

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARRYL JOHNSON,

Defendant-Appellee.

UNPUBLISHED

August 28, 2001

No. 225874

Wayne Circuit Court

LC No. 99-012703

Before: Fitzgerald, P.J. and Gage and C. H. Miel*, JJ.

MEMORANDUM.

The prosecutor appeals as of right from a circuit court order granting defendant's motion to dismiss. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with certain felony offenses for a shooting incident that occurred on April 30, 1993. The charges were dismissed in July 1993 when the complainant failed to appear for trial and reinstated in October 1999. Defendant claimed that the six-year delay between dismissal and reinstatement violated his right to a speedy trial. The trial court agreed and, finding that the prosecutor had not rebutted the presumption of delay that arises after eighteen months, granted the motion. Speedy trial claims raise constitutional issues that we review de novo on appeal. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

The delay between dismissal and reinstatement of the charges did not itself violate defendant's right to a speedy trial because no charges were pending against defendant during that time.¹ *People v Boucher*, 131 Mich App 216, 219; 345 NW2d 670 (1983). However, that does not mean that the speedy trial right is inapplicable. Rather, the time between dismissal and

¹ Such a delay may give rise to a violation of due process under the Fifth Amendment. *United States v MacDonald*, 456 US 1, 7; 102 S Ct 1497; 71 L Ed 2d 696 (1982). Because defendant did not raise that issue below and the trial court did not rule on it, we decline to consider the prosecutor's claim that the six-year delay did not in fact violate defendant's due process rights. *Lowman v Karp*, 190 Mich App 448, 454; 476 NW2d 428 (1991).

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

reinstatement of the charges is not counted as part of the delay. *United States v MacDonald*, 456 US 1, 3, 9; 102 S Ct 1497; 71 L Ed 2d 696 (1982); *People v Rosengren*, 159 Mich App 492, 506-507; 407 NW2d 391 (1987). The first factor to be considered is the length of the delay. Three months elapsed between the filing of the charges and their dismissal and another four months elapsed from the time the charges were reinstated until the trial court granted defendant's motion. That seven-month delay was sufficient to trigger further investigation of the claim and consideration of the other relevant factors. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). However, because the delay was less than eighteen months, prejudice is not presumed and defendant was obligated to prove prejudice. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Because the trial court erred in its analysis of the speedy trial issue, we reverse its order dismissing the charges.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage

/s/ Charles H. Miel