

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

UNPUBLISHED
December 20, 1996

No. 189475

ROCHELLE CHERNOFF,

Defendant-Appellee.

Oakland Circuit Court
LC No. 94-DA6213-AR

Before: Fitzgerald, P.J., and Holbrook, Jr. and E.R. Post,* JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration as on leave granted. Plaintiff appeals the circuit court order affirming the district court's dismissal of embezzlement charges against defendant on speedy trial grounds. We affirm.

Defendant was charged with embezzlement of jointly held property through checks issued on January 11 and 27, 1989. A preliminary examination was held on April 5, May 15, and July 15, 1990. Upon the completion of the prosecutor's proofs, defendant's motion to dismiss was denied by the district court. Defendant appealed this denial to the circuit court.

On October 9, 1990, the Oakland Circuit Court granted defendant's application for leave to appeal. At the conclusion of the argument on December 4, 1991, the circuit court affirmed the district court's denial of the motion to dismiss. The circuit court ruled that the matter should be remanded to the district court for completion of the preliminary examination. The prosecution indicated that it would prepare an order.

On December 10, 1991, the prosecutor provided defendant's counsel with a proposed order. Defense counsel stated that he wished to review a transcript of the proceeding to ensure that the proposed order accurately reflected the circuit court's ruling. On May 2, 1992, the prosecutor wrote

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

to defense counsel, reminding him that an order had not been filed and that he would file a motion for entry of an order. On May 19, 1992, defense counsel sent a proposed alternative order to the prosecutor.

No further action was taken on the case for over two years. On August 12, 1994, the prosecutor sent a letter to defense counsel regarding entry of the order. Defense counsel responded that the case should be dismissed due to the inordinate delay. The prosecutor filed a motion for entry of the order, which was entered by the circuit court on September 28, 1994.

Defendant filed a motion for dismissal in the district court. On November 21, 1994, the district judge ruled that application of the factors in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972), resulted in a finding that, under the totality of the circumstances, defendant's right to a speedy trial was violated. On that date, the district court entered an order dismissing the charges.

Plaintiff appealed to the circuit court. In an opinion and order dated March 13, 1995, the circuit court found that the delay of more than eighteen months raised a presumption that defendant was prejudiced by the delay and that the prosecutor had failed to present any justifiable reason for the delay. The court found that the prosecutor had assumed the responsibility to have an appropriate order entered, and that the facts raised a belief on the part of defendant and the district court that plaintiff had abandoned the case. After concluding that the district court properly balanced the factors under *Barker*, the circuit court affirmed the district court's dismissal of the charges.

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MSA 28.1024. In determining whether a defendant has been denied a speedy trial, four factors must be balanced: 1) the length of the delay; 2) the reasons for the delay; 3) whether the defendant asserted his right to a speedy trial; and 4) prejudice to the defendant from the delay. *Barker, supra*; *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978). A delay of more than eighteen months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecutor. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). Pursuant to *Barker*, the 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. *People v Rosengren*, 159 Mich App 492, 506; 407 NW2d 391 (1987).

The prosecutor argues that the lower courts erred in charging the delay from May 1992 until August 1994 to the prosecution because both parties had responsibility for preparing an order. However, plaintiff acknowledges that, on the record, it took the responsibility for preparing an order. Plaintiff did not submit an order for nearly three years. Defendant drafted an alternative order, but plaintiff failed to present it to the court. Under these circumstances, we cannot conclude that the lower courts erred in placing responsibility for the delay on plaintiff.

Plaintiff also argues that the lower courts failed to consider defendant's failure to assert her speedy trial right. While the courts did rationalize why defendant would not be expected to assert the

right, they did not weigh this factor in favor of defendant. Instead, the courts only held that defendant did not accede to any delays and did not waive the right to a speedy trial. Plaintiff has presented no showing that this finding was in error, particularly where defendant drafted a proposed order of remand and the prosecutor failed to file it for over two years.

Last, with regard to prejudice to defendant, although defendant was not incarcerated, she indicated that she suffered from anxiety and loss of business caused by the delay. Hence, the prosecution has failed to rebut the presumption of prejudice.

On the basis of our consideration of the length of the delay, the reasons for the delay, defendant's assertion of her right to a speedy trial, and any prejudice to defendant, we hold that the circuit court did not abuse its discretion in granting defendant's motion to dismiss.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post