IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. WADE SCOTT WALTERS, Defendant.	No. 3:07-cr-0589-JAJ **ORDER**

This matter comes before the court pursuant to the defendant's February 21, 2009, Motion to Dismiss Indictment Pursuant to the Speedy Trial Act and the Sixth Amendment to the United States Constitution. [Dkt 55]. The court held a hearing on this motion on March 11, 2009, at which the defendant was present and represented by Anne Laverty. The government was represented by Assistant United States Attorney Cliff Cronk. The defendant's motion is denied.

ISSUES PRESENTED

The primary issue presented pursuant to the Speedy Trial Act is whether a one year delay from the filing of a defendant's motion to determine his competence until the conclusion of the hearing on that motion can be excluded from consideration under the Speedy Trial Act's requirement that trial be conducted within seventy days following the defendant's arraignment. Under the defendant's Sixth Amendment Speedy Trial motion, the issue is whether presumptively prejudicial delay should cause the case to be dismissed where the vast majority of that delay arises out of a defendant's numerous motions to continue proceedings and the defendant's attempts to feign incompetence.

FINDINGS OF FACT

The following facts are derived from an examination of this court's record, except as otherwise noted. On the following dates, the following proceedings transpired in this matter:

08.10.07	Defendant appears in court on a criminal complaint
08.14.07	Defendant is detained
08.15.07	Grand Jury returns indictment
08.31.07	Defendant is arraigned on one count indictment charging production of child pornography
10.09.07	Defendant seeks and court grants continuance of the trial until 01.07.08
12.21.07	Defendant seeks and court grants continuance of the trial until 03.03.08
02.05.08	Defendant moves for • hearing to determine his competence to stand trial • evaluation of defendant's competence
02.22.08	Court orders psychological evaluation
03.14.08	Defendant leaves Dubuque County Jail for psychological evaluation[1]
03.26.08	Defendant arrives at medical facility for evaluation[2]
03.27.08	Psychological study commences.[3]
06.05.08	Defendant leaves medical facility.[4]

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[1]The United States Marshals Service ("USMS") keeps precise records of the defendant's movement in custody. This entry comes from the USMS records.

[2]From USMS records.

[3]See report filed herein July 9, 2008.

[4]From USMS records.

06.19.08	Defendant arrives at Muscatine County Jail in Southern District of Iowa.[5]
06.25.08	Court sets hearing on defendant's 02.02.08 Motion to Determine Competence. Hearing set 06.27.08.
06.27.08	Defendant asks for independent psychological evaluation.
07.08.08	Court grants defendant's request for independent evaluation.
09.13.08	Defendant's psychological report prepared (filed 12.19.08)
10.06.08	Defendant asks for second independent evaluation.
12.03.08	Court sets 10.06.08 motion for hearing.
12.11.08	Defendant moves to continue hearing.
12.19.08	Hearing held on 10.06.08 motion. Counsel for defendant reports having received second evaluation, requests a third evaluation.
02.02.09	Court denies request for third evaluation, sets hearing on defendant's 02.05.08 Motion to Determine Competence.
02.05.09	Defendant moves to continue hearing.
02.18.09	Hearing held. Defendant found competent. Case set for trial 04.06.09 at defendant's request.

CONCLUSIONS OF LAW

Pursuant to the Speedy Trial Act, trial must commence within seventy days after arraignment.[6] The parties agree that thirty-eight days elapsed from the defendant's August 31, 2007, arraignment until the defendant sought his first continuance of trial on October 9, 2007. The defendant does not dispute the exclusion of time between October 9, 2007,

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[5]From USMS records.

[6]The Speedy Trial Act also requires trial within ninety days of the defendant's initial appearance, when the defendant is detained. 18 U.S.C. § 3164(b). Less than twenty days elapsed between the defendant's initial appearance and his arraignment because the government immediately moved for his detention and that motion was resolved on August 14, 2007.

and March 3, 2008, caused by the defendant's two motions to continue the trial.

Defendant's Contentions

The defendant contends that there was excessive delay in transporting the defendant to his psychological evaluation after the court ordered the evaluation on February 22, 2008, and before the defendant's arrival on March 26, 2008. Delay resulting from the transportation of the defendant to and from places of examination is excludable from the Speedy Trial Act calculation, except that time consumed in excess of ten days from the date of an order directing transportation shall be presumed to be unreasonable. 18 U.S.C. § 3161(h)(1)(H). Because the deadline for transportation is less eleven days, the court excludes weekends and holidays. United States v. Garrett, 45 F.3d 1135, 1140 n.6 (7th Cir. 1995)(citations omitted); Fed. R. Civ. P. 45(a). Thus, to comply with § 3161(h)(1)(H), the defendant should have arrived at the medical facility on March 10, 2008. Instead, he arrived on March 26, 2008. Therefore, the defendant contends that an additional sixteen days elapsed pursuant to the Speedy Trial Act.

The defendant next contends that there was excessive delay in returning the defendant to this district from his psychological evaluation. Oddly, the defendant contends that time between "mid-May" and the date of the psychologist's report (June 10, 2008), should be excluded.[7] The defendant asks the court to "assume" that the defendant's evaluation was completed on May 15, 2008, and that June 25, 2008, was the "likely" date that the defendant was returned to this district. The court was asked to assume that the evaluation was completed on May 15, 2008, because the psychologist testified at the defendant's February 18, 2009, competence hearing that the defendant was at the facility from March 27, 2008, until "I'd say middle of May from my recollection".

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[7]The court finds this calculation odd because the date of the report has nothing to do with the defendant's transportation.

The defendant bears the burden of proof to establish a violation under the Speedy Trial Act. United States v. Williams, ___ F.3d ___, 2009 WL 415263 (8th Cir. Feb. 20, 2009). There are records of precise dates on which inmates are released from psychological studies to return to their districts. The psychologist's guess off the top of his head nine months later does not satisfy the defendant's burden to prove that an additional twenty-six days elapsed under the Speedy Trial Act in May and June of 2008, as claimed by him.

The court's concern about adopting a May 15th date as the date of the defendant's release from his study is more than a concern about substituting assumptions for evidence or accepting an off-the-cuff guess where precise evidence is available. The claim that the evaluation was completed in "mid-May" is contradicted by a portion of the psychological report itself. In the report and in his testimony, the examining psychologist noted the defendant's attempts to manipulate his placement at the institution. When referring to the defendant's placement, the psychologist noted that as of May 13, 2008, the institution was still attempting to return the defendant to the general population for interaction with other inmates.[8] If the evaluation were complete by mid-May, the court seriously doubts the examiner would make such a point of these efforts.

Court's Conclusions

In most instances in this court, counsel who question the competence of their clients to stand trial simply file a motion to have the defendant evaluated. In this case, the defendant moved for such an evaluation but also moved for the court to set a hearing to

[8]That interaction can be very helpful in determining evidence of attempts to feign incompetence.

determine the defendant's competence to stand trial.[9] The motion to have the defendant evaluated was granted promptly. The motion to set a hearing to determine the defendant's competence was not set, understandably, until June 25, 2008, after the defendant returned from his evaluation. On June 27, 2008, the hearing was continued due to the defendant's request for an independent evaluation. After that motion was granted, the defendant was still not ready for a hearing and he requested a second independent evaluation. The court set a hearing on the defendant's request for a second independent evaluation and the defendant moved to continue that hearing. When the defendant reported at the hearing that he had received a second evaluation, he again reported that he was not ready for a hearing and wanted a third independent evaluation. After the court denied the defendant's request for a third evaluation, the court set a hearing on the defendant's motion to determine his competence, which the defendant moved to continue.

Thus, over a one year period of time, the defendant was transported to a Bureau of Prisons' facility for evaluation and was independently evaluated at the defendant's request. After the defendant was finally evaluated and his request for additional evaluation was denied, the hearing demonstrated one very interesting, and now important, fact. The defendant obviously was faking incompetence. A battery of psychological tests demonstrated such but not as well as telephone calls by the defendant in which he admitted it. All of this time and expense was an escapade by the defendant, an attempt to outsmart the professionals and keep his trial at bay.

Pursuant to 18 U.S.C. § 3161(h)(1)(F), the following delay is excluded from consideration of the Speedy Trial Act's requirement that a case proceed to trial within seventy days following arraignment:

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[9]At the hearing held on this motion, the court mistakenly overlooked the fact that this defendant had moved for a hearing to determine his competence.

> [D]elay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion…

This exclusion is automatic. United States v. Williams, supra. Subsection (F) excludes delay from the filing of the motion through the conclusion of the hearing on the motion, regardless of whether or not the hearing was held promptly. Henderson v. United States, 476 U.S. 321, 326 (1986). Subsection (F) does not require that the delay be "reasonable" in order to be excluded. Id.

In Williams, the court appropriately cautioned against situations where, for example, the district court neglects a motion and then attempts to insulate the case from dismissal by holding a belated hearing and then declaring all the time up until the hearing excludable. Similarly, "a district court may not simply ignore a motion for a speedy trial and thereby render excludable all subsequent periods of delay." Williams, supra. However, there was no attempt by the court in this situation to manipulate the Speedy Trial Act. Magistrate Judge Shields promptly granted the defendant's motion for a psychological evaluation. Six days after the defendant returned to this district, Judge Shields set a prompt hearing to determine the defendant's competence. He promptly granted the defendant's request for an independent evaluation, courteously waited approximately three months for a report from the evaluation and conscientiously considered the defendant's request for additional evaluation and continuances requested by the defendant.

The decision to set a hearing on the defendant's competence motion was not contrived. It unquestionably had to be held. Judge Shields was ready to hold it on June 27, 2008. The defendant's requests delayed that hearing.

The court finds that thirty-eight days under the Speedy Trial Act transpired between the defendant's arraignment and his October 9, 2007, motion for a continuance. As noted above, the defendant does not challenge the exclusion of time between October 9, 2007,

and March 3, 2008. The court further finds that the delay between the defendant's February 5, 2008, motion for a hearing to determine his competence and the February 18, 2009, hearing to determine the defendant's competence is excludable pursuant to 18 U.S.C. § 3161(h)(1)(F).

If the court did not exclude the entire one year period pursuant to § 3161(h)(1)(F), the court would find that an additional sixteen days elapsed under the Speedy Trial Act from the date of the order directing the defendant's evaluation until the day the defendant arrived at the institution for that evaluation. (February 22, 2008 until March 26, 2008). The court would not exclude delay resulting from the defendant's return to this district from the study as the defendant failed in his burden of proof in that regard. The Marshals Service records demonstrate that he was moved within ten days. Finally, the court would find that the time between December 19, 2008, and February 2, 2009, involved delay in excess of thirty days for a "prompt" resolution of the defendant's December 19, 2008, request for an additional psychological evaluation. Such a delay would have put this case over the seventy day Speedy Trial deadline.

The Speedy Trial Act appears on its face to be easily implemented. The many decisions from the Courts of Appeal and the Supreme Court on Speedy Trial Act issues show that this is not always so. Congress is fully aware of the difficulty associated with moving a prisoner half way across this nation within ten days following a judge's order. Appropriate location designations and secure travel make this requirement alone a significant burden. This court and the prosecutor have stood ready to try this case on virtually any week since the fall of 2007. The magistrate judge stood ready to determine the defendant's competence as soon as appropriate evaluations were complete. This court stands ready to fully implement the Speedy Trial Act and has not hesitated to dismiss two

cases for such violations within the past year.[10]

Had the court found a Speedy Trial Act violation, the court would not have dismissed this case with prejudice. Neither the remedy of dismissal with or without prejudice should be given priority. United States v. Elmardoudi, 501 F.3d 935, 941 (8th Cir. 2007). Instead, the court should consider among other things the seriousness of the offense, the facts and circumstances which led to the dismissal, and the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice. 18 U.S.C. § 3162(a)(2). In addition, the district court should consider the presence or absence of prejudice to the defendant resulting from the violation. United States v. Taylor, 487 U.S. 326, 334 (1988).

This is a serious case. The government claims that the defendant has confessed to repeated sexual intercourse with a twelve year old girl and the taking of digital photographs of her. The facts and circumstances of the case which caused unexcludable delay pursuant to the Speedy Trial Act would favor dismissal without prejudice. The defendant is responsible for and requested five months of delay between October 2007 and March 2008. He received an evaluation during which he feigned incompetence and the court was ready for a hearing to determine his competence by June 27, 2008. Out of an abundance of caution and a respect for the possibility that contrary evidence might exist, Judge Shields entertained additional delays as the defendant sought successive psychological evaluations. It is true that the year was a complete waste of time. It is equally true that the defendant fraudulently placed the delay in motion and required that it go the distance. A dismissal with prejudice under these circumstances would do little

[10]One such case involved delay occasioned by the defendant's appeal to the United States Supreme Court without seeking a stay of the Eighth Circuit Court of Appeals' appellate mandate. The other case was similar to the situation presented here. Upon learning of the difficulties associated with complying with the Speedy Trial Act occasioned by defendants transported to and from psychological evaluations, the court immediately put into place measures that prospectively will assure that no similar further violations occur.

or anything to support the laudable goals of the Speedy Trial Act and the court's desire for the prompt administration of justice.

SIXTH AMENDMENT SPEEDY TRIAL

Sixth Amendment challenges are reviewed separately from the Speedy Trial Act. United States v. Thirion, 813 F.2d 146, 154 (8th Cir. 1987). However, "It would be unusual to find the Sixth Amendment has been violated when the Speedy Trial Act has not." United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003). Unlike the Act which begins counting days on the filing date of the information or indictment or from the first appearance, whichever is later, Id. at § 3161 (c)(1), the Sixth Amendment attaches at the time of the arrest or indictment, whichever comes first. United States v. Perez-Perez, 337 F.3d 990, 995 (8th Cir. 2003).

The U.S. Supreme Court has created a balancing test identifying four relevant inquiries in a Sixth Amendment right to a speedy trial claim: (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as a result of the delay. Doggett v. United States, 505 U.S. 647, 651 (1991) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

1. Uncommonly Long Delay

The first inquiry is actually a double inquiry. Doggett, 505 U.S. at 651. To trigger speedy trial analysis, the defendant "must [first] allege the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Id. at 651-52. Once the defendant has met this initial showing, "the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. Id. at 652. A delay approaching a year may meet the threshold of a "presumptively prejudicial" delay.

Titlbach, 339 F.3d at 699. The one year threshold, although not a bright-line rule, has been followed in this circuit. See United States v. Aldaco, 477 F.3d 1008, 1019 (8th Cir. 2007) (three and one half year delay is presumptively prejudicial); United States v. Shepard, 462 F.3d 847, 864 (8th Cir. 2006) (seventeen month delay is presumptively prejudicial); Titlbach, 339 F.3d at 699 (thirteen month delay is presumptively prejudicial, eight month delay is not); United States v. Walker, 92 F.3d 714, 717 (8th Cir. 1996) (thirty-seven month delay is presumptively prejudicial). cf. Perez-Perez, 337 F.3d at 995 (five month delay is not presumptively prejudicial); United States v. White Horse, 316 F.3d 769, 774 (8th Cir. 2003) (nine and one half month delay is not presumptively prejudicial); United States v. Sprouts, 282 F.3d 1037, 1043 (8th Cir. 2002) (four month or 125 day delay is not presumptively prejudicial); United States v. Patterson, 140 F.3d 767, 772 (8th Cir. 1998) (approximately five-month delay is not presumptively prejudicial); United States v. McFarland, 116 F.3d 316, 318 (8th Cir. 1997) (little over seven month delay is not presumptively prejudicial); United States v. Lewis, 759, F.2d 1316, 1351 (8th Cir. 1985) (seven-month delay is not presumptively prejudicial). The presumptive prejudice can be overcome. "[S]peedy Trial standards recognize that pretrial delay is often both inevitable and wholly justifiable." Doggett, 505 U.S. at 656. If the government pursues a defendant with reasonable diligence, the defendant's speedy trial claim fails. Id. However, "persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice." Id. at 657. Great weight is attached to these considerations when they are balanced against the difficulty a defendant will have in going forward with trial due to the passage of time. Id. at 656.

Under the authorities set forth above, the delay in this matter has been presumptively prejudicial. That does not end the inquiry.

2. Government and Defendant's Responsibility for Delay

In determining whether the government or the defendant is more to blame under the

second inquiry, courts have looked to whether the government sought prosecution of the defendant with diligence. See Doggett, 505 U.S. at 652. "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." Barker, 407 U.S. at 531. In contrast, delay caused by the defense weighs against the defendant. Vermont v. Brillon, ___ U.S. ___, 2009 WL 578642, at *8 (S. Ct., March 9, 2009).

> Just as a state's deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the [State] … so too should a defendant's deliberate attempt to disrupt proceedings be weighted heavily against the defendant.

Id. In Brillon, the Supreme Court determined that the Vermont Supreme Court had failed appropriately to take into consideration the defendant's role during a year of delay in the "chain of events that started all this".

Brillon is on point here. For all the reasons set forth above, the court believes that the defendant is responsible for five months of pre-psychological evaluation delay. He is responsible for the delay typically associated with the psychological evaluation and any additional delay caused by his attempt to feign incompetence. He is responsible for the delay associated with his initial and successive requests for independent evaluations. Neither the court nor the prosecutor had any other agenda during this time other than to determine the issue of competence and proceed to trial.

3. Assertion of Right to Speedy Trial

In the third inquiry, courts look to the actions of the defendant in determining whether the defendant has asserted the right to a speedy trial. Barker, 407 U.S. at 522-23. Motions for continuances, failure to object to government motions for continuance, or failures to file motions for immediate trial can be interpreted as failures of the defendant to assert the right to a speedy trial. Barker, 407 U.S. at 534-35.

This defendant has never asserted his right to a speedy trial prior to filing his motion to dismiss.

4. Prejudice

The fourth inquiry looks to the prejudicial effects on the defendant. Barker, 407 U.S. at 532. Three interests need to be protected in considering prejudice: (I) preventing oppressive pretrial incarceration; (ii) minimizing anxiety and concern of the accused; and (iii) limiting the possibility that the defense will be impaired. Id. The most serious is the third interest because an inability to prepare a defendant's case skews the fairness of the system. Id.

The defendant is unable to articulate actual prejudice. He simply states that generally the ability to locate and secure witnesses declines with the passage of time as does the accuracy of witnesses' memories. He states that some witnesses may have picked up new criminal charges or be difficult to locate, or otherwise unable to testify. However, he does not identify any such persons by name. He states the physical evidence located in the defendant's home may have degraded but presents no evidence of this. Finally, he contends that his mental, physical and financial health have been impaired due to his lengthy incarceration and anxiety. There is no evidence of this either.

Upon the foregoing,

IT IS ORDERED that defendant's Motion to Dismiss for Lack of Speedy Trial is denied.

DATED this 12th day of March, 2009.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA