

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

BERTYL N. VANN, JR.,

Defendant-Appellee.

UNPUBLISHED

July 9, 2002

No. 234752

Wayne Circuit Court

LC No. 88-002239

Before: Hood, P.J., and Saad and E. M. Thomas,* JJ.

PER CURIAM.

The prosecutor appeals as of right from a circuit court order dismissing the charges for a violation of defendant's right to a speedy trial. We remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged in February 1988 with first-degree murder, MCL 750.316, and possession of a firearm during commission of a felony, MCL 750.227b. Just before trial was to commence in June 1988, the trial court ruled certain evidence inadmissible and then dismissed the charges when the prosecutor was unable to proceed. This Court reversed and remanded the case for further proceedings. *People v Vann*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 1991 (Docket Nos. 109860; 110412). The trial court then scheduled a pretrial conference for September 3, 1991. When defendant failed to appear, a capias order was issued for his arrest. Defendant was arrested in January 2001 and proceedings resumed. He moved to dismiss for lack of a speedy trial and the court granted the motion. We review a speedy trial issue de novo on appeal. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999).

A criminal defendant has a right to a speedy trial. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). The speedy trial right requires that the trial commence within a reasonable time under the circumstances. *People v Spalding*, 17 Mich App 73, 75; 169 NW2d 163 (1969). Whether a defendant has been denied his right to a speedy trial involves consideration of four factors: (1) the length of the delay, (2) the reasons for the delay, (3) defendant's assertion of the right, and (4) prejudice to the defendant. *Cain*, *supra* at 112. If the delay is less than eighteen months, the burden is on the defendant to prove that he was prejudiced

* Circuit judge, sitting on the Court of Appeals by assignment.

by the delay. A delay of eighteen months or more is presumptively prejudicial and the burden is on the prosecutor to rebut the presumption. *Id.*

As of February 2001, over nine years had passed without a trial since the charges were reinstated. Although the delay is substantial, “[t]he length of the delay is insufficient in and of itself to require dismissal.” *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). The reason for the delay appears to be that defendant failed to appear for a special pretrial conference after the charges were reinstated, no one knew where he was at the time, and no one went looking for him once the *capias* was issued. A defendant is not denied his right to a speedy trial when the delay is caused by defendant’s failure to appear, necessitating the issuance of a *capias* for his arrest. *People v Leverette*, 84 Mich App 268, 277; 269 NW2d 559 (1978). Defendant himself claims he was unaware of the conference, but evidence in the record suggests that defense counsel may have attended the conference and it is unclear why he did not notify his client of the proceeding.

A defendant’s failure to assert his right to a speedy trial does not constitute a waiver of that right. *People v Missouri*, 100 Mich App 310, 322; 299 NW2d 346 (1980). However, it “does weigh heavily against a finding that the right has been violated.” *People v Sickles*, 162 Mich App 344, 356; 412 NW2d 734 (1987). While defendant himself apparently did not know that the charges had been reinstated as a result of the appeal and thus would have no reason to demand a right to a speedy trial on charges that had been dismissed, there is no claim or evidence that defense counsel did not know. To the contrary, he represented defendant on appeal and would have received a copy of the opinion when it was issued. There is no explanation as to why counsel never filed anything on defendant’s behalf after the charges were reinstated.

The last factor is prejudice. The right to a speedy trial protects “three interests of the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; (3) limitation of the possibility that the defense will be impaired.” *People v White*, 54 Mich App 342, 351; 220 NW2d 789 (1974). “In considering the prejudice to the defendant, the most serious inquiry is whether the delay has impaired the defendant’s defense.” *Simpson, supra* at 564. Defendant was not incarcerated. If, as he contends, he never knew the charges had been reinstated, they obviously would not have caused him any anxiety or concern. Finally, despite the lengthy delay, defendant does not claim that the lengthy delay adversely affected his ability to defend the charges. *Mackle, supra* at 583. While there is speculation that witnesses’ memories may have faded, there is no indication that any key witnesses are unavailable or unable to recall the incident. However, the prosecutor bears the burden of proving that defendant was not prejudiced by the delay, and failed to show if the witnesses were available and had sufficient recall to enable them to testify.

Given that defendant may have greater responsibility for the delay than he admits and the overall lack of evidence, we decline to reverse. Instead, we remand this case for an evidentiary hearing to determine if defendant’s speedy trial right was violated. *People v Patterson*, 170 Mich App 162, 169; 427 NW2d 601 (1988), remanded 437 Mich 895 (1991).

Remanded for further proceedings. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas