Circuit Court for Prince George's County
Case Nos. CT190638B, CT190638C, CT190638D, CT190638A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES
No. 1508
September Term, 2019

STATE OF MARYLAND

v.

DESHAWN WATKINS

No. 1509
September Term, 2019

STATE OF MARYLAND

v.

MANDEL GREENE

No. 1510
September Term, 2019

STATE OF MARYLAND

v.

CARLOS GREENE

— Unreported Opinion —

No. 1511
September Term, 2019

STATE OF MARYLAND

v.

DIANTE BREWER

Berger,
Shaw Geter,
Raker, Irma E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: February 3, 2021

In 2017, appellees, Diante Brewer, Carlos Greene, Mandel Greene, and Deshawn Watkins, were indicted in the Circuit Court for Prince George's County for the murder of Douglas Brooks. For various reasons, each case was continued multiple times and on the final trial date for each respective appellee, the State entered a nolle prosequi as to all charges. On June 11, 2019, appellees were again indicted for the murder of Brooks. In the second set of cases, the four original co-defendants as well as an additional defendant, Kevin Baldwin, were identified as co-conspirators. Appellees, respectively, filed motions to dismiss the charges and following a joint hearing where appellees argued for dismissal of their charges, the circuit court granted the motions and dismissed all charges with prejudice. These timely appeals followed.

Appellant presents the following question for our review:

1. Did the circuit court err in dismissing the indictment(s) on constitutional speedy trial grounds?

For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

On August 21, 2016, Prince George's County police officers responded to a call and found Douglas Brooks lying on a sidewalk suffering from multiple gunshot wounds to his upper body. Medics arrived but were unable to resuscitate him. An autopsy later determined Brooks' cause of death was multiple gunshot wounds and the manner of death was homicide. The police investigation revealed that prior to the murder, a vehicle arrived at the crime scene and four or five men got out of the vehicle, approached Brooks, and began shooting him. Police later connected Diante Brewer, Mandel Greene, Carlos

Greene, and Deshawn Watkins to the murder. Appellees, respectively, were charged with seven counts: (1) murder; (2-3) two counts of use of a handgun in the commission of a crime of violence or felony; (4) robbery with a dangerous weapon; (5) conspiracy to commit murder; (6) conspiracy to commit robbery with a dangerous weapon; and (7) possession of a regulated firearm under the age of 21 years.

(As to Appellee Watkins Only)

Appellee Watkins was arrested on March 1, 2017 and indicted on March 23, 2017. A motions hearing and trial date were scheduled to begin on October 2, 2017. At the motions hearing, both the State and defense requested a continuance of the trial date, which was granted by the court. Appellee waived *Hicks* on the record and in writing and a new motions hearing and trial date were set for March 14 and March 26, 2018.[1] On the motions date, however, a newly appointed defense counsel requested a continuance, indicating that he had just been repaneled for the case one week prior to the hearing and there was "a lot

[1] A *Hicks* waiver occurs when a defendant waives the rule articulated by the Court of Appeals in *State v. Hicks*, 285 Md. 310, 318 (1979), in which the Court held that absent a finding of good cause, the time parameters during which a criminal trial must be held in a circuit court are mandatory and cannot be contravened. Currently, Maryland Rule 4-271 requires that the trial date for a criminal matter in the circuit court may not be later than 180 days after the earlier of: (1) the appearance of counsel; or (2) the defendant's first appearance before the circuit court. An exception is made to the *Hicks* rule when a "defendant seeks or expressly consents to a trial date in violation of the rule." *Goins v. State*, 293 Md. 97, 108 (1982). *See also Jules v. State*, 171 Md. App. 458, 474 (2006) (explaining that "[t]here must be some overt act evidencing an intent to consent to the delay. Once a defendant consents to a continuance beyond the 180-day period, however, there can be no circumvention of Maryland Rule 4-271 because the point of reference is the 180-day period and, assuming a case is not brought to trial within that time frame, the *sine qua non* of the Rule is not achieved.").

of discovery to go over." The State did not object and the court granted the continuance, as a "[c]ourt's continuance to the trial date . . . in order for counsel to be appointed." On March 26, 2018, appellee's counsel requested a continuance of the trial and his request was granted by the court. A new motions hearing was scheduled for May 18, 2018 and the trial was scheduled for August 6, 2018.

On August 2, 2018, the defense filed a written motion to continue the August 6, 2018 trial date, citing two reasons: (1) an eyewitness contacted defense counsel regarding testimony in appellee's favor; and (2) defense counsel recently learned that DNA found on a handgun recovered in a District of Columbia case might constitute exculpatory evidence. The court granted appellee's third continuance request and trial was set for October 15, 2018. Appellee then requested a fourth continuance, stating they were awaiting further discovery; specifically, crime scene photos, a transcript from the State, and appellee was also considering a plea offer. Defense also indicated that the State was waiting on discovery as well. The State joined in the continuance request.

A fifth trial date was scheduled for March 18, 2019, and the State moved for a continuance arguing it had been unable to obtain the DNA analysis of the handgun recovered in the District of Columbia case that forensically linked the gun to one of the weapons used in Brooks' murder. The following colloquy occurred:

> The Court: —before you found out the results of the analysis, he was charged with this case, correct?
>
> State: That is correct.

The Court: So you had sufficient evidence at that time that you felt you could go forward on the charges before you knew the DNA?

State: There is other evidence, but this evidence is particularly probative. And in light of expectations that juries have with respect to a DNA analysis, I believe that it really is essential to the State's case. We have evidence that places him on the scene, and we have evidence of him coming out of an alley where a handgun was found, but this evidence is incredibly probative in terms of linking Mr. Watkins definitively to that handgun because again this isn't a situation where the gun was found on his person. It's not even a situation where a police officer could testify that he saw Mr. Watkins drop or dispose of the gun. An officer could only testify that he saw Mr. Watkins and another individual in the area, that he saw them go in the alley . . .

* * *

The Court: In an alley in the District of Columbia?

State: It's in the District of Columbia.

The Court: Right

* * *

The Court: Okay. All of this is in 2016, even the recovery of this gun in the alley, all of this, the incident in the District of Columbia? Are you saying—yeah. Okay . . .

* * *

State: The recovery of the gun was in November, the end of November 2016.

The Court: Okay. And for two years, they had this gun and the results, and they've not been willing to share it with you?

State: That is correct. D.C. has not been willing to provide this information to Prince George's County. However, through essentially a personal connection in the U.S. Attorney's Office I have obtained this report, and I do want to use it at trial. I think it's very obviously probative. In an interest of allowing the State to have all of the possible evidence to present to a jury so that a fact finder can have all of the available evidence to best reach a verdict

in this case, I am asking to be able to have a continuance to be able to use this evidence . . .

* * *

Defense Counsel: . . . What happens then is that January 20, 2017, this report is generated. When the testing is actually done, it had to be between October 2016 and January 20, 2017. A report is created whereby they say that my client's DNA, it would have been one—for African Americans, one in 1.22 thousand . . . My client is picked up and brought in February 23, 2017. He's been in custody since then. I believe it's the same day he is brought in, he is interviewed at length by Detectives Boulden and Cruz. There's a long video . . . In that interview, Detective Boulden . . . confronts my client with the fact that his DNA was on the—was found on the gun. Okay. So—although nothing has ever been—nothing's provided to us until February of this year. So he obviously had—he had knowledge of it. He's a Prince George's County detective and he had knowledge of it going back to at least February 23, 2017, if not earlier . . .

* * *

The Court: Let me ask you this. He says that in the interview, on the tape, the detective confronts him with the fact that his DNA is on the weapon, yes or no? Does he—

* * *

State: I don't know if he was making it up. He certainly didn't have this report to be able to say that.

* * *

The Court: . . . And now you think that a continuance will allow you to do what?

State: To meet my obligations under the statute, which is to provide the source material to the defense so that I can actually use this evidence in trial.

The Court: What makes you think you're going to be able to get that here? It is in Utah? . . .

* * *

> State: Yes. I've been in contact with the lab and with the specific analysts in the case. They will come and testify. They have provided our office with estimates, and our office has approved the expenditure.

The State then indicated they had extended a cooperation offer to appellee and agreed he could be released on electronic monitoring pending sentencing. The court denied the State's request for a continuance and the State entered a nolle prosequi as to all charges. Appellee noted his demand for a speedy trial.

(As to Appellee Mandel Greene Only)

Appellee Mandel Greene was arrested on July 12, 2017 and indicted on September 5, 2017. A motions hearing and trial date were scheduled to begin on January 26, 2018. At the motions hearing, the State requested a joint continuance, which was granted by the court. Appellee waived *Hicks* on the record and in writing and a new motions hearing and trial date were set for July 16, 2018. On the trial date, however, appellee entered an *Alford* plea and defense counsel requested a presentence investigation (PSI).[2]

At the sentencing hearing on October 17, 2018, defense counsel requested a continuance because the PSI had not been completed. A new sentencing date was scheduled for December 17, 2018. On that date, defense counsel sought another continuance stating that she needed more time to review the PSI. Defense also filed a written motion to withdraw appellee's *Alford* plea on December 17, 2018. The court

[2] An *Alford* plea is "a specialized type of guilty plea where the defendant, although pleading guilty, continues to deny his or her guilt, but enters the plea to avoid the threat of greater punishment." *Ward v. State*, 83 Md. App. 474, 478 (1990) (citing North Carolina v. Alford, 400 U.S. 25, 37 (1970)) (citations omitted).

granted appellee's continuance request and a new sentencing hearing was scheduled. On the new sentencing date, January 31, 2019, the court granted appellee's motion to withdraw his *Alford* plea. A motions hearing was then scheduled for May 30, 2019 and a second trial date was scheduled for June 3, 2019. However, on June 3, 2019, without first requesting a continuance of the trial date, the State entered a nolle prosequi as to all charges. Appellee noted his demand for a speedy trial.

(As to Appellee Carlos Greene Only)

Appellee Carlos Greene was arrested on May 5, 2017 and indicted on June 22, 2017. A motions hearing and trial date were scheduled to begin on November 9, 2017 and December 5, 2017, respectively. At the motions hearing, both the State and defense requested a continuance of motions to the trial date, which was granted by the court. On the first trial date, December 5, 2017, defense requested a continuance of the motions hearing and trial date, which was granted by the court. Appellee waived *Hicks* on the record and in writing and a new motions hearing and trial date were set for March 9 and May 7, 2018.

On February 2, 2018, defense counsel withdrew from the case due to a conflict of interest and a hearing was held on February 9, 2018, where the court converted the motions date of March 9, 2018 to a status conference. At the status conference, the newly appointed defense counsel requested that the motions hearing be continued because he was still reviewing discovery. A new motions and trial date were set for April 13 and May 7, 2018. At the April motions hearing, both parties withdrew their motions. On May 2, 2018, the

parties filed a joint motion to continue the trial date. The court entered an order continuing the second trial date. On the third trial date, October 29, 2018, the State requested a continuance, indicating that a week prior an inmate entered into a cooperation agreement to provide information in appellee's case and that the State needed more time to produce the witness. The court denied the State's request for a continuance and the State entered a nolle prosequi as to all charges. Appellee asserted his demand for a speedy trial.

(As to Appellee Brewer Only)

Appellee Brewer was arrested on February 28, 2017 and indicted on March 23, 2017. A trial was scheduled to begin on October 2, 2017. On the first trial date, the State indicated that the parties had a joint motion to continue, which the defense disputed. The court then charged the continuance to the State. Appellee noted a demand for a speedy trial and waived *Hicks* on the record and in writing. A motions hearing and trial date were respectively scheduled for March 14 and April 9, 2018. At the motions hearing, both the State and the defense requested a continuance of motions, which was granted by the court. On the new motions date, March 26, 2018, the State moved to continue motions to the trial date and indicated that the parties might also seek a joint continuance of the trial date. Defense counsel agreed but stated that she may have to object "for the record" and was not committing to a joint postponement at the time. The court granted a joint continuance.

On the second trial date, April 9, 2018, the State moved to continue the motions and trial date. The State indicated it had just discovered a new witness who had information about the case and had just made a proffer. The defense did not object to a continuance of

motions but objected to a continuance of the trial. The motions hearing was continued to June 25, 2018 and a third trial date was scheduled for August 13, 2018. At the motions hearing, new defense counsel appeared and requested a continuance. Defense counsel indicated that there was a statement at issue that he anticipated would be litigated but he had not had a chance to review it with his client. A new motions date was set for July 26, 2018. At that hearing, defense counsel requested a continuance because he was still reviewing discovery and indicated that he was relatively new to the case. A new motions date was scheduled for August 1, 2018.

At the August motions hearing, defense counsel moved to continue motions and the trial date, noting several reasons: (1) he had just received notice of a potential defense witness; (2) he needed to resubmit his application for technical assistance from the Forensics Unit of the Public Defender's Office in Baltimore City, because his original application was inadequate; (3) there were outstanding discovery issues; and (4) he intended to litigate his client's statement at the motions hearing, which was a potential *Bruton* problem.[3] The court granted the continuance of the motions hearing and scheduled motions to be heard on the trial date of August 13, 2018. The court advised that the administrative judge would have to rule on the request to continue the trial date. The court noted that defense filed a motion to sever from Watkins to which the State did not object.

[3] A *Bruton* issue involves the criminally accused's right to confrontation secured by the Sixth Amendment Confrontation Clause. *Bruton* is implicated where multiple defendants are jointly tried and one of the defendants does not testify at trial but gives an extrajudicial confession or statement that is later admitted into evidence. *Bruton v. United States*, 391 U.S. 123, 123–26 (1968).

The court stated, "put down Defense motion to sever not counts, but individuals from this gentleman and Mr. Watkins [was] granted."

On August 2, 2018, the defense filed a motion to continue and the administrative judge entered an order moving the motions date to October 16, 2018 and scheduling a fourth trial date for November 19, 2018. At the motions hearing, the State and the defense indicated that they were working on discovery issues. On November 16, 2018, the State filed a motion to continue the fourth trial date. On November 26, 2018, the court entered an order granting the State's motion to continue and setting a new trial date for February 25, 2019.

On the fifth trial date, the State moved to postpone the trial to March 18, 2018 in order to jointly try appellee with Watkins because they no longer believed there was a *Bruton* issue. Defense objected to joining Watkins and when asked if it was ready to go to trial defense stated, "I would go to trial today." The court denied the State's request for a continuance and the State entered a nolle prosequi as to all charges. Appellee noted a speedy trial demand.

(As to all Appellees)

Appellant alleges additional information was gleaned during and after the initial prosecution of each appellee, including:

1. On March 6, 2019, the State received a January 2017 DNA report from a Utah lab concerning a November 2016 District of Columbia case. Watkins' DNA was discovered on a handgun found near him in an alley in the District of Columbia.

Firearm analysis connected the gun found in the alley to one of the guns used in Brooks' murder.

2. On May 29, 2019, the Prince George's County police reanalyzed a cell phone belonging to one of two of Brooks' music managers, Kevin Baldwin, utilizing new technology. The reanalysis generated additional text messages and a new cell phone number that made several contacts with Mandel Greene immediately before and after Brooks' murder. On May 31, 2019, the police discovered that the new cell phone number belonged to Kevin Baldwin.
3. On May 30, 2019, Watkins pleaded guilty, in the District of Columbia, to possession of the handgun that had been forensically linked to Brooks' murder.
4. On June 3, 2019, the State learned of an inmate who alleged Mandel Greene informed him that appellee, Brewer, and Carlos Greene killed Brooks at Baldwin's request. The State asserts the information corroborated the reanalyzed cell phone evidence and statements of two additional inmates, who reported that the murder was committed at Baldwin's request.

The State alleges that after June 3, 2019, it learned from an inmate that Mandel Greene told him that Brewer, Watkins, and Carlos Greene killed Brooks at Baldwin's request. The State asserts the inmate's information corroborated the reanalyzed cell phone evidence and the statements of two additional inmates, who also reported that the murder was committed at Baldwin's request.

Appellees were indicted for a second time on June 11, 2019. The charging documents consisted of six counts and added Baldwin as a co-conspirator. Appellees were charged with: (1) the murder of Brooks; (2) use of a firearm in a crime of violence; (3) use of a firearm in a felony; (4) conspiracy with the four original co-defendants and Baldwin to commit robbery of Brooks with a dangerous weapon; (5) conspiracy with the four original co-defendants to commit first-degree assault; and (6) conspiracy with the four original co-defendants and Baldwin to commit murder.

Appellees filed respective motions to dismiss the second indictments. The court held a joint hearing on August 5, 2019 and following arguments of counsel, the court took the matter under advisement. On August 12, 2019, the court issued its ruling from the bench.

The judge held that all four men had been denied a speedy trial and the court noted that there were no violations of the *Hicks* rule. The court, in discussing its *Barker* analysis, stated:[4]

> [T]he first step in the analysis is that we must first make a determination as to whether the length of delay is of constitutional dimension and requires actual constitutional analysis. And obviously, we are talking about upwards of three years here and—at least for three of these defendants, and obviously, three years since the alleged crime itself occurred. And, therefore, clearly, this does equate to a constitutional delay that is merited and warranted in terms of the analysis.

[4] The *Barker* analysis consists of four factors that the United States Supreme Court established in *Barker v. Wingo*, which courts must balance to determine whether a defendant's constitutional right to a speedy trial has been violated. 407 U.S. 514, 53 (1972). The 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.*

Now, one thing that's significant about the delay itself is the fact that the length of delay presumptively creates a prejudice to the defense. And that presumption may be rebutted by the State, but it is presumed that based on the length of delay alone, there is, in fact, a prejudice to the defendant. And we'll get to that prong later on, but we should be very clear about that.

So now that the analysis has been triggered based on the length of the delay, we need to go through the four factors that must be examined. And obviously, the first of those is the length of delay itself. As I indicated, for at least three of these defendants, we are talking about upwards of three years. Clearly, that is a factor that falls in favor of the defendants.

The next step in the analysis is the reason for the delay, and this is somewhat convoluted here. If you look at it from the macro perspective and take an overall examination, looking at the procedural history of all these cases, including—what's the name of the defendant with the shorter length of time? It's one of the Greenes. Let's see . . . Mandel Greene.

If we look at the length—I mean, excuse me, if we look at the reason for delay, including the Mandel Greene case, it is apparent to the Court, at least from the macro perspective, that the reason for the delays can all really be attributed to the State. For various ambiguities or unclarified reasons, the State had to continue a case or at least provide more discovery or obtain more discovery throughout the delay of the three years.

And while I can't comment as to the reason for the nolle prosses, it became apparent, I believe, to the State that no further continuances were going to be granted because of the numerous continuances the State had obtained throughout these matters. And so the delay in terms of actually going forward, from the nolle pros forward also appears to be attributable—attributed to the State.

Clearly, each one of these defendants asserted the right to a speedy trial. I don't think anyone can dispute that particular prong of the analysis, which brings us back to the last prong that I alluded to earlier, and that is the presumption of prejudice.

It's very interesting. If you go back and you look at *Barker v. Wingo* itself and what the Supreme Court actually stated in that case, they indicated that the right to a speedy trial exists really to protect certain interests. Number one, they want to prevent oppressive pretrial incarceration.

> I don't think I have seen a case that has—or cases that have been delayed longer without actually going to trial than these matters in my 20 years in this courthouse, so—and considering that these defendants have been incarcerated throughout.
>
> * * *
>
> Also, the Supreme Court indicated that there was an interest to minimize the amount of anxiety and concern that accused may have while awaiting trial. To have a situation where individuals are locked up for a year, two years, then going into three years, have their cases nolle prossed and then turn right back around and charge and incarcerate them again, I can't imagine a situation that would create more anxiety than that.
>
> And then the third area that the *Barker v. Wingo* [C]ourt talked about was a limitation to the impairment of the defense. And one thing that resonated with the [c]ourt was a comment made [Brewer's counsel] when putting forth his arguments, and that was, "Your Honor, I can't even tell you what the actual prejudices are, because there was such a delay by the State in providing discovery . . .

The court then dismissed all charges collectively, with prejudice.

DISCUSSION

A. Standards Governing Review of Speedy Trial Challenge

Under the Sixth Amendment of the Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. Amend. VI. Article 21 of the Maryland Declaration of Rights provides that "in all criminal prosecutions, every man hath a right . . . to a speedy trial[.]"

Maryland courts apply the four-part balancing test articulated by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine whether a defendant has been deprived of his constitutional right to a speedy trial. *Greene v. State*, 237 Md. App. 502, 512 (2018) (citing *State v. Kanneh*, 403 Md. 678, 687 (2008) (citation omitted). The four

factors of the *Barker* analysis include the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. No one factor "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." *Phillips v. State*, 246 Md. App. 40, 56 (2020) (quoting *Nottingham v. State,* 227 Md. App. 592, 613 (2016) (internal citation and quotation marks omitted). "[T]here is no bright-line rule to determine whether a defendant's right to a speedy trial had been violated" therefore, we are to apply a balancing test. *Phillips*, 246 Md. App. at 56. The threshold inquiry is "whether the delay is deemed to be of constitutional dimension." *Smart v. State,* 58 Md. App. 127, 131 (1984).

In *United States v. MacDonald*, the Supreme Court held "the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges." 456 U.S. 1, 7 (1982). The Court of Appeals opined in *Henson*, "where the State terminates a prosecution in good faith, i.e. it does not intend to circumvent the speedy trial right, and the termination does not have that effect, the period preceding the earlier dismissal is not counted in the speedy trial analysis." *State v. Henson,* 335 Md. 326, 338 (1994).

In reviewing a ruling on a motion to dismiss for infringement of the constitutional right to a speedy trial, "we make our own independent constitutional analysis" to determine whether the right has been violated. *Glover v. State*, 368 Md. 211, 220 (2002) (citations omitted). Accordingly, "[w]e perform a de novo constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact

unless clearly erroneous." *Id*. at 221. "Appellate review should be practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case." *Peters v. State*, 224 Md. App. 306, 359 (2015) (quoting *Brown v. State*, 153 Md. App. 544, 556 (2003), and *State v. Bailey*, 319 Md. 392, 415 (1990)) (internal quotation marks omitted).

1. Good Faith

As articulated by the Court of Appeals' holding in *State v. Henson*, if the State terminated its prosecution of an initial indictment in good faith, "the period between the good faith termination of a prosecution and the reinstitution of that prosecution . . . will not be considered in the speedy trial analysis." 335 Md. 326, 335 (1994).

Appellant here argues the State acted in good faith when it nolle prossed appellees' initial indictments and the circuit court erred by failing to make a finding of good faith before reaching any other determinations, including, calculating the length of delay. Because the State acted in good faith, appellant contends the court miscalculated the length of delay in each case by including the period between the first indictment and the entry of the nolle prosequi in its conclusion regarding appellees' second cases.

(As to Appellee Watkins Only)

Appellee Watkins argues the State intended to circumvent his right to a speedy trial by entering a nolle prosequi as to the first indictment and refiling the charges. Appellee contends the start date the judge used to calculate the length of delay coincided with the date of the first indictment and therefore, the judge must have found that the State acted in

bad faith. Appellee cites *Morris v. State* for the proposition that where a trial judge's fact-finding is ambiguous, incomplete, or non-existent, ambiguities should be resolved in the favor of the prevailing party. *See* 153 Md. App. 480, 489–90 (2003). In *Morris*, the trial court made a finding of fact at a suppression hearing that facts contained in a search warrant application were sufficient to establish probable cause necessary to justify its issuance. *Id.* at 490. The search warrant application included information supplied by a "concerned citizen," including the description of a suspect, the location of where the suspect discarded parts of his clothing, which was corroborated by police, and the identification of the suspect by several witnesses through a photographic array. *Id.* at 491–92.

This Court explained, in reviewing a suppression hearing ruling, appellate courts will "accept that version of the evidence most favorable to the prevailing party . . . fully credit the prevailing party's witnesses and discredit the losing party's witnesses . . . give maximum weight to the prevailing party's evidence and little or no weight to the losing party's evidence." *Id*. at 490. We further stated, "[t]his is, however, the *supplemental rule that is only brought to bear on the record of the suppression hearing* when the hearing judge's fact-finding itself is 1) ambiguous, 2) incomplete, or 3) non-existent. The supplemental rule guides the appellate court in resolving fact-finding ambiguities and in filling fact-finding gaps." *Id.* (emphasis added). The *Morris* holding is specific as to suppression hearings where evidence is presented and is not dispositive here. *See id.*

(As to Appellee Mandel Greene Only)

Appellee Mandel Greene argues the State acted in bad faith and nolle prossed the initial indictment in an attempt to circumvent the authority of the administrative judge to grant continuances only for good cause. Appellee cites *State v. Price* for the rule that "trials proceed except when there has been a finding of good cause by the administrative judge." *See* 385 Md. 261, 279 (2005). In *Price*, within the 180 day *Hicks* period, whereupon the defendant had not waived *Hicks*, the State requested and was denied a continuance by the administrative judge who *expressly* found no good cause for a continuance. *Id.* at 278. The State then nolle prossed the charges, re-indicted the defendant, and conceded the purpose of the nolle pros was to avoid dismissal of the case or an acquittal. *Id.* The Court of Appeals held that "the nolle pros did not have the 'necessary effect' of circumventing the 180 day requirement of the statute and the rule; rather, it was for the purpose of circumventing, and, indeed, that intention was achieved, the requirement of the statute . . . 'the purpose for entering the nol[le] pros in the case under consideration was to circumvent the authority and decision of the administrative judge.'" *Id.* at 278–79 (footnote and citations omitted). The *Price* holding, however, is limited to *Hicks* violation analyses rather than speedy trial violation analyses and is not controlling here. *See id.*

(As to Appellee Carlos Greene Only)

