UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1451

September Term, 2014

BRIAN K. TIDMORE

v.

STATE of MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: August 11, 2015

Appellant, Brian K. Tidmore, appeals the judgments of convictions for possession of cocaine with intent to distribute as a volume dealer, possession of cocaine with intent to distribute, and possession of cocaine, rendered by the Circuit Court for Wicomico County on a not guilty agreed statement of facts.[1] Appellant seeks our review of his convictions, and presents the following two questions for our consideration:

> [I]. Did the circuit court err in denying appellant's Motion to Dismiss due to a violation of the Interstate Agreement on Detainers when, while detained in Georgia in 2010, he provided written notice of his request for final disposition in this case that was sent by the warden in Georgia to the State's Attorney's Office for Wicomico County?
>
> [II]. Did the circuit court err in denying appellant's Motion to Dismiss due to a violation of his Sixth Amendment right to a speedy trial when the State's Attorney's Office for Wicomico County had notice in September, 2010 of appellant's waiver of extradition and desire to be tried in Maryland but failed to take any action in the case until May, 2014?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTUAL BACKGROUND

This case has as its genesis the traffic stop of the appellant's vehicle on March 2, 2007. Aided by a K-9 dog, officers detected and seized a sealed bag that contained approximately 500 grams of cocaine. The initial trial date was scheduled for July 10, 2007. When appellant failed to appear, trial was continued until August 24. Appellant again failed to appear, and trial was held in abeyance until appellant could be located. In the meantime,

[1] On March 26, 2007, a Wicomico County grand jury returned an indictment charging appellant with volume possession of cocaine with intent to distribute, *see* Md. Code (2002, 2006 Supp.), § 5-612 of the Criminal Law Article ("Crim. Law"); possession of cocaine with intent to distribute, Crim. Law § 5-602; and possession of cocaine, Crim. Law § 5-601(a).

appellant had traveled to Georgia, where he was arrested and convicted on unrelated narcotics charges. He was sentenced to ten years' incarceration, and released on parole in May, 2014. As previously noted, on August 4, 2014, appellant was convicted on a number of drug-related charges after a bench trial on a not guilty agreed statement of facts. The trial court sentenced appellant to twenty years' incarceration, with all but seven years suspended, the first five years without the possibly of parole pursuant to Md. Code (2002, 2012 Repl. Vol.) of Crim. Law §5-612 (c) and placed on three years probation, upon release. This timely appeal followed.

We reserve further recitation of the facts during our discussion of the issues before us.[2]

DISCUSSION

Appellant presents two avenues for appellate relief, each seeking a dismissal of his charges based on the purported failure of the State to prosecute this matter in a timely fashion. Appellant first maintains that the State violated the Interstate Agreement on Detainers (IAD) by not returning him to Maryland for trial, an error that entitles him to relief under the speedy trial provisions of the IAD.[3] Appellant's second complaint is that the

[2] "Because of the legal nature of this issue, the facts [relevant to the underlying prosecution] can be recounted succinctly." *Clipper v. State*, 295 Md. 303, 304 (1983).

[3] *See* Md. Code (1999, 2008 Repl. vol.), §§ 8-401 - 8-411 of the Correctional Services Article.

excessive delay in bringing him to trial violated his constitutional right to a speedy trial. On these facts, we conclude that appellant is not entitled to relief.

Standard of Review

The trial court's findings of first-level facts are reviewed for clear error. *See* Md. Rule 8-131(c). The court's legal conclusions are reviewed *de novo*. The interpretation of a statute, in this instance the IAD, constitutes a question of law which we review *de novo*. *Harrison-Solomon v. State*, 442 Md. 254, 265 (2015). "In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220-21 (2002).

I. Interstate Agreement on Detainers

Introduction.

The first issue implicates the speedy trial provisions of the IAD. *See* Article III of the IAD. Md. Code (1999, 2008 Repl. vol.), § 8-405 of the Correctional Services Article ("Corr. Servs."). Appellant insists that the State's failure to bring him to trial within 180 days of his request to be returned to Maryland to stand trial dictates that his convictions should be overturned and the charges dismissed. The State avers that the "actual notice" provision of the IAD was not satisfied and that the resulting obligation to return appellant for trial was not triggered. *See* Corr. Servs. § 8-416.

As noted, appellant failed to appear for trial in the instant case in 2007. He would later turn up in Georgia, where he was arrested and convicted on drug charges. In 2010, his

Maryland attorney moved for a speedy trial, and the State responded by filing a detainer with Georgia authorities seeking appellant's return. It would not be until 2014 when appellant was paroled in Georgia that he was returned to Maryland. Appellant moved to dismiss the indictments, asserting a violation of the IAD and speedy trial guarantees. A two-day hearing on appellant's motion commenced on Friday, August 1, 2014, and concluded the following Monday. Appellant testified at the hearing. Once he learned of the detainer, appellant told the case manager in Georgia that he wanted to return to Maryland to stand trial. He signed the applicable forms and within days was told that the prison warden had sent them to the Wicomico County Sheriff's Office and the county "District Attorney." This was verified by a letter from the warden as well as a Postal Service "green card" that confirmed the mailing. Appellant could not recall whether the paperwork was also sent to the court.

Following argument and appellant's testimony, the trial court denied the motion, explaining that "[i]t's undisputed that nothing was sent to the Court in this case." Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

Analysis

"The Interstate Agreement on Detainers (IAD) is a compact among forty-eight states, the United States and the District of Columbia." *Clipper v. State*, 295 Md. 303, 305 (1983). The "provisions of the [IAD] are activated only when a detainer based on an untried

indictment, information or complaint is filed with the custodial state by a member party." *Stone v. State,* 344 Md. 97, 107 (1996) (citing cases). The IAD,

> creates uniform procedures for lodging and executing a detainer, *i.e.*, a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime.[4]
>
> The Agreement provides for expeditious delivery of the prisoner to the receiving State for trial prior to the termination of his sentence in the sending State. And it seeks to minimize the consequent interruption of the prisoner's ongoing prison term.

Alabama v. Bozeman, 533 U.S. 146, 148 (2001). *See Clipper v. State*, 295 Md. at 305-06. The IAD "gives a prisoner the right to demand a trial within 180 days[.]" *Alabama v. Bozeman*, 533 U.S. at 151. *See* IAD, Article III, codified at Corr. Servs. § 8-405.

The "origins of the Agreement date back to 1948, when a group known as the Joint Committee on Detainers issued a report concerning the problems arising from the use of detainers[.]" *United States v. Mauro*, 436 U.S. 340, 349 (1978) (footnote omitted). The "Council of State Governments drafted the language of the [IAD] in 1956." *Arizona v. Bozeman*, 533 U.S. at 149. *See* Bernard J. Fried, *The Interstate Agreement on Detainers and the Federal Government*, 6 HOFSTRA L.REV. 493, 496-97 & nn. 22-24 (1978). Maryland in turn "enacted the IAD and joined the signatory states in 1965" *Clipper v. State*, 295 Md.

[4] "Although the [IAD] does not define detainer," the Court of Appeals "has described a detainer within the contemplation of the [IAD] 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." *Stone v. State*, 344 Md. 97, 108 (1996) (citation, internal quotation marks and brackets omitted).

at 305. *See* 1965 Laws of Maryland Chap. 627, § 1. *See also Davidson v. State*, 18 Md. App. 61, 65 (1973).

The IAD is set forth in Md. Code (1999, 2008 Repl. Vol.), §§ 8-402 - 8-411 of the Corr. Servs. *See Painter v. State*, 157 Md. App. 1, 5 (2004). The operative provision that is relevant here, Article III, codified in Maryland as Corr. Servs. § 8-405, pertinently reads:

> **§ 8-405. Agreement – Request for final disposition of untried indictment, information, or complaint.**
>
> Article III
>
> (a) *Notice of prisoner's place of imprisonment and request for final disposition*. – Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, the prisoner shall be brought to trial within 180 days after the prisoner shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of the prisoner's imprisonment and the prisoner's request for a final disposition to be made of the indictment, information, or complaint; provided that for good cause shown in open court, the prisoner or the prisoner's counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating 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.

In addition, "Maryland has enacted supplemental provisions" in the Correctional Services Article, and these are set forth at Corr. Servs. §§ 8-412 - 8-417. *See* Nolan H.

Rogers & Edward O. Siclari, *Maryland Extradition Manual* at 38 (2013). One such provision, Corr. Servs. § 8-416, supplements Corr. Servs. § 8-405(a) and provides:

> **§ 8-416. Actual receipt of notice required.**
>
> As to any request by an individual confined in another party state for trial in this State, written notice may not be deemed to have been delivered to the prosecuting officer and the appropriate court of this State in accordance with § 8-405(a) (Article III(a) of the Agreement) of this subtitle and notification may not be deemed to have been given in accordance with § 8-405(d) or § 8-406(b) of this subtitle (Article III(d) and Article IV(b) of the Agreement) until the notice or notification is actually received by the appropriate court and the appropriate State's Attorney of this State, the State's Attorney's deputy or assistant, or any other person empowered to receive mail on behalf of the State's Attorney.

Section 8-416 of Corr. Servs. is especially relevant to the case before us. The trial court's finding that the court did not receive actual notice of the IAD request is not clearly erroneous. On this record, we conclude that the failure to effect actual notice forecloses appellant's claim that the trial court erred by denying his motion to dismiss based on a violation of the Interstate Agreement on Detainers.

We disagree with appellant that substantial compliance with 8-416 of Corr. Servs. satisfies the IAD notice requirement. In *Davidson*, we noted with respect to the predecessor to Corr. Servs. § 8-416:

> Section 616Q of Article 27 is peculiar to Maryland and was a supplemental provision to the IAD at the time the IAD was adopted in this State. We think it clear from the language employed in § 616Q that the legislative intent in adopting it was to restrict and clarify the notice provision of § 616D(a). That is, to restrict this provision so that the 180 day period referred to therein should not begin to run until the prisoner's notice and

> request are actually received by the appropriate prosecuting officer and court in this State. Without such specification, the notice provision is unclear as to whether the 180 day period begins to run (1) when the prisoner delivers his notice and request to the warden of the institution where he is imprisoned in the party state, as required by § 616D(b), or (2) when the warden sends the notice and request to the prosecutor and the trial court in the State issuing the detainer, as also required by § 616D(b), or (3) when the notice and request are actually received by the prosecutor and the appropriate court in the State issuing the detainer. This supplemental section also prevents a prisoner from becoming entitled to a dismissal of charges against him in situations where the prosecutor and the trial court do not have actual notice of his request. A contrary result has been reached by the interpretations placed on the IAD in other jurisdictions that have not adopted supplemental provisions comparable to § 616Q.

Davidson v. State, 18 Md. App. at 67. (footnote omitted). *Cf. Stone*, 344 Md. at 109 (warden of custody state is to send forms to prosecutor). *But see* Corr. Servs. § 8-416 (notice delivered to prosecuting officer and the appropriate court). Although the IAD is to be "liberally construed," the notice requirements are mandatory and not directory." *Brooks v. State*, 329 Md. 98, 103 (1993) (construing provisions of the companion statute, the Intrastate Detainers Act. *See* Corr. Servs. §§ 8-501 - 8-503). The following conclusion by the First Circuit is instructive:

> "'[C]ourts have generally required that prisoners must strictly comply with IAD procedures before they will dismiss charges on the basis of a violation of [the 180 day provision of] Article III.'" *Casper v. Ryan*, 822 F.2d 1283, 1292 (3d Cir.1987), *cert. denied*, 484 U.S. 1012 (1988), quoting *Nash v. Jeffes*, 739 F.2d 878, 884 (3d Cir.1984), *rev'd on other grounds sub nom. Carchman v. Nash*, 473 U.S. 716 (1985); *see also Johnson v. Stagner*,781 F.2d 758, 761 (9th Cir.1986) ("'formal requirements must be met before the timely trial provisions of the IAD come into play'" (quoting *Tinghitella v. California*, 718 F.2d 308, 312 (9th Cir.1983)).

> A vital aim of the requirement of strict compliance is to assure that the appropriate prosecuting authorities promptly are placed on notice when Article III is invoked by an inmate. The inmate bears the burden of demonstrating compliance with the formal procedural requirements of Article III. *United States v. Moline*, 833 F.2d 190, 192 (9th Cir.1987). If a premature communication, or one which is misdirected or fails to provide the information required by Article III, were considered sufficient to trigger the 180-day provision under the IAD, it "could create 'a trap for unwary prosecuting officials,'" *Casper*, 822 F.2d at 1292-1293 (quoting *Nash*, 739 F.2d at 884), and undermine the primary purpose of Article III, that of affording a "'systematic method of rapidly adjudicating charges against prisoners held in another jurisdiction,'" *id*.; *see also Johnson*, 781 F.2d at 762.

United States v. Henson, 945 F.2d 430, 434-35 (1st Cir. 1991) (parallel citations omitted).

The trial court's finding that it had not received actual notice of appellant's request was not clearly erroneous. Its rejection of the argument that substantial compliance satisfies the IAD notice provision, and its denial of the motion to dismiss under the IAD are legally correct. *See Thurman v. State*, 89 Md. App. 125, 130 (1991). *Cf. State v. Barnes*, 273 Md. 195, 210-12 (1974) (method of delivery not compliant by statute; both prosecutor and court nevertheless had actual notice).

II. Constitutional Speedy Trial

Introduction

We turn to appellant's complaint that the circuit court erred by denying his motion to dismiss for violations of his constitutional right to a speedy trial. He specifically asserts that the three and one-half year interval between the time the State learned of his status in Georgia and the time he was brought to trial abridged this right. The State acknowledges the

considerable delay from the time appellant was indicted and the beginning of trial, but responds that it is responsible for an "insignificant amount of time." Further, the State emphasizes that appellant "failed to assert his right to a speedy trial in any meaningful way" during his incarceration in Georgia, and that he has failed to demonstrate actual prejudice due to the delay in bringing him to trial.

Analysis

The speedy trial guarantee is afforded by the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const., amend. VI. *Vermont v. Brillon*, 556 U.S. 81, 89 (2009). This guarantee is applied to the states by the Due Process Clause of the Fourteenth Amendment. *Lloyd v. State*, 207 Md. App. 322, 327 (2012), *cert. denied*, 430 Md. 12 (2013). *See Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967); *State v. Gee*, 298 Md. 565, 568 n. 1 (1984). Article 21 of the Maryland Declaration of Rights affords a similar right.[5] *See Divver v. State*, 356 Md. 379, 388 (1999); *Jones v. State*, 241 Md. 599, 608 (1966). The remedy for a violation of the Sixth Amendment right to a speedy trial is

[5] Article 21 of the Maryland Declaration of Rights provides:

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

dismissal of the indictment. *See Smith v. State*, 276 Md. 521, 534 (1976). *See also Strunk v. United States*, 412 U.S. 434, 440 (1973).

With respect to the Sixth Amendment guarantee, the Supreme Court has observed:

> The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

United States v. MacDonald, 456 U.S. 1, 8 (1982). *See Smith v. Hooey*, 393 U.S. 374, 377-79 (1969).

The inquiry is tied to the specific facts of each case, and so "the review of a speedy trial motion should be 'practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case.'" *Brown v. State*, 153 Md. App. 544, 556 (2003) (quoting *State v. Bailey*, 319 Md. 392, 415 (1990)). *See generally, Brillon*, 556 U.S. at 89.

Maryland courts have "consistently applied the four factor balancing test" outlined in *Barker v. Wingo*, 407 U.S. 514 (1972) to assess whether a speedy trial right has been violated to the prejudice of the accused. *State v. Kanneh*, 403 Md. 678, 687 (2008); *Divver v. State*, 356 Md. 379, 388 (1999). *See Brady v. State*, 288 Md. 61, 65 n. 2 (1980) (internal quotation marks omitted).

> When the [pre-trial] delay is of a sufficient length, it becomes "presumptively prejudicial," thereby triggering a balancing test [which] necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. The factors to be weighed are [l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Because whether a period is presumptively prejudicial, or not, depends upon the length of a pre-trial delay, the first factor is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. And this factor cannot be applied until it is determined from what point the period of delay is measured.

Divver, 356 Md. at 388 (citations and internal quotation marks omitted). The *Barker* factors cited above make up a "non-exclusive list[.]" *Brady v. State*, 291 Md. 261, 264-65 (1981). Hence, no one of them is, by itself, "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. *See Kanneh*, 403 Md. at 688.

Length of Delay

At the outset, we consider whether the post-arrest, pre-adjudication delay was of sufficient length to be presumptively prejudicial so as to trigger an analysis of the *Barker* factors. *See Ratchford v. State*, 141 Md. App. 354, 358-59 (2001). This initial *Barker* factor "is actually a double enquiry." *Doggett v. United States*, 505 U.S. 647, 651 (1992). The Court continued in *Doggett*:

> Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay . . . since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes

> this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.

Doggett v. United States, 505 U.S. at 651-52. *See State v. Bailey*, 319 Md. at 410 (unless delay presumptively prejudicial, no further need to inquire into other *Barker* factors) (citation omitted).

The length of delay for speedy trial analysis is measured from the earlier of the date of arrest or filing of indictment or other formal charges to the date of trial. *United States v. Marion*, 404 U.S. 307, 320-21 (1971); *Divver*, 356 Md. at 388-89. Appellant was arrested on March 2, 2007, and his trial commenced on August 1, 2014. This interval in excess of seven years and five months triggers the *Barker* analysis. *See Divver, supra,* 356 Md. at 389.[6]

Because appellant has made out a case for "presumptive prejudice" on the basis of the overall delay from arrest to trial, we must consider "as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim," along with the other *Barker* factors. *Doggett*, 505 U.S. at 652. The

[6] In *Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992), Justice Souter said that

> [d]epending on the nature of the charges, the lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year. . . . We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker [i]nquiry.*

"presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 652.

We shall set forth the chronology, and then assess the responsibility for each relevant interval.

Chronology

1. **March 2, 2007.** Appellant is arrested and charged.

2. **March 4, 2007.** Appellant secures a surety bond and is released.[7]

3. **March 26, 2007.** Appellant is indicted.

4. **July 10, 2007.** Appellant fails to appear for trial. Case is continued until August 24.

5. **August 24, 2007.** Appellant again fails to appear for trial.

6. **"Post - August, 2007."** Appellant is arrested in Georgia on drug-related charges, is convicted and sentenced to ten years' imprisonment.

7. **June 30, 2010.** Appellant's counsel files a demand for speedy trial.

8. **July 15, 2010.** Appellant's counsel moves to dismiss for violation of appellant's right to a speedy trial.

9. **September 14, 2010.** Appellant signs forms requesting a disposition of his charges in Maryland.

10. **May 11, 2014.** After being paroled in Georgia, appellant is returned to Wicomico County.

[7] The State represents that appellant was released on bond in "April 2007." The record contains a receipt for a surety bond, dated March 4, 2007.

11. **August 1, 2014.** Following a hearing, the trial court denies appellant's motion to dismiss, and appellant is convicted after a trial on a not guilty agreed statement of facts.

Responsibilities for the Delay

We turn to the analysis of the reasons assigned for the delay. The Supreme Court observed in *Barker* that

> [c]losely related to the length of delay is the reason the [State] assigns to justify the delay. Here, too, different weights should be assigned to different reasons. 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. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted). *See Kanneh*, 403 Md. at 690. Thus "[t]he reason for a delay weighs against the government in proportion to the degree to which the government caused the delay." *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir.2006). The assignment into the reasons for a delay "seeks to ensure that courts not concentrate on the sheer passage of time without also taking account of the etiology of the delay." *Rashad v. Walsh*, 300 F.3d 27, 34 (1st Cir. 2002).

March 2 - July 10, 2007

The initial delay from March 2 until the first scheduled trial date is neutral. The "law permits reasonable time for normal trial preparation[,]" and "time spent in pre-trial preparation is neutral and not charged either to the State or the defendant." *Malik v. State*,

152 Md. App. 305, 317-18 (2003). *See Ferrell v. State*, 67 Md. App. 459, 463 (1986) (five months for normal pretrial preparations is neutral period of delay). *See generally Epps v. State*, 276 Md. 96, 110 (1975).

July 10, 2007 - September 14, 2010

This interval of three years and two months is taxed heavily against appellant. Appellant failed to appear for trial, both for the initial trial date and the subsequent date in August, 2007, and absconded from Maryland. *See generally, Powell v. State*, 56 Md. App. 351, 363-65 (1983). "While it is true that a defendant is not under any obligation to take affirmative steps to ensure that he will be tried in a timely fashion, a court need not ignore a defendant's fugitivity in considering whether there has been a violation of his sixth amendment right to a speedy trial." *Rayborn v. Scully*, 858 F.2d 84, 90 (2nd Cir. 1988) (citation omitted). "[L]aw enforcement officials are not expected to make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension or who has fled to parts unknown." *Id.*

September 14, 2010 - May 11, 2014

This delay of nearly three years and eight months is taxed against the State, although not heavily. We do not find that the State acted in bad faith, or that it sought to impair the defense.[8] As noted by the *Barker* Court, "[a] more neutral reason such as negligence . . .

[8] The State attempts to justify this delay by citing to our opinion in *Davidson v. State*, 18 Md. App. 61 (1973). Our decision in that case offers no solace to the State. In that case, (continued...)

should be weighted less heavily but nevertheless should be considered [against the prosecution]." *Barker*, 407 U.S. at 531. Further, appellant "has offered nothing to suggest that the [State] acted intentionally in causing this delay." *United States v. Arceo*, 535 F.3d 679, 685 (7th Cir. 2008) (portion of delay – four years and eight months, attributable to government negligence but not weighed heavily).

May 11 to August 1, 2014

This interval is neutral. With appellant's return to Maryland, the parties would be permitted a period for pre-trial preparation. *See Ferrell v. State*, 67 Md. App. at 463.

Assertion of Right

We accord little, if any, weight in favor of appellant for this factor. He emphasizes that he asserted his right to a speedy trial in 2007 and then in July, 2010. Because he absconded from Maryland in 2007 and failed to appear for trial, appellant has waived any reliance on his early *pro forma* demand for a speedy trial. *See United States v. DeTienne*, 468 F.2d 151, 156 (7th Cir. 1972). Although appellant's counsel, who was still the attorney

[8](...continued)
Davidson fled Maryland after arraignment on charges in Cecil County, only to be arrested later in Delaware on unrelated charges. *Id*. at 63. Pursuant to the IAD, Davidson sought to be returned to Maryland to face the charges in Cecil County. Although Davidson tendered his IAD materials to Delaware authorities, with instructions that they be delivered in turn to the Circuit Court for Cecil County and the Cecil County State's Attorney's office, neither the court nor the prosecutor received Davidson's IAD request. *Id*. at 63-64. Indeed, the "State's Attorney for Cecil County . . . categorically denied ever receiving any forms, notice, or request from the Delaware authorities or the appellant concerning the appellant's letter to [the circuit court.]" *Id*. at 64. Unlike the prosecutor in that case, the Office of the State's Attorney in the case before us did receive appellant's IAD request.

of record during this entire period because his appearance had never been stricken, demanded a speedy trial and moved to dismiss in 2010 for a violation of that right, the record belies appellant's claim that he continuously asserted his right to a speedy trial.

Prejudice

The last element of the *Barker* inquiry is whether appellant suffered prejudice as a result of the delay. The Court of Appeals has emphasized that "under the [*Barker*] guidelines an affirmative demonstration of prejudice by the defendant is not necessary in order to prove a violation of the Sixth Amendment speedy trial right." *Brady v. State*, 288 Md. at 66-67 (Fourteen month delay) (quoting *Smith v. State*, 276 Md. 521, 532 (1976)). In *Erbe v. State*, 276 Md. 541, 548 (1976), the Court pointed out that "[t]he Supreme Court recognized in [*Barker*] that delay was inextricably tied to prejudice, speaking, as we have noted, of delay 'which is presumptively prejudicial' so as to necessitate 'inquiry into the other factors that go into the balance.'" The "presumptive prejudice" from the overall delay is a trigger for further *Barker* analysis and is but one factor that must be weighed:

> Instead, once there is a pre-trial delay of constitutional dimension, it gives rise to an irrebuttable presumption of prejudice insofar as the requirement of a balancing test. Otherwise, the single factor "rebutting the presumption" would become determinative, contrary to the cases in the Supreme Court and in this Court from and after [*Barker v. Wingo*]. The language from this Court's opinion in [*Wilson v. State*, *supra*], was intended to mean only that, where the record fails to show actual prejudice or affirmatively shows a lack of prejudice in certain respects, this particular factor is weighed against the defendant in the balancing process.

Brady v. State, 288 Md. at 69 n.4. *Cf. Divver*, 356 Md. at 392 (presumption of prejudice created . . . [defendant] presented no evidence of any impairment of defense).

Given that the overall delay of over seven years is presumptively prejudicial, the inquiry then becomes whether, considering all of the *Barker* factors, appellant is obligated to demonstrate actual prejudice at the fourth stage. On this record, we conclude that he does.

We are mindful that the delay between arrest and trial constitutes a considerable period of time. Some courts have considered a post-indictment delay of five years insufficient to relieve a defendant of the burden of showing actual prejudice. *See United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) (noting that Fifth Circuit "and others generally have found presumed prejudice only in cases in which the post-indictment delay lasted at least five years."). In *United States v. Banks*, 761 F.3d 1163, 1183 (10th Cir.), *cert. denied*, 135 S.Ct. 308 (2014), the Tenth Circuit noted that "in cases of extreme delay, the defendant may rely on the presumption of prejudice and need not present any specific evidence of prejudice." The Tenth Circuit further noted, however, that "[g]enerally, the court requires a delay of six years before allowing the delay itself to constitute prejudice." *Id.* (citation omitted). Many courts relieve a defendant of the obligation to prove actual prejudice with an interval that is far less. *See, e.g., United States v. Ferreira*, 665 F.3d 701, 707 (6th Cir. 2011) (three years).

On the record before us, we conclude that appellant is required to establish actual prejudice. Although the total interval exceeds seven years, slightly over three years of the

delay were caused by appellant's flight from Maryland to avoid trial. This weighs heavily against appellant, and, serves as a counterweight to the State's negligence, which lies at the heart of the delay between September 2010 and trial. The next question is whether appellant has, in fact, demonstrated actual prejudice.

In the case at bar, appellant claimed that his witnesses were unavailable:

> They're gone. I've lost contact with them, I don't know where they are. I'm sure people moved on with their lives. But I wasn't able to keep in contact with anyone, it was difficult being so far away in the situation that I was in.

On cross-examination, appellant insisted that he had "secured" his witnesses:

> [STATE:] So there was a period of time where you weren't in the State of Maryland, you didn't do anything to preserve your witnesses or evidence for trial?
>
> A. Incorrect.
>
> Q. There was not a lapse in time between when you absconded and you got picked up in the State of Georgia while you were on the run from Maryland authorities?
>
> A. Yes, but I continued to secure my witnesses at that time because I had fully intended to come to trial.
>
> Q. At your own leisure you were going to come to trial?

Appellant continued to assert that he had witnesses and had a "strong defense:"

> Witnesses included. I had a very strong defense. I was very confident that I would be acquitted of the charges against me because I had witnesses that would have given testimony that would have clearly explained the situation and my involvement in the situation and I'm sure I would have gone home.

Yet there was no showing that specific witnesses were unavailable. Indeed, although appellant failed to appear twice for trial, his counsel presumably had been ready to proceed with a defense as of July 10, 2007, the first trial date. Given that appellant fled the area, leaving his witnesses behind, his complaint rings hollow.

In *Kanneh*, 403 Md. at 693, the Court of Appeals overturned the dismissal of a case on speedy trial grounds where the overall delay was approximately thirty-five months. The failure to demonstrate prejudice weighed against the defendant:

> The Supreme Court, in *Barker*, noted that prejudice should be weighed with respect to the three interests that the right to a speedy trial was designed to preserve:
>
> (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. 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.

Barker, 407 U.S. at 532 (footnote omitted).

* * *

> We turn to the final of the three factors under the prejudice analysis, and the most serious, the possibility that the defense might be impaired. In the case at bar, there is no assertion of any actual prejudice to the defense's case, for example, that any defense witnesses have become unavailable due to the delay. In *Barker*, the Supreme Court determined that prejudice was minimal where the defendant spent ten months in jail pending trial. *Barker*, 407 U.S. at 534. In that case, the defendant, Barker, lived under a cloud of suspicion for over four years, but there was no claim that any of his witnesses died or became unavailable as a result of the delay. *Id*. In this case, there is even less prejudice, and, weighing this final factor, we conclude that Kanneh's right to a speedy trial was not violated.

State v. Kanneh, 403 Md. at 694. *See Ratchford v. State*, 141 Md. App. at 361 (observing that "most significant variety of actual prejudice" is prejudice to defense of case). We consider the Court's decision in *Kanneh* to be instructive. On this record, we are unable to conclude that appellant has demonstrated "actual prejudice." *See also Glover*, 368 Md. at 231 (stating "[w]e cannot find any evidence on the record that indicates that the petitioner's defense was impaired"); *Brown*, 153 Md. App. at 564. *Cf. Divver*, 356 Md. at 392 (presumption of prejudice created . . . [defendant] presented no evidence of any impairment of defense).

We also agree with the United States Court of Appeals for the Tenth Circuit, which observed:

> We have looked with disfavor on defendants' hazy descriptions of prejudice, and required criminal defendants to "show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided the defense[.]"

United States v. Margheim, 770 F.3d 1312, 1331 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 1514 (2015). (internal citations omitted). As noted by the Fourth Circuit:

> Indeed, they have not identified any witnesses that were unavailable as a result of the delay; they have not shown that any witness was unable to accurately recall the relevant events; they do not contend that exculpatory evidence was lost; nor have they identified any evidence that was rendered unavailable by the delay. In sum, the [d]efendants simply argue generally that they were prejudiced by delay.

United States v. Hall, 551 F.3d 257, 273 (4th Cir. 2009) (internal citation omitted). According to the Sixth Circuit,

> The only manner in which appellant has claimed his defense was impaired was his alleged inability to call witnesses. However, appellant does not explain how the alleged prolonged detention affected his ability to call these witnesses.

Norris v. Schotten, 146 F.3d 314, 328 (6th Cir. 1998). (internal citation omitted).

Weighing Barker Factors

Weighing all of the *Barker* factors, we conclude that the seven year and five month delay in bringing appellant to trial did not abridge his rights to a speedy trial. The delay certainly triggers the *Barker* inquiry, but as Judge Greene noted for the Court of Appeals, "of the four factors we weigh in determining whether [the defendant's] right to a speedy trial has been violated, '[t]he length of delay, in and of itself, is not a weighty factor.'" *Kanneh*, 403 Md. at 689 (quoting *Glover*, 368 Md. at 225).

We shall credit, with minimal weight, appellant for asserting his right to a speedy trial in 2010, but will not accord any credit for his initial speedy trial demand prior to his decision to avoid going to trial and absconding. Although counsel remained in the case, there was no activity during the remainder of the pre-trial period, other than appellant's filling out the IAD forms. The weight to accord appellant on this factor is *de minimis*.

We view the reasons for the delay overall to be neutral. The periods between arrest and the first trial date, and the interval between the date of appellant's return to Maryland and the actual trial date, are neutral and comprise a total of approximately seven months. The period between the first trial date and the time appellant actually executed his forms for transfer to Maryland under the IAD is taxed heavily against appellant. This interval consists

of three years and two months. The period, amounting to nearly three years and eight months between appellant's assertion of his IAD rights and his return to Maryland, is taxed lightly against the State.

Finally, the fact that appellant has not substantiated any claim of prejudice weighs against him. Certainly, "extensive incarceration may be presumed to be prejudicial[.]" *Wheeler v. State*, 88 Md. App. 512, 524 (1991). To be sure, the delay that is attributed to the State's negligence is significant. This is certainly balanced by the extensive delay caused by appellant's failure to appear for trial and travel to Georgia. In the final analysis, even accounting for the initial presumed prejudice resulting from the overall delay, we are unable to conclude on this record that appellant's speedy trial rights were violated.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.