NO. COA01-732

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 99 CRS 4235, 50017

WAYNE MCCURRY PAYNE, JR.

Appeal by defendant from judgments entered 12 April 2000 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 24 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Public Defender J. Robert Hufstader, by Assistant Public Defender John T. Barrett, for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 1 January 1999, defendant was arrested and charged with assault with a deadly weapon with intent to kill inflicting serious injury. According to the warrant for defendant's arrest, on 31 December 1998, defendant stabbed Carroll Douglas Anderson in the back four times. The wounds resulted in serious injury, including a punctured lung which required immediate surgery. On 7 June 1999, defendant was indicted for attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury relating to the assault on Anderson on 31 December 1998.

On 12 April 2000, defendant was convicted of the above-stated charges and was subsequently sentenced to a term of 176 to 221 months imprisonment for the attempted murder charge, and a concurrent term of 116 to 149 months imprisonment for the assault charge. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by denying his motion to dismiss, asserting that a fifteen and a third of a month delay between indictment and the trial violated his right to a speedy trial. Defendant argues that the State's reason for the delay, inability to locate witnesses, could have been prevented had the State maintained contact with the witnesses. At a minimum, defendant contends that the State should have known that the witnesses were missing and could have begun a good faith effort to find them much sooner. Defendant notes that he made a *pro se* claim for a speedy trial in December 1999. His trial did not begin until April 2000. Defendant concedes that he is unable to show any specific prejudice from the delay, but argues that the "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655, 120 L. Ed. 2d 520, 531 (1992). Accordingly, defendant argues that the trial court erred and the judgment should be vacated and the charges dismissed. After careful review of the record, briefs and contentions of the parties, we find no error.

In considering whether a defendant's constitutional right to

a speedy trial has been violated, the Court must balance four factors:

> (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay.

State v. Lundy, 135 N.C. App. 13, 19, 519 S.E.2d 73, 79 (1999)(citing *Barker v. Wingo*, 407 U.S. 514, 530-32, 33 L. Ed. 2d 101, 116-18 (1972)), *disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000). The issue of whether defendant's right to a speedy trial has been violated is not resolved by any one factor. Instead, "the factors must be examined as a whole." *Id.*

"The first factor, the length of the delay, is essentially a triggering device, as it does not determine whether a constitutional violation has occurred, but may, if the delay is substantial, trigger the *Barker* inquiry." *Lundy*, 135 N.C. App. at 19, 519 S.E.2d at 79 (citing *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117). "'Viewed as such, its significance in the balance is not great.'" *State v. Avery*, 95 N.C. App. 572, 577, 383 S.E.2d 224, 226 (1989)(quoting *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975), *disc. review denied*, 326 N.C. 51, 389 S.E.2d 96 (1990). In the case *sub judice*, the delay was fifteen months from the date of indictment to the date of trial. This Court has found longer delays not to be clearly inordinate. *See id.*

Even assuming *arguendo* that the delay was inordinate, the remaining factors do not weigh in defendant's favor. First, "defendant bears the burden of proving that the delay was brought

about by neglect or willfulness on the part of the prosecution." *Lundy*, 135 N.C. App. at 20, 519 S.E.2d at 79.

Defendant has presented no evidence to meet his burden. In fact, the trial court noted that some of the delay was due in part to counsel change by defendant. Initially represented by the public defender, defendant later retained his own counsel, who withdrew in August 1999. The public defender was reappointed to represent defendant following counsel's withdrawal. The record further reveals that the State wished to proceed in November 1999, however, the State was unable to locate certain witnesses until two weeks prior to trial. There is no evidence of any neglect upon the part of the State in locating these witnesses. Second, defendant attempted to assert his right to a speedy trial in a *pro se* motion filed in December 1999. However, the *pro se* motion was improper because defendant was already represented by counsel. *See Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 384-85 (1981)("[A] party has no right to 'appear' both by himself and by counsel."). Defendant's counsel brought forward the speedy trial claim in March 2000, and the trial was held but a few weeks later. "While, '[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial.'" *Lundy*, 135 N.C. App. at 20, 519 S.E.2d at 80 (quoting *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998)).

With regard to the issue of prejudice, the objectives of the right to a speedy trial are:

> "'(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.'" The most serious of these aims is the last, "because the inability of a defendant to adequately prepare his case skews the fairness of the entire system."

Lundy, 135 N.C. App. at 21, 519 S.E.2d at 80 (citations omitted). Here, defendant has shown no specific prejudice from the delay, making only general allegations that the "excessive delay" presumptively compromised his trial. Balancing the *Barker* factors, we conclude that defendant was not denied his constitutional right to a speedy trial, and the trial court did not err in denying his motion to dismiss. Accordingly, we find no error.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).