Circuit Court for Baltimore City
Case No. 114328033-039

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1426

September Term, 2016

DAVID PERKINS

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 31, 2018

Appellant, David Perkins, was convicted by a jury in the Circuit Court for Baltimore City of armed robbery and several related offenses.[1] In his appeal, he poses the following questions for our review:

1. Was Appellant denied his constitutional right to [a] speedy trial?
2. Did the trial court abuse its discretion in overruling a defense objection to the jury instruction on accomplice liability?
3. Was there a plain error in the commitment record?

For the reasons that follow, we shall affirm the judgments of conviction, but remand for correction of the commitment record.

BACKGROUND

Perkins, in company with Pierre Sims, entered a home in Baltimore City in search of a person who, they claimed, owed them money. Instead, they confronted the new residents and, as a result of their conduct, were ultimately charged with the offenses referred to, *supra*. Because Perkins does not challenge the sufficiency of the evidence, we need not provide a full explication of the facts underlying the charges and verdicts. *See, Washington v. State*, 190 Md. App. 168, 171 (2010). As necessary to our discussion, we shall provide additional factual background.

[1] Perkins was convicted of three counts of robbery with a deadly weapon, two counts of first degree assault, two counts of second degree assault, and five counts of use of a handgun in a crime of violence. Sentences aggregating 45 years, with all but 30 years suspended, and a period of probation, were imposed.

(continued)

Perkins was arrested on October 8, 2014, and charged by indictment on November 24, 2014. He remained in pre-trial detention until his first trial on February 29, 2016, which resulted in a mistrial, and thereafter, until his second trial, which was held on May 9-12, 2016.[2] On February 29, 2016, prior to commencement of the first trial, both Sims and Perkins moved to dismiss on speedy trial grounds. Those motions were denied.

1. Speedy Trial

The constitutional analysis of claims of speedy trial denial was articulated by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), and has been consistently applied by Maryland appellate courts. *See, e.g.*, *Glover v. State*, 368 Md. 211, 221-22 (2002) (collecting cases). In our analysis, we consider four factors: the length of the delay, the reasons for the delay, whether a defendant has asserted a speedy trial right, and actual prejudice to the defendant, if any, as a result of the delay. *See Barker*, 407 U.S. at 530; *Glover*, 368 Md. at 222. We perform our own *de novo* constitutional analysis in light of the facts before us, but we accept the trial court's findings of fact, unless clearly erroneous. *Hallowell v. State*, 235 Md. App. 484, 513 (2018) (quoting *Glover*, 368 Md. at 221).

The Delay

Perkins argues that the length of time to be measured for his speedy trial arguments is from October 8, 2014 – the date of his arrest – to February 29, 2016 – the date the first trial commenced. He insists, further, that because he refused to join Sims in his motion for

[2] Perkins and Sims were joined for trial, which concluded in a mistrial, occasioned by the disclosure by a State's witness of a statement made by Perkins. Ultimately, Sims entered a guilty plea prior to Perkins's second trial.

a mistrial, the period of time should be expanded to include the two additional months of delay from the date of the mistrial to May 9 – the day the re-trial commenced.

The State disagrees, contending that we need look only to the delay between the date of the mistrial and the commencement of the second trial – March 4, 2016 to May 9, 2016, a period of 66 days, claiming that "Perkins failed to move for a speedy trial after the mistrial but before the second trial, and so he waived the claim." In support of its argument that Perkins has waived his speedy trial claims, the State refers us to *Icgoren v. State*, 103 Md. App. 407 (1995), wherein we said:

> Thus, it is clear to us that the Maryland cases having similar factual situations, as well as the weight of authority elsewhere, support a holding, and we so hold, that, in construing a party's right to a speedy trial under the Sixth Amendment of the Federal Constitution and Article 21 of the Declaration of Rights of Maryland's Constitution, in a serial trial context, we are *generally,* absent extraordinary circumstances not present here, only concerned with the period between … the declaration of a mistrial and the commencement of the retrial.

Icgoren, 103 Md. App. at 420.

The State's reliance on *Icgoren* is misplaced. Recently, in applying the rationale of *Icgoren,* this Court explained that

> [o]rdinarily, in a case in which there was 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.

Nottingham v. State, 227 Md. App. 592, 613 (2016) (citing *Icgoren*, 103 Md. App. at 420). *See also Hallowell,* 235 Md. App. at 513-14.

However, both *Icgoren* and *Nottingham* are distinguishable, because neither Icgoren nor Nottingham moved to dismiss on speedy trial grounds until *after* the first trial had resulted in a mistrial, thereby challenging only the length of delay until the re-trial. In contrast, Perkins moved to dismiss *prior* to the commencement of the first trial, failing only to reassert that claim prior to the re-trial. This, however, does not waive his right to challenge the denial of his timely motion on appeal after the entry of the final judgment of his convictions. *See Stephens v. State*, 420 Md. 495, 504-06 (2011) (explaining that the denial of a motion to dismiss on speedy trial grounds is not reviewable until after final judgment). *See also Divver v. State*, 356 Md. 379, 387 (1999) (confirming the right of the defendant, on *de novo* review of his conviction in the circuit court, to move to dismiss the charges based on the speedy trial violation in the District Court proceeding).

While both *Icgoren* and *Nottingham* preclude the calculation of a cumulative period from the initial arrest to a trial and any subsequent re-trials, they do not stand for the proposition that only the period from the date of a mistrial to the date of the re-trial may be counted and considered on appeal, when the motion to dismiss was made prior to the first trial and challenged only the delay from arrest to the first trial.

Although Perkins may now challenge the denial of his speedy trial claim, we shall consider only the time calculated from the date of his arrest until the commencement of his first trial.[3]

[3] Perkins failed to reassert a speedy trial claim after the mistrial and before re-trial. Nonetheless, even had he reasserted the speedy trial claim prior to re-trial, the delay was (continued)

Nonetheless, although we find that Perkins's claims based on denial of a speedy trial are without merit, we shall discuss application of the four *Barker* factors, *infra*.

Length of delay

First, we must determine whether a delay is of constitutional dimension. *Nottingham*, 227 Md. App. at 613. We apply no established measure in terms of number of days or months. *See State v. Kanneh*, 403 Md. 678, 689 (2008) (quoting *Barker*, 407 U.S. at 523, 530-31. However, the Court of Appeals noted in *Glover* that,

> [w]hile no specific duration of delay constitutes a *per se* delay of constitutional dimension, … we have employed the proposition that a pre-trial delay greater than one year and fourteen days was "presumptively prejudicial" on several occasions.

Glover, 368 Md. at 223 (internal citations omitted).

Perkins was arrested on October 8, 2014, indicted on November 24, 2014, and held in custody until his first trial on February 29, 2016, a period of 16 months and 21 days. Applying *Glover*, we find the delay from the date of Perkins's arrest to the date of his first trial to be of constitutional dimension, which the State does not dispute. Hence, we turn to a consideration of the other *Barker* factors.

Reasons for delay

only two months and not, alone, of "constitutional dimension." *See Nottingham*, 227 Md. App. at 615 (finding that the two-month delay from date the new indictment was filed, and the hearing on the motion to dismiss, fell "well short of triggering the *Barker* analysis"). Nonetheless, because we find the initial delay to be of constitutional dimension, inclusion of the additional 66 days would be of no consequence.

Perkins, in his brief, articulates a chronology of events, and the dates of those events, that are relevant to our consideration of his claims. Each of those delay events were carefully considered by the trial court in its denial of Perkins's motion to dismiss on speedy trial grounds.

Our review of the record, and each of the chronological delay events asserted by Perkins, without the need of detailed recitation, satisfies us, as it did the trial court, that the delays were caused, variously, by the unavailability of Sims's counsel, the State's compelling reasons to try Sims and Perkins together and, finally, on one occasion, by the unavailability of court facilities for the scheduled trial. Although one of the eight postponements was occasioned by the absence of Perkins's counsel, there is nothing otherwise in the record to suggest that the other inordinate or compelling delays were created by Perkins or his counsel.[4]

Assertion of the right

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to

[4] The record reflects that on the February 24, 2015 trial date, Perkins's counsel failed to appear and had co-defendant's counsel inform the court that: "Mr. Man is not in town. He asked me to stand in for him because all he could do is request a postponement because he's just getting … his appearance in." Counsel's appearance was entered on February 11, 2015, two weeks before the first scheduled trial date. Even in that instance, Perkins had not been transported for trial. The trial court allocated that delay equally to the State and defense.

> assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531–32.

Perkins argues that, on several occasions, he asserted his speedy trial rights. His initial request was made in a formulaic omnibus motion on March 19, 2015, which also contained a number of various other preliminary requests. On five subsequent occasions, during the various scheduled and rescheduled trial dates, Perkins contends that his counsel signaled his readiness for trial and objected to requests for delay. Although Perkins did not formally move to dismiss until the day of the first trial, we are satisfied that, collectively, his assertions were adequate, as the State concedes.

Prejudice

While none of the *Barker* factors alone is "'either necessary or sufficient to find a violation of the speedy trial right[,]'" *Hallowell*, 235 Md. App. at 513 (quoting *Nottingham*, 227 Md. App. at 615), prejudice to the accused is often the most significant factor to be considered in the analysis. *See Randall v. State*, 223 Md. App. 519, 553 (2015). *See also Barker*, 407 U.S. at 531-32. Dismissal has been warranted, when actual prejudice has been found where an important defense witness has been unavailable for trial as a result of delay, *Epps v. State*, 276 Md. 96, 119-21 (1975), or where the defense has been otherwise hampered by the absence of witnesses or evidence. *Davidson v. State*, 87 Md. App. 105, 114-15 (1991).

Perkins has demonstrated no actual prejudice, asserting only, for the first time on appeal, that he "endured oppressive pre-trial incarceration and the anxiety and concern

caused by being unable to force the Court … to go to trial." During the hearing on both oral motions for dismissal on the day of trial, Perkins, unlike Sims, failed to assert any claim of actual prejudice he may have endured, offering only that, "not only is it a violation of Maryland rule to a speedy trial, but also a Constitutional speedy trial because of the length of time he's been detained." Such an assertion, absent more, should be given little prejudicial weight. *See Hallowell*, 235 Md. App. at 518 (explaining that "[o]ppressive pretrial incarceration with its attendant anxiety and concern to the accused is generally afforded only slight weight").

Moreover, Perkins did not identify any potential witnesses whom he had been unable to obtain; he did not identify unsuccessful efforts to compel the attendance of potential defense witnesses; he did not allege the destruction of evidence; and he made no assertions of prosecutorial misconduct in creating the delay. To equate his generic assertions to actual prejudice would require us to engage in considerable speculation, which we decline to do.

Balancing of the Factors

In sum, after a careful balancing of the *Barker* factors, the court below noted that it "found no specific prejudice to either Defendant[,]" warranting dismissal on speedy trial grounds. We concur.

2. Jury Instructions

Perkins pressed the court to give an accomplice liability instruction from the Model Penal Code. The court declined and instructed the jury from the Maryland Pattern Jury

Instructions – MPJI-Cr 6:00. We have often said that Maryland trial courts are "strongly encouraged to use the [Maryland] pattern jury instructions[,]" *Johnson v. State*, 223 Md. App. 128, 152, *cert. denied*, 445 Md. 6 (2015), and "the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions." *Green v. State*, 127 Md. App. 758, 771 (1999).

Having instructed the jury from the Maryland Pattern Jury Instructions, the court did not err.

3. Commitment Record

Lastly, Perkins claims that the commitment record incorrectly provides that his sentence is to have "All but 45 years" suspended. While the record contains a different commitment record than the one appended to appellant's brief, reflecting the time to be served as 30 years, any inconsistencies contained therein must be corrected by the trial court. The State concurs. "'The transcript of the trial, unless shown to be in error, takes precedence over the docket entries[.]'" *Gatewood v. State*, 158 Md. App. 458, 482 (2004) (alteration omitted) (quoting *Jackson v. State*, 68 Md. App. 679, 688 (1986), *aff'd.*, 388 Md. 526 (2005).

We shall remand for correction of the commitment record to reflect the sentence on Count 1, as announced in open court: "45 years, all but 30 years suspended."

JUDGMENTS OF CONVICTION AFFIRMED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY TO CORRECT THE COMMITMENT RECORD CONSISTENT WITH THIS OPINION.
COSTS ASSESSED TWO-THIRDS TO APPELLANT AND ONE-THIRD TO THE MAYOR AND CITY COUNCIL OF BALTIMORE.