SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1610-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DIANE L. WILLIAMS,

Defendant-Appellant.

Argued January 11, 2017 – Decided March 10, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 12-02-0281.

James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Smith, of counsel and on the brief).

Melinda A. Harrigan, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Diane Ruberton, Acting Atlantic County Prosecutor, attorney; Ms. Harrigan, on the brief).

PER CURIAM

Defendant Diane L. Williams was convicted by a jury of second-degree vehicular homicide, N.J.S.A. 2C:11-5b(1); third-degree assault by auto, N.J.S.A. 2C:12-1c(2); and two counts of fourth-degree assault by auto, N.J.S.A. 2C:12-1c(2). The judge sentenced her to six years in State prison for the vehicular homicide, subject to the periods of parole ineligibility and supervision required by the No Early Release Act, N.J.S.A. 2C:43-7.2, and to a consecutive three-year term on the third-degree assault by auto, with concurrent terms of 270 days each on the remaining two fourth-degree convictions. She appeals, contending her right to a speedy trial was violated and the judge double-counted one aggravating factor and misapplied another in crafting her sentence. Finding no error, we affirm.

On Halloween 2008, defendant spent a few hours in a bar drinking beer and doing shots with a companion. Driving him home along a two lane county road, her car left the roadway and then fishtailed into an oncoming car driven by a woman conveying her elderly parents home from a family gathering. The force of the impact nearly ripped defendant's car in half and demolished the Chevy Impala with which it collided. The driver of the Impala suffered moderate injuries, as did her father in the rear seat.

Her mother, however, was not so lucky. The local fire department had to use the Jaws of Life to extract her from the car. She suffered a broken bone in her neck, multiple broken ribs, a broken femur at the hip joint and two open fractures of the bones of her lower leg into her ankle. Although she was airlifted to Atlantic City Medical Center, she went into severe shock and succumbed to her injuries eight days later. Defendant's companion was also airlifted from the scene with life-threatening injuries, although he survived.

Defendant too suffered injuries in the accident. A blood draw performed at the hospital, where she was transported by ambulance, revealed her blood alcohol level was over twice the legal limit. Although defendant was immediately issued motor vehicle summonses for driving while intoxicated, reckless driving, failure to maintain a lane and having an open container in the car, she was not formally charged with vehicular homicide until April 6, 2009, 157 days later. She was arrested on April 8 and released on bail the same day. Defendant was not indicted on that charge, or the others on which she was tried, until February 1, 2012, over thirty-three months later.

Defendant made a motion to dismiss the indictment in July 2013, claiming the prosecutor failed to present clearly exculpatory material to the jury, which was denied. She did not

make a speedy trial motion, however, until just days before she was finally tried in June 2014, nearly five-and-a-half years after the accident.

Judge Kyran Connor heard the motion. Applying the balancing test of Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which weighs the conduct of the State and the defendant in assessing the length of delay, the reason for the delay, any effort by the defendant to assert his right to a speedy trial and any prejudice the defendant may have suffered by reason of the delay, State v. Szima, 70 N.J. 196, 201, cert. denied, 429 U.S. 896, 97 S. Ct. 259, 50 L. Ed. 2d 180 (1976), he found defendant had not been denied her Sixth Amendment right to a speedy trial.

The judge had no difficulty in agreeing with defendant that "the prosecutor's administrative oversight of this case post-complaint was seriously lacking." Noting "that the first prosecutor assigned to the case became gravely ill and died, the second one ended up on a leave of absence for some period, . . . [and] that things just sort of drifted" until a third prosecutor took the case over in 2012, the judge concluded "it's certainly not a pretty picture of administrative efficiency, but it's also a far cry from reflecting any deliberate attempt to gain an advantage."

Analyzing the delay as consisting of two distinct phases, the first being the thirty-three months between charge and indictment[1] and the second being the twenty-eight months between indictment and trial, the judge found the total delay an inordinately long period, by any standard, which triggered the need to consider the other three Barker factors. After comprehensively considering the arguments of counsel and discussing for the record his own contemporaneous notes of the progress of the case and the reasons proffered for requested adjournments,[2] Judge Connor summed up his findings:

> Factor 1, the length of delay, very long, mandates an analysis of the other 3 factors.
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> Factor 2, I think the reasons for the delay in the pre-indictment phase are clearly attributable to the prosecutor's failure to efficiently attend to the criminal business of the State and the weight is against the prosecutor there, but I do note also that Barker counsels that such reasons for delay as inattention, while not defensible, fall on the more neutral side as compared with an intentional delay to gain an advantage.

[1] The judge also characterized the first phase as running from the date of the accident to indictments, a period of thirty-nine months.

[2] Reading extensively from his notes, the judge concluded "[a]lmost without exception, right from the arraignment starting gate when counsel asked for six weeks postponement before the next listing, the postponements and delays were at the behest of the defense."

When we turn to the post-indictment phase, as I've said, I think the delay has been pretty much exclusively chargeable to the defendant. So in analyzing reasons for the delay, I think the most that probably can be said is that one side is as responsible for them as the other side, just at different stages of the litigation.

Number 3, the assertion of the right to a speedy trial, this one I find is all on the defendant in terms of negative weight. That right was never asserted until this motion was filed essentially on the eve of trial. And, again, as we all recognize there is . . . no obligation to put yourself on trial. Barker went out of its way to stress that where a defendant does not assert that right, that defendant makes it awfully hard on herself to prove that she has been denied that right.

Factor 4, prejudice, I think the only prejudice that is out there is that second interest Barker talked [about], anxiety and concern of the defendant. There's certainly some prejudice over these unresolved charges, but there was I find certainly no incarceration and there's been no demonstration in any concrete way of an impairment of the ability to defend.

So I guess what I'm coming down to is this. I think I see factor 2 as in most respects kind of a draw, factor 3 heavily against the defendant, factor 4 minimal prejudice that weighs to a slight extent against the State. So I conclude that the motion should be denied for all those reasons. I don't find that the defendant's right to a speedy trial has been violated under existing case law and the statutes and the court rules.

In sentencing defendant, Judge Connor found aggravating factors two, the seriousness and gravity of harm inflicted on the victim, N.J.S.A. 2C:44-1a(2) and nine, the need to deter, N.J.S.A. 2C:44-1a(9). The judge found mitigating factors seven, no history of prior criminal activity, N.J.S.A. 2C:44-1b(7), and nine, defendant's character and attitude make it unlikely that she will re-offend, N.J.S.A. 2C:44-1b(9). In discussing the aggravating factors, the judge noted

> that a woman who was then 84 years old, lays dead after suffering cerebral contusions, open leg fractures, multiple rib fractures, spinal fractures, a man who was then 44 suffered a fractured nose, lacerations, 12 fractures ribs, a punctured lung, and a broken back. An 85-year-old man and a 55-year-old woman suffered various forms of less serious bodily injury. And astride it all, a 52-year-old woman, a mother of three, with no history of any convictions, not even a speeding ticket as far as I can see or a parking citation, astride it all, stands that woman who is criminally responsible for it all.
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> . . . .
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> I think we all acknowledge that drinking and driving is a modern-day plague and that it is responsible for an unconscionable number of deaths and injuries on our streets and highways and, you know, it's a problem of such magnitude that it has received consistent special attention from our Legislature and as time goes by, the laws regulating this field have become more and more strict and less and less forgiving.

. . . .

> But [defendant is] here notwithstanding a clean record and an upstanding life and she's on her way to prison because under our law she has been found criminally responsible for causing the death of an innocent woman by driving her car recklessly and driving it while she was under the influence of intoxicating liquor.
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> Nobody here, as I understand it, asserts that [defendant] intended to harm anyone that day and I don't think anybody here thinks that she has a mean bone in her body and yet, she's still in the crosshairs because our Legislature has made a public policy determination that what she did on October 31st, 2008, regardless of any evil intent, tears so deeply at the fabric of our social contract that she must be imprisoned.
>
> This public policy determination that prison is mandatory is indeed finally all about deterrence, deterrence not only of [defendant] from ever engaging in this conduct again, but also deterrence of others in the community, who seeing the harshness of this result will presumably be deterred themselves from duplicating this conduct.
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> And so, we move forward as we must, grieving over the painful death suffered by Estella Mills, regretful for the injuries suffered by three other people on that same occasion, and also understanding the stark fear of the unknown that is about to befall her being experienced by [defendant].

Defendant appeals, raising the following issues for our consideration:

POINT I

DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE VIOLATED BY THE STATE'S FAILURE TO SEEK AN INDICTMENT UNTIL 33 MONTHS AFTER THE COMPLAINT WAS FILED.

A. The 33-Month Delay in Filing The Indictment.

B. The Defendant's Right To A Speedy Trial

Length of Delay.
Reason for the Delay.
Defendant's Assertion Of The Right.
Prejudice To Defendant.

C. The Factors Weigh Heavily Against The State And Require That The Indictment Be Dismissed.

POINT II

BECAUSE THE TRIAL COURT DOUBLE-COUNTED THE VICTIM'S DEATH AS AN AGGRAVATING FACTOR AND INCORRECTLY BELIEVED THAT "THE POLICY OF THE LEGISLATURE" REQUIRED THAT THE DETERRENCE FACTOR BE GIVEN SUBSTANTIAL WEIGHT, THIS MATTER SHOULD BE REMANDED FOR A NEW SENTENCING HEARING.

A. The Gravity And Seriousness Of The Harm Inflicted on The Victim.

B. The Need For Deterrence.

Because our Supreme Court has "decline[d] to adopt a rigid bright-line try-or-dismiss rule," but instead has continued its commitment to a "case-by-case analysis," under the Barker balancing test, it has acknowledged "that facts of an individual

case are the best indicators of whether a right to a speedy trial has been violated." State v. Cahill, 213 N.J. 253, 270-71 (2013). "[T]he difficult task of balancing all the relevant factors relating to the respective interests of the State and the defendants," and applying considered "subjective reactions to the particular circumstances [to] arrive[] at a just conclusion" is delegated to the trial judge, whose determination "should not be overturned unless clearly erroneous." State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).

Having reviewed the record, we are satisfied Judge Connor conscientiously considered the facts and carefully applied the law in determining defendant's speedy trial rights were not violated here. Defendant has not provided us any reason to second-guess the judge's assessment of this record.

The judge's decision to analyze the unconscionably long delay of almost five-and-a-half years in bringing this case to trial in two phases, the thirty-three month span between charge and indictment and the twenty-eight month span between indictment and trial, and assigning responsibility for the first to the State and the second to defendant, was both eminently reasonable and supported by the record. The judge did not shirk from finding the pre-indictment delay, although occasioned by the death of one prosecutor and the leave of absence required by

another, was "clearly attributable to the prosecutor's failure to efficiently attend to the criminal business of the State."

Although the law is clear that a defendant's assertion of her right to a speedy trial "is not dispositive of the merits of the claim and is certainly not a pre-condition to [its] invocation," it is likewise beyond cavil that a defendant's "assertion of a right to a speedy trial is measured heavily in the speedy trial analysis." Cahill, supra, 213 N.J. at 274; see also Barker, supra, 407 U.S. at 531-32, 92 S. Ct. at 2192-93, 33 L. Ed. 2d at 117-18 ("The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.").

Here, far from asserting her Sixth Amendment right to a speedy trial upon the State's finally presenting the case to the grand jury, defendant repeatedly sought continuances, resulting in a further delay of almost two-and-a-half years, as the judge's meticulously kept bench notes attest. Defendant even moved to dismiss the indictment in July 2013, for failure to present exculpatory material to the grand jury, without ever raising a speedy trial claim. Defendant certainly never

disputed the State's representation that it was prepared to try the case at the first listing in September 2013, almost a year before the case was actually tried.

Because "[a] defendant has no duty to bring himself to trial," Barker, supra, 407 U.S. at 527, 92 S. Ct. at 2190, 33 L. Ed. 2d at 115, "there is an obvious difference in the weight to be given to defendants' inaction prior to indictment and subsequent to indictment." Merlino, supra, 153 N.J. Super. at 17. As the Court has noted, "[a]ny delay that defendant caused or requested would not weigh in favor of finding a speedy trial violation." State v. Gallegan, 117 N.J. 345, 355 (1989). We agree with the trial court that defendant's failure to assert her right to a speedy trial following indictment and her own actions to further delay trial for another nearly two-and-a-half years, effectively neutralized the State's own inordinate thirty-three month delay in securing an indictment in this case.

Finally, defendant cannot show she suffered any real prejudice from the delay. See State v. Fulford, 349 N.J. Super. 183, 195-96 (App. Div. 2002). Defendant concedes she was "not able to establish a specific instance where the delays in filing the indictment impeded her ability to present a defense," and she was never in pre-trial detention on the charges. While we do not minimize the employment interruption defendant's license

suspension caused her, the anxiety engendered by a continued and unresolved prosecution, and the public obloquy attendant to the charges, we agree with the trial court these factors do not tilt the scales sufficiently to find a speedy trial violation on the entire record.

We have considered the arguments defendant has offered regarding her sentence and determined they present no basis for reversal. Although it is certainly true "that facts that established elements of a crime for which a defendant is being sentenced should not be considered as aggravating circumstances in determining that sentence," State v. Kromphold, 162 N.J. 345, 353 (2000), and counting the victim's death as an aggravating factor in sentencing on a death by auto conviction is impermissible, State v. Pineda, 119 N.J. 621, 627 (1990), we do not agree the trial judge double-counted the factor here. Defendant's contention otherwise relies on emphasizing and taking out of context the judge's remark in assigning aggravating factor two that the factor "speaks for itself, particularly in the case of the decedent, Ms. Estella Mills." The judge, however, had just detailed, at length, the multiple injuries inflicted on the other three victims of the accident, including the life-threatening injuries suffered by the passenger in defendant's

own car and referred to the gravity of the harm inflicted "on the victim or victims in this case."

The court has recently reaffirmed that "[i]njuries to victims of other crimes of which defendant was convicted . . . may be used as aggravating factors for sentencing of the defendant's particular offense." State v. Lawless, 214 N.J. 594, 608 (2013). As Judge Connor made clear that his assignment of aggravating factor two relied on the extensive injuries to defendant's own passenger as well as to the less serious injuries suffered by the surviving passengers of the Impala, we do not find his reference to the decedent in his assignment of the factor renders the sentence infirm. See State v. Carey, 168 N.J. 413, 425-26 (2001) (finding in the context of vehicular homicide sentence that the extensive injuries sustained by the two surviving victims warranted the trial court's reliance on aggravating factor two "independent of the deaths of the two other victims").

The judge's identification of aggravating factor nine, the need for deterrence, coupled with mitigating factor nine, the defendant's character and attitude making re-offense unlikely, requires only brief comment. As the Court has noted with regard to application of aggravating factor nine and mitigating factor eight, that the offense was "the result of circumstances

unlikely to recur," N.J.S.A. 2C:44-1b(8), the two are not inherently incompatible, although they will rarely apply in the same sentencing. See State v. Fuentes, 217 N.J. 57, 79-80 (2014).

Similarly here, we do not find the trial court's application of aggravating factor nine and mitigating factor nine are irreconcilable in the context of this vehicular homicide and drunk driving case. The judge correctly noted that "drinking and driving is a modern day plague . . . responsible for an unconscionable number of deaths and injuries on our . . . highways" that has "received consistent special attention from our Legislature." That defendant has never had so much as a speeding ticket before does not detract from the need to deter her and others from driving while intoxicated.

Judge Connor obviously gave great thought and took considerable care in crafting the sentences imposed in this case. Our review of the sentencing transcript convinces us that the judge's careful findings and balancing of the aggravating and mitigating factors are supported by adequate evidence in the record, and the sentences imposed are neither inconsistent with sentencing provisions of the Code of Criminal Justice nor shocking to the judicial conscience. See Fuentes, supra, 217 N.J. at 70-71;

State v. Bieniek, 200 N.J. 601, 608 (2010); State v. Cassady, 198 N.J. 165, 180-81 (2009).

Affirmed.