FILED
April 22, 2025
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent,

v.) No. 23-170 (Cabell County 21-F-9)

Gary A. Thomas,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Gary A. Thomas appeals the February 21, 2023, sentencing order of the Circuit Court of Cabell County.[1] On appeal, the petitioner argues that the court erred when it denied his motion to dismiss the indictment for a violation of his right to a speedy trial. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

In March 2021, the petitioner was indicted in the Circuit Court of Cabell County, West Virginia, for fifteen counts of third-degree sexual assault and fifteen counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child.[2] The petitioner was arraigned in April 2021, and the court scheduled a status hearing during the May 2021 term of court. At a status hearing in July 2021, the court granted a motion to withdraw filed by the petitioner's counsel and appointed new counsel for the petitioner. At a status hearing in August 2021, the petitioner's counsel moved the court to continue the case into the September 2021 term of court to provide counsel with additional time to talk to the petitioner and the State "regarding some discovery issues in the case." At a status hearing in December 2021, petitioner's counsel moved to continue the case until the January 2022 term of court because he needed to discuss the State's plea offer and review discovery with the petitioner.

At a status hearing in January 2022, the petitioner asserted his right to a speedy trial, and the circuit court scheduled a trial in March 2022. Before the March 2022 trial date, the State moved for a continuance because of a death in the prosecuting attorney's family. The petitioner objected

[1] The petitioner appears by counsel Matthew Brummond, and the respondent appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

[2] The terms of court in Cabell County commence "on the first Monday in January and May, and the second Tuesday in September." W. Va. Trial Ct. R. 2.06.

to a continuance, but the court overruled his objection and continued the trial into the May 2022 term of court. The petitioner's jury trial commenced in August 2022, and the petitioner was convicted of ten counts of first-degree sexual assault and ten counts of sexual abuse by a parent, guardian, custodian, or person in position of trust. Ultimately, the court consecutively sentenced the petitioner to one to five years of imprisonment for each of the ten counts of first-degree sexual assault and ten to twenty years of imprisonment for each of the ten counts of sexual abuse by a parent, guardian, custodian, or person in position of trust. The petitioner appeals from the court's sentencing order.

On appeal, the petitioner presents one assignment of error, arguing that he was denied his constitutional right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution.

> "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 2, *Walker v. West Virginia Ethics Commn.*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 2, *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009). It is well-established that "'[i]t is the three-term rule, W. Va. Code, 62-3-21, which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution.' Syllabus point 1, *Good v. Handlan*, 176 W. Va. 145, 342 S.E.2d 111 (1986)." Syl. Pt. 2, *Porter v. Farrell*, 245 W. Va. 272, 858 S.E.2d 897 (2021). Under that statute,

> "when an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute." Syllabus, *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998).

Syl. Pt. 1, in part, *State v. Damron*, 213 W. Va. 8, 576 S.E.2d 253 (2002). The pertinent exception applicable to the petitioner's case excludes terms of court where "the failure to try him was caused . . . by a continuance granted on the motion of the accused[.]" *See* W. Va. Code § 62-3-21. In that regard, we have held that

> [a]ny term at which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three terms in favor of discharge from prosecution under the provisions of [West Virginia] Code, 62-3-21, as amended.

Syl. Pt. 2, *Spadafore v. Fox*, 155 W. Va. 674, 186 S.E.2d 833 (1972).

Here, the petitioner was indicted in the January 2021 term of court and tried in the May 2022 term of court, and "neither of these terms count toward our calculation of the three-term rule." *Sowards v. Ames*, 248 W. Va. 213, 222-23, 888 S.E.2d 23, 32-33 (2023); *see also Good*, 176 W. Va. at 152, 342 S.E.2d at 118 (ruling that "the term at which the indictment is returned is not counted under the three-term statute, W. Va. Code 62-3-21 . . . ."). Significantly, the petitioner admits that his counsel moved to continue his trial from the May 2021 and September 2021 terms of court, but he argues that the factors enunciated in Syllabus Point 2 of *State v. Foddrell*, 171 W. Va. 54, 297 S.E.2d 829 (1982), require that these continuances "be charged against the State." In *Foddrell*, we held that

> [a] determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.

Id. The circuit court did not engage in an analysis of the *Foddrell* factors, and simply noted, as we do now, that of the three terms of court that passed after the petitioner's indictment and before his trial, the first two were marked by his counsel's motions to continue the trial into the next term of court. The petitioner argues that his counsel's motions to continue should be charged to the State because he had a "State-appointed lawyer," or because "the State was dilatory in providing discovery . . . ." We do not agree. The petitioner has not asserted that his counsel acted contrary to his instructions, and there is no indication that he argued to the circuit court that the State intentionally delayed his trial during the discovery process.[3] Moreover, the petitioner did not assert his right to a speedy trial until the January 2022 term of court, and there is no evidence that the State gained any tactical advantage by delay. In consideration of the *Foddrell* factors and under the circumstances of this case, we conclude that the court did not err when it ruled that the petitioner was not denied a speedy trial.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 22, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV

[3] "This Court's general rule is that non-jurisdictional questions not raised at the circuit court level will not be considered [for] the first time on appeal." *Jessie*, 225 W. Va. at 27, 689 S.E.2d at 27.