19-P-470 Appeals Court

COMMONWEALTH vs. DWAYNE McNAIR.

No. 19-P-470.

Suffolk. June 2, 2020. - November 5, 2020.

Present: Lemire, Singh, & Englander, JJ.

Constitutional Law, Speedy trial. Practice, Criminal, Speedy trial, Dismissal. Deoxyribonucleic Acid.

Indictments found and returned in the Superior Court Department on September 5, 2014.

A motion to dismiss was heard by Linda E. Giles, J., and the cases were tried before her.

Max Bauer for the defendant.
Julianne Campbell, Assistant District Attorney, for the Commonwealth.

SINGH, J. In September 2012 the defendant was charged in connection with the 2004 gunpoint abduction, rape, and robbery of two women in two separate incidents, a week apart, in Boston. Although deoxyribonucleic acid (DNA) evidence linked the defendant to the crimes, it could not distinguish him from his

identical twin. In April 2014, on the eve of trial, and over the defendant's speedy trial objection, the Commonwealth nol prossed the case in order to pursue novel DNA testing that could so distinguish. Several months later, in September 2014, the Commonwealth reindicted the defendant, armed with this new evidence. After lengthy proceedings concerning the admissibility of the novel DNA evidence, a judge of the Superior Court excluded it. A few months later, in August 2017, the defendant moved to dismiss the 2014 indictments on speedy trial grounds. The motion was denied, and in January 2018 the defendant was convicted after a jury trial of eight counts of aggravated rape and two counts of armed robbery. On appeal, he contends that the judge erred in denying his August 2017 motion to dismiss the 2014 indictments, based on his right to a speedy trial. We affirm.

Background. On the night of Tuesday, September 21, 2004, a twenty-three year old medical assistant was walking home near the Arboretum in Boston when she was grabbed and pushed into the back seat of a waiting car. When asked her age, the woman said she was fourteen years old. In response, the defendant said, "[Y]ou have to be lying. Don't lie." When she tried to escape from the car at one point, she was hit in the head with a gun. The woman was taken to a garage-type shed where two men took turns raping her. After taking her phone, identification, and

other items from her purse, the men dropped the woman off at Franklin Park and told her not to look at them as they drove away or they would come back and kill her. After flagging down a passing motorist, the woman went to a hospital where medical personnel administered a rape kit.[1]

One week later, on the night of Wednesday, September 29, a nineteen year old college student had nearly arrived at her Mission Hill home in Boston when she was grabbed and pushed into the back seat of a waiting car. When asked her age, the woman said she was fifteen years old. She was beaten in the head with a gun for lying. The woman was taken to Franklin Park. When she tried to run, the woman was punched in the stomach. In a remote wooded area of the park, two men took turns raping the woman. After taking her identification and other items from her wallet, the men instructed her to get down and count. Once she could hear that the men had driven away, the woman ran down a hill to a nearby building, where a security guard answered the door. A 911 call was made, and she was taken to a hospital where medical personnel administered a rape kit.

[1] The term "rape kit" refers to the sexual assault evidence collection kit used by medical personnel to collect physical evidence from a sexual assault victim to provide to law enforcement for forensic testing.

After interviewing both victims, detectives within the Sexual Assault Unit of the Boston Police Department suspected the two incidents were connected. The detectives attempted to locate the shed in which the first assault had taken place by calculating the distance likely traveled from the point of abduction and searching within the entire circumference. They attempted to locate the suspects by tracking the phone that had been taken from the victim. The detectives knocked on doors, canvassing the area for possible witnesses, and viewed surveillance videos from area businesses to see if one of them might have captured the abductions. Based on descriptions given by the victims, the police obtained an artist's rendering of the suspects and released the sketches to the public. Although the police were able to develop DNA profiles from specimens recovered from both rape kits, they had no suspects from which to conduct comparative analysis.

After several years, police investigation focused on the defendant. They learned that in 2004 the defendant had been living with his mother, who had a garage-type shed on her property. Police followed the defendant to his place of employment. He drove the same car that was registered to him in 2004 and which matched the appearance of the car used in both assaults. After watching the defendant smoke a cigarette outside, police recovered the discarded cigarette. They were

able to obtain a DNA sample from the cigarette and compare it to the rape kits from the two victims. It was a match. After learning that the defendant had a twin brother, police sought and obtained authority to collect a DNA sample from the twin and compared it to the rape kits. It was a match as well -- the twins were identical.[2]

The inability to distinguish between the twins stalled the investigation until police got a "CODIS hit" for the possible second assailant, Anwar Thomas, in July 2010.[3] Thomas's DNA matched the samples from both rape kits, and he was subsequently indicted in connection with the 2004 crimes and faced multiple life felonies as a result. In late 2012, as trial approached, Thomas sought a plea deal. He agreed to testify against the defendant in exchange for a lesser sentence. Thomas had gone to high school with the defendant as well as his twin brother and could tell them apart.

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[2] The descriptions given by the victims indicated that the two assailants looked different enough to suggest that only one of the twins was involved. Given the time that had elapsed since the crimes, however, efforts to determine whether one or the other twin had an alibi were fruitless.

[3] CODIS was described as the "Combined DNA Indexing System," an FBI database of DNA profiles collected as a result of criminal incidents, and a "hit" was described as the system matching DNA profiles from different cases.

A criminal complaint issued against the defendant in September 2012, and with the aid of Thomas's grand jury testimony, the defendant was indicted in November 2012; he was detained on high bail. Two weeks before the scheduled trial date in April 2014, the Commonwealth moved for a twelve-week continuance in order to pursue a recently announced DNA test that promised to be able to distinguish between identical twins by examining genetic mutations. The defendant opposed, asserting his speedy trial rights. The judge (first judge) denied the continuance, commenting that the likelihood of the new DNA evidence passing the gatekeeper hearing[4] in order to be admitted at trial was "really very, very small."

The Commonwealth subsequently filed a nolle prosequi of the indictments, explaining in detail its investigation, its evidence against the defendant, and its decision to discontinue the prosecution, concluding that

> "the interests of justice require that a jury asked to decide a case of this seriousness and complexity should have the best available evidence in order to render its decision. As the Commonwealth has a strong basis to believe that the results of this testing will definitively inculpate (or, if not, conclusively exculpate) the defendant, the Commonwealth concludes that it has no responsible alternative to terminating the prosecution and conducting the state-of-the art forensic genome-sequencing in order to distinguish scientifically between the defendant and his twin brother."

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[4] See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Commonwealth v. Lanigan, 419 Mass. 15 (1994).

The Commonwealth indicated its intention to reindict. The defendant was released from custody.

Some four months later, in September 2014, the defendant was reindicted on eight counts of aggravated rape and two counts of armed robbery[5] based on the newly obtained DNA evidence, which inculpated the defendant and exculpated his twin. The defendant was again held in custody on high bail. The defendant moved to exclude the new DNA evidence after a lengthy period of discovery. Following a week-long evidentiary hearing, a second judge (trial judge) found that the new DNA testing and analysis "were based on generally accepted, valid scientific or statistical principles . . . and were unshaken by defense testimony." Acknowledging that additional indicia of reliability had not been established, however, the judge allowed the defendant's motion to exclude the evidence due to the potential for jury confusion.[6]

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[5] The initial set of indictments included additional counts for aggravated kidnapping, indecent assault and battery, assault and battery by means of a dangerous weapon, assault by means of a dangerous weapon, and assault and battery. However, those counts were time barred by the time of the second set of indictments.

[6] After its motion was denied, the Commonwealth filed a petition pursuant to G. L. c. 211, § 3, concerning the admissibility of the new DNA evidence. A single justice of the Supreme Judicial Court determined that the Commonwealth had failed to demonstrate an abuse of discretion, see Canavan's Case, 432 Mass. 304, 312 (2000), and denied the petition.

The defendant subsequently moved to dismiss the indictments on speedy trial grounds in August 2017, and the motion was denied. The defendant proceeded to trial in January 2018, where his defense was that the crimes were not committed by him but rather by his identical twin brother.[7] After a week-long jury trial, the defendant was convicted on all charges.

Discussion. The sole issue on appeal is whether the trial judge erred in denying the defendant's motion to dismiss based on violation of his constitutional right to a speedy trial. "Both the Sixth Amendment [to the United States Constitution], incorporated through the Fourteenth Amendment [to the United States Constitution], and art. 11 [of the Massachusetts Declaration of Rights] guarantee criminal defendants the right to a speedy trial. We interpret art. 11 through the lens of Sixth Amendment analysis." Commonwealth v. Dirico, 480 Mass. 491, 505 (2018), citing Commonwealth v. Butler, 464 Mass. 706, 709 n.5 (2013). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from

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[7] There was evidence at trial that, despite indistinguishable DNA, the defendant and his twin differed in height and speech. In order to assess these differences, the defendant and his twin were presented to the jury together and were each asked to read a script.

'presumptively prejudicial' delay." Commonwealth v. Wallace, 472 Mass. 56, 60 (2015), quoting Doggett v. United States, 505 U.S. 647, 651-652 (1992).

Once that threshold has been met, the court engages in the balancing test articulated in Barker v. Wingo, 407 U.S. 514, 530-532 (1972), to determine whether a violation has occurred. See Dirico, 480 Mass. at 506. "The burden is on the defendant to demonstrate prejudicial delay sufficient to warrant dismissal of the indictments against him." Id. at 505, citing Commonwealth v. Gilbert, 366 Mass. 18, 22 (1974). On review of a denial of a motion to dismiss based on a speedy trial violation, "we give deference to the findings of the motion judge, but we may reach our own conclusions." Wallace, 472 Mass. at 60.

Here, the defendant's criminal complaint issued on September 12, 2012; his initial set of indictments was returned on November 9, 2012; and he filed his motion to dismiss for want of a speedy trial on August 16, 2017.[8] This nearly five-year delay,[9] between 2012 and 2017, thus establishes presumptively

[8] The right to a speedy trial attaches upon issuance of a criminal complaint under art. 11 and upon indictment under the Sixth Amendment. See Dirico, 480 Mass. at 505.

[9] In calculating the length of the delay in this case, we note that "dismissal of pending charges by the government, acting in good faith, 'stops' the speedy trial clock." Butler, 464 Mass. at 713 n.10, citing United States v. MacDonald, 456

prejudicial delay. See, e.g., Dirico, 480 Mass. at 506 (approximately three-year delay was "more than sufficient to establish 'presumptively prejudicial delay'").

Proceeding to the balancing test, we consider "[1] the length of the delay, [2] the reason for the delay, [3] the defendant's assertion of his right to a speedy trial, and [4] prejudice to the defendant." Dirico, 480 Mass. at 506, citing Barker, 407 U.S. at 530. As with any balancing test, "courts are compelled 'to approach speedy trial cases on an ad hoc basis.'" Commonwealth v. Rodriguez, 380 Mass. 643, 651 (1980), quoting Barker, supra at 530. "[E]ach decision invariably turns on a careful analysis of the particular factual situation." Rodriguez, supra at 651.

1. Length of delay. The "[l]ength of delay 'is actually a double enquiry.'" Wallace, 472 Mass. at 60, quoting Doggett, 505 U.S. at 651. While "[a]n unreasonable delay is the trip wire giving rise to speedy trial analysis," as discussed above,

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U.S. 1, 7 (1972). "[P]ursuant to art. 11 . . . the speedy trial clock 'resumes' when the Commonwealth reinstates charges following dismissal." Butler, supra at 707. Thus, the time between the original September 2012 complaint and the Commonwealth's nolle prosequi of those charges "counts against the government for speedy trial purposes . . . ." Id. at 713. Excluding the approximately four month interim between the nolle prosequi (April 29, 2014) and reindictment (September 5, 2014), see Butler, supra at 713, the length of the delay from the September 2012 complaint to the defendant's August 2017 motion to dismiss is nearly five years (four years and seven months).

"we additionally weigh [it] independently as a factor." Wallace, supra at 60-61. Under this factor, we consider the "total delay from formal accusation." Id. at 61 n.6. The nearly five-year delay in this case was, at minimum, "substantial" and "considerable." See Dirico, 480 Mass. at 506 (approximately three-year delay was "substantial"); Commonwealth v. Lanigan, 419 Mass. 15, 18 (1994) (nearly four and one-half year delay was "considerable"). This factor weighs decidedly in favor of the defendant.[10]

2. Reason for delay. "The reason for the delay is the 'flag all litigants seek to capture.'" Wallace, 472 Mass. at 61, quoting United States v. Loud Hawk, 474 U.S. 302, 315 (1986). "Weighing most heavily against the government are deliberate attempts at delay," Dirico, 480 Mass. at 506, quoting Wallace, 472 Mass. at 61, and "bad faith." Dirico, 480 Mass. at 507, quoting Butler, 464 Mass. at 716. See Wallace, supra at 61, citing Barker, 407 U.S. at 531. "Of equal weight but opposite import to a defendant are 'delays requested or otherwise orchestrated by the defendant.'" Wallace, supra at 61, quoting Commonwealth v. Carr, 464 Mass. 855, 861 (2013).

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[10] Despite both parties' insistence that we thoroughly probe the reason for the delay under factor one, "[t]he assignment of reasons for a particular part of the delay remains the second prong of the analysis under Barker." Wallace, 472 Mass. at 61 n.6.

"[A] valid reason . . . should serve to justify appropriate delay." Barker, supra at 531.

Here, the delay in the proceedings was caused by the Commonwealth's pursuit of newly announced DNA testing that could distinguish the defendant from his twin. The case thus "presented special circumstances concerning a relatively new method of significant potential in the proof of guilt in criminal cases." Lanigan, 419 Mass. at 18. Although the evidence was ultimately deemed inadmissible at trial, there is nothing to suggest that the Commonwealth's actions were taken in a deliberate attempt to delay the proceedings. See id. at 18-19 (Commonwealth not culpable for delay where it was attributable, in part, to matters relating to DNA testing, hearings, and deliberations leading to ruling that results were inadmissible). As the trial judge noted, there was no indication that the Commonwealth was unprepared for trial or otherwise motivated to delay the trial for the sake of delay.

Indeed, within approximately four months, the Commonwealth promptly obtained the additional testing, reindicted the defendant, and presented the bulk of the discovery to the defendant at arraignment. Although additional discovery and hearings encompassed roughly three more years, the subject matter was unique and complex and there is no indication that the Commonwealth was the cause of undue delay in the discovery

and hearing process. See Dirico, 480 Mass. at 506-507 (no indication of "intentional delay or bad faith on the part of the Commonwealth" despite approximately three-year delay due in part to Commonwealth's "obtaining . . . forensic testing results").

The defendant nevertheless alleges bad faith in the Commonwealth's pursuit of "a novel form of DNA testing that, it should have been clear from the outset, would be inadmissible at trial." He cites as support the conclusion of the first judge in denying the Commonwealth's motion for continuance that there was "no reasonable likelihood" that the evidence would be admitted at trial. Notwithstanding the judge's skepticism, the trial judge, who presided over the week-long admissibility hearing, found the science to be "sound" and "unshaken" by defense experts. She nevertheless excluded the evidence, citing jury confusion. The ruling was upheld as a proper exercise of discretion. See Canavan's Case, 432 Mass. 304, 312 (2000). There is nothing to indicate that the judge's admission of the evidence would not also have been upheld as a proper exercise of discretion. See Lanigan, 419 Mass. at 26 (proponent of scientific evidence may establish reliability, and therefore admissibility, by variety of different methods).

While there may be a case where the Commonwealth's pursuit of additional evidence, at the expense of the defendant's speedy trial rights, is patently unreasonable, this was not it. As

outlined in its opposition to the defendant's motion to dismiss, the Commonwealth faced a situation where the defendant would likely argue to the jury that they could not conclude that he was guilty beyond a reasonable doubt because his twin brother could not be excluded. The defendant would also likely argue that the jury could not rely on the testimony of the cooperating codefendant, Thomas, because he had a strong incentive to lay blame on the twin upon whom the Commonwealth's investigation had already focused. Indeed, these were the very themes pressed by the defendant at trial.

Thus, the Commonwealth's attempt to secure cutting-edge evidence that could distinguish the defendant from his twin was not a frivolous lark but rather a serious pursuit in the interests of justice. See Lanigan, 419 Mass. at 18-19 ("resolution of the admissibility of [even] incriminating DNA test results" served "ends of justice" and was "strong public interest reason[] justifying the delay").

3. Defendant's assertion of right. "[A] defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight." Wallace, 472 Mass. at 66, quoting Barker, 407 U.S. at 531. "While it is not necessary that 'a defendant must storm the courthouse and batter down the doors to preserve his right to a speedy trial,' we do require some affirmative action." Wallace, supra at 66, quoting Butler, 464 Mass. at

716. "[T]he failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Wallace, supra at 66, quoting Barker, supra at 532.

Here, the defendant first asserted his speedy trial right in April 2014, in his opposition to the Commonwealth's motion for a continuance. The case had been pending for approximately one and one-half years by that time. When the defendant was reindicted some four months later, he did not immediately move for dismissal based on a speedy trial violation. Cf. Commonwealth v. Thomas, 353 Mass. 429, 430 (1967) (upon arraignment in Superior Court, after nolle prosequi in District Court, defendant sought leave to move to dismiss indictment based on speedy trial violation).

Rather, he engaged in pretrial proceedings for three additional years before again asserting his speedy trial rights by way of a motion to dismiss in August 2017. Thus, "[t]he record does not indicate the defendant's zealous pursuit of his right to a speedy trial." Lanigan, 419 Mass. at 19 (defendant first moved to dismiss based on speedy trial right more than two years after arraignment, then moved to dismiss second time while case was on interlocutory appeal and third time while admissibility of DNA evidence was under advisement by trial court upon remand). Cf. Commonwealth v. Davis, 91 Mass. App. Ct. 631, 636 (2017) (defendant "zealously guarded his right to a

speedy trial" where he repeatedly objected to delays and persisted in attempting to advance his case).

4. Prejudice to defendant. "Prejudice to the defendant 'should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect[.]' [These] include . . . '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" Dirico, 480 Mass. at 507, quoting Barker, 407 U.S. at 532. In Dirico, the court stated that "[t]he potential impairment of a defense from delay is the 'most serious' concern when evaluating whether the defendant was prejudiced, 'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" Dirico, supra at 508, quoting Barker, supra at 532. "[T]he Commonwealth can rebut [presumptive prejudice] with evidence that any delay left the defendant's 'ability to defend himself unimpaired.'" Dirico, supra at 507, quoting Butler, 464 Mass. at 717.

We acknowledge that there were prejudicial consequences of the defendant's lengthy detention. Moreover, the defendant averred that while he was first in custody from September of 2012 through April 2014 due to his inability to post bail, he lost his full-time employment. He further averred that "[a]s a

result of the delay in bringing this case to trial," after the nolle prosequi, he "suffered anxiety and concern over []his case and its negative media attention, [his] loss of liberty and employment, . . . the impairment of [his] relationship with [his] family and child, and the disruption to [his] life."

On the other hand, as the trial judge observed, the defendant never "allege[d] the impairment of his defense by reason of the delay. . . . Specifically, he [did] not aver any loss of evidence material to his defense by reason of either a failure of a witness'[s] memory, the unavailability of any potential witness, or any other cause of prejudice."

Indeed, on appeal the defendant does not identify any prejudice to his trial defense, and concedes that "it is difficult to say whether [he] suffered impairment to his defense at trial." See Dirico, 480 Mass. at 508 (speedy trial claim failed because, among other reasons, "nothing in the record . . . suggest[ed] that the delay in bringing the defendant to trial precluded him from advancing his best defense or otherwise prejudiced his defense"); Commonwealth v. Beckett, 373 Mass. 329, 334 (1977) ("judge was plainly warranted in finding that [the defendant] was not prejudiced" where "[t]here was no claim that any witness was unavailable, nor any proof that any witness, potentially helpful to the defendant, had forgotten significant facts").

5. Weighing the Barker factors. We apply "the four Barker factors . . . 'in their totality.'" Dirico, 480 Mass. at 508, quoting Butler, 464 Mass. at 719. "No single factor nor specific combination thereof is a 'necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.' . . . The balancing of the factors is 'difficult and sensitive.'" Wallace, 472 Mass. at 72, quoting Barker, 407 U.S. at 533.

Here, although the defendant experienced a substantial delay in being brought to trial, that delay is not alone sufficient, under the circumstances, to establish a violation of his speedy trial right. Importantly, as discussed above, the defendant did not assiduously assert that right. The defendant asserted the right for the first time one and one-half years into the case, which was followed by a nolle prosequi. After reindictment, he did not again assert his speedy trial right until he moved to dismiss three years later. As the Court noted in Barker, 407 U.S. at 521, there can be strategic reasons why a defendant does not wish to go to trial, and the record here does not reveal a defendant who was urgently seeking his day in court. Rather, the record here is very similar to that in Lanigan, where the court held that a fifty-three month delay, with the defendant incarcerated, did not violate the defendant's speedy trial rights. Lanigan, 419 Mass. at 18-20. In Lanigan,

as here, the defendant did not zealously assert his speedy trial rights while he sought to exclude novel DNA evidence. Id. at 19. And in Lanigan, as here, the defendant did not assert any impairment of his case once he did go to trial. Id. at 19-20.

As in many speedy trial analyses, "[t]his case fundamentally turns on the characterization of the Commonwealth's conduct." Wallace, 472 Mass. at 68. The defendant would characterize the Commonwealth's conduct as one indicative of bad faith, contending that the outcome is controlled by Thomas, 353 Mass. at 432 (upholding Superior Court's dismissal of indictment on speedy trial grounds). There, the prosecutor's action in nol prossing a District Court complaint, after being denied a continuance of trial, and in later obtaining an indictment and arraigning the defendant in the Superior Court, id. at 429-430, was criticized as an "act of effrontery" against the District Court. Id. at 432. Noting that the prosecutor had assigned no reason for the nolle prosequi, the Supreme Judicial Court stated that the reason was "obvious" -- the prosecutor sought to compel the trial court to continue the case beyond the time statutorily allowed and over the objection of the defendant. Id. at 431. As the court explained in a later case, "[T]he prosecutor [in Thomas] misused his power, first, by threatening to exercise it in order to force the judge to grant a continuance to which the Commonwealth

was not entitled, and then, by carrying out that threat. The prosecutor's power was not used for a legitimate purpose." Commonwealth v. Hinterleitner, 391 Mass. 679, 682 (1984). In contrast, there was no misuse of the prosecutor's power in this case. See id. at 684 (prosecutor's nol pros of District Court complaints followed by indictments not an "affront to the court" requiring dismissal).

Despite the almost five-year delay between accusation and trial, the defendant's constitutional right to a speedy trial was not violated. As the Supreme Court has observed, "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Barker, 407 U.S. at 522, quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905).[11]

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[11] For the first time on appeal, the defendant argues that dismissal is also warranted under Mass. R. Crim. P. 36 (b), 378 Mass. 909 (1979). In the trial court, the defendant's rule 36 motion was premised exclusively on Mass. R. Crim. P. 36 (c), and the Commonwealth opposed accordingly. As a result, the record on appeal is inadequate for our review of the defendant's argument, and we decline to reach it. See Commonwealth v. Santos, 95 Mass. App. Ct. 791, 795 (2019). Having abandoned his rule 36 (c) argument on appeal, the defendant also is not entitled to review of that claim. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) (appellate court need not pass on questions or issues not argued in brief). In any event, given our disposition of the constitutional claim, the defendant would fare no better under rule 36 (c). See Commonwealth v. Roman, 470 Mass. 85, 95 (2014) ("Rule 36 [c] is consistent with constitutional principles"). See also Wallace, 472 Mass. at 73 n.10 (court declined to dismiss under rule 36

Judgments affirmed.

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[c] where particular prejudice was not shown under constitutional analysis).