

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY WHITE,

Defendant-Appellant.

UNPUBLISHED

June 20, 1997

No. 195636

Oakland Circuit Court

LC No. 93-128173 FH

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

Pursuant to a conditional plea, on each count defendant claims that his right to speedy trial was violated on both constitutional and statutory grounds. As defendant was incarcerated on the basis of a conviction for violating §7401(2)(a) of the Public Health Code, he was subject to consecutive sentencing by virtue of §7401(3) of the Public Health Code. When consecutive sentencing applies, the 180-day statute is inapposite. *People v Smith*, 438 Mich 715; 475 NW2d 333 (1991).

Defendant's constitutional claim requires this Court to apply the traditional four-factor analysis. Delay of more than 18 months is presumed to be prejudicial and the burden is on the prosecution to prove lack of prejudice. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993), citing *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972). Docket congestion is attributed to the prosecution but is deemed a neutral factor to be assigned minimal weight. *Wickham, supra* at 111. The length of delay is insufficient in and of itself to require dismissal. *People v Lowenstein*, 118 Mich App 475, 489; 325 NW2d 462 (1982). In considering prejudice to the defendant, the most serious inquiry is whether the delay has impaired the defendant's defense. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987).

Length of Delay. In this case, the delay of 30 months is presumptively prejudicial. *Wickham, supra*. Accordingly, this Court must balance the competing interests to determine whether defendant was deprived of his right to a speedy trial. *Rosengren, supra*, at 504.

Reason for Delay. There is absolutely no indication in the record that any delay is attributable to the prosecution. Any delay caused by the failure to secure such writs of habeas corpus ad

prosequendam could have been measured in hours, by sending a fugitive response team to call for defendant, a round trip of perhaps two hours. Much of the delay appears attributable to defendant's requests for adjournment of trial, adjournments necessitated by defendant's hospitalization, and adjournments resulting from defense counsel's unavailability for trial.

Defendant's Assertion of His Right to a Speedy Trial. Defendant first asserted his right to a speedy trial, at the commencement of the case, but his subsequent actions are inconsistent with this demand. Within two weeks of filing that demand, defendant requested an adjournment of at least two and one-half months, and thereafter his counsel managed to be unavailable for trial on at least two occasions, and defendant's health required an additional adjournment while he was hospitalized.

Prejudice to Defendant. Defendant contends that he was prejudiced by the loss of several witnesses, but he fails to identify how those witnesses would have aided in his defense. The record fails to establish that defendant would have been able to secure the presence of these witnesses on some earlier date, although defendant had the opportunity by statute to preserve the testimony of such witnesses by taking their depositions. MCL 767.79; MSA 28.1019. As defendant was free on bond until sentenced to prison as a probation violator, there was no prejudice to his person as a result of oppressive pretrial incarceration. Accordingly, on this record defendant's constitutional right to speedy trial has not been infringed. *People v Simpson*, 207 Mich App 560, 563-564; 526 NW2d 33 (1994).

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra