STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY ALLEN LECLERC,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 205943
Macomb Circuit Court
95-001449 FH

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). Defendant was sentenced to a term of three years' probation. He now appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to a speedy trial. US Const, Am VI; 1963 Const, art 1, § 20. As explained in *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997):

> Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. We review trial court factual findings under the clearly erroneous standard.[1] . . . We review constitutional questions of law de novo. . . . To determine whether a defendant has been denied his right to a speedy trial, this Court considers (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) any prejudice to the defendant. . . . A delay of more than eighteen months is presumed to be prejudicial; the prosecution bears the burden of proving lack of prejudice to the defendant. . . . The establishment of a presumptively prejudicial delay "triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." [(citations omitted).]

In this case, the approximately twenty-four months that elapsed between defendant's May, 1995, arrest and May, 1997, trial is presumptively prejudicial. In examining the court file to ascertain

the reasons for the delay, we note that approximately two months elapsed between the date of defendant's arrest and the date originally scheduled for trial. The original trial date was then adjourned for approximately seven weeks pursuant to defendant's request. An adjournment of approximately one month and three weeks can be attributed to a request by the prosecutor. No reason is given for adjournments totaling approximately seven weeks, which will therefore be attributed to the prosecution. An adjournment of approximately two weeks can be attributed to defense counsel's apparent failure to be present on one of the scheduled trial dates. And, an adjournment of approximately three weeks can be attributed to a stipulation by the parties. Our review of the court file reveals that the bulk of remaining delays were attributable to delays inherent in the court system, i.e., ongoing plea negotiations, docket congestion and motion practice. "Although these delays are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993); see also *Gilmore*, *supra* at 460.

With respect to the third factor, we note that defendant did not assert his right to a speedy trial below. Defendant's failure to timely assert his right weighs against a finding that he was denied a speedy trial. *People v Collins*, 388 Mich 680, 692; 202 NW2d 769 (1972); *Wickham*, *supra* at 112. Finally, with respect to the fourth factor, defendant, who was free on bond in this case, alleges no prejudice to his person. *Gilmore*, *supra* at 462. However, defendant contends that he can show prejudice to his defense. *Id*. Specifically, defendant contends that the delay prevented him from establishing at trial that there were no "gate ring" records of him leaving the Chrysler plant during his lunch break, with the resulting inference that he was not in the plant's parking lot when the alleged delivery of marijuana occurred. However, we fail to understand how defendant's defense was prejudiced in this respect where evidence was presented at trial that employees could bypass the "gate ring" system while entering or leaving the Chrysler plant. Defendant also contends that the delay caused his memory to fade concerning exactly what he did on his lunch break. However, we again fail to understand how defendant's defense was prejudiced in this respect where defendant testified that he "was more likely to just stay in at lunch" and where defendant denied that he delivered marijuana.

In summary, although the delay of twenty-four months is presumed prejudicial, in light of the facts that the bulk of the delays are to be given a "neutral tint" and assigned minimal weight, *Wickham*, *supra*, that defendant failed to timely assert his right, and that there was no showing of actual prejudice, we conclude that defendant was not denied his right to a speedy trial.

Next, defendant contends defense counsel's failure to demand a speedy trial constituted ineffective assistance of counsel. However, where no record on this issue has been made, we conclude that defendant has simply failed to overcome the presumption that the challenged action might be considered sound trial strategy. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Finally, defendant argues that he is entitled to a new trial because newly discovered evidence may have changed the outcome of the trial. However, a motion for a new trial on this ground must first be brought in the trial court in accordance with the Michigan Court Rules. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998) (citing MCR 2.611 and MCR 2.612). In this case, defendant failed to move below for a new trial on this ground. Moreover, newly discovered evidence is

not a ground for a new trial where it would merely be used for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Further, defendant's newly discovered impeachment evidence would probably not cause a different result on retrial. *People v Lester*, 232 Mich App 262, 271; ___ NW2d ___ (1998). Therefore, we conclude that defendant is not entitled to a new trial.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[1] In this case there are no factual findings to review because defendant did not raise this issue below. However, defendant's failure to assert his right to a speedy trial below does not waive consideration of this issue. *People v Metzler*, 193 Mich App 541, 546; 484 NW2d 695 (1992).