STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2008
v	No. 273647 Oakland Circuit Court
CARLTON VIRGIL BURKS, Defendant-Appellant.	LC No. 2005-200425-FH

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree retail fraud, MCL 750.356c. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 months to 20 years for each count. We affirm.

I. Surveillance Video

Defendant claims his due process rights were violated, alleging that certain store surveillance video was destroyed before trial. We review this question de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Even if we agreed that defense counsel was not dilatory in requesting the videotape, reversal is unwarranted. To succeed on this claim, defendant had the burden to show that the evidence was exculpatory or that the police acted in bad faith. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant has not shown that the allegedly missing video evidence would have been exculpatory. Indeed, defendant merely asserts that the evidence would have been helpful to his defense of the retail fraud charge *if* the tape showed defendant actually making a purchase.

Absent a showing that the evidence would have been exculpatory, defendant must show bad faith on the part of the police. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Defendant's motion expressly absolved the prosecution and police of any wrongdoing and stated that they worked "tirelessly" to try and obtain the video from Target and Wal-Mart. We see no basis for imputing any acts by Target or Wal-Mart employees to the police or the prosecution but, in any event, defendant has not shown that any Target or Wal-Mart employees acted in bad faith to destroy the videos. Moreover, even if video footage was intentionally destroyed, nothing in the record suggests that the purpose was to destroy evidence before trial. *People v Hardaway*, 67 Mich App 82, 87; 240 NW2d 276 (1976). Accordingly, defendant's claim is without merit.

II. Right to Speedy Trial

Defendant argues that the 20-month delay between his arrest and his trial violated his right to a speedy trial. Because defendant did not make a formal demand on the record to preserve a speedy trial issue, *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999), we review this unpreserved constitutional issue for plain error that affected substantial rights, *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

The right to a speedy trial is guaranteed under both the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, and is statutorily enforced by the Michigan Legislature, MCL 768.1, as well as being enforced by court rule, MCR 6.004(A). *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). We analyze defendant's claim by balancing the factors set forth in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972): (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant. *Williams*, *supra* at 261-262. When the delay is 18 months or longer, prejudice is presumed and the prosecution has the burden to show that there was no injury. *Id.* at 262. Because the delay here was presumptively prejudicial, we look to the other factors to determine whether defendant was denied his right to a speedy trial. *Id.*

In reviewing these factors, we find no plain error. The first factor is the length of the delay. While a 20-month delay is somewhat lengthy, it is not determinative of the claim. *Cain*, *supra* at 112. As was true with the 27-month delay in *Cain*, "the delay in this case does not approach the outer limits of other delays we have addressed." *Id.*

With regard to the reason for the delay, we consider the time spent adjudicating motions filed by defendant, as well as adjournments requested by defense counsel. *Id.* at 113; *People v Sickles*, 162 Mich App 344, 354; 412 NW2d 734 (1987). According to the trial court record, there were ten adjournments and multiple reschedulings. Though many of the adjournments and delays do not indicate which party requested them, when there is no objection by a defendant, the adjournments are generally charged to neither party. See *Id*. Only two of the adjournments or delays may be clearly allocated to the prosecution. One adjournment occurred because the judge was unavailable. While court system delays like this " 'are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial.' " *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997), quoting *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). The last adjournment, though attributable to the prosecutor, resulted in little more than a two-week delay and steps were taken to assign the matter to another prosecutor for trial. On the whole, the evidence does not suggest that the delays in this case were substantially the fault of the prosecution. *Cain*, *supra* at 113. Indeed, much of the delay can be attributed to the fact that defendant went through four different attorneys.

The third factor, whether defendant asserted his right to a speedy trial, weighs against defendant because he never asserted his right or demanded a speedy trial, and nothing in the record suggests that he objected to any of the delays. *Williams*, *supra* at 263.

With regard to injury or prejudice caused by the delay, defendant makes several claims. Defendant claims that he was most prejudiced by the loss of the surveillance video. However, because defendant has not shown that any video evidence would have been exculpatory, there is

no prejudice. Moreover, even if additional video existed, Target surveillance video is digital, and if a videotape is not immediately requested, the footage is automatically destroyed after 30 days. Here, the charged conduct occurred on December 28, 2004, and the preliminary examination took place 25 days later, on January 24, 2005. Thus, the automatic destruction of any video not already preserved at the time of the preliminary examination or shortly thereafter, could not be attributed to any delay by the prosecution. There is simply no evidence that the delay jeopardized defendant's right to a fair trial relative to the surveillance video.

Defendant also contends that he was prejudiced by the long delay because of "dead time," i.e., time not credited to his prison sentences. Defendant is correct that he did not receive credit for his sentences in this case. However, defendant was on parole for another offense when he committed these crimes. Therefore, under MCL 791.238(2), defendant was credited with the 20 months he served against the sentence he was serving while on parole. See *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994). Because defendant received credit against the paroled offense sentence, there is no "dead time" and, therefore, no prejudice. Moreover, this alleged form of prejudice has nothing to do with prejudice in regard to defending against the prosecution's case. *Williams, supra* at 264 (prejudice to the defense, as opposed to prejudice to the person, is the more serious concern).

Defendant further argues that the delay caused him increased anxiety. However, a long delay, without more, does not rise to the level of prejudice. See, e.g., *Williams, supra* at 264 (the defendant alleged mental anxiety from the 19-month delay, but no prejudice was found); *People v Chism*, 390 Mich 104, 115; 211 NW2d 193 (1973) (no prejudice after 27-month delay because there was no evidence that delay denied the defendant a fair trial). In sum, although prejudice is presumed, on analysis and balancing of the factors, they weighed in favor of the prosecution, and the record establishes that there was no injury. Therefore, we find no plain error.

III. Assistance of Counsel

Defendant maintains that he was denied effective assistance of counsel because he testified in reliance on defense counsel's mistaken advice that defendant could not be impeached with his prior convictions. For defendant to succeed on this claim, trial counsel's performance must have fallen below an objective standard of reasonableness and, but for any errors, there must be a reasonable probability that the outcome of trial would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Here, in light of the overwhelming evidence of defendant's guilt, there is no reasonable probability that the alleged deficiency changed the outcome of his trial. Eyewitness testimony established that defendant put the stolen merchandise in the car, no receipts or bags were found for the merchandise, and computer checks showed that the items were never formally sold at either Target or Wal-Mart. Thus, there is no reasonable probability that defendant would have been acquitted if he did not testify.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello