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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4120-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MEGAN JEBARA,

Defendant-Appellant.

Argued October 24, 2017 – Decided January 16, 2018

Before Judges Fasciale, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Municipal Appeal No. 14-046.

Jaclyn DeMais argued the cause for appellant (Greenberg Traurig, LLP, attorneys; Jaclyn DeMais, on the brief).

Erin Smith Wisloff, Supervising Assistant Prosecutor, argued the cause for respondent (Fredric M. Knapp, Morris County Prosecutor, attorney; Erin Smith Wisloff, on the brief).

PER CURIAM

Defendant Megan Jebara was arrested on November 27, 2012, and charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50;

reckless driving, N.J.S.A. 39:4-96; driving while unlicensed, N.J.S.A. 39:3-10; and failure to notify of an address change, N.J.S.A. 39:3-36. She appeals her October 30, 2015 conviction for DWI and driving while unlicensed,[1] after a trial de novo in the Law Division, arguing:

> POINT I
>
> THE UNREASONABLE DELAY BETWEEN THE DATE OF ARREST AND THE DATE OF CONVICTION VIOLATED [DEFENDANT'S] RIGHT TO A SPEEDY TRIAL, AND THE LAW DIVISION'S DECISION IS BASED ON A MISAPPLICATION OF THE LAW AND NOT SUPPORTED BY THE RECORD.
>
> A. LENGTH OF DELAY.
>
> B. REASON FOR THE DELAY.
>
> C. ASSERTION OF THE RIGHT.
>
> D. PREJUDICE.
>
> POINT II
>
> THE ALCOTEST RESULTS SHOULD HAVE BEEN SUPPRESSED BECAUSE THE STATE FAILED TO ESTABLISH THAT OFFICER TONGRING SATISFIED THE TWENTY-MINUTE OBSERVATION PERIOD.
>
> POINT III
>
> THE STATE FAILED TO PROVE [DEFENDANT'S] GUILT BEYOND A RESONABLE DOUBT BASED ON THE OBSERVATION STANDARD.

[1] The Law Division judge found defendant not guilty of reckless driving. The municipal court judge found defendant not guilty of failing to notify of an address change.

We reject the arguments in Point I and Point II, and affirm substantially for the reasons set forth by the Law Division judge in his comprehensive review of the proofs relating to the officer's observation of defendant during the twenty-minute period utilizing a phone to mark the time, and the observations of defendant's physical condition.

We also conclude defendant's right to a speedy trial was not violated. Defendant raised the speedy-trial issue before the Law Division after the municipal court denied her motion to dismiss on July 2, 2014. The Law Division judge considered "the record" and a procedural timetable developed by the municipal court judge after a remand for that purpose and found the initial delay was caused by a transfer of the case on April 5, 2013, from one municipal court to another. He also concluded from his review:

> On May 1st, the case was adjourned at the request of . . . defendant's attorney. Now I presume, by that point, discovery [had] been exchanged. From November until May 1st, when the case was adjourned, that adjournment happened at the request of . . . defendant's attorney. There's nothing to indicate in the record that the State was not ready, willing, and able to proceed on that date. It was adjourned.

The judge also noted defendant retained new counsel on May 29, 2013, and defendant requested an adjournment of a June 5, 2013 court date. He continued:

> July 16th the matter was adjourned by the court due to the officer -- one of the officers sustaining an injury which precluded him from coming to court. That would be a reasonable adjournment if . . . defendant was injured. I would expect the [m]unicipal [c]ourt judge to adjourn it for that basis or if their expert or anybody, a witness on their behalf. If they were injured and had proof of that, I would have no issue with that.
>
> [On] September 3rd, 2013, the officer was unavailable. . . . That one there I would have to say is the first one that is a question, in my view, as to why that officer was not available.

The judge acknowledged trial started on October 29, 2013, and thereafter on

> November 14th, 2013, the transcript [wa]s ordered by the attorney for . . . defendant after a bunch of motions were made at the first trial date, and that takes a long time because . . . on December 17th, when the case was to resume, of 2014,[2] the attorney was still not in receipt of the transcripts and he, again, requested an adjournment. Again, not the fault of the attorney. It was just not done, but not the fault of the State either. January 8, 2014, the transcript was not ready, adjourned at the request of the attorney. Look it, this is one -- two months have gone by waiting for the transcripts.

The judge found "excusable" an adjournment on February 24 due to an officer's "mandatory training." He followed, "Again, for the last two months, three months almost, that the case was

[2] The correct year is obviously 2013.

adjourned by . . . defendant. There's no indication that the State's witnesses were not available. They didn't complain about it."

Continuing, the judge found a special session on March 14, 2014, was adjourned by the court — not the State — "without further explanation." Proceedings were again adjourned — with defendant's consent — on April 14, 2014, when the prosecutor took ill and, again, on June 2, 2014, because the prosecutor was in Tax Court which the judge remarked "is an upper court, equivalent to the Superior Court." Concluding, the judge observed:

> July 2nd, 2014, the special session continued, finished, and a decision was rendered by the court on September 9th. The delay between the July 2nd completion of the trial and the decision of the judge, again, what happened in there? Defense counsel asked to submit a written submission. It's unclear from either party when that submission was submitted to the judge, but clearly that also contributed to the delay in the judge's decision, waiting for the defendant's brief and the prosecutor's brief, I presume, if he submitted one.

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and imposed on the states by the Due Process Clause of the Fourteenth Amendment." State v. Tsetsekas, 411 N.J. Super. 1, 8 (App. Div. 2009) (citing Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967)). "The constitutional right . . . attaches upon defendant's arrest."

Ibid. (alteration in the original) (quoting State v. Fulford, 349 N.J. Super. 183, 190 (App. Div. 2002)). Since it is the State's duty to promptly bring a case to trial, "[a]s a matter of fundamental fairness," the State must avoid "excessive delay in completing a prosecution," or risk violating "defendant's constitutional right to speedy trial." Ibid.

The four-part test to determine when a violation of a defendant's speedy-trial rights contravenes due process was announced in Barker v. Wingo, 407 U.S. 514, 530-33 (1972); that test was adopted by our Supreme Court in State v. Szima, 70 N.J. 196, 200-01 (1976). The test requires "[c]ourts [to] consider and balance the '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" Tsetsekas, 411 N.J. Super. at 8 (third alteration in the original) (quoting Barker, 407 U.S. at 530). "No single factor is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." Id. at 10 (citing Barker, 407 U.S. at 533). Courts are required to analyze each interrelated factor "in light of the relevant circumstances of each particular case." Ibid.

"These four factors are . . . applied when [a] defendant asserts a speedy trial claim arising from delay in a municipal court drunk driving prosecution." Fulford, 349 N.J. Super. at

189; see, e.g., Tsetsekas, 411 N.J. Super. at 8-10 (citing State v. Berezansky, 386 N.J. Super. 84, 99 (App. Div. 2006); State v. Farrell, 320 N.J. Super. 425, 446 (App. Div. 1999)). We will not overturn a trial judge's decision whether a defendant was deprived of due process on speedy-trial grounds unless the judge's ruling was clearly erroneous. State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).

As to the first Barker factor, the Law Division recognized the obvious delay between defendant's arrest and the commencement of her municipal court trial 337 days later, and the delay between the arrest and the conclusion of the trial 652 days later.

Our judiciary "is, as a matter of policy, committed to the quick and thorough resolution of DWI cases." Tsetsekas, 411 N.J. Super. at 11 (quoting Farrell, 320 N.J. Super. at 446). To that end, "[i]n 1984, Chief Justice Wilentz issued a directive, later echoed in Municipal Court Bulletin letters from the Administrative Office of the Courts, that municipal courts should attempt to dispose of DWI cases within sixty days." Ibid. (quoting Farrell, 320 N.J. Super. at 446-47).

Although we have not suggested that "any delay beyond the sixty-day goal is excessive," as "[t]here is no set length of time that fixes the point at which delay is excessive," id. at 11, the delay in both the commencement of the trial and the delay until

final adjudication was inordinate, see id. at 11-12 (holding a delay of 344 days excessive); Farrell, 320 N.J. Super. at 428 (holding a delay between summons and trial completion of 663 days to be extensive).

"Barker's second prong examines the length of a delay in light of the culpability of the parties." Tsetsekas, 411 N.J. Super. at 12 (citing Barker, 407 U.S. at 531). "[D]ifferent weights should be assigned to different reasons" proffered to justify a delay. Barker, 407 U.S. at 531. Purposeful delay tactics weigh heavily against the State. Tsetsekas, 411 N.J. Super. at 12 (citing Barker, 407 U.S. at 531). "A more neutral reason[,] such as negligence or overcrowded courts[,] should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." Ibid. And, "[d]elay caused or requested by the defendant is not considered to weigh in favor of finding a speedy trial violation." Farrell, 320 N.J. Super. at 446.

Our review of the record leads us to conclude the Law Division judge parsed the reasons for each delay but misapprehended that "the overwhelming majority of the delays were precipitated by

either the request of . . . defendant or request for transcripts by . . . defendant." Defendant requested four adjournments: May 1, 2013, June 5, 2013, December 17, 2014,[3] and January 8, 2014. The judge attributed the first delay to the transfer of the matter to the Dover Joint Municipal Court; although not entirely clear from the record, defendant told the Law Division judge that the case was transferred because she knew the municipal prosecutor. Of the other six adjournments, the judge found one was caused by an officer's injury (July 16, 2013); another by an officer's mandatory training (February 24, 2014); two because the prosecutor was ill (April 14, 2014) and because she was in Tax Court (June 2, 2014); one because the officer was unavailable without explanation (September 3, 2013); and one when the court cancelled the session (March 14, 2014). Although the Law Division judge did not chronicle it, the Alcotest operator was not available on October 29, 2013, and the trial was continued at the State's request; the prosecutor advised the municipal court judge that the officer was "not cleared medically" so as to be able to appear in court that session.

[3] Defendant ordered transcripts of the first court session on November 14, 2013.

We have previously ruled that "the transfer of the matter between municipal courts and the unavoidable absence of [a] police witness" — even if a "significant part" of the delay — reasonably explains and justifies the lapse. State v. Detrick, 192 N.J. Super. 424, 426 (App. Div. 1983). So too, the illness of the State's attorney justifies a delay. The valid reasons for these adjournments do not weigh against the State.

The prosecutor's conflicting Tax Court date and the officer's mandatory training, however, are neutral reasons that should be weighed — albeit less heavily than a purposeful delay — against the State. A defendant's constitutional right to a speedy trial trumps an unavailable prosecutor for whom a covering attorney can be found, and officer training that can be rescheduled when it conflicts with a court date. Further, the adjournment caused by the unexplained unavailability of a police witness must be weighed against the State. Although, as defendant concedes, none of the delays attributed to the State were purposeful, it is clear that defendant did not cause the majority of the delays. The number of delays weighed against the State, however, were fewer than those precipitated by defendant.

We note in analyzing the third Barker factor, a defendant's assertion of the right to a speedy trial need not be "by way of formal motion." State v. Smith, 131 N.J. Super. 354, 363-64 (App.

Div. 1974), aff'd, 70 N.J. 213 (1976). A defendant's mere comment that he or she was "'ready for trial' and 'wanted it to occur sooner rather than later'" are sufficient assertions of a defendant's speedy-trial right. State v. May, 362 N.J. Super. 572, 597 (App. Div. 2003). A court may also consider "the frequency and force of the [defendant's] objections" when assessing whether the defendant properly invoked the right. Barker, 407 U.S. at 529.

The Law Division judge recognized defendant moved for a speedy trial on July 2, 2014. The record also establishes that defendant objected to the adjournment of the trial on October 29, 2013, when the Alcotest operator was not medically cleared to appear in court. Defense counsel premised his objection on the municipal court's establishment of that date as the "trial day." Defendant, therefore, sufficiently asserted her speedy-trial right at that first trial session.

The fourth prong of the Barker test considers the prejudice to a defendant caused by delay. "[P]roof of actual trial prejudice is not 'a necessary condition precedent to the vindication of the speedy trial guarantee.'" Tsetsekas, 411 N.J. Super. at 13-14 (quoting Merlino, 153 N.J. Super. at 15-16). Although the delay may not prejudice a "defendant's liberty interest or his ability to defend on the merits[,] . . . significant prejudice may also

arise when the delay causes the loss of employment or other opportunities, humiliation, the anxiety in awaiting disposition of the pending charges, the drain in finances incurred for payment of counsel or expert witness fees and the 'other costs and inconveniences far in excess of what would have been reasonable under more acceptable circumstances.'" Id. at 13 (quoting Farrell, 320 N.J. Super. at 452) (citing Fulford, 349 N.J. Super. at 195; State v. Dunns, 266 N.J. Super. 349, 380 (App. Div. 1993); Merlino, 153 N.J. Super. at 15-16). The impairment of an accused's defense is considered "the most serious since it [goes] to the question of fundamental fairness." Szima, 70 N.J. at 201.

We find insufficient merit in defendant's contentions – that delays caused prejudicial confusion or deprived her of the opportunity to present a complete defense or prevented her from confronting witnesses – to warrant discussion in a written opinion. R. 2:11-3(e)(2). If there was any confusion, it was not the result of any delays in the trial. A careful review of both trial sessions reveals defense counsel knew exactly the status of the proceedings and the course he wanted to take. Any contention that the parties could not remember the evidence presented at the first trial session is unsubstantiated; it must be remembered defense counsel ordered a transcript.

The Law Division judge acknowledged the personal prejudice defendant faced during the pendency of the case: her anxiety and uncertainty; missed work; and incurred legal fees. He also recognized that she was not subject to pretrial incarceration and that her defense was "absolutely not" impaired. He concluded defendant was not seriously prejudiced.

Balancing the four Barker factors, that are "related factors to be considered with such other circumstances as may be relevant," Szima, 70 N.J. at 201, we do not find the Law Division's denial of defendant's speedy-trial application to be erroneous. Without question, the delay in adjudicating this case was much too long. But considering the valid reasons for most of the adjournments, the delays caused by defendant, and – except for pre-verdict anxiety, stress and personal inconvenience – the lack of prejudice suffered by defendant militates against dismissal of this case, notwithstanding defendant's assertion of her speedy-trial rights as early as the first trial date. Measured against the four Barker factors, we conclude there was no violation of defendant's constitutional speedy-trial right.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION