REL: December 16, 2020

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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0469

Salathia Rodriquez Wilson

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-11-1624; CC-19-515)

McCOOL, Judge.

Salathia Rodriquez Wilson appeals his guilty-plea convictions and resulting sentences for third-degree burglary, a violation of § 13A-7-7, Ala.

Code 1975; first-degree theft of property, a violation of § 13A-8-3, Ala. Code 1975; and first-degree robbery, a violation of § 13A-8-41, Ala. Code 1975.

Facts and Procedural History

On December 9, 2011, a Montgomery County grand jury indicted Wilson for third-degree burglary and first-degree theft of property in case no. CC-11-1624. (Supp. C. 144-46.) Wilson was arrested for those charges on December 21, 2011, and was released on bond pending a trial scheduled for February 13, 2012. However, Wilson did not appear for trial, and a capias warrant authorizing Wilson's arrest was issued three days later. (Supp. C. 151.) On February 21, 2012, Wilson was arrested by a Montgomery police officer following a traffic stop and was taken to the Montgomery Police Department. (Supp. C. 165.) At the time of the traffic stop, Wilson "had a lot of dry blood on his clothing, and ... there was some dry blood on the microwave in the backseat of the vehicle." (R. 22.) There were also various articles of mail in the backseat "addressed to a Morris Dixon who lived in" Macon County (R. 22), and law enforcement officers in Macon County found Dixon dead in his home later that day. (R. 22.)

It appears, however, that Wilson "was not booked in [the Montgomery County] jail" (Supp. C. 166) but, according to the State, was "re-released by accident." (R. 9.) Thus, the following day a new warrant was issued authorizing Wilson's arrest for the burglary and theft charges in case no. CC-11-1624. Before that warrant could be executed, however, Wilson was arrested on February 23, 2012, for the murder of Dixon and was taken to the Macon County jail. (C. 60.)

The investigation into Dixon's murder revealed that Wilson was a suspect in a robbery that occurred in Montgomery County in September 2010. Thus, on March 8, 2012, a warrant was issued authorizing Wilson's arrest for the alleged robbery. (C. 12.) On June 15, 2012, while Wilson remained incarcerated in the Macon County jail, a Montgomery County grand jury indicted Wilson for first-degree robbery in case no. CC-19-515 (C. 13-14), and on June 18, 2012, another warrant was issued authorizing Wilson's arrest for that charge. (C. 15.)

On February 11, 2013, a Macon County grand jury indicted Wilson for capital murder ("the Macon County case"). (C. 62-63.) Wilson, who had remained incarcerated since his arrest on February 23, 2012,

subsequently entered into an agreement with the State whereby he agreed to plead guilty to felony murder in the Macon County case and to be sentenced to 20 years' imprisonment, which sentence would be split for Wilson to serve 5 years' imprisonment to be followed by 24 months' supervised probation. (C. 67, 71-72.) In February 2017, Wilson was released from incarceration after serving the split portion of his sentence, but he was arrested on May 9, 2018, for violating his probation. (C. 76.) On June 11, 2018, the Macon Circuit Court ordered Wilson to serve a 45-day "dunk" in the Alabama Department of Corrections under § 15-22-54(e)(1), Ala. Code 1975, and Wilson returned to supervised probation following the "dunk." (C. 78-79.)

On May 8, 2019, law enforcement officers executed the 2012 warrants authorizing Wilson's arrest for the burglary and theft charges in case no. CC-11-1624 and the robbery charge in case no. CC-19-515. (C. 15; Supp. C. 167.) In June 2019 and July 2019, respectively, Wilson filed separate motions seeking to dismiss the indictments in case no. CC-11-1624 and case no. CC-19-515 for want of a speedy trial. Following an evidentiary hearing at which the circuit court heard the testimony of one

witness for the State, the circuit court entered an order denying Wilson's motions without stating its reasons. (Supp. C. 226.)

On January 13, 2020, after reserving his right to appeal the denial of his motions to dismiss for want of a speedy trial, Wilson pleaded guilty to first-degree robbery in case no. CC-19-515 and to third-degree burglary and first-degree theft of property in case no. CC-11-1624.[1] On January 16, 2020, the circuit court sentenced Wilson for his convictions. In case no. CC-19-515, the circuit court sentenced Wilson to 20 years' imprisonment but split the sentence and ordered Wilson to serve 36 months' imprisonment, followed by one day of unsupervised probation. (C. 131.)

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[1]The guilty-plea hearing is not included in the record on appeal, and on February 21, 2020, this Court entered an order directing Wilson to certify the specific issues he reserved for appellate review before pleading guilty. Williams v. State, 854 So. 2d 625 (Ala. Crim. App. 2003). On February 26, 2020, Wilson filed a response to the Court's order and certified that, before pleading guilty, he reserved the right to appeal the denial of his motions to dismiss for want of a speedy trial. Wilson also indicated that he had requested that the circuit court enter an order reflecting that he reserved that issue before pleading guilty, and he attached to his response a copy of the circuit court's order accepting his guilty pleas, which contains a handwritten note by the circuit court stating that Wilson reserved the right to appeal the denial of his motions to dismiss for want of a speedy trial. (C. 135.)

However, it does not appear that Wilson served the split portion of his sentence because, on the same day the circuit court sentenced Wilson, the court also entered an order releasing Wilson from the Montgomery County jail (C. 132), at which point Wilson presumably served his one day of unsupervised probation. It appears that the reason Wilson did not serve the split portion of his sentence was either because the circuit court suspended the split portion of Wilson's sentence (C. 131) or because the parties agreed that Wilson would receive credit for "time served." (C. 121.). See Wilson's brief, at 20 ("In case no. CC-19-515 [Wilson] was ordered to serve 240 months split to serve 36 months suspended with credit for time served."). In case no. CC-11-1624, the circuit court sentenced Wilson to concurrent sentences of 24 months' imprisonment and split the sentences and ordered Wilson to serve six months' imprisonment, followed by one day of unsupervised probation. (Supp. C. 257.) As noted, however, Wilson was released from the Montgomery County jail the same day he was sentenced. Wilson filed a timely notice of appeal.

Analysis

On appeal, Wilson reasserts his claim that the trial court should have granted his motions to dismiss case no. CC-11-1624 and case no. CC-19-515 for want of a speedy trial. Because this issue involves a question of law and the application of the law to undisputed facts, we review the trial court's ruling de novo. Ex parte Walker, 928 So. 2d 259, 262 (Ala. 2005).

> "In determining whether a defendant has been denied his constitutional right to a speedy trial, we apply the test established by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), in which the following four factors are considered: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant.
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> "In Ex parte Walker, 928 So. 2d 259, 263 (Ala. 2005), the Alabama Supreme Court stated:
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> > "'"A single factor is not necessarily determinative, because this is a 'balancing test, in which the conduct of both the prosecution and the defense are weighed.'" Ex parte Clopton, 656 So. 2d [1243] at 1245 [(Ala.1985)] (quoting Barker, 407 U.S. at 530). We examine each factor in turn [as it applies to each of Wilson's cases].'"

State v. Jones, 35 So. 3d 644, 646 (Ala. Crim. App. 2009).

I. Case no. CC-11-1624

A. Length of the Delay

> "In Doggett v. United States, the United States Supreme Court explained that the first factor -- length of delay -- 'is actually a double enquiry.' 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). The first inquiry under this factor is whether the length of the delay is '"presumptively prejudicial."' 505 U.S. at 652, 112 S. Ct. 2686 (quoting Barker, 407 U.S. at 530–31, 92 S. Ct. 2182). A finding that the length of delay is presumptively prejudicial 'triggers' an examination of the remaining three Barker factors. 505 U.S. at 652 n.1, 112 S. Ct. 2686 ('[A]s the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.'). See also Roberson v. State, 864 So. 2d 379, 394 (Ala. Crim. App. 2002).
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> "In Alabama, '[t]he length of delay is measured from the date of the indictment or the date of the issuance of an arrest warrant -- whichever is earlier -- to the date of the trial.' Roberson, 864 So. 2d at 394."

Ex parte Walker, 928 So. 2d at 263–64.

In case no. CC-11-1624, the length of the delay is measured from December 9, 2011 -- the date of the indictment -- to January 13, 2020 -- the date Wilson pleaded guilty. See Ex parte Carrell, 565 So. 2d 104, 107 (Ala. 1990) ("Although the defendant was never tried, because he entered a plea of guilty ... we consider that he was 'tried' as of the date when he

was convicted and sentenced on his plea of guilty."). Thus, the length of the delay in case no. CC-11-1624 was approximately 97 months, or 8 years and 1 month. The State concedes, as it did below, that such a delay is presumptively prejudicial (State's brief, at 7) -- a concession supported by Alabama caselaw. See Ex parte Walker, 928 So. 2d at 264 (collecting cases in which delays of 60, 42, 26, 19, and 16 months were held to be presumptively prejudicial). Accordingly, because the delay in case no. CC-11-1624 was presumptively prejudicial, that delay is sufficient to trigger an examination of the remaining Barker factors. Ex parte Walker, supra.

B. Reason for the Delay

> "The State has the burden of justifying the delay. See Barker, 407 U.S. at 531, 92 S. Ct. 2182; Steeley v. City of Gadsden, 533 So. 2d 671, 680 (Ala. Crim. App. 1988). Barker recognizes three categories of reasons for delay: (1) deliberate delay, (2) negligent delay, and (3) justified delay. 407 U.S. at 531, 92 S. Ct. 2182. Courts assign different weight to different reasons for delay. Deliberate delay is 'weighted heavily' against the State. 407 U.S. at 531, 92 S. Ct. 2182. Deliberate delay includes an 'attempt to delay the trial in order to hamper the defense' or '"to gain some tactical advantage over (defendants) or to harass them."' 407 U.S. at 531 & n.32, 92 S. Ct. 2182 (quoting United States v. Marion, 404 U.S. 307, 325, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)). Negligent delay is weighted less heavily against the State than is deliberate delay. Barker, 407 U.S. at 531, 92 S. Ct. 2182; Ex parte

> Carrell, 565 So. 2d at 108. Justified delay -- which includes such occurrences as missing witnesses or delay for which the defendant is primarily responsible -- is not weighted against the State. Barker, 407 U.S. at 531, 92 S. Ct. 2182; Zumbado v. State, 615 So. 2d 1223, 1234 (Ala. Crim. App. 1993) (' "Delays occasioned by the defendant or on his behalf are excluded from the length of delay and are heavily counted against the defendant in applying the balancing test of Barker." ') (quoting McCallum v. State, 407 So. 2d 865, 868 (Ala. Crim. App. 1981))."

Ex parte Walker, 928 So. 2d at 265.

Here, Wilson does not allege that the State's delay in bringing him to trial in case no. CC-11-1624 was deliberate. That is to say, Wilson does not allege that the State delayed bringing him to trial to hinder his defense, to gain a tactical advantage over him, or to harass him, Ex parte Walker, supra, and nothing in the record would support that conclusion. In addition, we note that the State conceded below that the delay in bringing Wilson to trial "was just straight negligent delay" (R. 9) and that "there's absolutely no evidence ... it was justifiable delay." (R. 35-36.) Thus, because there appears to be no dispute that the State's delay in bringing Wilson to trial was negligent, this factor weighs against the State, but it does not weigh heavily against the State. Ex parte Walker,

supra. In fact, this factor's weight is particularly light with respect to case no. CC-11-1624 because Wilson's trial was scheduled to occur in February 2012, approximately two months after he was initially arrested, but he failed to appear for trial. Thus, Wilson had an opportunity to have case no. CC-11-1624 resolved approximately eight years before he entered guilty pleas in that case. Although Wilson's failure to appear for the February 2012 trial date does not excuse the State's negligence in failing to bring him to trial for approximately the next eight years, it does mean that the State's negligence weighs only slightly against the State. See Lawson v. State, 954 So. 2d 1127, 1133-34 (Ala. Crim. App. 2006) ("[T]he State's ... negligent delay ... weighs slightly against the State. In analyzing this matter, it should be noted that this matter was scheduled for trial three months after Lawson's arrest. Lawson failed to appear for trial, and the trial was rescheduled for a month later. Again Lawson failed to appear. Lawson thus was provided an opportunity for trial 10 years before his trial actually occurred.").

We note that the State argues on appeal that the delay in bringing Wilson to trial in case no. CC-11-1624 was justified, i.e., was not the fault

of the State, by the fact that Wilson committed the murder of Dixon and was incarcerated for that conviction for much of the time Wilson's trial in case no. CC-11-1624 was delayed. However, because the State conceded below that the delay was not justified, the State is estopped from asserting that argument on appeal. See Phillips v. State, 287 So. 3d 1063, 1098 (Ala. Crim. App. 2015) (noting that "a party cannot assume inconsistent positions at trial and on appeal" (citations omitted)). Regardless, there is no merit to the State's argument because the fact that Wilson was incarcerated for felony murder did not excuse the State from bringing him to trial for approximately eight years following the indictment in case no. CC-11-1264. See Austin v. State, 562 So. 2d 630, 633 (Ala. Crim. App. 1989) ("An accused's right to speedy trial remains undiminished even when he is already serving a prison sentence." (citations omitted)); and Bailey v. State, 885 S.W.2d 193, 201 (Tex. Ct. App. 1994) (rejecting the State's claim that the delay in bringing the appellant to trial in Dallas County was justified by the appellant's incarceration in Harris County on another charge).

