

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD ONEIL HARVEY,

Defendant-Appellant.

UNPUBLISHED
November 20, 2012

No. 306303
Genesee Circuit Court
LC No. 08-023862-FC

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, carrying a concealed weapon, MCL 750.227, aggravated stalking, MCL 750.411i, entry without breaking with intent to commit a felony, MCL 750.111, felon in possession of a firearm, MCL 750.224f, and possession of a firearm in the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to serve 58 months to 20 years' imprisonment for the assault conviction; one year in jail for each of the convictions for carrying a concealed weapon, aggravated stalking, entering without breaking, and felon in possession of a firearm; and two years' imprisonment for the felony firearm conviction. He appeals as of right. We affirm his convictions but remand for resentencing.

I. BASIC FACTS

The victim, Yioda Boureima, was married to defendant's ex-wife, Katrina Harvey, at the time of the trial. Harvey had been previously married to defendant for three years. Shortly after the divorce, she obtained a PPO against defendant, which prohibited defendant from assaulting, threatening, and stalking her. On the day of the shooting, Boureima and Harvey were sitting in the garage talking and reading newspapers. Defendant arrived at the home at approximately 2:00 p.m., demanding his weed wacker. Harvey told defendant there was a PPO against him and he was not supposed to be there. Defendant left but later called Harvey; he was upset and using obscenities. Harvey called the police and was told that defendant already called them and that the police would come with defendant on Tuesday to retrieve his belongings from Harvey's home. However, defendant returned to Harvey's later that same day and confronted Boureima and Harvey in the garage, pointing at Harvey's nose, hitting her in the nose, and swearing at her. Defendant and Boureima pulled their guns on one another. Boureima testified that defendant

shot at him first and he simply returned fire; defendant argued that Boureima was the first to shoot. Boureima was shot six times; defendant was not shot. Shell casings were found throughout the garage.

Defendant was convicted and sentenced as outlined above. He appeals as of right.¹

II. SPEEDY TRIAL

Defendant argues he was denied his constitutional right to a speedy trial and that his conviction should be vacated. We disagree. Whether defendant was denied his right to a speedy trial is a mixed question of fact and law. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). “The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo.” *Id.*

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). The right is also protected by statute and court rule. MCL 768.1; MCR 6.004(A). In determining whether a defendant has been denied his constitutional right to a speedy trial, a 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. *Williams*, 475 Mich at 261-262.

A. LENGTH OF THE DELAY

The relevant period for determining whether a defendant was denied a speedy trial begins on the date of the defendant’s arrest. *Williams*, 475 Mich at 261. However, “there is no set number of days between a defendant’s arrest and trial that is determinative of a speedy trial claim.” *Waclawski*, 286 Mich App at 665. The defendant must prove prejudice when the delay is less than 18 months. *Id.* A delay of more than 18 months, however, is presumptively prejudicial to the defendant and shifts the burden of proving lack of prejudice to the prosecution. *Id.* “The establishment of a 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 Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997) quoting *People v Wickham*, 200 Mich App. 106, 110; 503 NW2d 701 (1993).

Defendant was arrested on or about August 5, 2008, and his trial commenced on April 7, 2011. The length of delay was approximately 32 months. Thus, the delay is presumptively

¹ Defendant also moved this Court for remand, arguing that the trial court miscalculated the prior record variables (PRV) and that he was entitled to be resentenced. Defendant further argued that he was denied the right to a speedy trial when there was a 32-month delay between his arrest and the beginning of his trial. On March 15, 2012, this Court denied defendant’s motion “for failure to persuade the Court of the necessity of a remand at this time.” *People v Clifford Oneil Harvey*, unpublished order of the court of Appeals, entered March 15, 2012 (Docket No. 306303).

prejudicial and triggers inquiry into the other factors. As a result, the prosecution must rebut the presumption that defendant was not prejudiced as a result of the delay.

B. REASON FOR THE DELAY

“In assessing the reasons for delay, the court must examine whether each period of delay is attributable to the prosecutor or to the defendant.” *People v Walker*, 276 Mich App 528, 541-542; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). Defendant argues that 806 of the 974-day delay cannot be attributable to defendant. A review of the record reveals otherwise; in fact quite the opposite:

(1). REVIEW OF DELAYS

On August 20, 2008, the preliminary examination was adjourned at defense counsel’s request because further investigation was needed.

On September 24, 2008, the preliminary examination was adjourned at defendant’s request because he wanted to take a polygraph examination. The preliminary examination took place on November 4, 2008.

On December 5, 2008, defendant filed a motion requesting that the court:

- (1) hold an evidentiary hearing to review the sufficiency of the complaint, affidavit and warrant in the district court;
- (2) allow defendant to represent himself;
- (3) restrain the Genesee County Jail from denying him access to his legal books and law materials;
- (4) issue subpoenas for 911 telephone records;
- (5) provide defendant a copy of the district court file;
- (6) reduce bond;
- (7) rule on his motion for ineffective assistance of counsel.

Defendant’s motions were heard on December 29, 2008, and January 12, 2009. The trial court addressed defendant’s motion regarding self-representation or to act as co-counsel with his attorney, spending a great deal of time and exercising an extraordinary amount of patience explaining to defendant what would be expected of him if he represented himself. Defendant was unclear about whether he wanted his attorney to represent him, but he was very clear that he wanted his law books. The trial court suggested that they adjourn for two weeks so defense counsel and defendant could meet and defendant could make a decision about whether he wanted his attorney to represent him.

On January 12, 2009, defendant requested another week to decide what he wanted to do about his attorney. The trial court attempted to assist defendant in getting the legal information he requested.

On January 20, 2009, defendant's attorney was allowed to withdraw. The trial court advised defendant that he could represent himself but if at any time he decided he no longer wanted to represent himself, all he had to do was tell the trial court. Plaintiff asked about the pretrial and trial dates that were a week away and the trial court stated it was not going to press defendant into a quick decision about trial counsel and would get new dates for defendant.

Between January 2009 and March 2009, defendant filed a variety of requests, including:

- (1) a letter to the clerk on January 23, 2009, requesting a copy of the district court file;
- (2) a letter to the trial court dated February 4, 2009, requesting a speedy trial;
- (3) a motion to quash, strike information, and suppress evidence dated February 14, 2009;
- (4) a notice of hearing dated February 17, 2009;
- (5) a letter to the trial court dated February 25, 2009, alleging that the judge was "not a man of his word;"
- (6) a letter dated March 2, 2009, informing the trial court of a filing with United States District Court;
- (7) a letter to the clerk received on March 3, 2009, requesting an evidentiary hearing and show cause for denial of law material.

On March 11, 2009, the trial court advised defendant that it appeared that he may have a defensible case with respect to the district court proceedings, but that defendant was bogged down with other issues that were probably "losers." The trial court offered defendant appointed counsel and defendant acquiesced. The trial court stated it would not rule on the motions until defendant's attorney had an opportunity to review them. The trial court ordered that the transcripts from district court be available to defendant no later than April 17, 2009. That same day, defendant provided a letter to the court clerk requesting a filing of his application and complaint for habeas corpus.

On April 20, 2009, the trial court advised the parties that the district court transcripts were received and asked defense counsel how much time he needed to file motions related to the district court proceedings. Defense counsel requested three weeks. The trial court set a cut-off date to file the motions by May 15, 2009 and the motions would be heard by May 26, 2009.

On May 29, 2009, the trial court was ready to go forward on defendant's motions but defendant requested more time. He did not have the transcript from the arraignment in the district court and felt he needed it, and he had just gotten out of "the hole" and was not prepared.

Defense counsel requested that the motions be adjourned without a date. Counsel hoped to secure an expert who might be able to testify as to who shot first by listening to a 911 audio. The June 9, 2009 pretrial and June 10, 2009 trial date were cancelled.

On June 3, 2009, the trial court denied defendant's motion to dismiss.

On July 29, 2009, the trial court granted defendant's motion to adjourn the trial for preparation of the district court arraignment transcript.

On October 7, 2009, defendant filed a motion with numerous requests including: show cause, complaint for writ of habeas corpus, request for documents, "Ginther Strickland hearings," "rescission" of signature and remand to district court, fraud upon the court, dismissal of prosecution and other sundries petitions.

On October 19, 2009, defendant requested that the trial court rule on his motions. The trial court ruled on any motions for which defendant requested a ruling. The remainder of defendant's motions were adjourned without date until it was the appropriate time to have them noticed up. There was some confusion about subpoenas defendant wished to have issued, and the trial court thought defendant meant them for trial. Defendant stated, "[n]ot the trial. Hearing. . . . Why you all tryin' to push the trial, man?" The trial court did not set a new date until either more of defendant's motions were requested to be heard or there was a request for a trial date. Defense counsel noted his frustration with his client's actions: "actually, from a defense standpoint, it's a pretty good case to try . . . I mean, at the risk of angering Mr. Harvey, I wish this thing would get to trial." The trial court also noted:

You know, as an aside, might I just mention, that there are legitimate defensible positions in this case. There are issues that I have brought to light, frankly speaking, having been asked to read the preliminary examination, that seriously calls into question who it was that shot first in this scenario.

I really don't know why so much time, frankly, is being spent on these ancillary issues.

There is a legitimate argument to be made, in my humble opinion, that this man may have been responding to being shot at, rather than shooting first.

It mystifies me that here we are, months into this, and we're worrying about what happened at the District Court arraignment; when the preliminary examination transcript actually could be argued to support Mr. Harvey's position.

On December 4, 2009, the trial court set January 4, 2010 as a cut-off date for motions to be filed and heard, January 11, 2010 as the final pretrial, and January 13, 2010 as the trial date. The trial court specifically stated in its order that it was setting these dates "[i]n order to prevent this matter from lagging any further." The trial court subsequently denied defendant's motion to quash. Defendant wanted a polygraph, and the trial court gave the parties until March 15, 2010 to resolve the issue of whether a polygraph could be done.

On May 4, 2010, the trial court addressed plaintiff's notice to admit MRE 404(b) evidence. Defense counsel stated he would be objecting to the admission of this evidence. Defendant stated he wanted to place an objection on the record for a speedy trial. Defendant stated, "speedy trial is necessary. This is the eighth prosecutor that's had this case. The prosecution is searching in a haystack."

On July 26, 2010, defense counsel filed a motion with regard to the MRE 404(b) evidence and a motion to appoint an expert witness on behalf of defendant. Defendant's motion for exclusion was granted at an August 9, 2010, hearing. At that hearing, defendant stated, "We're at two years now, your Honor." To which the trial court responded, "I appreciate that, Mr. Harvey. But, you have to remember, it was a guy named Clifford Harvey that brought about many of these delays."

On January 14, 2011, defendant filed numerous motions and the January 20, 2011 trial date was adjourned to hear defendant's motions. On January 24, 2011, the trial court denied three of defendant's motions. But because the victim and one of the witnesses were going to be out of the country for several months, the trial court set a date for trial after the victim returned and reduced defendant's bond from \$100,000 to \$25,000.

On February 24, 2011, the trial court denied defendant's motion for dismissal based on violation of his constitutional right to a speedy trial. The trial court found that "virtually every delay has been occasioned by or been the result of requests by Defendant."

(2). SUMMARY

As can be seen by the foregoing, the 32-month delay between the date of defendant's arrest and the trial can almost exclusively be attributed to defendant. While the delay occasioned by the victim's absence from the country for several months may be attributable to the prosecution, it is entitled to be viewed in a "neutral tint" and should be "assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Williams*, 475 Mich at 263. This factor weighs heavily against a finding that defendant was denied his right to a speedy trial.

C. ASSERTION OF THE RIGHT TO A SPEEDY TRIAL

Defendant raised the issue of a speedy trial in open court on February 4, 2009, six months after his arraignment, but a formal motion was not filed. It was not until April 1, 2010, that defendant filed a motion to dismiss, alleging that his right to a speedy trial had been violated. This was 20 months after his arraignment in district court. "Defendant's failure to assert timely his right in this case weighs against a finding that he was denied a speedy trial." *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993); *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Therefore, this factor weighs against a finding that defendant's right to a speedy trial was violated.

D. PREJUDICE

A defendant may experience prejudice to his person and prejudice to his defense while awaiting trial. *Williams*, 475 Mich at 264. Prejudice to the person results when there is

“oppressive pretrial incarceration leading to anxiety and concern.” *People v Collins*, 388 Mich 680, 694; 202 NW2d 769 (1972). Prejudice to the defense results when the defense is prejudiced by delay, usually occurring when key witnesses become unavailable or cannot accurately recall events of the distant past. *Barker v Wingo*, 407 US 514, 532; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *Collins*, 388 Mich at 694. “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.” *Williams*, 475 Mich at 264 (internal quotations omitted). However, “[g]eneral allegations of prejudice are insufficient to establish that a defendant was denied the right to a speedy trial.” *Walker*, 276 Mich App at 544-545.

Defendant does not argue that he suffered prejudice, either to his person or to his defense, as the result of the delay. Defendant suffered prejudice to his person because he was incarcerated throughout the 32-month delay; however, the delay in defendant’s trial was in large part attributable to his motions and requests for adjournments. In fact, when the delay in defendant’s trial was caused by the fact that witnesses were unavailable for several months, and not due to delays occasioned by defendant, the trial court reduced defendant’s bond from \$100,000 to \$25,000 to reduce this potential prejudice. Although a 32-month delay is presumptively prejudicial to defendant, there is no basis for finding that defendant was prejudiced by the delays when the delays were primarily intended to accommodate defense requests for additional time to file motions and to allow substitute counsel an opportunity to become familiar with the case and prepare for trial.

E. CONCLUSION

Weighing and balancing the four factors set forth in *Williams*, 475 Mich at 261, we find that defendant was not denied his constitutional right to a speedy trial. The record plainly demonstrates that the delays were primarily attributable to defendant, that defendant did not file a motion alleging that his right to a speedy trial was violated until 20 months had passed since the date of his arraignment in district court, and that defendant was not prejudiced by the delay. We further note that the trial court in this case was thorough, meticulous, and conscientious in his interactions with defendant and in trying to move this case forward.

II. SENTENCING GUIDELINES

Defendant argues that the trial court erred when it scored his prior convictions under the Michigan Sentencing Guidelines. A defendant may preserve an objection to the scoring of an offense variable by objecting to the scoring at sentencing or challenging the scoring in a proper motion for resentencing or a proper motion to remand. MCR 6.429(C); MCL 769.34(10); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Defendant filed a timely motion for remand that was denied by this Court², and thus his challenge to the sentencing guidelines is preserved for this Court’s review. We review for clear error the factual findings

²*People v Clifford Oneil Harvey*, unpublished order of the Court of Appeals, issued March 15, 2012 (Docket No. 306303).

underlying a trial court's decision to score a particular variable. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant argues, and plaintiff concedes, that the trial court erred when it scored his prior convictions under the Michigan Sentencing Guidelines. The parties agree that PRV 1 should have been scored at 25 points for one prior high severity conviction, rather than 50 points for two such convictions, and PRV 2 should have been scored at five points for one low severity prior conviction, rather than zero. The resulting guidelines range would change from 43 to 76 months to 38 to 76 months. Because defendant is a habitual offender, third offense, the top of the guidelines ranges was increased by 50 percent. MCL 777.21(3)(b). Therefore, defendant's guidelines should be reduced from 43 to 114 months to 38 to 114 months.

The change in guidelines range entitles defendant to be resentenced. As the Michigan Supreme Court stated in *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010):

The first sentence of MCL 769.34(10) governs when the Court shall or shall not remand for resentencing: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and *shall not remand* for resentencing *absent an error in scoring the sentencing guidelines or inaccurate information* relied upon in determining the defendant's sentence." . . .The clear meaning of this sentence is that the Court shall not remand for resentencing *unless* there was either an error in scoring or defendant's sentence was based on inaccurate information. . . .Conversely, this means that the Court is required to remand whenever one of these two circumstances is present . . . Thus, the Court may not ignore the two criteria for when a case should be remanded merely because the sentence is within the appropriate guidelines range. When the defendant's sentence is based on an *error in scoring* or *based on inaccurate information*, a remand for resentencing is required.

The *Jackson* Court noted in a footnote: "We emphasize that this does not mean that the trial court is required to change the sentence on remand. However, a remand to the trial court is required in these circumstances so that the issue of resentencing can be considered by the trial court in light of the new information." *Jackson*, 487 Mich at 792 n 24 (citation omitted). Accordingly, we remand this case to the trial court for resentencing based on the corrected guidelines range.

The trial court sentenced defendant to a term of 58 months to 20 years for his conviction for assault with intent to do great bodily harm. Therefore, his sentence was at the lower end of the guidelines, and it is conceivable that the trial court might further reduce defendant's sentence based on the errors in scoring PRV 1 and PRV 2. This is especially true in light of the trial court's statement at sentencing: "So, Mr. Harvey, I didn't really go to the low end of the Guidelines, I didn't really go to the high end of the Guidelines. I went lower rather than higher."

Affirmed and remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio