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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0271
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
GUADALUPE ROBLES-CASTRO,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-163164-004DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Maricopa County Public Defender's Office Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Guadalupe Robles-Castro, Appellant Florence

G E M M I L L, Judge

¶1 Defendant Guadalupe Robles-Castro appeals from his
convictions and sentences. Robles-Castro's counsel filed a

brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Robles-Castro was afforded the opportunity to file a *pro se* supplemental brief, and he has done so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have reviewed both briefs and the entirety of the record. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). The facts from the trial record are as follows.

¶13 During the morning of September 28, 2009, the perpetrators kidnapped Vicente in the parking lot of a central Phoenix business after he and his wife exited the store. An armed man pushed Vicente into a green Lincoln Town Car occupied by three people and proceeded to leave with another individual separately in a white truck. People on the business premises witnessed the kidnapping and contacted police. With guns present, the perpetrators beat Vicente while in the car. The perpetrators then placed Vicente in a white truck with two

occupants, who were also armed. Vicente was taken to a residence after about a half hour drive.

¶14 The perpetrators wanted to know the location of Belen, a friend of Vicente's wife, who had gone into hiding after taking drugs and not paying for them. They told Vicente that he would not be released until he told them Belen's whereabouts, or he paid the \$40,000 she owed and gave them his truck.

¶15 At the residence, a different group of perpetrators took Vicente into a room where they kept his eyes covered and bound his hands and feet. While in the room, he was beaten multiple times, choked, and a gun was placed to his head. Vicente heard four or five different voices and was periodically checked on by different people. Vicente denies ever having his hands untied or being allowed to go to the bathroom although he was given some water.

¶16 Within 20 minutes after Vicente was taken from the parking lot, his family received a telephone call demanding \$40,000 and his truck or Vicente would be killed. Under police direction, the family placed the ransom money in a truck and parked it as directed. Police arrested the two people who arrived to pick up the ransom and were subsequently led by one of the arrestees to Vicente's location at the residence. Police rescued Vicente that night. Two suspects were also located at the residence, including Robles-Castro, who was found in a

bedroom hiding under clothing.

¶17 Robles-Castro claimed he came to the house looking for work around noon, met with an individual, and discovered Vicente being held in a room around noon or 1:00 p.m. Robles-Castro subsequently remained in the room with Vicente from 3:00 p.m. until police arrived. Robles-Castro claimed he removed Vicente's restraints, gave him food and water, and allowed him to go to the bathroom; however, Vicente disputes this account. Robles-Castro admitted that he agreed to watch over Vicente in return for \$300 - \$400. Robles-Castro also admitted to touching a handgun in the residence but claimed it was only to push it aside while he ate lunch, and he denies ever assaulting Vicente.

¶18 Robles-Castro was charged with kidnapping, a class 2 dangerous felony, conspiracy to commit kidnapping, a class 2 dangerous felony, theft by extortion, a class 2 dangerous felony, aggravated assault, a class 3 dangerous felony, aggravated assault, a class 6 dangerous felony, and misconduct involving weapons, a class 4 dangerous felony. After all evidence and argument was presented, the jury convicted Robles-Castro of all charges except the misconduct involving a weapon count, which the prosecutor dismissed the day of trial. The court sentenced Robles-Castro to a prison term amounting to 20 years with 568 days of presentence incarceration credit. The court ordered all the counts to be served concurrently, except

for the theft by extortion, which was ordered to be served consecutively.

¶9 Robles-Castro timely appeals, and we have jurisdiction pursuant to Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).¹

DISCUSSION

¶10 Robles-Castro filed a supplemental brief raising two primary issues, including: (1) judicial bias at the settlement conference contributed to his conviction and (2) the denial of a speedy trial caused him to suffer prejudice from the delay.² Robles-Castro also raised requests for deoxyribonucleic acid (DNA) testing of trial evidence and various pre-trial transcripts.

Denial of a Speedy Trial

¶11 Robles-Castro claims he was denied his right to a speedy trial as guaranteed by the United States Constitution

¹ We cite to the current versions of statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

² The opening brief filed by counsel lists issues that Defendant wished to raise for this Court's review. Defendant, however, does not provide any argument for these issues in his supplemental brief. Because we have also done an independent review of the entire record for fundamental error, *see infra* ¶ 25, we will not specifically address any issues raised for which there is no argument provided in the briefs.

("Constitution"). U.S. Const. amend. VI. We review Robles-Castro's Sixth Amendment speedy trial claim de novo, but accept the factual determinations of the trial court unless they are clearly erroneous. *United States v. Gregory*, 322 F.3d 1157, 1160 (9th Cir. 2003). Although the Constitution guarantees criminal defendants "a speedy public trial," it does not provide a defined time frame within which a defendant must be tried. U.S. Const. amend VI. In *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972), the Supreme Court established a test by which courts determine whether a trial delay is sufficient to warrant reversal. The four-factor *Barker* test examines (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) the prejudice to the defendant. *Id.* "In weighing these factors, the length of the delay is the least important, while the prejudice to the defendant is the most significant." *State v. Spreitz*, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997).

¶12 Robles-Castro was arraigned on October 15, 2009, and his trial began 488 days later on February 15, 2011. Although the time frame provided in the Arizona Rules of Criminal Procedure is not determinative of our constitutional analysis, this period is significantly longer than the 150-day restriction in which a defendant in custody must be tried. Ariz. R. Crim. P. 8. Therefore the 488 day delay is significant. It does not

establish, however, a violation of rights negating the importance of demonstrating prejudice from the delay. Compare *Humble v. Superior Court*, 179 Ariz. 409, 416, 880 P.2d 629, 636 (App. 1993) (five-year delay caused by state in DUI prosecution sufficient for dismissal when other factors also favored dismissal), with *Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271 (five-year delay, though presumptively prejudicial, insufficient to vacate conviction where other factors weighed against reversal). Therefore, the delay weighs only slightly in favor of Robles-Castro's position considering the length of delay is the least among the factors. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71.

¶13 A delay can weigh strongly against the state when it is the product of a "deliberate attempt to delay the trial in order to hamper the defense." *Barker*, 407 U.S. at 531. Other "more neutral reason[s]" for state-engendered delay, such as negligence, weigh less heavily against the state. *Id.* On October 5, 2010, the court found extraordinary circumstances existed causing delay and Robles-Castro waived the applicable time limits. Subsequently, on November 23, 2010, a co-defendant was granted a requested continuance, further delaying Robles-Castro's trial. No evidence exists showing the delay was a deliberate attempt to hamper Robles-Castro. Accordingly, the second factor, which requires consideration of the reasons for

delay, weighs only slightly in favor of Robles-Castro's position.

¶14 As for Robles-Castro's demand for speedy trial, Robles-Castro failed to assert his speedy trial right until this appeal. Generally, the right to a speedy trial is waived if not "promptly asserted." *State v. Adair*, 106 Ariz. 58, 60 470 P.2d 671, 673 (1970). Consequently, this factor weighs against finding a speedy trial violation.

¶15 Case law addressing the Sixth Amendment right to a speedy trial recognizes three kinds of prejudice that can result from delay: infringements on liberty arising from formal accusation, anxiety engendered by public accusation, and impairment of the accused's ability to put on a defense at trial. *United States v. Marion*, 404 U.S. 307, 320 (1971). Robles-Castro only argues that his defense was impaired by the delay, thus we need only address this category of potential prejudice.

¶16 Robles-Castro suggests he need not show prejudice to establish the denial of his constitutional right to a speedy trial. Relying on *Moore v. Arizona*, 414 U.S. 25 (1973), Robles-Castro contends "the notion that an affirmative demonstration of prejudice [is] necessary to prove a denial of the constitutional right to a speedy trial" is fundamental error. *Id.* at 26. *Moore* is distinguishable on this point, however, because in that

case the defendant alleged his right to a speedy trial prior to trial and the Supreme Court was addressing the trial court's application of the *Barker* test. *Id.* at 25-26. In the present case, the trial court did not address the right to a speedy trial since Robles-Castro raised this issue for the first time on appeal. Accordingly, because we will not vacate a conviction absent prejudicial error, see Ariz. Const. art VI, § 27; A.R.S. § 13-3987, we conclude Robles-Castro must demonstrate prejudice to obtain relief. *Cf. State v. Vasko*, 193 Ariz. 142, 143, ¶ 3, 971 P.2d 189, 190 (App. 1998) (explaining that, regarding a speedy trial analysis based on Arizona Rule of Criminal Procedure 8, "in the absence of a showing of prejudice, a speedy trial violation raised as error on appeal after conviction does not warrant reversal of that conviction").

¶17 To show prejudice, Robles-Castro claims that the extended time before trial limited his recollection of the facts and his ability to remember and locate witnesses. He contends that he did, in fact, suffer prejudice by the delay, impeding him from adequately preparing a defense. We are not persuaded. Contrary to his claim, Robles-Castro does not pinpoint any specific aspect of the indictment where his memory failed or any particular witness he was unable to locate for trial. "[D]elay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The

passage of time may make it difficult or impossible for the Government to carry this burden." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). Accordingly, upon consideration of the *Barker* factors, we find no violation of Robles-Castro's right to a speedy trial under the Sixth Amendment of the Constitution.

Judicial Bias

¶18 Robles-Castro argues that "[j]udicial [b]ias contributed to [his] conviction." Bias is a "hostile feeling or spirit of ill-will . . . toward one of the litigants." *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984) (quoting *State v. Myers*, 117 Ariz. 79, 86, 570 P.2d 1252, 1259 (1977), *cert denied*, 435 U.S. 928 (1978)). A trial judge is presumed to be unbiased, *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), and to rebut the presumption, a party must prove bias or prejudice by a preponderance of the evidence. *State v. Hurley*, 197 Ariz. 400, 404-05, ¶ 24, 4 P.3d 455, 459-60 (App. 2000).

¶19 Specifically, Robles-Castro cites the judge's remarks regarding accomplice liability made during the settlement conference:

If you aided and abetted people to commit crimes, you're just as liable as the person with the gun . . . and it's hard for us to get people like you to understand that, and so they go to trial, they get convicted, and they can't understand how they could get convicted . . . so we have a difficult time

telling people about this and educating them on it; and I certainly hope you can understand what they're saying.

Robles-Castro contends the judge presiding at the settlement conference, Judge Gottsfield, exhibited judicial bias by using the word "hope" instead of the word "know" when describing Robles-Castro's understanding of accomplice liability. Robles-Castro appears to claim the bias resulted in his confusion and therefore he did not receive proper notice regarding the gun, an aggravating factor, at the settlement conference. In an effort to address the merits of Robles-Castro's claim, we review whether proper notice was provided to Robles-Castro.

¶20 As stated in the Arizona Rule of Criminal Procedure 17.4(a), unless consent of the parties is obtained, settlement discussions shall not be held before the judge presiding at the subsequent trial. In this case and consistent with Rule 17.4(a), Judge Gottsfield, and not the trial judge, Judge McMurdie, presided over the settlement conference. Additionally, the court's involvement in a settlement conference is not a right of a defendant, but is within the sole discretion of the court. Ariz. R. Crim. P. 17.4(a). Here, all charges brought against Robles-Castro were contained in the indictment, which solely put Robles-Castro on sufficient notice before trial, thus satisfying Robles-Castro's notice rights.

¶21 Although a defendant is entitled to notice of specific

charges against him, due process rights do not include notice of aggravating factors prior to trial. *State v. Scott*, 177 Ariz. 131, 141, 865 P.2d 792, 802 (1993). Therefore, no notice of the gun as an aggravating factor was required at the settlement conference. Judge Gottsfeld, however, did explain the enhanced sentence range of an aggravating factor to Robles-Castro. At the time, Robles-Castro was provided with an interpreter, was responsive during the proceeding, and was specifically asked by the court if he had questions regarding accomplice liability. These facts further evidence sufficient notice was provided and Robles-Castro's due process rights were not violated.

¶22 Robles-Castro has alleged no additional facts supporting his claim of judicial bias. Our review of the entire record on appeal does not reveal evidence of bias or prejudice toward Robles-Castro. Accordingly, we find no evidence of judicial bias.

Post-Conviction Requests

¶23 Robles-Castro requested, for the first time in his supplemental brief, that DNA testing be performed on the crime weapon and on Vicente's clothing to counter evidence that Robles-Castro beat Vicente. Although this request is unavailable in this appeal, Robles-Castro may consider filing a post-conviction relief request pursuant to A.R.S. § 13-4240 (2010).

¶124 Robles-Castro has also requested transcripts of his statements to police and of all pre-trial hearings. Under Ariz. R. Crim. P. 31.8(b), the record on appeal is complete and a notice of completion was properly filed by the clerk of the court on September 15, 2011. In addition, the defendant failed to show that the denial of the requested transcripts "prevented him from asserting some legitimately appealable issue." *State v. Clark*, 196 Ariz. 530, 541, 2 P.3d 89, 100 (App. 1999). Therefore, the requested transcripts are unavailable in this appeal.

**The Court's Independent Review of the Record for
Fundamental Error**

¶125 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The evidence presented supports the conviction and the sentence imposed falls within the range permitted by law. As far as the record reveals, Robles-Castro was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶126 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Robles-

Castro of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Robles-Castro has 30 days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶27 The convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge