

State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

No. 15
The People &c.,
Respondent,
v.
Reginald Wiggins,
Appellant.

Ben A. Schatz, for appellant.
Sabrina Margret Bierer, for respondent.
New York State Association of Criminal Defense Lawyers et al.; JustLeadershipUSA;
The Bronx Defenders et al., amici curiae.

FAHEY, J.:

The answer to the question “how long is too long?” is a difficult one to resolve. However, certain basic principles must guide us. An accused’s right to be presumed innocent is protected by the right to prompt justice. Incarceration should generally follow conviction, not precede it. The failure of our criminal justice system to promptly resolve

cases erodes faith in its fundamental fairness. This Court has long recognized that “[s]ociety, as well as the defendant, has an important interest in assuring prompt prosecution of those suspected of criminal activity” (People v Staley, 41 NY2d 789, 792 [1977], citing People v Johnson, 38 NY2d 271, 276 [1975]). Delays are often inevitable and justifiable. Nevertheless, in discharging their obligation to ensure “that those accused of crimes are swiftly brought to justice” (Johnson, 38 NY2d at 276), the People do not have discretion to indefinitely delay a defendant’s trial in order to pursue evidence that would strengthen their case.

On this appeal, we must determine whether a lengthy delay between defendant’s arrest and his eventual guilty plea violated his constitutional right to a speedy trial. Applying the factors set forth in People v Taranovich (37 NY2d 442 [1975]) to the circumstances of this case, we conclude that defendant’s right to a speedy trial was violated.

I.

On May 24, 2008, after a “sweet sixteen” party, defendant Reginald Wiggins and codefendant Jamal Armstead confronted another partygoer after they were told that the partygoer had insulted their friend. Armstead pointed a gun at the alleged offender and pulled the trigger, but the gun did not fire. Armstead then handed the gun to defendant, who fired a shot that hit a 15-year-old bystander, killing him. Defendant was 16 years old at the time.

Defendant was arrested on May 28, 2008 and remanded without bail. Defendant and Armstead were charged in an indictment with murder in the second degree, two counts

of attempted murder in the second degree, and criminal possession of a weapon in the second degree. On August 26, 2008, defendant filed an omnibus motion in Supreme Court seeking, inter alia, severance of his case from Armstead's, in part on Bruton grounds (see generally Bruton v United States, 391 US 123 [1968]). On October 23, 2008, the court held that part of the motion seeking severance on Bruton grounds in abeyance, pending resolution of Armstead's motion to suppress his statements to police. The court, however, did not hold a Huntley hearing in Armstead's case or decide that suppression motion for nearly four years.

For approximately 2½ years, from January 2009 to June 2011, the People sought to obtain Armstead's cooperation in testifying against defendant. The People requested numerous adjournments for that purpose, generally with Armstead's consent. Inasmuch as severance had not yet been granted, these adjournments necessarily also resulted in adjournments of defendant's case. The People pursued Armstead's cooperation for this length of time even though the People acknowledged during later litigation of defendant's speedy trial motion that Armstead "repeatedly indicated through his lawyer that he [would] never testify against the defendant," although they further asserted, without elaboration, that "Armstead himself has wavered on this point."

The People's efforts to obtain Armstead's cooperation were unsuccessful. In June 2011, the People presented Armstead with the terms of a cooperation agreement, which Armstead rejected. Armstead's request for reassignment of counsel was granted. In July 2011, the People announced their intention to try Armstead first, separately from defendant. The People hoped that if Armstead was convicted on a top count, he might decide to testify

against defendant in exchange for a more lenient sentence. The People further asserted that Armstead's testimony "would significantly enhance the overall nature and quality of the evidence against the defendant." Due to adjournments requested by Armstead's counsel, Armstead's Huntley hearing did not begin until May 2012. In August 2012, the court denied Armstead's motion to suppress his statements.

In the meantime, in October 2011, defendant was involved in a jailhouse altercation. He was convicted of assault in the second degree, and in June 2013, he was sentenced to 4½ years' imprisonment. That judgment was affirmed on appeal (People v Wiggins, 132 AD3d 514 [1st Dept 2015], lv denied 27 NY3d 1076 [2016]). Defendant was also charged in 2009 with conspiracy and gang assault. Those charges were pending until March 2013, when they were ultimately dismissed.

Armstead's first trial began in October 2012, resulting in a partial verdict convicting him of criminal possession of a weapon in the second degree. Before deliberations could continue on the remaining counts, Hurricane Sandy interrupted the trial. When the trial resumed on November 7, 2012, only 11 jurors returned, and the court declared a mistrial. Armstead's counsel announced that he would be unable to retry the case until the following April.

In April 2013, Armstead's second trial began. That trial also ended in a mistrial due to jury deadlock. Armstead's counsel stated that he would be unable to retry the case until October.

In May 2013, before Armstead's third trial began, defendant filed his first motion to dismiss the indictment on constitutional speedy trial grounds. The court denied that

motion in December 2013. The court acknowledged that the delay was lengthy, but reasoned that “a good part of the extraordinary delay was caused by” Armstead, and that defendant had been incarcerated due to his unrelated pending cases during much of that time. The court further concluded that the defense did not appear to be impaired by the delay.

Armstead’s third trial began in January 2014. Armstead was acquitted of second-degree murder, but the jury deadlocked on the attempted murder counts, and a third mistrial was declared. Armstead’s fourth trial was scheduled for August 2014. In June 2014, defendant filed a second motion to dismiss the indictment based on a violation of his constitutional right to a speedy trial.

By September 23, 2014, Armstead’s fourth trial had not yet begun, and the People had not responded to defendant’s second speedy trial motion. Defendant pleaded guilty to manslaughter in the first degree in exchange for a determinate sentence of 12 years’ imprisonment, to be followed by five years’ postrelease supervision. During the plea proceeding, defendant withdrew his pending speedy trial motion. On October 7, 2014, defendant was sentenced in accordance with the terms of the plea agreement. On February 26, 2015, Armstead pleaded guilty to attempted murder in the second degree in exchange for a sentence of 15 years’ imprisonment, to be followed by five years’ postrelease supervision.

In short, the People pursued a cooperation agreement with Armstead for approximately 2½ years. After that effort proved unsuccessful, they spent the next three years attempting to convict Armstead, trying him separately from defendant. After three

mistrials, Armstead had been convicted of only criminal possession of a weapon in the second degree, he had been acquitted on the top count of second-degree murder, and the People were no closer to securing his testimony against defendant. The time between defendant's arrest on May 28, 2008 and defendant's plea on September 23, 2014 spanned six years, three months, and 25 days, from when defendant was 16 years old until he was 22. Defendant spent the entirety of that period incarcerated.

On appeal, the Appellate Division held, in a 3-2 decision, that defendant's constitutional right to a speedy trial was not violated (People v Wiggins, 143 AD3d 451 [1st Dept 2016]). One of the dissenting Justices granted defendant leave to appeal to this Court (28 NY3d 1152 [2017]). We now reverse.

II.

We analyze constitutional speedy trial claims using the five factors set forth in People v Taranovich (37 NY2d 442 [1975]): “(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay” (*id.* at 445). These factors are similar, but not identical, to the factors used in evaluating speedy trial claims under the federal constitution, which include the “[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant” (Barker v Wingo, 407 US 514, 530 [1972]). “[N]o one factor or combination of the factors . . . is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it” (Taranovich, 37 NY2d at 445).

To the extent the People argue that our review of this issue is circumscribed because the balancing of the Taranovich factors generally or the lower courts' determination as to the second Taranovich factor specifically constitutes a mixed question of law and fact, we disagree. The People rely on People v Vernace (96 NY2d 886, 887 [2001]), where we held that the Appellate Division's determination that the People had good cause to delay the commencement of prosecution based on witness fear was "a mixed question of law and fact for which there is support in the record" (*id.*). Whether witnesses were fearful involves factual inferences beyond the review powers of this Court. Here, the reason for the delay is not a disputed factual issue; the dispute pertains only to whether the reason for the delay was sufficient to justify it as a matter of law. Furthermore, we have never referred to the general application of the Taranovich factors as a mixed question over which we have limited powers of review.

A.

With respect to the first Taranovich factor – the length of the delay – we agree with the Appellate Division that "[t]here is no question that the six-year delay between the shooting in 2008 and defendant's guilty plea in 2014 was 'extraordinary'" (Wiggins, 143 AD3d at 455, quoting People v Staley, 41 NY2d 789, 792 [1977]; see People v Romeo, 12 NY3d 51, 56 [2009], cert denied 558 US 817 [2009]), and therefore that this factor favors defendant. Even if we examine only the time between defendant's arrest and the denial of his first speedy trial motion, as the People contend we must because defendant withdrew his second speedy trial motion when he pleaded guilty, that delay still amounts to 5½ years. Although we have "steadfastly refused to set forth a per se period beyond which a criminal

prosecution may not be pursued” (Taranovich, 37 NY2d at 445), and this extraordinary delay therefore is “not in itself decisive,” it demands “close scrutiny of the other factors, especially the question of why the delay occurred,” inasmuch as it is “the People's burden to bring defendant to trial in a timely fashion” (Romeo, 12 NY3d at 56).

B.

The second Taranovich factor requires us to consider the reason for the delay. There are two primary reasons for the extraordinary delay here: adjournments consented to or requested by Armstead, and the People’s desire to secure Armstead’s cooperation in testifying against defendant. Although the People point to other reasons for the delay outside of their control, such as a fire in the courthouse and Hurricane Sandy, those delays were minimal. The People also note that some delay was due to defendant’s requests for adjournments for motion practice, discovery, and reassignment of counsel, but those adjournments amounted to, at most, seven months of the delay.

Addressing first delay attributable to Armstead, the Appellate Division erred in applying case law interpreting CPL 30.30 to conclude that adjournments granted with Armstead’s consent “should not be chargeable here” (Wiggins, 143 AD3d at 455). CPL 30.30 is inapplicable, inasmuch as defendant was charged with second-degree murder (see CPL 30.30 [3] [a]).

Furthermore, even though we have acknowledged that CPL 30.30 “in large part serves the same purposes” as CPL 30.20 (People v Anderson, 66 NY2d 529, 535 [1985]), we have also stated that the problem of prosecutorial readiness addressed by CPL 30.30 and the constitutional speedy trial right are not analogous. “Although the words ‘speedy

trial’ appear in the title to CPL 30.30 and the section is often referred to as expressing a statutory right to a speedy trial, in both form and intention it articulates only the right of a defendant to a dismissal ‘where the people are not ready for trial’” (People v Brothers, 50 NY2d 413, 417 [1980]). “[A] defendant's right to a CPL 30.30 dismissal has its origin solely in legislative enactment which is in no way expressive of or dependent on any constitutional right to speedy trial” (id. at 418; see People v Johnson, 38 NY2d 271, 278 n 3 [1975]). The legislature intended for CPL 30.30 “to address only the problem of prosecutorial readiness” (People v Worley, 66 NY2d 523, 527 [1985]).

CPL 30.30 (4) (d) generally excludes from time chargeable to the People reasonable periods of delay attributable to a codefendant because those delays are not the result of prosecutorial unreadiness. By contrast, “[t]he protection of speedy trial rights, which would include the consideration of delays caused not only by the prosecution but also by factors such as court congestion, were addressed by CPL 30.20 and by constitutional provisions” (Worley, 66 NY2d at 527). Thus, although many of the adjournments, both before and after the People decided to try Armstead first, were at Armstead’s request or on his consent, each criminal defendant has an individual constitutional right to a speedy trial that cannot be rendered meaningless by the dilatory tactics of his or her codefendant.

In any event, even if CPL 30.30 were applicable, that statute excludes from the time chargeable to the People only a “reasonable period of delay” attributable to a codefendant, and then only when good cause has not been shown for granting a severance and the codefendant’s CPL 30.30 time has not run (CPL 30.30 [4] [d]). Here, it is questionable whether the delay attributable to Armstead would be considered “reasonable” even if CPL

30.30 applied. In addition, defendant did show good cause for a severance on Bruton grounds in 2008. The trial court, however, did not determine whether Armstead's statement would be suppressed until nearly four years later.

Turning to the People's desire to secure Armstead's testimony against defendant, the Appellate Division was also incorrect in concluding that it could not "second guess 'the significant amount of discretion that the People must of necessity have' in the prosecution of an indictment . . . , so long as they act in good faith" (Wiggins, 143 AD3d at 457). The Appellate Division quoted People v Decker (13 NY3d 12, 15 [2009]) for that proposition, but Decker is a case involving preindictment delay (see id. at 13-14). It is true that this Court has "never drawn a fine distinction" between due process violations based on delay in commencing prosecution and speedy trial violations (People v Singer, 44 NY2d 241, 253 [1978]). "Indeed, the factors utilized to determine if a defendant's rights have been abridged are the same whether the right asserted is a speedy trial right or the due process right to prompt prosecution" (People v Vernace, 96 NY2d 886, 887 [2001], citing Staley, 41 NY2d at 792; see Decker, 13 NY3d at 15). The relevance of the People's good faith, however, is one distinction between the due process right to prompt prosecution and the right to a speedy trial.

In Singer, we acknowledged that pursuant to United States Supreme Court case law, "[c]haracterization of the delay as 'preindictment' or 'postindictment' is often determinative," inasmuch as a claim of unconstitutional preindictment delay "generally requires a showing of actual prejudice before dismissal would be warranted" (Singer, 44 NY2d at 252, citing United States v Marion, 404 US 307 [1971] and United States v

Lovasco, 431 US 783 [1977]). The Singer Court made clear that, under state due process principles, “lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown” (Singer, 44 NY2d at 253-254). The Singer Court further held, however, that “a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense” (*id.* at 254, citing Lovasco, 431 US at 790). In preindictment delay cases decided after Singer, we have repeated that statement (*see* Decker, 13 NY3d at 14; Vernace, 96 NY2d at 888).

By contrast, in post-charge delay cases, the People’s good faith determination to delay the defendant’s trial cannot continue indefinitely, even if their proffered justification for the delay would otherwise excuse a *reasonable* period of delay. For example, in Romeo, we held that the defendant’s constitutional speedy trial right had been violated even though the defendant did “not suggest that the People acted with bad faith” (Romeo, 12 NY3d at 56). Thus, in cases considering delay between formal commencement of a criminal action and trial, although bad faith by the People “obviously would weigh heavily in favor of dismissal of the indictment,” the People’s good faith will not insulate their decision to delay trial from judicial review on constitutional speedy trial grounds (*id.* at 56-57; *see also* Doggett v United States, 505 US 647, 656-657 [1992]; Barker, 407 US at 531).

The People necessarily have wider discretion to delay *commencement of prosecution* for good faith, legitimate reasons than they do to delay a defendant’s *trial* after charges have been filed, even for legitimate reasons and without acting in bad faith.

“It requires no extended argument to establish that prosecutors do not deviate from ‘fundamental conceptions of justice’ when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. . . . [R]equiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried. . . . [N]o one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so” (Lovasco, 431 US at 790-792).

In other words, the People generally have “‘the untrammelled power to institute a prosecution any time within the limitations period . . . but *once having instituted the prosecution by detainer warrant, indictment or other initiatory process, they have the obligation of advancing it unless there is a reasonable ground for delay*’” (People v White, 32 NY2d 393, 398 [1973], quoting People v Winfrey, 20 NY2d 138, 144 [1967]).

Here, we assume that the People acted on a good faith belief that Armstead's testimony would “significantly enhance the overall nature and quality of the evidence against . . . defendant,” as they assert. Yet the People cannot justify this extraordinary delay through their good faith alone. The People do not have unfettered discretion to indefinitely pursue evidence that would strengthen their case while the defendant's trial is postponed.

We do not suggest that a defendant's constitutional rights will be violated whenever the People delay trial for a reasonable period of time to pursue evidence that would

strengthen their case. Nor do we suggest that it is unacceptable for the People to delay a defendant's trial for a reasonable period of time while they attempt to obtain the cooperation of a codefendant in testifying against the defendant. Considering the particular circumstances of this case, however, as we must (see Taranovich, 37 NY2d at 445), the People pursued a cooperation agreement with Armstead for 2½ years, even though they concede that Armstead repeatedly told them through his attorney that he would never testify against defendant. When those efforts failed, the People attempted for the following three years to obtain a conviction against Armstead in the hope that Armstead would decide to testify against defendant in exchange for a more lenient sentence. The People were repeatedly unsuccessful in that endeavor as well. After three mistrials, Armstead had been convicted of only criminal possession of a weapon in the second degree, he had been acquitted of second-degree murder, and the People were no closer to securing his testimony against defendant. The People "knew or should have known that there was no guarantee" (Romeo, 12 NY3d at 57), or even any likelihood, that Armstead would agree to testify against defendant, or that they would promptly obtain a conviction against Armstead on a top count. We assume that their choice to proceed as they did was a good faith effort to obtain stronger evidence against defendant in order to secure his conviction. Nevertheless, by pursuing Armstead's testimony for several years, without any guarantee that they would secure it, instead of moving defendant's case to trial without Armstead's cooperation, "the People ran the risk of a speedy trial violation" (id.).

The Supreme Court's decision in Barker v Wingo is particularly instructive on the good cause analysis, although there the Court ultimately concluded that Barker's speedy

trial right was not violated, primarily because he did not assert that right and indeed “did not want a speedy trial” (Barker, 407 US at 534). Unlike the federal speedy trial factors, the state Taranovich factors do not separately consider whether the defendant has asserted his or her right to a speedy trial (compare Taranovich, 37 NY2d at 445, with Barker, 407 US at 528-530). In any event, there is no support in the record for the conclusion that defendant intentionally acquiesced in the delay caused by the People and Armstead in order to gain a strategic advantage.

In Barker, the prosecution attempted to secure the cooperation of the codefendant, Manning, in testifying against Barker by convicting Manning first, but they had to try Manning several times over four years in order to convict him, meanwhile continually moving for adjournments of Barker’s case (see Barker, 407 US at 516-517). The Supreme Court concluded that “the length of delay between arrest and trial – well over five years – was extraordinary” (id. at 533). With respect to the reason for the delay, the Court observed that “[o]nly seven months of that period can be attributed to a strong excuse, the illness of the exsheriff who was in charge of the investigation” (id. at 533-534). As to the prosecution’s pursuit of Manning’s testimony, the Court acknowledged that “[p]erhaps some delay would have been permissible under ordinary circumstances,” but concluded that “more than four years was too long a period” (id. at 534).

We similarly conclude that, although we assume that the People acted in good faith in attempting to secure Armstead’s testimony against defendant, and a reasonable period of delay to do so would have been supported by good cause, under all the circumstances of this case, five years was “too long a period” (id.), and the People therefore have not

established good cause for the extraordinary delay. We therefore disagree with the Appellate Division that the second Taranovich factor favors the People.

C.

The third Taranovich factor requires us to consider the nature of the underlying charges against defendant (see Taranovich, 37 NY2d at 445). It is undisputed that the charges against defendant, which included murder in the second degree, were serious. The People “may be expected to proceed with far more caution and deliberation than [they] would expend on a relatively minor offense” (id. at 446). “Of course, this is not to say that one’s right to a speedy trial is dependent upon what one is charged with, but rather that the prosecutor may understandably be more thorough and precise in . . . preparation for the trial” (id.). This factor therefore favors the People.

D.

With respect to the fourth Taranovich factor, we consider “whether or not there has been an extended period of pretrial incarceration” (Taranovich, 37 NY2d at 446). Here, defendant was incarcerated for the entirety of the delay between his arrest and guilty plea, which amounted to more than six years. We therefore agree with the Appellate Division that this factor favors defendant (see Wiggins, 143 AD3d at 457). To the extent the Appellate Division concluded, however, that the importance of this factor was diminished because “during a significant portion of this time, defendant was also under indictment for two other assault charges, one of which resulted in a conviction and sentence of 4½ years” (id.), we disagree.

Although we have held that the significance of the fourth Taranovich factor may be

mitigated under certain circumstances, for example where the defendant is incarcerated pursuant to a sentence imposed after conviction on unrelated charges (see Romeo, 12 NY3d at 58; People v Prosser, 309 NY 353, 357 [1955]), the same rationale will not necessarily apply to a defendant who is facing *pending* unrelated charges, inasmuch as the defendant is presumed to be innocent of those charges until convicted, and where, as here, it cannot be determined whether the defendant would have otherwise been subject to pretrial incarceration on those charges. Indeed, one of the assault charges upon which the Appellate Division relied to minimize the importance of defendant's lengthy pretrial incarceration was ultimately dismissed after pending for nearly four years. In June 2013, when defendant was sentenced on the assault conviction to 4½ years' imprisonment, he had already spent five years in pretrial incarceration. We reiterate, however, that even though the fourth Taranovich factor may have less significance where the defendant is incarcerated on unrelated charges, such imprisonment cannot provide good cause for the delay, as the People concede (see Singer, 44 NY2d at 254; Winfrey, 20 NY2d at 141).

In any event, the People have not demonstrated, on this record, that defendant would have been held on the unrelated pending charges alone if he was not incarcerated pending trial on the present charges (cf. Romeo, 12 NY3d at 58). The significance of the extended period of defendant's pretrial incarceration therefore was not mitigated.

E.

The fifth and final Taranovich factor requires us to consider prejudice to the defendant (see Taranovich, 37 NY2d at 446-447). The Appellate Division concluded that this factor favored the People because "defendant has not shown any prejudice as a result

of the delay” (Wiggins, 143 AD3d at 458). We disagree.

Defendant has not demonstrated any specific impairment to his defense as a result of the extraordinary delay. Nevertheless, both the United States Supreme Court and this Court have recognized that a demonstration of specific prejudice is not necessarily required (see Moore v Arizona, 414 US 25, 26 [1973], citing Barker, 407 US at 532-533; Taranovich, 37 NY2d at 446-447). The Supreme Court has stated that “impairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown’” (Doggett, 505 US at 655, quoting Barker, 407 US at 532). The courts therefore “generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify” (*id.*). Although “presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria, . . . it is part of the mix of relevant facts, and its importance increases with the length of delay” (*id.* at 656). Similarly, in Taranovich we refused to “depart from the now traditional view in this court that where [under] the circumstances delay is great enough there need be neither proof nor fact of prejudice to the defendant” (Taranovich, 37 NY2d at 447).

In addition, “prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings” (Moore, 414 US at 26-27).

“Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and

create anxiety in him, his family and his friends. These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty” (id. at 27 [internal quotation marks and citations omitted]).

The People argue that under the federal Barker factors, the period of pretrial incarceration is not considered separately from the prejudice factor, and so federal courts consider the effects of pretrial incarceration as relevant to prejudice, whereas the Taranovich factors consider only whether the defense has been impaired due to the delay (see Taranovich, 37 NY2d at 445). Whether we consider it as relevant to the lengthy period of pretrial incarceration or to the prejudice factor, it remains true that a lengthy period of pretrial incarceration detrimentally impacts an accused individual in ways that go beyond specific impairment of the defense.

We therefore conclude that defendant suffered presumptive prejudice. This factor would weigh more heavily in defendant’s favor if he had demonstrated specific impairment to his defense, but considering the extraordinary length of the delay and the fact that defendant was incarcerated during the entirety of that delay, this factor favors defendant.

III.

After evaluating all the relevant Taranovich factors under the circumstances of this particular case, we conclude that defendant’s constitutional right to a speedy trial was violated. The delay was extraordinary, and although we assume that the People acted out of good faith belief that Armstead’s testimony would significantly enhance their case against defendant, their decision to pursue a strategy for Armstead’s cooperation that

continued to be unsuccessful after five years cannot justify that extraordinary delay. Although the serious nature of the charges favors the People, the lengthy period of pretrial incarceration, as well as the presumptive prejudice to defendant that resulted from the lengthy delay and pretrial incarceration, favor defendant.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

People v Reginald Wiggins

No. 15

DiFIORE, Chief Judge (dissenting):

It is undisputed that the five-year postindictment delay in prosecuting defendant, who was incarcerated the entire time, was extraordinary, triggering the “sensitive weighing process of the diversified factors present in the particular case,” as set forth in People v Taranovich (37 NY2d 442, 445 [1975]). There is also no question that the lengthy pretrial incarceration of a defendant who was 16 years old at the time of arrest is presumptively prejudicial. However, it remains incumbent upon us, in determining whether dismissal of the indictment is required, to balance all of the Taranovich factors in this particular case. In doing so, on this factual record, I would conclude that defendant, who stood accused of the intentional murder of a 15-year-old – a grave offense exempt from the five-year statute

of limitations for felonies – was not deprived of his right to a speedy trial, or the due process right to prompt prosecution.

I.

Defendant was arrested and arraigned on a felony complaint on May 29, 2008, five days after the murder was committed, and was remanded without bail.¹ In June 2008, he and codefendant Jamal Armstead were charged jointly in a single indictment with murder in the second degree, two counts of attempted murder in the second degree (involving another victim) and criminal possession of a weapon in the second degree. In August 2008, defendant filed an omnibus motion seeking, among other relief, a severance. The motion was denied in October 2008, except for the portion of the motion seeking a severance under Bruton v United States (391 US 123 [1968]). The severance issue was held in abeyance pending the resolution of a Huntley hearing in Armstead's case, as the codefendant's statement implicated defendant as the shooter. Armstead's suppression hearing was held in August 2012, whereupon Supreme Court denied Armstead's motion to suppress and defendant's trial was severed (CPL 200.40).

In May 2013, defendant moved to dismiss the indictment under CPL 210.20 (1), arguing that the five-year delay in his prosecution violated his state right to due process and his federal constitutional right to a speedy trial, as well as his state statutory right to a speedy trial under CPL 30.20. The factual allegations in the motion concerning the reasons for the first four years of adjournments – from the commencement of the action in 2008 to

¹ There is no preaccusatory delay in this case.

2012, when the pretrial hearings for the codefendant were held – can fairly be characterized as sparse, except for the litany of adjournments. One thing the motion does make clear is that defendant was brought to court with diligence on essentially a monthly basis from the time of his June 2008 indictment until May 2012 and that, on each occasion, “the matter was adjourned.” Defendant made no claim that he objected to any of the adjournments during this four-year period or that he raised any speedy trial protest during these proceedings. Indeed, there is nothing in the motion papers to indicate anything other than his silent acquiescence to the continuation of the case in this manner. To be precise, although he averred that he was incarcerated for the five-year period, he simply asserted that “[t]he reasons for the delay are not clear from the court file.”

Defendant’s motion papers specifically aver that after the cases were severed in August 2012, the People elected to try Armstead first. The motion sets forth that defendant’s matter was adjourned for two months beginning in May 2012 while pretrial hearings were conducted in Armstead’s case. It also alleges that defendant’s case was adjourned for the period attributable to both Armstead’s first trial in October 2012, which ended in a mistrial after the jury rendered a partial verdict convicting the codefendant of criminal possession of a weapon but failed to convene for the continuation of the trial due to Hurricane Sandy, and Armstead’s second trial in April 2013, which was ongoing when defendant filed his dismissal motion. Defendant maintained that the “8-week period for the co-defendant’s two trials does not justify the 5 year delay in bringing [defendant] to trial.” Thus, the focus of defendant’s motion is plainly on the delay in his prosecution

caused by the People's attempt to resolve the case against codefendant Armstead before defendant was tried. Aside from defendant's protest as to the entire five-year period of delay, the requisite factual allegations set forth in support of his motion to dismiss on speedy trial grounds narrowly addressed those proceedings that began in May 2012 – four years after defendant's arrest and one year prior to the filing of the speedy trial motion (see CPL 210.45 [1]).

Finally, defendant posited that, “[b]ased upon the length of the post-arrest delay in this case, the People must establish good cause to justify such delay. In the event the People are unable to establish good cause for the 5 year delay in bringing the instant defendant to trial, defendant moves, pursuant to CPL 210.20 (1) (h) to dismiss the indictment.” Defendant's motion was devoid of any allegation that he had suffered prejudice – actual or presumed – as a result of the delay. Rather, he observed that, where the delay is “lengthy and unjustifiable,” dismissal of the indictment may be required even in the absence of actual prejudice.

In response, the People conceded that the five-year delay was “atypically long,” but asserted that dismissal of the murder indictment was not warranted. The People noted that Armstead had consented to several adjournments beginning in January 2009 while a series of three ADAs attempted to secure his cooperation against defendant. Armstead rejected the cooperation agreement in June 2011 and then moved for reassignment of counsel. After new counsel was assigned in July 2011, “every single adjournment of Armstead's case [was] at the request of Armstead's counsel” – including several adjournments after the

People answered ready to try Armstead in May 2012. These latter adjournments were granted over the People's objection that the delays would impact defendant. The People further observed that, since defendant's speedy trial motion was filed, Armstead's second trial had ended in a mistrial and another six-month adjournment was granted at Armstead's counsel's request. They maintained that they decided to try Armstead first in an attempt to obtain his testimony against defendant – observing that “[h]is testimony would significantly enhance the overall nature and quality of the evidence against the defendant.” The People conceded that Armstead had repeatedly maintained through his counsel that he would not testify against defendant, but asserted that “Armstead himself has wavered on this point.”

The People also pointed out that defendant had been indicted for two separate assaults that occurred during the course of his pretrial incarceration. In January 2009, at the early stages of the case, he was indicted in Bronx County for gang assault and other related charges. Those charges were later dismissed in March 2013. In addition, defendant was indicted in October 2011 in New York County for attempted gang assault in the first degree, attempted assault in the first degree and two counts of assault in the second degree, based on a “jailhouse assault” that took place at the Manhattan Detention Center. He was convicted of assault in the second degree after an April 2013 jury trial and was sentenced to 4½ years' imprisonment, to be followed by 3 years postrelease supervision (PRS).

Supreme Court denied defendant's motion, without a hearing, after engaging in the appropriate balancing test, holding that his right to a speedy trial had not been violated.

Notably, although the court recognized that a significant portion of the delay was due to codefendant Armstead (and his counsel) – particularly beginning in July 2011 – the court also observed that the People have “broad discretion” when determining the order in which to prosecute codefendants. The court pointed out that the People “consistently push[ed Armstead’s] attorney to get ready for trial.” Moreover, the court held that there were several additional reasons for the various delays, including the substitution of counsel for both the People and defendants and proceedings relating to defendant’s other pending indictments. The court ultimately concluded that there was good cause for the delay.

In June 2014, defendant made a second motion to dismiss the indictment on speedy trial grounds. However, defendant pleaded guilty on September 23, 2014 to the reduced charge of manslaughter in the first degree in full satisfaction of the indictment, in exchange for a sentence of 12 years’ imprisonment, to be followed by 5 years’ PRS. The manslaughter sentence was ordered to be served concurrent with the previously imposed 4½-year sentence for the 2011 assault, and to run nunc pro tunc from the date of defendant’s May 2008 arrest.²

² Before the plea of guilty was entered, defense counsel acknowledged on the record that there was a second speedy trial motion filed in June that had not been decided and that he was withdrawing the motion. To the extent defendant now argues that the length of the delay at issue was beyond the five-year period designated in the first motion, that argument is not before this Court. Defendant expressly withdrew his second speedy trial motion prior to accepting the guilty plea. There is no indication whatsoever in this record that defendant’s guilty plea was conditioned by the court or the People on the withdrawal of the second speedy trial motion and the motion, which was undecided, was therefore abandoned upon the entry of the plea (see People v Alexander, 19 NY3d 203, 218-219 [2012]). Thus, the length of delay that is properly before us is limited to the five-year period asserted in defendant’s first speedy trial motion.

The Appellate Division affirmed, with two Justices dissenting, agreeing that defendant's right to a speedy trial had not been violated (143 AD3d 451 [1st Dept 2016]). The Court likewise held that there was good cause for the delay. The Court opined that, although the attempt to get Armstead to testify "certainly played an important role," it was not the only source of delay. It held that "much of the delay was occasioned by requests by defendant and/or his codefendant for motion practice, change of counsel, discovery proceedings, unavailability of co-defendant's counsel and the like" (143 AD3d at 455). The Court also concluded that the People's attempt to secure Armstead's cooperation was made in good faith. After balancing all of the relevant factors, the Court determined that there was no speedy trial violation. The dissent, however, would have dismissed the indictment, finding that the People failed to show good cause for the delay and hypothesizing that on the basis of the length of the delay it was "likely" that the defense was prejudiced. The majority noted that the dissent "minimize[d] the defense side of the equation in determining the reason for the delay" (143 AD3d at 455).

II.

The United States Constitution guarantees a defendant a "right to a speedy and public trial" (US Const, 6th Amend). Recognizing that it is difficult to identify exactly when that right has been abridged, the United States Supreme Court has imposed a balancing test requiring an evaluation of the particular circumstances of each case (see Barker v Wingo, 407 US 514 [1972]). The Court identified four relevant factors to be

weighed: “[l]ength of [the] delay, the reason for the delay, the defendant’s assertion of his right, and [actual or potential] prejudice to the defendant” (407 US at 530).

Although New York does not have a specific constitutional speedy trial provision, we do have statutory speedy trial requirements under the due process doctrine (CPL 30.20; Civil Rights Law § 12). We have also recognized that “unreasonable delay in prosecuting a defendant constitutes a denial of due process of law” and that undue delay may require dismissal of the indictment, even when there is no resulting prejudice to the defendant (People v Staley, 41 NY2d 789, 791 [1977]). “In this state, ‘we have never drawn a fine distinction between due process and speedy trial standards’ when dealing with delays in prosecution” (People v Vernace, 96 NY2d 886, 887 [2001], quoting People v Singer, 44 NY2d 241, 253 [1978]). We have evaluated both the speedy trial right and the due process right to prompt prosecution under a multi-factor balancing test derived from Barker (see People v Taranovich, 37 NY2d 442 [1975]).

“The following factors should be examined in balancing the merits of an assertion that there has been a denial of defendant’s right to a speedy trial: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay” (37 NY2d at 445). The evaluation of these factors requires “a sensitive weighing process of the diversified factors present in the particular case” and “no one factor or combination of the

factors . . . is necessarily decisive or determinative of the speedy trial claim” (37 NY2d at 445).

Where there has been an extended period of delay, the burden is on the People to establish good cause (see Singer, 44 NY2d at 254). However, “[t]he Appellate Division’s determination that the People established good cause for the delay in prosecuting the defendant is a mixed question of law and fact,” which is beyond our review if there is support in the record (see Vernace, 96 NY2d at 887).

We have made clear that “there is no specific temporal duration after which a defendant automatically becomes entitled to release for denial of a speedy trial” (Taranovich, 37 NY2d at 444-445). “Moreover, the various factors must be evaluated on an *ad hoc* basis since no rigid precepts may be formulated which apply to each and every instance in which it is averred that there has been a deprivation of the speedy trial right” (Taranovich, 37 NY2d at 445). Thus, the five-year delay in this case is not, in itself, a tipping point – particularly where, as here, the five-year felony statute of limitations is inapplicable to the crime of murder (see CPL 30.10 [2]). Moreover, this case does not involve prosecutorial inaction resulting in preindictment or preaccusatory delay (see Singer, 44 NY2d 241; People v Staley, 41 NY2d 789 [1977]). Nor does it involve the People’s failure to bring defendant into the court to answer the charges (see People v White, 32 NY2d 393 [1973]; People v Winfrey, 20 NY2d 138 [1967]). This case involves a five-year delay in a postindictment courtroom setting where there are regular calendar adjournments while defendant and his counsel are present.

III.

Here, the first factor of length of delay clearly weighs in defendant's favor. The five-year delay between defendant's arrest and his speedy trial motion, during which defendant was held in pretrial detention, was an undisputed fact and is presumptively prejudicial so as to trigger the speedy trial balancing test (see Barker, 407 US at 530). Prompt prosecutions are fundamentally sound and serve the needs of both defendants and society. Five years of postindictment delay, even in a murder case, is antithetical to our long established goals in the speedy trial universe.

As to the second factor, the reason for the five-year delay, the facts are in dispute. Both courts below held that the People established good cause for the delay attributed to the codefendant. Rather significantly, both courts also found that there were a variety of factors that contributed to the overall delay, including defendant's actions. The primary question as to one part of the delay is whether the People's decision to defer defendant's prosecution while pursuing a cooperation agreement with Armstead amounts to good cause. A similar situation was presented in Barker, where the Supreme Court held that a delay of four years so that the codefendant in a double murder could be used as a witness against the defendant was "too long . . . particularly since a good part of that period was attributable to the Commonwealth's failure or inability to try [the codefendant] under circumstances that comported with due process" (407 US at 534). Similarly, the prosecution believed it had a stronger case against the codefendant and that they could "assure his testimony" against Barker if they convicted the codefendant first (407 US at

516). There, the codefendant was tried six times – including two hung juries and two convictions that were then litigated and overturned on appeal. However, after balancing all of the other relevant factors, the Court concluded that Barker was not deprived of his right to a speedy trial. The Court noted the lack of prejudice – Barker was only incarcerated for 10 months of the pretrial delay and there was no indication that witnesses had gone missing or suffered memory loss (see 407 US at 534). “More important,” was the Court’s conclusion that “Barker did not want a speedy trial” (407 US at 534). The Court observed that he had not asserted his speedy trial right for nearly four years and that the record suggested that Barker was “gambling on [the codefendant’s] acquittal” (407 US at 535). Indeed, Barker’s counsel had essentially conceded as much.

Here, the majority does not even attempt to analyze this case under the federal constitutional speedy trial right. Indeed, as in Barker, defendant’s failure to assert his speedy trial right for five years on a record that, despite regular court appearances, does not indicate that he ever objected to four of the five years of delay would be a significant factor weighing against him (see People v Prosser, 309 NY 353, 359-360 [1955]; compare United States v Tigano, __ F3d __, 2018 WL 503281 [2d Cir 2018]). One could reasonably conclude from this record that defendant, who faced a minimum sentence of 15 years to life imprisonment on the murder charge, and potential consecutive prison sentences on the two assault indictments, had reason to bide his time and acquiesce in the delay in order to await the outcome of Armstead’s first trial and assess the strength of the People’s case.

In any event, the People have “broad discretion in determining when and in what manner to prosecute a suspected offender” (People v Di Falco, 44 NY2d 482, 486 [1978]). This discretion is not without boundaries and a defendant’s trial cannot be postponed indefinitely while the People pursue a jointly indicted codefendant’s conviction or cooperation. To that end, the lengthy adjournments granted by the court to Armstead’s counsel at the latter stage of this case, over the People’s objection on defendant’s behalf, are at odds with defendant’s right to a speedy trial at that late juncture.³ However, the record supports the reasonableness of the People’s determination that Armstead’s testimony would strengthen the evidence against defendant – the shooter. Significantly, there is no record to support that the People were not diligent, negligent or acted in bad faith in their efforts to prosecute Armstead and obtain his cooperation against defendant (cf. Doggett v United States, 505 US 647, 652-653 [1992]; People v Romeo, 12 NY3d 51, 56 [2009]). As this period of delay was not a result of prosecutorial inaction, negligence or bad faith, the nature of any presumed prejudice is weighed less as a consequence (see Doggett, 505 US at 652-653). Nor is this period of delay viewed in isolation. As the courts below also pointed out, there are several additional reasons that contributed to the other periods of delay – including factors that were beyond the People’s control or were directly attributable to defendant (substitution of counsel, trial adjournments, etc.). Like Barker, this is a close case, but it appears that there is record support for the Appellate Division’s

³ Although CPL 30.30 is not controlling to a CPL 30.20 speedy trial claim, it is relevant that the legislature has determined that this type of delay attributable to a joined codefendant would be excludable for speedy trial computation (see CPL 30.30 [4] [b]).

conclusion that the People established good cause for the delay in this case and the issue is beyond our further review (see Vernace, 96 NY2d at 887).⁴

Under no circumstances do we discount the extensive length of the pretrial delay here. In order to expedite the matter, it may have been better to conduct a joint trial as a modified form of severance with separate juries for defendant and Armstead, especially when Armstead went to trial (see People v Ricardo B., 73 NY2d 228 [1989]; People v Irizarry, 83 NY2d 557, 560 [1994]). Although trials with “multiple juries are the exception, not the rule,” we have observed that they do “have obvious attractions, particularly in cases involving Bruton problems” (73 NY2d at 235).

The third factor, the nature of the underlying charge (here, the intentional murder of a 15-year-old), is clearly in the People’s favor. The grave nature of the charge, in itself, however, does not eclipse defendant’s right to a speedy trial (see People v Romeo, 12 NY3d 51, 57 [2009]).

The fourth factor of pretrial incarceration presumptively weighs in defendant’s favor, although not determinatively so, given that, for more than four years of the five-year period, he was simultaneously detained on other indictments relating to two separate violent felonies committed during the course of his pretrial incarceration.

⁴ Despite the majority’s conclusion that there is no disputed issue of fact, the question of good cause necessarily entails a factual inquiry into the reasons for all of the delay and the merits of those reasons. Indeed, defendant himself argues only that there is no record support for the Appellate Division’s conclusion – not that reasonable minds could not draw different inferences from the established facts (see e.g. People v McRay, 51 NY2d 594, 601 [1980]).

The final factor in the case weighs against the defendant, as there was no allegation of actual prejudice to defendant in his motion papers and there is no apparent prejudice but for the pretrial incarceration, which has been fully accounted for in the fourth factor. Although a defendant is not necessarily required to show that he has been prejudiced by the delay, the circumstances of each particular case control, and whether or not the defense has been impaired can be a “critical” factor in the weight analysis (see Taranovich, 37 NY2d at 446-447). Here, despite that trial proceedings had been ongoing against Armstead, defendant made no allegation whatsoever that witnesses at the trials were having difficulty remembering the crime or that any witnesses were unavailable. Moreover, the witness testimony in Armstead’s trials could have been a source of ample Rosario material to defendant’s benefit. Nor can we ignore what courts have long recognized – “[d]elay is not an uncommon defense tactic” (Barker, 407 US at 521). The delay did work in defendant’s favor to the extent that, after the codefendant’s trial resulted in mistrials, defendant received a very favorable sentence – concurrent terms of imprisonment for the reduced manslaughter conviction and the assault conviction.

In its prejudice analysis, the majority maintains that defendant has suffered “presumptive prejudice” – language that is used by the Supreme Court to denote an extensive period of pretrial incarceration that will trigger the speedy trial balancing test (see Barker, 407 US at 530; Doggett, 505 US at 652). However, as the majority observes, this prejudice is fully accounted for, under Taranovich, in the pretrial incarceration factor. In any event, under Doggett, presumptive prejudice must be evaluated on a sliding scale,

in that not all delay is treated equally (see 505 US at 656-658). A delay resulting from bad faith weighs against the prosecution, while the weight “assign[ed] to official negligence compounds over time as the presumption of evidentiary prejudice grows” (505 US at 657). On the other hand, where the prosecution has been pursued with “reasonable diligence,” the defendant must demonstrate specific prejudice (see 505 US at 656). As noted above, the delay in bringing defendant to trial did not involve bad faith or “protracted[]” negligence likely to threaten “the fairness of the accused’s trial” (see 505 US at 657). In the conspicuous absence of any allegation in the motion papers of a specific prejudice to defendant, this factor weighs in the People’s favor.

Clearly, five years is an extensive amount of time, even for a murder case, when the defendant remains incarcerated for the duration. The People, even while acting in good faith, must be wary of delays of this length when attempting to secure a codefendant’s cooperation in a joint prosecution. However, the record supports the finding of the courts below that the People were making diligent efforts to move forward with the prosecution. In this context, it is duly noted that the court brooked an unacceptable amount of delay in defendant’s case as a result of codefendant’s adjournments. Nevertheless, on this record, as defined by the pretrial motion papers, defendant apparently acquiesced in the bulk of the delay – between 2008 and 2012 (see CPL 210.45). Based on a careful balancing of all of the factors, the courts below did not err in denying defendant’s motion to dismiss the murder indictment based on an alleged violation of defendant’s due process right or right to a speedy trial. As this was the senseless murder of a 15-year-old victim, the most serious

of offenses, the fact that defendant failed to allege any prejudice militates against the dismissal of the indictment under all the particular circumstances. Thus, I would affirm the Appellate Division order and uphold the denial of defendant's motion to dismiss the indictment.

* * * * *

Order reversed and indictment dismissed. Opinion by Judge Fahey. Judges Rivera, Stein and Wilson concur. Chief Judge DiFiore dissents in an opinion, in which Judges Garcia and Feinman concur.

Decided February 15, 2018