

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

OCTOBER TERM, 2022

State of New Hampshire

v.

BRANDON CASTIGLIONE

218-2019-CR-01132

STATE'S OBJECTION TO MOTION TO DISMISS

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully OBJECTS to the Defendant's Motion to Dismiss Due to a Violation of the Right to a Speedy Trial, and in support thereof states as follows:

1. The defendant is charged with two alternative counts of Second Degree Murder – Knowing and Reckless, alleging, respectively, that he knowingly caused the death of Luis Garcia by shooting him through the neck with a firearm, or that he recklessly caused the death of Luis Garcia under circumstances manifesting extreme indifference to the value of human life by shooting Mr. Garcia in the head with a firearm on or about October 1, 2019.

2. The defendant has moved to dismiss the charges against him, arguing his right to a speedy trial under Part 1, Article 14 of the New Hampshire State Constitution, and the 14th Amendment of the United States Constitution. The State objects.

Procedural History

3. The initial complaint in this case was filed, and the defendant was arrested on October 2, 2019. He was assigned counsel from the New Hampshire Public Defender's Office and was arraigned later that same date.

4. On December 2, 2019, the defendant, through prior counsel, filed a Motion to Determine Competency to Stand Trial which was granted by the Court (Honigberg, J.). A competency hearing was scheduled for January 27, 2020.

5. On December 3, 2019, the State filed an Assented-To Motion to Extend Indictment Deadline and an Assented-To Motion to Continue a dispositional conference scheduled for December 4, 2019, both of which were also granted by the Court.

6. On January 8, 2020, the Office of the Forensic Examiner (“OFE”) attempted to complete a competency evaluation with the defendant. However, part-way through the evaluation, the defendant refused to participate further. As the OFE could not complete the evaluation due to the defendant’s decision to no longer participate, the January 27, 2020 competency hearing was cancelled and rescheduled for March 9, 2020. A second evaluation was scheduled for February 2, 2020, but the defendant refused to respond to corrections officers when they came to transport him for the evaluation.

7. Another evaluation with the OFE was then scheduled for March 6, 2020. On that date, the defendant again met with the OFE for a competency evaluation. However, the defendant again refused to participate part-way through the evaluation. As a report could not be completed, nor the parties prepared, in time for the hearing scheduled for March 9, 2020, and as a result of the defendant again refusing to fully participate in the competency evaluation, the March 9, 2020 competency hearing was rescheduled for April 30, 2020.

8. On March 16, 2020, the New Hampshire Supreme Court issued the Order Suspending In-Court Proceedings in response to the COVID-19 pandemic. Relevant here, the order suspended all grand jury proceedings and in-person hearings, including competency

hearings, and ordered that extensions to the State's 90-day deadline to indict cases under N.H. Rule of Criminal Procedure 8(d)(2) would be granted.

9. On April 13, 2020, the defendant, through counsel, filed a Motion to Address Bail. A hearing on bail was held on April 16, 2020 and bail was continued as previously set.

10. On April 24, 2020, the OFE issued its report on the defendant's competency, finding the defendant competent to stand trial. As the report was received so closely to the scheduled competency hearing, the parties again agreed to continue the hearing. Specifically, the defendant and defense counsel expressed a need to review the report with their own expert prior to any hearing. The competency hearing was rescheduled for July 16, 2020.

11. On May 15, 2020, the defendant, through counsel, filed a "Brief Report Concerning the Status of Competency Proceedings". Within this report, defense counsel included several items of which the defendant specifically wanted the Court to take note. Relevant here, the defendant "is troubled that Defense Counsel has not yet filed a notice of speedy trial and has requested that Defense Counsel file another bail motion." This is the first mention – though not a clear and unambiguous assertion – of the defendant's Speedy Trial right within the record of this case's history.

12. A competency hearing was held over the course of July 16 and 27, 2020, and the Court (Wageling, J.) issued an order on August 12, 2020 finding the defendant competent to stand trial.

13. On August 17, 2020, the defendant, through counsel, requested another bail hearing which was scheduled for September 2, 2020. Due to scheduling conflicts, counsel for the defendant requested, with the State's assent, that the hearing be continued and it was rescheduled for September 30, 2020.

14. On September 3, 2020, the New Hampshire Superior Court issued Administrative Order 2020-07 authorizing a multicounty grand jury allowing cases and indictments to be presented remotely. The multicounty grand jury was available to all prosecution offices across New Hampshire and was, at least initially, tasked with handling an extreme backlog of cases that had accrued across the state during the pandemic.

15. This case was presented for indictment at the multicounty grand jury convened on November 2, 2020, the third sitting of the multicounty grand jury. The grand jury returned true bills on both indictments for Second Degree Murder, as described above.

16. In early October 2020, the Court (Wageling, J.) issued two orders in response to two ex parte pleadings filed by the defendant regarding a “breakdown in communication” with his counsel and seeking to dismiss the charges in this case for lack of evidence. In its order, the Court made clear it would not accept any pleadings not filed by defense counsel.

17. An arraignment on the charges was originally scheduled for December 14, 2020 but was continued at the defendant’s request for an in-person hearing. A hearing on the defendant’s Motion to Compel Discovery, originally scheduled for November 4, 2020, was also continued at the defendant’s request for an in-person hearing, and both the arraignment and motion hearing were rescheduled for February 1, 2021.

18. At the defendant’s request, an ex parte Status of Counsel hearing was held on April 5, 2021. The State was not present. That same date, an Assented-To Structuring Proposal was filed by the defendant. Pursuant to the defendant’s Structuring Proposal, which was granted by the Court (Wageling, J.), trial was scheduled for February 2022.

19. On July 14, 2021, a status conference was held during which prior lead defense counsel, Attorney Eliana Forciniti, informed the Court of her unavailability for the February

2022 trial. The Court (Honigberg, J.) in essence provided the defendant with two options: his case could be reassigned to another attorney within the NH Public Defender's Office and the trial pushed to March 2022 to provide time for new counsel to prepare, or he could wait for Attorney Forciniti to become available again for trial in June 2022. On August 4, 2021, the defendant provided the Court with his decision to proceed to trial with a new public defender in March 2022. In its August 6, 2021 order – issued to the State on August 10, 2021 – the Court (Honigberg, J.) noted that the defendant had asserted his right to a speedy trial at the August 4, 2021 hearing.

20. On August 31, 2021, an ex parte hearing on status of counsel was held. No rulings were made at that time.

21. On December 1, 2021, a hearing on the defendant's Motion for Discovery was scheduled but converted to another ex parte hearing on the status of counsel. Per the Court's order (Honigberg, J.) dated December 2, 2021, the Court advised the defendant that any change in counsel at that time would make a March 2022 trial virtually impossible. Another hearing on the pending motions was scheduled for January 11, 2022.

22. The January 11, 2022 motions hearing was again converted into an ex parte hearing on the status of counsel. Based on discussions in this hearing, another ex parte hearing on status of counsel was then scheduled and held on January 31, 2022. At this subsequent hearing, counsel for the defendant was discharged and the defendant indicated he may proceed in the matter representing himself. The March 2022 trial date was cancelled.

23. A further hearing on the status of counsel was scheduled and held on March 17, 2022. After the hearing, the Court (Ruoff, J.) authorized the appointment of two attorneys to represent the defendant. The Court further ordered that the defendant and his new counsel would

have 60 days after appointment to meet and review the case and decide whether the defendant would proceed with representation or representing himself. Lastly, the Court ordered that trial be scheduled for May 2023.

24. Current defense counsel was appointed shortly after the March 17, 2022 hearing. On June 20, 2022, another status of counsel hearing was held, at which the defendant elected to proceed with counsel.

25. The defendant filed the instant Motion to Dismiss on October 4, 2022, nearly 6 months after new counsel was appointed.

Argument

I. DEFENDANT’S RIGHT TO A SPEEDY TRIAL HAS NOT BEEN VIOLATED

26. “In determining whether a defendant’s right to a speedy trial has been violated under the State Constitution, [this Court will] apply the four-part test articulated” in *Barker v. Wingo*, 407 U.S. 514 (1972). *State v. Allen*, 150 N.H. 290, 292 (2003) (citations omitted). The factors are: “(1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay.” *Id.* This [C]ourt puts substantial emphasis on the latter two of the *Barker* factors.” *State v. Brooks*, 162 N.H. 570, 582 (2011). *See also Allen*, 150 N.H. at 292 (“If the length of the delay is not presumptively prejudicial, however, [this Court will] not consider the remaining three factors.”)

27. Here, assuming for the sake of argument that the length of the delay is presumptively prejudicial, the remaining factors do not weigh in the defendant’s favor to the extent that a violation to his right to a speedy trial has occurred. His Motion to Dismiss should be denied.

a. The length of the delay is not a significant infringement

28. “Where a case remains untried for nine months after indictment, we recognize the delay as a signal of presumptive prejudice and inquire into the remaining *Barker* criteria.” *State v. Cotell*, 143 N.H. 275, 282 (1998) (citation omitted). The State does not dispute the 9-month threshold to review the remaining *Barker* factors has been surpassed in this case. However, the length of the delay claimed by the defendant – 298 days over the periods of October 2, 2019 to December 2, 2019 and August 12, 2020 to April 6, 2021 – amounts to only approximately 10 ½ months. In light of the nature of the charges against the defendant and the complexity in bringing such homicide cases to trial, this is not a significant infringement, and this factor does not weigh heavily in the defendant’s favor.

b. The reasons for the delay do not weigh heavily in the defendant’s favor

29. In his motion, the defendant accepts responsibility for his part in causing much of the delay in reaching a trial in this case. He does argue, however, that he bears no responsibility for the delay over two periods of time.

30. The first time period contested by the defendant represents the 61 days following his arrest on October 2, 2019 and ending on December 2, 2019, when he filed a Motion to Determine Competency. The defendant accepts that the speedy trial timeline was paused while the determination of his competency was pending.

31. New Hampshire Rule of Criminal Procedure 8(d)(2) establishes a 90-day deadline for the State to obtain an indictment from a grand jury in all felony proceedings initiated in Superior Court. The day after the defendant filed his Motion to Determine Competency, the State filed its first Assented-to Motion to Extend Indictment Deadline. As discussed above, the defendant refused to participate fully in the competency evaluation process at several points,

unnecessarily protracting the time needed to complete his evaluation and ultimately reach a determination on the issue. Throughout the process, the State filed two more assented-to motions to extend its deadline to indict.

32. Following the initial indictment extensions, the Superior Court issued its order suspending all in-court proceedings and allowing for further extensions of the State's indictment deadlines in light of the COVID-19 pandemic.

33. That the defendant initiated competency proceedings before the State's 90-day deadline had expired, that he accepts the speedy trial timeline paused while competency was pending, and that he assented to extending the State's deadline while his competency to stand trial was being determined, are all significant. Given the nature of this case and the complexities of conducting a trial for homicide, it would be unreasonable to expect a trial within the first 61 days after the defendant's arrest. Beyond that, it was the defendant's own decision to pursue a determination of his competency to stand trial that paused the speedy trial timeline at that point, regardless of his failure to assert his right beforehand.

34. In his motion, the defendant attempts to charge the State with the delay to the case caused by the pandemic and resulting suspension of in-court proceedings, albeit less heavily. However, the pandemic effectively played no part in any delay in this case. The defendant ignores in his motion the fact that his competency determination was pending for nearly the entirety of the period when in-court proceedings were suspended. In fact, the competency hearing was held in-person in July 2020. The State presented its case to the multicounty grand jury within its third sitting. Beyond whatever minimal delay there was between the finding of competency and the return of the indictments against the defendant, he offers no other

explanation as to how exactly the pandemic is to blame for any delay in his case, nor how exactly that blame is to then be charged to the State.

35. Furthermore, pausing the speedy trial timeline and extending the State's deadline to indict while competency was pending would arguably have been to the defendant's benefit. Had he been found incompetent, as he claimed he was, it would have resulted in the charges against him being dismissed before an indictment was even returned against him.

36. Given all the circumstances described above, the reason for the delay between October 2, 2019 and December 2, 2019 does not weigh in favor of the defendant.

37. The second time period the defendant contends he bears no responsibility for ran between August 12, 2020, the date the Court (Wageling, J.) issued its order finding him competent to stand trial, and April 6, 2021, the date the defendant's Proposed Scheduling Order was approved by the Court. The defendant points to two events throughout this time period in an effort to support his argument that the delay was the fault of the State: November 2, 2020, the date the multicounty grand jury returned the two indictments against him, and April 6, 2021, the date his proposed scheduling order was approved.

38. By baldly asserting he bears no responsibility for the delay in this timeframe, the defendant appears to argue the scheduling order should have been filed earlier than April 5, 2021 and that it is somehow the State's responsibility it was not, either because of the date the indictments were returned, or for some other reason. In so arguing, however, the defendant completely ignores the fact that he, through counsel, could have filed a proposed scheduling order at any point between August 12, 2020 and April 5, 2021.

39. While it is often the case (and may be ideal) that parties agree on scheduling and file either joint or assented-to proposed scheduling orders, agreement is also often not achieved.

In such instances, parties are free to propose their own case deadlines so the Court can resolve the issue either through pleadings or after conducting a hearing and seeking the rationale from both parties. The defendant offers nothing in his motion to explain why he, through counsel, was prevented from proposing his own scheduling order as soon as the finding on competency was issued by the Court. This is because there was nothing preventing him from doing so. Instead, he chose to wait to file the proposal, and it is clear he was unbothered by waiting to do so because he did not assert his right to a speedy trial at any point during that timeframe.

40. At nearly every turn throughout the course this case, the defendant has either assented, acquiesced, or failed to object to the manner and timing of how things have progressed. The most significant delays have also been the result of his own actions or decisions, such as refusing to participate fully in competency proceedings and repeated *ex parte* motions and hearings which ultimately resulted in changes in counsel and delays in trial. The February 2022 trial date was moved to the defendant's chosen date of March 2022. The March 2022 trial date was moved at the defendant's decision to retain new counsel. In light of all of this, this factor clearly weighs against the defendant.

c. The defendant has neither consistently nor unambiguously asserted his right to a speedy trial

41. In analyzing any potential violation of a defendant's speedy trial rights, substantial emphasis is placed on the final two factors in the *Barker* test: the strength of the defendant's assertion of the right, and whether and to what extent the defendant suffered prejudice. *See Brooks*, 162 N.H. at 582. *See also Allen*, 150 N.H. at 294. As to the strength of the defendant's assertion of the right, "the frequency and force of the objections" should be taken into account and "failure to assert the right will make it difficult for a defendant to prove" that their rights have been violated. *See Barker*, 407 U.S. at 529, 532.

42. When represented by counsel, it is difficult to establish that a defendant's right to speedy trial was denied where he has failed to assert the right. *See, e.g., State v. Tucker*, 132 N.H. 31 (1989) (no violation in seven-month unexplained delay where defendant never asserted his right); *State v. Perron*, 122 N.H. 941 (1982) (no violation in nineteen-month delay where defendant failed to assert right). In *Brooks*, the N.H. Supreme Court held that this factor did not weigh heavily in that defendant's favor, even though there was a 32 month delay, because the defendant did not assert the right until 15 months after he was charged and acquiesced to the State's two motions to continue. *Brooks*, 162 N.H. at 582-83.

43. The defendant baldly concludes in his motion, "[t]hat Mr. Castiglione asserted his right to a speedy trial several times during the pendency of this case should not be at issue. He asserted at several hearings, through defense counsel's motions and in his own pro se motions." To the contrary, the defendant's claimed assertions are very much at issue.

44. To the State's knowledge, the only actual, clear and unambiguous assertion of the right by the defendant occurred in the ex parte hearing, outside the State's presence, on August 4, 2021. The State was not informed of the assertion until the Court's (Honigberg, J.) order on August 10, 2021. This assertion was not made until 22 months after the defendant was arrested and charged, and a full year following the Court's (Wageling, J.) finding that the defendant is competent to stand trial. And, in contrast to the State's actions in *Brooks*, the State has never asked to continue trial in this case. *See Brooks*, 162 N.H. at 582-83. The only extensions requested by the State here were to extend its deadline to indict the defendant in light of the ongoing competency issue and the strictures created by the COVID-19 pandemic. These extensions were all assented-to by the defendant, and even if they had not been assented-to, the defendant fails to establish in any meaningful way how those extensions resulted in trial being

delayed, especially considering the first trial date in the case was selected in his own proposed scheduling order.

45. Furthermore, from the Court's order, it appears the assertion was made in the context of choosing to assign new counsel to the defendant's case so it could proceed to trial in March 2022, rather than retaining Attorney Forciniti and waiting until June 2022 for trial. The defendant's right was fulfilled in that moment by his own selection of the earlier trial date.

46. The defendant points to two other instances to support his claim that his assertion of the right "should not be at issue." First, the defendant argues the right was asserted in his Brief Report Concerning the Status of Competency Proceedings where he, through counsel, informed the Court he was "troubled that Defense Counsel has not yet filed a notice speedy trial..." In his motion, the defendant fails to include the complete statement from that filing. Paragraph 8 D of that report states, "Lastly, Mr. Castiglione is troubled that Defense Counsel has not yet filed a notice of speedy trial and has requested that Defense Counsel file another bail motion."

47. First, this statement amounts, at most, to an expression of the defendant's concerns with how his prior counsel was handling his case. It certainly does not amount to a clear, unambiguous assertion of the defendant's right to a speedy trial. This is made all the clearer by the second half of the sentence expressing his desire to be heard on bail again, rather than actually asserting the right. Announcing to the parties and to the Court that he is "troubled" is simply not an assertion.

48. The second instance the defendant claims amounts to an assertion occurred in a hearing held on January 11, 2022, where the defendant orally requested a Show Cause hearing concerning his right to a speedy trial. As the defendant admits in his own motion, however, what truly occurred was a waiver of the right, at that time. As the defendant makes clear in his motion,

he raised the issue, and then “decided to wait...” See Defendant’s Motion, ¶18. It defies logic to argue that the defendant, by choosing to wait to address his speedy trial rights, has actually asserted them.

49. To the extent the defendant argues his Motion to Dismiss bolsters the strength of his assertion of his right to a speedy trial, this too does not weigh heavily in his favor as the motion was not filed for another 14 months after the only other assertion on record in August 2021, and a full 6 months after appointment of new counsel. Furthermore, in its order dated February 16, 2022 granting the State’s Expedited Motion to Clarify Scheduling, the Court (Honigberg, J.) also granted to the State’s request to make a finding that the postponement of the March 2022 trial was “due to no fault of the State or of the Court.” That postponement was the result of the defendant’s decision to retain new counsel.

50. The sole clear and unambiguous assertion of his right to a speedy trial by the defendant was made on August 4, 2021, 22 months after he was arrested and charged, nearly a year after being found competent to stand trial, and 14 months before he filed the instant Motion to Dismiss before a trial date he agreed to. It simply cannot be said that the defendant has actively pursued his right to a speedy trial, and this factor, one of two requiring substantial emphasis, does not weigh in his favor.

d. The defendant has not demonstrated actual prejudice caused by the delay

51. “When a defendant does not – or cannot – articulate the particular harm caused by the delay, we inquire whether the length and reason for the delay weigh so heavily in the defendant’s favor that prejudice need not be specifically demonstrated. *State v. Paone*, 142 N.H. 216, 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 delay, as long as the defendant cannot show specific prejudice to his defense.” *State v. Locke*, 149 N.H. 1, 9 (2002) (citation omitted).

52. Prejudice may take the form of incarceration, anxiety and impairment of defense. *See Barker*, 407 U.S. at 532-33. However, impairment of the defense is “the most serious indication of prejudice.” *State v. Lake Winnepesaukee Resort*, 159 N.H.42, 49 (2009).

53. Here the defendant only claims prejudice related to his incarceration and associated anxiety during the pandemic. Notably, the defendant includes all pre-trial inmates in his description of the conditions while incarcerated. He further states in his motion that all pre-trial inmates were “denied visits by their attorneys, they had no indictment timeframes and no answers about when trials would resume, and they would have their day in court.” That these conditions have somehow prejudiced the defendant, or even applied to him, is demonstrably false.

54. As the record discussed above shows, there have been regular, often in-person hearings throughout nearly the entirety of the pendency of this case, including throughout the pandemic. These frequently came at the request of the defendant. The May 15, 2020 Brief Report Concerning Status of Competency Proceedings filed by counsel, in the middle of some of the strictest times brought on by the pandemic, includes statements from the defendant conveyed through his counsel. To say that he was denied visits or contact with his attorney is simply false. The defendant has specified no occasion or specific circumstance where he was denied access to his attorney, let alone to the detriment of his case.

55. That indictment timeframes were extended through the early stages of the pandemic in the summer of 2020 does little to bolster the defendant’s claim of prejudice. He was indicted within 2 months of the multicounty grand jury being convened.

56. Likewise, the defendant was provided with a trial date in April 2021 when he filed his proposed scheduling order requesting a February 2022 trial. That the trial was moved from that date was only due to the defendant's knowing decisions related to obtaining new counsel. The defendant knows, and has known for some time, exactly when he will have his day in court.

57. In describing these conditions, the defendant admits that all pre-trial inmates were subjected to the same conditions. He has, therefore, failed to demonstrate that he has suffered more than any other defendant normally would have throughout the same time period for anyone being held pre-trial. *See State v. Colbath*, 130 N.H. 316, 320 (1988).

58. Lastly, and most importantly, the defendant fails to allege impairment of his defense in any way. He does not allege that any witnesses have been lost, or memories dimmed as a result of the delay in his case. In failing to demonstrate this, and that his incarceration and anxiety amounted to actual prejudice, it is clear that this factor does not weigh heavily in the defendant's favor either.

Conclusion

59. As none of the *Barker* factors discussed above weigh heavily in the defendant's favor, it is clear his right to a speedy trial has not been violated. Therefore, his motion to dismiss the charges against him should be denied.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) DENY the defendant's Motion to Dismiss; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: October 14, 2022

/s/ Adam L. Woods

Adam L. Woods, Bar ID No. 265354
Attorney
Office of the Attorney General

/s/ Benjamin J. Agati

Benjamin J. Agati, Bar ID No. 16161
Senior Assistant Attorney General
Office of the Attorney General

33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

I certify that a copy of this pleading was uploaded through the e-filing system which provides service to counsel for the defendant, Wade Harwood, Esq. and Amy Ashworth, Esq. of Sisti Law Offices.

October 14, 2022

/s/ Adam L. Woods

Adam L. Woods