

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WILLIAM CANTER,

Defendant-Appellant.

UNPUBLISHED

May 11, 2010

No. 290318

Oakland Circuit Court

LC No. 2007-213830-FH

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for possession with intent to deliver less than 50 grams of cocaine. MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a second offense habitual offender, MCL 769.10, to 1 ½ to 30 years in prison for the possession with intent to deliver less than 50 grams of cocaine conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's first argues that a 20-month delay from the time of his arrest until his trial violated his Fifth Amendment due process rights.

The charges against a defendant may be dismissed on due process grounds for prearrest delay where the delay has resulted in actual and substantial prejudice to the defendant's right to a fair trial and where the prosecution intended to gain a tactical advantage. *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009). Substantial prejudice is prejudice that meaningfully impairs the defendant's ability to defend against the charge in a manner that the outcome of the proceedings was likely affected. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). To determine whether a defendant's due process rights were violated, the court must balance the defendant's interest in a prompt adjudication of the case against the prosecution's interest in delaying the prosecution. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Defendant first bears the burden of coming forward with evidence of prejudice resulting from the delay. *Id.* "[T]he guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process." *Patton*, 285 Mich App at 236, quoting *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979). If the defendant meets his burden of establishing prejudice, then the prosecution must prove that the reasons for the delay were sufficient to justify the prejudice. *Cain*, 238 Mich App at 109.

Defendant has not come forward with any assertions regarding how the delay in this case prejudiced him. Defendant was in custody with the Department of Corrections (the Department) and knew of the charges in Oakland County. He has not suggested that the outcome of the proceedings would have been different if he was brought to trial sooner or that the prosecution intended to delay his trial to receive a tactical advantage. Defendant has failed to meet his burden and has not established actual and substantial prejudice. Defendant was not denied due process.

Defendant additionally argues that a 20-month delay from the time of his arrest until his trial violated his Sixth Amendment right to a speedy trial.

Defendant preserved this issue by asserting his right in the lower court. *Cain*, 238 Mich App at 111. Whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Walker*, 276 Mich App 528, 540; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). The trial court's factual findings are reviewed for clear error, while the constitutional issue is a question of law that is reviewed de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

The United States and Michigan Constitutions guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; *Williams*, 475 Mich at 261. In determining whether a defendant has been denied this right, this Court balances four factors: "(1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Williams*, 475 Mich at 261-262. The fourth factor is critical to the analysis. *Cain*, 238 Mich App at 112. If the total delay is under 18 months, then the burden is on the defendant to show that he suffered prejudice. *Id.* If the trial is delayed 18 months or more, the burden is on the prosecution to rebut a presumption of prejudice to the defendant. *Id.* The delay period begins with the date of the defendant's arrest until the time that trial commences. *Williams*, 475 Mich at 261.

Defendant was arrested for the charged offense on March 23, 2007, and his trial date was not until November 14, 2008. This resulted in an approximately 20 month delay of trial, and thus, the delay was presumptively prejudicial and the burden is on the prosecution to rebut the presumption. There are not a set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim. *Williams*, 475 Mich at 261. However, since this factor weighs in favor of defendant, this Court must examine the remaining factors. *Id.* at 262.

The reason for delay in this case is at the heart of the appeal. This Court must examine whether each period of delay is attributable to the defendant or the prosecution in assessing the reasons for the delay. *Walker*, 276 Mich App at 541-542. Defendant was arrested for the charged offense on March 23, 2007. Although the record is silent regarding when defendant was later arrested on an unrelated charge, defendant's affidavit states that he was incarcerated in the county jail as of May 4, 2007, and he was sentenced on the unrelated conviction on September 12, 2007. Defendant remained at the county jail until October 19, 2007, when he was transferred to the Department. Two hundred and ten days passed between defendant's March 23, 2007, arrest and his October 19, 2007, transfer to the Department. During this time, defendant was out on bail until he was arrested and placed in the county jail on account of his own behavior in an unrelated criminal matter, and therefore, that period of time is chargeable to defendant. See *People v Waclawski*, 286 Mich App 634, 667; ___ NW2d ___ (2009). From October 19, 2007,

until September 24, 2008, when defendant was transferred to Oakland County, 340 days passed without the Department providing written notice to the prosecution, as required under MCL 780.131. From September 24, 2008, until defendant's trial on November 14, 2008, an additional 51 days passed that are chargeable to the prosecution.

Regarding the 340 days defendant was incarcerated, defendant asserts that the prosecution was verbally told about defendant's incarceration within the Department on at least four separate occasions, while the prosecution asserts that from the time of the general information issuance on April 10, 2007, until September 2008, when it received a phone call from the Department, it was unaware of defendant's location. The prosecution also argues that because it never received proper written notice from the Department, as required under MCL 780.131,¹ and because it appears from the exhibits provided by defendant that defendant purposefully did not seek to contact the prosecution directly, the time delay should not be charged to it. Defendant asserts that while he did not directly seek to contact the prosecution, he informed his attorneys and personnel within the Department that he believed charges were pending against him in Oakland County. Defendant claims his attorneys and the Department assured him that no charges were pending and MCL 780.131 would prohibit any such charges. "Unexplained delays are charged against the prosecution." *Walker*, 276 Mich App at 542. Because the prosecution has offered no reason regarding what caused the delay in notification, the 340 days are charged to it. Accordingly, of the 601 days between March 23, 2007, defendant's arrest date, and November 14, 2008, defendant's trial date, 391 days are chargeable to the prosecution and 210 days are chargeable to defendant. Because the burden is on the prosecution to rebut a presumption of prejudice, this factor weighs in favor of defendant.

Defendant appears to have first asserted the right to a speedy trial in his October 28, 2008, motion to dismiss. However, a letter from defendant's attorney reveals that as early as January 14, 2008, defendant was aware of the possibility of asserting this right. By January 2008, approximately eight months had passed and, if defendant had asserted his right at that point, the burden would have been on defendant to establish prejudice. However, defendant waited more than eight months—until October 2008—to assert his right to a speedy trial. This delay shifted the burden to the prosecution and came about a month after defendant appeared at his September 25, 2008, arraignment hearing. Additionally, trial commenced within 17 days of defendant's assertion of his right to a speedy trial. Thus, the circumstances surrounding defendant's assertion of his right weigh in favor of the prosecution. *Cain*, 238 Mich App at 113-114.

There are two types of prejudice implicated in claims under the right to a speedy trial: (1) prejudice to the person and (2) prejudice to the defense. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). "Prejudice to the defense is the more serious concern, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.""

¹ MCL 780.131 is Michigan's 180-day statutory right to a speedy trial. However, defendant is entitled to no relief under the statute because the statute requires written notice to trigger the 180-day period, and written notice was never provided. See *People v Williams*, 475 Mich 245, 254-256; 716 NW2d 208 (2006).

Williams, 475 Mich at 264, quoting *People v Chism*, 390 Mich 104, 114; 211 NW2d 193 (1973), quoting *Barker v Wingo*, 407 US 514, 532; 92 S Ct 2182; 33 L Ed 2d 101 (1972). Defendant has failed to establish that any prejudice resulted from the delay of his trial. Defendant does not assert any prejudice to his defense resulted from the delay, and because defendant took the stand on his own behalf, it appears he was able to adequately prepare his defense. Defendant argues that the Department's negligence in failing to report his incarceration to the prosecution caused defendant to lose credit for time served in prison. This suggests that defendant is claiming prejudice to his person, because he will now endure additional time in prison. However, it is not prejudicial for defendant to serve separate incarceration terms when he was found guilty of separate crimes. Because prejudice to defendant's defense did not occur, this factor weighs heavily against defendant. *Cain*, 238 Mich App at 114.

Although a 20-month delay is presumptively prejudicial to defendant, and much of the delay is attributable to the prosecution, defendant did not assert his right until after the burden of prejudice was shifted onto the prosecution and defendant's ability to prepare his defense was not prejudiced. We conclude that defendant's right to a speedy trial was not violated.

Defendant also argues that there was insufficient evidence for a reasonable trier of fact to convict him of possession with intent to deliver less than 50 grams of cocaine. Specifically, defendant contends that there was no evidence that he intended to deliver the cocaine to someone else.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). In reviewing the sufficiency of the evidence, this Court should not interfere with the fact finder's role of determining the weight of the evidence or the credibility of the witnesses. *Id.*

Possession with intent to deliver can be established by both direct and circumstantial evidence and reasonable inferences arising from that evidence. *Id.* at 526.

Just as proof of actual possession of narcotics is not necessary to prove possession, actual delivery of narcotics is not required to prove intent to deliver. Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest. [*Id.* at 524.]

In looking at the evidence in the light most favorable to the prosecution, the evidence is sufficient to convict defendant of possession with intent to deliver less than 50 grams of cocaine. Defendant argues that he was unaware of the quantity of cocaine purchased and his lack of knowledge negates there being sufficient evidence to support the intent to deliver conviction. However, the prosecution does not need to prove that defendant was aware of the quantity of cocaine to establish intent to deliver. See *People v Marion*, 250 Mich App 446, 450-451; 647 NW2d 521 (2002). Intent to deliver can be inferred from the surrounding circumstances and reasonable inferences, including the quantity of cocaine in the defendant's possession and the packaging of the cocaine. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

Defendant admitted that earlier in the day he had driven to Detroit with Julie Dennis to purchase crack cocaine. When Deputy Patrick Bilbey requested to see a vehicle registration and proof of insurance, defendant opened the glove compartment and immediately tried to conceal a black bag containing crack cocaine from Bilbey's view. Right after that, defendant engaged in a "potty dance" and pretended to need to use the bathroom in an attempt to get rid of the black bag containing crack cocaine. Bilbey immediately found the black bag containing crack cocaine behind the dumpster, inside a tire, after allowing defendant to go behind the dumpster to use the bathroom. The black bag contained 24 individually wrapped crack cocaine rocks. An additional three crack cocaine rocks were found on defendant's person. Detective Michael Pankey, the expert in this case, opined that intent to deliver could be inferred from the quantity and packaging of the crack cocaine rocks. Thus, the prosecution offered sufficient evidence for a rational trier of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt. Even though defendant submitted contradictory evidence, it was for the trier of fact to determine the credibility of the proofs presented. *People v Lemmon*, 456 Mich 625, 642-43; 576 NW2d 129 (1998).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly