

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD EARL BROWN,

Defendant-Appellant.

UNPUBLISHED

February 11, 1997

No. 187610

LC No. 88-1794-FH

Before: Wahls, P.J., and Young and J.H. Fisher,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant remained on bond while he appealed his conviction and corresponding sentence. We affirmed the conviction but remanded for an explanation of the sentence. *People v Brown*, unpublished opinion per curiam of the Court of Appeals, decided May 8, 1991 (Docket No. 120781). When denying defendant's request for a rehearing on August 8, 1991, we remanded for a full resentencing due to the death of the original trial judge. Our Supreme Court denied leave to appeal. *People v Brown*, 439 Mich 949; 482 NW2d 744 (1992). Resentencing was first attempted on February 10, 1995. Defendant moved to object to the trial court's jurisdiction to sentence him. The trial court denied that motion on July 3, 1995 and resentenced him at the same time. Defendant received a two-year mandatory sentence for the felony-firearm conviction which is to be consecutive with a term of six to forty-eight months for the felonious assault conviction and a term of six to sixty months for the carrying a concealed weapon conviction. Defendant appeals as a matter of right from his sentence. We affirm.

Defendant claims that he was denied a speedy trial and that the trial court lacked jurisdiction to resentence him. It is uncontested that defendant's case "fell through the cracks" and resulted in a delay between when the case was remanded to the trial court for resentencing and when defendant was actually resentenced. The sole issue is whether the almost four-year delay divested the trial court of jurisdiction to resentence defendant based on either MCL 771.1(2); MSA 28.1131(2) or constitutional

* Circuit judge, sitting on the Court of Appeals by assignment.

law principles. We review de novo a lower court's exercise of jurisdiction over a defendant. *People v Blume*, 443 Mich 476, 487 n 17; 505 NW2d 843 (1993). We will address the constitutional claim first.

Defendants are guaranteed the right to a speedy trial through the Sixth Amendment which is imposed on the states by the Due Process Clause of the Fourteenth Amendment. *Barker v Wingo*, 407 US 514, 515; 92 S Ct 2182; 33 L Ed 2d 101 (1972). Delays in a trial process have been applied to include time lapses occurring before sentencing is completed. *People v Garvin*, 159 Mich App 38, 46; 406 NW2d 469 (1987).

Whether a defendant is denied his right to a speedy trial involves a four-part balancing test: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker, supra* at 407 US 530; *People v Grimm*, 388 Mich 590, 606; 202 NW2d 278 (1972), overruled on other grounds *People v White*, 390 Mich 245; 212 NW2d 222 (1973). These factors are related and must be considered together under the circumstances of each case. *Barker, supra* at 407 US 533.

The length of delay is a triggering mechanism. *Barker, supra* at 407 US 530. However, time reasonably consumed on appeal is not considered. *People v Hammond*, 84 Mich App 60, 67; 269 NW2d 488 (1978). The almost four-year delay triggers a speedy-trial analysis. However, a lapse in time in and of itself does not cause a court to lose jurisdiction to sentence a defendant. *Garvin, supra* at 46. See *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994) (a 4-1/2 year delay, under the circumstances of the case, did not violate the defendant's right to a speedy trial).

The reason for the delay should be assigned different weights with a more neutral reason, such as negligence, being weighed less heavily against the government. *Barker, supra* at 407 US 531. In this case, the reason was pure negligence. Hence, this factor does not weigh heavily against the prosecution.

Regarding defendant's assertion of his right, although the primary burden is on the prosecution to timely execute a case, the defendant has some burden to protect his right and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker, supra* at 407 US 529, 532. Defendant did not assert his right until June 16, 1995 when he moved to prevent resentencing on jurisdictional grounds. Therefore, this factor does not weigh in his favor.

Regarding prejudice to defendant, of the three interests protected under this factor, see *Barker, supra* at 407 US 532-533, defendant's anxiety is the only possible interest applicable to his case. The anxiety discussed by the United States Supreme Court is that caused from citizens looking down on an accused because they do not know whether he is guilty. *Id.* However, a jury had already convicted defendant, and his anxiety is that from not knowing when, if ever, he would be sentenced. We do not recognize this type of anxiety. *People v McIntosh*, 103 Mich App 11, 20-21; 302 NW2d 321 (1981). More important, defendant's failure to inquire about the delay indicates that he did not feel

particularly prejudiced. *People v Goode*, 106 Mich App 129, 135; 308 NW2d 448 (1981). Therefore, this factor does not weigh in his favor.

Balancing these factors, we find that defendant was not denied his right to a speedy trial.

Defendant also relies on MCL 771.1(2); MSA 28.1131(2) to contend that the trial court lost jurisdiction because more than one year elapsed between the time we issued an order to resentence him and his amended sentence. However, MCL 771.1(2); MSA 28.1131(2) applies where a defendant may receive probation and is inapplicable in his case because he was convicted of felony-firearm, which carries a mandatory two-year prison term. See, e.g., *People v West*, 100 Mich App 498, 500-501; 299 NW2d 59 (1980).

Under the facts of defendant's case, we conclude that he was not denied his right to a speedy trial and that the trial court did not lose jurisdiction under the one-year rule of MCL 771.1(2); MSA 28.1131(2).

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher