2012 IL App (2d) 110823
No. 2-11-0823
Opinion filed August 3, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. GRETCHEN TOTZKE, Defendant-Appellee.	)	Appeal from the Circuit Court of Lee County. No. 10-CF-287 Honorable Ronald M. Jacobson, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment and opinion.

OPINION

¶ 1 The State appeals the trial court's dismissal of an indictment against the defendant, Gretchen Totzke, on constitutional speedy-trial grounds. The State contends that the defendant's due process and speedy-trial rights were not violated when it dismissed charges by *nolle prosequi* and then waited 285 days to recharge her. We determine that the trial court incorrectly applied the speedy-trial test to the delay between the dismissal of charges by *nolle prosequi* and the filing of the new charge, because due process is the only relevant consideration during such a period. We vacate and remand to allow the trial court to apply the correct tests in determining whether the defendant's speedy-trial or due process rights were violated by the various delays in this case.

¶ 2 BACKGROUND

¶ 3 On January 7, 2008, the defendant was arrested and charged by complaint with two counts of resisting or obstructing a police officer. 720 ILCS 5/31-1(a), (a-7) (West 2006). Count I alleged that the defendant committed a Class 4 felony when she actively resisted an officer, causing injury to the officer's wrist. Count II alleged that she committed a Class A misdemeanor when she pulled away from the officer as he tried to arrest her. The defendant was released on bail the same day. A public defender was appointed to represent her.

¶ 4 On February 13, 2008, the same counts were charged by information and, on February 21, 2008, a speedy-trial demand was filed. Between that date and February 2009, the case was continued multiple times on the defendant's motion or with her agreement, including to allow her to retain private counsel after the court determined that she was not eligible for a public defender. The defendant initially sought to proceed *pro se*, but later retained counsel.

¶ 5 On May 11, 2009, the date set for the final pretrial conference, the State sought to continue trial in order to obtain a medical expert concerning the injury to the officer's wrist. The State's motion was granted over the defendant's objection, with counsel noting that a witness for the defense was coming from Colorado and had already purchased a plane ticket. The case was then continued several more times either on the defendant's motion or by agreement until March 2010, with a final pretrial conference set for February 25, 2010.

¶ 6 On February 25, 2010, the State again sought a continuance of the trial date, this time because its medical expert was unavailable for trial and it needed to find a different expert. The defendant objected, stating that once again she had purchased a plane ticket for the witness from Colorado, that she had spent several hundred dollars on subpoenas, and that several physicians had treated the

officer and the State had had ample time to arrange for testimony from one of them. The court denied the motion for a continuance, and the State then dismissed the charges by *nolle prosequi*. The court informed the defendant that she could be recharged and ordered the release of her bond deposit.

¶ 7 On December 8, 2010, the State indicted the defendant on the felony charge (count I in the earlier case). The defendant was arraigned on January 6, 2011, and she filed a speedy-trial demand. The case was continued to February 23, 2011, with the time charged to the State. Trial was set for March 31, 2011. A different judge presided over the new case.

¶ 8 On March 15, 2011, the defendant filed a motion to dismiss on due process grounds and statutory and constitutional speedy-trial grounds. A hearing was held, and the defendant testified that, in the spring of 2010, she was prepared for trial. She had witnesses ready, including one from Colorado whose attendance was difficult to arrange. The witness had limited financial means and had difficulties arranging time to appear because she could not afford to miss work. The defendant's conversations with the witness became more tense each time she would talk to the witness about taking time off to appear for trial, and the defendant felt bad about asking her to be available to testify. The defendant, who also had limited financial means, paid for the witness's travel arrangements using her credit card. She also took out loans to pay her counsel.

¶ 9 The defendant stated that, at the hearing where the State dismissed the charges, the prosecutor told her something to the effect of, "don't worry, we're going to bring you before the Grand Jury and indict you again." Because of this, the defendant felt like the charges were never actually dismissed. She was nervous and apprehensive and felt like her life was put on hold. She checked every day or every other day to see if she had been indicted yet. She also wanted to do volunteer work but did not, because she was uncertain about her ability to do so when a felony charge was pending.

¶ 10 On April 6, 2011, the trial court granted the motion to dismiss on statutory speedy-trial grounds and on the basis that the State had used the *nolle prosequi* to evade the defendant's speedy-trial rights. The court noted that the State had had plenty of time to arrange for witnesses, the *nolle prosequi* occurred shortly before the trial date, the defendant had spent money on her defense, and she had spent a long time waiting to see if the charges would be refiled.

¶ 11 On May 5, 2011, the State filed a motion to reconsider, attaching transcripts of previous proceedings. On July 5, 2011, the court found that it had erred in its statutory speedy-trial calculation. The court indicated concern over the reasons for the delay between the *nolle prosequi* and the indictment and set the matter for a July 12, 2011, evidentiary hearing on that issue.

¶ 12 At the hearing, the State called Jonathan Watson, who was the assistant State's Attorney assigned to the case at the time of the *nolle prosequi* proceeding. Watson testified that he was unable to secure for trial the presence of the officer's treating doctor and that the doctor's testimony was necessary. He said that the only reason he dismissed the charges by *nolle prosequi* was that the doctor was unavailable. He then described his workload between the *nolle prosequi* and the indictment. In that period, Watson worked on a stalking case, an attempted murder case with two defendants, and a rape case with two defendants. He took three days off that summer and attended two half-day seminars to fulfill continuing-legal-education requirements. He had no jury trials and two bench trials during that time. He did not know how many trials the other prosecutors had. Watson admitted that the defendant's case took less time because it had been previously charged and prepared for trial. He said that he always intended to refile the case but had to wait until there was time to have a trial on it. The defendant's case was put before the December 2010 grand jury, which was the fourth grand jury that year. Because Watson was familiar with the case, it took him only

about half an hour to prepare the questions for the grand jury. Because of time constraints, Watson later assigned the defendant's case to another prosecutor.

¶ 13 The trial court granted the State's motion to reconsider and reversed its earlier ruling, stating that, while it might have handled things differently, it had received an adequate and reasonable explanation for the delay between the *nolle prosequi* and the indictment. In its ruling, the court spoke primarily of due process. It did not clearly apply any specific factors for determining whether there was a constitutional speedy-trial or due process violation. On July 25, 2011, the defendant moved to reconsider, citing primarily due process, but also mentioning speedy-trial rights.

¶ 14 At the hearing on the defendant's motion, the defendant presented additional legal argument and authority about the factors that should be applied. She contended that she had made a showing of actual and substantial prejudice from the delay, that the State had not shown a reasonable explanation for the delay, and that the balance of factors required dismissal of the indictment. The court took the matter under advisement.

¶ 15 On August 2, 2011, the court granted the motion to reconsider. Applying a constitutional speedy-trial analysis, the court found that there were other prosecutors who could have handled the case and that the defendant experienced anxiety and had spent money in securing a witness. The court then reinstated the dismissal of the case, on constitutional speedy-trial grounds. The State appeals.

¶ 16 ANALYSIS

¶ 17 The State contends that the trial court erred when it dismissed the indictment, because there was no basis to do so. Throughout the proceedings, the parties and the trial court alternately addressed the issue as either a constitutional speedy-trial violation or a due process violation, often

without being clear about the legal tests that they were applying. On appeal, the parties recognize that there are two different legal doctrines that might apply. The first is due process; the second is the constitutional right to a speedy trial.[1] Whether due process has been violated is reviewed *de novo*. See *People v. Carini*, 357 Ill. App. 3d 103, 112-13 (2005). Similarly, "the ultimate determination of whether a defendant's constitutional speedy-trial right has been violated is subject to *de novo* review." *People v. Crane*, 195 Ill. 2d 42, 52 (2001). "However, we will uphold the trial court's factual determinations unless they are against the manifest weight of the evidence." *People v. Silver*, 376 Ill. App. 3d 780, 783 (2007). We begin by examining the due process and constitutional speedy-trial analyses and the kinds of delay that trigger each analysis.

¶ 18 Due Process and the Sixth Amendment Right to a Speedy Trial

¶ 19 The right to a speedy trial guaranteed by the sixth amendment (U.S. Const., amend. VI) applies only within "the confines of a formal criminal prosecution," that is, once a defendant has been arrested or charged. *Doggett v. United States*, 505 U.S. 647, 655 (1992). The constitutional guarantee of due process, which protects a criminal defendant against proceedings that are fundamentally unfair in some manner, applies more broadly, applying even outside of the criminal prosecution itself. See *id.* at 655 n.2 ("a defendant may invoke due process to challenge delay both

[1]As noted, the defendant initially sought dismissal of the case on statutory speedy-trial grounds as well. On appeal, however, no party has argued the application of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2008)), and neither side has challenged the trial court's July 5, 2011, determination that, at that point, a total of 131 days chargeable to the State had elapsed during the two proceedings. Pursuant to Illinois's speedy-trial statute, only delays of 160 days or more violate the statute. We therefore do not address statutory speedy-trial considerations in this decision.

before and after official accusation"). Thus, a preindictment delay (such as a delay between the commission of a crime and an arrest or charge) can be a violation of due process but not the speedy-trial right. *People v. Sanders*, 86 Ill. App. 3d 457, 472 (1980) (citing *United States v. Marion*, 404 U.S. 307, 323-34 (1971)). One of the questions that bedeviled the trial court is which rights are implicated where, as here, there has been a delay between the cessation of criminal proceedings via a *nolle prosequi* and the reinstatement of criminal charges.

¶ 20 In *Klopfer v. North Carolina*, 386 U.S. 213, 223-24 (1967), the Supreme Court applied a speedy-trial analysis to a delay after a dismissal by *nolle prosequi*. Subsequently though, in *United States v. MacDonald*, 456 U.S. 1 (1982), the Court declined to apply a speedy-trial analysis to the time between the dismissal of charges and a later reinstatement, and it distinguished *Klopfer* based on the unique *nolle prosequi* procedure in that case. Thus, the question here is whether the Illinois *nolle prosequi* was like the procedure used in *Klopfer* or whether it was more akin to the dismissal of charges in *MacDonald*.

¶ 21 In *Klopfer*, the defendant was indicted for criminal trespass, but the jury was unable to reach a verdict, a mistrial was declared, and the prosecutor moved to enter a *nolle prosequi* with leave to reinstate at a later time. In North Carolina, the effect of a dismissal by *nolle prosequi* was to leave the indictment pending with leave to reinstate it later, and it tolled the statute of limitations. The Court held that the *nolle prosequi* violated the defendant's sixth amendment right to a speedy trial, noting the possible effects of the pending indictment on the defendant. *Klopfer*, 386 U.S. at 221-22.

¶ 22 In *MacDonald*, however, the Court held that the speedy-trial guarantee did not extend to the time between the dismissal of charges and their reinstatement. The Court specifically held that "the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops

charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *MacDonald*, 456 U.S. at 7. The Court distinguished the case from *Klopfer*, characterizing the *nolle prosequi* in *Klopfer* as an "unusual state procedure" under which the prosecutor could suspend proceedings indefinitely and activate the charges at any time without a court order. *Id*. at 8 n.8. Thus, the charges in *Klopfer* were never dismissed in any real sense and the speedy-trial guarantee continued to apply. *Id.*

¶ 23 Although *Klopfer* involved a *nolle prosequi*, the Illinois *nolle prosequi* procedure is not like the one in *Klopfer* and is more akin to the dismissal of charges in *MacDonald*. In Illinois, when the State moves for a *nolle prosequi*, the State formally indicates that it is unwilling to prosecute the case. *People v. Stafford*, 325 Ill. App. 3d 1069, 1073 (2001). This action has the same effect as moving to dismiss. *People v. Gill*, 379 Ill. App. 3d 1000, 1003 (2008). The dismissal of charges through *nolle prosequi* reverts the matter to the same condition that existed before the commencement of the prosecution. *People v. Tannenbaum*, 218 Ill. App. 3d 500, 502 (1991). Hence, no criminal charges remain pending against the defendant. Instead, the effect of a *nolle prosequi* is to terminate the charges and to permit the defendant to go wherever he or she pleases, without entering into a recognizance to appear at any other time. *People v. Watson*, 394 Ill. 177, 179 (1946). In order to reinstate the prosecution, the State must file a new charging instrument. *People v. Woolsey*, 139 Ill. 2d 157, 168 (1990). The statute of limitations imposes a limit on the length of time in which new charges may be filed. *MacDonald*, 456 U.S. at 7.

¶ 24 Illinois also permits charges to be stricken with leave to reinstate (SOL). Under an SOL procedure, which is similar to the *nolle prosequi* in *Klopfer*, the defendant is still charged with the crime, such that the statutory speedy-trial period continues. See *Sanders*, 86 Ill. App. 3d at 469. By

contrast, a *nolle prosequi* in Illinois terminates the charge, and the speedy-trial period stops running unless there is evidence that the State sought to evade the statute through the use of the *nolle prosequi*. *Id*. at 470. Thus, *MacDonald* rather than *Klopfer* applies to a dismissal by *nolle prosequi* in Illinois. If the *nolle prosequi* is taken in good faith,[2] the constitutional speedy-trial guarantee does not apply during the period of time between the *nolle prosequi* and the new indictment. *Id*. During this period of time, the only constitutional safeguard that applies is due process. *MacDonald*, 456 U.S. at 7 (citing *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977)).

¶ 25 In this case, although the delays that occurred *during* the two prosecutions could be considered under a speedy-trial analysis, only a due process analysis applied to the 285-day delay between the *nolle prosequi* and the defendant's indictment. The trial court therefore erred in considering factors relevant to the speedy-trial test with regard to this latter period, and we must vacate its dismissal of the case. We next discuss the tests that apply to the different periods, and ultimately remand for the trial court to apply those tests in the first instance.

¶ 26 Due Process Analysis

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[2]What constitutes good faith under *MacDonald* has not been widely addressed. However, *MacDonald* itself indicated that the dismissal of charges with the purpose of evading the speedy-trial guarantee would constitute bad faith. *MacDonald*, 456 U.S. at 10 n.12. This is in line with how Illinois courts have treated *nolle prosequis* in regard to the statutory speedy-trial right. See *Sanders*, 86 Ill. App. 3d at 470. For the purposes of the remainder of this opinion, we assume for the sake of argument that the State acted in good faith in nol-prossing the first charges. However, we make no finding to this effect.

¶ 27 As noted, due process applies throughout, from the commission of a crime to the conclusion of the trial.[3] *Doggett*, 505 U.S. at 655 n.2. Here, due process provides the proper test for considering whether the 285-day delay between the two prosecutions was constitutionally unacceptable. "To constitute a due process violation it must be shown that the delay between crime and arrest or charge caused substantial prejudice to the defendant's right to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused." *Sanders*, 86 Ill. App. 3d at 472 (citing *Marion*, 404 U.S. at 323-34). Both of these prongs—substantial prejudice and intentional tactical maneuvering by the State—must be established before a delay will be considered to violate due process.

¶ 28 Here, the trial court made conflicting findings regarding these two prongs. On April 6, 2011, when it initially granted the defendant's motion to dismiss, the court found that, by failing to act with diligence to secure its witnesses (this was the second request to continue the trial date so that the State could obtain a medical expert) and then deciding to nol-pros the case shortly before the scheduled trial date after the second continuance was denied, the State was seeking "to delay or avoid the statute of limitations and speedy trial in violation of the defendant's rights." The court continued:

> "In this case I find that that's exactly what happened. It was done shortly before the trial in the case. They [the State] had plenty of time to try and get their witness but for whatever reason they didn't do that. The defendant expended money on her own behalf and then for

[3]However, perhaps because of its more specific application and more stringent protections, courts typically apply only the speedy-trial analysis to delays that occur when charges are pending.

> the reasons that I heard testimony about spent a long period of time waiting to see if the statement about being reindicted would occur."

These statements reflect conclusions by the trial court that the State acted to gain a tactical advantage in deciding to nol-pros the first prosecution and that this action caused the defendant substantial prejudice, costing her both financially and emotionally. However, the trial court was also required to consider whether the 285-day delay itself (not just its commencement) was an intentional device by the State to gain a tactical advantage. *Id*.

¶ 29 In this case, the answer to that question is unclear. Despite its earlier comments, when granting the State's motion to reconsider, the trial court found that the State did not act unreasonably in waiting 285 days to indict the defendant—finding in essence that, although the State might have been negligent in not proceeding with the indictment earlier, the State was not acting with the intent of seeking a tactical advantage. On the other hand, it is clear that the trial court was also concerned by certain aspects of the delay, including that two grand juries convened during the interim; the State apparently did not proceed with the indictment until the expiration of the statute of limitations was less than a month away; doing the paperwork to proceed with the indictment took only half an hour; and the State ultimately assigned the defendant's case to a different prosecutor, raising the question of why that reassignment did not occur earlier. This conflict between the trial court's findings at different points is not one that we may resolve here. Rather, the weighing of the necessary factors is unique to each case in which a due process violation is alleged, and should be done by the trial court in the first instance in order to avoid factfinding by the appellate court. *People v. Delgado*, 368 Ill. App. 3d 661, 664 (2006). We merely clarify the two prongs of the due process analysis and the relevant period to which that analysis should be applied.

¶ 30 Constitutional Speedy-Trial Analysis

¶ 31 As noted above, the constitutional speedy-trial analysis applies to delays that occur after charges are brought. See *Silver*, 376 Ill. App. 3d at 783 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Where, as here, the period between the initial charges and the trial on those same charges (or the granting of a motion to dismiss on speedy-trial grounds) includes two criminal proceedings, we apply this analysis to all of the time that has passed in both proceedings. We note that neither party has suggested that we disregard the time elapsed during the first proceeding in considering the defendant's speedy-trial arguments. This approach is also supported by precedent (see *Sanders*, 86 Ill. App. 3d at 472 (considering the one-month period during the defendant's first prosecution as well as the time after his indictment on the same charges in evaluating his constitutional speedy-trial claim)) and logic—if the time between a *nolle prosequi* and a later indictment is not counted because the defendant is not facing any criminal charge during that period, we cannot see why all of the time that the defendant *is* facing charges on the same matter should not be counted.

¶ 32 Under *Barker*, four factors are considered when determining whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right; and (4) the prejudice to the defendant as a result of the delay. *Silver*, 376 Ill. App. 3d at 783; see also *Doggett*, 505 U.S. at 651 (describing the *Barker* factors as "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice" as a result of the delay). The threshold question is whether the delay is presumptively prejudicial. *Silver*, 376 Ill. App. 3d at 784. If the

length of the delay is presumptively prejudicial, the court should balance the remaining three factors. *Id.*

¶ 33 "For the purpose of the first prong of the *Barker* test, one year is the generally recognized dividing point between ordinary and presumptively prejudicial delay." *People v. Singleton*, 278 Ill. App. 3d 296, 299 (1996); see also *Doggett*, 505 U.S. at 652 n.1. In *Doggett*, the most recent Supreme Court analysis of constitutional speedy-trial rights, the Court stated that, in this threshold context, " 'presumptive prejudice' *** simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett*, 505 U.S. at 652 n.1. Here, we calculate that, not counting the 285 days between the *nolle prosequi* and the subsequent indictment, 877 days elapsed between the commencement of the first prosecution of the defendant (January 7, 2008) and the date on which the defendant first moved to dismiss on speedy-trial grounds (March 15, 2011). That is equivalent to 28 months and 25 days, or almost 29 months.[4] This period, which substantially exceeds one year, is presumptively prejudicial delay sufficient to trigger the application of the remaining *Barker* factors.

¶ 34 In this case, the trial court made conflicting findings with respect to the factors and erroneously applied them to the 285-day gap between the *nolle prosequi* and the indictment. Instead, the remaining factors must be applied only to the time during which criminal charges were pending

[4]Of course, not all of this time is chargeable to the State, but at this point in the *Barker* analysis we simply look at all of the time during which charges were pending; our consideration of the reasons for any delays comes later, in our consideration of the remaining *Barker* elements, once the initial threshold of presumptive prejudice is met.

against the defendant. We therefore remand for the trial court to conduct the initial balancing of the factors, and we simply note some principles that may be relevant.

¶ 35 In evaluating the second factor—the reasons for the delay in prosecuting the defendant—the trial court may find helpful certain portions of *Doggett*, in which the Supreme Court noted that negligence by the State in bringing a case to trial occupies a middle ground between bad-faith delay and diligent prosecution, and is to be weighed against the State more lightly than bad-faith delay but must still be given some weight (unlike the passage of time that can occur despite diligent prosecution). See *id.* at 656-57; *People v. Adams*, 59 Ill. App. 3d 590, 595 (1978) (delay in prosecution was not justified, although it was not deliberate); *cf. Sanders*, 86 Ill. App. 3d at 471 (second *Barker* factor did not weigh against the State where the record showed "no lack of diligence in prosecuting defendant"). However, the State may not be held at fault for delays caused by the defendant herself. The third *Barker* factor may weigh against a defendant who has not asserted her speedy-trial right promptly. However, it has no application where, as here, a defendant asserts her right to a speedy trial in a timely fashion. See *Silver*, 376 Ill. App. 3d at 785. In assessing the fourth *Barker* factor—the prejudice caused by the slowness of the prosecution—we find instructive *Singleton*, 278 Ill. App. 3d at 301, in which the court explained that the necessary showing of prejudice can vary depending on the circumstances. Where the delay in prosecution or trial is relatively short, "a more particularized showing of prejudice" may be required; where the delay is "protracted," a defendant may not need to show actual prejudice because " 'excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.' " *Id.* (quoting *Doggett*, 505 U.S. at 655). We also note that the facts considered by the trial court in its previous assessments of prejudice—that the defendant was not incarcerated

during the prosecutions, the financial costs associated with the State's requests for continuances and *nolle prosequi*, any impact on the defendant's ability to defend herself, and the emotional and psychological strain on the defendant throughout both prosecutions—were appropriate. However, on remand, the trial court is free to consider whatever circumstances it finds relevant in determining the extent of the prejudice to the defendant, as well as the appropriate balancing of that prejudice and the other *Barker* factors.

¶ 36 CONCLUSION

¶ 37 The trial court erred in its application of due process and speedy-trial principles, and we therefore vacate its dismissal of the case and remand for further proceedings. On remand, the trial court must consider anew whether the defendant was (1) denied due process by the delays in this case, including the period between the dismissal of the charges by *nolle prosequi* and the indictment, or (2) denied her speedy-trial rights by the passage of time in the two prosecutions.

¶ 38 Vacated and remanded.