STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 1, 2009
v	No. 287033 Saginaw Circuit Court
DONALD ALLEN LOWN, Defendant-Appellant.	LC No. 05-026696-FH

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's order denying his motion to dismiss a charge of second-degree home invasion, MCL 750.110a(3). Defendant contends that the delays in bringing him to trial violated both the 180-day rule, MCL 780.131, and his constitutional right to a speedy trial. We affirm in part and remand for further proceedings consistent with this opinion.

I

On about September 25, 2005, defendant, who was on parole, was arrested on a charge of home invasion. After several adjournments, docketing delays, other unexplained delays, and the appointment of new attorneys, defendant moved to dismiss the charge on the basis of the 180-day rule, MCL 780.131. The trial court denied the motion, finding that the prosecution had made good-faith attempts to commence trial. Defendant now appeals that denial. He also contends that his constitutional right to a speedy trial was violated.

II

We review de novo questions of law pertaining to the 180-day rule. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). A trial court's attributions of delay for purposes of the 180-day rule are reviewed for clear error. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998); *People v England*, 177 Mich App 279, 286; 441 NW2d 95 (1989). But the trial court's ultimate ruling on a motion to dismiss is reviewed for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). We review de novo questions of constitutional law, including whether a criminal defendant was denied the right to a speedy trial. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

III

Defendant first argues that the trial court erred by denying his motion to dismiss the home invasion charge on the ground that he was not brought to trial within 180 days as required by MCL 780.131. We disagree.

A

MCL 780.131(1) provides in relevant part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. . . .

MCL 780.133 provides:

> In the event that, within the time limitation set forth in section 1 of this act [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Under MCL 780.131, the 180-day period commences on the day after the prosecution receives notice that the defendant is incarcerated and awaiting trial on pending charges. *Williams*, 475 Mich at 256 n 4. In the instant case, the prosecution received the required notice from the department of corrections on July 22, 2006. Therefore, the running of the 180-day period began on July 23, 2006.

The calculation of the 180-day period must include delays attributable to the prosecution or the court, but must exclude any delays that are attributable to the defendant. See *Crawford*, 232 Mich App at 613-615. "The burden imposed by the 180-day rule rests as much upon the court as upon the prosecutor. All adjournments without reason and unexplained delays are chargeable to the prosecution." *England*, 177 Mich App at 285 (citations omitted). "This Court has repeatedly held that delay attributable to docket congestion is inexcusable and must be attributed to the prosecution." *Id.*

B

Several periods of delay, totaling more than 180 days, came about between the time the prosecution received certified notice of defendant's incarceration from the department of

corrections on July 22, 2006, and the time defendant filed the motion to dismiss that forms the basis of this appeal. It is therefore necessary to determine whether these periods of delay were attributable to defendant, or alternatively, whether they were attributable to the prosecution.

It appears from the record that trial was initially scheduled for February 7, 2006. When defendant appeared on February 7, 2006, he informed the court that there had been no plea deal. The court then stated that it would reschedule trial for a future date. At defendant's request, the trial date was ultimately adjourned until September 19, 2006. As noted previously, the prosecution received certified notice of defendant's incarceration from the department of corrections on July 22, 2006, and the 180-day period therefore began to run on July 23, 2006. *Williams*, 475 Mich at 256 n 4. Thus, the period between July 23, 2006, and September 19, 2006, is attributable to defendant and does not count against the 180 days.

On September 19, 2006, defendant's new counsel requested an adjournment because he was appointed only one month earlier and had only just met with defendant. Trial was adjourned until November 28, 2006. This period of delay is also clearly attributable to defendant, as defense counsel requested the adjournment.

On November 28, 2006, defendant rejected a plea offer, and trial was adjourned because the court had other ongoing trials at the time. Indeed, the court noted that it would "adjourn Mr. Lown's case since we have some active, incarcerated defendants that we are going to commence, and Mr. Lown will be tried next year." Trial was then set for April 24, 2007. There was no explanation for this delay except for the court's observation that it had other ongoing trials. The court noted that "the People were at all times, ready, willing and able to proceed with trial of this case," and stated the delay between November 28, 2006, and April 24, 2007, was "otherwise beyond the Prosecution's control." However, we conclude that the trial court clearly erred by attributing the delay between November 28, 2006, and April 24, 2007, to defendant. This delay was clearly caused by the court's own docket congestion and scheduling concerns. It was therefore attributable to the prosecution. *England*, 177 Mich App at 285.

Defendant appeared in court on April 24, 2007, and the court stated that it would hold trial later that week. However, a docket entry for April 24, 2007, reads "CRT WILL NOT COMMENCE TRIAL—THIS MATTER TO BE RESET." No explanation for this entry is contained in the record. Trial was then reset for July 10, 2007, and again reset for July 11, 2007. This period of unexplained delay, from April 24, 2007, until July 11, 2007, is also attributable to the prosecution. *Id.*

On July 11, 2007, at the request of defense counsel, the case was adjourned until September 5, 2007. The matter was then subsequently adjourned until September 6, 2007. On September 6, 2007, defense counsel withdrew, citing a breakdown of the attorney-client relationship. Trial was rescheduled, although the prosecution stated that it was "ready to proceed." At the next hearing, on December 4, 2007, defendant's new counsel requested an adjournment to have time to file a renewed motion to dismiss. The request was granted, and the motion was filed on December 7, 2007. The period of delay from July 11, 2007, until December 7, 2007, is clearly attributable to defendant, as it resulted from a request for an adjournment by defense counsel, a withdrawal of defense counsel, and defense counsel's filing of the motion to dismiss.

C

It is true that more than 180 days of the total delay in this case were caused by docket congestion or otherwise unexplained factors. These delays were accordingly attributable to the prosecution. However, it is equally true that the prosecution was ready and willing to go to trial at least as early as September 19, 2006. This was well within the initial 180-day period, and it appears from the record that the prosecution had made a good-faith effort to proceed to trial at that time.

In *People v Davis*, 283 Mich App 737, 741-744; 769 NW2d 278 (2009), this Court held that the 180-day rule does not require dismissal of the case if the prosecution has made a good-faith attempt to commence trial within the initial 180-day period. The *Davis* Court stated:

> "The [180-day rule] statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period. If, as here, apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met. When the people have moved the case to the point of readiness for trial and stand ready for trial within the 180-day period, defendant's delaying motions, carrying the matter beyond that period before the trial can occur, may not be said to have brought the statute into operation, barring trial thereafter." [*Id*. at 741-742, quoting *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959).]

The record establishes that the prosecution was prepared for trial and had taken the necessary good-faith steps to proceed to trial within the initial 180-day period. As we have stated, the prosecution appears to have been ready for trial as early as September 19, 2006. We fully acknowledge that subsequent delays—between November 28, 2006, and July 11, 2007—were attributable to the prosecution. But this does not in any way alter the fact that the prosecution had been ready and willing to proceed to trial, and had taken good-faith steps to do so, months earlier, well within 180 days of the time it learned of defendant's incarceration from the department of corrections. In accordance with the reasoning of *Davis*, we hold that the 180-day rule of MCL 780.131 was not violated because the prosecution made good-faith efforts to bring defendant to trial within the initial 180-day period. *Davis*, 283 Mich App at 743-744. Accordingly, the trial court never lost jurisdiction over the case and did not abuse its discretion by denying defendant's motion to dismiss. The trial court's ruling on this issue is affirmed.

IV

Defendant also argues that he was denied the constitutional right to a speedy trial. The right to a speedy trial is guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, as well as by statute, MCL 768.1, and court rule, MCR 6.004(A). The trial court made no specific ruling on defendant's arguments regarding a speedy trial, ruling solely on the purported violation of the 180-day rule. We remand for consideration of the speedy trial issue.

Courts must consider four factors when determining whether a defendant has been denied a speedy trial: (1) length of delay, (2) reasons for delay, (3) whether defendant asserted his right to a speedy trial, and (4) prejudice to defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *Williams*, 475 Mich at 261-262.

A

With respect to the length of the delay, although there is no specific number of days that violate a defendant's right to a speedy trial, "[t]he time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Id*. at 261. Following a delay of 18 months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury. *People v Collins*, 388 Mich 680, 695; 202 NW2d 2d 769 (1972). "Under the *Barker* test, a 'presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial.'" *Williams*, 475 Mich at 262 (citation omitted).

The timeline in this case runs from the date of the arrest, September 25, 2005. As of the filing of the motion to dismiss on December 7, 2007, defendant had been awaiting trial for approximately 26 months. Because this is more than an 18-month delay, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury. *Collins*, 388 Mich at 695.

B

Regarding the reasons for delay, each period of delay must be examined and attributed to the prosecution or the defendant. *People v Walker*, 276 Mich App 528, 541-542; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). Unexplained delays are attributable to the prosecution. *Id*. at 542. Scheduling delays and delays caused by the court system are also attributable to the prosecution, but should be given a neutral tint and only minimal weight. *Williams*, 475 Mich at 263. Delays sought by defense counsel, whether counsel is retained or assigned, are ordinarily attributable to the defendant. *Vermont v Brillon*, 556 US ___; 129 S Ct 1283; 173 L Ed 2d 231 (2009).

Defendant was arrested on September 25, 2005, and arraigned in district court on October 3, 2005. He waived preliminary examination, was arraigned in circuit court on November 7, 2005, and the matter was scheduled for trial on February 7, 2006. Absent an explanation for this delay, this period must technically be attributed to the prosecution; but it does not appear that any more than minimal weight should be given to this initial period of delay. *Williams*, 475 Mich at 263.

On February 7, 2006, defendant appeared in court, and for unexplained reasons, the court reset the trial date for May 9, 2006. This unexplained delay of three months is attributable to the prosecution. *Walker*, 276 Mich App at 542. Trial was not held on May 9, 2006, because, according to the docket sheet, defendant was unavailable as he was returned to prison. Trial was then rescheduled for sometime in July 2006. But on June 6, 2006, defendant requested an adjournment, and trial was rescheduled for September 19, 2006. It is not entirely clear to whom

the delay between May 9, 2006, and June 6, 2006, should be attributed. But the delay between June 6, 2006, and September 19, 2006, is clearly attributable to defendant.

For the reasons set forth above, the period of delay between September 19, 2006, and November 28, 2006, is attributable to defendant; the period of delay between November 28, 2006, and July 11, 2007, is attributable to the prosecution; and the period of delay between July 11, 2007, and December 7, 2007, is attributable to defendant.

In short, both parties share responsibility for the delay of trial in this case, and the exact reasons for this delay must be further analyzed on remand.

C

With respect to defendant's assertion of his constitutional right to a speedy trial, we simply note that defendant properly asserted the right before the trial court. The trial court failed to rule on this issue.

D

Lastly, concerning the matter of prejudice, we note that a defendant can experience two types of prejudice while awaiting trial. Prejudice to the person results when pretrial incarceration deprives an accused of his or her civil liberties. Prejudice to the defense occurs when the defense might be prejudiced by the delay. See *Williams*, 475 Mich at 264. The latter type of prejudice is the more important in assessing a speedy trial claim. *Id*. A general allegation of prejudice caused by delay, such as the unspecified loss of evidence or memory, or financial burden, is generally insufficient to establish that a defendant was denied his right to a speedy trial. *Walker*, 276 Mich App at 544-545.

In the present case, defendant contends that his defense was greatly prejudiced by the delay in trial because a critical eyewitness died in the interim period. Defendant maintains that the testimony of this witness would have exonerated him.

As noted, the trial court failed to rule on defendant's assertion that he was denied the right to a speedy trial. Given that we have no findings of fact to review, particularly concerning whether defendant was prejudiced by the delay, we must remand this matter to the trial court for consideration of defendant's speedy trial claim.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher