STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs

KATHERINE LINDSEY HENRY,
Defendant,

HONORABLE WILLIAM A. BAILLARGEON

CASE NO.: 203569SM

MOLLY SCHIKORA (P46997)
Assistant Prosecutor
113 Chestnut Street
Allegan, Michigan 49010
Phone: (269) 673-0280

KATHERINE LINDSEY HENRY
In Pro Per
[redacted]

ROBERT J. BAKER (P57964)
Attorney for Defendant
225 Hubbard Street
Allegan, Michigan 49010
(269) 686-9448

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF ALLEGAN)

Gina M. Shashaguay, being duly sworn, deposes and says that on June 17, 2022 she served a copy of the following:

People's Supplemental Answer to Defendant's Motions to Dismiss for Declaratory Relief, and for Immediate Consideration totaling 7 pages;

Appendix A: Defendant's Proposed Jury Instructions of July 19, 2021 totaling 4 pages;

Appendix B: *People v Witkoski*, **Mich App** ; NW2 d—(2022) (Docket No. 355299) totaling 7 pages;

Appendix C: *People v Langsford,* unpublished per curiam opinion of the Court of Appeals, issued May 12, 2022 (docket no. 354311) totaling 7 pages;

and Proof of Service via email to:

Katherine Lindsey Henry: [redacted]@gmail.com) and ([redacted]@restorefreedomkh.com)

Robert J. Baker, Esq.: (kristle.goins@rjbaker-law.com) and (rjb@rjbaker-law.com)

I declare the above statement is true to the best of my information, knowledge and belief.

Dated: June 17, 2022

Gina M. Shashaguay
Legal Administrative Specialist

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff,

HONORABLE WILLIAM A. BAILLARGEON

vs

CASE NO.: 203569SM

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Defendant.

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KATHERINE LINDSEY HENRY
In Propria Persona
[redacted]

ROBERT J. BAKER (P57964)
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PEOPLE'S SUPPLEMENTAL ANSWER TO DEFENDANT'S MOTIONS TO DISMISS, FOR DECLARATORY RELIEF, AND FOR IMMEDIATE CONSIDERATION

The People of the State of Michigan, through Molly Schikora, assistant prosecutor, state as following in response to Defendant's motions:

1. Defendant previously raised most of these issues, including to the 48th Judicial Circuit and Michigan Court of Appeals. She again alleges lack of subject matter jurisdiction, denial of her right of counsel, denial of confrontation, lack of reasonable accommodation under the Americans with Disabilities Act (ADA), a failure by the People to provide discovery, and a failure by the People to redact Defendant's personal information from pleadings.

2. **Subject matter jurisdiction.** That the district court lacks subject matter jurisdiction was raised previously in the trial court as to the count of **trespass**, contrary to MCL 750.552. On February 5, 2021, the Honorable William A. Baillargeon denied Defendant's motion to dismiss for lack of subject matter jurisdiction. On April 5, 2021, the Honorable Margaret Zuzich Bakker denied Defendant's application for leave to appeal Judge Baillargeon's ruling. On May 3, 2021, the Court of Appeals denied Defendant's application for leave to appeal. (21-64004-AR). Defendant now also raises the issue of subject matter jurisdiction as to the count of **disturbing the peace**, contrary to MCL 750.170.

The 57th District Court has subject matter jurisdiction of this case.

> 'Subject matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and *is not dependent on the particular facts of the case*.' *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011) (quotation marks, citations, and some emphasis omitted) [People v Henry (Aft. Rem.), 305 Mich App 127, 159 (2014)].

MCR 600.8311(a) states, "The district court has jurisdiction of… the following: (a) Misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both." Both counts, trespass, contrary to MCL 750.552, and disturbing the peace, contrary to MCL 750.170, are punishable by fine or imprisonment not exceeding one year. This Court has the abstract power to try cases of trespass and disturbing the peace. Hence, this Court has subject matter jurisdiction.

As to claims that are fact-driven, including whether there is direct or circumstantial evidence of a requisite state of mind, as this Court and the Court of Appeals previously held (21-64004-AR), it is acceptable for the trial court to delay consideration of those until, at least, after the conclusion of the People's case in chief. It is potentially burdensome (duplicative) for the

Court to conduct an evidentiary hearing as to issues that will be resolved with legally admissible evidence at trial.

Finally, of note, in her July19, 2021 list of requested jury instructions, Defendant herself requested a jury instruction on the offense of Disturbing the Peace. Presumably, she, too, believes this Court has subject matter jurisdiction as to that charge. (Appendix A at 2).

4. **Speedy trial**. Defendants have constitutional and statutory rights to a speedy trial. U.S. Const., Am. VI; Const. 1963, art. 1, § 20. The People also have a statutory right to a speedy trial. MCL 768.1.

Michigan courts analyze speedy trial claims under the standard set forth in *Barker v Wingo*, 407 US 514 (1972). *People v Williams*, 475 Mich 245, 261 (2006). The *Barker* standard balances "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id.* at 261-262.

In *People v Cain*, 238 Mich App 95, 112-113 (1999) the Court of Appeals considered a pretrial delay of 27 months. The Court held,

> As noted above, the length of the delay in this case was longer than a routine period between arrest and trial. Nevertheless, we note that *People v. Missouri,* 100 Mich. App. 310, 319–320, 299 N.W.2d 346 (1980), instructs that "[t]he length of delay is not determinative of a speedy trial claim" and the delay in this case does not approach the outer limits of other delays we have addressed. See, e.g., *Simpson, supra* at 564, 526 N.W.2d 33 (4 ½ years); *Missouri, supra* at 319–320, 299 N.W.2d 346 (thirty-one months); *People v. Cutler,* 86 Mich. App. 118, 272 N.W.2d 206 (1978) (thirty-seven months); *People v. Smith,* 57 Mich. App. 556, 226 N.W.2d 673 (1975) (nineteen years).

The burden is on the prosecution to show the reasons for the delay. Issues such as the court's docket congestion are technically weighed against the prosecution but are "given a neutral tint" and "assigned only minimal weight." *People v Waclawski*, 286 Mich App 634, 666

(2009). (See also MCR 6.004, noting that a court excludes from the speedy trial computation those delays that are due to a defendant's pretrial motions and interlocutory appeals.)

Primarily COVID-19 jury trial cancellations and, secondarily, Ms. Henry's interlocutory appeals (which continue) and motions are the causes for the delay in trial. In *People v Witkoski*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 355299) (Appendix B); slip op at 3-4, the Court of Appeals analyzed a 180-day rule claim where the delay was largely attributable to Covid-19 jury trial restrictions. The Court of Appeals found that the prosecution had taken action in good-faith to move the case to trial and that the Covid-related delays were excusable.

As to the demand for speedy trial, despite Defendant's assertion that she has made a demand, the People cannot locate a demand for speedy trial in the file or at a court hearing. "Whether and how a defendant asserts his right is closely related other factors [for consideration]". *Barker*, 407 US at 531. This factor "is entitled to strong evidentiary weight" because "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.*

While there is no fixed time period for determining whether speedy trial rights have been violated, for a delay of greater than 18 months, prejudice is presumed. *People v Collins*, 388 Mich 680, 690 (1972). Prejudice may be to the person or to the defense. *Cain*, 238 Mich App at 114.

> Prejudice to the person includes 'oppressive pretrial incarceration' as well as 'anxiety and concern of the accused.' *Barker*, 407 US at 532. 'However, anxiety, alone, is insufficient to establish a violation of defendant's right to speedy trial.' *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). [*People v Langsford*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 2022 (docket no. 354311), p 2, Appendix C]

Defendant has not been incarcerated throughout this case. She has been permitted to move out of state. There is no prejudice to the person. As to prejudice to the defense, witnesses and evidence remain available without exception.

The repeated adjournments of Defendant's trial show the Court's repeated efforts to keep this case on track for adjudication. The Court, recognizing the complexity here, had set a firm date for trial. But for Ms. Henry's last minute flurry of motions and newest application for leave to appeal, all of which could have been brought and resolved months ago, or were resolved months ago and are now being re-litigated by Defendant, this matter would have proceeded to trial on June 15.

5. **ADA accommodations**. Defendant's ADA complaint was addressed previously on appeal. (21-640029-AR). Regardless, the People have no objection to reasonable accommodations consistent with the Act.

6. **Discovery.** On April 26, 2021, the Court ordered that police reports, use of force reports, dispatch records and other records… that are in generated by or in the possession of the law enforcement agencies involved in any part of the incident at Leighton Township Hall on November 3, 2020." The People are verifying that discovery consistent with the Court's order has been provided to Defendant. If it has not been, it will be immediately. As to the other matters, those were deemed not ripe for consideration by the Court in its April 26 order. The People will reexamine Ms. Henry's requests. The People do not regularly run criminal histories of witnesses for trial. Notwithstanding, if MRE 609 or legally admissible evidence were known to the People, that information would be disclosed to Defendant. If Defendant has an articulable belief that a witness has a relevant criminal history, the People are unaware of that. Short of such a belief, the People object to providing information not in their possession as part of a "fishing expedition."

7. **Personal Identifying Information**. As to inclusion of Defendant's Personal Identifying Information (PII), this issue was previously raised in this Court, and on appeal to the

circuit court and the Court of Appeals. (21-64029-AR). Contrary to Defendant's assertions, nothing has been done that stands in contravention of MCR 1.109(D)(9). Under MCL 1.109(D)(1)(b)(vi), the names and addresses of pro se parties must appear in the caption of the pleadings.

8. **E-service**. As to Defendant's request for e-service, this has generally be provided, including through Mifile and directly. MCR 2.107(G), implemented through judicial fiat on July 26, 2021, provides for electronic service "to the greatest extent possible."

9. **Standby counsel, defenses, open hearings, and jury questionnaires**. Defendant has raised several procedural issues that are not ripe for consideration, that were previously decided by this Court and on appeal, or that neither the People nor the Court are impeding. These include her being assisted by standby counsel, her ability to present relevant defenses, and her access to juror questionnaires.

Defendant couches issues that are not ripe for consideration as being claims for declaratory relief. "'[T]he judicial power … is the right to determine *actual controversies* arising between adverse litigants, duly instituted in courts of proper jurisdiction.'" *People v Richmond*, 486 Mich 29 (2010) (emphasis added; citation omitted).

The issue of open hearings was previously raised in the circuit court and Court of Appeals. (21-64029-AR).

On appeal to circuit court and the Court of Appeals, Defendant previously raised the issue of denial of her assistance of counsel at February 2021 hearings. (21-64029-AR). As to Ms. Henry being assisted by standby counsel going forward, the People do not anticipate objecting. However, they would note that there is no constitutional right to standby counsel --

"We conclude that art. 1, sec. 13 permits the use of standby counsel as a matter of grace, but not as a matter of right." *People v Dennany*, 445 Mich 412, 443 (1994).

The People have no objection to a criminal defendant asserting relevant defenses to charges at trial or to examining jury questionnaires consistent with court policy.

WHEREFORE, the People request that this Honorable Court deny Defendant's motions that were previously raised on appeal, deny as to lack of subject matter jurisdiction for the charge of disturbing the peace, deny as to the speedy trial claim, and deny as to e-service.

DATED: June 17, 2022

Respectfully submitted,

By: _____

Molly Schikora (P46997)
Assistant Prosecutor

APPENDIX A

Defendant's Proposed Jury Instructions of July 19, 2021

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE COUNTY OF ALLEGAN
113 Chestnut Street, Courthouse, Allegan, MI 49010
Phone: 269-673-0400

THE PEOPLE OF THE STATE OF MICHIGAN, CASE NO. 20-3569-SM

Plaintiff, HON. WILLIAM A. BAILLARGEON

-vs-

KATHERINE LINDSEY HENRY,

Defendant.
_____/

MYRENE K. KOCH (P62570)
Prosecuting Attorney
113 Chestnut Street
Allegan, MI 49010
(269) 673-0280

KATHERINE HENRY, In Pro Per
Robert J. Baker (P57964)
R.J. Baker & Associates, PLLC
Standby Counsel for Defendant
225 Hubbard Street
Allegan, MI 49010
269-686-9448
_____/

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

NOW COMES, Defendant, Katherine Lindsey Henry, with assistance of her standby counsel, Robert J. Baker and Stephen J. Vargo of R.J. Baker & Associates, PLLC, requests the following jury instructions:

1.1 Preliminary Instructions to Prospective Jurors
1.2 Selection of Fair and Impartial Jury
1.3 Challenges
1.4 Juror Oath Before Voir Dire
1.5 Introduction of Judge, Parties, Counsel, and Witnesses
1.6 Length of Trial
1.7 Health Questions
1.8 Reading of Information
1.9 Presumption of Innocence, Burden of Proof, and Reasonable Doubt
2.1 Juror Oath Following Selection
2.2 Legal Principles
2.3 Trial Procedure
2.4 Function of Court and Jury
2.5 Considering Only Evidence/What Evidence Is
2.6 Judging Credibility and Weight of Evidence
2.8 Court's Questioning Not a Reflection of Opinion

2.9 Questions by Jurors Allowed
2.10 Objections
2.17 Notetaking Allowed
2.20 Defendant Represents Himself or Herself
2.25 Deliberations and Verdict
3.2 Presumption of Innocence, Burden of Proof, and Reasonable Doubt
3.5 Evidence (as amended to reflect Defendant representing herself with only standby counsel)
3.6 Witnesses – Credibility
3.14 Communications with the Court
3.15 Exhibits
3.16 Written or Electronically Recorded Instructions in the Jury Room
3.17 Single Defendant-Single Count
3.24 Verdict Form
4.1 Defendant's Statements as Evidence Against the Defendant
4.8 Jury View of Premises
4.9 Motive (including the bracketed portion "[and that (he / she) meant to do so].")
4.16 Intent
5.9 Child Witness
5.11 Police Witness
5.15 Interpreter (as modified to inform the jury of pauses or other ADA accommodations that may be made to allow Defendant to communicate effectively in court during the trial and to understand the proceedings.)
6.4 Property Crimes: Mistake and Intent (as modified to focus on the trespass property crime)
7.5 Claim of Right (including the bracketed portion "[It also does not matter if the defendant (used force / trespassed) to get the property or if she knew that someone else claimed the property.]")
13.5 Legal Acts and Duties
22.2 Definition of Owner (as modified for trespass instead of larceny)
22.3 Honest Taking-Larceny (as modified for trespass instead of larceny)
22.8 Definition of Certificate (of Notary Public or Any Public Official)
22.19 Definition of Public Official (Officer)
40.1 Disturbing the Peace (as contrasted with the elements of trespass)

Nonstandard Instruction, People v. Moreno, 491 Mich. 38 (2012), Right to Resist Unlawful Police Conduct pursuant to MCR 2.512(D)(4) and People v. William Johnson, 187 Mich. App. 621 (1991). (See Attached).

Nonstandard Instructions regarding "the offense instructions [containing] any required mens rea element" M Crim JI 3.9 Note on intent. (See Attached).

Nonstandard Instruction for MCL 750.552. (See Attached).

Nonstandard Instruction for clerk's authority to remove Defendant from township property. (See Attached).

Defendant also may request the following jury instructions, depending on the evidence presented or prosecutor arguments at trial:

2.5a Interim Commentary by Attorneys
2.7 Questions Not Evidence
3.3 Defendant Not Testifying
3.5a Summary of Evidence
4.5 Prior Inconsistent Statement Used to Impeach Witness
4.6 Judicial Notice
4.7 Stipulation
5.2 Weighing Conflicting Evidence – Number of Witnesses
5.3 Witness Who Has Been Interviewed by a Lawyer
5.4 Witness as Undisputed Accomplice
5.5 Witness a Disputed Accomplice
5.6 Cautionary Instruction Regarding Accomplice Testimony
5.8 Character Evidence Regarding Conduct of the Defendant
5.8a Character Evidence Regarding Conduct of the Defendant
5.12 Prosecutor's Failure to Produce Witness
13.1 Assaulting, Resisting, or Obstructing a Police officer or Person Performing Duties
13.2 Assaulting or Obstructing Officer or Official Performing Duties
17.14 Definition of Force and Violence
17.15 Definition of Touching
17.16 Actual Injury Is Not Necessary
17.36 Torture

Respectfully submitted,

Dated: 7/19/21

/s/ Katherine L. Henry
Katherine L. Henry, In Pro Per (P71954)

APPENDIX B

***People v Witkoski*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 355299)**

2022 WL 627018
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Justin Scott WITKOSKI, Defendant-Appellee.

No. 355299
|
March 3, 2022, 9:15 a.m.

Synopsis

Background: Defendant, a state inmate, moved to dismiss charges of assault with intent to do great bodily harm less than murder and possession of child sexually abusive material, on the ground the State had not brought him to trial within 180 days of receiving written notice of the charges from the Department of Corrections, as required by rule. The Circuit Court, Muskegon County, granted the motion. State appealed.

[Holding:] The Court of Appeals, Swartzle, J., held that delay of several months in bringing defendant to trial due to COVID-19 restrictions did not violate the 180-day rule.

Reversed and remanded.

West Headnotes (13)

[1] **Criminal Law** ⇐ Preliminary proceedings

The Court of Appeals reviews for an abuse of discretion a circuit court's decision on a motion to dismiss.

[2] **Criminal Law** ⇐ Review De Novo

The Court of Appeals reviews de novo questions of law, including statutory interpretation.

[3] **Criminal Law** ⇐ Speedy trial

The circuit court's attributions of prosecutorial delay, under rule requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections, are reviewed for clear error. Mich. Comp. Laws Ann. § 780.131(1).

[4] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

Statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period. Mich. Comp. Laws Ann. § 780.131(1).

[5] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

If apparent good-faith action is taken well within the 180 period required by statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections, and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met. Mich. Comp. Laws Ann. §§ 780.131(1), 780.133.

[6] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

It is sufficient to meet the requirements of statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections if the prosecutor proceeds promptly and move the case to the point of readiness for trial within the 180-day period. Mich. Comp. Laws Ann. § 780.131(1).

[7] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

Although a prosecutor must proceed promptly and take action in good faith in order to satisfy statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections, there is no good-faith exception to the rule; instead, good faith is an implicit component of proper action by the prosecutor, who may not satisfy the rule simply by taking preliminary steps toward trial but then delaying inexcusably. Mich. Comp. Laws Ann. § 780.131(1).

[8] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

The requirement that a prosecutor proceed in good faith, under statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections, means simply that the prosecutor must in fact commence action and cannot satisfy the rule by taking preliminary steps without an ongoing, genuine intent to promptly proceed to trial, as might be evident from subsequent inexcusable delays. Mich. Comp. Laws Ann. § 780.131(1).

[9] **Criminal Law** ⇐ Accrual of right to time restraints

Because the statutory 180-day period, under statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections, is a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the Department, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. Mich. Comp. Laws Ann. § 780.131(1).

[10] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

If criminal action against inmate is commenced within 180 calendar days following the date the prosecutor receives notice from the Department of Corrections of accused inmate's imprisonment, statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by the Department has been satisfied, unless the prosecutor's initial steps are followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly. Mich. Comp. Laws Ann. § 780.131(1).

[11] **Criminal Law** ⇐ Computation

A court should not calculate the 180-day period in statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections by apportioning to each party any periods of delay after the Department delivers notice. Mich. Comp. Laws Ann. § 780.131(1).

[12] **Criminal Law** ⇐ Cause for delay, "good cause", and excuse or justification in general

State's delay of several months in bringing defendant, a state inmate, to trial, due to the Supreme Court suspending all court proceedings as part of the state's COVID-19 response, did not violate statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections, although State likely did not follow best practices in bringing matter to rapid resolution and case was not fully ready for trial within the 180-day period; Supreme Court's COVID-19 order suspending all court proceedings was issued weeks before 180-day period expired, State's lack of best practices did not cause meaningful delay, and State was prepared for trial by the first day courts were reopened. Mich. Comp. Laws Ann. § 780.131(1).

[13] **Criminal Law** ⇐ Duty of prosecution to proceed to trial

> A prosecutor does not necessarily violate the 180-day rule in statute requiring that inmates charged with criminal offenses be brought to trial within 180 days following notice by Department of Corrections solely because more diligence could have been employed, but instead, the 180-day rule requires that the prosecutor act in good faith and proceed promptly and move the case to the point of readiness for trial within the 180-day period. Mich. Comp. Laws Ann. § 780.131(1).

Muskegon Circuit Court, LC No. 20-000702-FH

Before: Riordan, P.J., and K. F. Kelly and Swartzle, JJ.

Opinion

Swartzle, J.

***1** When a prosecutor brings a criminal charge against an inmate of a state penal institution, state law requires that, once the prosecutor has received written notice from the Department of Corrections, the prosecutor must proceed promptly and take good-faith action within 180 days to bring the case to the point of readiness for trial. The circuit court dismissed the criminal charges in this case based on this "180-day rule." The circuit court abused its discretion in doing so, however, because a significant amount of the delay in bringing defendant's case to trial was not the fault of the prosecutor, but rather resulted from our Supreme Court's decision to suspend jury trials during the early days of the Covid pandemic. Accordingly, we reverse the circuit court's dismissal of charges against defendant.

I. BACKGROUND

The prosecutor charged defendant with one count of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count of possession of child sexually abusive material, MCL 750.145c(4)(a). The allegations of the underlying incident are not relevant to this appeal. The prosecutor received written notice from the Department of Corrections on October 22, 2019, that defendant was incarcerated at a state prison serving a sentence for an unrelated conviction. The notice triggered MCL 780.131, also known as the 180-day rule. The 180-day period expired on April 19, 2020.

On January 10, 2020, the prosecutor notified the district court that the 180-day rule applied to this case. Defendant was arraigned on January 27, and a probable-cause conference was held on February 5. The matter was bound over to the circuit court on February 12, and the felony complaint was filed the same day. Defendant then sent discovery requests to the prosecutor. A pretrial conference was scheduled for March 3, but it had to be rescheduled to March 16 because the prosecutor did not file a writ for defendant's appearance from prison.

On March 15, the day before the pretrial hearing was scheduled to take place, the Michigan Supreme Court issued Administrative Order No. 2020-1. Administrative Order No. 2020-1 (2020). Administrative Order 2020-1 imposed emergency measures on the Judiciary as a result of the Covid-19 pandemic. Administrative Order 2020-2 was entered three days later on March 18. Administrative Order No. 2020-2, —— Mich —— (2020). Administrative Order 2020-2 instructed trial courts to adjourn all criminal matters, including jury trials, until after April 3, with a few exceptions not relevant here. Administrative Order 2020-1 and 2020-2 were later extended to April 14, see Administrative Order 2020-5, —— Mich —— (2020), then April 30, see Administrative Order 2020-7, —— Mich —— (2020), and finally for an indefinite period, Administrative Order 2020-12, —— Mich —— (2020). On April 23, all jury trials were delayed until the later of June 22 or further notice. Administrative Order 2020-10, —— Mich —— (2020).

April 19—the final day of the 180-day period—came and went without any further action in this case. Ten days later, the prosecutor responded to defendant's discovery request. A pretrial hearing was held on July 29, and the jury trial was scheduled for October 19, 2020—the first day the prosecutor believed that the circuit court would be able to hold a jury trial under our Supreme Court's administrative orders. On September 1, defendant moved to dismiss this case on the basis that the prosecutor had violated the 180-day rule. Following a hearing, the circuit court concluded that the prosecutor had not proceeded in good faith to set this matter for trial and dismissed this case.

***2** This appeal followed. On appeal, the prosecutor asserted for the first time that the office took immediate action to alert the district court that defendant was an

inmate with the Department of Corrections. In support, the prosecutor pointed to the district court's register of actions, which does have the following minute entry for October 22, 2019: "VIDEO ARRAIGNMENT FORM RECEIVED FROM PROSECUTOR'S OFFICE." There is nothing else in the record, however, to indicate what the district court purportedly received from the prosecutor that day—the only letter in the record from the prosecutor to the district court referencing the 180-day rule is the one dated January 10, 2020. Moreover, defendant argued before the circuit court that the prosecutor had not alerted the district court about the 180-day rule until January 10, 2020, and the prosecutor did not challenge this factual assertion, either during the hearing or in the prosecutor's supplemental brief filed after the hearing. As part of its ruling in favor of defendant, the circuit court made the factual finding that the district court had not been alerted about the 180-day rule until January 10, 2020. In all other respects, the parties have argued on appeal consistent with their arguments before the circuit court.

II. ANALYSIS

[1] [2] [3] We review for an abuse of discretion a circuit court's decision on a motion to dismiss. *People v. Herndon*, 246 Mich.App. 371, 389, 633 N.W.2d 376 (2001). We review de novo questions of law, including statutory interpretation. *People v. Lown*, 488 Mich. 242, 254, 794 N.W.2d 9 (2011). The circuit court's attributions of delay are reviewed for clear error. *People v. Crawford*, 232 Mich.App. 608, 612, 591 N.W.2d 669 (1998).

The requirements of the 180-day rule are set forth in MCL 780.131(1), which provides in relevant part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner.

When a prosecutor violates the 180-day rule, the following consequences apply:

> In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [MCL 780.133.]

The 180-day rule is distinct from a criminal defendant's constitutional right to a speedy trial under our federal and state Constitutions, U.S. Const., Am. VI; Const. 1963, art. 1, § 20, and this latter right is not currently before us on appeal.

[4] [5] With respect to the 180-day rule, our Supreme Court has concluded that the Legislature did not intend to require that a trial necessarily take place within 180 days. *People v. Hendershot*, 357 Mich. 300, 303, 98 N.W.2d 568 (1959). As explained by the *Hendershot* Court, "The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period." *Id.* at 304, 98 N.W.2d 568. Rather, if "apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met." *Id.*

[6] [7] [8] Our Supreme Court revisited the 180-day rule in *Lown*, 488 Mich. 242, 794 N.W.2d 9, just over a decade ago. The *Lown* Court explained, "The object of [the 180-day] rule is to dispose of new criminal charges against inmates in Michigan correctional facilities; the rule requires dismissal of the case if the prosecutor fails to commence action on charges pending against an inmate within 180 days after the [Department] delivers notice of the inmate's imprisonment." *Lown*, 488 Mich. at 246, 794 N.W.2d 9. But "the rule does not require that a *trial* be commenced or completed within 180 days of the date notice was delivered." *Id.* Rather, "it is sufficient that the prosecutor proceed promptly and move the case to the point of readiness for trial within the 180-day period." *Id.* (cleaned up). "Significantly, although a prosecutor must proceed promptly and take action in good faith in order to satisfy the rule, there is no good-faith exception to the rule. Instead ... good faith is an implicit component of proper action by the prosecutor, who may not

satisfy the rule simply by taking preliminary steps toward trial but then delaying inexcusably." *Id.* at 246-247, 794 N.W.2d 9. Stated differently, "the requirement that a prosecutor proceed in 'good faith' means simply that [the prosecutor] must in fact commence action and cannot satisfy the rule by taking preliminary steps without an ongoing, genuine intent to promptly proceed to trial, as might be evident from subsequent inexcusable delays." *Id.* at 273, 794 N.W.2d 9.

*3 [9] [10] [11] Additionally, "the statutory 180-day period is, by the plain terms of the statute, a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the [Department]." *Id.* at 247, 794 N.W.2d 9. "Thus, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. If so, the rule has been satisfied unless the prosecutor's initial steps are followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly." *Id.* (cleaned up). Given this, "a court should not calculate the 180-day period by apportioning to each party any periods of delay after the [Department] delivers notice." *Id.*

[12] On appeal, defendant places the blame for the delay squarely on the shoulders of the prosecutor. It certainly could be argued that the prosecutor did not follow "best practices" in bringing the matter to a rapid resolution. The Department notified the prosecutor in October 2019 that the 180-day rule applied. The circuit court found that the prosecutor did not take any action for nearly three months—about half of the 180 days. While the prosecutor challenges this factual finding on appeal, there is insufficient evidence in the record to show that the circuit court clearly erred, and so we accept the circuit court's factual finding on this point. Then, the pretrial hearing had to be adjourned several days because the prosecutor did not file a writ for defendant's appearance from prison. It was not until several days after the 180-day period had expired that the prosecutor responded to defendant's discovery request.

[13] But, a prosecutor does not necessarily violate the 180-day rule solely because more diligence could have been employed. Instead, the 180-day rule requires that the prosecutor act in good faith and "proceed promptly and move the case to the point of readiness for trial within the 180-day period." *Id.* at 246, 794 N.W.2d 9 (cleaned up).

Nothing in the record suggests that the prosecutor initially delayed proceedings until January 2020 in a bad-faith attempt to delay trial. As for the March 3 pretrial hearing, although the prosecutor should have filed a writ for defendant's appearance, that miscue resulted in only a brief delay. As for the discovery response, while the prosecutor similarly should have responded sooner, the resulting delay had little-to-no practical impact on the proceedings because our Supreme Court had imposed emergency measures in the meantime. Moreover, we note that trial was eventually scheduled to begin on October 19, 2020, the first day a jury trial was again permitted in that circuit court under our Supreme Court's administrative orders.

Significantly, much of the delay in defendant's scheduled jury trial resulted from our Supreme Court's decision to suspend jury trials in response to the Covid-19 pandemic. This delay is somewhat analogous to the one encountered in *People v. Schinzel*, 97 Mich.App. 508, 512, 296 N.W.2d 85 (1980), where the delay was caused by a wholesale change in docketing systems approved by our Supreme Court. The *Schinzel* Court concluded that the delay was excusable under the 180-day rule. *Id.* at 513, 296 N.W.2d 85. Although we are not bound by the decision in *Schinzel* because it was issued prior to November 1, 1990, MCR 7.215(J)(1), we find its analysis on this question persuasive.

As a counter-example, this case does not present a situation in which trial courts remained open for jury trials, but subject to heightened Covid-19 safety measures. See, e.g., Administrative Order of the Western District of Michigan 20-MS-024; Administrative Order of the Western District of Michigan 20-MS-029; Administrative Order of the Western District of Michigan 20-MS-037. In such a circumstance, the prosecutor would have been expected to bring the case to trial promptly because a jury trial would have been permitted. But this was not an option here.

*4 Defendant counters that the prosecutor could have done more in the ensuing weeks after the emergency measures were put in place, but instead, the prosecutor delayed until July 2020 to hold a pretrial hearing. This might be the case, but again, the standard is not whether the prosecutor could have moved faster. Rather, the prosecutor must take good-faith actions within the 180-day period and move promptly and with dispatch toward readying the case for trial.

Our review of the record confirms that the prosecutor took necessary steps to get this case ready for trial within a

practicable time-frame given the circumstances. While the case was not fully ready for trial when the 180-day period expired, our case law does not require that the trial actually take place within that time period and, in any event, criminal proceedings and jury trials in our state courts were suspended weeks before the time period had expired. The prosecutor's actions were sufficient to have trial ready for the first possible day the circuit court was permitted to resume jury trials. In fact, given the timing of our Supreme Court's orders, defendant's trial would have very likely begun on October 19 in any event, even if more diligence had been shown at the outset. The prosecutor did not cause an inexcusable delay in readying defendant's case for trial, and the circuit court abused its discretion in concluding that the prosecutor violated the 180-day rule.

III. CONCLUSION

For the reasons stated in this opinion, we reverse the circuit court's order dismissing the charges against defendant. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

--- N.W.2d ----, 2022 WL 627018

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APPENDIX C

People v Langsford, unpublished per curiam opinion of the Court of Appeals, issued May 12, 2022 (docket no. 354311)

2022 WL 1509090
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Justin David LANGSFORD, Defendant-Appellant.

No. 354311
|
May 12, 2022

Marquette Circuit Court, LC No. 19-058134-FH

Before: Letica, P.J., and Markey and O'Brien, JJ.

Opinion

Per Curiam.

***1** Defendant appeals as of right his bench-trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and domestic violence, third offense, MCL 750.81(2), (5).[1] Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve 25 to 50 years' imprisonment for AWIGBH and 40 to 60 months' imprisonment for domestic violence. We affirm.

I. BACKGROUND

This case arises from an incident that occurred on May 18, 2019, in which defendant was accused of throwing his then girlfriend on the ground breaking her leg, then bouncing up and down on top of her while slapping her face and making her look at him. Defendant was arrested on June 8, 2019, and his trial was initially scheduled for January 2020. However, another trial scheduled for that day took precedence, and defendant was not tried until April 21 and 22, 2020. By this time, the COVID-19 pandemic was underway, and the trial court had implemented safety precautions intended to mitigate the spread of the disease. As such, the courtroom was limited to 10 people, several witnesses testified over Zoom, and social distancing was required. After a bench trial, defendant was found guilty and sentenced as described above. His sentence of 25 to 50 years' imprisonment for AWIGBH was the mandatory minimum sentence prescribed by MCL 769.12(1)(a) because defendant was convicted as a fourth-offense habitual offender.

II. SPEEDY TRIAL

Defendant first argues that the trial court violated his right to a speedy trial. We disagree.

Defendant preserved this issue by making a formal demand for a speedy trial in the trial court. See *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Whether a defendant's right to a speedy trial has been violated presents a constitutional issue reviewed de novo. *Id.*

Both the United States and Michigan Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const., Am. VI; Const. 1963, art. 1, § 20; *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). This Court evaluates allegations of speedy trial violations by balancing the following four factors, known as the *Barker*[2] factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id.* at 261-262.

The length of the delay in this case was 10 months and 13 days. When considering the length of the delay, there is not a fixed number of days after which a defendant's right to a speedy trial is violated, see *id.*, and courts instead consider the circumstances surrounding the case, see *People v Collins*, 388 Mich 680, 690; 202 NW2d 769, 774 (1972) ("This Court in considering length of delay has always considered the surrounding circumstances of the case."). The trial in this case lasted two days and involved the testimony of six witnesses, including testimony from two competing expert witnesses about the possible causes for the victim's injuries. Thus, while this case may appear to be a straight-forward assault at first glance,[3] the circumstances surrounding this case were more complex. Moreover, while the delay of 10 months and 13 days was more than the 180 days that the Legislature has deemed

reasonable for a person in custody to be brought to trial, see MCL 780.131, it was far less than the 18-month delay that courts presume is prejudicial, see *People v Den Uyl*, 320 Mich 477, 494; 31 NW2d 699 (1948). In light of the foregoing, we conclude that this factor weighs against defendant's claim.

***2** Turning to the second factor, the reason given for the delay was docket congestion. Defendant contends that this Court should ignore this explanation for the delay, and instead conclude that no reason was given, because the trial court only made "fleeting reference" to docket congestion in explaining the delay. Defendant cites no caselaw to support such an argument, and we otherwise disagree with his assertion that a concise explanation for the delay is equivalent to a failure to explain the delay.[4] Returning to the speedy-trial analysis, docket congestion as a reason for delay weighs against the prosecution, but is "given a neutral tint" and "assigned only minimal weight." *Waclawski*, 286 Mich App at 666. Accordingly, this factor weighs against the prosecution, but only minimally.

The third factor is the defendant's assertion of his right to a speedy trial. "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned." *Barker v Wingo*, 407 US 514, 531; 92 S Ct 2182; 33 L Ed2d 101 (1972). This factor "is entitled to strong evidentiary weight" because "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.* Defendant asserted his right to a speedy trial days after his arrest when defense counsel filed his appearance, but he did not make any subsequent requests.[5] At no point prior to this appeal did defendant suggest that his right to a speedy trial had actually been violated, which also suggests that he was not harmed by the delay.

The fourth and final factor in a speedy trial analysis is whether defendant suffered prejudice as a result of the delay. When the delay less than 18 months, like in this case, the burden is on the defendant to show prejudice. *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013). "There are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to the defense." *Williams*, 475 Mich at 264 (quotation marks and citation omitted). Prejudice to the person includes "oppressive pretrial incarceration" as well as "anxiety and concern of the accused." *Barker*, 407 US at 532. "However, anxiety, alone, is insufficient to establish a violation of defendant's right to a speedy trial." *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). "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 (quotation marks and citations omitted).

Regarding prejudice to the person, defendant cites his statement at the arraignment that he would "probably" lose his job as a result of his incarceration, but this statement was made three days after his arrest, which was before he could possibly have known that it would take more than 10 months for his trial to be conducted, and it does not appear as though any additional mention of his employment status was made at subsequent hearings. Defendant also argues that he suffered prejudice to his person because he was incarcerated during the start of the COVID-19 pandemic. While there is nothing in the record to suggest that defendant actually contracted this illness, defendant argues that his risk of exposure was heightened by his incarceration, and the increased risk caused him undue anxiety. This anxiety was intensified, defendant argues, because of defendant's various underlying health conditions. However, the record includes virtually no information pertaining to defendant's health or how it could be impacted by the pandemic. Moreover, the pandemic struck Michigan in March 2020, and defendant's trial was conducted in April 2020. This additional pretrial anxiety lasted for only approximately one month. Regardless, as stated previously, anxiety alone is not sufficient to establish prejudice for the purposes of a speedy trial argument. *Gilmore*, 222 Mich App at 462.

***3** Defendant further argues that the delay caused prejudice to his defense because he was not tried until the onset of the pandemic, at which time courtroom restrictions were in place that allegedly compromised his right to a public trial, to confront witnesses, and to the assistance of counsel. It would be unreasonable, however, to attribute the public health precautions in place due to COIVD-19 to the delay in conducting defendant's trial—the delay did not cause the pandemic, and the fact that the delay and start of the pandemic coincided was purely happenstance. Moreover, given that the delay in this case was less than 18-months, it was defendant's burden to establish that his defense was prejudiced, and, as the prosecution points out, defendant "has not alleged that any exculpatory evidence has been lost or destroyed, that any defense witness became unavailable as a result of the delay, does not explain how his ability to effectively cross-examine witnesses was hindered, or otherwise indicate how he was unable to present evidence that could have supported his defense." Put differently, defendant has not presented anything from which this Court can reasonably conclude that

his ability to adequately prepare or present his defense was prejudiced by the delay.

In sum, of the four *Barker* factors, only the second factor supports that defendant's right to a speedy trial was violated, and that factor only minimally weighed against the prosecution. The other three *Barker* factors weighed against defendant's claim. Accordingly, balancing the four *Barker* factors, we find no violation of defendant's right to a speedy trial.

III. WAIVER OF CONFRONTATION RIGHT

Defendant next argues that he did not execute a valid waiver of his right to confront witnesses. We disagree.

"A defendant must raise an issue in the trial court to preserve it for [this Court's] review." *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012). Defendant did not raise this issue in the trial court and concedes that it is unpreserved. Unpreserved constitutional arguments are reviewed for plain error. *Carines*, 460 Mich at 752-753. A plain error occurs if three requirements are "met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763.

Both the United States and Michigan constitutions protect a defendant's right to confront the witnesses against him. U.S. Const., Am. VI; Const. 1963, art. 1, § 20. This right generally "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact ...." *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012) (quotation marks and citation omitted). A defendant, however, can waive this right, and this waiver may be accomplished through counsel. *Id.* at 306-307. A waiver is "the intentional relinquishment or abandonment of a known right," and one who waives a right cannot then seek appellate review of a claimed deprivation of that right because the waiver extinguished any error. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citation omitted). In *Buie*, our Supreme Court adopted "the following rule to govern the waiver of the right of confrontation by counsel in Michigan: if the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *Buie*, 491 Mich at 315.

In the present case, defendant and the complaining witness both testified in person, but several witnesses were allowed to testify remotely through the use of videoconferencing technology. Before trial began, defense counsel expressly consented on the record to the use of this technology for taking testimony, and defendant did not object. Defendant does not attempt to rebut the presumption that this waiver was a reasonable trial strategy, but rather argues that the rule articulated in *Buie* should be modified such that "this court should ask whether, in light of COVID-19, a defendant knowingly and voluntarily waived his right to confrontation through his attorney." This Court, however, has no authority to modify a rule handed down by the Supreme Court, see *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011) ("This Court is bound to follow decisions of our Supreme Court."), and we therefore reject defendant's invitation to do so. Defendant fails to otherwise direct this Court to evidence in the record suggesting that this waiver was involuntary or unreasonable trial strategy.[6] Accordingly, defendant has not rebutted the presumption that his counsel's waiver of defendant's right to confrontation was reasonable trial strategy, and so his argument does not warrant appellate relief.

IV. SENTENCING

***4** Defendant argues that his 25-year mandatory minimum sentence was excessive in violation of the Michigan Constitution's prohibition of cruel or unusual punishments. We disagree.

Defendant did not raise this issue in the trial court, so it is unpreserved. See *People v Burkett*, — Mich App ——, ——; — NW2d —— (2021) (Docket No. 351882); slip op. at 2. Unpreserved constitutional arguments are reviewed for plain error. *Carines*, 460 Mich at 752-753.

The United States Constitution prohibits punishments that are both cruel and unusual, U.S. Const., Am. XIII, while Michigan's Constitution prohibits punishment that is cruel *or* unusual, Const. 1963, art. 1, § 16. See *Harmelin v Michigan*, 501 US 957, 994-995; 111 S Ct 2680; 115 L Ed2d 836 (1991); *People v Bullock*, 440 Mich 15, 30-31; 485 NW2d 866 (1992). " 'The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition.' " *Bullock*, 440 Mich at 31, quoting *People v Lorentzen*, 387 Mich 167, 171-172; 194 NW2d 827 (1972).

In this case, defendant's sentencing offense was AWIGBH, MCL 750.84, and he received a mandatory 25-year prison sentence as a fourth-offense habitual offender pursuant to MCL 769.12(1)(a). Defendant argues that this mandatory sentence as applied to him was unusually excessive in violation of the Michigan Constitution.

When assessing whether a punishment is cruel or unusual, this Court uses "a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). "Legislatively mandated sentences are presumptively proportional and presumptively valid." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Burkett*, —— Mich App at ——; slip op. at 3.

This Court in *Burkett* recently addressed the same constitutional argument to MCL 769.12(1)(a) that defendant raises in this case. For the first prong, the *Burkett* Court acknowledged the mandatory 25-year sentence was "a harsh punishment," but ultimately determined that the sentence was not "unduly harsh" given the gravity of the defendant's offense. *Burkett*, —— Mich App at ——; slip op. at 4. We similarly conclude that the 25-year prison sentence imposed in this case was "a harsh punishment," but not unduly harsh. Defendant threw his then girlfriend to the ground violently enough to break her leg, then climbed on top of her and began bouncing up and down on her pinned-down body, while slapping her face and holding her eyes open to look at him. This was undoubtedly an egregious crime. Moreover, defendant was previously convicted of other felonies, including second-degree home invasion, assault with a dangerous weapon, and assaulting, resisting, or obstructing a police officer causing injury. While MCL 769.12(1)(a) requires that only one of the defendant's prior offenses be a listed felony, two of these prior convictions are listed felonies under MCL 769.12(6)(a). See MCL 769.12(6)(a)(*iii*). Accord *Burkett*, —— Mich App at ——; slip op. at 4.

***5** On appeal, defendant urges this Court to find his sentence unduly harsh because his guidelines' sentencing range was 38 to 152 months. The sentencing guidelines, however, do not always reflect the seriousness of an offense. See, e.g., *People v Houston*, 448 Mich 312, 322; 532 NW2d 508 (1995). Thus, that defendant's guidelines' range is lower than the 25-year sentence ultimately imposed does not necessarily support defendant's argument that his sentence is unduly harsh. Regardless, the 25-year sentence was not unduly harsh given the gravity of defendant's offense, as previously explained.

The second prong of the test for whether a punishment is cruel or unusual asks for a comparison between the penalty at issue and other crimes in Michigan. Defendant's primary argument for this prong is that the maximum penalty for a first offense of AWIGBH is 10 years and many of the other crimes listed as "serious crimes" in MCL 769.12(6)(c) carry maximum penalties of 15 years for a first offense. However, assault with intent to maim, MCL 750.86; mayhem, MCL 750.397; and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), are also punishable by a maximum of 10 years' imprisonment, and MCL 769.12(6)(c) lists them as serious crimes subject to a 25-year mandatory minimum sentence. Defendant also compares his 25-year minimum sentence to the guidelines' ranges for more serious offenses scored to reflect his same prior-record-variable and offense-variable scores, but defendant has not cited any caselaw to support that this type of comparison is an appropriate basis on which to conclude that the penalty imposed for defendant's crime was unusual when compared to the penalties for other Michigan crimes. Indeed, such a comparison seems ill-suited for present purposes because the legislative sentencing guidelines reflect only advisory sentences, see *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), not penalties for other crimes.

The final prong involves a comparison of Michigan's penalty to the penalty imposed for the same offense in other states. Defendant concedes that Michigan's penalty is less severe than those allowed under California's "three strikes" law, which was upheld by the United States Supreme Court in *Ewing v California*, 538 US 11; 123 S Ct 1179; 155 L Ed 2d 108 (2003), but defendant attempts to distinguish California's provision. However, the defendant in *Burkett* attempted to make the same distinction, and this Court was unpersuaded. *Burkett*, —— Mich App at ——; slip op. at 5. Defendant also compares his sentence to penalties for what he believes are similar offenses in Indiana, Kansas, and Florida.

In Indiana, a defendant sentenced as a habitual offender for a conviction of an offense equivalent to defendant's—a level 5 felony battery—would face a fixed prison term as short at three years and as long as 12 years. Ind Code §§ 35-50-2-8, 35-42-2-1.[7] For Kansas, defendant argues that his conviction is equivalent to a conviction for aggravated battery under Kan Stat § 21-5413(b), and contends that he could only be sentenced as a habitual offender for up to 9½ years' imprisonment under Kan Stat § 21-6706. That statute, however, provides that its provisions "shall not be applicable to ... any felony committed on or after July 1, 1993." Kan Stat § 21-6706(e)(3). Thus, that statute would not be applicable to defendant, and it is not for this Court to search out and discover which statute would be applicable to defendant. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims ...."). Finally, in Florida, a person with defendant's criminal history who committed the equivalent offense of aggravated battery[8] would be sentenced to serve "a term of years not exceeding 30." Fla Stat §§ 784.045(2), 775.084(4)(a).

*6 Based on the foregoing, defendant has indeed demonstrated that there is at least one state in which the penalty for his crime would be less severe. However, in the other state that defendant provided current law for, the penalty for his crime could be more severe. Therefore, the third factor, like factors one and two, does not support defendant's position. Moreover, defendant has failed to articulate any unique circumstances which would overcome the presumption that the statutorily enhanced sentence is proportionate to the offense. We therefore conclude that defendant has failed to establish that his mandatory minimum sentence was unconstitutional.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2022 WL 1509090

Footnotes

1 Defendant was found not guilty of one count of felonious assault, MCL 750.82.

2 *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed2d 101 (1972).

3 The crimes of which defendant stood accused were serious, but the seriousness of the offense does not necessarily make the case complex. See, e.g., *Collins*, 388 Mich at 689 (recognizing that the crime at issue—armed robbery—was "a serious crime," but describing it as "a simple street crime" given the circumstances of that case).

4 Defendant also argues that the trial court's explanation of " 'docket congestion' as a statutorily sanctioned reason for the delay ... runs contrary" to MCR 6.004(C)(6). That rule, however, deals with whether a defendant must be released on personal recognizance, and defendant has not explained MCR 6.004(C)'s significance to the second *Barker* factor.

5 Defense counsel mentioned the right to a speedy trial at a February 5, 2020 hearing, but this was only a passing reference made in support of defendant's request for pretrial release.

6 For instance, defendant asserts that his waiver was involuntary because "he had to choose between the videoconferencing witnesses or waiting in jail even longer for his trial to commence." Defendant does not explain why trial would have been delayed if he insisted on in-person testimony, but accepting this assertion as true, it does not render his choice to proceed with trial by videoconferencing witnesses involuntary.

7 A defendant in Indiana is guilty of a level 5 felony battery if he or she intentionally touches another person in a rude, insolent, or angry manner and the offense results in serious bodily injury to the other person. Ind Code § 35-42-2-1(g)(1). The prosecution contends that a Michigan conviction for AWIGBH is more equivalent to a level 3 felony battery in Indiana, which is when a person "intentionally inflicts injury on a person that creates a substantial risk of death or causes: (1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) the loss of a fetus[.]" Ind Code § 35-42-2-1.5. While neither Indiana offense is particularly analogous to Michigan's AWIGBH, we believe that the offense cited by defendant is the better comparison.

8 A defendant in Florida is guilty of aggravated battery if he or she, in committing a battery, intentionally causes great bodily harm. Fla Stat § 784.045(1)(a). Defendant, however, contends that his Michigan conviction for AWIGBH is equivalent to a Florida conviction for aggravated assault, which is an assault with a deadly weapon without intent to kill or assault with an intent to commit a felony. Fla Stat § 784.021. We agree with the prosecution that Michigan's AWIGBH is more comparable to Florida's aggravated battery, not aggravated assault.

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