UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2796

September Term, 2014

DONALD W. ALEXANDER

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 3, 2015

Donald Alexander, appellant, was convicted by a jury sitting in the Circuit Court for Harford County of driving while under the influence of alcohol, driving while impaired by alcohol, exceeding the speed limit, and driving on a revoked license. Appellant raises a single question on appeal: Did the trial court err when it denied appellant's motion to dismiss for an alleged violation of his constitutional right to a speedy trial? Finding no error, we shall affirm.

OVERVIEW

We shall start with a brief recitation of the facts, and will provide additional facts in our discussion.

Appellant was arrested on August 27, 2012, and charged with various traffic offenses in the District Court for Harford County. He prayed a jury trial and his case was transferred to the Circuit Court for Harford County. After several postponements, appellant was ultimately tried on December 4, 2014. About a month prior to trial, he moved to dismiss the charges against him, alleging that the State had violated his constitutional right to a speedy trial. The circuit court denied the motion, and it is from that denial that appellant appeals. We note that appellant was unrepresented at all events leading up to, and at, trial. We are mindful that "we have long held that a defendant in a criminal case who chooses to represent himself is subject to the same rules regarding reviewability and waiver of questions not raised at trial as one who is represented by counsel." *Grandison v. State*, 341 Md. 175, 195 (1995), *cert. denied*, 519 U.S. 1027 (1996)(citation omitted).

DISCUSSION

A defendant has a constitutional right to a speedy trial found in the Sixth Amendment of the United States Constitution, applied to the States by the Due Process Clause of the Fourteenth Amendment.[1] *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967). This right is also guaranteed by Article 21 of the Maryland Declaration of Rights. *Glover v. State*, 368 Md. 211, 221-22 (2002)(citation and footnote omitted). We review the trial court's denial of a motion to dismiss on speedy trial grounds by conducting a *de novo* constitutional analysis. *Jules v. State*, 171 Md. App. 458, 481-82 (2006)(citation omitted), *cert. denied*, 396 Md. 525 (2007). This inquiry is tied to the specific facts of each case, and "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)), *cert. denied*, 380 Md. 618 (2004).

Maryland courts have "consistently applied the four factor balancing test" articulated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972) to determine whether a defendant's speedy trial right has been violated. *State v. Kanneh*, 403 Md. 678, 687 (2008). The Court of Appeals has described the *Barker* analysis as follows:

[1] This right is "separate and distinct" from the right enforced by Md. Rule 4-271 and *State v. Hicks*, 285 Md. 310 (1979), commonly referred to as the 180-day rule. *See Dalton v. State*, 87 Md. App. 673, 681-82 (1991). Appellant does not argue that his right to a speedy trial under that Rule was violated.

> When the [pre-trial] delay is of a sufficient length, it becomes presumptively prejudicial, thereby triggering a balancing test[.] . . . 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.

Divver v. State, 356 Md. 379, 388 (1999)(quotation marks and citations omitted). We will examine each factor in turn.

Length of Delay

At the outset, we must determine whether appellant's post-arrest, pre-trial delay was of sufficient length to be presumptively prejudicial so as to trigger further analysis. This initial *Barker* factor

> is actually a double enquiry. 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. 647, 651-52 (1992)(citations 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.[2] *Divver*, 356 Md. at 388-89 (citation

[2] The posture of appellant's case is unusual in that the trial court denied his motion (continued...)

omitted). We note that "[t]he length of delay, in and of itself, is not a weighty factor." *Kanneh*, 403 Md. at 689 (quotation marks and citations omitted).

Appellant was arrested on August 27, 2012, and was brought to trial on December 4, 2014. This delay of 829 days, as the State concedes, is of constitutional dimension to justify further Sixth Amendment scrutiny. *See Ratchford v. State*, 141 Md. App. 354, 360 (2001)(calling an eighteen-month delay not particularly remarkable but "more than enough to spark further analysis"), *cert. denied*, 368 Md. 241 (2002).

Responsibilities for the Delay

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

> Closely related to length of delay is the reason the [State] assigns to justify the delay. [D]ifferent 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 with the defendant.

[2](...continued)
to dismiss for a lack of a speedy trial but then, because appellant requested a postponement due to illness, trial did not commence for another three plus months. In appellant's analysis, the relevant time period ends on August 21, 2014, when the trial court denied his motion to dismiss, not December 4, 2014, when trial commenced. Language in various cases sometimes state that the end date is when the trial court ruled on the motion to dismiss, but those cases concern situations where no trial occurred because the trial court granted the motion to dismiss. We are aware of no cases employing a *Barker* analysis that used the date the trial court ruled on the motion when there was a later trial. Accordingly, we believe that here the applicable end date is when trial commenced.

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

Barker, 407 U.S. at 531 (footnote omitted).

The following is a history of the delay between appellant's arrest and his trial:

a. **August 27, 2012.** Appellant is arrested.

b. **December 12, 2012.** First district court trial date. Appellant prayed a jury trial and the case was transferred to circuit court.

c. **March 6, 2013.** Second trial date. Court closed due to inclement weather.

d. **May 21, 2013; August 21, 2013; and October 23, 2013.** Third, fourth, and fifth trial dates were postponed because no courts or juries were available. The October trial date was also postponed because the State prosecutor was unavailable.

e. **January 9, 2014.** Sixth trial date was postponed because appellant was hospitalized.

f. **April, 30, 2014.** Seventh trial date was postponed because there was no court or jury available.

g. **August 21, 2014.** Eighth trial date was postponed because appellant had a medical emergency. Court denied appellant's motion to dismiss for lack of a speedy trial.

h. **December 4, 2014.** Trial commenced.

The weight given to the 107-day interlude between appellant's arrest and his first trial date in district court, from August 27, 2012, to December 12, 2012, is accorded neutral status. The law permits reasonable time for normal trial preparation. *Malik v. State*, 152 Md. App. 305, 318 ("time spent in pre-trial preparation is neutral and not charged either to

the State or the defendant.")(citations omitted), *cert. denied*, 378 Md. 618 (2003). *See Ferrell v. State*, 67 Md. App. 459, 463 (1986)(a period of almost five months for normal pre-trial preparations is neutral and charged to neither party).

Appellant argues that the 84-day delay between December 12, 2012, and March 6, 2013, should be accorded neutral status because he should not be punished for exercising his "fundamental right to a jury trial." Appellant is wrong as to the status of this delay. *See Lloyd v. State,* 207 Md. App. 322, 330-31 (2012)(stating that the delay caused by removal to circuit court at defendant's request counted against defendant for speedy trial purposes), *cert. denied*, 430 Md. 12 (2013)(citing *State v. Gee,* 298 Md. 565, 576-77, *cert. denied*, 467 U.S. 1244 (1984)). Accordingly, this delay is attributable to appellant.

The 76-day delay between March 6, 2013, and May 21, 2013, is accorded neutral status because the courthouse was closed on March 6 due to inclement weather.

The next three postponements, from May 21, 2013, to January 9, 2014, are the first to weigh against the State, but not heavily. While prosecutors have no control over the availability over courtrooms and jurys, it is ultimately the State's responsibility to dedicate adequate resources to the criminal justice system to try cases that pass constitutional muster. *See Divver*, 356 Md. at 391-92 (unavailability of a courtroom is chargeable to the State, but it is not weighed heavily); *Brown*, 153 Md. App. at 561-62 (delay due to lack of available courtroom charged only minimally against the State). Accordingly, this delay of 233 days is weighed minimally against the State.

The delay of 111 days, from January 9, 2014, to April 30, 2014, is weighed against appellant. He requested the postponement because he was in the hospital. The next delay of 113 days, from April 30, 2014, to August 21, 2014, is attributable to the State because there was no court room or jury available. As noted above, however, it does not weigh heavily. The final delay of 105 days, from August 21, 2014 to December 4, 2014, is attributable to appellant because it was necessitated by his request for a postponement for medical reasons.

In sum, the 829 days between appellant's arrest and trial can be broken down as follows: 183 days are neutral; 300 days are attributable to the defense; and 346 days are chargeable to the State. The number of days attributable to the State and the defense are roughly equal. Although all of the delays attributable to the State generally do not weigh heavily against it because they are due to the unavailability of a courtroom or jury, we do note that this was a relatively simple case, and so shall weigh it somewhat more heavily than the usual light weight given to delays of this nature. In sum, the delays weigh in appellant's favor.

Assertion of Right

We now turn to the third Barker factor – how often and how strongly appellant asserted his constitutional right to a speedy trial. The Supreme Court has stated:

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most

> particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531-32. "Often the strength and timeliness of a defendant's assertion of his speedy trial right indicate whether the delay has been lengthy and whether the defendant begins to experience prejudice from that delay." *Glover*, 368 Md. at 228 (citations omitted).

Appellant argues that this factor should weigh in his favor and directs our attention to August 21, 2013, when he moved to dismiss the charges against him based on a violation of the 180-day requirement of Md. Rule 4-271. A Md. Rule 4-271 assertion does not, however, constitute an assertion of a constitutional speedy trial claim. *Marks v. State*, 84 Md. App. 269, 281 (1990)(assertion of speedy trial right under 180-day provisions of Rule 4-271 does not constitute assertion of the constitutional right to a speedy trial), *cert. denied*, 321 Md. 502 (1991).

Reviewing the record, we note that appellant did not invoke his constitutional right to a speedy trial until he filed a written motion asserting his constitutional right eighteen months after his arrest, on December 26, 2013. We note, however, that six days after asserting his right, the court received a letter from appellant asking for a postponement for medical reasons. Because of the length of time between his arrest and the weak assertion

of his right, in light of his request for a postponement six days later, this factor does not weigh in appellant's favor.

Prejudice

The final element of the *Barker* inquiry is whether the defendant suffered prejudice as a result of the delay. The Supreme Court has stated:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (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). "[A]n 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. 61, 66-67 (1980)(citations and quotation marks omitted).

Appellant was not incarcerated on these charges at any time, although he was incarcerated for a portion of the relevant time period on an unrelated matter. Appellant does not allege that he suffered any pre-trial anxiety or concern due to the delay. Additionally, appellant does not argue that his defense was impaired in any way by the delay – the witnesses at trial consisted of the police officer who arrested him for drunk driving and himself. Under the circumstances, we find any presumed prejudice undercut by the

complete lack of demonstrable prejudice (or even an allegation of prejudice) and by the lack of any incarceration. Accordingly, this factor weighs against appellant's claim.

Balancing

> Balancing the four factors is undoubtedly a sensitive task, completely dependent on the specific facts presented by each unique case. In carrying out this difficult task, we are mindful that our task is to ensure that the petitioner's right to a speedy trial has not been violated; we are also mindful, however, that delay is often the result of efforts to ensure the highest quality of fairness during a trial.

Glover, 368 Md. at 231-32.

Weighing all of the *Barker* factors, we conclude that the 829-day delay in bringing appellant to trial did not abridge his constitutional right to a speedy trial. The length of the delay certainly triggers a *Barker* inquiry. While the reasons for the delay given the simplicity of the case weigh in appellant's favor, this is undercut because he did not forcefully assert his right, doing so only late in the process, and because he was not incarcerated and alleges no prejudice.

Appellant argues *Divver*, *supra*, compels reversal of his convictions. In that case, the delay between Divver's arrest and his trial date was 12 months and sixteen days. *Divver*, 356 Md. at 382. Only one postponement occurred during that time and the entire delay was attributable to the failure of the district court to assign the case for trial earlier. *Id*. at 391. Divver asserted his right with "uncommon alacrity" – four days after his arrest. *Id*. at 392. Additionally, his case was a "run-of-the-mill" district court case for drunk driving and

failure to stop at a red light with only two witnesses testifying at trial: the arresting police office and Divver. *Id*. at 382, 390-91.

Appellant directs our attention to the similarities of his case and *Divver*. He argues that as in *Divver*, he was not responsible for the "extraordinary and inexcusable" length of the delay given the straightforward nature of the charges. Appellant concludes by arguing that "the importance of the right to a speedy trial is such that a defendant suffering only presumed prejudice from an unwarranted delay 'should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads[]'" (quoting *Divver*, 356 Md. at 393)(italics in *Divver* omitted).

While the facts here have some similarities to those in *Divver*, as noted above speedy trial claims are considered on a fact-specific, case-by-case basis. We note that Divver's claim was entirely within the confines of the district court, whereas here, the transferring of appellant's case to circuit court, at his request, resulted in a several month delay. Additionally, the delay in *Divver* was entirely attributable to the failure of the district court to schedule the matter for trial. Here, and in marked contrast to *Divver*, an almost equal number of days of the delay were chargeable to appellant. Moreover, while Divver asserted his speedy trial right four days after his arrest, appellant did not assert his right until 18 months after his arrest, and six days later he requested a postponement. Accordingly, *Divver* does not control the outcome here.

We are mindful that this was a relatively straightforward case and the delay was lengthy. Nonetheless, because a significant portion of the delay was attributable to appellant, because he did not assert his right "with alacrity" or forcefulness, and where there was no actual prejudice, we are persuaded that the trial court did not err in denying appellant's motion to dismiss because his constitutional right to a speedy trial had been violated.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.