C. Wilson's Assertion of His Right to a Speedy Trial

> "An accused does not waive the right to a speedy trial simply by failing to assert it. Barker, 407 U.S. at 528, 92 S. Ct. Even so, courts applying the Barker factors are to consider in the weighing process whether and when the accused asserts the right to a speedy trial, 407 U.S. at 528–29, 92 S. Ct. 2182, and not every assertion of the right to a speedy trial is weighted equally. Compare Kelley v. State, 568 So. 2d 405, 410 (Ala. Crim. App. 1990) ('Repeated requests for a speedy trial weigh heavily in favor of an accused.'), with Clancy v. State, 886 So. 2d 166, 172 (Ala. Crim. App. 2003) (weighting third factor against an accused who asserted his right to a speedy trial two weeks before trial, and stating: ' "The fact that the appellant did not assert his right to a speedy trial sooner 'tends to suggest that he either acquiesced in the delays or suffered only minimal prejudice prior to that date.' " ') (quoting Benefield v. State, 726 So. 2d 286, 291 (Ala. Crim. App. 1997), additional citations omitted), and Brown v. State, 392 So. 2d 1248, 1254 (Ala. Crim. App. 1980) (no speedy-trial violation where defendant asserted his right to a speedy trial three days before trial)."

Ex parte Walker, 928 So. 2d at 265-66.

Here, Wilson concedes that he was aware in December 2011 of the charges in case no. CC-11-1624. (Wilson's brief, at 28.) However, Wilson did not assert his right to a speedy trial on those charges until more than seven years later in June 2019, and he does not allege that he believed those charges had been dismissed. As noted in Ex parte Walker, supra, the fact that Wilson waited more than seven years to assert his right to

a speedy trial tends to suggest that Wilson either acquiesced in the delay or that he suffered only minimal prejudice as a result of the delay. See also State v. Jones, 35 So. 3d 644, 655 (Ala. Crim. App. 2009) ("Given that Jones waited almost two years to assert her right, we can assume that Jones either acquiesced in the delays or suffered only minimal prejudice from the delay."); and Ex parte Anderson, 979 So. 2d 777, 781 (Ala. 2007) ("Anderson's delay in asserting his right to a speedy trial ... weighs against his claim."). Thus, as to case no. CC-11-1624, this factor weighs against Wilson.

D. Prejudice to Wilson

> "In Ex parte Walker, the Alabama Supreme Court discussed the general principles concerning prejudice and set forth guidelines regarding the interaction of the type and weight of prejudice with the cause of the delay and explained how those two factors influenced the defendant's burden of proving the fourth prong of Barker:
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> > " 'Because "pretrial delay is often both inevitable and wholly justifiable," Doggett [v. United States], 505 U.S. [647,] 656 [(1992)], the fourth Barker factor examines whether and to what extent the delay has prejudiced the defendant. Barker, 407 U.S. at 532. The United States Supreme Court has recognized three types of harm that may result from depriving a defendant of the

right to a speedy trial: " 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Doggett, 505 U.S. at 654 (quoting Barker, 407 U.S. at 532, and citing Smith v. Hooey, 393 U.S. 374, 377–79 (1969); United States v. Ewell, 383 U.S. 116, 120 (1966)). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.' " 505 U.S. at 654 (quoting Barker, 407 U.S. at 532).

" '....

" 'The United States Supreme Court in Doggett used three hypothetical cases to demonstrate the accused's burden under the fourth Barker factor. 505 U.S. at 656–57, 112 S. Ct. 2686. See Robinson v. Whitley, 2 F.3d 562, 570 (5th Cir. 1993) (discussing Doggett). The accused's burden "of proof in each situation varies inversely with the [State]'s degree of culpability for the delay." Robinson, 2 F.3d at 570 (citing Doggett, 505 U.S. at 656, 112 S. Ct. 2686). In the first scenario, where the state pursues the accused "with reasonable diligence," the delay -- however long -- generally is excused unless the accused demonstrates "specific prejudice to his defense." Doggett, 505 U.S. at 656, 112 S. Ct. 2686. Thus, when the state acts with reasonable diligence in bringing the defendant to trial, the defendant has the burden of proving prejudice caused by the delay.

> " '[Discussion of the second situation recognized in Doggett involving bad-faith efforts by the state to delay the defendant's trial].
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> " 'The third scenario recognized in Doggett involves delay caused by the state's "official negligence." Doggett, 505 U.S. at 656–57, 112 S. Ct. 2686. Official negligence "occupies the middle ground" between bad-faith delay and diligent prosecution. Id. In evaluating and weighing negligent delay, the court must "determine what portion of the delay is attributable to the [state]'s negligence and whether this negligent delay is of such a duration that prejudice to the defendant should be presumed." Robinson, 2 F.3d at 570 (citing Doggett, 505 U.S. at 656–58, 112 S. Ct. 2686). The weight assigned to negligent delay "increases as the length of the delay increases." United States v. Serna–Villarreal, 352 F.3d 225, 232 (5th Cir. 2003)(citing Doggett, 505 U.S. at 656–57, 112 S. Ct. 2686). Negligent delay may be so lengthy -- or the first three Barker factors may weigh so heavily in the accused's favor -- that the accused becomes entitled to a finding of presumed prejudice. 352 F.3d at 231 (citing Robinson, 2 F.3d at 570, citing in turn Doggett, 505 U.S. at 655, 112 S. Ct. 2686). When prejudice is presumed, the burden shifts to the state, which must then affirmatively show either that the delay is "extenuated, as by the defendant's acquiescence," or "that the delay left [the defendant's] ability to defend himself unimpaired." Doggett, 505 U.S. at 658 & n.4, 112 S. Ct. 2686.'

"928 So. 2d at 266–68."

State v. Pylant, 214 So. 3d 392, 397-98 (Ala. Crim. App. 2016). If the facts of a particular case do not warrant a finding of presumed prejudice under the fourth Barker factor, the defendant must demonstrate actual prejudice to prevail on a speedy-trial claim.[2] Ex parte Walker, 928 So. 2d at 267.

As to case no. CC-11-1624, Wilson argues that prejudice from the State's negligent delay is to be presumed. We disagree. Although the

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[2]In Ex parte Walker, the Alabama Supreme Court explained the difference between "presumptive prejudice" under the first Barker factor and "presumed prejudice" under the fourth Barker factor:

> "We carefully distinguish throughout this opinion the concepts of 'presumptive prejudice' and 'presumed prejudice' or 'prima facie prejudice.' In analyzing the length of delay under the first Barker factor, we use the term 'presumptive prejudice' to refer to a delay that is lengthy enough to trigger inquiry into the remaining Barker factors. See Barker, 407 U.S. at 530, 92 S. Ct. 2182 ('Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.') ....
>
> "By contrast, in analyzing under the fourth Barker factor[,] the prejudice caused to an accused by the delay, we use 'presumed prejudice' or 'prima facie prejudice' to mean that the accused is relieved of the burden of establishing that the delay actually prejudiced her."

Ex parte Walker, 928 So. 2d at 264 n.6.

approximately eight-year delay arguably weighs in favor of a finding of presumed prejudice, we do not consider that factor in a vacuum. Rather, we also consider the fact that the State's negligence is accorded only slight weight because Wilson failed to appear for his February 2012 trial date, Lawson, supra, and the fact that Wilson waited more than seven years to assert his right to a speedy trial, which weighs against a finding that Wilson was prejudiced by the delay. See Jones, 35 So. 3d at 655 ("Given that Jones waited almost two years to assert her right, we can assume that Jones either acquiesced in the delays or suffered only minimal prejudice from the delay."). Thus, although the delay in case no. CC-11-1624 was lengthy, we do not presume prejudice under the fourth Barker factor because the first three Barker factors, taken as a whole, do not weigh heavily against the State. Cf. United States v. Escamilla, 244 F. Supp. 2d 760, 769 (S.D. Tex. 2003) (holding that nine-year delay in bringing defendant to trial did not give rise to presumed prejudice under the fourth Barker factor because other factors weighed against the defendant, including the fact that defendant "fled prosecution" and did not assert his right to a speedy trial despite his knowledge of the charges

against him). See also United States v. Villarreal, 613 F.3d 1344, 1355 (11th Cir. 2010) ("If ... the first three [Barker] factors do not weigh heavily against the government, the defendant generally must demonstrate actual prejudice to succeed on his speedy trial claim."). Accordingly, we conclude that in case no. CC-11-1624 Wilson was not entitled to a presumption of prejudice and that he therefore had the burden of demonstrating actual prejudice to prevail on his speedy-trial claim. Ex parte Walker, supra.

As noted, the United States Supreme Court has recognized that a defendant may suffer three types of harm when he or she is deprived of a speedy trial: (1) "oppressive pretrial incarceration," (2) "anxiety and concern of the accused," and (3) "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." Ex parte Walker, 928 So. 2d at 267 (citations omitted).

Here, Wilson argued that he suffered prejudice in the form of "oppressive pretrial incarceration" (C. 93), but Wilson was incarcerated only approximately eight months from the date of his May 2019 arrest to the date he pleaded guilty in January 2020, which, without more, does not constitute "oppressive pretrial incarceration." See United States v. Koller,

956 F.2d 1408 (7th Cir. 1992) (noting, in concluding that there was no speedy-trial violation, that the defendant "spen[t] the entire eight and one-half months of delay in jail, but in Barker the Court found that ten months of incarceration prior to trial was not sufficient to rise to the level of serious prejudice"); and United States v. Claxton, 766 F.3d 280, 297 (3rd. Cir. 2014) ("We have held that a finding of prejudice based upon oppressive pretrial incarceration cannot be premised upon even seven months of pretrial incarceration, 'absent [a showing of] substandard conditions.' " (citation omitted)). Thus, this claim does not support a finding of actual prejudice.

Wilson also argued that he suffered prejudice in the form of "anxiety and worry" while awaiting trial. (C. 93.) However, in addition to the fact that Wilson offered no evidence supporting that allegation, his failure to assert his right to a speedy trial for more than seven years, despite his knowledge of the charges in case no. CC-11-1624, undermines his allegation that he suffered anxiety as a result of those pending charges. See State v. Ramirez, 184 So. 3d 1053, 1059 (Ala. Crim. App. 2014) (finding no speedy-trial violation in a case where the appellant "made only

a general allegation that the delay caused her to live under 'a cloud of anxiety' for nearly 10 years"); United States v. Wanigasinghe, 545 F.3d 595, 599 (7th Cir. 2008) ("We have no evidence that [the defendant] suffered anxiety because of the charges hanging over his head, and if he did, he could easily have turned himself in to resolve the matter."); and Goodrum v. Quarterman, 547 F.3d 249, 263 (5th Cir. 2008) ("Goodrum has not demonstrated that the anxiety he felt was of such an extreme degree that it differed in any way from that which would naturally be expected to accompany a defendant's awareness of pending charges. Given this minimal showing, the state court did not unreasonably view Goodrum's generalized anxiety and concern as insufficient to sustain his speedy trial claim."). Thus, this claim does not support a finding of actual prejudice.

Wilson also argued that he suffered prejudice in the form of "dimming memories and inability to interview potential witnesses." (Supp. C. 195.) Specifically, in his motion to dismiss case no. CC-11-1624, Wilson stated:

> "The alleged [burglary and theft] occurred on or about August 30, 2011. It is unknown exactly where the event took place, as discovery does not mention the actual address or location of

> the alleged incident. Furthermore, the alleged complainant was not present at time of incident and could only testify to what he believed was his property. There is indication that a witness saw a black male enter the residence and return to abandoned apartment across the breezeway[;] however, there is no identifying information for Defense to be able to interview the witness, and unlikely after so many years that he would be able to state clearly what he saw. There was no official interview conducted with that witness and therefore no preservation of exactly what he saw that night. This is important since the Co-Defendant that was arrested had an injury to their hand consistent with how entry was made into the apartment, but no such injuries were noted on [Wilson]. Any physical evidence or video evidence will be lost as so much time as passed since the alleged incident. This severely hampers [Wilson] and the undersigned in presenting a defense to the above-styled case."

(C. 195-96.)

However, Wilson presented no evidence at the hearing to support the allegations in his motion. "As this Court has held, [Wilson] must point to specific facts in evidence in order to support his claim of actual prejudice. ' "Speculative allegations, such as general allegations of loss of witnesses and failure of memories, are insufficient to demonstrate the actual prejudice ...." ' that the appellant must establish" to prevail on a speedy-trial claim. Irvin v. State, 940 So. 2d 331, 344 (Ala. Crim. App. 2005)

(quoting Haywood v. State, 501 So. 2d 515, 518 (Ala. Crim. App. 1986), quoting in turn United States v. Butts, 524 F.2d 975, 977 (5th Cir. 1975)).

In holding Wilson to this standard, we note that, although Wilson claimed he was unable to identify or interview the witness to the burglary and theft, he did not explain below and does not explain on appeal any efforts he undertook to identify or locate the witness during the approximately eight years the charges were pending. Thus, Wilson's alleged "inability to locate the witness[ ] 'could just as easily be the result [Wilson's] own negligence as the result of any delay which could be attributed to the State.' " Austin v. State, 562 So. 2d 630, 633 (Ala. Crim. App. 1989) (citation omitted). Moreover, we note that an October 22, 2019, report filed by the Alabama Bureau of Pardons and Paroles identifies the witness as Darrell Whitted. (Supp. C. 108.) Granted, that report was filed after the hearing on Wilson's motions to dismiss, but the fact that Whitted is identified in the report tends to indicate that reasonable efforts on Wilson's behalf would have likely revealed Whitted's identity, which would have perhaps allowed Wilson to present Whitted's testimony at the hearing so that there would be evidence regarding

allegations of Whitted's "dimming memor[y]." However, because that did not occur and because Wilson presented no other evidence at the hearing, Wilson's allegations that it was "unlikely" Whitted would be able to "state clearly what he saw" and that there was "no official interview conducted with" Whitted remain purely speculative, as do the other allegations in Wilson's motion. Thus, Wilson's unsupported allegations that his defense was hampered by the State's delay are not sufficient to carry his burden of establishing the actual prejudice he must demonstrate to prevail on his speedy-trial claim. Irvin, supra.

Finally, Wilson argued that he suffered prejudice in that, he says, he "could have already served his sentence[s] in [case no. CC-11-1624] had [they] run concurrent with his other charges that the State brought against him out of Macon County" (Supp. C. 195), i.e, Wilson's sentence for his felony-murder conviction. See Austin v. State, 562 So. 2d at 633 (" ' "[T]he possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed" is a legitimate and significant consideration in determining whether or not the delay has

resulted in prejudice to the accused.' " (quoting Steele v. State, 542 So. 2d 1309, 1311 (Ala. Crim. App. 1988), quoting in turn Smith v. Hooey, 393 U.S. 374 378 (1969))). Initially, we note that this claim appears to be without merit because it does not appear Wilson served any time for his sentences in case no. CC-11-1624. As noted, Wilson was released from incarceration the same day he was sentenced in case no. CC-11-1624 and was required to serve only one day of unsupervised probation in that case.

Furthermore, although the possibility of concurrent sentences is a relevant consideration in evaluating prejudice under the fourth Barker factor, it must be remembered that such a claim is speculative. That is to say, even if Wilson had been convicted in case no. CC-11-1624 near the time he was serving his sentence for his felony-murder conviction, there is no guarantee that the circuit court would have ordered Wilson's sentences in that case to run concurrently with his sentence for his felony-murder conviction. See McLemore v. State, 562 So. 2d 639, 650 (Ala. Crim. App. 1989) ("The question of whether a sentence for conviction of a crime is to be consecutive or concurrent is within the sound discretion of the trial judge." (citation omitted)). Thus, the mere possibility that

Wilson's sentences in case no. CC-11-1624 and his sentence in the Macon County case might have run concurrently in the absence of delay is not sufficient to establish actual prejudice resulting from the delay. See State v. Spencer, 84 N.E.3d 106, 112 (Ohio Ct. App. 2017) (holding, in a case where the defendant argued that the State's delay in bringing him to trial "prevented him from getting concurrent sentences for other crimes he committed," that, "[d]ue to its speculative nature, losing his opportunity to bargain for concurrent sentences is not sufficient to show prejudice" under the fourth Barker factor); cf. United States v. Madden, 682 F.3d 920, 929 (10th Cir. 2012) ("[The appellant] argues the preindictment delay caused actual prejudice because the sentence he received in this case is consecutive to, rather than concurrent with, the sentence he received for the state drug convictions. 'To constitute a showing of actual prejudice,' however, 'the defendant must show that he has suffered definite and not speculative prejudice.' The prejudice [the appellant] claims he suffered is speculative." (citation omitted)). Accordingly, this claim does not support a finding of actual prejudice.

For the foregoing reasons, we conclude that Wilson was required to demonstrate actual prejudice from the delay in case no. CC-11-1624 and that Wilson failed to carry that burden. Accordingly, Wilson is not entitled to relief on his speedy-trial claim in case no. CC-11-1624.[3]

II. Case no. CC-19-515

As to case no. CC-19-515, our analysis with respect to the first two Barker factors is no different than it was with respect to case no. CC-11-1624. That is to say, the length of the delay in that case is measured from the date of the issuance of the arrest warrant -- March 8, 2012 -- to the date Wilson pleaded guilty -- January 13, 2020, which is approximately 94 months, or 7 years and 10 months, and the State concedes that such a delay was presumptively prejudicial. (State's brief, at 12.) In addition, we

[3]On appeal, Wilson contends that the State "conceded the prejudices argued by [Wilson]." (Wilson's brief, at 35.) However, we think Wilson misrepresents the State's position below. Although the State indicated at the hearing that it would "admit to ... what [defense counsel] argues are the prejudices" (R. 10), it appears the State was simply agreeing with defense counsel's representation of the types of prejudice a defendant can suffer from excessive pretrial delay, not that Wilson had actually been prejudiced. Indeed, the State expressly argued at the hearing that Wilson could not establish actual prejudice with respect to case no. CC-11-1624. (R. 38-43.)

have already noted that Wilson does not allege that the State's delay was deliberate and that the State conceded below that its delay was negligent. Thus, the first two Barker factors weigh in Wilson's favor in case no. CC-19-515.

With respect to the third Barker factor, the State conceded below that Wilson "was not aware ... that he was being charged with robbery" until he was arrested in May 2019 and that, as a result, because he asserted his right to a speedy trial in July 2019, the third Barker factor "does not weigh in favor of the State." (R. 43.) Thus, the third Barker factor also weighs in Wilson's favor in case no. CC-19-515. See Wade v. State, 381 So. 2d 1057, 1060 (Ala. Crim. App. 1980) (holding that the third Barker factor weighed in the defendant's favor where the defendant asserted his right to a speedy trial two months after his arrest and where there was no evidence indicating that he had knowledge of the indictment before the arrest); and United States v. Butner, 350 F. Supp. 3d 1036, 1041 (D.N.M. 2018) (holding that the third Barker factor weighed in the defendant's favor where the defendant asserted his right to a speedy trial "just over two months after he learned of the charges").

Because the first three Barker factors weigh in Wilson's favor in case no. CC-19-515 and because the negligent delay in that case lasted almost eight years, case no. CC-19-515 comes closer to a case of presumed prejudice for purposes of the fourth Barker factor than does case no. CC-11-1624. In fact, we note that the State conceded below that, based on the weighing of the first three Barker factors, the burden had shifted to the State to demonstrate that Wilson's ability to defend himself against the robbery charge had not been impaired by the delay. (R. 44.) Thus, we must consider whether the State carried its burden of demonstrating " ' "that the delay left [Wilson's] ability to defend himself unimpaired." ' " Pylant, 214 So. 3d at 398 (quoting Ex parte Walker, 928 So. 2d at 268, quoting in turn Doggett, 505 U.S. at 658 n.4)).

In his motion to dismiss case no. CC-19-515 for want of a speedy trial, Wilson argued that he was prejudiced by "dimming memories and inability to interview potential witnesses," although he did not identify such witnesses. (C. 94.) However, at the hearing on Wilson's motion, the State presented the testimony of Jason Danunzio, an agent with the Alabama State Bureau of Investigation ("the ABI"). Agent Danunzio

testified that the ABI was "asked [by the Macon County Sheriff's Department] to take over" the capital-murder investigation in the Macon County case (R. 21) and that, as part of that investigation, he had "identif[ied] a witness [(Jerry Thomas, Jr.)] who provided information of Wilson's involvement in a business robbery." (R. 24.) According to Agent Danunzio, his interview with Thomas had been recorded, and that recording was still in the ABI's possession. Agent Danunzio also testified that he had interviewed another witness, Mark Malloy, who admitted to participating in the robbery and who also implicated Wilson in the robbery. (R. 26-27.) According to Agent Danunzio, his interview with Malloy was also recorded, although Agent Danunzio testified that the interview was "recorded by the Montgomery Police Department" and that, as a result, he would "have to check with them" to see if it was still available. (R. 27.) In addition, Agent Danunzio testified:

> "[T]here are some still photographs from that robbery. I've seen the -- it's been a while. It's been several years since I've seen them, but I know that there's some still photographs that do exist. Mr. Malloy, during his joint interview, he identified, not only himself from the still photographs, but I believe he identified Mr. Wilson from those still photographs."

(R. 27.)

Thus, in short, Agent Danunzio testified that the evidence material to the robbery charge is still available, which provided Wilson the opportunity to prepare his defense in light of such evidence, and Wilson did not argue in response to Agent Danunzio's testimony that Thomas and Malloy were no longer available. Rather, Wilson merely argued that it was "unfair" for him to "have to defend actions with people that [he was] having to chase down through the decade of wherever they may be now." (R. 51.) However, the mere fact that it might require effort to "chase down" Thomas and Malloy, or any other potential witnesses, does not constitute an impairment of Wilson's ability to defend himself against the robbery charge when there is no allegation that the passage of time had rendered it impossible to "chase down" those witnesses or that those witnesses were otherwise unavailable. In addition, Wilson did not argue that there were any witnesses crucial to his defense who were unavailable. Although the burden was on the State to demonstrate that Wilson's defense was not impaired by the delay, the State was not required to prove that witnesses crucial to Wilson's defense were available

if Wilson did not so much as allege that such witnesses once existed but had since become unavailable. Thus, because the State established that the evidence material to the robbery charge was available and had been preserved as it was at the time it was first made available, i.e., in recorded interviews and photographs, there is no basis for concluding that Wilson's ability to defend himself against the robbery charge was impaired by the delay, i.e., that Wilson was prejudiced by the delay. See Booker v. State, 5 So. 3d 411, 422 (Miss. Ct. App. 2008) (holding, in evaluating a speedy-trial claim, that the defendant was not prejudiced because "[n]one of the witnesses for either the State or Booker were unavailable due to the delay in his trial" and because there was no "loss of evidence"); cf. State v. Kerby, 25 P.3d 904, 907 (N.M. Ct. App. 2001) (holding that there was no speedy-trial violation where the defendant admitted that he did not suffer any prejudice to his defense "since all the relevant evidence was still available"). Accordingly, Wilson is not entitled to relief on his speedy-trial claim in case no. CC-19-515.

Conclusion

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.