Circuit Court for Baltimore City
Case No. 1114099020

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 610

September Term, 2017

GREGG THOMAS

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 11, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Baltimore City, Gregg Thomas, appellant, was convicted of attempted first-degree murder, use of a handgun in the commission of a crime of violence, and prohibited possession of a handgun. Thomas raises two issues on appeal: (1) whether the trial court erred in denying his motion to dismiss on constitutional speedy trial grounds, and (2) whether there was sufficient evidence to sustain his convictions. For the reasons that follow, we affirm.

I. Speedy Trial Claim

Thomas was arrested in March 2014 and his first three trials ended in a mistrial. Following the last mistrial, in May 2016, the parties requested that the case be specially set for a retrial on October 21, 2016. Both parties were prepared to proceed to trial on that date; however, when they arrived in court, they discovered that the case had not been specially set and that no courtroom was available for the anticipated four-day trial. Therefore, the trial was continued until February 6, 2017. Defense counsel indicated that Thomas was "not happy, but he gets it" and asked the court to "just note the Defense objection." Approximately one month before Thomas's February trial date, he filed a motion to dismiss on constitutional speedy trial grounds. Following a hearing, the circuit court denied the motion, finding that the reason for the delay was "entirely one of the administrative limitations of the physical facility of [the] Court" and that Thomas had not demonstrated any "prejudice that [was] particular to [his] case."

On appeal, Thomas contends that the circuit court erred in denying his speedy trial motion. In addressing this claim, we apply the four-factor balancing test articulated by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). *See State v. Kanneh*, 403 Md.

678, 687–88 (2008). Those factors are: (1) the "[l]ength of delay"; (2) the "reason for the delay"; (3) the "defendant's assertion of" his speedy trial right; and (4) "prejudice to the defendant." *Barker*, 407 U.S. at 530. "None of these factors is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead, they are related factors and must be considered together with such other circumstances as may be relevant." *Nottingham v. State*, 227 Md. App. 592, 613 (2016) (internal quotation marks and citation omitted).

A. Length of the Delay

Unless "there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. Thus, the first factor, the 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." *Kanneh*, 403 Md. at 688. Where there is a retrial following the declaration of a mistrial, the starting point for computing the length of delay begins at the time when the mistrial was declared, and the relevant time period runs until the commencement of the retrial. *Icgoren v. State*, 103 Md. App. 407, 420 (1995). Therefore, the delay that we must consider in this case is approximately eight months. Because that delay "might" be construed as presumptively prejudicial and of constitutional dimension, we will address the remaining *Barker* factors. *See Lloyd v. State*, 207 Md. App. 322, 329 (2012) (addressing the delay of eight months and fifteen days because the delay "might" be considered presumptively prejudicial).

Nevertheless, we note that the length of the delay "is the least determinative of the four factors that are consider in analyzing whether [a defendant's] right to speedy trial has been violated." *Kanneh*, 403 Md. at 690. And delays of much greater length than eight months have been found not to violate the constitutional right to a speedy trial. *See Barker*, 407 U.S. at 533-36 (five years); *Kanneh*, 403 Md. at 689-90 (35 months). Considering that Thomas was charged with a serious crime and that the trial was set for a four-day period, we are not persuaded that the length of the delay in this case was particularly egregious. *See Glover v. State*, 368 Md. 211, 224 (2002) (noting that the length of the delay "that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted."). Consequently, the length of the delay is not a weighty factor.

B. Reason for the Delay

We accord essentially no weight to the time between Thomas's mistrial in May 2016 and his scheduled retrial in October 2016 because both parties agreed to the October trial date and that is the time it would have taken for trial preparation in the absence of any ensuing postponement. *See Hallowell v. State*, ___ Md. App. ___, 2018 WL 679867, at *13 (Feb. 1, 2018) (giving no weight to the delay between the appellant's September 2014 mistrial and his scheduled retrial in March 2015). The parties agree, and the circuit court found, that the delay between Thomas's first trial date in October 2016 and his actual trial in February 2017 was the result of an overcrowded docket and the fact that no judge was available to preside over a four-day trial. Although the responsibility for this delay ultimately falls on the State, we weigh it only slightly against the State because there is no

evidence that it was an intentional delay that was calculated to hamper the defense. *See Diver v. State*, 356 Md. 379, 391-92 (1999).

C. Assertion of the Right to a Speedy Trial

Thomas did assert his speedy trial rights by objecting when the circuit court continued his trial. However, the objection was hardly strenuous and appears to have been little more than the avoidance of waiver. Moreover, although Thomas did file a motion to dismiss on speedy trial grounds, he waited over two months after the continuance to file that motion, at which point his trial was less than a month away. Therefore this factor only weighs only slightly in favor of appellant. *See, e.g., Jules v. State*, 171 Md. App. 458, 486 (2006) (concluding that, where "the frequency of the demands" to be brought to trial were "not extraordinary," this factor "weighs lightly in favor of dismissal").

D. Prejudice

We consider three interests in analyzing prejudice: the prevention of an oppressive pretrial incarceration, minimizing the anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *See Barker*, 407 U.S. at 532. The "most serious" of those three is "the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

In asserting that his defense was prejudiced, Thomas generally notes that witnesses' memories can fade over time. However, he does not identify any particular instance where a witness was unable to remember critical testimony that was favorable to his defense. Moreover, he does not assert that the delay caused important evidence to go missing,

caused any witnesses to become unavailable, or otherwise impaired his ability to present his defense in any specific manner.

Thomas also claims that he was "prejudiced by the oppressive, anxiety-inducing condition of pre-trial incarceration[.]" But where the only possible prejudice is the lengthy pretrial incarceration with its attendant anxiety and concern, the balance of factors weighs against appellant. *See Wilson v. State*, 148 Md. App. 601, 639 (2002) ("accord[ing] great weight to the lack of any significant prejudice resulting from the delay," where the only possible prejudice was the defendant's pretrial incarceration).

E. Balancing of the Factors

A review of the *Barker* factors in this case demonstrates that: (1) the eight-month delay between Thomas's mistrial and re-trial was not egregious in light of the charges against Thomas and the anticipated length of the trial; (2) the reason for the delay, while attributable to the State, was not for the purpose of undermining Thomas's defense; (3) Thomas's assertions of his speedy trial right were not strenuous; and (4) Thomas has not identified any specific prejudice, other than the fact that he remained incarcerated while awaiting his re-trial. Having weighed those factors, we are persuaded that Thomas's right to a speedy trial was not violated. Consequently, the trial court did not err in denying his motion to dismiss.

II. Sufficiency of the Evidence Claim

Thomas also contends that there was insufficient evidence to sustain his convictions because the State failed to prove that he was the perpetrator of the offenses. Thomas concedes that this claim is not preserved because his defense counsel did not provide any

specific reasons in support of his motion for judgment of acquittal. *See Peters v. State*, 224 Md. App. 306, 354 (2015) ("[R]eview of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal." (citation omitted)). However, relying on *Testerman v. State*, 170 Md. App. 324 (2006), he asks us to conclude that his defense counsel's failure to preserve the issue constituted ineffective assistance of counsel.[1]

"Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). And, unlike *Testerman*, we are not persuaded that the record in this case is sufficiently developed to permit a fair evaluation of Thomas's claim that his defense counsel was ineffective. Consequently, *Testerman* does not require us to consider Thomas's claim of ineffective assistance of defense counsel on direct appeal, and we decline to do so.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[1] Although Thomas does not specifically ask us to do so, we decline to exercise our discretion to engage in "plain error" review of this issue pursuant to Maryland Rule 8-131(a).