NO. COA09-1663

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Wake County
Nos. 07 CRS 63953, 66576

LACY LEE WILLIAMS

Appeal by defendant from an order entered 14 January 2009 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 17 August 2010.

Roy Cooper, Attorney General, by Scott A. Conklin, Assistant Attorney General, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Lacy Lee Williams appeals from the trial court's order denying his *pro se* motion to dismiss under N.C.G.S. § 15A-954(a)(3) for lack of a speedy trial resulting from the 17-month delay between his arrest and his trial. We affirm the trial court's order.

On 7 September 2007, defendant was arrested and incarcerated on charges of possession with intent to sell or deliver cocaine, sale of cocaine, delivery of cocaine, and attaining habitual felon status, resulting from a "controlled buy" conducted on 25 August 2007. Defendant was also charged with a second set of drug

offenses, which, according to defendant's attorney, stemmed from defendant's arrest that day. Defendant remained in custody for approximately one month, and then made bond and was released for approximately one month before being incarcerated on a third set of charges.[1]

Defendant was indicted on the first set of charges on 10 December 2007. Thereafter, his motions and arraignment hearing on those charges was scheduled for 14 January 2008, rescheduled for 23 January 2008, rescheduled for 8 February 2008, and rescheduled for March 2008. In March, the State scheduled defendant's third set of charges for trial. Defendant was tried on those charges, convicted of assault on a female on 14 May 2008, and sentenced to 150 days' imprisonment.

Following the trial on his third set of charges, defendant was scheduled for motions and arraignment on his remaining two sets of charges for the week of 7 July 2008. At that time, defendant's counsel waived arraignment without defendant appearing in court, and defendant's trial on the first set of charges was scheduled for the week of 8 September 2008.

On 8 September 2008, the State provided defense counsel new discovery, which consisted of an officer's notes from the controlled buy. When the case was called for trial the following day, the prosecutor indicated that she was prepared to proceed, but that she would not object to a motion to continue. Defendant's

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[1]After his release, defendant was charged with strangulation and kidnapping.

counsel moved to continue the case. Defendant indicated at the hearing that he had filed motions for a speedy trial which had not been heard and that he no longer wanted to be represented by his court-appointed lawyer, Mr. Dewey O'Kelley. The trial court granted defendant's motion to continue. On 2 October 2008, defendant's case was added to the calendar for the purpose of setting a new trial date. At that hearing, Mr. O'Kelley requested that he be removed as defendant's counsel and that a different attorney be appointed, partly because defendant had filed suit against the Public Defender's Office. The trial court allowed Mr. O'Kelley's motion to withdraw. Mr. Anthony Blalock was appointed as defendant's new attorney on 30 October 2008.

On 20 November 2008, defendant's case was again added to the calendar to set a trial date. At the State's suggestion, the trial court scheduled a new trial date of 2 February 2009. A special hearing was called on 9 January 2009 to address the status of cases in which a defendant had been incarcerated for a significant amount of time. At that time, the trial court set defendant's *pro se* motion to dismiss for lack of a speedy trial for hearing on 13 January 2009.

A hearing was held on defendant's *pro se* motion to dismiss for lack of a speedy trial on 13 and 14 January 2009. At the hearing, defense counsel argued that defendant's right to a speedy trial had been violated by the willful delay of the district attorney. The trial court denied defendant's motion, in part because defendant had contributed to the delay.

Due to a conflict in Mr. Blalock's schedule, the trial was rescheduled for the week of 9 February 2009, and defendant's trial was conducted that week. On 10 February 2009, defendant was convicted of possession with intent to sell or deliver cocaine, sale of cocaine, and delivery of cocaine. On 11 February 2009, defendant was convicted of attaining habitual felon status. He was sentenced to a minimum of 168 months' and a maximum of 211 months' active time, with 468 days' credit for time served (approximately 15 months).

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the charges against him for violation of his right to a speedy trial. We disagree.

Initially, we note that the order from which defendant appeals was entered following a hearing on the December 2008 *pro se* motion defendant filed while he was represented by counsel.[2]

Our Supreme Court has recognized that by "elect[ing] for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000), *cert.*

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[2]The record shows that defendant was represented by Mr. O'Kelley from 5 November 2007 until 2 October 2008, when the trial court granted Mr. O'Kelley's motion to withdraw and reappointed the Public Defender's Office. On 30 October 2008, Mr. Blalock was appointed and represented defendant through his trial on the drug charges on 10 February 2009. At no time did the trial court allow defendant to proceed *pro se*.

denied, 534 U.S. 838, 151 L. Ed. 2d 54 (2001); *see* N.C. Gen. Stat. § 1-11 (2009).

Defendant filed at least 13 *pro se* motions between his arrest and his trial. Of those, one was a motion to dismiss under N.C.G.S. § 15A-954 for the deprivation of his right to a speedy trial and four others were motions for a speedy trial. At the 9 January 2009 hearing, defendant's counsel informed the court that defendant "ha[d] filed some *pro se* motions" and the court stated they could "be addressed later on in the calendar week," and scheduled a hearing on defendant's § 15A-954 motion to dismiss for 13 January 2009.

By filing *pro se* motions while he was represented by counsel, defendant violated the rule that he had "no right to appear both by himself and by counsel." *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721. Further, defense counsel did not cure the violation by "suppl[ying] [the State] with the motion" before the hearing. *See State v. Williams*, 363 N.C. 689, 700, 686 S.E.2d 493, 501 (2009) (concluding that counsel could not "adopt" a *pro se* motion to dismiss by requesting a ruling on the motion). Therefore, the trial court should not have held a hearing or entered an order on defendant's *pro se* motion to dismiss. However, to the extent that we are able to review the trial court's order, we hold that defendant's right to a speedy trial was not violated.

Defendant moved to dismiss pursuant to N.C.G.S. § 15A-954, which provides that the trial court, on motion of the defendant, "must dismiss the charges stated in a criminal pleading if it

determines that . . . [t]he defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina." N.C. Gen. Stat. § 15A-954 (2009). "The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 18 of the North Carolina Constitution guarantee the right to a speedy trial." *State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986). "The right to a speedy trial attaches when a defendant is formally charged with a crime, which is usually upon arrest." *State v. Strickland*, 153 N.C. App. 581, 585, 570 S.E.2d 898, 902 (2002), *cert. denied*, 356 N.C. 691, 578 S.E.2d 594 (2003), *cert. dismissed*, 602 S.E.2d 679 (2004). To determine whether a defendant's right to a speedy trial has been violated, courts apply a balancing test involving consideration of four interrelated factors: (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 resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-32, 33 L. Ed. 2d 101, 117-18 (1972); *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989). "Of the four factors to be considered, no single factor is determinative of the issue of whether a trial was sufficiently speedy." *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 902. "Whether the undisputed evidence supports the implied conclusion of the trial court that defendant's constitutional rights to a speedy trial were not violated requires application of legal principles and thus is reviewable *de novo*."

State v. Chaplin, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996).

"The United States Supreme Court has found postaccusation delay 'presumptively prejudicial' as it approaches one year." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992)). This interval "marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Id.* (internal quotation marks omitted); *see also State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994) (holding that a delay of sixteen months was lengthy enough to trigger the trial court's examination of the other three *Barker* factors). Although normally "a defendant bears the burden of presenting *prima facie* evidence that the delay was caused by the neglect or willfulness of the prosecution," *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 804 (2008), "[i]f a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor." *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 902. "The prosecutor may rebut the prima facie case by showing a valid reason for the delay." *Id.*; *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 655-56 ("A showing of a particularly lengthy delay establishes a *prima facie* case that the delay was due to the neglect or wilfulness of the prosecution and requires the State to offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing."). "Once the prosecutor offers

a reason for the lengthy delay of defendant's trial, the burden of proof shifts back to the defendant to show neglect or willfulness by the prosecutor." *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 902. "If the delay is not proven to be purposeful or oppressive, this factor weighs in favor of the State." *Id.* at 586, 570 S.E.2d at 903. We now apply the *Barker* factors to the facts of this case.

The 17-month period between defendant's September 2007 arrest and his February 2009 trial entitles him to a presumption of prejudice, and requires consideration of the remaining *Barker* factors. The second *Barker* factor has to do with the reason for the delay. Because this Court has held a 17-month delay presumptively unreasonable, the State had the burden of demonstrating a valid reason for the delay. *See State v. Branch*, 41 N.C. App. 80, 86, 254 S.E.2d 255, 259, *appeal dismissed*, 297 N.C. 612, 257 S.E.2d 220 (1979) ("[O]nce the defendant showed a seventeen month delay after his request for a speedy trial, the State should have presented evidence fully explaining the reasons for the delay.").

The record shows that the delay between defendant's arrest and the week his trial was originally scheduled, 8 September 2008, resulted from the repeated rescheduling of defendant's motions and arraignment hearing and the State's decision to try defendant's third set of charges first. The State offered no reason for the rescheduling of the motions and arraignment hearing on 14 January 2008. The hearing was rescheduled on 28 January due to an

attorney's illness. The State was also unable to offer a reason for rescheduling on 8 February. In March, the hearing was rescheduled because the State decided to try defendant's third set of charges first since that set involved a civilian witness. Defendant finally waived arraignment in July 2008, and his trial was scheduled for the week of 8 September 2008.

The record shows that the delay between 9 September 2008 and 9 February 2009 resulted largely from defendant's conduct. The State's reason for failing to provide the officer's notes from the controlled buy until the day before the September trial was that the State had only received the notes "within a few days of trial." According to the State, it turned the discovery over to defendant "as soon as [the State] received it." Additionally, the record shows that defendant's attorney moved to continue not only as a result of the new discovery, but also as a result of his strained relationship with defendant: when defendant's counsel requested a continuance, he stated that he and defendant did not have "the best attorney-client relationship," and that therefore, he would need "to confer with [defendant] about all of the discovery." On 2 October 2008, the trial court granted defense counsel's motion to withdraw, necessitating the appointment of substitute counsel. At the next hearing, the State informed the trial court that it was closed for the holiday for two weeks in December, and defendant's trial was set for 2 February 2009. We conclude that the State's explanations for the delay are sufficient to shift the burden of

proof to defendant to show that the delay was due to the State's neglect or willfulness.

Defendant argues that the delay was due to neglect or willfulness on the part of the State because the State failed to "coordinate with the SBI in a clear and timely manner regarding chemical analysis" and failed to "comply with discovery in a timely manner." Defendant relies on *Washington*.

There, the State continued the defendant's case three times over a four-year period because the State could not proceed without test results from the SBI, which had not yet been performed. We held that "the majority of the delay was caused by the State's neglect and underutilization of court resources throughout the course of th[e] prosecution," and weighed this factor in favor of the defendant. *Washington*, 192 N.C. App. at 290, 665 S.E.2d at 808.

Here, contrary to *Washington*, the State never continued defendant's case. Moreover, the record does not indicate that defendant's trial on his first set of charges was delayed by the State's failure to coordinate with the SBI. Aside from defendant's unsupported statement that such was the case, the only reference to SBI testing was made by the State during the hearing on defendant's motion to dismiss. At that time, the State mentioned that the "email correspondence about whether the drugs had been tested" all took place "in district court prior to the defendant's [10 December 2007] indictment." Without additional support for defendant's argument, we conclude there is no basis for holding that the time

period from defendant's 7 September 2007 arrest until his 10 December 2007 indictment was due to neglect or willfulness on the part of the State. We overrule defendant's argument on this point.

Defendant's argument that the State caused the delay by failing to provide discovery in a timely manner also lacks merit. First, the trial court continued the trial on defendant's motion, not that of the State; as previously discussed, the State was prepared to proceed. Second, even assuming the new discovery made it necessary for defendant to continue the case, had defendant's counsel not moved to withdraw on 2 October 2008, the trial court would have been able to schedule a trial at that time, and would not have had to wait until 20 November 2008 to do so. *See State v. Brooks*, 136 N.C. App. 124, 132-33, 523 S.E.2d 704, 709-10 (1999), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000) (excluding twelve-month period during which the defendant fired several court-appointed attorneys from consideration of whether the defendant had been denied his right to a speedy trial). Although the State's failure to provide the officer's notes earlier may have amounted to a discovery violation under N.C.G.S. § 15A-903(a)(1), based on the facts of this case, it did not significantly delay defendant's trial. Accordingly, defendant has failed to establish that the delay was caused by the wilful neglect of the prosecution, and we therefore weigh this factor against defendant.

With regard to the third *Barker* factor, whether defendant asserted his right to a speedy trial, defendant argues that this Court should consider his requests to compel discovery and his *pro*

se motions for a speedy trial. Defendant directs our attention to *Washington*, 192 N.C. App. at 290-91, 665 S.E.2d at 808, where we considered the defendant's attempt to reduce the delay by filing motions to compel testing of evidence as informal assertions of his right to a speedy trial. *See Washington*, 192 N.C. App. at 291, 665 S.E.2d at 808 ("[D]efendant began informally asserting his right . . . when he began moving the court to expedite SBI testing."). Defendant notes that he filed four motions to compel discovery in this case.[3] Where, as here, when there is no indication that the State delayed the trial in order to collect discoverable material, we will not interpret a defendant's motion for discovery as an assertion of his right to a speedy trial.

Moreover, as previously discussed, defendant's *pro se* motions for a speedy trial were made "in violation of the rule that a defendant does not have the right to be represented by counsel and to also appear *pro se*." *State v. Spivey*, 357 N.C. 114, 121, 579 S.E.2d 251, 256 (2003). However, to the extent that his *pro se* motions for a speedy trial can be considered assertions of his right, whether a defendant has asserted his right to a speedy trial "is not determinative of whether he was denied the right." *Id.* We therefore turn to the fourth *Barker* factor and consider whether defendant has shown that he was prejudiced by the delay. *See id.* ("Assuming *arguendo* that defendant properly asserted his rights

[3]Only one such motion, filed by defendant's counsel on 26 November 2008, appears in the record on appeal.

through his *pro se* motion, this assertion of the right, by itself, did not entitle him to relief.").

As to the fourth factor, "the United States Supreme Court has recognized three objectives of the right to a speedy trial: '(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.'" *State v. Hammonds*, 141 N.C. App. 152, 162, 541 S.E.2d 166, 174 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 529, 549 S.E.2d 860 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002) (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.) "*Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Webster*, 337 N.C. at 681, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.)

In the present case, defendant argues that he was prejudiced because he was made to suffer from anxiety and he was kept away from his family. Defendant again relies on *Washington*, where we stated that "defendant's sudden separation from his child, which lasted for more than a year, is a form of prejudice that we must consider." *Washington*, 192 N.C. App. at 292, 665 S.E.2d at 809.

This case is distinguishable from *Washington*, however. In *Washington*, the defendant was incarcerated pending only one set of charges. *Id.* at 280, 665 S.E.2d at 802. Here, at least a portion of the time defendant was incarcerated can be attributed to his third set of charges and the sentence imposed as a result of his

conviction of those charges. Moreover, in *Washington*, the Court weighed against the State "the clear impairment to the defense caused by the inability of many of the witnesses to recall details pertinent to the defense." *Id.* at 293, 665 S.E.2d at 809. In the present case, defendant does not argue that his defense was in any way impaired by the delay.

With due regard for the anxiety suffered by defendant while awaiting trial on these charges, we cannot conclude that defendant was seriously prejudiced by the delay. *See Webster*, 337 N.C. at 681, 447 S.E.2d at 353 ("While there has been some prejudice to defendant . . . the weight of it in the balancing process is diminished by the absence of any impairment to her defense[.]").

In sum, although defendant's pretrial incarceration was of sufficient duration to raise some concern, we observe that there is no evidence of wilful neglect or dilatory tactics by the State. Further, defendant has presented no evidence that the 17-month delay prejudiced his defense in the matter. After balancing the four factors, we hold that the trial court did not err in denying defendant's motion to dismiss for violation of his right to a speedy trial.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).