STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN D. ZARZORIAN,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 195633
Oakland Circuit Court
LC No. 95-140253-FH

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Prior to commencement of his jury trial, defendant pled guilty to driving while license suspended (DWLS) in violation of MCL 257.904(1)(b); MSA 9.2604(1)(b). Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor, third offense (OUIL-3rd), MCL 257.625(6)(d); MSA 9.2325(6)(d). Defendant subsequently pled guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to two to five years' imprisonment for the habitual offender conviction, and ninety days in jail for the DWLS conviction. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that his convictions should be reversed because he was denied his constitutional right to a speedy trial. We disagree. Both the United States and the Michigan Constitution guarantee every criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. In addition, Michigan has enacted legislation and the Supreme Court has promulgated a court rule to further guarantee a defendant's right to a speedy trial. MCL 768.1; MSA 28.1024; MCR 6.004.

In assessing whether a defendant has been denied the right to a speedy trial, the court must balance four factors: (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 v Wingo*, 407 US 514, 533; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Metzler*, 193 Mich App 541; 484 NW2d 695 (1992). Further, when the asserted delay is greater than six months, an investigation is warranted where the defendant raises the issue of speedy trial. *People v Daniel*, 207 Mich App 47,

51; 523 NW2d 830 (1994). However, when the delay is less than eighteen months, there is no presumption of prejudice and the defendant is required to prove undue prejudice in order to successfully assert this claim. *Id.*

In the instant case, defendant was arrested on July 9, 1995 and his trial commenced on March 25, 1996. The actual length of time between the two events was more than six months. However, because the elapsed time did not exceed eighteen months, defendant is not entitled to a presumption of prejudice. Thus, the eight-month delay between defendant's arrest and trial, alone, was insufficient to establish a speedy trial claim and other factors must be considered.

Although there may have been scheduling difficulties in the judicial system in this case, such factors are to be given limited weight in evaluating defendant's claim. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). Moreover, approximately two months of the delay in this case was a result of defendant's decision to plead guilty and later withdraw such plea. Therefore, the lapse from defendant's hearing to withdraw his guilty plea until trial was actually only six months and barely exceeded the time required to warrant a speedy trial investigation. Further, defendant did not raise the speedy trial issue until two days prior to the commencement of the trial, a fact that weighs heavily against him. See *People v Gravedoni*, 172 Mich App 195, 199; 431 NW2d 221 (1988).

Finally, we conclude that defendant has failed to establish that he suffered undue prejudice by the delay in bringing this case to trial. The Supreme Court in *Wingo, supra* at 514, indicated that prejudice may arise in several respects as the result of a delay in trial. These may relate to the defendant's interests in: (1) avoiding oppressive pretrial incarceration; (2) minimizing anxiety and concern; and (3) limiting the possibility that his defense will be impaired. *Id.* In this case, we do not find that defendant experienced any oppressive pretrial incarceration. Defendant argues that he was on parole at the time of his arrest and, pursuant to statutory enactments, he was unable to receive credit for time served as a result of his incarceration while awaiting trial. This argument is meritless. In our judgment, the denial of potential sentencing credit is not the equivalent of actual incarceration and does not constitutes "oppressive pretrial incarceration." Additionally, defendant has failed to demonstrate how the brief delay in his trial impaired his ability to prepare or present an effective defense. Therefore, we find that defendant was not prejudiced as a result of the delay and that he was not denied his right to a speedy trial.

Defendant next argues that the 180-day rule was violated because he was not tried until more than eight months after his arrest. Defendant relies on MCL 780.131(1); MSA 28. 969(1), which requires the prosecution to bring charges against prisoners to trial within 180 days after the prosecutor receives notice of the status of the prisoner and the charges, and the request for disposition is made. The failure to prosecute an accused within 180 days results in dismissal of the claim with prejudice. MCL 780.133(3); MSA 28.969(3); *People v Taylor*, 199 Mich App 549, 552; 502 NW2d 348 (1993).

In this case, from the time defendant was arrested until his trial, he was lodged in the Oakland County Jail for parole violations. Therefore, defendant was not incarcerated in a state correctional facility and was not an "inmate" as defined by the statute and case law.[1] Hence, the 180-day rule does

not apply and we decline to further address the merits of defendant's claim. See *People v Wyngaard*, 151 Mich App 112; 390 NW2d 694 (1986).

Finally, defendant argues that he was denied a fair trial because the trial court gave a confusing and misleading jury instruction on the lesser included offense of driving while impaired (DWI). However, because defendant did not object to the instruction, this Court will only review the issue to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We conclude that there was no such injustice. A plain reading of these instructions suggests that in order to find defendant guilty of DWI, they must find that defendant drove differently than a reasonably, prudent driver, in a manner sufficient for an ordinary observer to notice a difference. The fact that the court did not provide the instructions verbatim from the manual does not make the instructions any less clear or effective. Further, if the instructions were confusing or misleading, as alleged by defendant, the jury could have requested clarification or guidance from the court. See *People v Torres* (*On Remand*), 222 Mich App 411; 564 NW2d 149 (1997). Further, the prosecutor and defense counsel agreed to submit the instructions to the court and the court precisely read the instructions as proposed. Hence, contrary to defendant's claim, his theory of the case was presented to the jury, as requested. Defendant cannot now assert that his theory of the case was not represented merely because the jury did not accept it. Therefore, we find that the jury instruction pertaining to the lesser included offense of DWI was not confusing or misleading and that defendant did not suffer manifest injustice. Accordingly, defendant was not denied a fair trial.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Stephen J. Markman

[1] This Court has repeatedly held that a defendant who is on parole at the time of committing another offense is not "incarcerated" in a state correctional facility and is not afforded the protection of the 180-day rule. *People v Metzler*, 193 Mich App 541, 544; 484 NW2d 695 (1992); *People v Hastings*, 136 Mich App 380, 382; 356 NW2d 645 (1984), rev'd on other grounds 422 Mich 267; 373 NW2d 533 (1985); *People v Rose*, 132 Mich App 656, 658; 347 NW2d 774 (1984).