Appellee Carlos Greene argues that "taken in context," the record reflects that the circuit court found that the State dismissed appellee's charges in bad faith. Appellee contends that when a trial judge does not explicitly address good faith, the ruling of the trial court should not be overturned unless there is clear error. Appellee cites to this Court

in *Nottingham v. State*, where we "conclude[d] that the motions court found, as a fact, that the State acted in good faith in entering a nolle prosequi to the original indictment and, one week later, return[ed] a new indictment" when "the State's argument focused almost exclusively on good faith." 227 Md. App. 592, 615 (2016). The *Nottingham* Court concluded that "[a]lthough the motions court did not articulate the basis of its ruling, it appears that it adopted the State's argument, as it did not engage in the *Barker* four-factor balancing test." *Id.* at 614. This Court distinguished *Nottingham* from *State v. Henson*, 335 Md. 326, 332 (1994),

> where the trial court likewise did not engage in the [*Barker*] balancing test, . . . but where, because the "State's good faith in dismissing the charges . . . was neither presented to, nor decided by, the motions court," . . . it was necessary to remand so that the circuit court could make findings as to whether the State had acted in good faith and whether [the defendant's] speedy trial right had been violated, once the relevant time period had been determined.

Id. at 614–15 (quoting *Henson*, 335 Md. at 340). Here, the circuit court did engage in the *Barker* balancing test, however, the record does not reflect that the State's good faith was decided by the circuit court. We cannot conclude, as we did in *Nottingham*, that the circuit court adopted the State's argument as to good faith with respect to each appellee. Thus, the holding in *Nottingham* is not controlling.

Like Watson, appellee cites to *State v. Price* as instructive for determining good faith in a speedy trial violation. 365 Md. 261 (2005). As we clarified above, the *Price* holding is limited to Hicks violation analyses rather than speedy trial violation analyses and is not dispositive. *See id.*, at 278–79. Appellee, like Brewer below, cites to *White v.*

State and *Clark v. State* as model cases where this Court has found that the State acted in good faith where it nolle proses charges and then indicts the defendant on the same or similar charges. *See White v. State*, 223 Md. App. 353, 383 (2015); *Clark v. State*, 97 Md. App. 381, 391(1993).

(As to Appellee Brewer Only)

Appellee Brewer argues that the circuit court correctly found that the length of delay included the first indictment because the State acted in bad faith when it nol prossed the initial of charges. Appellee cites to *Henson's* holding that the State terminates a prosecution in good faith when the intent to circumvent the speedy trial right and the effect of circumventing the right are absent. *State v. Henson*, 335 Md. 326, 338 (1994). Appellee argues that the "bad faith analysis" in speedy trial cases "parallels the circumvention analysis in the *Hicks* cases." Appellee acknowledges, however, that the *Hicks* rule is distinct from the constitutional speedy trial right and serves a different purpose. Appellee looks to this Court's decision in *Greene v. State*, noting that the "two-factor rule [, the intent to circumvent the speedy trial right and the effect of circumventing the speedy trial right,] is identical to the rule applied when a nol pros occurs in a 180-day case." 237 Md. App. 502, 514 n. 2 (2018) (alterations not in original).

Appellee cites as illustrative, several cases where courts have found that the prosecution acted in good faith when it dismissed charges and then re-indicted the defendant. Appellee notes that a prosecution may be terminated in good faith where the prosecutor decides not to prosecute the case after concluding the allegations were false.

See United States v. MacDonald, 456 U.S. 1, 10 n. 12 (1982) (noting that there were "no allegation[s] here that the Army acted in bad faith in dismissing the charges. This is not a case where the Government dismissed and later reinstituted charges to evade the speedy trial guarantee. The Army clearly dismissed its charges because the Commanding General . . . concluded that they were untrue."). Appellee acknowledges that the State may act in good faith where the State dismisses the charges due to the belief that they cannot successfully prosecute due to missing or unavailable evidence. *See White v. State*, 223 Md. App. 353, 383 (2015) (concluding that the State acted in good faith where it entered a nol pros when the sole identification evidence was DNA analysis and "pending before the Court of Appeals at that time was a case presenting the question of whether all DNA analysts who participated in the analysis would be required to testify at trial" and the analyst in the case was out of the county with no known return date); *Clark v. State*, 97 Md. App. 381, 391(1993) (finding that the State nol prossed in good faith where it believed it could not prosecute without the testimony of the only eyewitness and there was evidence that the defendant was responsible for the witness's refusal to testify). Like Watson and Brewer, appellee cites to *State v. Price*¸ where the State moved for a continuance to obtain DNA analysis, the court did not find good cause for delay and denied the continuance, and the State nol prossed the charges. 385 Md. at 266 (2005). As we explained above, the *Price* holding is limited to Hicks violation analyses rather than speedy trial violation analyses and is not controlling. *See id.*, at 278–79.

(As to all Appellees)

In our review of the record in the present case, the judge made no findings regarding whether the termination of the prosecution was made in good faith. In discussing the length of delay, the judge observed, "while I can't comment as to the reason for the nolle prosses, it became apparent, I believe, to the State that no further continuances were going to be granted because of the numerous continuances the State had obtained throughout these matters." The judge made no other comments regarding this issue and did not specify that his remarks were applicable to each appellee. Thus, on this record, we hold, the judge did not make the required finding, explicitly or implicitly, as to whether the State acted in good faith, nor can its statement be construed as ambiguous. Further, the judge's conclusion that the State had obtained "numerous continuances" is not reflective of the court's records in each case.

While the cases of each original co-defendant were similarly indicted and some had comparable procedural postures, each individual was entitled to an individual assessment. We therefore remand for further proceedings and a determination as to whether the State, in the case of each individual appellee, acted in good faith in dismissing the initial indictments and based on the court's conclusion, if appropriate, an analysis of the *Barker* factors. We explain the *Barker* factors for the court's analysis on remand.

2. *Barker Factors*

The *Barker* analysis requires the court to individually assess the procedural posture and circumstances of each case. Balancing the *Barker* factors is a delicate task, which requires courts to "engage in a difficult and sensitive balancing process," and necessitates

an individual assessment of each defendant's case. *See Barker v. Wingo*, 407 U.S. 514, 533 (1972). Because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Length of Delay

The first *Barker* factor, the length of delay serves a dual role as the triggering mechanism that must be met before there is a further *Barker* inquiry and is also one of the factors. The length of delay "cannot be computed unless it is known when the period of delay starts." *Clark v. State*, 97 Md. App. 381, 387 (1993). For speedy trial analysis, the "length of delay is measured from the date of arrest or filing of indictment . . . to the date of trial." *Divver v. State*, 356 Md. 379, 389 (1999) (citing *State v. Gee*, 298 Md. 565, 569, 471, *cert. denied*, 467 U.S. 1244 (1984)). Although "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 v. State*, 368 Md. 211, 223 (2002). *But see Divver*, 356 Md. at 390 (quoting *Gee*, 298 Md. at 579 (noting that "a six month delay '[is] not presumptively prejudicial [and therefore] there is no necessity for inquiry into the other factors which go into the balance.'")) (footnote omitted). When the length of delay is "'one of constitutional dimension, then a presumption arises that the defendant has been deprived of his right to a speedy trial.'" *State v. Bailey*, 319 Md. 392, 416 (1990) (quoting *Brady v. State*, 291 Md. 261, 266 (1981)). The speedy trial guarantee, however, "does not apply

once a defendant has been found guilty at trial or has pleaded guilty to criminal charges." *Betterman v. Montana*, 136 S. Ct. 1609, 1612 (2016).

The State argues the judge erred by calculating the length of delay beginning from the time of the offense, rather than the date of the arrest or indictment of each of the defendants. In examining the length of delay factor, the court stated:

> [T]he first step in the analysis is that we must first make a determination as to whether the length of delay is of constitutional dimension and requires actual constitutional analysis. And obviously, we are talking about upwards of three years here and—at least for three of these defendants, and obviously, three years since the alleged crime itself occurred. And, therefore, clearly, this does equate to a constitutional delay that is merited and warranted in terms of the analysis.

(As to Appellee Watkins Only)

Appellee Watkins contends the judge correctly ruled that the time period surrounding the first indictment, March 1, 2017, was the proper start date to begin calculating the length of time. The total delay in appellee's case from the date of his initial arrest on March 1, 2017, to the bench ruling on August 12, 2019, granting his motion to dismiss, was two years, five months, and 11 days.

(As to Appellee Mandel Greene Only)

Appellee Mandel Greene argues the judge correctly ruled that the time period surrounding the date of his initial arrest, July 12, 2017, was the proper start date to begin calculating the length of delay. The total delay in appellee's case from the date of his initial arrest on July 12, 2017, to the bench ruling on August 12, 2019, granting his motion to

dismiss, not including the time frame between the entry and withdrawal of appellee's *Alford* plea, July 16, 2018 to January 31, 2019, was one year, six months, and 15 days.

(As to Appellee Carlos Greene Only)

Appellee Carlos Greene contends that the State dismissed his charges in bad faith and the circuit court did not find good faith, therefore May 5, 2017, was the proper start date to begin calculating the length of delay. The total delay in appellee's case from the date of his initial arrest on May 5, 2017, to the bench ruling on August 12, 2019, granting his motion to dismiss, was two years, three months, and 7 days.

(As to Appellee Brewer Only)

Appellee Brewer contends the circuit court correctly ruled that the time period surrounding the first indictment, March 23, 2017, was the proper start date to begin calculating the length of delay. The total delay in appellee's case from the date of his initial arrest on March 23, 2017, to the bench ruling on August 12, 2019, granting his motion to dismiss, was two years, four months, and 20 days.

(As to all Appellees)

The court, here, did not specifically analyze the length of delay attributable to each defendant. In finding there was a delay of constitutional dimension, the court stated, regarding the delays " . . . we are talking about upwards of three years here and—at least for three of these defendants, and obviously, three years since the alleged crime itself occurred." The finding that the delays were "upwards" of three years, however, is not reflective of the case records. It appears that the court's calculations may have included

additional time frames. If the period from the date of the incident, which was August 21, 2016, is calculated, then the delays might properly have been characterized as "upwards of three years." However, the inclusion of this additional time frame would have been improper as the clock starts when a defendant is arrested or indicted.

Nevertheless, we agree that the delays in appellees' cases were of constitutional dimension as each was more than one year and fourteen days and was most likely presumptively prejudicial. However, the inquiry does not stop there.

Reason for the Delay

Closely related to length of delay is the reason the government assigns to justify the delay." *Barker v. Wingo*, 407 U.S. 514, 531 (1972). Under *Barker*, "the conduct of both the prosecution and the defendant are weighed." *Id.* at 530. Not all delays are accorded equal treatment, hence "the delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex conspiracy charge." *State v. Bailey*, 319 Md. 392, 411 (1990).

The Court of Appeals, in *State v. Kanneh*, noted that when balancing the reasons for delay, the court should address each postponement of the trial date individually. *See* 403 Md. at 690 (considering the length of delay by "address[ing] each postponement of the trial date in turn"). Quoting the Supreme Court, the *Kanneh* Court stated:

> 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 with the defendant.

> Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

403 Md. 678, 690 (2008) (quoting *Barker*, 407 U.S. at 531) (footnote omitted)).

According to appellant, the judge's finding that all of the delays were attributable to the State was not supported by the record. Nor did the judge examine the procedural history of appellee's case or evaluate the reasons for each delay. Rather, his statements were framed from a "macro perspective" of all the cases.

(As to Appellee Watkins Only)

In appellee Watkins' case, there were four trial continuances. The first continuance on October 2, 2017, was a joint continuance. The second continuance, on March 26, 2018, was a defense continuance, due to the case being repaneled and new counsel entering his appearance. The third continuance was requested by defense by written motion, stating that a new witness had emerged and there was a need to explore potential exculpatory evidence, i.e., the handgun case in the District of Columbia. The fourth continuance on October 15, 2018, was also requested by the defense attorney, who indicated he was awaiting additional discovery, and was joined by the State. The final request for a continuance, on March 18, 2019, was the State's sole request for a continuance.

(As to Appellee Mandel Greene Only)

In appellee Mandel Greene's case, there was one continuance of the trial date. The continuance, requested on January 26, 2018, was a joint continuance. On the second trial date, July 16, 2018, appellee entered an *Alford* plea. Sentencing hearings were scheduled for October 17, 2018, December 17, 2018, and January 17, 2019. On the first sentencing

date, defense moved to continue because the PSI had not been completed. On the second sentencing date, December 17, 2018, defense moved to continue sentencing and filed a written motion to withdraw appellee's *Alford* plea. On the third sentencing date, January 17, 2019, appellee withdrew his plea. The third and final trial was scheduled for June 3, 2019, at which neither party requested a continuance and the State entered the matter nolle prosequi.

(As to Appellee Carlos Greene Only)

In appellee Carlos Greene's case, there were three continuances of the trial date. The first continuance on December 5, 2017, was requested by the defense who stated that they recently received discovery and defense counsel was beginning a murder trial the next week. On February 2, 2018, defense counsel withdrew due to a conflict of interest. The second continuance was requested by both parties via written motion. The final continuance was requested by the Assistant State's Attorney, who indicated that, a week prior, an inmate entered a cooperation agreement to provide information in appellee's case and the State needed more time to produce the witness.

(As to Appellee Brewer Only)

In appellee Brewer's case, there were five continuances of the trial date. The first continuance on October 2, 2017, was charged as a State's continuance. The State indicated that the parties had a joint motion to continue and the defense stated that they believed it was the State's postponement because discovery was outstanding. The second continuance, on April 9, 2018, was requested by the State and granted over the defense's

objection. The State indicated that it had recently discovered a new witness and made a proffer the week prior. The third continuance was requested by new defense counsel who had entered the case as of June 25, 2018 and was requested via written and oral motion on August 1 and August 2, 2018, respectively. The fourth continuance, on October 15, 2018, was requested by the State via written motion. The fifth and final continuance, on February 25, 2019, was requested by the Assistant State's Attorney, who sought to jointly try Appellee with Watkins as counsel no longer believed there was a *Bruton* problem.

(As to all Appellees)

Appellees look to *Wheeler v. State* and argue that "[w]hen a delay is necessitated by the failure of the State to prepare its case, that delay weighs heavily against it." 88 Md. App. 512, 519 (1991). However, *Wheeler* also holds that when the delay is caused, at least in part, by the defendant, the delay should not be charged to the State. *See id.* at 520. In *Wheeler*, this Court found that a continuance requested by the State should not be chargeable to the State, when the continuance was needed to analyze the defendant's blood sample after the defendant had previously agreed to provide a blood sample and then rescinded that agreement. *Id.* *Wheeler* also provides that a continuance "requested by the defense because the defendant had obtained new counsel, who needed more time to prepare for the trial . . . is chargeable to the [defendant]." *Id.* at 523.

The Court of Appeals, in *Jones v. State*, explained:

> [w]hile we must scrutinize the entire interval between arrest and trial, and attempt to ascribe reasons for particular delays, it is not possible or even desirable to do so with mathematical precision; we will not count up the time chargeable to the State, that chargeable to the defendant, and those delays

> attributable to neutral reasons, multiply the number of days or months by a parameter assigned for each particular reason and then dismiss the indictment if the defendant ends up with the lower tally. Instead, delays must be examined in the context in which they arise and therefore a lengthy uninterrupted period chargeable to one side will generally be of greater consequence than an identical number of days accumulating in a piecemeal fashion over a long span of time.

279 Md. 1, 7 (1976). In *Jones*, the length of delay at issue was 29 months. *Id.* The *Jones* Court concluded that the reasons for the 29-month delay in that case could best be analyzed by dividing the timespan into multiple periods and attributing the reason for the delay in each period, in full or in part, to the responsible party. *Id.* at 7–14. Here, the judge explained that the reasons for delay were "somewhat convoluted here." He then attributed the reasons for all the delays to the State, stating, "[f]or various ambiguities or unclarified reasons, the State had to continue a case or at least provide discovery or obtain more discovery throughout the delay of the three years." As a result, the court's analysis was incomplete.

Assertion of Right

When evaluating the third factor, courts recognize "[t]he more serious the deprivation, the more likely a defendant is to complain." *Barker*, 407 U.S. at 531–32. Therefore, a defendant's assertion of his speedy trial right is given "strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id*. A defendant's "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*., 407 U.S. at 532. A perfunctory request for a speedy trial included as part of an omnibus motion "is little more than avoidance of waiver," but can

weigh slightly in the defendant's favor. *Lloyd v. State*, 207 Md. App. 322, 332 (2012). Trial courts are permitted to exercise "judicial discretion based on the circumstances" when evaluating a defendant's assertion of his right to a speedy trial. *Barker*, 407 U.S. at 529.

(As to all Appellees)

Appellant argues appellees' *Hick*s waivers are inconsistent with their desire to have a speedy trial. We disagree. Appellees' waivers are limited to the requirements of Rule 4-271, which mandates that a trial date for a criminal matter in the circuit court may not be later than 180 days after the earlier of: (1) the appearance of counsel; or (2) the defendant's first appearance before the circuit court. Appellees' waivers of their *Hicks* dates are not an implicit or explicit waiver of their right to a speedy trial.

(As to Appellee Watkins Only)

Appellee Watkins asserted his right to a speedy trial after the State nolle prossed the initial indictment. Additionally, in his motion to dismiss the second indictment, appellee asserted that his right to a speedy trial had been denied.

(As to Appellee Mandel Greene Only)

Appellee Mandel Greene first asserted his right to a speedy trial via a motion, filed on November 30, 2017, demanding, *inter alia*, a speedy trial. Appellee again asserted his right to a speedy trial after the State entered the initial indictment nolle prosequi. Also, in his motion to dismiss the second indictment, appellee contended that his right to a speedy trial had been denied.

(As to Appellee Carlos Greene Only)

Appellee Carlos Greene asserted his right to a speedy trial on his final trial date after the State dismissed the initial charges. Appellee contends that although he did not repeatedly utter the phrase "speedy trial," the record is clear that that he forcefully and repeatedly demanded that his trial occur that day. Appellee cites to *Jones v. State*, expressing that *Barker v. Wingo*, "requires us to give repeated demands for a speedy trial 'strong evidentiary weight,'" 279 Md. 1, 16 (1976) (citations omitted). The Court of Appeals, in *Jones*, found it was not disputed that the defendant and his counsel repeatedly asserted his right to a speedy trial. *Id.* at 14. There, the defendant filed three motions to that effect and filed two motions to dismiss for lack of speedy trial. *Id.* Unlike the defendant in *Jones*, appellee did not file multiple motions asserting his right to a speedy trial, nor did he file multiple motions to dismiss for the denial of his right. *See id.* The *Jones* holding is, therefore, inapposite.

(As to Appellee Brewer Only)

Appellee Brewer asserted his right to a speedy trial at his first trial date on October 2, 2017 after the State requested a continuance. Appellee again asserted his right to a speedy trial at the second trial date on April 9, 2018 where the State moved for a continuance of the trial and the defense objected, noting that appellee was currently incarcerated. Appellee also asserted his right to a speedy trial after the State entered the initial indictment nolle prosequi. Additionally, in his motion to dismiss the second indictment, appellee asserted that his right to a speedy trial had been denied.

(As to all Appellees)

Appellant contends appellees' actions in these cases do not demonstrate that they were "seriously interested" in having a trial as expeditiously as possible. Appellant cites *Lloyd v. State* for the proposition that the pro forma filing of an omnibus motion is not accorded significant weight in a speedy trial analysis. *See* 207 Md. App. 322, 332 (2012).

In evaluating appellees' assertions of their right to a speedy trial, the judge found that: "[c]learly, each one of these defendants asserted the right to a speedy trial. I don't think anyone can dispute that particular prong of the analysis."

The *Barker* balancing test requires courts to "weigh the frequency and force of the [defendant's] objections [to delays of his trial] as opposed to attaching significant weight to a purely pro forma objection" *See Barker v. Wingo*, 407 U.S. 514, 529 (1972). The Court of Appeals has expressed that a defendant's "failure to assert his right is entitled to strong evidentiary weight." *State v. Kanneh*, 403 Md. 678, 693 (2008) (internal citations omitted). However, a perfunctory motion made as part of an omnibus motion without further motion for a speedy trial until the morning before the court accepted the parties' plea bargain can weigh slightly in the defendant's favor. *See Lloyd v. State*, 207 Md. App. at 332.

Actual Prejudice

The fourth and most important *Barker* factor examines "whether the defendant has suffered actual prejudice." *Phillips v. State*, 246 Md. App. 40, 67 (2020) (quoting *Henry v. State*, 204 Md. App. 509, 554 (2012)). Although a defendant's right to a speedy trial can be violated absent an affirmative showing of prejudice, "[i]f a defendant can show

prejudice, of course, he has a stronger case for dismissal." *Jones v. State*, 279 Md. 1, 17 (1976). "Actual prejudice requires more than an assertion that the accused has been living in a state of constant anxiety due to the pre-trial delay. Some indicia, more than a naked assertion, is needed to support the dismissal of an indictment for prejudice." *Glover v. State*, 368 Md. 211, 230 (2002). We analyze claims of prejudice to the defendant in the light of the three interests of defendants which 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. The most important interest is the last, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* A merely plausible "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *Glover*, 368 Md. at 231 (quoting *United States v. Marion*, 404 U.S. 307, 321–322 (1971)) (emphasis in *Glover* removed).

(As to Appellee Watkins Only)

Appellant contends appellee never argued that his defense was impaired or that he was actually prejudiced by the trial delay. Appellee notes, however, that in a written motion, appellee indicated that the pending charges had been "a constant source of stress, anxiety, and worry in and of itself," and cited his lengthy pretrial incarceration.

(As to Appellee Mandel Greene Only)

Appellant contends appellee Mandel Greene did not demonstrate that he was actually prejudiced by the trial delay. Appellant argues appellee's assertions that it would

be more difficult to locate witnesses and that his length of pretrial detention was "prejudicial in and of itself" are "bald allegations" insufficient to establish prejudice. Appellee contends, however, that although oppressive pretrial incarceration does not have decisive weight, it must be given some weight. Appellee cites this Court in *Hallowell v. State*, noting that "oppressive pretrial incarceration with its attendant anxiety and concern to the accused is generally afforded only slight weight." 235 Md. App. 484, 518 (2018) (citations omitted).

(As to Appellee Carlos Greene Only)

Appellant argues that appellee Carlos Greene did not demonstrate that he was prejudiced, nor did he claim that he was prejudiced via his written motion or at the hearing on the motion to dismiss. Appellee avers that the circuit court properly found that the delay in his case satisfied the actual prejudice factor. Appellee cites to *Divver v. State* and argues that the delay in his case was presumptively prejudicial because it was a delay of constitutional dimension. *See* 356 Md. 379, 395 (1999). Appellee further cites to the Court of Appeals in *State v. Kanneh*, where the Court expressed that no one factor is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." 403 Md. 678, 688 (2008).

(As to Appellee Brewer Only)

Appellant contends that appellee Brewer's assertion that he was prejudiced because a civilian witness's contact information had been redacted under the first indictment and he was unable to contact the witness before the trial, fails to establish prejudice due to a

trial delay. Appellant also argues that appellee's assertion that his ability to locate potential witnesses was "grievously affected" because three years had passed since the date of the incident is a bald allegation that fails to meet the standard for actual prejudice. Appellant further argues that the court conflated the presumption of prejudice that arises when a delay is of constitutional dimension and the prejudice factor, which requires a showing of actual prejudice, by relying heavily upon the length of appellee's pretrial incarceration. Finally, appellant asserts that although appellee never stated he experienced anxiety, the court found that he did.

Appellee argues that his defense was impaired due to the State's failure to provide discovery, which hindered the defense's ability to conduct their own investigation. Appellee cites to *Glover v. State*, expressing that impairment of one's defense may be "due to both tangible factors, such as the unavailability of witnesses or loss or destruction of records, and intangible factors, including fading memories about the incident in question and a decrease in the likelihood that exculpatory witnesses can be found." 368 Md. 211, 230 (2002). Appellee contends that he experienced oppressive pretrial incarceration and anxiety. Appellee relies on *Brady v. State*, where the Court of Appeals concluded that a defendant "suffered at least some actual prejudice" where he was incarcerated for approximately two months, "due entirely to the State's neglect." 291 Md. 261, 268 (1981). In *Brady*, the defendant was arrested and released on bail, in Anne Arundel County, then informed that his "charge(s)" had been dismissed. *Id.* at 263. Two months later, he was indicted for the same offense. *Id.* Two months after his second indictment, he was

incarcerated in the Baltimore City Jail on an unrelated charge. *Id.* at 264. During his incarceration, Anne Arundel County authorities did not attempt to locate him, but on the day of his release, he was transported to the Anne Arundel Detention Center. *Id.* The *Brady* Court found that the State was neglectful because "the Anne Arundel County prosecution could have been instituted while [the defendant] was confined at Baltimore City Jail or perhaps even earlier." *Id.* at 267–68. Here, there was no period during which appellee was incarcerated in another jurisdiction while charges were pending against him elsewhere. Thus, *Brady* is not dispositive of this factor.

(As to all Appellees)

At the motions hearing on August 12, 2019, the judge offered the following general statements about the anxiety experienced by all of the defendants in this case: "[t]o have a situation where individuals are locked up for a year, two years, then going into three years, have their cases nolle prossed and then turn right back around and charge and incarcerate them again, I can't imagine a situation that would create more anxiety than that." The judge then summarized the defenses' impairment by restating a comment made by Brewer's attorney, as thus, "Your Honor, I can't even tell you what the prejudices are, because there was such a delay by the State in providing discovery."

CONCLUSION

Each appellee was entitled to an individual assessment as to whether the State acted in good faith in dismissing the initial indictments and based on the court's conclusion, if appropriate, an analysis of the *Barker* factors. We remand for further proceedings.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED, AND THE CASES ARE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEES.