Circuit Court for Baltimore City
Case No. 117079001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2415

SEPTEMBER TERM, 2017

STATE OF MARYLAND

v.

DONTAZ BRANDON

Woodward, C. J.,
Friedman,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: October 22, 2018

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Appellant, the State of Maryland, challenges the Circuit Court for Baltimore City's dismissal of first-degree murder and related charges against appellee Dontaz Brandon. The State noted a timely appeal and presents two questions, which we rephrase slightly:

1. Did the court err in granting the motion to dismiss based on a constitutional speedy trial violation?
2. Did the court err in granting the motion to dismiss based on a *Hicks* violation?

For the reasons to be discussed, we reverse.

BACKGROUND[1]

This case arises out of a February 2017 verbal disagreement that escalated to a homicide. Baltimore City police detectives interviewed several eyewitnesses who reported that William Neely and Donald Sympton argued and then "squared off to fist fight," but, according to a later filed application for statement of charges, Neely said: "I don't fight, I shoot." The two men then went their separate ways. A short time later, however, Neely and Sympton encountered one another at the intersection of Harford Road and Southern Avenue where appellee, allegedly, handed Neely a handgun and, according to a witness, reminded Neely that he needed to cock the gun to fire it. Neely then used the firearm to

[1] We limit our summary of the underlying facts to that which is relevant to the issues raised on appeal. *See Cure v. State*, 195 Md. App. 557, 561 (2010) (only brief summary necessary), *aff'd on other grounds*, 421 Md. 300 (2011); *see also Teixeira v. State*, 213 Md. App. 664, 666-67 (2013) ("It is unnecessary to recite the underlying facts in any but a summary fashion because for the most part they [otherwise] do not bear on the issues we are asked to consider.") (citations and internal quotation marks omitted).

(Continued…)

fatally shoot Sympton. After witnesses positively identified appellee and Neely from photographic arrays, warrants were issued for their arrest.

Appellee turned himself in to police on February 21, 2017, and Neely was arrested on March 17, 2017.[2] Appellee was subsequently charged by indictment with first-degree murder, conspiracy to commit first-degree murder, and use of a firearm in the commission of a crime of violence. His privately retained defense attorney entered his appearance for appellee on March 31, 2017. This meant that unless good cause was demonstrated, the State was required to try appellee within 180 days of March 31, 2017, i.e., by September 27, 2017. *See* Section 6-103 of the Criminal Procedure Article of the Annotated Code (2001, 2008 Rep. Vol.) and Maryland Rule 4-271. On April 27, 2017, Catherine Flynn, Esquire, a public defender panel attorney, entered her appearance for Brandon, even though Brandon already had a privately retained attorney. Separate trials for both defendants were scheduled for August 18, 2017. The State filed a motion to consolidate the trials of Neely and Brandon on May 1, 2017.

On August 1, 2017, both defendants and their counsel appeared before the Honorable Charles Peters, the designee of the Administrative Judge for Baltimore City Circuit Court. At that point, it was discovered that Ms. Flynn had entered her appearance by mistake. Neely's attorney requested a postponement because she had a scheduling conflict on the trial date and needed more time to review discovery. The prosecutor agreed

[2] We note that certain docket entries, pretrial motions, and other information referenced by the parties are missing from the record, and we therefore rely on facts that are not in dispute based on the "Statement of Facts" in the briefs.

to the request but asked the administrative judge to also postpone appellee's trial "to consolidate the cases," because the State planned to try both defendants on "[t]he same evidence." Neely's attorney and the prosecutor proposed December 7, 2017 for trial, explaining that they had conferred and that this was the first date that they were both available. Brandon's privately retained attorney objected, arguing that his client should not be required to remain incarcerated for an additional four months to accommodate Neely. The administrative judge noted the objection but found good cause to postpone. Both trials were then rescheduled for December 7, 2017. Thereafter, on November 29, 2017, Brandon's attorney filed an opposition to the State's joinder motion.

On December 7, 2017, both Neely and Brandon appeared in court with their counsel. Neely resolved his case by entering a guilty plea. This made the State's joinder motion moot.

The circuit court then heard appellee's motion to dismiss for lack of a speedy trial and violation of his right to be tried within 180 days. The attorneys discussed the pretrial posture of the case at length,[3] and the court noted that although the administrative judge had found that consolidation of the cases was good cause to postpone, that "legally, they were not joined." After counsel concluded their arguments, the court described in detail the procedural issues that had plagued the case, explaining:

> Looking at the Defendant's motion, as well as the State's response, it actually all really comes down to due process for this defendant.

[3] The prosecutor explained to the court that Ms. Flynn had erroneously entered her appearance in the case, which caused the State to coordinate with the wrong attorney to set appellee's August 18, 2017 trial date.

> I – he was never even brought before the Court and advised of the charges against him in a murder case where he could be facing life imprisonment.
>
> His attorney was never even – I mean, no one even knew who his attorney was. It was assumed that his attorney was one person and it was someone else, which is part of the problem for the trial, which is part of the problem [why] this date was chosen which I really don't – which the Court really doesn't understand particularly in light of the fact that [defense counsel] did appear on behalf of the Defendant as early as March 31st. And, then, April there's someone else.
>
> The arraignment date, [defense counsel] shows up and no one else does. Not the Defendant. Not the State. Not the Defendant's other supposed or possible attorney. Not the co-defendant. Nobody. The Court is really at a loss for that situation right there.
>
> There was a motion filed for joinder. Was it timely? Probably not. Would it really matter at this point? Not if we get to the practical point of it today. Monday morning, after the game was yesterday. No.
>
> But if we back up, it's a big problem. The matter needs to be resolved before trial.
>
> ***
>
> However, at the time that the postponement, the critical postponement was made, that motion was pending and that motion is critical, particularly in light of the fact that the Defendant, Mr. Brandon, vehemently objected to the postponement request and there was really no basis for Mr. Brandon's matter to be postponed except to consolidate.

The court noted that the administrative judge did not reference "judicial economy" or otherwise explain its reasons for finding good cause to postpone the trial. The court, addressing in part the four-factor test for analyzing speedy trial claims established in *Barker v. Wingo*, 407 U.S. 514 (1972), then stated that the nine-month delay in the case was "ridiculous" and noted that appellee had clearly asserted his right to a speedy trial. Although the court recognized that the reason for the delay was to allow the State to consolidate the cases, it did not state on the record how heavily it weighed the delay against

the State. With respect to whether appellee was prejudiced by the delay, the court noted that he had experienced "severe" anxiety during his pretrial incarceration.[4] Ruling that his Sixth Amendment right to a speedy trial and his right to be tried within 180 days in accordance with *State v. Hicks*, 285 Md. 310 (1979) had been violated, the court granted the motion and dismissed the charges.

DISCUSSION

I. Dismissal for violation of right to speedy trial.

The State contends that the trial court erred in finding a violation of appellee's Sixth Amendment right to a speedy trial, because the delay from August 18, 2017 to December 7, 2017 "to accommodate judicial economy, as well as Neely's need to prepare adequately for trial" should not have weighed heavily against it. We agree with the State.

The right of an accused to a speedy trial is guaranteed by Article 21 of the Maryland Declaration of Rights, as well as by the Sixth Amendment to the United States Constitution. The appellate court, when reviewing the judgment on a motion to dismiss, must make its own independent examination of the record to determine whether a defendant's right to a speedy trial has been denied. *Glover v. State*, 368 Md. 211, 220 (2002); *accord Howard v. State*, 440 Md. 427, 446-47 (2014); *Henry v. State*, 204 Md. App 509, 549 (2012). In conducting our independent review of the record, we accept the circuit court's first level

[4] At the hearing, the court heard oral argument as to the affect the delay had on Brandon, but no stipulation or other evidence was presented in this regard.

findings of fact unless clearly erroneous, but "[w]e perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand." *Glover*, 368 Md. at 221.

Claims that the Sixth Amendment speedy trial guarantee has been violated are assessed under the balancing test the U.S. Supreme Court announced in *Barker*, *supra*, 407 U.S. at 530. *See State v. Kanneh*, 403 Md. 678, 687 (2008). In *Barker*, the Supreme Court "rejected a bright-line rule to determine whether a defendant's right to a speedy trial had been violated, and instead adopted 'a balancing test, in which the conduct of both the prosecution and the defendant are weighed.'" *Kanneh*, 403 Md. at 687-88 (quoting *Barker*, 407 U.S. at 530). Hence, we consider four factors to determine whether a defendant's right to a speedy trial has been violated: "'[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *Id.* at 688 (quoting *Barker*, 407 U.S. at 530). No single *Barker* factor, considered in isolation, is sufficient to establish that a defendant's right to a speedy trial has been violated. "'Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id.* (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990), in turn quoting *Barker*, 407 U.S. at 533).

1. Length of Delay:

"This Court has noted that the first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *Kanneh*, 403 Md. at 688 (citation omitted). "For speedy trial purposes the length of delay is measured from the date of arrest or filing of indictment, information, or other

formal charges to the date of trial." *Divver v. State*, 356 Md. 379, 388-89 (1999) (citation omitted). "However, 'the length of the delay is the least determinative of the four factors that [a court] consider[s] in' determining whether a defendant's right to a speedy trial was violated." *Howard*, 440 Md. at 447-48 (quoting *Kanneh*, 403 Md. at 690).

Here, appellee was arrested on February 21, 2017 and, following a postponement, his trial was scheduled for December 7, 2017. This nine-and-a-half month delay from arrest to trial date, while perhaps presumptively prejudicial, is certainly not inordinate. *Satchell v. State*, 54 Md. App. 333, 340 (1983) ("A delay of less than nine months, though sufficient to trigger the balancing test, is not a grossly inordinate one."). Appellee was alleged by the State to have conspired to commit, and then did commit, first-degree murder. Although the facts in this case were not complex, considering the nature and seriousness of the charges, the nearly nine-month delay in this case weighs minimally against the State.

2. Reason for the Delay:

All reasons for delay are not considered the same. When considering the reason for the delay, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. While "[a] deliberate attempt to delay the trial in order to hamper the defense" should be weighed heavily against the State, "[a] more neutral reason such as negligence or overcrowded courts" should be considered but weighed less heavily. *Id.* "In considering this factor, we ... address each postponement of the trial date in turn." *Kanneh*, 403 Md. at 690. With that in mind, we review the reasons for the single postponement granted in this case.

The period from appellee's February 21, 2017 arrest to the August 1, 2017 postponement hearing comprises five months and eleven days. This time is accorded neutral weight and is not charged to the State in the overall *Barker* analysis. *See Howell v. State*, 87 Md. App. 57, 82 ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status"), *cert. denied*, 324 Md. 324 (1991).

The State requested the sole postponement granted in this case, from August 1, 2017 to December 7, 2017, to effectuate a joint trial for the two defendants. This Court has previously held that a delay to prosecute multiple defendants in a joint trial is charged to the State, but not weighed heavily against it. *Satchell*, 54 Md. App. at 341. Similarly, although we have held that the delay attributable to a co-defendant's requests for continuances should be charged to the State, we emphasized that "this type of delay is given less weight than a delay caused by the State attempting to deliberately hamper a defendant's case." *Marks v. State*, 84 Md. App. 269, 284 (1990). Accordingly, we charge the four-month delay in this case to the State, but do not weigh it heavily.

3. Assertion of the Right:

The third *Barker* factor considers the "defendant's responsibility to assert his right," and a "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 531-32. Here, appellee first asserted his right to a speedy trial on March 31, 2017, at the time defense counsel entered his appearance, and then reasserted the right during the August 1, 2017 postponement hearing. The State agrees with Brandon that he timely and repeatedly asserted his right to a speedy trial.

4. Prejudice to the Defendant:

"Finally, the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Peters v. State*, 224 Md. App. 306, 364 (2015) (citing *Henry*, *supra*, 204 Md. App. at 554). The *Barker* Court identified three interests that the right to speedy trial was designed 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 (footnote omitted). Of these, the Court of Appeals has held that the most serious "is the potential that a delay will impair the ability to present an adequate defense[.]" *Glover*, 368 Md. at 230.

The only prejudice alleged in this case was oppressive pretrial incarceration, anxiety and concern. This, according to Brandon's defense counsel's oral argument at the December 7, 2017 motions hearing, was attributable to appellee being moved to the Jessup Correctional Institution, where he was held on twenty-four hour lock down status. The Court of Appeals has recognized the presumed emotional distress caused by pre-trial delay, but ultimately concluded that "intangible personal factors 'should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial caseloads.'" *Glover*, 368 Md. at 229-30 (quoting *Divver*, 356 Md. at 393, in turn quoting *Barker*, 407 U.S. at 537). In other words, appellee's claim in this case that the pre-trial delay caused him to experience anxiety and concern fails where the postponement was requested by the State to consolidate the defendants' cases into a single trial. As the Court of Appeals explained in *Glover*, "[a]ctual prejudice requires more than an assertion that the accused has been living in a state of constant anxiety due to the

pre-trial delay." *Id.* at 230. Consequently, although we consider this last factor in appellee's favor, we do not give it substantial weight because the State had a justifiable reason for the postponement, and further, appellee does not allege, nor does the record reflect, that he experienced any actual prejudice.

5. Balancing and Conclusion:

In balancing the *Barker* factors, we conclude that there was no violation of appellee's right to a speedy trial. The nearly ten-month delay in this case, though sufficient to trigger the balancing test, is not grossly inordinate. Five months of the delay was neutral and reasonable for ordinary trial preparation. The remaining four-month delay to effectuate a joint trial and allow Neely's attorney to adequately prepare, though chargeable to the State, does not weigh heavily against it, particularly where there is no evidence that the State engaged in intentional delay tactics or acted in bad faith. Despite his assertions of emotional distress caused by his pre-trial incarceration, there is no evidence that the delay caused any impairment to appellee's defense. Because the reason for the delay was justifiable and there was no actual prejudice to appellee, we hold that the circuit court erred in granting the motion to dismiss for lack of a speedy trial.

II. Dismissal for a *Hicks* violation

In Maryland, a criminal case must be brought to trial within 180 days of the appearance of counsel or the appearance of the defendant before the circuit court, whichever occurs first. *Choate v. State*, 214 Md. App. 118, 139 (2013). *See* Md. Code

Ann., Crim. Proc. Art., § 6-103 (2008); Md. Rule 4-271(a). A county administrative judge or that judge's designee may, however, grant a request to postpone a defendant's trial beyond the 180-day deadline where good cause has been established. 214 Md. App. at 139. If the State, without good cause, fails to bring the case to trial within the 180-day period, the appropriate sanction is dismissal. *Id.* (citing *Hicks*, 285 Md. at 318). Dismissal of criminal charges for a violation of *Hicks* furthers "society's interest in trying criminal cases within 180 days." *Fields v. State*, 172 Md. App. 496, 520-21, *cert. denied*, 399 Md. 593 (2007) (citing *State v. Brown*, 307 Md. 651, 658 (1986)). As this Court has stated previously, "[t]he goal of the dismissal sanction is to foster prompt disposal of criminal matters at the circuit court level." *Id.* at 521 (citing *State v. Brown*, 355 Md. 89, 108 (1999)).

The administrative judge's decision to extend trial beyond a defendant's *Hicks* date is subject to "wide discretion and carries a heavy presumption of validity." *Id.* (citing *Tapscott v. State*, 106 Md. App. 109, 122 (1995), *aff'd*, 343 Md. 650 (1996)). A finding of good cause by the administrative judge must be accorded deference by a trial court considering a motion to dismiss, and "is rarely subject to reversal on review." *Id.* (citing *State v. Frazier*, 298 Md. 422, 451-54 (1984)). A defendant challenging the administrative court's decision to postpone beyond *Hicks* must demonstrate "'either a clear abuse of discretion or a lack of good cause as a matter of law.'" *Id.* (quoting *Brown*, 355 Md. at 108). Moreover, "[t]rial judges and appellate courts should not use hindsight in determining whether there was good cause to support an exercise of discretion by the

administrative judge or his or her designee to grant a continuance beyond the *Hicks* date." *Marks*, *supra*, 84 Md. App. at 279 (citing *Morgan v. State*, 299 Md. 480, 488 (1984)).

The State claims that the administrative court did not abuse its discretion in finding good cause to postpone and argues that the trial court erred in dismissing the charges for a *Hicks* violation. The State analogizes the facts in this case to *Satchell v. State*, 54 Md. App. 333, 336 (1983), *aff'd*, 299 Md. 42 (1984), where Satchell objected to his co-defendant's request to postpone trial beyond the 180-day deadline to secure private counsel. We held that the administrative judge appropriately exercised his discretion in granting the postponement request rather than severing Satchell's case from the joint trial. *Id.* at 339. The Court of Appeals affirmed, stating that "the inconvenience of trying Satchell separately from his codefendants constituted good cause[.]" *Satchell*, 299 Md. at 45 (internal quotation marks omitted). The Court of Appeals emphasized that "the postponement decision in the [] case was a matter within the discretion of the administrative judge" and held that no clear abuse of discretion had been shown. *Id.* at 46. The Court of Appeals reached a similar conclusion in *McFadden v. State*, 299 Md. 55, 58 (1984), where the administrative judge, over the defendant's objection, found good cause to postpone beyond the 180-day deadline to allow for a joint trial.

In this case, the State had filed a motion to join the defendants' cases for trial. During the August 2017 postponement hearing, the State said explicitly that it intended to consolidate the cases and predicated its postponement request for appellee's trial on those grounds. The administrative judge then ruled, over appellee's objections, that consolidation constituted good cause to postpone the trial.

We are unpersuaded by appellee's contention that because the State failed to file its joinder motion in conformity with Md. Rule 4-252, the administrative court abused its discretion. Maryland Rule 4-253(a) provides that, "[o]n motion of a party, the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Maryland Rule 4-252 provides that a request for a joint trial of defendants in the circuit court "shall be raised by motion in conformity with this Rule and if not so raised [is] waived unless the court, for good cause shown, orders otherwise[.]" Md. Rule 4-252(a)(5). And, pertinent to the issue raised, the motion to join "shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]" Md. Rule 4-252(b).

Even if we were to assume, without deciding, that the motion to join the defendants' trials was untimely filed or deficient as to its content, our conclusion would not render the administrative court's good cause finding an abuse of discretion.[5] Rule 4-252(a) permits the court to grant a late or insufficiently detailed motion upon a finding of "good cause." *See Sinclair v. State*, 444 Md. 16, 30 (2015) (recognizing that Rule 4-252 "grants trial courts discretion to hear noncompliant motions 'for good cause shown'"); *Ball v. State*,

[5] The State's motion for joinder was filed on May 1, three months before the originally scheduled August 17, 2017 trial date. Whether that motion was timely filed depended on the date of defense counsel's appearance, which was "muddled" by Catherine Flynn erroneously entering her appearance in the case on April 27, 2017.

347 Md. 156, 206 (1997) ("Trial judges are presumed to know the law and to apply it properly").

Because the administrative court's finding of good cause for postponement was not a clear abuse of discretion or an error of law, we hold that the circuit court erred when it granted the motion to dismiss on grounds that *Hicks* had been violated. Because we also hold that there was no speedy trial violation, reversal is required.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.