STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2010
v	No. 288811 Oakland Circuit Court
CHARLES LEE ROGERS, Defendant-Appellant.	LC No. 2008-222084-FH

Before: MARKEY, P.J., and ZAHRA, and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree retail fraud, MCL 750.356c. He was sentenced as a fourth-offense habitual offender, MCL 769.13, to 18 months' to 20 years' imprisonment. He received 82 days of jail credit. He appeals as of right and we affirm.

I. BASIC FACTS AND PROCEEDINGS

On December 7, 2007, defendant was in an Oakland County Kroger grocery when he was observed placing items from the shelves into a duffle bag and then leaving the building without paying. After the police arrived, the bag was recovered and the items were catalogued and returned to the shelves for sale. A week later, defendant was arrested on an unrelated retail fraud charge in Wayne County and placed in Wayne County Jail on December 16, 2007. Defendant pleaded guilty to first-degree retail fraud for the Wayne County offense on February 22, 2008 and was sentenced by the Wayne Circuit Court on March 6, 2008.

The Oakland County complaint was issued on December 21, 2007 and an arrest warrant was signed on January 4, 2008. Approximately four months after completion of trial and sentencing in Wayne County, defendant was transferred to Oakland County Jail, and the process of bringing him to trial in Oakland County proceeded. Defendant's preliminary examination was held on August 4, he was arraigned on August 12, a one-day jury trial was held on September 29, and he was sentenced on October 14. He is currently on parole.

II. RIGHT TO A SPEEDY TRIAL

Defendant argues that his right to a speedy trial was violated because of the nine-month interval between the issuance of the complaint and the date of trial.

A. STANDARD OF REVIEW

A determination whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We review the trial court's factual findings for clear error but review de novo constitutional questions. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006); *People v Cain*, 238 Mich App 95, 111; 605 NW2d 29 (1999). When reviewing preserved constitutional error, we must determine whether the prosecution has established that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

B. ANALYSIS

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). When reviewing an assertion that a defendant has been denied a speedy trial, we focus on four aspects of the particular delay in issue: (1) length of the delay, (2) reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the 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. Violation of the constitutional right to a speedy trial requires dismissal of the charge with prejudice. MCR 6.004(A); *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), judgment vacated on other grounds, 480 Mich 1059; 743 NW2d 912 (2008).

Although there is no specific number of days that violate a defendant's right to a speedy trial, "a delay of six months is necessary to trigger an investigation into a defendant's claim of denial of the right to a speedy trial. If the total delay was under 18 months, the burden is on the defendant to prove that he or she suffered prejudice." *Walker*, 276 Mich App at 541. 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).

"[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States v Marion*, 404 US 307, 320; 92 S Ct 455; 30 L Ed 2d 468 (1971).[1] Defendant was arrested on December 14, 2007 for an unrelated retail fraud offense and placed in the Wayne County Jail. He was then charged with the instant crime on December 21, 2007. Under *Marion*, the time

[1] In *Williams*, 475 Mich at 261, our Supreme Court stated, "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." While consistent with *Marion*, *Williams* general statement of the timing rule is too narrow. In *Williams*, the Court was considering the amount of time that had elapsed since the defendant's arrest. *Id*. at 248-249, 262. In other words, although the statement of the rule is applied to "the defendant" (the convention being, as elsewhere followed in *Williams*, to use the definite article only when referring to the indefinite class of defendants and not the particular defendant involved in the current appeal), *Williams* formulation should be understood as applying to Cleveland Williams, the defendant in the case.

frame in this case should begin on December 21, 2007. The trial took place on September 29, 2008. Thus, the length of the delay was approximately nine months and the burden is on defendant to show that he suffered prejudice.

In assessing the reasons for the delays, each period of delay is examined and attributed, as appropriate, to the prosecutor or the defendant, with unexplained delays attributed to the prosecutor. *Walker*, 276 Mich App at 541-542. Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but they should be given "a neutral tint and are assigned only minimal weight." *Williams*, 475 Mich at 263 (internal quotation marks and citations omitted). Nevertheless, delays caused by the functioning of the court system "should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Vermont v Brillon*, 556 US ___; 129 S Ct 1283, 1290; 173 L Ed 2d 231 (2009). Delays sought by defense counsel, whether counsel is retained or assigned, are ordinarily attributable to the defendant. *Id.* at 1290-1291.

Defendant alleges that he alerted the Oakland County Prosecutor's office by means of letter dated January 3, 2008 that he was incarcerated in the Wayne County Jail and requested that he be moved to Oakland County because of a felony warrant. The prosecutor at trial indicated that her record did not contain the letter, but seemed to concede knowledge of defendant's incarceration as of March 26, 2008, the date of a letter from the Wayne County Sheriff indicating that defendant was then housed in the Wayne County Jail and that his booking date was December 16, 2007.

The progression of the judicial process in Wayne County should be attributed to the prosecution. *Walker*, 276 Mich App at 542. However, defendant's incarceration in another county on an unrelated charge is a valid reason for prosecutorial delay in bringing defendant to trial. Cf. *People v Harris*, 110 Mich App 636, 646; 313 NW2d 354 (1981) (noting that the defendant's sentencing in another county on unrelated charges was one of many valid reasons for a delay in bringing him to trial). This is particularly so where the other county has an interest in seeing that their judicial proceedings involving defendant are efficiently completed.

The period between March 6, 2008 and defendant's arraignment on August 12, 2008 is also attributable to the prosecutor. *Williams*, 475 Mich at 263. Nonetheless, it should not be given excessive weight because the delay does not stem from foot dragging on the part of the Oakland Circuit Court. Rather, it was caused by an elevation of the judicial interests of one county over another within the context of efficiently managing the operation of the court system. Moreover, it is reasonable to temper the court system's ultimate responsibility by the fact that it was defendant that engaged in cross-jurisdiction criminal behavior.

On September 17, 2008, defendant's counsel moved to withdraw. New counsel was appointed on September 18, 2008, but the trial date of September 29, 2008 was not affected. Nor was a pretrial hearing, which was held on September 15, 2008 as scheduled. Thus, despite motion to withdraw, the time period from August 12 through September 29, 2008 is properly attributed to the prosecution. *Walker*, 276 Mich App at 542.

"A defendant's claim that his speedy trial right has been denied is heavily offset by a failure to assert that right." *Harris*, 110 Mich App at 647. Neither the purported January 3 letter nor the March 26 letter specifically invoke defendant's right to a speedy trial. The former, which

plaintiff does not admit receiving, does request that defendant "be brought to Oakland County to take care of the warrant." But "taking care" of the warrant could include a number of possibilities, and it would require a series of assumptions to conclude that what the letter is getting at is the constitutional protection afforded by the right to a speedy trial.

As for the latter, in *Williams* the Department of Corrections (DOC) had sent to the prosecutor on July 16, 2001 notice of the defendant's incarceration and "requesting disposition of the pending warrant." *Williams*, 475 Mich at 249. Trial was scheduled to begin on January 9, 2002. *Id.* The *Williams* Court discussed the DOC notice in context of how it impacted the starting of the clock for purposes of the 180-day rule. *Id.* at 256. However, a speedy trial claim was also at issue in that case. *Id.* at 260. The *Williams* Court concluded that the defendant had not asserted a violation of the constitutional protection until the day before trial was set to begin. *Id.* at 263. Thus, by implication, the DOC notice in *Williams* did not qualify as an assertion of the right to a speedy trial. This was despite the request by the DOC that the pending warrant be dealt with. In the case at hand, the March 26 letter, which only provided notice of incarceration, did not qualify as an assertion of defendant's right to a speedy trial. Thus, because defendant waited to assert his right, this factor weighs heavily against him. *Williams*, 475 Mich at 263; *Harris*, 110 Mich App 647.

Defendant contends that he was personally prejudiced by the nine-month delay because he cannot now serve his sentence concurrently with his others and because he was not given 224 days additional jail credit for the time he served in Wayne County Jail and Washtenaw County Jail.[2] Defendant neglects to note that his sentences may run consecutively under MCL 768.7b(2).[3] Further, defendant does not explain, within the confines of protecting his due process rights, how trial in these two counties could have occurred simultaneously if action had been taken on the alleged January 3, 2008 letter. As for the question of an additional 224 days jail credit, the law is abundantly clear regarding the interpretation of the clear language of MCL 769.11b. Although defendant is entitled to the 82 days of credit he served for the instant charge in Oakland County Jail, he is not entitled to credit he served under the prior, unrelated charge. *People v Ovalle*, 222 Mich App 463, 468; 564 NW2d 147 (1997).

Defendant also claims that he suffered prejudice to his defense because his ability to investigate the charge was hampered when the items taken from the store were returned to inventory, the duffel bag was discarded, and a store security video was not viewed. The record belies his argument. The police gave the items back to Kroger freely and did not request the bag

[2] Although the basis for the number is not specified either in this Court or below, it appears to encompass the time period from his arrest on December 14, 2007 up to August 24, 2008 (when he was transferred to Oakland County Jail). In the current case, defendant received 82 days jail credit. This encompasses the time period from August 24, 2008 (when he was transferred to Oakland County Jail) through sentencing on October 14, 2008. In the Wayne County case, defendant apparently received 83 days jail credit.

[3] MCL 768.7b(2)(a) provides, "Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively."

as evidence. The items were rung through a cash register and a receipt was generated indicating that their value was $294.58. They were photographed, catalogued, and placed back on the shelves for sale, in accordance with standard store procedure. The store was in possession of the duffel bag until it was discarded somewhere between three to five months after the incident. These facts establish clearly that the nine-month interval before trial did not affect defendant's access to the items stolen. Regarding the duffel bag, defendant provides no argument on how lack of access to the bag prejudiced his defense.

As for the purported security video, the grocery manager testified that there was a video monitoring system for some aisles in the store, but he did not check to see if there was a video of the incident. He did not know if the aisle where defendant was stealing had a video camera on it and explained, even if there was footage, it would have been erased by the video system 50 days after the event. Thus, defendant's access to any video footage, if it existed, was not hindered by the period before the trial. In any event, defendant has offered no explanation how the absence of such footage has prejudiced his defense, especially in light of eyewitness accounts of the theft.

In sum, the four *Barker* factors weigh against finding a speedy trial violation.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher