Pennsylvania robbery until December 6, 2017, after the so-called detainer was filed in July 2017. As such, the July 2017 "detainer" did not trigger application of the IAD.[3]

B.

JANUARY 31, 2019

Mr. Ornstein argues that he initiated the 180-day period in which Maryland was required under CS § 8-405(a) to bring him to trial on January 31, 2019, when he sent his so-called "Notice of Availability" to the clerk's and state's attorney's offices in Cecil County. Recognizing that the January 31 Notice was not on the form created for such purpose, Mr. Ornstein contends that such forms "are neither contained in nor mandated by the IAD," and that "the caselaw is replete with examples where documents other [than]

[2] That the IAD becomes applicable only after the prisoner is sentenced is supported by other provisions of the IAD providing that the prisoner's and the State's respective rights to initiate a transfer apply only to a prisoner serving a "term of imprisonment." *See* CS § 8-405(a) ("[w]henever a person has entered upon a term of imprisonment") & CS § 8-406(a) ("the prisoner against whom the officer has lodged a detainer and who is serving a term of imprisonment").

[3] Even if the July 2017 "detainer" had sufficed to trigger application of the IAD, the State of Maryland was not obligated to exercise its right under CS § 8-405(a) to initiate the return of Mr. Ornstein to stand trial.

these forms were found to suffice for purposes of the IAD."[4] According to Mr. Ornstein, to hold otherwise, as the circuit court did, would inappropriately elevate form over substance.

Mr. Ornstein misses the point. The issue is not that he failed to use the proper form; it's that he failed to meet the requirements of a formal request for disposition contemplated under Section 8-405(a) of the IAD. The January 31 Notice did not include the required certificate from an official at the Pennsylvania prison where Mr. Ornstein was incarcerated. Section 8-405(a) of the IAD provides that the notice to the receiving state must include a certificate from the "appropriate official having custody of the prisoner" and must contain "the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner." "The purpose of these notice requirements is to enable the State's Attorney 'to evaluate whether the nature of the charges pending against the accused was of such a severe degree as to merit further trial in this State in the light of the sentence then being served in the other state that was a party to the interstate agreement.'" *Hines*, 58 Md. App. at 649 (quotation omitted).

[4] In support of his argument, in addition to citing *Hines v. State*, 58 Md. App. 637, 649 (1984), discussed below, Mr. Ornstein also relies on *United States v. Mauro*, 436 U.S. 340 (1978). He claims that in *Mauro*, "the Supreme Court found a writ of habeas corpus *ad prosequendum* sufficed to serve as a written request for temporary custody within the meaning of the IAD." Nothing in *Mauro* addresses the need for compliance with the certificate requirements of the IAD.

Mr. Ornstein acknowledges that the certificate was required, but shrugs it off as "inapplicable to the facts in the instant case." He argues that because Detective Wight had investigated the Maryland robbery in Pennsylvania and interviewed both Mr. Ornstein and his wife there,

> it [was] unnecessary, and indeed would be frivolous, for the State to assert it had a need for a certificate later of the status of the case in Pennsylvania from a proper authority in that state because it in fact had already been fully apprised about that case and had no need of any further information in order to be able to make an informed prosecutorial decision. It already had all the information necessary for making its decision to prosecute and had in fact initiated the process of prosecution by levying charges.

Mr. Ornstein's argument is unsupported.

First, the requirements of the IAD are clear, and there is no exception even if, as Mr. Ornstein asserts, the State didn't need any more information in order to decide whether to prosecute. Second, and more importantly, Mr. Ornstein is incorrect that the required information was known in Maryland. The certificate must contain "the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner." CS § 8-405(a). None of that information was or could have been known to Detective Wight from his trip to Pennsylvania in 2017, before Mr. Ornstein pleaded guilty and was sentenced for the Pennsylvania robbery.

Insisting on the certificate was not "exalt[ing] form over substance," as Mr. Ornstein contends. Although the IAD statute is liberally construed, its notice provisions are not, and the defendant bears the burden of making an appropriate request for speedy disposition.

Brooks v. State, 329 Md. 98, 103 (1993) (quotation omitted). As we stated in *Hines*, 58 Md. App. at 649 (quotation omitted), "[t]he notice requirements . . . , particularly the provision that the request of the prisoner 'shall be accompanied by a certificate of the appropriate official having custody of the prisoner' containing the information specified, are 'mandatory and not directory.'" *See also Thurman v. State*, 89 Md. App. 125, 131 (1991); *Isaacs v. State*, 31 Md. App. 604, 611 (1976).

A similar situation occurred in *Issacs v. State*, 31 Md. App. 604. There, we explained:

> The "Demand by Accused for Trial" did not comply with the Act. The information required by s 616D(a) was not supplied, and no certificate of the official having custody of the appellant accompanied the "Demand." Even after the State's Attorney invited appellant's attention to the deficiency in the 'Demand," there was no compliance with the Act until approximately four months later. The one hundred and eighty (180) day period in which an accused out-of-state prisoner must be tried did not begin to run until there was full compliance with the Act.

Id. at 613. So too here. Because Mr. Ornstein's January 31 Notice did not contain the requisite certificate, it did not comply with the IAD. *See id.* As such, it did not trigger the 180-day period under CS § 8-405(a) for the State of Maryland to bring the charges against Mr. Ornstein to trial.[5]

[5] Courts in other jurisdictions have also found that the IAD deadline was not triggered under similar circumstances. *See, e.g.*, *Eckard v. Commonwealth*, 20 Va. App. 619 (1995); *Parks v. State*, 43 So. 3d 858 (Fla. 5th DCA 2010); *State v. Blackburn*, 214 Wis. 2d 372 (1997).

Mr. Ornstein additionally claims that the court "issued a ruling that is somewhat confusing in its legal analysis of the facts and how they apply to the IAD." He states:

> At the Hearing on Defendant's Motion to Dismiss based on a Violation of the Interstate Agreement on Detainers, the Court found that Appellant gave notice on January 31, 2019. Since the court found Appellant's Notice of Availability to be "Notice," it should have found that its receipt was the operative date for the start of the 180 day time period to bring Appellant to Trial. The Court then found "The State properly responded." The court can only be referring to the fact [that] the State issued a Request for Temporary Custody as it is required to do under the IAD. But then, in a confusing conclusion given the two previous findings, since its rulings imply the IAD was controlling the actors' actions, the Court stated "And Mr. Ornstein … signed appropriate documents on March 15. That was the start date." Based on that analysis, the court denied the Motion. The trial court's ruling appears to put the cart before the horse.

(Internal citations omitted).

Mr. Ornstein seems to base his allegation of confusion on the court's statement that it "finds that notice was given on January 31." He takes this as proof that the court found that the 180-day clock under the IAD started ticking on January 31, 2019. Even if this reference may have been confusing, the court clearly held that the January 31 Notice did not trigger the IAD. The court stated:

> And Mr. Ornstein indicated – or signed appropriate documents on March 15. That was the start date. His trial date is currently scheduled for September 4 and 5. The Court finds that it's within his speedy trial right. The Court denies the motion.

We need not decide whether Mr. Ornstein's transfer was initiated by the State or by Mr. Ornstein because, either way, he was tried in a timely fashion. If we assume, as the circuit court did, that the IAD was triggered under CS § 8-405(a) by Mr. Ornstein on March

15, 2019, his trial was timely under the IAD because it he was tried less than 180 days later.

Likewise, if we assume that the State triggered the IAD under CS § 8-406(a), the trial was also timely. That's because the 120-day deadline under CS § 8-406(c) runs from the date the prisoner arrives in the receiving state, which in this case was May 15, 2019. Because Mr. Ornstein was tried within this 120-day window, his trial was timely under the IAD.

III.

SPEEDY TRIAL

At the hearing on his motion to dismiss, Mr. Ornstein added a basis for dismissing the charges not mentioned in his written motion to dismiss, namely, that his constitutional rights to a speedy trial were violated. Mr. Ornstein presses that argument on appeal.

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 Phillips v. State*, 246 Md. App. 40, 55-56 (2020). 18; *Divver v. State*, 356 Md. 379, 387-88 (1999).

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). 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; *State v. Kanneh*, 403 Md. 678, 688 (2008). "[N]one of the four 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." *Jules v. State*, 171 Md. App. 458, 482 (2006) (internal quotations omitted) (quoting *Barker*, 407 U.S. at 533).

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, 447 (2014) (internal quotations omitted) (quoting *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." *Glover*, 368 Md. at 221.

Before conducting the analysis using the *Barker* factors, we must first determine whether the length of the delay is so presumptively prejudicial that it warrants constitutional review. *See Barker*, 407 U.S. at 530; *Phillips*, 246 Md. App. at 56. Although there is no specific duration that constitutes a "delay of constitutional dimension," delays in excess of one year have been considered "presumptively prejudicial" and warranted a full analysis. *See Glover*, 368 Md. at 223-24; *Kanneh*, 403 Md. at 688.

The length of the delay is calculated from the date the "putative defendant" becomes an "accused." *Hines*, 58 Md. App. at 652 (quoting *United States v. Marion*, 404 U.S. 307, 313 (1971)). That occurs "upon commencement of [the accused's] prosecution by way of arrest, warrant, information or indictment, whichever first occurred." *Powell v. State*, 56 Md. App. 351, 358 (1983).

Mr. Ornstein was indicted by a grand jury, and an arrest warrant was issued on July 26, 2017. Accordingly, he became an "accused" in July 2017. There was a delay of

approximately 25 months before he was tried. This delay was long enough to trigger a speedy trial analysis. *Kanneh*, 403 Md. at 688; *see also Glover*, 368 Md. at 223 ("a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial'").

A.

LENGTH OF DELAY

"[T]he length of delay plays a dual role 'because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis.'" *Phillips*, 246 Md. App. at 56-57 (quoting *Kanneh*, 403 Md. at 688). Length of the delay is but one factor, and it is the least determinative of the four factors of the analysis. *Howard*, 440 Md. at 447-48 (citing *Kanneh*, 403 Md. at 690); *see also*, *Glover*, 368 Md. at 225 ("The length of delay, in and of itself, is not a weighty factor[.]").

The nature of the case is also a consideration in determining the significance of the length of delay. *See Divver*, 356 Md. at 390-91. In *Divver v. State*, the Court of Appeals found that a delay of one year and sixteen days constituted a speedy trial violation. *Id*. at 389, 395. With respect to the length of that delay, the Court noted that the defendant's charge of driving while intoxicated was "a relatively run-of-the-mill District Court case," involving two witnesses: the police officer and the defendant. *Id.* at 390-91. Therefore, the delay weighed more heavily in the defendant's favor than would ordinarily be the case in a circuit court criminal trials. *Id.* at 391; *see also State v. Bailey*, 319 Md. 392, 411 (quoting *Barker*, 407 U.S. at 531) ("the delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex . . . charge").

This case is distinguishable from *Divver* because it involved Mr. Ornstein's incarceration in Pennsylvania for a different robbery. Nonetheless, under the specific circumstances of this case and viewed in isolation, the length of the delay tilts slightly in favor of Mr. Ornstein's speedy trial claim.

B.

REASONS FOR THE DELAY

In assessing the reasons for the delay, the Supreme Court explained:

> 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).

Although Mr. Ornstein alleges that he often attempted without success to get Pennsylvania officials to assist him in having his case heard in Maryland, we have "repeatedly held that only the portion of the total delay period which is fairly attributable to this State is to be considered in determining the 'length of delay' factor." *Davidson v. State*, 18 Md. App. 61, 71 (1973).

Mr. Ornstein does not attribute Maryland's failure to try him sooner to anything other than negligence. As we previously stated:

> Although the negligent conduct on the part of the State by its apparent indifference to appellant's incarceration ought not be condoned, neither should it serve as a "check-mate" terminating prosecution. The Supreme Court has stated that

> [a] criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.

Powell, 56 Md. App. at 368 (quoting *United States v. Ceccolini*, 435 U.S. 268, 279 (1978) (quoting *with approval*, *McGuire v. United States*, 273 U.S. 95, 99 (1927))). Even if the State was negligent, as Mr. Ornstein contends, that factor would not favor Mr. Ornstein's claim that his speedy trial right was violated.

In any event, we see no evidence of negligence here as it appears that the delay owed to the fact that Mr. Ornstein was serving a prison sentence in Pennsylvania. As such, the State's reason for the delay weighs against a finding that Mr. Ornstein's speedy trial right was violated. *See Kanneh*, 403 Md. at 690. Moreover, even if the State had been negligent, this factor would be neutral, at best.

C.

ASSERTION OF THE RIGHT TO A SPEEDY TRIAL

The third factor concerns the "defendant's responsibility to assert his right [to a speedy trial]." *Henry v. State*, 204 Md. App. 509, 554 (2012) (internal quotations omitted) (quoting *Barker*, 407 U.S. at 531). The diligence of the defendant in asserting his right to a speedy trial is an important consideration because "[t]he more serious the deprivation, the more likely the defendant is to complain." *Bailey*, 319 Md. at 409 (internal quotations omitted) (quoting *Barker*, 407 U.S. at 531-32). "Because the strength of the defendant's efforts will be affected by the length of the delay, asserting the speedy trial right weighs heavily in determining if the right has been denied." *Dalton v. State*, 87 Md. App. 673, 688 (1991) (citing *Bailey*, 319 Md. at 409-10). In reviewing this factor, courts "weigh the

frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection." *Barker*, 407 U.S. at 529.

Mr. Ornstein argues that he first attempted to be brought to trial in 2017 and made "repeated attempts" thereafter.[6] After acknowledging Mr. Ornstein's attempts to be brought to trial, the circuit court nonetheless found that Mr. Ornstein first asserted his right when he sent the Notice in January 2019. This finding was not clearly erroneous. *See Vaise*, 246 Md. App. at 216. Because the State acted promptly upon its receipt of Mr. Ornstein's January 31 Notice, we conclude that this factor strongly weighs against Mr. Ornstein's claim.

D.

PREJUDICE AS A RESULT OF THE DELAY

"Finally, the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Peters v. State*, 224 Md. App. 306, 364 (2015) (citing *Henry*, 204 Md. App. at 554). Actual prejudice to the defendant must be assessed in light of the three interests that the right to a speedy trial was intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*; *see also Glover*, 368 Md. at 230. Particular forms of impairment, such as witnesses becoming unavailable, the loss or

[6] The State is mistaken to the extent that it claims, "Ornstein points to no instances of him asserting the right, other than the letter triggering the State's IAD request . . . ."

destruction of records, and fading memories, may create prejudice. *See Glover*, 368 Md. at 230; *Fraidin v. State*, 85 Md. App. 231, 268 (1991).

The burden is on the defendant to show actual prejudice. *Henry*, 204 Md. App. at 555 (citing *Ratchford v. State*, 141 Md. App. 354, 361 (2001)). Here, although Mr. Ornstein claims that as a result of the delay, he has been substantially prejudiced, he alleges only that:

> Witnesses' memories would not be as good. He would have no opportunity to examine physical evidence, especially electronic devices, such as surveillance cameras, and so on, at a time contemporaneous to the incident to check whether they were properly set up and operating correctly. Other physical evidence might no longer be in existence.

These assertions are nothing more than bald allegations of prejudice, which is not enough. *See Bailey v. State*, 319 Md. 392, 417 (1990); *Barnett v. State*, 8 Md. App. 35, 42 (1969). Mr. Ornstein failed to establish any actual prejudice resulting from the pretrial delay.

E.

BALANCING THE FACTORS

Viewing each of the factors from Mr. Ornstein's perspective, two clearly weigh against his claim; one is, at best, neutral; and one, at best, tilts slightly in his favor. On our review of this record, therefore, we reject Mr. Ornstein's contention that his right to a speedy trial was violated.

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