

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS.

SUPERIOR COURT

State of New Hampshire

v.

Brandon Castiglione

No. 218-2019-CR-01132

ORDER ON DEFENDANT'S MOTION TO DISMISS

Considering the parties' pleadings, the Court finds that there is no basis for concluding that a violation of Defendant's right to a speedy trial has occurred. The Court therefore concludes that a hearing on this matter is unnecessary, and Defendant's Motion to Dismiss is DENIED.

Background

Defendant Brandon Castiglione stands charged with two alternative counts of Second Degree Murder. See Docs. 94, 95 (Indictments) (alleging Defendant recklessly or knowingly caused the death of Luis Garcia using a firearm). Before the Court is Defendant's Motion to Dismiss the charges against him, alleging a violation of his right to a speedy trial under Part I, Article 14 of the New Hampshire Constitution and the 6th and 14th Amendments to the United States Constitution. See Doc. 172 (Def's Mot. Dismiss). The State objects. See Doc. 173 (State's Obj. to Mot. Dismiss). For the reasons that follow, the Court concludes that dismissal is not warranted at this time.

The following facts are derived from the parties' pleadings, see Docs. 172, 173,

unless otherwise noted. Defendant has been incarcerated since his arrest on October 2, 2019. On December 2, 2019, Defendant filed a Motion to Determine Defendant's Competency. All pre-trial motions were stayed at this time. On December 19, 2019 (Honigberg, J.) and again on March 4, 2020 (Wageling, J.), the Court granted the State's Assented-to Motions to Extend the Indictment Deadline. Defendant refused to fully participate in the competency evaluations on January 8, February 10, and March 6, 2020. See Doc. 66 (Def's Brief Report Concerning the Status of Competency Proceedings). Although noting the limitations of this evaluation given Defendant's minimal participation, the evaluator nonetheless concluded that Defendant was competent to stand trial. See id.

In the report, filed May 15, 2020, Defendant stated that he "wished for the following to be noted by the Court," and stated, in part, that he did not participate in the evaluations because he "did not agree with Defense Counsel's decision to raise competency. He believes that it is a waste of time and that he is competent to stand trial." Id. ¶ 8(A). He also noted that he was "troubled that Defense Counsel has not yet filed a notice of speedy trial and has requested that Defense Counsel file another bail motion." Id. ¶ 8(D). The Court (Wageling, J.) held hearings on this matter on July 16 and 27, 2020, and found Defendant competent to stand trial on August 12, 2020. See Doc. 82 (August 12, 2020 Order on Defendant's Competency).

While Defendant's competency proceedings were pending, the COVID-19 pandemic began, causing courts to suspend jury trials, grand jury proceedings, and in-person hearings. On September 3, 2020, the Chief Justice of the New Hampshire Superior Court (Nadeau, J.), issued an Order authorizing a multi-county grand jury.

Defendant was indicted on the third sitting of the multi-county grand jury on November 2, 2020. Defendant filed an Assented-to Structuring Proposal on April 5, 2021, which the Court (Wageling, J.) granted the following day. This schedule contemplated a trial in February of 2022. See Doc. 104 (April 6, 2021 Order Granting Assented-to Scheduling Proposal).

Throughout the fall of 2020, Defendant, while represented by counsel, filed a number of ex parte pleadings, alleging, in part, a breakdown in communication with his counsel at that time. See Docs. 88, 90–91. On March 30, 2021, Defendant filed a similar ex parte motion, this time through counsel. See Doc. 102. Following an April 5, 2021 ex parte hearing, the Court (Wageling, J.) had no concerns “that there [wa]s a breakdown in communication” as alleged. See Doc. 105. During a July 14, 2021 status conference, the Court (Wageling, J.) and the parties discussed the trial schedule. See Doc. 123 (July 14, 2021 Order). Because Defendant’s counsel at the time, Attorney Forciniti, would not be available for the then-scheduled February 2022 trial, the Court advised Defendant he would need to continue the trial to either March or June of 2022 and waive his speedy trial rights as to that continuance if he wanted Attorney Forciniti to continue to represent him. See id. The Court also recognized during this discussion that any newly-appointed counsel might not be prepared for trial by February 2022, and gave Defendant a deadline of July 23, 2021 to provide his answer. See id.

Defendant did not provide an answer by July 23. Instead, he requested another ex parte hearing concerning his communication issue with counsel. See Doc. 125. The Court (Wageling, J.) held a hearing on August 4, 2021, during which Defendant stated “that he does not want to further delay the start of his trial and, therefore, he will not

agree to a June 2022 start date for his trial.” Doc. 129 (Aug. 6, 2021 Order on Status of Counsel and Scheduling). The Court acknowledged that “Defendant asserted his speedy trial rights and asked that the trial begin as soon as possible.” Id. The Court also observed that “[w]hile the July 14, 2021 order contemplated that the trial may be able to remain in February 2022, because of the delay in obtaining a decision from Defendant, that option is no longer realistic. The Court warned Defendant that the change in counsel may ultimately result in a delay in the start of his trial.” Id.

The New Hampshire Public Defender notified the Court on August 18, 2021 that Attorney Robin Davis, who was set to join the Public Defender on September 13, 2021, would replace Attorney Forciniti. Doc. 134 (Public Defender’s Response to Court’s Order on Status of Counsel). However, on August 20, 2021, Defendant, through counsel, informed the Court that he wanted counsel outside of the New Hampshire Public Defender to represent him, and requested a hearing on the matter. Doc. 135 (Def’s Ex Parte Mot. Regarding Status of Counsel). Following a hearing on August 31, 2021, the Court deferred ruling on that issue to allow Defendant an opportunity to meet Attorney Davis. Doc. 139 (Sept. 1, 2021 Order). On November 17, 2021, Defendant filed another motion regarding the status of counsel. See Doc. 146 (Def’s Ex Parte Mot. Regarding Status of Counsel). As a result, the Court (Honigberg, J.) converted a previously-scheduled December 1, 2021 hearing on pending motions to another ex parte hearing with Defendant and his counsel. See Doc. 148 (Dec. 2, 2021, Order). Among other things, the Court “specifically discussed . . . the practical reality that” a change in counsel would make “a trial in March . . . virtually impossible.” Id. Based on the Court’s discussion with Defendant that day, the Court “did not find it necessary to

issue any further orders on the subject” of counsel at that time, but gave Defendant “until December 8, 2021, to submit additional information if he so desire[d].” Id. The hearing on pending motions was rescheduled to January 11, 2022. See id.

Prior to the start of the January 11, 2022, Defendant indicated he again wished to address the Court (Honigberg, J.) on an ex parte basis. See Doc. 152 (Jan. 13, 2022 Order on Status of Counsel). As a result, this hearing was also converted to an ex parte hearing with Defendant and his counsel. See id. Attorneys McCarthy and Davis indicated that they were ready, willing, and able to continue to represent Defendant, but Defendant maintained that there was a breakdown in communication between himself and his counsel such that new counsel should be appointed. See id. Although the Court recognized the strained relationship between Defendant and his counsel at that time, the Court concluded that a further status of counsel hearing was warranted, asking Defendant to provide specific examples of his concerns at that time. See id. In its Order following the January 11, 2022 hearing, the Court also noted:

Defendant should also consider how a change in counsel will necessarily impact the trial schedule. It is apparent from the record that Defendant does not want to delay trial any further. Indeed, during the January 11, 2022, hearing, Defendant orally requested a show cause hearing concerning his right to a speedy trial. Although the Court was prepared to immediately hold such a hearing following the ex parte discussion regarding status of counsel, Defendant indicated he did not want to proceed with a show cause hearing until after the Court ruled on his oral motion for new counsel. The Court admonished Defendant that a change in counsel would almost certainly delay his trial, which is currently scheduled to occur in March of 2022. Defendant indicated he did not wish to waive his right to a speedy trial, but he understood any newly-appointed counsel would need time to get up to speed.

Id. The Court also noted that as of the August 31, 2021 hearing, the Public Defender indicated “that there were no attorneys in the State who could be prepared to go forward

with trial in this matter with only six-months' notice." Id. After discussing the shortage of criminal defense attorneys, the Court concluded that "it is highly likely that a change in counsel would result in significant delay to Defendant's trial schedule." Id.

At the January 31, 2022 hearing, Defendant maintained his desire for counsel outside the Public Defender. See Doc. 160 (Mar. 9, 2022 Order on Status of Counsel). One of the subjects related to the breakdown in communication between Defendant and his counsel was a disagreement regarding speedy trial "starting two years ago with Attorney Forciniti, through a week prior to the January 31 hearing with Attorney McCarthy and Attorney Davis." Id. at 5. "Indeed, the Public Defender stated explicitly that the attorney-client relationship 'has degraded to the point that they cannot talk about anything other than the speedy trial motion, and they cannot talk about the case or preparing for the case.'" Id. at 6. At this hearing, "the Court was satisfied that these concerns were not a dilatory tactic by Defendant, as he was primarily concerned with a right to a speedy trial and a swift resolution of his case." Id. at 8. The Court then discharged Attorneys McCarthy and Davis, and Defendant indicated that he may wish to represent himself going forward. Id. The Court (Honigberg, J.) subsequently canceled the March 21, 2022 jury selection, specifically noting that "[t]he postponement is due to no fault of the State or Court." Doc. 156 (Feb. 16, 2022 Order).

In an Order dated March 17, 2022, the Court (Ruoff, J.) approved the appointment of two (as then yet-to-be-assigned) attorneys to represent Defendant, and noted that the Public Defender had been discharged. Doc. 164 (Mar. 17, 2022 Order on Status of Counsel). The Court also noted that trial would be scheduled for the month of May 2023. Id. Following another status of counsel hearing, the Court (Ruoff, J.) noted

that Defendant wished to proceed with assigned counsel, and reaffirmed the May 2023 trial date. On October 4, 2022, Defendant filed the instant motion, seeking dismissal based on an alleged violation of his right to a speedy trial. Doc. 172.

Analysis

In considering a motion to dismiss on speedy trial grounds, the Court applies the balancing test articulated in Barker v. Wingo, which requires the analysis of four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion or waiver of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay. Barker v. Wingo, 407 U.S. 514, 530 (1972); *see also* State v. Allen, 150 N.H. 290, 292 (2003) (New Hampshire courts apply the test articulated in Barker to speedy trial violations under the State Constitution). The first factor, the length of delay, is "to some extent a triggering mechanism": courts generally consider the remaining factors only when the length of delay is presumptively prejudicial. Barker, 407 U.S. at 530; Allen, 150 N.H. at 292. A delay is presumptively prejudicial if a case remains untried for nine months after indictment. State v. Cotell, 143 N.H. 275, 282 (1998) (superseded by court rule on other grounds, as stated in State v. Mottola, 166 N.H. 173, 176 (2014)). No single Barker factor is a "necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial"; rather, the four factors are "related . . . and must be considered together with other such circumstances as may be relevant . . . in a difficult and sensitive balancing process." 407 U.S. at 533. However, New Hampshire courts put "substantial emphasis on the latter two of the Barker factors." State v. Langone, 127 N.H. 49, 55 (1985).

As to the first factor, the length of the delay, the State "does not dispute the 9-

month threshold to review the remaining Barker factors has been surpassed in this case.” Doc. 173 ¶ 28. The time span between Defendant’s arrest on October 2, 2019 and the new trial date of May 3, 2023 is about three years and seven months. However, Defendant moved to determine his competency to stand trial on December 2, 2019, and the Court (Wageling, J.) found Defendant competent on August 12, 2020. See Doc. 82. Defendant concedes that the eight months while the competency determination was pending does not count against the State. See Doc. 173 ¶ 30. Nonetheless, a total delay of one year and seven months is greater than the 9-month threshold and is therefore presumptively prejudicial, so the Court considers the remaining Barker factors. See 407 U.S. at 530; Allen, 150 N.H. at 292.

The Court next considers the reason for the delay. See Barker, 407 U.S. at 530. Barker divides the reasons for the State’s delay of trial into three categories: deliberate, neutral, and valid. See id. at 531. Deliberate attempts to hamper the defense are weighed heavily against the government. Id. A neutral reason, such as negligence or an overcrowded court docket, weighs less heavily against the State, although neutral reasons are assumed to be the State’s, and not the Defendant’s, responsibility. Id. Valid reasons, such as a missing witness, generally justify appropriate delay. Id. First, Defendant argues that the delay between October 2, 2019 and December 2, 2019 is attributable to the State. See Doc. 172 ¶ 33. As the State correctly points out, New Hampshire Rule of Criminal Procedure 8(d)(2) establishes a 90-day deadline for the State to obtain an indictment for felony cases. See Doc. 173 ¶ 31 (citing N.H. R. Crim. P. 8(d)(2)). Complicated felony cases like the instant murder trial cannot reasonably be tried in two months. Thus, this delay does not weigh heavily against the State.

Defendant next argues that delay caused by the COVID-19 pandemic beginning in March 2020 “must be charged to the government, but weighed less heavily than if the State was the direct cause of the delay.” Doc. 172 ¶¶ 34. The State notes that the competency proceeding was “unnecessarily protract[ed]” as a result of Defendant’s refusal to fully participate in the evaluations. Doc. 173 ¶¶ 31; see also Doc. 66. The State further argues that the pandemic effectively played no part in the delay because the competency issue was pending for most of the period when in-court proceedings were suspended. See Doc. 173 ¶¶ 34. Courts addressing delays related to the COVID-19 pandemic in the context of a Barker analysis have found that such delays constitute either a valid reason for a delay or a type of neutral delay that does not weigh against the State, as the pandemic was not foreseeable and outside any party’s control. See State v. Roz, No. 218-2020-CR-79 at *8–9 (N.H. Aug. 10, 2020) (collecting cases in support of this proposition and concluding that COVID-19-related delays are valid reasons which do not weigh against the State). Thus, to the extent that the pandemic caused any delay in this case, this is a valid reason to delay trial.

Defendant further contends that the period between his finding of competency on August 12, 2020 and the date the Court approved his Assented-to Structuring Proposal on April 6, 2021 weighs against the State. See Doc. 172 ¶¶ 30, 36. The State notes that Defendant was indicted on the third sitting of the multicounty grand jury on November 2, 2020. See Doc. 173 ¶¶ 15. The State argues that Defendant did not assert his right to a speedy trial during this time, and that Defendant “could have filed a proposed scheduling order at any point between August 12, 2020 and April 5, 2021.” Id. ¶¶ 38, 39. There is no allegation that the State improperly extended the process of

negotiating the structuring proposal. Because the Assented-to Structuring Proposal was only submitted on April 5, 2021, to the extent that the State is to blame for the delay in filing the proposal, Defendant is equally at fault. Thus, this is at most a neutral reason for the delay, weighing less heavily against the State.

As the State points out, Defendant caused substantial subsequent delay. In its March 9, 2022 Order, the Court (Honigberg, J.) partially summarized Defendant's many changes in counsel throughout this case. See Doc. 160. Although there is a degree of irony in the fact that one of the main sources of the "breakdown in communication" between Defendant and his multiple lawyers was his disagreement with them about filing a speedy trial motion, this does not impart upon the State any fault for these delays. Indeed, the Court warned Defendant multiple times of the likelihood that changes in counsel would delay trial. See Doc. 155 (Feb. 7, 2022 Interim Order on Status of Counsel); Doc. 152 at 7–8; Doc. 148; Doc. 129 at 2. In canceling the March 21, 2022 jury selection, the Court (Honigberg, J.) specifically noted that "[t]he postponement is due to no fault of the State or Court." Doc. 156. Moreover, Defendant does not appear to argue that any delay after April 6, 2021 should be charged to the State, as he assented to the structuring proposal contemplating the February 2022 trial date. See Doc. 172 ¶¶ 14; 30. Because Defendant himself caused or assented to much of the delay, and any delay caused by the State was for a valid or neutral reason, see Barker, 407 U.S. at 531, this factor does not weigh heavily against the State.

Next, the Court considers the strength of Defendant's assertion of the speedy trial right. See Barker, 407 U.S. at 530. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant

has been deprived of the right.” Id. at 531–32. Where a defendant seeks the earliest possible trial date and subsequently asserts his right to a speedy trial, this factor weighs in the defendant’s favor. State v. Brooks, 162 N.H. 570, 583 (2011). However, in such cases, where a defendant waits a substantial amount of time before asserting that right, and acquiesces to the State’s motions to continue the original trial date, this factor does not weigh heavily in the defendant’s favor. Id. As in Brooks, this is the case here.

Defendant’s first mention of a speedy trial was in a competency report filed May 15, 2020 (approximately 7 ½ months after his arrest). See Doc. 66. In this report, Defendant states that he did not wish to be further evaluated for competency to stand trial because, in part, “[h]e believes that it is a waste of time.” Id. ¶ 8(A). He further stated that he “is troubled that Defense Counsel has not yet filed a notice of speedy trial and has requested that Defense Counsel file another bail motion.” Id. ¶ 8(D). The first clear, unambiguous assertion of the right occurred in another Status of Counsel hearing held on August 4, 2021 (approximately 22 months after Defendant’s arrest). Following this hearing, in an order dated August 6, 2021, the Court (Wageling, J.) noted, “Defendant asserted his speedy trial rights and asked that the trial begin as soon as possible.” Doc. 129. Defendant made clear throughout the many status of counsel hearings that he was concerned with trial schedule and his right to a speedy trial. Defendant filed the instant Motion to Dismiss on speedy trial grounds on October 4, 2022 (approximately three years after his arrest). See Doc. 172. Thus, because Defendant indicated his interest in a speedy trial throughout the proceedings and unambiguously asserted the right prior to moving for dismissal, the Court finds that this factor weighs in favor of Defendant. See Brooks, 162 N.H. at 583.

However, this factor does not weigh heavily in Defendant's favor. As to the assertion of the right to a speedy trial, Barker established a flexible balancing test which "allows the trial court to exercise judicial discretion based on the circumstances." 507 U.S. at 529–30. Here, Defendant acquiesced to the State's Assented-to Motions to Extend the Indictment Deadline due to his pending competency evaluation, once on December 19, 2019, and again on March 4, 2019. See Doc. 172 ¶¶ 4, 5. Defendant refused to participate at certain points in the competency evaluation, thus extending that process. See Doc. 82. Defendant's desire to file a speedy trial motion was at the heart of his disputes with his multiple lawyers, which disputes themselves have caused the most significant delays in this case. See, e.g., Doc. 157. Given the Court's multiple warnings about this result, as discussed above, it appears from the record that Defendant is more interested in securing a dismissal on speedy trial grounds than he is in securing the earliest possible trial date. See United States v. Colombo, 852 F.2d 19, 26 (1st Cir. 1988) (the factor as to the assertion of the speedy trial right does not weigh heavily in a defendant's favor where the "record suggests that the [defendant] did not want a speedy trial until their right to a speedy trial became a means by which to obtain dismissal of the charges against them"). Thus, although this factor weighs in Defendant's favor, it does not do so heavily. See Brooks, 162 N.H. at 583.

Finally, the Court considers prejudice to Defendant. See Barker, 407 U.S. at 530. Except where the "length and reason for the delay weigh so heavily in the Defendant's favor that prejudice need not be specifically demonstrated," New Hampshire courts typically require defendants to show "actual prejudice from a delay to prevail on a speedy trial claim." State v. Paone, 142 N.H. 216, 219, 220 (1997). "[I]f the

State pursues a defendant with reasonable diligence, then a speedy trial claim is likely to fail, regardless of the length of the delay, so long as the defendant cannot show specific prejudice to his defense.” State v. Locke, 149 N.H. 1, 9 (2002) (cleaned up).

Here, the Court finds that the State has pursued Defendant’s case with reasonable diligence. Defendant does not argue that the delay caused any impairment in his defense. Although he states that during the COVID-19 shutdowns in 2020, pre-trial inmates in general were “denied visits by their attorneys . . . had no indictment timeframes and no answers about when trials would resume,” Defendant does not contend that he was ever denied a visit by one of his attorneys or that this impaired his defense. Doc. 172 ¶ 43. Although his confinement throughout the pandemic, particularly in its early stages, is not to be discounted, this factor does not weigh heavily in Defendant’s favor in the absence of a particularized impairment to his defense. Thus, because the length and reason for the delay do not weigh heavily in Defendant’s favor, see Poane, 142 N.H. at 219, 220, because the State has pursued Defendant’s case with reasonable diligence, and because Defendant has failed to show actual prejudice to his defense, see Locke 149 N.H. at 9, Defendant’s speedy trial claim must fail.

Conclusion

Consistent with the foregoing, Defendant’s motion to dismiss based on an alleged violation of the right to a speedy trial is DENIED.

SO ORDERED.

Date: November 3, 2022



Clerk’s Notice of Decision
Document Sent to Parties
on 11/10/2022

Hon. David W. Ruoff