

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ERVIN HAWTHORNE,

Defendant-Appellant.

UNPUBLISHED

March 29, 2007

No. 265473

Oakland Circuit Court

LC No. 2002-186567-FH

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial, after remand, of his motion to dismiss based on violation of his right to a speedy trial. Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and second-degree criminal sexual conduct (CSC II), MCL 750.520c. We reverse.

Defendant was arrested in January 1993 for physically and sexually assaulting a casual acquaintance. A preliminary examination was scheduled for February 4, 1993, but the complainant failed to appear and the proceedings were not rescheduled until December 2, 1993. Both defendant and his trial counsel failed to appear at the rescheduled examination. Defendant asserts he was incarcerated at the time in the Wayne County Jail, while trial counsel's excuse for his absence is not known.

Upon the expiration of his term in the Wayne County facility in 1994, a search found no writs or detainers for defendant, and he was released. Defendant was subsequently incarcerated in Ohio in November 1995, and was released after six years in November 2001. On November 14, 2001, the prosecutor filed a motion for a writ of habeas corpus,¹ and a preliminary examination was scheduled for September 10, 2002, but was not held until September 26, after the complainant again failed to appear.

On March 4, 2002, defendant filed a motion to discharge his criminal complaint on the grounds that his right to a speedy trial had been violated. Defendant was bound over for trial

¹ Defendant indicates that the prosecutor was later advised that she should have filed a detainer, rather than a writ, to resume proceedings in the case and to seek defendant.

after the preliminary examination, and his trial began on December 9, 2002. After a one-day trial, the jury found defendant guilty of both charges. Defendant appealed, and a panel of this Court affirmed the convictions. *People v Hawthorne*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2004 (Docket No. 248657). The decision of this Court was vacated by our Supreme Court, and the case remanded to the circuit court for a hearing on the four-part balancing test set out in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972), adopted by Michigan courts in *People v Collins*, 388 Mich 680; 202 NW2d 769 (1972), to determine whether a defendant was denied his right to a speedy trial. *People v Hawthorne*, 473 Mich 862 (2005). The trial court found that under *Barker*, defendant had not been denied his right to a speedy trial.

Under both the federal and Michigan constitutions, a defendant has the right to a speedy trial. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999), citing US Const, Am VI; Const 1963, art 1, § 20. The four-part test laid out in *Barker*, *supra*, and rearticulated in *Cain*, *supra*, requires a court to consider “(1) the length of the delay, (2) the reasons for the delay, (3) the defendant’s assertion of the right, and (4) prejudice to the defendant.” *Cain*, *supra* at 112 (citation and quotation marks omitted). A delay of 18 months or more is presumed to be prejudicial and places the burden of rebuttal on the prosecutor. *Id.* (citation omitted).

Accordingly, although the length of the delay is not determinative of a speedy trial claim, a delay is considered to be “presumptively prejudicial” if it is 18 months or more. *People v Lowenstein*, 118 Mich App 475, 487; 325 NW2d 462 (1982). After such a delay, the burden shifts to the prosecutor to prove that defendant was not prejudiced. *Id.* Clearly, the nine-year delay at issue in this case meets the first requirement of *Barker* and creates presumptive prejudice.

The prosecutor argues that the second part of the test, the reason for the delay, is mostly attributable to defendant, particularly that defendant’s failure to appear for his preliminary examination was a primary reason for the delay, and that if defendant was incarcerated at the time as he claims, it was his responsibility to inform Oakland County of his incarceration. However, the prosecutor does not cite any authority for this assertion. Case law suggests that it is the responsibility of the prosecutor to provide some notice to the incarcerated defendant of the status of the proceedings against him. See *People v Bowman*, 442 Mich 424, 425-426; 502 NW2d 192 (1993). Here, the preliminary examination was originally adjourned because of the complainant’s failure to appear. Defendant then failed to appear due to his incarceration. There is no explanation for the absence of some sort of “hold” or *capias* in the LEIN system that would have resulted in defendant being brought before the Oakland Circuit Court upon his release from the Wayne County jail. Information regarding defendant’s status in the judicial system was either not entered in the LEIN system or not entered properly, resulting in defendant’s release from Wayne County after the county’s LEIN check did not reveal any outstanding warrants or detainers. Further, it was not unreasonable for defendant to assume that the case had been dismissed for failure of the victim to appear at the preliminary examination under the circumstances that she had failed to appear at the first scheduled date, and defendant was released from jail twenty-two months after the offense, without any indication that the case was still pending. Defendant was available for trial throughout this period, and throughout his incarceration in Ohio, from November 1995 until the prosecutor finally took action in November 2001. We conclude that the prosecution was more responsible for the delay than defendant.

The third factor the reviewing court must consider is the circumstances of defendant's assertion of the right to a speedy trial. The prosecution asserts, and the circuit court agreed, that defendant's demand for a speedy trial was late and dilatory, coming only after the prosecutor filed its motion for habeas corpus. Defendant counters that this was the most logical point at which he could assert his right because he was previously unaware that charges were still pending against him in Oakland County. In *Cain, supra*, this Court held that the twenty-seven-month delay between the defendant's arrest and trial did not violate her right to a speedy trial in part because she waited eighteen months to assert her right, and the trial was held within nine months of her assertion. *Cain, supra* at 111, 113-114. The Court in *Cain* found that the defendant was responsible for many of the delays in the case, as she had requested various adjournments for interlocutory appeal and filed motions for substitution of counsel as well as several motions in limine. *Id.* at 113. Unlike *Cain*, however, defendant in the instant case did not attempt to procedurally delay the case. He was incarcerated at the time of the adjourned preliminary examination, and never heard about the case again until late 2001, or early 2002, when the prosecutor filed a writ and then a detainer. Defendant promptly asserted his right to a speedy trial when he was served with the writ of habeas corpus and had actual notice that the Oakland County Prosecutor's Office still sought to try him. There is no evidence that he waited to assert the right until he believed the case could be dismissed due to prejudice based on the length of the delay. Therefore, the third factor in the *Barker* test weighs in favor of defendant.

The fourth and final part of the test, whether defendant was prejudiced by the delay, is a two-part inquiry. "Prejudice to [the defendant's] person would take the form of oppressive pretrial incarceration leading to anxiety and concern. Prejudice to his defense might include key witnesses being unavailable. Impairment of defense is the most serious, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *People v Chism*, 390 Mich 104, 114; 211 NW2d 193 (1973).

The trial court concluded that defendant failed to show any concrete prejudice. Defendant asserts that because of the length of the postaccusation delay before trial (9 years), prejudice is presumed,² and the court should have followed *Doggett v United States*, 505 US 647; 112 S Ct 2686; 120 L Ed 2d 520 (1992) (8½ year delay between indictment and arrest), *United States v Brown*, 169 F3d 344 (CA 6, 1999) (5 ½ year delay between arrest and trial), and *United States v Graham*, 128 F3d 372 (CA 6, 1997) (8 year delay between indictment and trial),

² Defendant argues that although he is not required to show prejudice, both his defense and his person were, in fact, prejudiced. Defendant notes that the prosecution offered no explanation or reasonable excuse for failing to bring him to trial, and contends that the nine-year delay severely hampered his defense in that he was deprived of any opportunity to investigate the accusations against him, and that his lengthy incarceration increased his anxiety. Defendant maintains that perhaps the most egregious prejudice is that he, a sixty-five year old, was deprived of the possibility of serving the sentences for the instant offenses concurrently with the sentence for the Ohio conviction. Defendant notes that consecutive sentencing under these circumstances is not mandatory in Michigan. Further, defendant notes that he was not given credit for the seven years he was incarcerated before trial in the instant case (one year in the Wayne County jail and six years in Ohio). Defendant argues that, in effect, he has been forced to serve a minimum sentence of fourteen years when the court determined that a seven-year sentence was appropriate.

all of which found that the delay involved was so long as to create a presumption of prejudice, that the prosecution was unable to persuasively rebut the presumption of prejudice, and that the defendants were thus entitled to relief. We agree.

The United States Supreme Court in *Doggett, supra*, held the defendant's right to a speedy trial violated by the 8 ½ year delay between the defendant's indictment for conspiring to import and distribute cocaine, and his arrest. Applying the *Barker* criteria, the Court noted that

if the accused makes this showing [that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay] the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter enquiry is significant to the speedy trial analysis because, as we discuss below, *the presumption that pretrial delay has prejudiced the accused intensifies over time*. In this case, the extraordinary 8 ½ year lag between Doggett's indictment and arrest clearly suffices to trigger the speedy trial enquiry . . . : [505 US at 651-652. Emphasis added.³]

* * *

[T]he Government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the Government's argument takes it only so far: consideration of prejudice is not limited to the specifically demonstrable, and, as it concedes . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim. [Citations omitted.] *Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown." 407 U.S., at 532, 92 S.Ct., at 2193. And though time can tilt the case against either side, one cannot generally be sure which of them it has prejudiced

³ Regarding the second *Barker* criterion, the *Doggett* Court noted that the record supported the findings of the courts below that the government for six years

made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and, had they done so, they could have found him within minutes. While the Government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug trafficking, it was still findable negligence, and the finding stands. [505 US at 652-653.]

Regarding the third *Barker* criterion, the *Doggett* Court noted that the government conceded that it had no information that the defendant was aware of the indictment prior to his arrest, and the record supported that the defendant did not know of his indictment until then, thus the fact that the defendant asserted his right to speedy trial only on arrest was not to be held against him. [505 US at 653-654.]

more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claims without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

B

This brings us to an enquiry into the role that presumptive prejudice should play in the disposition of Doggett's speedy trial claim. We begin with hypothetical and somewhat easier cases and work our way to this one.

Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down. We attach great weight to such considerations when balancing them against the costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question. Thus, in this case, if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense.

The Government concedes, on the other hand, that Doggett would prevail if he could show that the Government had intentionally held back in its prosecution of him to gain some impermissible advantage at trial. That we cannot doubt. *Barker* stressed that official bad faith in causing delay will be weighed heavily against the government, 407 U.S., at 531, 92 S. Ct. at 2192, and a bad-faith delay the length of this negligent one would present an overwhelming case for dismissal.

Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred, and on the facts before us, it was reversible error.

Barker made it clear that "different weights [are to be] assigned to different reasons" for delay. *Ibid.* Although negligence is obviously to be weighted more lightly than a deliberate intent to harm the accused's defense, *it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.* And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. *Thus, our toleration of such negligence varies inversely with its protractedness,* and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the

state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

To be sure, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice. But even so, the Government's egregious persistence in failing to prosecute Doggett is clearly sufficient. The lag between Doggett's indictment and arrest was 8 ½ years, and he would have faced trial 6 years earlier than he did but for the Government's inexcusable oversights. The portion of the delay attributable to the Government's negligence far exceeds the threshold needed to state a speedy trial claim; indeed, we have called shorter delays "extraordinary." See *Barker, supra*, 407 U.S., at 533, 92 S.Ct., at 2193. When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, see n. 1,⁴ *supra*, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, *e.g.*, 407 U.S., at 534-536, 92 S.Ct. at 2194-2195, nor persuasively rebutted, the defendant is entitled to relief.

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion. [*Doggett*, 505 US at 655–658. Some citations omitted. Emphasis added.]

In *Brown, supra*, on which defendant also relies, the United States Court of Appeals for the Sixth Circuit affirmed on speedy trial grounds the district court's dismissal with prejudice of an indictment charging the defendant with conspiracy and attempted possession with intent to distribute cocaine. Regarding the *Barker* factors, the government conceded that the 5 ½ year delay between accusation and trial was presumptively prejudicial; the Court concluded that the record supported the district court's finding that the government did not exercise reasonable

⁴ Footnote 1 in *Doggett* states:

Depending on the nature of the charges, the lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year. See 2 W. LaFare & J. Israel, *Criminal Procedure* § 18.2, p. 405 (1984); Joseph, *Speedy Trial Rights in Application*, 48 *Ford.L.Rev.* 611, 623, n. 71 (1980) (citing cases). We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry. Cf. Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 *Colum.L.Rev.* 1376, 1384-1385 (1972). [*Doggett*, 505 US 647 at 652, n 1.]

diligence in attempting to locate the defendant and failed to prove that the defendant was actually culpable in causing the delay in his case, and concluded that the defendant would not be penalized for waiting until his arrest for invoking his right to a speedy trial under the circumstances that the government had not presented sufficient proof that the defendant knew that he had been indicted. 169 F3d at 349-350. As to the last *Barker* factor, prejudice to the defendant, the *Brown* Court noted:

[W]hen the government's negligence caused the delay, the need to prove prejudice diminishes as the delay increases. *See Doggett*, 505 U.S. at 657, 112 S.Ct. at 2686.

The Supreme Court has recognized that in some cases, however, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* at 655, 112 S.Ct. 2686. As a result, it is not always necessary for a defendant to pinpoint with specificity how the delay prejudiced his defense. *See id.* at 648, 112 S.Ct. 2686 (finding that an affirmative showing of actual prejudice was not necessary given that the length of delay was six years, which is six times as long as that generally sufficient to trigger judicial review). The amount of prejudice that the defendant must show depends on the reasons for the delay. "While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other criteria . . . it is part of the mix of relevant facts, and its importance increases with the length of the delay." *Id.* at 655-56, 112 S.Ct. 2686.

Similarly, this Court has stated that "[i]f the government has been diligent in its pursuit of a defendant and delay was 'inevitable and wholly justifiable,' a speedy trial claim will generally fail." *United States v. Mundt*, 29 F.3d 233, 236 (6th Cir. 1994) (citation omitted). But if the government has been intentionally dilatory for the purpose of impairing the defendant's defense, a violation will most surely be found. *See id.* However, negligence lies between these two extremes." While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 236-37 (citation omitted). *If the government can persuasively rebut the presumed prejudice, the defendant is not entitled to relief. See Doggett*, 505 U.S. at 658, 112 S.Ct. 2686.

The government relies upon *United States v. White*, 85 F.2d at 276, for the proposition that a delay caused by the government's negligence, as here, is not sufficient to excuse a defendant from demonstrating substantial or actual prejudice. The government also points that Brown did not clearly assert how the delay prejudiced his defense. Brown stated in his motion to dismiss for lack of speedy trial that he had suffered actual prejudice "because his stepbrother, now dead, is unavailable to give exculpatory testimony," but he did not explain precisely what exculpatory evidence his stepbrother could provide.

As to Brown's failure to articulate the specific evidence his stepbrother could have provided were it not for the delay, we adopt the district court's stance that

“such a failure does not preclude finding prejudice given the inordinate delay in this case.” *Doggett*, 505 U.S. at 655, 112 S.Ct. 2686 (finding that the “impairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown’”). Indeed, while the delay in *White* was only six-and-one-half months, the government in this case is responsible for a pretrial delay of more than sixty months. Given the extraordinary delay in this case combined with the fact that the delay was attributable to the government’s negligence in pursuing Brown, we conclude that the government did not sufficiently rebut the presumption that its delay did not prejudice Brown’s case. *See Mundt*, 29 F.3d at 236 (stating that when a defendant is unable to articulate the harm caused by the delay, the reason for the delay will be used to determine whether the defendant was presumptively prejudiced). [169 F3d at 350-351.]

Defendant in the instant case also relies on *Graham, supra*, in which the United States Court of Appeals for the Sixth Circuit held the defendant’s right to speedy trial violated where there was a delay of almost 8 years between the defendant’s indictment for conspiracy to commit a RICO violation and his trial. As in *Doggett* and *Brown*, the *Graham* Court on the first *Barker* criterion found the nearly 8-year delay presumptively prejudicial, noting that the delay was “so extraordinary that it cannot be seriously contended that it was not presumptively prejudicial.” 128 F3d at 374. On the second *Barker* criterion, the *Graham* Court found that the defendants were responsible for a delay of several months of the 8 years, but that the blame for the delay otherwise fell on the government and district court. 128 F3d at 374-375. The third *Barker* criterion weighed in the defendants’ favor, as they had asserted their right to speedy trial repeatedly and during the pre-trial period. Regarding the prejudice criterion, the *Graham* Court noted that “affirmative proof of particularized prejudice is not essential to every speedy trial claim,” 128 F3d at 375, quoting *Doggett*, 505 US at 655. The Court noted that the defendants asserted that several police officers could not recall details about the crime scene, the coroner who performed an autopsy was dead, the officer who interviewed the prosecution’s “star” witness testified his notes no longer existed, and one of the crime victims was in a nursing home suffering from dementia. 128 F3d at 375-376. The Court continued:

It must be noted that the defendants do not comment on how failing memory on the part of what are largely prosecution witnesses demonstrates actual prejudice to their case. However, the impression left by the defendants’ briefs is that the dimmed memory interfered with effective cross-examination. One of the fundamental elements of a fair trial is the right of the accused to cross-examine the witnesses against him. . . . Therefore, to the extent that memories were impaired by time, the defense was clearly prejudiced by a lessened ability to probe the details of the witnesses’ recollection.

Further, the Supreme Court has instructed us that the inability of the accused to pinpoint how exactly he was prejudiced by delay is not fatal to his claim that his speedy trial right was violated. *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693. Where it is clear that the court and the government were responsible for the extraordinary delay, and it is clear that the delay was caused by negligence rather

than bad faith, prejudice can be presumed. *Id.* The strength of that presumption grows as the length of the delay extends. *Id.* [128 F3d at 375-376.]

In the instant case, the postaccusation delay of 9 years exceeded the delays in *Doggett*, *Brown* and *Graham*. As in those cases and as we concluded above, the delay in the instant case was not attributable to defendant, and the prosecution did not show that it exercised due diligence in locating defendant. As in *Doggett*, *supra*, defendant in the instant case was unaware that charges remained pending against him until the prosecutor filed a writ, at which time he asserted his right to a speedy trial.

We conclude that the trial court erred in its application of the prejudice criterion of *Barker*. Defendant in the instant case did assert various ways in which he was prejudiced. See n 2, *supra*. We conclude that even if these assertions of prejudice are less than particularized, “consideration of prejudice is not limited to the specifically demonstrable,” and “affirmative proof of particularized prejudice is not essential.” *Doggett*, 505 US at 654. Because of the extraordinary delay present in this case, and because the presumptive prejudice established was not persuasively rebutted by the prosecution, we conclude that defendant’s right to a speedy trial was violated and defendant is entitled to relief. *Doggett*, 505 US at 658; *Brown*, 169 F3d at 350-351; *Graham*, 128 F3d at 375-376.

We reverse the trial court’s denial of defendant’s motion to dismiss on speedy trial grounds and vacate defendant’s convictions. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White