

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ANN M. BAKER,)	
)	
Defendant-Below,)	
Appellant,)	
)	
v.)	I.D. No. 0803038600
)	
STATE OF DELAWARE,)	
)	
Plaintiff-Below,)	
Appellee.)	

Date Submitted: February 6, 2009
Date Decided: December 16, 2009

*Upon Defendant's Appeal of Commissioner's Order
Recommending the Denial of Defendant's Motion to Dismiss:
Motion to Dismiss GRANTED*

MEMORANDUM OPINION

Appearances:

Louis B. Ferrara, Esquire, Wilmington, Delaware 19899
Attorney for Defendant Ann M. Baker

Kevin M. Carroll, Deputy Attorney General, Wilmington, Delaware 19801
Attorney for the State of Delaware

JOHN E. BABIARZ, JR., JUDGE

Factual and Procedural Background

On March 29, 2008, Ann M. Baker, (“Baker”), was arrested on misdemeanor charges of driving under the influence, (“DUI”), careless driving, and driving without a valid license. Baker appeared in the Justice of the Peace Court on April 16, 2008, where she pled Not Guilty, and the case was transferred to the Court of Common Pleas. On May 8, 2008, in the Court of Common Pleas, Baker again pled Not Guilty, waived her right to a jury trial, and was released without bail.

During the discovery process, the State forwarded Baker’s driving record to defense counsel. However, the driving record demonstrated that the State was aware that the present DUI charge was Baker’s fourth DUI offense. Yet, instead of pursuing the charge as a felony in Superior Court, the State elected to pursue it as a misdemeanor in the Court of Common Pleas. Trial was scheduled for October 6, 2008.

On the day of trial in the Court of Common Pleas, Baker was present and prepared to go forward. However, at that time, the State entered a *nolle prosequi* on the misdemeanor DUI charge and stated its intent to file a felony indictment in Superior Court. The felony indictment was filed on October 27, 2009, approximately seven months after Baker’s arrest. Trial was scheduled for February 5, 2009, in Superior Court.

Consequently, on December 19, 2008, Baker filed a motion to dismiss the felony indictment on the grounds that her Constitutional right to a speedy trial was violated and that there was unnecessary delay. On January 26, 2009, after a hearing, the Commissioner recommended that the motion to dismiss be denied on the grounds that Baker suffered no prejudice. Baker has now filed this appeal of the Commissioner's recommendation.

Contentions of the Parties

Baker alleges that her Constitutional right to a speedy trial has been violated due to a wait of seven months between her arrest and the filing of an indictment. Baker further contends pursuant to Superior Court Criminal Rule 48(b) that there was an unnecessary delay as to the filing of the indictment in Superior Court and that the State should not be permitted to prosecute the charges in Superior Court after pursuing the action to trial in the Court of Common Pleas.

The State argues that a seven-month delay does not result in a violation of Baker's Constitutional right to a speedy trial. Furthermore, the State asserts that, since the Court of Common Pleas has no jurisdiction over felony charges, it has no jurisdiction over Baker's fourth DUI offense, and, thus, the indictment in Superior Court should stand.

Discussion

Speedy Trial Violation

In determining whether a defendant's right to a speedy trial has been violated, four factors are considered: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant."¹ A court evaluates these factors along with any other relevant circumstances.² However, without first finding that the length of the delay is presumptively prejudicial, there is no need to consider the other three factors.³

The length of delay that violates a defendant's right to a speedy trial is determined by the particular circumstances of the case and not a rigid number of days.⁴ Nevertheless, in *Dabney v. State*, the Court found that "one year between arrest and incarceration to trial" was a delay that prompted the consideration of the other three factors.⁵

¹ *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

² *Middlebrook*, 802 A.2d at 273.

³ *Middlebrook*, 802 A.2d at 273.

⁴ *Dabney v. State*, 953 A.2d 159, 165 (Del. 2008).

⁵ 953 A.2d at 165.

Here, Baker was arrested on March 29, 2008, indicted on October 27, 2008, and scheduled to be tried on February 5, 2009, somewhat less than one year from her date of arrest.⁶ Furthermore, Baker has not been incarcerated during this period of time, as the defendant in *Dabney* had, but, rather, has remained free on bail.

However, Baker cites to *Doggett v. United States* and argues that a delay can be so lengthy that the delay itself provides proof of prejudice.⁷ Yet, the delay in *Doggett* that was found to be presumptively prejudicial was a delay of eight and one-half years between arrest and indictment⁸ and can hardly be compared to the delay, here, of seven months between arrest and indictment.

Therefore, the Court finds that the delay between the arrest on March 29, 2008, and the felony indictment on October 27, 2008, with a scheduled trial date of February 5, 2009, is not “presumptively prejudicial” as that standard applies to a speedy trial violation. Accordingly, since the length of delay is not presumptively prejudicial, the Court does not reach a discussion of the remaining three factors of a speedy trial analysis.

⁶ Since the indictment on October 27, 2008, the Court has entertained various pre-trial motions and several continuance requests on this matter.

⁷ 505 U.S. 647, 655-56 (1992).

⁸ *Doggett*, 505 U.S. at 656 (stating that even a delay that is presumptively prejudicial cannot alone support a speedy trial violation without consideration of the other three factors, although, the longer the delay, the greater its importance).

Nevertheless, while a delay of seven months between arrest and indictment or eleven months between arrest and a scheduled trial date may not invoke a Constitutional remedy, the Court will consider whether such a delay is too long under Rule 48(b).

Unnecessary Delay

Superior Court Criminal Rule 48(b) provides the Court with discretionary power to dismiss an indictment if there is an unnecessary delay either in the filing of the indictment or in bringing the defendant to trial.⁹ The discretionary power of Rule 48(b) serves a broader purpose than and is not governed by the power to dismiss granted by the Constitutional provision for the right to a speedy trial.¹⁰

Delay Attributable to the Prosecution

A proper motion to dismiss for unnecessary delay must be based on a delay that is attributable to the prosecution.¹¹ In so determining, a court should consider the degree to which the State caused the delay as well as the amount of control the State had over the cause of the delay.¹² Dismissal of an indictment

⁹ *State v. Anderson*, 2009 WL 2620502, *2 (Del. Super. 2009).

¹⁰ *State v. Fischer*, 285 A.2d 417, 418 (Del. 1971).

¹¹ *State v. McElroy*, 561 A.2d 154, 156 (Del. 1989).

¹² *State v. Willis*, 2001 WL 789667, *1 (Del. Super. 2001).

is proper where the delay is caused by circumstances within the State's control.¹³

In this matter, the State was the sole cause of the delay in that it waited over seven months to indict on felony DUI charges. The initial misdemeanor prosecution proceeded in a timely manner in the Court of Common Pleas until the day of trial when the State entered a *nolle prosequi* on the misdemeanor DUI charge and indicated that it would pursue a felony indictment on the same charge in Superior Court. The reason for the *nolle prosequi* on the misdemeanor charge was that the State had not properly prepared and, thus, was not aware that Baker's driving record and other evidence provided a sufficient basis for a felony DUI charge. Therefore, the State's lack of preparation was the cause of the delay. The State had full control over the time it spent, or did not spend, preparing the case, and no intervening causes attributable to either Baker or the Court have been presented.

Accordingly, the Court finds that the delay is attributable to the prosecution.

Prejudice

Furthermore, a valid motion to dismiss for unnecessary delay must demonstrate that the defendant suffered prejudice in a manner "beyond that

¹³ *State v. Richards*, 1998 WL 732960, *3 (Del. Super. 1998).

normally associated with a criminal justice system necessarily strained by a burgeoning case load.”¹⁴ Financial burden, anxiety, and stress resultant from various pre-trial hearings alone are not enough to support a finding of prejudice beyond what is normally associated with the criminal justice system.¹⁵ On the other hand, prejudice in the traditional sense—loss of evidence, loss of a witness, or loss of an opportunity to prepare for trial—is not required for dismissal under Rule 48(b).¹⁶

A defendant can be found to have suffered prejudice where the delay causes any legal harm or detriment.¹⁷ Moreover, “scheduled trial dates do have some legal value to the parties involved, and when a trial date is disturbed because one side is not prepared, there is at least some minimal legal prejudice to the other side.”¹⁸ Likewise, other factors that can under certain circumstances support a finding of prejudice include the commencement of a new prosecution after dismissal of the same charge in another court, the anxiety suffered because of such a duplicative prosecution, and expenses incurred due

¹⁴ *McElroy*, 561 A.2d at 156.

¹⁵ *McElroy*, 561 A.2d at 157.

¹⁶ *State v. Budd Metal Co., Inc.*, 447 A.2d 1186, 1188-89 (Del. 1982).

¹⁷ *State v. Kozak*, 1999 WL 1846459, *2 (Del. Super. 1999).

¹⁸ *Kozak*, 1999 WL 1846459 at *2; *State v. Bethel*, 2007 WL 3231630, *2 (Del. Com. Pl. 2007).

to the renewal of a prosecution.¹⁹ These factors do not create an exclusive list—other like considerations may provide a finding of sufficient prejudice to justify a dismissal under Rule 48(b).²⁰

In this matter, Baker was present in Court and prepared for trial on October 6, 2008. At that time the prosecution indicated a lack of knowledge of the evidence and a lack of preparation as to the matter and, consequently, entered a *nolle prosequi* on the misdemeanor DUI charge. So, on the brink of trial, any defense Baker was prepared to offer was thwarted, and she then had to wait for another trial date before the matter could be resolved. Thus, Baker's trial date was significantly delayed. And, since a scheduled trial date has been found to have legal value to a defendant, its delay can cause a legal detriment. Therefore, Baker suffered a legal detriment when her trial date was delayed due to the State's error.

Furthermore, while the anxiety and expense of duplicative prosecutions can also under certain circumstances support a finding of prejudice, we have no facts, here, as to the effect of the prosecutions on Baker.

¹⁹*State v. Morris*, 340 A.2d 846, 850 (Del. Super. 1975).

²⁰*Fischer*, 285 A.2d at 419.

Nevertheless, the Court finds that the delay of Baker’s trial date in such a manner was significant enough to cause her legal harm and, as a result, supports a finding of prejudice.

Length of Delay

Where a prosecution lay dormant for seven and one-half months, a trial court’s dismissal of the indictment was upheld.²¹ Additionally, in *State v. Richards*, dismissal was affirmed where a forty-one day delay was attributable to the prosecution.²² In *Richards*, the Court further stated that “the State cannot be allowed to sit on the case without making any efforts to prepare for trial and then seek a continuance on the day of trial to complete a task that it could have at least begun weeks earlier.”²³ In addition, the fact that a defendant is released on bail does not shorten the length of any delay because of the substantial, albeit lesser, impairment of liberty that is in effect when an accused is released on bail.²⁴

Here, after a seven-month delay, the State entered a *nolle prosequi* on the misdemeanor DUI charge and pursued a felony indictment. Moreover, the *nolle*

²¹ *Budd Metal Company, Inc.*, 447 A.2d at 1188.

²² 1998 WL 732960 (Del. Super. 1998).

²³ *Richards*, 1998 WL 732960 at * 4.

²⁴ *Richards*, 1998 WL 732960 at *4 (citing *State v. Roane*, Del. Super., Cr. A. No. IN85-12-0262, Babiarz, J. (January 24, 1992) (Mem. Op.) at 2).

prosequi on the misdemeanor occurred on the day of trial in the Court of Common Pleas where the State admitted to error and indicated that no one had read the file in preparation for trial so as to know that the evidence was sufficient to support a felony charge. These circumstances are analogous to the facts in *Richards* in that the State, here, sat on Baker's case for seven months without being aware of the evidence and without preparing for trial. Seven months is ample time to read a file, review evidence and make appropriate determinations as to what type of charges to bring forth. Instead, the State entered a *nolle prosequi* on the misdemeanor in court at the time trial was to commence and, then, indicted a second time in order to pursue a felony charge in Superior Court. This task could and should have been done much sooner.

Moreover, here, while the methodology used by the State was different than that employed in *Richards* in that the State entered a *nolle prosequi* on the misdemeanor at the moment trial was to begin, as opposed to the continuance sought in *Richards*, the result to the defendant is the same. Similar to *Richards*, Baker suffered an unnecessary delay due to the State's lack of preparation and resulting error.

In addition, Baker's delay of approximately seven months is much longer than the delay of forty-one days discussed in *Richards*. And, although Baker was released on bail, this fact does not serve to shorten the length of delay

between arrest and indictment because Baker still endured an impairment of her liberty.

Therefore, the Court finds that the length of delay in accord with the circumstances here presented is sufficient to support dismissal.

Jurisdiction

A previous prosecution is not a bar to a second prosecution where the first prosecution was presented in a court without jurisdiction over the offense.²⁵ However, absent compelling circumstances, when the State chooses to prosecute an offense in a court of proper jurisdiction, the State is thereafter restricted from pursuing that offense in another forum.²⁶ Such manipulative and unilateral removals from one court to another subvert the power of the court system “to the defendant’s prejudice.”²⁷

Here, the State claims that the Court of Common Pleas does not have jurisdiction over this matter because it is a felony DUI offense and should have been indicted in Superior Court. The State further contends that it erred in pursuing misdemeanor charges against Baker because neither was the file read in time nor was Baker’s driving record reviewed.

²⁵ *State v. Zickgraf*, 2005 WL 4858688 (Del. Super.) (citing 11 Del. C. § 210).

²⁶ *State v. Pruitt*, 805 A.2d 177, 183 (Del. 2002) (further stating that the State is to exercise its choice of forum only once).

²⁷ *Pruitt*, 805 A.2d at 183.

Baker argues that an offense does not become a felony until the State makes a decision to prosecute the offense as a felony, and, therefore, the State's choice to proceed as a misdemeanor all the way to the brink of trial should preclude any last minute switch to Superior Court for a felony indictment.

In the matter before the Court, it is not necessary to discuss whether Baker's fourth DUI offense is a misdemeanor until the State in its discretion charges otherwise, and, as a result, whether the Court of Common Pleas would have jurisdiction of the offense until that occurrence. Even if the initial prosecution was pursued in a court without competent jurisdiction, it has not been demonstrated that a motion to dismiss due to unnecessary delay must be negated in this circumstance. Rule 48(b) gives the Court discretionary power to dismiss a case due to unnecessary delay and that power is not curtailed where the State's negligence results in an error as to jurisdiction.

At the same time, though, the Court does not wish to ignore that the State made a choice to proceed with a misdemeanor prosecution up to the brink of trial in the Court of Common Pleas even though enough evidence existed to charge Baker with a felony in Superior Court.

Here, while the State claims that the filing of a misdemeanor charge was done in error rather than a deliberate manipulation, Baker still suffered prejudice. The delay is the same whether the State inadvertently pursued a

misdemeanor prosecution or purposely delayed pursuing a felony prosecution in Superior Court until after Baker rejected its plea offer on the misdemeanor. So, while it may be true that a jurisdictional issue surfaced in this matter, the State's negligence in waiting over seven months to correct its error while pursuing this misdemeanor prosecution up to the brink of trial is not excused. To allow the felony indictment to continue where there is a jurisdictional issue without factoring in the length of delay and prejudice to Baker could set a precedent that the State does not have to concern itself with time where mistakes as to jurisdiction are made. Consequently, a jurisdictional hurdle does not negate the responsibility of the State to prosecute without unnecessary delay.

Therefore, the Court finds that Baker suffered prejudice to due unnecessary delay in prosecuting the offenses against her. Accordingly, the Commissioner's Recommendation to Deny the Motion to Dismiss is Rejected, and the Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

Judge John E. Babiarz, Jr.

Jeb, Jr./lb/bjw
Original to Prothonotary