

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-221

The State Of New Hampshire

v.

Stanley Emanuel

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
LACONIA DISTRICT COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(3JX, 5 minutes)

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ISSUES PRESENTED

I. Whether the defendant's constitutional rights to a speedy trial and speedy disposition were violated, where the delay at issue was presumptively prejudicial, but much of it occurred because of continuances requested by the defendant and the necessities of the court docket, the defendant did not assert his speedy trial or disposition right until after a verdict was rendered, and the defendant was not incarcerated and points to no specific witnesses or evidence that was lost as a result of the delay.

II. Whether the defendant's state and federal rights to due process were violated by mid-trial and pre-verdict delay, where the defendant affirmatively agreed to a portion of the delay, did not object to any portion of the delay, did not assert a due process claim until after a verdict had been rendered, and points to no specific witnesses or evidence that was lost as a result of the delay.

STATEMENT OF THE CASE

The defendant was charged with one count of driving while intoxicated. DBA 22.¹ See RSA 265-A:2, I (Supp. 2008). Following a two-day bench trial, he was convicted and the district court (MacLeod, J.) ordered that he pay a \$500 fine. DBA 22; NOA 2. The court also ordered that his license be revoked for nine months, with six months suspended. NOA 2. This appeal followed.

¹ References to the transcript of trial shall be made as T____.
References to the defendant's brief shall be made as DB____, and the appendix thereto as DBA____.
References to the appendix to the State's brief shall be made as SBA____.

STATEMENT OF FACTS

A. The Charged Conduct.

On October 12, 2007, Charles Whitten, a resident of Gilford and an aspiring Gilmanton police officer, and his cousin, Tim Walters, attended a hockey game in Salem, New Hampshire. T 6-8. They returned home together late in the evening, traveling along Interstate 93 to Exit 20 in Tilton. T 9. It was raining. T 35. When they reached the end of the exit ramp, they turned left toward Laconia. T 9.

Shortly thereafter, at approximately 11:30 p.m., a white SUV passed them. T 9. Whitten and Walters followed the SUV as it drove past a Tilton police officer who was parked along the side of the road. T 32-33. After Whitten and Walters passed the Tilton police officer and as they followed the SUV, Whitten noticed that it was moving erratically. At first, it swerved and went over the white and yellow lines a “dozen” times. T 11-12. Then, it came within feet of hitting a stationary truck that was waiting to make a left turn across traffic. T 13, 15.

Shortly thereafter, the SUV went through a construction zone, “almost clipped the road barrel and . . . swerved into the other lane, almost hitting another car.” T 18. Whitten characterized this incident as “dangerous.” T 18. Then, the SUV nearly collided with oncoming traffic, but “cut back at the last second.” T 20.

At that point and after consulting Walters, Whitten called the Laconia police department dispatcher and informed him that an SUV with a vanity plate, O-WASTE, was driving erratically toward Laconia. T 17-18. Whitten testified that he called the direct line for the Laconia police dispatcher, rather than 911, because he had memorized the dispatcher's number while working for the Gilford police department. T 27-28. He also testified that he called the Laconia police department, even though the SUV was in Belmont, because the SUV was traveling toward Laconia and he did not think that the Belmont police would have enough time to find the SUV before it crossed the town line into Laconia. T 18.

Whitten continued to follow the SUV and watched as it came within feet of hitting another road barrel. T 23. He provided the Laconia dispatcher with updates about the location of the SUV. T 25. Finally, the SUV stopped at the Hebert Foundry, so Whitten called the Laconia dispatcher once more to provide that information. T 25.

Officer Adam Marsh of the Laconia police department was dispatched to Hebert Foundry and told to try to find the white SUV. T 51. As he reached the parking lot at the foundry, he saw an SUV with an O-WASTE vanity plate, so he pulled in behind it and turned on the spotlight and the blue lights on his cruiser. T 52. As Marsh approached, the defendant, who was standing by the door of the SUV, looked over his left shoulder, quickly got into the SUV, and drove out of the parking lot, despite the fact that the cruiser's blue lights were still flashing. T 54.

At that point, Marsh activated his siren and the SUV stopped. T 55.² Marsh then saw the defendant put something, which turned out to be gum, in his mouth. T 55, 59, 144.

Marsh approached the SUV and saw that the defendant was its only occupant. T 55-56. The defendant said that his name was Stanley, and Marsh asked for his license and registration. T 56. During this initial interaction, Marsh noticed a strong odor of alcohol emanating from the car. T 56. He also noticed that the defendant's speech was slurred and slow, that his eyes were bloodshot, watery, and glassy, that his face was flushed, and that his eyelids were droopy. T 56-57. When Marsh asked the defendant if he had been drinking, the defendant said no. T 57.

The defendant then agreed to perform some field sobriety tests. T 58. Before he performed them, he walked slowly to the back of his car, scuffling his feet and swaying. T 58. He told Marsh that he did not take medication, but was chewing Nicorette gum. T 59. He then dropped his cigarettes on the ground and had difficulty retrieving them. T 59.

The first test that Marsh asked the defendant to perform was the horizontal gaze nystagmus test. T 60. The defendant failed, having a "distinct and sustained nystagmus at maximum deviation in both left and right eyes" and a lack of smooth

² The court took judicial notice that the SUV stopped on a "way" within the meaning of the statute. T 55. See RSA 265-A:2, I.

pursuit. T 61. His pupils were dilated. T 62. The second test that Marsh asked the defendant to perform was the walk and turn test. T 62. He failed that one too, stepping off the line, swaying, and lifting his arms as he walked. T 65-66. Next, the defendant unsuccessfully attempted to perform the one-leg stand. T 67-69.

Based upon his observations and the defendant's poor performance on the field sobriety tests, Marsh concluded that the defendant was under the influence of alcohol and placed him under arrest. T 70. As Marsh drove the defendant to the police station, the cruiser "filled with the odor of [an] alcoholic beverage [and it was] very strong." T 71. During the booking process, the defendant was unsteady and said that he was confused by the administrative license suspension form that Marsh had shown him. T 72-73, 76. He declined to sign the form, saying that he would not do so until he had spoken with his attorney. T 74.³

During fingerprinting, the defendant continued to emit an odor of alcohol and continued to have droopy eyelids and watery, glassy, and bloodshot eyes. T 76. As the police inventoried the defendant's belongings, they found in his wallet a receipt from Holiday's Bar and Grill. T 77. It indicated that the defendant had purchased several alcoholic beverages earlier that evening. T 77. The police also found an empty beer can and a cold, half-full one, with condensation on the outside, in his SUV. T 108. There was also a receipt showing that the defendant had purchased beer from a convenience store earlier that day. T 108.

³ Marsh tried to call the defendant's attorney, but no one answered the telephone. T 74.

B. The Defendant's Case.

The defendant testified in his own behalf. He acknowledged that he was driving the white SUV on the night that Marsh stopped him. T 120. He denied, however, having been intoxicated or having driven erratically. T 126, 138. He explained the receipt from Holiday Bar and Grill by saying that he had gone there earlier in the evening for a business dinner, and had paid the tab for the entire party. T 123-24. He explained his stop at Hebert Foundry by saying that an ash from his cigar had fallen on his windbreaker, so he wanted to get out quickly to brush it off. T 138-39. He said that the beer that was found in his car was intended to be a gift for some workers at a company that he owned. T 150-55.

C. Pertinent Procedural Posture.

The defendant was arraigned on November 9, 2007, less than one month after his arrest. SBA 5. Trial was set to begin on January 10, 2008. SBA 5. But the defendant sought a continuance because he was scheduled to be on vacation. So, the trial date was moved to February 4, 2008. SBA 5, 9. Then, the State sought a continuance because a material witness was away from New Hampshire on work-related matters. SBA 5, 15-16. As a result of the State's request, trial was rescheduled for March 31, 2008. SBA 5. But it did not go forward on that date either because the defendant sought another continuance, which resulted in a new trial date of May 20, 2008. SBA 6, 10. On April 16, 2008, the defendant sought a third continuance, which resulted in a trial date of July 7, 2008. SBA 6,

11. The defendant sought a fourth continuance on June 6, 2008, and trial was again rescheduled, this time for July 28, 2008. SBA 6, 13-14.

On July 28, 2008, the trial began and the court heard testimony from the State's witnesses. T 1-110. There was not, however, sufficient time for the defendant to present his witnesses. T 111. Because the judge was not going to be returning to the courthouse for a few months, the clerk proposed September 5, 2008, for the second day of trial. T 113. When the clerk asked defense counsel if September 5, 2008, would be an acceptable date, he said, "September 5th at one is great." T 113. For reasons that are not clear from the record, it appears that the court, on its own, later rescheduled the second day of trial for October 31, 2008. SBA 6. The defendant did not object.

On October 31, 2008, the second day of trial, the defendant testified in his own behalf. T 117-86. At the conclusion of the proceedings, the court noted that there had been a "several month interval" between the first day of trial and the second and said that it would listen to the audio recording of the first day before rendering a judgment. T 186-87. The court then said to counsel for both sides, "Gentlemen, given the gap, if you wish to make any argument, you're free to do that as well right now." T 187. Defense counsel replied, "I'll wait." T 187.

The court issued its verdict on December 19, 2008. DBA 23. The parties received notice of the verdict on January 14, 2009. DBA 21. On January 26, 2009, the defendant filed a motion to set aside the verdict. SBA 1-3. Therein, he

argued that the three-month delay between the first day of trial and the second, the “subsequent two month delay in rendering a verdict, and the issuance of the actual verdict to Mr. Emanuel three weeks later” resulted in a violation of his rights to a speedy trial and due process. SBA 2-3. Less than one month later, the court denied the motion. SBA 1.

SUMMARY OF THE ARGUMENT

I. The defendant contends that pretrial and pre-verdict delay resulted in a denial of his rights to a speedy trial and a speedy disposition. That contention must be rejected. The State concedes that the delay was presumptively prejudicial. But much of the delay was attributable to continuances that the defendant requested or to the court docket. Delays caused by the defendant's requests for continuances weigh against him; delays caused by the court's docket weigh against the State, but not heavily. In addition, the defendant did not assert the right to a speedy trial or disposition until after the trial was over and a verdict had been rendered. His failure to make a timely assertion of the right weighs heavily against him. Finally, the defendant did not show that he suffered any prejudice.

II. The mid-trial and pre-sentencing delay that occurred in this case did not amount to a due process violation. To prevail on a due process claim, the defendant must show actual prejudice and that the delay was unreasonable because it amounted to a deliberate attempt by the State to gain an advantage. He has not identified any actual prejudice and nothing in the record suggests that the State caused or used the delay to gain an advantage in the case. Therefore, the defendant's due process claims must be rejected.

ARGUMENT

I. THE DEFENDANT WAS NOT DENIED A SPEEDY TRIAL OR SPEEDY DISPOSITION BECAUSE HE OCCASIONED A PORTION OF THE DELAY AT ISSUE BY REQUESTING CONTINUANCES, HE DID NOT ASSERT HIS SPEEDY TRIAL OR DISPOSITION RIGHTS UNTIL AFTER A VERDICT WAS RENDERED, AND HE WAS NOT INCARCERATED AND POINTS TO NO SPECIFIC WITNESSES OR EVIDENCE THAT WAS LOST AS A RESULT OF THE DELAY.

The defendant contends that his state and federal speedy trial rights were violated because there was an unduly lengthy delay between when he was arrested, when a verdict was issued, and when he was finally sentenced. DB 13-16. This argument must be rejected.

When reviewing a lower court's rulings on a speedy trial claim, this Court "defer[s] to [its] factual findings unless those findings are clearly erroneous, and consider[s] de novo the court's conclusions of law with respect to those factual findings." State v. Allen, 150 N.H. 290, 292 (2003).

The state and federal constitutions entitle criminal defendants to both a speedy trial and a speedy disposition. State ex rel. McLellan v. Cavanaugh, 127 N.H. 33, 37-39 (1985). But see United States v. Ray, 578 F.3d 184, 198-99 (2d Cir. 2009) (undertaking extensive historical analysis and concluding that the federal constitution's speedy trial guarantee does not include the right to a speedy sentence). The right to a speedy trial and the right to a speedy disposition are, however, independent rights. Cavanaugh, 127 N.H. at 37-38.

The guarantee of speedy trial serves to prevent undue and oppressive pretrial incarceration, to minimize the anxiety that attends public accusation, and to limit the risk that a long delay might impair the ability of the accused to defend himself. A call for speedy disposition after trial addresses similar concerns: that indefinite incarceration could exceed the length of a fair sentence; that extended and indefinite uncertainty about disposition could destroy the opportunity for a defendant to perceive a fair relationship between guilt and penalty; and that delay in completing the trial process could prejudice both the State and the defendant if a retrial should be ordered on appeal.

Id. at 37. Because the rights are distinct, it necessarily follows that they should be analyzed separately.

But regardless of whether a defendant claims a violation of the speedy trial right or a violation of the speedy disposition right, and regardless of whether the claim is advanced under the state or the federal constitution, the analytical framework is the same. That is, both this Court and the federal courts apply the four-part analysis articulated in Barker v. Wingo, 407 U.S. 514, 530 (1972).

United States v. Munoz-Franco, 487 F.3d 25, 60 (1st Cir. 2007); Allen, 150 N.H. at 292; Cavanaugh, 127 N.H. at 38-39.

This test requires [the court] to balance four factors: (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. If the length of the delay is not presumptively prejudicial, however, [the court] do[es] not consider the remaining three factors.

Allen, 150 N.H. at 292 (citations omitted).

A. The Defendant's Speedy Trial Claim Must Be Rejected.

The State begins with the defendant's speedy trial claim. The first factor requires the court to determine the length of the delay. In the typical case, "[t]he period of delay considered for purposes of analyzing a defendant's speedy trial claim begins to run when he is arrested or charged, whichever comes first." Humphrey v. Cunningham, Warden, 133 N.H. 727, 734 (1990). This case, however, has a complication. The defendant did not argue to the trial court that pretrial delay violated his right to a speedy trial. Instead, he focused solely upon mid-trial and pre-verdict delay. SBA 2-3. Further, in his brief, the defendant indicates that pre-trial delay is not his "main complaint." DB 14. Because the defendant did not argue that pretrial delay caused a violation of his state or federal speedy trial rights, any argument in that regard should not be entertained on appeal. Blagbrough Family Realty Trust v. A & T Forest Prods., 155 N.H. 29, 35 (2008) (supreme court will not address issues raised for the first time on appeal); State v. Ryan, 135 N.H. 587, 588 (1992) (a specific and contemporaneous objection is required for preservation); Reynolds v. Cunningham, Warden, 131 N.H. 312, 314 (1988) (the defendant bears the burden of establishing that he raised a proper objection).

But even if this Court includes pretrial delay in its analysis of the defendant's appellate contentions, he still cannot prevail. Here, the defendant was

arrested on October 12, 2007. T 70. So, that is the date on which the speedy trial clock would begin.

The next question is when the period of delay stopped running. In general, when this Court has analyzed “the scope of the right to a speedy trial in criminal proceedings, [it] [has] based [its] analysis upon the date upon which the trial commenced.” In re Juvenile 2007-150, 156 N.H. 800, 802 (2008). See State v. Colbath, 130 N.H. 316, 319 (1988) (Barker involves assessment of pretrial delay); State v. Langone, 127 N.H. 49, 53 (1985); see also 4 Wayne R. LaFare, Criminal Procedure § 18.2(b) (2d ed. 1999) (“In the usual case, this is simply a matter of calculating the time which has elapsed from when the Sixth Amendment right attached until trial (or, until the pretrial motion to dismiss on this ground is determined).” (Footnotes omitted.)).

The defendant, however, seems to suggest that the speedy trial right extends through verdict. DB 13-15. He does not cite any case law standing for that proposition in his brief. Nor does he make any specific argument to justify that result. See State v. Blackmer, 149 N.H. 47, 49 (2003) (refusing to consider an argument that was not fully developed). Furthermore, his position is inconsistent with this Court’s previous case law discussing the speedy trial right. That is, in addition to cases like Colbath and Langone, cited above, this Court has drawn an analogy between an adult defendant’s constitutional speedy trial right and the protections conferred upon juveniles by the delinquency statutes that require

adjudicatory and dispositional hearings to be held within a specified period of time. See Juvenile 2007-150, 156 N.H. at 802. In the juvenile context, this Court has held that adjudicatory and dispositional hearings must be commenced—but not necessarily concluded—within the time periods specified in the statutes. Id. (adjudicatory hearing must be commenced, but not necessarily concluded, within statutory time period); In re Juvenile 2004-469, 151 N.H. 706, 707 (2005) (dispositional hearing must be commenced, but not necessarily concluded, within statutory time period). The fact that the juvenile speedy trial “clock” stops when the hearing commences lends support to the argument that the adult speedy trial clock also stops when the trial commences. For all of these reasons, this Court should refuse to adopt the defendant’s formulation of the speedy trial right in this case.⁴

That said, even if this Court, like the United States Court of Appeals for the First Circuit, assumes that the speedy trial right extends through verdict, the defendant cannot prevail. Regardless of whether the right covers pretrial or pre-verdict delay, the delay was presumptively prejudicial. With respect to pretrial

⁴ The State acknowledges that least one court has been willing to assume that the speedy trial right may extend beyond the pre-trial phase to cover mid-trial delays. See United States v. Bristol-Martir, 570 F.3d 29, 44 (1st Cir. 2009); see also State v. Adams, 133 N.H. 818, 823 (1991) (counting the time between jury selection and the first day of trial, where there was a continuance of approximately three months between those two events); 4 Wayne R. LaFave, Criminal Procedure § 18.1(c) (2d ed. 1999) (“Once the speedy trial right has attached, it continues until the defendant is convicted, acquitted or a formal entry is made on the record of his case that he is no longer under indictment.” (Quotation omitted.)). In light of this authority, the State will analyze this case in terms of both pretrial and overall pre-verdict delay. The State does not, however, concede that that the speedy trial right extends through verdict.

delay, the defendant was arrested on October 12, 2007. He was brought to trial on July 28, 2008. T 1-110. Therefore, his trial occurred approximately 290 days, or 9½ months, after his arrest. This delay was presumptively prejudicial. See Allen, 150 N.H. at 294 (delay of six months or more in a misdemeanor case, where a defendant is not incarcerated, is presumptively prejudicial); RSA 265-A:18, I(a) (Supp. 2008) (a violation of RSA 265-A:2, I, is a class B misdemeanor).

With respect to pre-verdict delay, the defendant was arrested on October 12, 2007. The first day of trial was on July 28, 2008. T 1-110. The second day of trial was October 31, 2008. T 117-86. The court issued its verdict on December 19, 2008. DBA 23. The parties received notice of the verdict on January 14, 2009. DBA 21. Accordingly, there were approximately fifteen months from arrest to verdict. This delay was also presumptively prejudicial. See Allen, 150 N.H. at 294; RSA 265-A:18, I(a). Because the delay was presumptively prejudicial, this Court must consider the remaining three factors. State v. Fletcher, 135 N.H. 605, 607 (1992) (“The first Barker factor, the length of the delay, serves as a ‘triggering mechanism.’ [This Court] need not consider the remaining three factors unless the delay is ‘presumptively prejudicial.’” (Citation omitted.)).

The second factor is the reason for the delay. Allen, 150 N.H. at 292. “In considering the second factor, [this Court] initially discount[s] any delays that were prompted by the defendant because he cannot take advantage of delay that he has occasioned.” Fletcher, 135 N.H. at 607. “When a defendant requests a

continuance, he thereby temporarily waives his right to a speedy trial.” State v. Fraser, 120 N.H. 117, 120 (1980). The defendant filed four continuances, moving the trial from (1) January 10, 2008, to February 4, 2008, SBA 5, 9, (2) March 31, 2008, to May 20, 2008, SBA 5-6, 10, (3) May 20, 2008, to July 7, 2008, SBA 6, 11, and (4) from July 7, 2008, to July 28, 2008, SBA 6, 13-14. These four continuances account for approximately 144 days of delay (a period of slightly more than four months). None of this time is attributable to the State. Fletcher, 135 N.H. at 607; Fraser, 120 N.H. at 120.

The State sought a continuance which resulted in the trial being delayed approximately 56 days, from February 4, 2008, to March 31, 2008. SBA 5, 9, 15-16. The State sought the continuance because Whitten was in Florida. SBA 10-12, 15-16. Whitten was an unavailable lay witness—not a police officer. Both this Court and the United States Supreme Court have held that “a missing witness is a valid reason to delay a trial.” State v. Zysk, 123 N.H. 481, 485 (1983) (citing Barker, 407 U.S. at 531); see Langone, 127 N.H. at 54 (explaining that the rule from Zysk does not apply where the missing witness is a police officer). Furthermore, the defendant agreed to the continuance and defense counsel was scheduled to begin a jury trial in a different case on February 4, 2008. SBA 15-16. Therefore, these 56 days should be deemed neutral and not attributed to the State.

The remaining 90 days before trial, from October 12, 2007 (the date of arrest), to January 10, 2008 (the date trial was originally set to begin) were

occasioned by the necessities of the court docket. The right to a speedy trial “is necessarily relative and must be considered with regard to the practical administration of justice.” State v. Cole, 118 N.H. 829, 830 (1978) (quotation omitted). Thus, “[t]he delay due to the crowded docket of the court is . . . held against the State, although to a lesser extent than would a deliberate delay.”

Langone, 127 N.H. at 54-55; see Zysk, 123 N.H. at 485.

In light of the foregoing circumstances, approximately half of the 290 days between arrest and the commencement of trial are attributable to the defendant, and only approximately one-third count slightly against the State. Therefore, in terms of pretrial delay, the second factor favors the State.

With respect to mid-trial and pre-verdict delays, there were approximately 170 days (about 5½ months) between the first day of trial and the issuance of the verdict. All of this time is attributable to the court docket and the orderly administration of justice. See Campononico v. United States, 222 F.2d 310, 315-16 (9th Cir. 1955) (rejecting a speedy trial claim where a trial lasted 14 hours, but judgment was not handed down until one year later, and observing, “We know of no constitutional, statutory, or judicial pronouncement that forbids a busy court from taking ample time to ponder involved and troublesome questions of law and of fact before handing down a decision. Speedy justice does not mean hasty justice.”).

Nothing in the record or in the defendant's brief suggests that the State deliberately or even inadvertently occasioned any of this pre-verdict delay. Moreover, the record shows that the defendant affirmatively agreed to the continuation of trial to September 5, 2008, and never raised any objection before the verdict was issued. T 113. In fact, he did not even object at the end of the second day of trial when the court specifically asked if he wished to make an argument concerning the delay between trial dates. T 187. Because the defendant affirmatively agreed to a portion of the pre-verdict delay and never interposed an objection even when given an express opportunity, this 5½-month period should count against him or be neutral. State v. Weitzman, 121 N.H. 83, 87 (1981) (the failure to assert the right to a speedy trial may be considered as a reason for any delay because it "is reasonable to assume that those defendants who request a speedy trial are given preference as to early court dates"). In the alternative, this time counts against the State but not heavily. Langone, 127 N.H. at 54-55; see Zysk, 123 N.H. at 485. Thus, with respect to pre-verdict delay, the second Barker factor should not weigh heavily in the defendant's favor, and arguably it should weigh against him.

The defendant says that the delay between trial dates was due to inadequate staffing and funding of the judicial branch. DB 14. But that factual proposition is not developed in the record. Because the defendant failed to develop an evidentiary basis to support his position in the trial court, it should not be a basis

for him to prevail on appeal. Flaherty v. Dixie, 158 N.H. 385, 387 (2009) (supreme court will not consider evidence not presented to the trial court).

Having addressed the first two Barker factors, the State turns to the last two. “This [C]ourt puts substantial emphasis on the latter two of the Barker factors.” Cole, 118 N.H. at 831.

The third factor is whether the defendant asserted his right to a speedy trial. Allen, 150 N.H. at 292. “Absent a rule or statute setting time limits, a defendant has a responsibility to assert his right to a speedy trial.” Weitzman, 121 N.H. at 86. The failure to make a timely assertion of the right weighs heavily against a defendant. Barker, 407 U.S. at 532 (a failure “to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial”); State v. Tucker, 132 N.H. 31, 33 (1989) (“it is significant that throughout the period of his first counsel’s representation the defendant never protested the court’s scheduling or raised a speedy trial issue”); Colbath, 130 N.H. at 319 (emphasizing that the defendant “never initiated a speedy trial request”); State v. Barham, 126 N.H. 631, 642 (1985) (emphasizing that the defendant did not assert his speedy trial right until sixteen months after his arrest); accord Wilson v. State, 814 A.2d 1, 22 (Md. Ct. Spec. App. 2002) (holding that a defendant was “foreclosed from any challenge of his conviction on the basis of the denial of the right to a speedy trial by virtue of his failure to assert the right”); Jones v. State, 846 So. 2d 1041, 1046 (Miss. Ct. App. 2004) (“Where a defendant first notes the delay and seeks to be

discharged only when trial is about to commence, this does not amount to a prompt demand for a speedy trial.”).

Here, the defendant did not assert his right to a speedy trial until the trial had concluded and the verdict had been rendered. This stands in sharp contrast to cases in which a defendant “consistently demanded that his speedy trial rights be honored.” Langone, 127 N.H. at 55. By waiting until after a verdict was rendered to demand a speedy trial, the defendant effectively failed to assert the right at all. This factor therefore counts heavily against him and “make[s] it difficult for [him] to prove that he was denied a speedy trial.” Barker, 407 U.S. at 532.

The final factor is the extent to which the delay caused prejudice to the defendant. Allen, 150 N.H. at 292. In analyzing this factor, courts consider factors such as incarceration, anxiety, and impairment of the defense, which would occur when, for example, witnesses are lost. Allen, 150 N.H. at 294-95 (lost witnesses); Colbath, 130 N.H. 316, 320 (1988) (“cognizable prejudice may take the form of incarceration, anxiety and impairment of defense”).

In his trial court pleading, the defendant did not make a specific or even generalized argument concerning prejudice. SBA 1-3. Instead, he broadly alleged violations of several state and federal constitutional provisions. SBA 2-3. Because the defendant did not make a specific argument concerning prejudice in the trial court, his efforts to do so on appeal should be rejected. Blagbrough, 155 N.H. at 35 (argument may not be made for the first time on appeal); Ryan, 135

N.H. at 588 (a specific and contemporaneous objection is required for preservation).

Even if the defendant's prejudice argument were not procedurally barred, he could not prevail on the merits because there was no prejudice. The defendant was not incarcerated. His liberty was not restrained. He continued working. His license was not suspended administratively in connection with this case. SBA 17. In fact, his license was not formally revoked until sentencing on March 2, 2009. DBA 24. To the extent the defendant was anxious about his pending trial, "there is no indication that he suffered more than any defendant normally does." Colbath, 130 N.H. at 320. In fact, there is no indication in the record that he suffered any anxiety at all. Indeed, rather than expressing any anxiety, the defendant affirmatively agreed to continue the case at various points and expressly declined to make an argument concerning the delay between trial dates.

In addition, no witnesses were lost and there has been no showing that their memories were affected by the passage of time. See Tucker, 132 N.H. at 33 ("What is important is the want of any indication of actual prejudice to the conduct of the defense. The defense lost no witnesses, and no memories appear to have faded during the time in question." (Citation omitted.)). To the contrary, the State's witnesses gave largely consistent testimony and did not articulate any material memory problems. See Colbath, 130 N.H. at 320 ("The record discloses no actual impairment to the defense, despite claims that the year's delay led to

dimmed memories The transcript of testimony carries no suggestion that any witness forgot facts in the year after the event”). Besides, typical memory loss cannot give rise to the type of prejudice required for a successful speedy trial claim. State v. Little, 121 N.H. 765, 773 (1981); accord Zysk, 123 N.H. at 486.

“A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here.” Reed v. Farley, 512 U.S. 339, 353 (1994); but see Moore v. Arizona, 414 U.S. 25, 26 (1973) (rejecting as “fundamental error” the Arizona Supreme Court’s holding that prejudice was a necessary showing for a speedy trial violation). Therefore, the defendant’s speedy trial claim should be rejected. In the alternative, the last Barker factor should weigh in favor of the State.

In sum, to prevail on a speedy trial claim, the defendant had to demonstrate that the delay at issue failed the four-prong test articulated in Barker. Allen, 150 N.H. at 292. He did not. First, to the extent this Court concludes that the speedy trial right extends through verdict, the State acknowledges that both the pretrial and pre-verdict delays were presumptively prejudicial. But much of the delay was attributable to continuances that the defendant requested or to the court docket. The defendant’s continuances weigh against him; delay due to the court docket weighs against the State, but not heavily. In addition, the defendant did not assert the right to a speedy trial until after the trial was over and a verdict had been rendered. Therefore, this factor weighs heavily against him. Finally, the

defendant did not show that he suffered any prejudice. Accordingly, on balance, the four-prong Barker test weighs in favor of affirming the defendant's conviction.

B. The Defendant's Speedy Disposition Claim Must Be Rejected.

The defendant contends that the delay between when the verdict was rendered and when he was actually sentenced resulted in a "deprivation of [his] constitutional rights." DB 14. This argument is essentially a claim that he was denied the right to a speedy disposition of his case. See Cavanaugh, 127 N.H. at 37. That claim must be rejected.

First, the argument is not preserved. In his trial court pleading, the defendant cited "[t]he three month delay between hearing dates, the subsequent two month delay in rendering a verdict, and the issuance of the actual verdict . . . three weeks later" in support of his constitutional claims. SBA 2-3. At no point did he argue that the delay between the issuance of the verdict and sentencing resulted in a violation of his constitutional rights to a speedy trial, disposition, or due process. Because the defendant did not advance a speedy disposition claim in the trial court, he cannot unveil one for the first time on appeal. Ryan, 135 N.H. at 588 (a specific and contemporaneous objection is required for preservation).

Even if the defendant's speedy disposition claim were preserved, he still could not prevail. This Court applies the four-part speedy trial test from Barker when evaluating speedy disposition claims. Cavanaugh, 127 N.H. at 38. The first

factor is the length of the delay. The defendant was notified of the verdict on January 14, 2009. SBA 1. He was issued a notice of sentencing on the same date. DBA 24. And he was sentenced approximately one and a half months later, on March 2, 2009. DBA 24. A delay of one and a half months should not be deemed presumptively prejudicial. See Cavanaugh, 127 N.H. at 38 (holding that a delay of over six months was not presumptively prejudicial in a speedy disposition case). Because the delay was not presumptively prejudicial, this Court does not need to consider the other three Barker factors. Fletcher, 135 N.H. at 607.

Nevertheless, to the extent this Court considers the other three Barker factors, the defendant cannot prevail. The second factor is the reason for the delay. Id. Here, the delay was attributable to the court docket and the orderly administration of justice. Therefore, this period is “held against the State, although to a lesser extent than would a deliberate delay.” Langone, 127 N.H. at 54-55; see Zysk, 123 N.H. at 485.

The third factor asks whether the defendant asserted the right to a speedy disposition. Cavanaugh, 127 N.H. at 38. Here, the defendant did not assert the right to a speedy disposition. Instead, he argued that his right to a speedy trial had been violated by pre-verdict conduct on the part of the State and the court. SBA 2-3. Therefore, this factor weighs heavily against the defendant. Barker, 407 U.S. at 532; cf. United States v. Howard, 577 F.2d 269, 272 (5th Cir. 1978) (“[N]ot only was the delay reasonable [and] the prejudice . . . only speculative, [but] the

defendant's failure to assert his rights weighs heavily against him. Defendant's right to speedy trial was not violated."); Tucker, 132 N.H. at 33.

The fourth factor asks whether the defendant suffered prejudice as a result of the delay. Cavanaugh, 127 N.H. at 38. Demonstrating prejudice on a speedy disposition claim is more difficult than demonstrating prejudice on a speedy trial claim. As the United States Court of Appeals for the Tenth Circuit explained,

the most serious of the interests protected by the speedy trial right is the ability of the defendant to prepare his defense. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Potential prejudice to an accused in a pretrial situation includes public scorn, deprivation of employment, disruption of family life, and the detrimental impact on the individual when jailed awaiting trial. . . . [But] [m]ost of those interests diminish or disappear altogether once there has been a conviction.

Perez v. Sullivan, 793 F.2d 249, 256 (10th Cir. 1986) (quotation and citations omitted).

Here, the defendant did not suffer prejudice. He was not incarcerated pending sentencing. To the extent that he was anxious about what sentence would be imposed, "there is no indication that he suffered more than any defendant normally does." Colbath, 130 N.H. at 320. In fact, there is no indication in the record that he suffered any anxiety at all. Although the defendant contends that he was anxious because he thought that if he drove his car between conviction and sentencing, he might be charged with driving on a revoked or suspended license, DB 15, nothing in the record suggests that he made that source of anxiety known

to the trial court. Perhaps more importantly, his license was not revoked until sentencing, and the ALS proceeding had been dismissed months earlier. SBA 17 One can be convicted of driving on a suspended or revoked license only if the license is actually suspended or revoked. RSA 263:64 (2004 & Supp. 2008). Because nothing in the record shows that the defendant's license was suspended or revoked before sentencing, this Court should reject the claim that he was anxious because he could have been charged with driving on a suspended or revoked license.

Finally, the defendant does not claim in his brief that he intended to offer any witnesses or evidence at the sentencing hearing. But even if he had advanced such a contention, nothing in the record suggests that any such witnesses or evidence disappeared or became impaired as a result of the one-and-a-half-month delay between verdict and sentencing. See Welsh v. United States, 348 F.2d 885, 887 (6th Cir. 1965) ("Appellate courts must assume, in the absence of anything in the record to the contrary, that delay in pronouncing sentence was for a lawful purpose in the orderly process of handling the case." (Quotation omitted.)). Accordingly, the defendant did not suffer any prejudice as a result of the delay between verdict and sentencing.

In sum, to prevail on a speedy disposition claim, the defendant had to demonstrate that the delay in sentencing him created a violation of the four-prong test articulated in Barker. Cavanaugh, 127 N.H. at 38. He did not. First, a delay

of one and a half months should not be deemed presumptively prejudicial. Second, the delay was attributable to the court docket and the orderly administration of justice. Therefore, it is “held against the State, [but] to a lesser extent than would a deliberate delay.” Langone, 127 N.H. at 54-55. Third, the defendant did not assert the right to a speedy disposition. Instead, he argued that his right to a speedy trial had been violated by pre-verdict conduct on the part of the State and the court. Therefore, this factor weighs heavily against him. Finally, the defendant did not show that he suffered any prejudice. Accordingly, his conviction should be affirmed.

II. THE DEFENDANT’S STATE AND FEDERAL RIGHTS TO DUE PROCESS WERE NOT VIOLATED BY PRE-VERDICT DELAY BECAUSE HE AFFIRMATIVELY AGREED TO A PORTION OF THE DELAY, DID NOT OBJECT TO ANY PORTION OF THE DELAY, DID NOT ASSERT A DUE PROCESS CLAIM UNTIL AFTER A VERDICT HAD BEEN RENDERED, AND POINTS TO NO SPECIFIC WITNESSES OR EVIDENCE THAT WERE LOST AS A RESULT OF THE DELAY.

The defendant contends that his state and federal due process rights were violated because there was an unduly lengthy delay between when trial began and when he was finally sentenced. DB 9-13. This argument must be rejected.

First, the defendant’s post-verdict arguments should be rejected because this Court has expressly determined that claims pertaining to speedy trial or speedy disposition are more appropriately analyzed under the speedy trial provisions of the state and federal constitutions rather than under due process provisions. Cavanaugh, 127 N.H. at 37 (“Conceptually, it would be possible to

consider a speedy disposition issue under either article 14, with its guarantee of justice promptly and without delay, or under the broader guarantee of due process under article 15, which [this Court] ha[s] interpreted generally to impose a requirement of fundamental fairness. . . . [C]larity will be served by considering the issue under article 14. That provision is the source of the speedy trial requirement, and there are close analogies between considerations that underlie the guarantee of speedy trial and those that support the demand for speedy disposition.” (Quotation and citations omitted.); but see State v. Adams, 133 N.H. 818, 824 (1991) (addressing claim of due process violation where a trial was delayed several times, including approximately three months after jury selection because of motions in limine filed by the State).

Even if this Court is willing to undertake a due process analysis, however, the defendant still cannot prevail. The United States Supreme Court has recognized that the Due Process Clause of the Fifth Amendment “has a limited role to play in protecting against oppressive delay.” United States v. Lovasco, 431 U.S. 783, 789 (1977) (discussing pre-indictment delay). To that end, a delay in criminal proceedings that “violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency,” can, depending upon the circumstances, constitute a violation of the Due Process Clause. Id. at 790 (quotations and citations omitted). Under the federal constitution,

[t]o prove a violation of his due process rights, [a defendant] must establish that: (1) the delay resulted in actual and substantial prejudice to the presentation of the defense; and (2) the government intentionally delayed . . . either to gain a tactical advantage or to harass him. The court will inquire into the reasons for delay only where actual prejudice has been established. . . . It is not sufficient for a defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time.

United States v. Sturdy, 207 F.3d 448, 452 (8th Cir. 2000) (citations omitted). See Lovasco, 431 U.S. at 790 (“[P]roof of actual prejudice makes a due process claim concrete and ripe for adjudication.”). The test is the same under the state constitution, with the exception that prosecutorial bad faith need not be shown; instead, the inquiry is whether the delay was unreasonable. Adams, 133 N.H. at 824 (to make a successful claim that a delay rose to the level of a due process violation, a defendant must show actual prejudice and that the delay was unreasonable).

Although Sturdy and Lovasco dealt with pre-indictment delay, this Court and others appear to have applied the same or a similar analysis in the context of claims of mid-trial or post-trial delay as well. See, e.g., United States v. DeGrasse, 258 Fed. Appx. 485, 488 (3d Cir. 2007) (unpublished opinion) (where a defendant asserted a due process claim because of delay in sentencing him, the court rejected his claim because he failed to show prejudice); Adams, 133 N.H. at 824 (addressing claim of due process violation where trial was delayed approximately three months after jury selection because of motions in limine filed by the State).

Here, for all of the reasons expressed earlier in this brief, the defendant cannot demonstrate any actual prejudice resulting from the delay between when trial began and when he was finally sentenced. He was not incarcerated pending sentencing. To the extent that the defendant was anxious about whether he would be found guilty or what sentence would be imposed, “there is no indication that he suffered more than any defendant normally does.” Colbath, 130 N.H. at 320.

In addition, although the defendant contends that he was anxious because he thought that if he drove his car between conviction and sentencing, he might be charged with driving on a revoked or suspended license, DB 10, nothing in the record suggests that he made that source of anxiety known to the trial court. Perhaps more importantly, his license was not revoked until sentencing, and the ALS proceeding had been dismissed months earlier. SBA 17. As noted earlier, one can be convicted of driving on a suspended or revoked license only if the license is actually suspended or revoked. RSA 263:64. Because nothing in the record shows that the defendant’s license was suspended or revoked before sentencing, this Court should reject the claim that the defendant was anxious because he could have been charged with driving on a suspended or revoked license.

Further, the defendant does not claim that any witnesses or evidence disappeared or became impaired as a result of the delay at issue. Nor does the

record support a conclusion in that regard. His claims of prejudice should be rejected on that basis too.

Finally, nothing in the record suggests that the delay was a deliberate attempt by the State to gain any sort of advantage over the defendant. Therefore, his due process claim must fail on that basis as well. See State v. Knickerbocker, 152 N.H. 467, 470 (2005) (bad faith is one factor to consider in assessing the reasonableness of a delay).

The defendant appears to contend that this Court should apply the test from Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976), to conclude that his due process rights were violated. DB 11. Matthews, however, applies where there is a dispute over whether an individual is entitled to additional or different procedures in the adjudication of a disputed issue. See, e.g., Petition of Kilton, 156 N.H. 632, 642-43 (2007) (discussing the procedures that are required to ensure a fair review of benefit determinations). Here, the State does not dispute that the defendant was entitled to a trial with the full range of protections afforded to all criminal defendants, including the rights to a speedy trial and disposition. Therefore, this Court should apply the standard from Lovasco and Adams—not the standard from Matthews—in evaluating the defendant's claims.

In sum, this Court should reject the defendant's argument that mid-trial and pre-sentencing delay amounted to a due process violation for at least three reasons. First, in Cavanaugh this Court determined that these types of claims are more

appropriately analyzed as speedy trial or speedy disposition claims. Cavanaugh, 127 N.H. at 37. Second, even if this Court were to undertake a due process analysis, the defendant would need to show actual prejudice and that the delay was unreasonable because it amounted to a deliberate attempt to gain an advantage. Lovasco, 431 U.S. at 790; Sturdy, 207 F.3d at 452; Adams, 133 N.H. at 824. He cannot make either of those showings here. Third, the Matthews v. Eldridge test that the defendant cites in his brief does not apply in this context. For all of these reasons, his conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

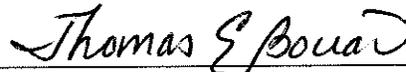
The State requests a 5-minute oral argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Eugene F. Sullivan, III, Esq., counsel of record.



Thomas E. Bocian