STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMAS LEE KOWALAK a/k/a THOMAS L. KOWALAK,

Defendant-Appellant.

UNPUBLISHED
November 20, 1998

No. 203164
Oakland Circuit Court
LC No. 93-123822 FC

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). Defendant was sentenced to a mandatory term of life in prison and now appeals his conviction as of right. We affirm.

Defendant argues that the delay of forty-eight months between the date of his arrest and the commencement of his trial, all of which he spent incarcerated, denied him his constitutional right to a speedy trial. This issue presents a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). On appeal, the trial court's factual findings are reviewed for clear error, but the application of constitutional law is reviewed de novo. *Id.*

Both the federal and state constitutions recognize the right of a criminal defendant to a speedy trial. US Const, Am VI; Const 1963, art I, § 20. A delay, as in this case, of over eighteen months entitles the defendant to a rebuttable presumption of prejudice and automatically triggers speedy-trial analysis. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994).

The analysis of whether an individual has been denied a speedy trial involves the weighing of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) the extent of any prejudice to the defendant resulting from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978); *Gilmore, supra* at 459.

Without question, a delay of forty-eight months between arrest and trial is far too long, absent extenuating circumstances. To ascertain whether circumstances justified the delay, we initially must examine the various periods of delay and ascertain which are attributable to the prosecutor or the defendant, respectively. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Delays owing to repeated substitution of counsel, defendant's interlocutory appeal, and adjudication of defendant's various other motions are all charged to defendant. See *People v Chism*, 390 Mich 104, 113; 211 NW2d 193 (1973) ("time reasonably consumed on appeal cannot be considered as in derogation of a speedy trial"); *Gilmore, supra* at 461 (delays stemming from defense motions are attributed to defendant); *People v Taylor*, 110 Mich App 823, 829; 314 NW2d 498 (1981) (a delay occasioned by the defendant's request for new counsel does not support a claim of violation of the right to a speedy trial). At least thirty-three months[1] of the total delay stemmed from causes attributable exclusively to defendant (six months on appeal to this Court, eight months pending application for leave to appeal in the Supreme Court, and a total of nineteen months for the three changes in defense counsel and for adjudication of defense motions). Of the remaining fifteen months of delay, seven resulted from actions technically attributable to the prosecutor; however the reasons for those actions are of sufficiently neutral character that we attach only minimal weight to their occurrence.[2] Another eight months of delay appears to be the mutual responsibility of each side; although we attribute these delays to the prosecution, defendant's contribution to, or concurrence in, those delays, considered in light of the evident good faith of the prosecutor, persuades us not to weigh them heavily.

We next consider whether and how defendant asserted his right to a speedy trial, affording this factor great evidentiary weight. *Barker, supra* at 531-532. Although defendant did not formally assert his right to a speedy trial until he brought a motion to dismiss on that ground some twenty-eight months after he was initially charged, he informally asserted that right through a letter-writing campaign directed at the trial judge during 1993. However, those protestations were inconsistent with defendant's other actions. Defendant dismissed counsel on three occasions when trial seemed imminent, he stipulated to delays so that his numerous demands for additional discovery items could be met (many of which were only tangentially related to the charges), and he made no objection during the fourteen or fifteen months that his own interlocutory appeal interrupted the progress of his case. Defendant's conduct inconsistent with an assertion of the right to speedy trial weighs against his claim that he was denied that right. See *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). It is apparent that defendant channeled his efforts toward avoiding trial altogether and, failing that, toward sowing the seeds for the argument that he was denied his right to a speedy trial as an appellate strategy. Although a criminal defendant may pursue any proper avenue for appellate relief, harboring error as an appellate parachute is not among them. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996). We conclude that defendant's course of conduct belies the sincerity of his demands for a speedy trial. "Defendant cannot have it both ways." *Rosengren, supra* at 508.

Finally, we consider the question of prejudice to defendant. The United States Supreme Court has identified three kinds of prejudice, oppressive pretrial incarceration, anxiety, and impairment of defense. *People v Doggett*, 505 US 647, 654; 112 S Ct 2686; 120 L Ed 2d 520 (1992). The courts of this state categorize prejudice from delay as prejudice to the person or prejudice to the defense. *Gilmore, supra* at 461-462. In this case, because almost all of the delay is either directly attributable

to defendant or extenuated by his acquiescence, defendant may not rely on unspecified presumptive prejudice. See *Doggett, supra* at 658; *People v Holland*, 179 Mich App 184, 196; 445 NW2d 206 (1989). Our review of the record reveals no prejudice to defendant concerning his ability to mount a defense, by way of lost evidence, witnesses, or memory. Although defendant argues that his pretrial incarceration prevented him from gathering information and obtaining the funds necessary to retain his own lawyer, we fail to see how a more expeditious trial would have alleviated those hardships. Further, concerning prejudice to defendant's person, although we accept defendant's declarations of anxiety without qualification, "that is of minimal importance in the scale of things when weighed against the offenses charged." *Rosengren, supra* at 508. These circumstances suggest that defendant suffered but slight prejudice from the delay of which he complains.

Because defendant caused most of the delay, defendant's own conduct substantially contradicted his assertion of the right to a speedy trial, and defendant suffered only minimal prejudice from the delay, we conclude that the passage of forty-eight months between arrest and trial in this case does not constitute a violation of the right to a speedy trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] If we defer to the trial court's factual finding when it ruled on this issue after the first twenty-eight months of delay and confine our own analysis to the remainder, forty-six months of the total delay is attributable to defendant.

[2] This period includes the initial three months of proceedings, three months resulting from docket congestion or unexplained causes, eighteen days resulting from an expert witness' being unavailable for an evidentiary hearing, and three days stemming from the prosecutor's need to respond to a death in the immediate family.