

STATE OF MICHIGAN  
IN THE 43RD DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff,

v.

CASE NO. 12H-0056-FY  
HON. BRIAN C. HARTWELL

TERRY LOUIS NIMMONS  
Defendant

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**OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

This matter is before the court on defendant's motion to dismiss based on violations of the right to a speedy trial and the extradition statute.

The United States and Michigan Constitutions guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, sec 20; People v. Williams, 475 Mich. 245, 261 (2006). In determining whether a defendant has been denied this right, this court balances four factors:

- (1) The length of the delay,
- (2) The reason for delay,
- (3) The defendant's assertion of the right, and
- (4) The prejudice to the defendant.

Id. at 261-262. Length of delay and defendant's assertion of the right are not in dispute.

Reason for Delay

On December 29, 2011, the Michigan State Police arrested defendant. On February 7, 2012, a bench warrant was issued for defendant's failure to appear at preliminary examination. From June 17, 2015, to November 21, 2018, defendant was jailed or imprisoned in Arizona. Since November 21, 2018, defendant has been on parole in Arizona. From October 2017 to September 2018, defendant sent letters to the court requesting dismissal or extradition from Arizona. In September 2018, the prosecutor approved defendant's extradition request. Arizona police arrested defendant to extradite him to Michigan but on January 9, 2019, Michigan State Police advised it would not extradite defendant. On June 26, 2020, during an online virtual hearing, defendant, appearing from Arizona, was arraigned on the bench warrant.

A

The court attributes to defendant delay prior to October 2017 for his failure to appear and bench warrant status. A defendant is not denied his right to a speedy trial when the delay is caused

by his failure to appear, necessitating the issuance of a warrant for his arrest. *People v. Leverette*, 84 Mich.App. 268, 277 (1978).

## B

Defendant's messages to the court in 2017 and 2018 were not properly served upon the prosecution. However, by September 2018, the prosecution took steps towards extradition confirming it received defendant's messages. The court equally attributes delay from October 2017 to September 2018 to defendant and the prosecution.

## C

"If the state makes a reasonably timely effort to extradite an out-of-state prisoner and is unsuccessful, then the state has done what it can." *People v. Rodriguez*, 47 Mich.App. 483, 488 (1973). The *Rodriguez* maxim limits the practical application of the extradition statute by recognizing that extradition proceedings are not assured of success. This does not permit the government to sidestep the constitution. Determining the weight of the police refusal to extradite is essential to defendant's motion.

Between diligent prosecution and bad faith, official negligence in bringing an accused to trial occupies the middle ground. *Doggett v. U.S.*, 505 U.S. 647 (1992). While not compelling relief in every case where bad faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. *Id.* Although negligence is obviously weighed more lightly than deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. *Id.* The refusal by Michigan State Police to extradite defendant when offered by Arizona amounts to official negligence and is attributable to the prosecution.

The reason for the 21-month delay from September 2018 to June 26, 2020, weighs heavily against the prosecution because defendant specifically advised the government of his desire to be extradited and when given the opportunity the government refused.

### Prejudice to Defendant

If the total delay is under 18 months, then the burden is on the defendant to show that he suffered prejudice. *People v. Cain*, 238 Mich.App. 95, 112 (1999). If the trial is delayed 18 months or more, like the present case, the burden is on the prosecution to rebut a presumption of prejudice to the defendant. *Id.* Defendant states he will be unable to mount a constitutionally adequate defense. Thus, the delay is presumptively prejudicial and the burden is on the prosecution to rebut the presumption.

There are two types of prejudice implicated in claims under the right to a speedy trial: (1) prejudice to the person which is not relevant because defendant is not incarcerated, and (2) prejudice to the defense. *People v. Wickham*, 200 Mich.App. 106, 112 (1993). Prejudice to the defense is the more serious concern because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Williams*, 475 Mich. at 264.

### A

The prosecution attempts to rebut presumptive prejudice by demonstrating that witnesses and evidence are the same today as they would have been at the scheduled preliminary examination of February 7, 2012. Beside defendant, the only known witnesses are two state troopers who recall the facts supporting the allegations of fleeing & eluding, unlawfully carrying a concealed pistol, and driving while license suspended. Defendant argues that other witnesses may have been discovered through timely discovery and disclosure.

### B

The prosecution acknowledges destruction of in-car video 30 days after arrest. In-car video might have exculpated defendant on some, to name a few, of the elements of third degree fleeing & eluding: trooper gave a command, ignored by defendant, in an area with a posted speed limit of 35 MPH or less. The prosecution claims the video is not exculpatory and would have been destroyed prior to preliminary examination. We may never know.

A defendant has a constitutional right to request and obtain from the prosecution evidence that is material to his guilt. *Brady v. Maryland*, 373 U.S. 83 (1963). The police are not required, however, to seek and find exculpatory evidence. *People v. Sawyer*, 222 Mich.App. 1, 6 (1997). Failure to preserve evidence that might have exonerated the defendant does not constitute a denial of due process unless bad faith is shown on the part of the police. *People v. Hunter*, 201 Mich.App. 671, 677 (1993).

The court has serious misgivings about the video retention policy which destroyed key evidence of interactions with defendant, and prosecutors who neglected to preserve evidence after authorizing a felony complaint. Although systemically unfair, the policy to destroy video is more a failure of diligence than bad faith to harm the defense. The video was not destroyed due to delay attributable to the prosecution and therefore is not a factor in weighing the factors of a speedy trial.

### C

The nature of presumed prejudice is that the weight the court assigns to official negligence compounds over time as the presumption of evidentiary prejudice grows. *Doggett*, 505 U.S. 647.

“Thus, our toleration of such negligence varies inversely with its protractedness [citations omitted], and its consequent threat to the fairness of the accused’s trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state’s fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority.”

*Id.* The police and prosecution’s failure to complete extradition and prosecute defendant for 21-months is sufficient to establish prejudice. The prosecution has not met its burden to rebut presumptive prejudice.

### Conclusion on Defendant’s Right to a Speedy Trial

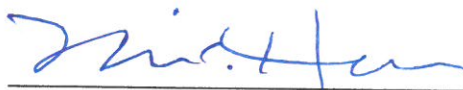
Any single factor is not determinative of whether defendant's right to a speedy trial is violated. The court's inquiry into all factors requires a balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial. Williams, 475 Mich. at 262. The parties agree to the extent of the delay and that defendant has asserted his right to a speedy trial. The parties disagree about the cause of the delay and if the delay prejudiced defendant. All factors weigh against the prosecution.

The prosecution knew defendant was incarcerated in Arizona, attempted extradition, refused to extradite defendant when given the chance, then did nothing. The prosecution's failure was not due to a foreign governor refusing to cooperate with Michigan; it was the police's refusal to participate in extradition. Even if the fourth factor weighed in favor of the prosecution, the right to a speedy trial requires more than an assumption the government might win at trial. The extent and cause of the delay are egregious and thus are determinative in this case.

Based on the foregoing, the court finds defendant has been deprived of his constitutional right to a speedy trial and dismisses all alleged counts.

**IT IS SO ORDERED.**

Dated: December 18, 2020



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HON. BRIAN C. HARTWELL  
DISTRICT COURT JUDGE