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IN THE
COURT OF APPEALS OF INDIANA

Jameson D. McCarthy,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 1, 2021

Court of Appeals Case No. 20A-CR-1892

Interlocutory Appeal from the Johnson Circuit Court

The Honorable Andrew S. Roesener, Judge

Trial Court Cause No. 41C01-1706-F2-6

Bradford, Chief Judge.

Case Summary

[1] On June 22, 2017, Jameson McCarthy is alleged to have robbed a Discount Tobacco Store in Johnson County, beating the store clerk in the process, among other things. Due to injuries that McCarthy sustained during his apprehension, he was transported to Eskenazi Hospital in Marion County by an officer from the Greenwood Police Department ("GPD"). While at Eskenazi, an Indianapolis Metropolitan Police Department ("IMPD") officer took McCarthy into custody due to an active warrant out of Marion County. The following day, Johnson County charged McCarthy with Level 2 felony robbery resulting in serious bodily injury, Level 3 felony armed robbery, Level 3 felony criminal confinement, Level 4 felony unlawful possession of a firearm by a serious violent felon, and Level 6 felony resisting law enforcement. The trial court also issued a warrant for McCarthy's arrest. The Johnson County warrant was served on McCarthy on December 14, 2018. Following multiple continuances granted to McCarthy and one granted to the State, McCarthy filed a motion for discharge pursuant to Indiana Criminal Rule 4(C), the Sixth Amendment of the United States Constitution, and Article 1, Section 12 of the Indiana Constitution. The trial court held a hearing on McCarthy's motion for discharge on September 3, 2020, and denied the motion five days later.

[2] McCarthy filed a motion for certification of interlocutory appeal, which was granted. McCarthy argues on appeal that his right to a speedy trial was violated because he claims his arrest and charge occurred in the Johnson County case in June 2017, beginning the one-year timeline in which Johnson County was

required to bring him to trial and that his rights had been violated due to the delay between his arrest, charging, and trial. Because we believe that McCarthy is partially responsible for the delay in his trial and that his speedy trial rights were not violated, we affirm.

Facts and Procedural History

[3] On June 22, 2017, it is alleged that McCarthy robbed a Discount Tobacco Store in Johnson County, beat a store clerk, and stole a customer's vehicle. McCarthy was apprehended by GPD officers shortly after the alleged crimes and, because of the injuries McCarthy sustained during his apprehension, he was transported from Johnson County to Eskenazi accompanied by an officer from the GPD. While at the hospital, McCarthy was taken into custody and arrested by an IMPD officer for an active warrant out of Marion County. The following day, Johnson County charged McCarthy with Level 2 felony robbery resulting in serious bodily injury, Level 3 felony armed robbery, Level 3 felony criminal confinement, Level 4 felony unlawful possession of a firearm by a serious violent felon, and Level 6 felony resisting law enforcement. The trial court also issued a warrant for McCarthy's arrest. On August 1, 2017, McCarthy's private counsel entered an appearance in the Johnson County case. That attorney filed a motion to withdraw on October 15, 2018, indicating on record that McCarthy's last known location was the Marion County Jail.

[4] The Johnson County warrant was not served on McCarthy until December 14, 2018. On December 17, 2018, McCarthy requested, and was granted, a

continuance. At the initial hearing on February 14, 2019, McCarthy requested a speedy trial and that he be allowed to proceed *pro se*. The trial court held a pre-trial conference on March 14, 2019, where McCarthy requested that the trial date be continued. The trial court held a pre-trial conference on June 24, 2019, where McCarthy requested that he be appointed counsel and that the trial be continued, which requests were granted. At a pre-trial conference on August 1, 2019, McCarthy requested the trial date be continued. At a pre-trial conference on October 28, 2019, McCarthy requested the trial date be continued, the State objected to the continuance, and the trial court denied the continuance and set an additional pre-trial conference. On December 5, 2019, McCarthy's appointed counsel withdrew from the case due to a breakdown in the attorney-client relationship and McCarthy moved to continue *pro se*. On March 16, 2020, McCarthy requested the trial be continued again.

[5] On July 27, 2020, with a trial date set for September 22, 2020, McCarthy filed a motion for discharge pursuant to Indiana Criminal Rule 4(C), the Sixth Amendment of the United States Constitution, and Article 1, Section 12 of the Indiana Constitution. The trial court held a hearing on McCarthy's motion for discharge on September 3, 2020, denying the motion on September 8, 2020. Three days later, McCarthy filed a motion for certification of interlocutory appeal, which was granted.

Discussion and Decision

I. Indiana Criminal Rule 4(C)

[6] When reviewing claims under Indiana Criminal Rule 4(C), "we review factual findings for clear error and questions of law de novo." *Watson v. State*, 155 N.E.3d 608, 614 (Ind. 2020) (citing *Austin v. State*, 997 N.E.2d 1027, 1040 n.10 (Ind. 2013)). Indiana Criminal Rule 4(C) states, in pertinent part,

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. [….] Any defendant so held shall, on motion, be discharged.

"The rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested but allows for extensions of that time for various reasons." *Cook v. State*, 810 N.E.2d 1064, 1065 (Ind. Ct. App. 2004). "Rule 4(C) is triggered automatically at the beginning of a criminal prosecution: the one-year clock runs from the later of charges being filed or arrest." *Watson*, 155 N.E.3d at 616 (emphasis omitted).

[7] McCarthy argues that the trial court erred in denying his motion for discharge because his right to a speedy trial was violated due to the initial delays in beginning the prosecution of his case and delays subsequent to Johnson County beginning proceedings. Specifically, McCarthy asserts that because

> 1) the State's filing of charges against McCarthy in Johnson County following his arrest happened to occur the same day IMPD executed the outstanding Marion County arrest warrant, and 2) the State of Indiana had specific knowledge of McCarthy's whereabouts at all relevant times because of the information it provided to the trial court in its sworn PCA, thus compelling it to bring McCarthy to trial.

Appellant's Br. p. 15.

[8] McCarthy has not satisfied us that Johnson County was under an obligation to bring McCarthy to trial until he had been transferred from Marion County. In *State ex rel. Johnson v. Kohlmeyer*, the Indiana Supreme Court determined that Johnson was not entitled to Rule 4 discharge in a Marion County case after having spent six months incarcerated in Johnson County while the Marion County case was pending. 261 Ind. 244, 301 N.E.2d 518 (1973), *aff'd on reh'g*, 261 Ind. 244, 303 N.E.2d 661 (1973). On rehearing, the Indiana Supreme Court stated:

> The Supreme Court of the United States has noted that where a person is charged with more than one crime he cannot be tried for all at the same time. His rights to a speedy trial must be considered with regard to the practical administration of justice. *Beavers v. Haubert* (1905), 198 U.S. 77, 86, 25 S.Ct. 573, 49 L.Ed. 950, 954.
>
> The authorities of Johnson County were entitled to carry out their duties pursuant to the warrant issued in that county before surrendering the relator to Marion County.

Id. at 247, 303 N.E.2d at 663.

[9] While another panel of this court in *Rust v. State* determined that a Marion County court had surpassed the 4(C) speedy trial limit while Rust was incarcerated in Hancock County, this case is distinguishable. 792 N.E.2d 616 (Ind. Ct. App. 2003). In *Rust*, the defendant was arrested and charged in Hancock County, released on bond, arrested and charged in Marion County, appeared for an initial hearing in the Marion County case, then failed to appear for subsequent hearings in both counties before being arrested by Hancock County and incarcerated there for the remainder of his prosecution by Hancock County, which took almost a full year. *Id.* at 617. The *Rust* court held that Rust's motion for discharge should have been granted because the Marion County court had already commenced proceedings with Rust at the initial hearing and because Rust had notified[1] the Marion County court of his presence in Hancock County via a notice of surrender, so the 4(C) speedy trial clock had been running during his incarceration in Hancock County. *Id.* at 619–20. Here, when McCarthy was taken to the Marion County jail, he had not been

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[1] The State argues in its brief that, even if McCarthy's 4(C) speedy trial clock had begun before being transferred to Johnson County, he did not satisfy the notice requirements to avoid that clock's tolling. The State relies on *Werner v. State* to claim that it is well established that a defendant is required to provide the State and the trial court with "formal written notice of his incarceration[,]" 818 N.E.2d 26, 31 (Ind. Ct. App. 2004), arguing that, in this case, McCarthy has failed to do so. The State points to the fact that, while private counsel appeared before the trial court on behalf of McCarthy on August 1, 2017, McCarthy did not provide any formal written notice of his whereabouts until private counsel filed a motion to withdraw his appearance on October 15, 2018, then indicating that McCarthy's last known location was the Marion County Jail. To the extent that McCarthy argues that he was in fact arrested on June 22, 2017, the day of his alleged crimes, the State argues that McCarthy's failure to notify Johnson County of his incarceration in Marion County seemingly tolled the 4(C) period until he gave notice on October 15, 2018. However, because we conclude that the Indiana Supreme Court's opinion in *Kohlmeyer* is dispositive, we need not address this argument. *State ex rel. Johnson v. Kohlmeyer,* 261 Ind. 244, 301 N.E.2d 518 (1973), *aff'd on reh'g*, 261 Ind. 244, 303 N.E.2d 661 (1973).

charged in Johnson County or appeared in person before the Johnson County court, so proceedings had not commenced as they had in *Rust*. Because McCarthy's case was not already underway, we see no reason to stray from the precedent set by the Indiana Supreme Court in *Kohlmeyer*, *i.e.*, that the 4(C) clock did not begin until McCarthy was transferred to Johnson County.[2]

II. Speedy Trial Right

[10] Article 1, Section 12 of the Indiana Constitution states in relevant part, "[j]ustice shall be administered freely, and without purchase completely, and without denial; speedily, and without delay." The Sixth Amendment to the U.S. Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." We apply the federal speedy trial analysis set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), to resolve state constitutional speedy trial claims. *Crawford v. State*, 669 N.E.2d 141, 145 (Ind. 1996). "The speedy-trial issue involves a pure question of law; accordingly, the appropriate standard of review is de novo." *State v.*

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[2] Of additional interest, proposed Indiana Criminal Rule 4.3 provides that

> [i]f a defendant is charged in one Indiana county prior to or during the time the defendant is incarcerated in a different county, the Rule 4 time periods commence on the earlier of either the date the court in the non-custodial county orders the defendant's return or on the date the defendant provides written notice to the court where the charge is pending of the defendant's location and requests return to the non-custodial county.

INDIANA SUPREME COURT, *Summary of Proposed Amendments: Indiana Rules of Criminal Procedure*, https://www.in.gov/courts/files/rules-proposed-2021-jul-criminal.pdf (last visited August 18, 2021). McCarthy would not prevail even under this proposed rule, since he never "requested return" to Johnson County.

Moss-Dwyer, 686 N.E.2d 109, 110 (Ind 1997). The speedy-trial right is a "fundamental principle of constitutional law" that has been zealously guarded by our courts. *Clark v. State*, 659 N.E.2d 548, 551 (Ind.1995) (*quotation omitted*).

> The Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused." It is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engages the particular protections of the speedy trial provisions of the Sixth Amendment.
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> When this Court considers a speedy trial claim based upon the delay between the filing of the information and the arrest of the accused, it applies the balancing test set forth in *Barker v. Wingo*. That test includes such factors as the [1] length of the delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] the prejudice to the defendant.

Harrel v. State, 614 N.E.2d 959, 963 (Ind. Ct. App. 1993) (citations omitted). Therefore, here, the triggering event for purposes of a *Barker* analysis was when McCarthy was charged by Johnson County on June 23, 2017.

A. Length of the Delay

[11] "[W]hen length of delay is considered as a factor in the *Barker* analysis, this court determines the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.'" *Davis v. State*, 819 N.E.2d 91, 96 (Ind. Ct. App. 2004) (*citing Doggett v. United States*, 505 U.S.

647, 652, (1992)), *trans. denied*. Further, the court must still determine "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim," meaning that, simply because delay exceeding one year is presumptively prejudicial, the court must determine whether the length of that delay warrants discharge. *Id.*

[12] As noted by the trial court, the initial "delay extended only 174 days into the time in which any delay is even considered prejudicial." Appellant's App. Vol. II p. 59. While there is no bright line rule for what length of delay should result in relief for a defendant alleging that his speedy trial rights were violated, relief has generally been limited to situations where the delay exceeds the statute of limitations for an alleged offense. *See Doggett*, 505 U.S. at 652 ("8½–year lag between Doggett's indictment and arrest clearly suffices to trigger the speedy trial enquiry[.]"); *see also Harrell*, 614 N.E.2d at 962–63 ("In the present case, the delay was also over five years.") Here, the initial delay between McCarthy's charging and initial hearing was eighteen months. Because the length of the delay was shorter than the shortest applicable statute of limitations, this factor weighs only slightly against the State.

[13] The proceedings were also delayed by approximately one year due to multiple requests for continuances made by McCarthy. These additional delays, which occurred at McCarthy's request, weigh against McCarthy. *See Span v. State*, 681 N.E.2d 223, 226 (Ind. Ct. App. 1997) ("A defendant is responsible for any delay caused by his action including seeking or acquiescing in any continuance.")

B. Reason for the Delay

[14] The State acknowledged it has some responsibility in the delay, so we must examine if the State acted with diligence, negligence, or in bad faith. *See Davis*, 819 N.E.2d at 97. In *Davis*, the defendant was released from incarceration in another county on an unrelated charge when a warrant for his arrest was pending, *id.* at 94, and another panel of this court found that the State's failure to timely effectuate the defendant's arrest was official negligence, *id.* at 98. We have similar circumstances before us here. While Johnson County had issued a warrant for McCarthy's arrest, for an unknown reason the Marion County Jail failed to serve it upon McCarthy while he was incarcerated. The evidence shows that that failure, though negligent, was not intentional or done in bad faith. Because the Marion County Jail is an agent of the State, any failure on their part to serve the warrant should be weighed against the State, even if only moderately. *See Doggett*, 505 U.S. at 657 ("Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.")

[15] Again, a significant portion of the delay bringing this case to trial resulted from McCarthy's six requests for continuance compared to the State's single request. Even discounting a disputed continuance request, our review of the record credits McCarthy with almost a full year of delays attributable to his continuances.

C. The Defendant's Assertion of His Right

[16] "We reject the rule that a defendant who fails to demand a speedy trial waives his right. This does not mean, however, that the defendant has no responsibility to assert his right." *Barker*, 407 U.S. at 528. Further, courts may consider the circumstance under which a defendant asserts, or fails to assert, his right to a speedy trial. *See id.* at 529. Here, McCarthy did not assert his speedy trial right until February 14, 2019, despite being represented by private counsel from July 13, 2017, to October 15, 2018, nor did he make any requests to expedite the pending legal proceeding during that period. Further, the trial court notes evidence of McCarthy's attitude toward his speedy trial right: "On February 14, 2019, Defendant, pro-se, requested a speedy trial under CR4(A). That request was withdrawn by the Defendant at the very next hearing on March 21, 2019 [. . . .] during that hearing the Court explicitly advised Defendant that his motion for continuance would set his trial date outside of the speedy trial parameters [. . . .] Defendant still voluntarily agreed to waive his rights to a speedy trial." Appellant's App. Vol. II p. 61. This factor, however, favors neither the State nor McCarthy, as McCarthy did assert his right to a speedy trial, though not for some time after he was charged.

D. Prejudice to the Defendant

[17] There are three types of prejudice which have been recognized in this context: "oppressive incarceration, constitutionally cognizable anxiety pending the

appeal's disposition, and impairment of the defendant's substantial rights either on appeal or in a new trial." *Allen v. State*, 686 N.E.2d 760, 783 (Ind. 1997) (citing *Harris v. Champion*, 15 F.3d 1538, 1547 (10th Cir. 1994)). "Because the inquiry examines the legal process afforded the claimant, each case turns on its peculiar facts, and the claimant must make a particularized showing of prejudice caused by any excessive delay." *Id.* "Prejudice is presumed if the delay exceeds the limitations period for the offenses with which the defendant is charged." *Bowman v.* State, 884 N.E.2d 917, 921 (Ind. Ct. App. 2008). Unlike *Bowman*, in which the delay between charging and prosecution exceeded the statute of limitations for the crime, we have no such delay here. McCarthy was charged with several felonies, which all have statutes of limitations of at least five years. Ind. Code § 35-41-4-2.

[18] In this case, "the Defendant was never being held on this charge; he was being held on a separate and distinct Marion County charge until such a time as shortly before he made a physical appearance on this cause." Appellant's App. Vol. II p. 62. Therefore, there was no danger or evidence of oppressive incarceration to prejudice McCarthy. Further, between McCarthy's counsel's appearance on August 1, 2017 and motion to withdraw on October 15, 2018, there was no communication made to the trial court or prosecution by McCarthy or his counsel concerning this case. We agree with the trial court that, the "absence of any such communications would make it reasonable to believe the Defendant did not have any concern about prompt resolution of this matter." Appellant's App. Vol. II p. 63.

[19] Finally, there is no evidence that any aspect of McCarthy's defense has been impaired. The burden is on McCarthy to show actual prejudice to prove a speedy trial deprivation. *See Sturgeon v. State*, 683 N.E.2d 613, 617 (Ind. Ct. App. 1997) ("The burden is on the defendant to show he was actually prejudiced by the delay."), *trans. denied.* In the present case, almost every aspect of the case has been "captured on various GPD body cams" and "store video security footage." Appellant's App. Vol. II p. 63. Further, McCarthy has put forth no evidence showing that any defense witnesses are no longer available or that other evidence may have expired. Because there is no actual prejudice against McCarthy, we weigh this factor against him.

[20] In sum, the length of the delay, the defendant's assertion of his right, and the reason for the delay, due to the delays being attributable separately to the State and McCarthy, weigh neutrally in this case, while the prejudice against the defendant weighs against McCarthy, because there is no prejudice in this case. Though official negligence may have contributed in some part to the initial delay in bringing McCarthy to trial, official negligence alone does not compel our decision without more. *See Doggett*, 505 U.S. at 657 ("And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness […] and its consequent threat to the fairness of the accused's trial.") With none of the other factors weighing against the State in the *Barker* analysis, we cannot say that the official negligence resulting in the initial delay here is enough to

warrant discharge. We conclude that the balance of factors indicates that McCarthy's right to a speedy trial has not been violated.

[21] The judgment of the trial court is affirmed.

Vaidik, J., and Brown, J., concur.