

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,)
)
 Plaintiff,)
)
 v.)
)
 JAHWADA H. JONES, ✓)
 (D.O.B.: 11-27-90))
)
 Defendant.)
 _____)

CRIMINAL NO. ST-09-CR-218 ✓
V.I. CODE ANN. tit. 14, §§ 1863(1);
295(3), 11; 1083(2), 11

PEOPLE OF THE VIRGIN ISLANDS,)
)
 Plaintiff,)
)
 v.)
)
 LAWRENCE A. POWELL,)
 (D.O.B.: 12-12-89))
)
 Defendant.)
 _____)

CRIMINAL NO. ST-09-CR-219
V.I. CODE ANN. tit. 14, §§ 1863(1);
295(3), 11; 1083(2), 11

MEMORANDUM OPINION

Defendants Lawrence A. Powell and Jahwada H. Jones ask this Court to dismiss the Information against them for violation of their Sixth Amendment right to speedy trial.¹ After weighing and evaluating the factors set out in *Barker v. Wingo*², this Court finds that the Defendants' right to speedy trial has not been violated and thus, the Court will deny the Motion to Dismiss.

FACTS AND PROCEDURAL HISTORY

On April 12, 2009, in the area around Joe's Diner in Cruz Bay, St. John, U.S. Virgin Islands, David Kane was beaten and robbed by individuals who were later identified as

¹ Defendant Lawrence A. Powell is represented by Denise Francois, Esq., of Hodge & Francois. Defendant Jahwada H. Jones is represented by Julie Smith Todman, Esq., of the Office of the Territorial Public Defender. The People of the Virgin Islands are represented by Douglas Sprotte, Esq., Assistant Attorney General.

² 407 U.S. 514 (1972).

Lawrence A. Powell and Jahwada H. Jones. According to witnesses, Jones removed property from Kane, while Powell struck him several times. Approximately Two Thousand Seven Hundred Dollars (\$2,700) and a cell phone were taken from Kane, and he sustained injuries that required medical treatment. Jones and Powell were arrested on May 6, 2009 for second degree robbery and other crimes arising out of the incident.

At arraignment on May 14, 2009, both Defendants pleaded not guilty to the Information which charged them with second degree robbery and other crimes arising out of the April 12, 2009 events. In an Order dated July 16, 2009, the Court set the case down for a pretrial conference on September 23, 2009 and for jury selection and trial on October 13, 2009.

Before the initial date for jury selection, the Court, *sua sponte*, continued the date for jury selection to December 7, 2009. On November 23, 2009, the People moved for a continuance based on the victim's inability to be present at trial on the date of jury selection and on certain dates during the trial period. Powell did not oppose the motion to continue, and joined in the People's motion to continue. On November 25, 2009, the Court continued the December jury selection to February 1, 2010 with trial to begin on February 8, 2010.

Before the new jury selection date, the Court, at the parties' request, scheduled the matter for a change of plea hearing on January 28, 2010. At the change of plea hearing, Assistant Attorney General Ernest Bason advised the Court that some of the witnesses had been paid by the Government and that he had just received this information. Because of this newly discovered information, Bason asked for a continuance of the trial. The Court gave the Defendants an opportunity to file motions relating to the alleged discovery violation and the case was taken off of the calendar without a new date. The Court also set down a briefing schedule.

By an Order dated February 8, 2010, the Court scheduled this case for a hearing relating to the discovery issue for March 16, 2010, which was later rescheduled to March 15, 2010.

On March 15, 2010, the Defendants were not ready to proceed with the hearing, having not filed memoranda directed to the alleged discovery violation. Defendants stated that they were ready to proceed with the plea offer, but the plea offer had expired and was withdrawn by the People. The Court set the case down for jury trial on May 24, 2010 and the People were directed to tender another plea offer to the Defendants before that date.

Before the date of jury selection, the People moved to continue based on the unavailability of an eye witness. In response, the Court granted the motion to continue the trial on May 24, 2010 to September 13, 2010. On the continued date of September 13, 2010, the People announced that they were not ready for jury selection, since the assistant attorney general assigned to the case was no longer with the Office of the Attorney General, and a successor assistant attorney general had not been assigned to the case. Because the People were not ready to proceed, the Court continued jury selection to January 3, 2011 and this date was later changed to January 4, 2011, since the Court is closed on January 3, 2011. On September 13, 2010, both

Defendants moved to dismiss for violation of their Sixth Amendment constitutional right to a speedy trial.³

DISCUSSION

I. IN WEIGHING THE FACTORS SET OUT IN *BARKER V. WINGO* TO DETERMINE WHETHER THE DEFENDANTS' RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED, THIS COURT FINDS THAT THE DEFENDANTS' RIGHT TO SPEEDY TRIAL HAS NOT BEEN VIOLATED.

A defendant's right to a speedy trial in a criminal case is guaranteed by the Sixth Amendment to the United States Constitution and the Revised Organic Act of the Virgin Islands.⁴ In *Barker v. Wingo*,⁵ the United States Supreme Court set out four factors in determining whether a defendant's right to a speedy trial has been violated. These factors which must be balanced by the Court are: 1. the length of the delay; 2. the reasons for the delay; 3. the defendant's assertion of the right; and 4. prejudice to the defendant.⁶ "None of these four factors are either necessary or sufficient, individually, to support a finding that a defendant's speedy trial right has been violated."⁷ This Court will weigh these factors with a "full recognition [of] [] the [] [Defendants'] interest in a speedy trial, [] specifically affirmed in the Constitution."⁸

i. LENGTH OF THE DELAY

A delay of one year or more is considered to be presumptively prejudicial.⁹ In the Motion to Dismiss, Powell points out that he was arrested in May 2009 and that sixteen months has elapsed between the date of his arrest and the September 2010 filing of this Motion to Dismiss. Currently, the trial is scheduled to commence with jury selection on January 4, 2011, and thus, the actual trial will not begin until approximately twenty months after the date the Defendants were arrested. Since the length of the delay is considerable, the Court reasons that the length of the delay supports the Defendants' Motion to Dismiss and dictates that this Court should consider the other three factors.

³ Powell orally moved to dismiss the Information on speedy trial grounds on September 13, 2010, the date of jury selection. Jones orally joined this motion, and Powell asked for leave to file a written motion, which the Court granted. Pursuant to the Court's order allowing the filing of a written motion, Powell later filed a written motion to dismiss. Although the Court did not receive a written motion or a written joinder in the motion to dismiss by Jones, the Court accepts Jones's oral joinder in Powell's motion to dismiss as sufficient for the Court to determine whether Jones as well as Powell was denied his constitutional right to a speedy trial.

⁴ Revised Organic Act of the Virgin Islands 1954, as amended, § 3, 48 U.S.C. § 1561, reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 861(1995) (preceding V.I. CODE ANN. tit. 1.); see also *In Re Moses*, D.C. Civ. App. No. 2006/068, 2006 WL 2572090 at *4 (D.V.I App. Div. Aug. 29, 2006) ("The Sixth Amendment right to a speedy trial applies in the Virgin Islands per section 3 of the Revised Organic Act.").

⁵ 407 U.S. 514.

⁶ *Id.* at 530.

⁷ *Id.* at 533.

⁸ *Id.*

⁹ *Gov't v. Richardson*, D.C. Crim. App. No. 2002-172, 2009 WL 102734, at *4 (D.V.I. App. Div. Jan. 13, 2009) (citing *Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992)).

ii. REASON FOR THE DELAY

The reasons for the delay are diverse. By an Order dated October 9, 2009, the Court, *sua sponte*, continued jury selection scheduled for October 13, 2009 to December 7, 2009. Indeed, the Court caused the first delay apparently because there were motions still outstanding. Although delays caused by scheduling problems are attributable to the prosecution, such delays weigh very lightly against the Government.¹⁰

Although the People asked for a continuance of the December 2009 trial date, the subsequent delay cannot be attributed to the People, because Powell joined in the People's motion and requested that a trial date be set after January 5, 2010. In reviewing the motions to continue the December trial date, it appears that Powell's attorney initially asked that the trial commence right after jury selection and take place during that week, while the People made it clear that the victim would not be able to testify during that week, but would be available at a time when Powell's attorney had a prior commitment to be off-island. As a result, the trial was continued by consent of Powell and the People to a convenient date, February 1, 2010.

Similarly, it would be unfair to attribute the delays from February 1, 2010 to May 25, 2010 to the People, since the delays were caused by aborted plea bargain discussions and the Defendants' unpreparedness for a hearing on a possible discovery violation. After the Court afforded the Defendants the opportunity to brief the issue concerning the newly discovered information that the People's witness had received payment for his testimony, the Defendants failed to avail themselves of the opportunity to demonstrate that the witness's testimony should be excluded or that the Court should give a special instruction. Instead, the case had to be continued because the Defendants were unprepared and later continued again, because the parties were unable to agree upon an acceptable disposition of the case.

On May 25, 2010, the People reported that they could not go forward and requested a continuance because of the unavailability of an eye witness. The delay from May 25, 2010 to September 13, 2010 is attributable to the People. However, this delay does not count heavily against the People if at all, since *Barker* has counseled that delays caused by witness unavailability may be considered appropriate.¹¹

On the continued jury selection date of September 13, 2010, the People again could not go forward because the previously assigned prosecutor's employment had been terminated and a new prosecutor had not been assigned to the case. Based on their unpreparedness, the Court had to continue the trial to the next available date, January 3, 2011, later moved to January 4, 2011. Because the continuance from September 13, 2010 to January 4, 2011 can be considered the

¹⁰ *Barker*, 407 U.S. at 531 (Delays caused by overcrowding of courts should not weigh as heavily against the defendant as a deliberate delay, but such neutral delays do count against the Government, since the ultimate responsibility for such circumstances lies with the Government.); *People of the Virgin Islands v. Rivera*, No. ST-09-CR-F53, 2010 WL 4723455, at *7 (Super. Nov. 17, 2010) (time to decide motions by the Court cannot be weighed heavily against the People under the Sixth Amendment speedy trial analysis.)

¹¹ *Barker*, 407 U.S. at 531 ("[A] valid reason, such as a missing witness, should serve to justify appropriate delay.").

result of inefficiency or negligence on the part of the People, it cannot be considered a purposeful delay, and for that reason, it does not weigh strongly against the People.¹²

The Court, however, notes that the other delays in moving this case to trial are equally attributed to the Defendants and the prosecution. Thus, this Court can not blame the People for the entire 20 month delay. The second factor, therefore, leads to a mixed conclusion, since the reason for the delay is attributable to both sides. Again, even though the People caused some of the delay, it was not purposefully done to gain a prosecutorial advantage and thus, does not weigh heavily against them.

iii. ASSERTION OF THE RIGHT

Turning to the assertion of the right to a speedy trial, the Court agrees that the Defendants asserted their right to a speedy trial at arraignment. However, the assertion of the right to a speedy trial did not occur again until September 13, 2010 when both Defendants complained that their speedy trial rights had been violated and requested that the Court dismiss the Information. Because the Defendants asserted this right, but not until a substantial period of repeated delays, some of which were caused by the Defendants, the Court will not heavily weigh this factor in favor of the Defendants.¹³

iv. PREJUDICE TO THE DEFENDANT

Finally, the Court has to weigh the fourth *Barker* factor relating to prejudice. Although there is a general prejudice to the Defendants caused by the delay, the lapse of time works as much against the Government as it does against the Defendants. Indeed, since the People have the burden to prove guilt beyond a reasonable doubt, and that burden remains on the People, this type of prolonged delay can only aid the Defendants.

A trial court, when weighing this factor, focuses on: 1. the prevention of oppressive pretrial incarceration; 2. minimizing the defendant's angst; and 3. limiting the likelihood that the accused's ability to defend himself will be weakened.¹⁴

This Court notes that both Defendants were promptly released on bail, and have been free during most of the time that the case has been pending. Although Jones was remanded to custody during the interim that this case has been pending, this was caused by Jones's failure to abide by the Court's release conditions pending trial. However, when the Government was not ready to proceed in September 2010, Jones was again released from custody.

¹² See *Doggett v. United States*, 505 U.S. 647, 657 (1992) (stating that "negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense").

¹³ *United States v. Mendoza*, 530 F.3d 758, 764 (9th Cir. 2008) (reasoning that because a defendant caused the delay before his assertion of his speedy trial rights, the third factor, assertion of the right, does not weigh in the defendant's favor nor the government's favor).

¹⁴ *United States v. Colon*, Crim. Action No. 2006-12, 2008 WL 1777385, at *8 (D.V.I. Apr. 16, 2008).

Defendants do not point to any specific prejudice nor assert any type of undue anxiety in the Motion to Dismiss. This Court, thus, finds that the Defendants have not been prejudiced by the delay and this factor does not support their Motion to Dismiss.

The Court acknowledges that this matter has been delayed for 20 months. However, after weighing the *Barker* factors, the Government did not purposefully cause the delay, the Defendants partially caused the delay before the assertion of their right to a speedy trial, and the prejudice to the Defendants has been minimal. Accordingly, the Court concludes that the Defendants' speedy trial rights have not been violated.

II. THE COURT CONCLUDES THAT THE DEFENDANTS ARE NOT ENTITLED TO A DISMISSAL OF THE INFORMATION UNDER RULE 48(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

In the Motion to Dismiss, the Defendants ask this Court to consider dismissing the Information pursuant to Fed. R. Crim. P. 48(b).¹⁵ Rule 48(b) permits this Court to dismiss a case for violation of a defendant's right to a speedy trial.¹⁶ This Court also has the inherent power to dismiss a case for lack of prosecution where the delay is not of a constitutional magnitude.¹⁷ This power to dismiss for lack of prosecution arises from the Court's general supervisory powers in controlling its calendar.¹⁸

In *Government of the Virgin Islands v. Castillo*, the Appellate Division enunciated a test for dismissals for lack of prosecution by adopting *Barker*'s four factors to the failure to prosecute context. The Court stated that under Rule 48(a) "it is appropriate to consider: the nature of the government's failure, the reason for the failure, the defendant's assertion of her right, and prejudice to the defendant."¹⁹

As noted above in the discussion of the *Barker* factors, most of the delay in bringing the case to trial was attributable to the Defendants, or to neutral factors such as the plea bargain discussions. The delay from May 24, 2010 to the date of the trial in January 2011 must be attributed to the People, but the cause of the failure of bringing the case to trial is attributable not to purposeful delay, but to the unavailability of a necessary Government witness or to the failure to assign a prosecutor to the case. Although the Court finds that the People's failure to promptly assign a prosecutor to the case is reprehensible, it is evidence at best of negligence, and not intentional misconduct. In *Castillo*, which involved the failure of the Attorney General to have an assistant attorney general in court at the time of a change of plea hearing, the Appellate Division found that this type of negligence was not sufficient to warrant a Rule 48(b) dismissal. Similarly, this Court finds that the failure to promptly assign a new prosecutor in this case is not

¹⁵ Although Jones did not specifically join in this argument at the hearing on September 13, 2010, the Court will consider whether either Defendant's rights under Rule 48(b) were violated.

¹⁶ *Gov't of the Virgin Islands v. Castillo*, D.C.Crim.App. No. 2005-90, 2008 WL 4371659, at *4 (D.V.I. App. Div. Aug. 15, 2008).

¹⁷ *Id.* (citing and quoting *United States v. Goodson*, 204 F.3d 508, 513 (4th Cir. 2000)).

¹⁸ *Id.* at *4.

¹⁹ *Id.*

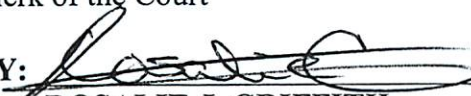
sufficient to warrant a dismissal under Rule 48(b). Since the other *Barker* factors have already been discussed in the context of the Defendants' Motion to Dismiss, it is not necessary to reiterate the Court's conclusions. The Court, therefore, finds a dismissal under Rule 48(b) inappropriate.

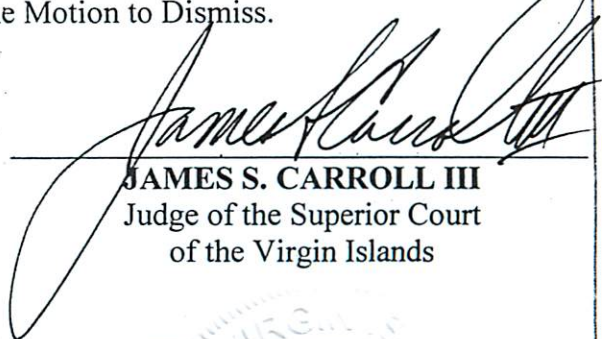
CONCLUSION

Because the Defendants have failed to show that their speedy trial rights have been violated by weighing and evaluating the factors set forth in *Barker v. Wingo* and have failed to show that they are entitled to a dismissal for failure to prosecute under Rule 48(b) of the Federal Rules of Criminal Procedure, the Court will deny the Motion to Dismiss.

DATED: December 21, 2010

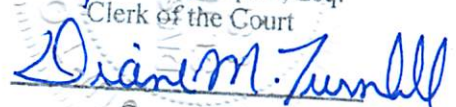
ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 
ROSALIE J. GRIFFITH
Court Clerk Supervisor 12/28/10


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 12/28/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk

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ORDER

AND NOW pursuant to the Memorandum Opinion date of even date, it is hereby

ORDERED that Defendants Jahwada H. Jones and Lawrence A. Powell's Motion to Dismiss is **DENIED**; and it is further

ORDERED that a copy of this Order and Memorandum Opinion shall be personally served on Defendants Jahwada H. Jones and Lawrence A. Powell; and copies thereof shall be directed to Douglas Sprotte, Esq., Assistant Attorney General; Julie Smith Todman, Esq., Territorial Public Defender, counsel for Defendant Jahwada H. Jones; and Denise Francois, Esq., of Hodge & Francois, counsel for Defendant Lawrence A. Powell.

DATED: December 27, 2010

CERTIFIED A TRUE COPY

Date: 12/28/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By: *Orlene M. Turnbull*
Court Clerk

James S. Carroll III
JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court
BY: *[Signature]*
ROSALIE J. GRIFFITH
Court Clerk Supervisor 12/28/10