IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Chad McCloskey,	:	
	:	
Defendant Below,	:	
Appellant;	:	
	:	
v.	:	Cr. ID. No. 0509027000
	:	
State of Delaware,	:	
	:	
Plaintiff Below,	:	
Appellee.	:	

OPINION AND ORDER

Upon Appeal from the Court of Common Pleas

Submitted: May 3, 2010
Decided: August 10, 2010

Cathy A. Jenkins, Esquire, Office of the Public Defender, 900 N. King St., Wilmington, DE; Attorney for the Appellant.

Stephen G. McDonald, Esquire, Department of Justice, 820 North French St., Wilmington, DE; Attorney for the Appellee.

TOLIVER, JUDGE

Before the Court is an appeal filed by Chad McCloskey from a decision of the Court of Common Pleas on February 18, 2009. That which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

On September 29, 2005, Mr. McCloskey was charged with several charges that stemmed from a high speed chase that took place on Route 13. The chase came to an end when he crashed his motorcycle into a traffic sign and was subsequently taken to Christina Hospital. The next day, Mr. McCloskey checked himself out of the hospital and as a consequence, a warrant for his arrest was issued.[1]

On December 8, 2006, Mr. McCloskey was arrested as a result of the acts he allegedly committed on September 29. From that arrest, five separate cases were instituted against him. Two of those cases involved

[1] Mr. McCloskey had several outstanding warrants and the hospital was instructed to contact the Delaware State Police Troop 9 prior to his release.

felonies that were prosecuted in this Court.[2] The charges in the three remaining cases consisted of misdemeanors and were pursued by the State in the Court of Common Pleas.[3]

On April 9, 2007, Court of Common Pleas Judge William C. Bradley, Jr. accepted a plea to five charges:

> 1. Driving with a suspended license on August 7, 2004;
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> 2. Failing to have proof of insurance while operating a motor vehicle on January 6, 2005;
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> 3. A second charge of driving with a suspended license on January 29, 2005;
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> 4. Disregarding a police officer's signal on August 8, 2005; and
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> 5. Reckless driving on August 8, 2005.[4]

Mr. McCloskey received a total sentence of 120 days at Level V which was suspended and he was placed on Level I probation for one year. None of the charges arising out of the September 29, 2005 incident were addressed at that

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[2] Superior Court Cr. ID. Nos. 0411003172 and 0507017851.

[3] Court of Common Pleas Cr. A. Nos. 0509027000, 050701686 and 0608012375.

[4] The five charges were brought in Court of Common Pleas Cr. A. Nos. 0408007289 and 0501017532.

time.

On December 27, 2006, Court of Common Pleas Case Nos. 0509027000, 050701686 and 0608012375 which had been lodged before the Court of Common Pleas in and for Sussex County, were transferred to the Court of Common Pleas in and for New Castle County. It is unclear why the charges were initiated in Sussex County. In any event, the September 29, 2005 cases were not scheduled for trial until February 18, 2009. Prior to that date, neither the State or Mr. McCloskey requested that those matters be addressed.

Of the three September 29, 2005 cases so initiated against Mr. McCloskey in the Court of Common Pleas, two, Cr. A. Nos. 050701686 and 0608012375, were dismissed on February 18, 2009 because of the failure of necessary witnesses to appear. The third case, which is the subject of this appeal, Cr. A. No. 0509027000, was tried on February 18 as well. At the conclusion of the trial, the jury found Mr. McCloskey guilty of receiving stolen property, failure to obey a police officer, turning without a signal, improper lane change and aggressive

driving. He was sentenced to one year at Level V.[5]

On April 7, 2009, those conviction were appealed to this Court on behalf of Mr. McCloskey. He claimed that the charges that he had been tried on had been previously disposed of in the April 9, 2007 plea agreement and proceedings. He also claimed to have been denied his constitutionally guaranteed right to a speedy trial.[6]

On January 5, 2010, Mr. McCloskey filed his opening brief. On the that same date, Mr. McCloskey's trial counsel, Cathy A. Jenkins, Esquire filed a motion pursuant to Supreme Court Rule 26(c) to withdraw as counsel. In support of her motion, Ms. Jenkins alleged that Mr. McCloskey's appeal had no merit. Stated differently, the case being appealed, Cr. A. No. 0509027000, had not been included as a part of the plea entered by Mr. McCloskey on April 9, 2007 and he had not

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[5] Mr. McCloskey was already incarcerated serving the remainder of a nine year sentence imposed on February 8, 2008 in Cr. A. No. 0612005942 by the Superior Court for Burglary Second and Third Degree, Possession of a Deadly Weapon by a Person Prohibited and Forgery Second Degree.

[6] Although he does not specifically identify the source of that right, the Court will presume that he is referencing the Sixth Amendment to the United States Constitution and/or Article 1, Section 7 of the Delaware State Constitution.

otherwise been deprived of any constitutionally guaranteed rights.

On or about January 19, 2010, Mr. McCloskey filed his response in support of his appeal and in opposition to Ms. Jenkins's motion. Mr. McCloskey alleged that on February 18, 2009, he informed Ms. Jenkins that the matters for which he was about to be tried had already been resolved and as a result, he should not be tried again on those same charges. Alternatively, he argued that if he had not taken a plea to that charge it nonetheless should have been brought and/or heard at the April 9, 2007 proceeding. Because it was not, it violated his right to a speedy trial.[7] He does not allege that he discussed the speedy trial issue with Ms. Jenkins or the judge who presided over his trial on February 18, 2009.

In her reply, Ms. Jenkins contends that on February 18, 2009, she spoke to Mr. McCloskey about Cr. A. No.

[7] To be accurate, Mr. McCloskey was not sure whether he accepted a plea in 2007 or 2008. After reviewing the record, the Court has determined that Mr. McCloskey could only be referring to his plea agreement entered on April 9, 2007.

0509027000 and recollects telling him that those charges had not been previously resolved. Ms. Jenkins also contends that Mr. McCloskey's right to a speedy trial was not violated because he had not suffered any prejudice as a result of being incarcerated on other unrelated charges during the period of any applicable delay. The State agreed and asked this Court to deny Mr. McCloskey's appeal.

On March 11, 2010, this Court held an evidentiary hearing during which Mr. McCloskey testified. He reaffirmed his belief that the charges in question were or should have been included in the April 9, 2007 plea proceedings. The State and Ms. Jenkins continued to adhere to their respective positions.

DISCUSSION

Standard of Review

In reviewing appeals from the Court of Common Pleas,

this Court sits as an intermediate appellate court.[8] It is to correct errors of law and to review the factual finding of the court below to determine if they are sufficiently supported by the records and are the product of an order and logical deductive process.[9] "If there is sufficient evidence to support the findings of the court below, this Court must affirm the decision, unless the findings are clearly erroneous."[10] To determine sufficient evidence the Court must determine whether, after viewing the evidence in the light most favorable to the State, any rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[11] Lastly, this Court cannot make its own factual conclusions, weigh evidence or make credibility

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[8] *See e.g., Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. May 28, 1998).

[9] *Guest v. State*, 2009 WL 2854670, at *1 (Del. Super. Sept. 4, 2009).

[10] *Ochoa v. State*, 2009 WL 2365651, at *2 (Del. Super. July 31, 2009).

[11] *McKinney v. State*, 2008 WL 282285, at *2 (Del. Super. Jan. 31, 2008).

determinations.[12]

Resolution of Cr. A. No. 0509027000 prior to February 18, 2009

After reviewing the record, it is quite clear that Mr. McCloskey did not plea to or otherwise resolve the charges referenced by Cr. A. No. 0509027000.

As noted above, on April 9, 2007, the State offered a plea to five charges and entered a *nolle prosequi* to the remaining offenses covered by the criminal actions before the Court of Common Pleas on that date. Mr. McCloskey was asked by the court if he understood the charges brought against him and he responded in the affirmative. The court subsequently asked him about each of the charges. He responded to each alleged charge that he was guilty.[13] There was no reference to Cr. A. No. 0509027000.

In sum, this Court's review of the record fails to

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[12] *State v. Goodwin*, 2007 WL 2122142, at *2 (Del. Super. July 24, 2007) (citing *Johnson v. Chrysler*, 213 A.2d 64 (Del. 1965)).

[13] *See* CCP Trial Tr. pp. 5-7 on April 9, 2007.

reflect the aforementioned criminal action number was discussed during the proceedings nor was any charge relating to that matter ever the subject of any consideration on that date. Nor has Mr. McCloskey been able to present any evidence to the contrary. The Court must conclude as a result that the charges now being appealed were not addressed or resolved prior to February 18, 2009 and remained legally viable on that date.

Defendant's Right to a Speedy Trial

As for Mr. McCloskey's final claim that his right to a speedy trial was violated, the Court disagrees. On September 25, 2005, Mr. McCloskey was charged with several offenses including those which were referenced under Cr. A. No. 0509027000. A warrant was subsequently issued for his arrest, but he was not apprehended until December 8, 2006. He was arraigned and his case was scheduled for trial on January 30, 2007. However, his case was transferred from the Court of Common Pleas in and for Sussex County to New Castle County for

disposition because of jurisdictional issues. For unknown reasons, the cases were not scheduled for trial until February 18, 2009.

The United States Supreme Court has established four factors to determine whether a defendant's constitutional right to a speedy trial has been violated.[14] The factors to consider are: (1) the length of the 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.[15] Courts will balance these factors in addition to other relevant circumstances to the case.[16] The right to a speedy trial attaches as soon as a defendant is arrested or indicted.[17] The length of the delay is a threshold requirement to analyzing the other three factors.[18]

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[14] *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, (1972).

[15] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192).

[16] *Middlebrook*, 802 A.2d at 272.

[17] *Id.* at 273.

[18] *Id.*

If the length of delay is found not to be "presumably prejudicial" there is no need for the Court to inquire about the other three remaining factors in the test.[19] Therefore, the Court must first overcome the first factor to analyze the other three factors in *Barker*.[20] Additionally, there is no specific amount of time that automatically violates the right to a speedy trial.

Length of the Delay

In this appeal, the delay about which Mr. McCloskey complains presumably began with his arrest on December 8, 2006 and lasted until his trial on February 18, 2009, or twenty-six months. During that period of time, the Court also notes that Mr. McCloskey was incarcerated as a result of having been convicted on unrelated charges in another matter. Nevertheless, the Court finds that the length of the delay is presumably prejudicial to Mr. McCloskey and therefore must address the remaining

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[19] *Id.*

[20] *Id.*

factors.[21]

Reason for the Delay

Mr. McCloskey was arrested on December 8, 2006. He was arraigned and the case was scheduled to proceed to trial on January 30, 2007. However, before his trial date, the case was transferred to the New Castle County CCP for jurisdictional reasons on December 27, 2006. Inexplicably that court did not receive and process the case until November 5, 2008, which was almost two years after it had been initially received. The case was then scheduled and brought to trial on February 18, 2009. There is no explanation for the delay, and as a consequence, the Court finds the second factor of *Barker* militates in favor of Mr. McCloskey.

Assertion of the right to a speedy trial

If and when a defendant asserts his right to a speedy trial weighs heavily in a court's determination of

[21] *Id.* at 273-74.

whether a defendant's speedy trial rights have been violated.[22] The failure to assert said right will make it difficult for a defendant to prove that he or she was denied a speedy trial.[23] The Court notes that Mr. McCloskey did not assert his right to a speedy trial until January 19, 2010, eleven months after the conviction about which he complains. After reviewing the record, including the trial transcripts on April 9, 2007 and February 18, 2009, there is not one mention or assertion of his right to a speedy trial. Therefore, the Court finds the third factor of *Barker* weighs heavily in favor of the State.

Prejudice to Mr. McCloskey

The three interests that the speedy trial right was designed to protect are considered when deciding the extent a defendant suffered undue prejudice. Those interests are: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the

[22] *Id.* at 275.

[23] *Id.*

accused; and (3) limiting the possibility that the defendant's defense will be impaired.[24]

Mr. McCloskey was already incarcerated serving a sentence on unrelated charges. There is as a result no concern about pretrial incarceration. Nor is there any evidence that Mr. McCloskey suffered any undue anxiety or was concerned about the delay in any manner. Indeed, he cannot argue to the contrary since he thought that the charges had been resolved in 2007 or 2008.

Equally significant is the lack of any argument that his defense was impaired by the delay in bringing the case against him or that the outcome of his trial was somehow negatively affected thereby. Indeed, it appears that any such impairment was nominal at best. The Court further notes that the delay appears to have actually benefitted him in that two of the three cases against him were dismissed not on the merits but because witnesses failed to attend the trial after such a lengthy period of time.

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[24] *Id.* at 276.

Based on this view of the record, the Court must conclude that Mr. McCloskey has not established that the delay was a detriment to his defense or that he suffered any more anxiety than anyone else awaiting trial. The absence of any such detriment does not support Mr. McCloskey's claim.

Totality of the Circumstances

Having found that two *Barker* factors weigh in favor of the Appellant and two factors weigh in favor of the State, the Court looks at the weight given to each factor in deciding whether Mr. McCloskey's rights to a speedy trial have been violated.[25]

Simply put, the two factors weighing in the State's favor greatly outweigh the two factors weighing in the Appellant's favor, especially given the fact that the Appellant never asserted his right to a speedy trial before January 19, 2010. That factor, along with the fact that he was already incarcerated serving time on a

[25] *Harris v. State*, 956 A.2d 1273, 1278 (Del. 2008).

separate unrelated matter tip the scales of justice in favor of the State and against the complaints made by Mr. McCloskey in this regard. Given the totality of the circumstances, the Court finds that those rights were not violated by the delay in bringing the case to trial.[26]

[26] In light of this disposition, the Court finds that the motion to withdraw filed by Ms. Jenkins is moot. The Court agrees that Mr. McCloskey's appeal is without merit and that no further action need be taken as a result.

CONCLUSION

The judgment of conviction and sentence imposed by the Court of Common Pleas following the trial of the charges included in Cr. A. No. 0509027000 must be, and hereby is, **affirmed.** The record as reviewed above reveals the decisions of that court were supported by substantial evidence and were free of legal error. Stated differently, Mr. McCloskey's challenge to the decisions and/or actions of the Court of Common Pleas below is **denied.**

IT IS SO ORDERED.

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TOLIVER, JUDGE