COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00434-CR

THE STATE OF TEXAS — STATE

V.

NATHAN A. MARKS — APPELLEE

FROM COUNTY CRIMINAL COURT NO. 3 OF DENTON COUNTY
TRIAL COURT NO. CR-2015-02707-C

MEMORANDUM OPINION[1]

The State appeals the trial court's order granting Nathan A. Marks's speedy-trial motion to dismiss. Because the State dragged its feet too long before arranging for Marks to be brought from federal custody to state court for trial, we affirm.

[1]*See* Tex. R. App. P. 47.4.

Timeline

2014

The police arrested Marks on October 18, 2014, for driving while intoxicated, enhanced by a previous DWI conviction, a class A misdemeanor. *See* Tex. Penal Code Ann. § 49.09(a) (West Supp. 2016). Marks was released on a surety bond the same day.

2015

More than six months passed before the State filed, on May 4, 2015, an information formally charging Marks for the offense.

On June 17, Marks reset the case for an announcement setting, and on July 8, he reset the case again, this time for a plea hearing on August 5. But before that hearing could take place, on July 16 the United States Marshals Service took Marks into custody for bond violations, a change in residence that altered the trajectory of this entire case.

Marks (understandably) missed his August 5 plea hearing. An August 12 "Case Reset Form" signed only by Marks's counsel shows that Marks was in the Bastrop County Jail at that time.[2] Five days later, on August 17, the trial court

[2]At the eventual hearing on his motion to dismiss—a hearing that occurred more than two years after his DWI arrest—Marks testified that the U.S. Marshals moved him around several times; he was first incarcerated in Fannin County, then Bastrop County, and then Caldwell County.

signed a judgment nisi, noting Marks's failure to appear for trial on August 5.[3] The court ordered an alias capias to issue.[4]

On the heels of that judgment nisi, on August 21 the trial court signed an order to remove an interlock device from Marks's car because he was in custody awaiting federal sentencing. So by August 21, at the latest, the record shows that the trial court knew that Marks was in federal custody.

October 18, 2015—the one-year anniversary of Marks's arrest—came and went; Marks went from the U.S. Marshals' custody into that of the Bureau of Prisons to serve his federal sentence on November 4.

Sixteen days later, on November 20, Marks moved for a speedy trial in this case, asserting that he was in federal custody and asking that the State be ordered to bring him to court. The trial court granted the motion on November 23.

That order led to another watershed moment in the case. On November 24, an assistant district attorney emailed Marks's counsel to inform him that he—

[3]A *judgment nisi* is a "provisional judgment that, while not final or absolute, may become final on a party's motion." *Judgment nisi*, Black's Law Dictionary (10th ed. 2014).

[4]*Alias*, when used as an adjective, means "[i]ssued after the first instrument has not been effective or resulted in action." *Alias*, Black's Law Dictionary (10th ed. 2014). *Capias* is defined as "[a]ny of various types of writs that require an officer to take a named defendant into custody. A capias is often issued when a respondent fails to appear or when an obligor has failed to pay child support." *Capias*, Black's Law Dictionary (10th ed. 2014).

Marks's counsel—was responsible for getting Marks back to Denton County for trial and that the State was not going to help.[5]

Within the week, Marks (not the State) filed a motion for a bench warrant, which the trial court granted on December 2. The actual bench warrant issued on December 4 and instructed the director of the Seagoville Federal Correctional Institution to deliver Marks to the Denton County Sheriff to stand trial on December 17.[6] Both a prosecutor and the trial court signed the bench warrant.

2016

Unsuccessful in his first attempt, Marks (again not the State) moved once more for a bench warrant on January 26, 2016, noting that the December 17, 2015 trial date had been cancelled. The motion fell into limbo for about four months and was never ruled on.[7]

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[5]That email read, in part, that "the consensus is that the defense attorney is responsible for getting their client back for a trial- just fyi so you know I am not going to file anything to get your guy back here." As we will see, that consensus was altogether flawed.

[6]Our understanding is that a bench warrant typically works to get a defendant back from the *state* penitentiary. In the trial court, the State argued at the dismissal hearing that both Marks's counsel and the prosecutor thought that a bench warrant would work in Marks's situation. Indeed, Marks's counsel moved three different times for a bench warrant.

[7]At the late-October 2016 hearing on Marks's motion to dismiss, the trial court stated that it was informed that the federal prison would not honor a bench warrant, so the court saw no point in signing a second one. ("I remember talking about it, but I didn't sign it because the Feds were not going to honor our bench warrants anyway.")

Marks's counsel filed a "Third Motion for Bench Warrant" on May 31. This motion gathered dust for the entire month of June.

On July 1, Marks's attorney filed another "Request for Speedy Trial." Five days later, the trial court set his speedy-trial motion for a hearing on August 8. Throughout this time Marks remained in federal prison.

With no other options presented to it, the trial court granted Marks's third motion for bench warrant on July 13, signing the warrant on July 18 and directing FCI Seagoville to deliver Marks to the Denton County Sheriff for an August 8 hearing on Marks's speedy-trial motion.[8] Only the trial court signed this bench warrant.

But on August 8—the hearing date—Marks was still sitting in Seagoville. That same day, Marks's counsel filed a motion to dismiss in which he complained that Marks's speedy-trial rights had been violated.

On August 22—twenty-two months after Marks had been arrested and more than nine months after Marks had filed his first motion for a speedy trial—the State sought and obtained a writ of habeas corpus *ad prosequendum*[9] to

[8]At the dismissal-motion hearing several months later, the trial court stated that when Marks's counsel persisted with a third request for a bench warrant, the court obliged him and signed it, noting that the federal prison predictably did not honor it.

[9]A *habeas corpus ad prosequendum* is a "writ used in criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined." *Habeas corpus ad prosequendum*, Black's Law Dictionary (10th ed. 2014).

have the warden of FCI Seagoville deliver Marks to the Denton County Sheriff for trial set for September 8, giving Seagoville less than three weeks' notice.

This writ was unavailing; on September 8, Marks was a no-show.[10]

On September 23, the State sought and obtained a second writ to have FCI Seagoville deliver Marks to the Denton County Sheriff for a trial set on October 27. This one, set for more than a month out, worked.

In the meantime, October 18, 2016—the second anniversary of Marks's arrest—came and went.

Marks was delivered to the Denton County Jail on October 20 and so was present for an October 25 pretrial hearing on his motion to dismiss, at which he and his father testified. After hearing the motion, the trial court granted it and dismissed the State's case because Marks's right to a speedy trial had been violated.

Discussion

In one issue, the State contends that the trial court erred by dismissing Marks's case. The State denies violating Marks's speedy-trial right and suggests that even if it did, dismissal was not the proper remedy.

The Sixth Amendment to the United States Constitution guarantees the accused's right to a speedy trial. *Zamorano v. State*, 84 S.W.3d 643, 647 (Tex.

[10]The record does not reveal how long it typically takes a federal penitentiary to deliver a defendant to state court after receiving a habeas corpus *ad prosequendum* writ.

Crim. App. 2002); *Orand v. State*, 254 S.W.3d 560, 565 (Tex. App.—Fort Worth 2008, pet. ref'd). In determining whether this right has been violated, courts weigh and balance four factors: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right; and (4) prejudice to the defendant resulting from the delay. *See Barker v. Wingo*, 407 U.S. 514, 530–32, 92 S. Ct. 2182, 2191–93 (1972) (creating test under federal constitution); *Cantu v. State*, 253 S.W.3d 273, 280 n.16 (Tex. Crim. App. 2008) (stating that test under Texas constitution uses same four *Barker* factors); *see also State v. Jones*, 168 S.W.3d 339, 346–52 (Tex. App.—Dallas 2005, pet. ref'd) (applying *Barker* factors to motion to dismiss for alleged speedy-trial violation).

Once the *Barker* test is triggered, courts analyze the claim by weighing the strength of the four factors and balancing their relative weights in light of both the State's and the defendant's conduct. *Cantu*, 253 S.W.3d at 281. None of the *Barker* factors is a necessary or sufficient condition to finding a speedy-trial violation; rather, the factors are related, and courts should evaluate them in conjunction with any other relevant considerations. *Id.*

We apply a bifurcated standard of review when reviewing a trial court's decision on a speedy-trial claim. *State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999). We review the trial court's factual determinations for abuse of discretion, and review de novo how it applied the law to the facts. *Id.* When the defendant has prevailed on a speedy-trial claim, we presume that the trial court

resolved any disputed fact issues in the defendant's favor, provided that the record supports those findings. *Zamorano*, 84 S.W.3d at 648.

Length of delay: presumptively unreasonable here

The length of the delay is measured from the time the defendant is arrested or formally accused. *United States v. Marion*, 404 U.S. 307, 321 n.12, 92 S. Ct. 455, 463 n.12 (1971). Unless the delay was long enough to be presumptively prejudicial, no further inquiry is necessary. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. Generally, depending on the nature of the crime charged, courts have found post-accusation delay presumptively prejudicial when it approaches one year. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 2691 n.1 (1992); *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003). Here, we agree with the trial court that the twenty-four-month delay to which the State subjected Marks is presumptively unreasonable. We will thus analyze the other *Barker* factors.

Reasons for the delay: weighs heavily against the State in this case

If a presumptively prejudicial delay has occurred, the State bears the initial burden of justifying the delay. *Emery v. State*, 881 S.W.2d 702, 708 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1192 (1995). Different weights are assigned to different reasons. *Munoz*, 991 S.W.2d at 822. A deliberate attempt to delay a trial, for example, is weighed heavily against the State, while more neutral reasons, such as negligence or overcrowded dockets, are still weighed against the State but less heavily. *Id.* If the record is silent regarding the reason for the

delay, it weighs against the State but not heavily, because courts do not presume that the State has tried to prejudice the defense. *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003); *Zamorano*, 84 S.W.3d at 649–50.

It is the State that is responsible for getting a defendant to trial, not the defendant himself. *Barker*, 407 U.S. at 527, 92 S. Ct. at 2190 ("A defendant has no duty to bring himself to trial."). In fact, the State must try to prosecute a person who is in federal custody even if that defendant is out of state. *Smith v. Hooey*, 393 U.S. 374, 382–83, 89 S. Ct. 575, 579 (1969). In *Hooey*, the Supreme Court further recognized that the State of Texas could (and should) have filed a writ of habeas corpus *ad prosequendum* to secure the defendant for trial.[11] *Id.* at 381, 89 S. Ct. at 578.

Here, the trial court found that the State believed that it was Marks's and his attorney's responsibility to have Marks in court for trial. The trial court also found that the State had stipulated to past uses of writs of habeas corpus *ad prosequendum* to get federal inmates to Denton County.

The State emphasizes that it knew that a *prosequendum* writ worked in the felony context but did not know whether it would work with misdemeanors. Why the State thought it would matter to the federal prison whether the State wanted

[11]In that case, the Supreme Court quoted the Solicitor General: "'[T]he Bureau of Prisons would doubtless have made the prisoner available if a writ of habeas corpus *ad prosequendum* had been issued by the state court. It does not appear, however, that the State at any point sought to initiate that procedure in this case.'" *Id.* at 378, 89 S. Ct. at 577.

Marks present to prosecute him for a misdemeanor or a felony is not clear. In any event, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Id.* at 382, 89 S.Ct. at 579 (cleaned up).[12] For that reason, the State was obliged to at least make the effort.

On the other hand, because the offense was a misdemeanor, it is conceivable that the prosecutors handling the case might have been less experienced than felony prosecutors. If so, failing to file a writ of *prosequendum* is more understandable—but still not justified.

Regardless, the trial court concluded that under the circumstances, the reasons for the delay weighed heavily against the State. The State appears concerned that because the trial court concluded that this factor weighed "heavily" against it, the trial court also believed that the State acted in bad faith. *See Munoz*, 991 S.W.2d at 822 (stating that a deliberate attempt to delay a trial

[12]The "cleaned up" parenthetical is fast gaining traction since first being proposed earlier this year. *See* Jack Metzler, *Cleaning Up Quotations*, Journal of Appellate Practice and Process (2018) (forthcoming). Available at SSRN: https://ssrn.com/abstract=2935374 or http://dx.doi.org/10.2139/ssrn.2935374; *see also* "#AppellateTwitter jumps at the chance to clean up quotes in citations," https://twitter.com/i/moments/844543157660499970?lang=en. "Cleaned up" signals that ungainly and substantively unnecessary brackets, ellipses, embedded quotation marks, and the like have been stripped from the source being quoted without coming out and saying so. It's already found favor with at least one Texas supreme court justice and at the Fifth Circuit, among other courts around the country. *See Cadena Comercial USA Corp. v. Tex. Alcohol & Beverage Comm'n*, 518 S.W.3d 318, 341 n.18 (Tex. 2017) (Willett, J., dissenting); *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017).

is weighed heavily against the State). Nowhere in its conclusions, though, did the trial court mention bad faith.

Moreover, bad faith is not a prerequisite to a speedy-trial violation; official negligence can suffice. *See Doggett*, 505 U.S. at 656–57, 112 S. Ct. at 2693. The trial court's conclusions show that where the duty to bring the defendant back to court was clearly the State's, and where the procedural mechanism was clearly a writ of habeas corpus *ad prosequendum*, the State's failure to assume that responsibility and its delay in using the writ were the reasons this factor weighed heavily against the State. We agree. *See id.* Although the State knew that a writ of habeas corpus *ad prosequendum* would work, at least for felonies, it sat by while Marks's counsel kept trying to use a bench warrant.

The defendant's assertion of his right: weighs in Marks's favor

The third *Barker* factor that a trial court must consider is the defendant's assertion of his right to a speedy trial. 407 U.S. at 531, 92 S. Ct. at 2192; *Munoz*, 991 S.W.2d at 825. A defendant is responsible for asserting or demanding this right. *Munoz*, 991 S.W.2d at 825. An accused's repeated (but futile) requests for a speedy trial weigh heavily in favor of dismissing the charge. *See Murphy v. State*, 280 S.W.3d 445, 454 (Tex. App.—Fort Worth 2009, pet. ref'd).

On November 20, 2015, sixteen days after Marks was sent to federal prison, he filed his first speedy-trial motion. As we discuss below in connection with the "prejudice" factor, Marks wanted this case resolved because its pendency adversely affected his ability to rehabilitate himself in federal prison

and thereby adversely affected the length of his federal incarceration and the amount of time he later had to spend in a halfway house. When Marks's attempts to get back to state court failed, he filed another speedy-trial motion on July 1, 2016. It was only on August 8, 2016—roughly nine months after he first moved for a speedy trial—that Marks, still in federal custody, filed his motion to dismiss. The trial court concluded that this third factor weighs in Marks's favor; again we agree.

Prejudice to the defendant resulting from the delay: weighs against the State

The final *Barker* factor examines whether and to what extent the delay has prejudiced the defendant. *Cantu*, 253 S.W.3d at 285. Generally, three interests are considered in determining prejudice: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. But proof of actual prejudice is not required when the delay is excessive, because such a delay "presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Shaw*, 117 S.W.3d at 890. If an accused can show prejudice, the burden shifts to the State to prove that the accused suffered no serious prejudice beyond that which ensued from ordinary and inevitable delay. *Munoz*, 991 S.W.2d 818.

The trial court made the following findings relating to the prejudice factor:

> 25. [Marks] testified that he was delayed in getting into a drug treatment program (hereinafter RDAP) because of the state detainer

> for the pending DWI charge. The delay into the program would also affect his release date and ability [to] parole to a halfway house.
>
> 26. [Marks] also testified that he had anxiety over the pending DWI charge and how the pending charge would affect his entry into the drug treatment program and his release date.
>
> 27. [Marks] testified that completion of the RDAP Program would knock off a year [of the time he would have to serve his sentence], plus six months [off the time he had to remain in] a halfway house . . . .[13]
>
> 28. [Marks's] father also testified [that] the pending charge delayed his entry into the RDAP treatment and that it would also delay his release date from federal prison.
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> 29. [Marks's] father also testified that his son was depressed, angry[,] and frustrated because he couldn't get into the RDAP program because of the pending charge.
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> 30. The [S]tate stipulated that the District Attorney's Office had done Writ[s] of Prosequendum in the past to get inmates to the Denton County jail from federal custody.
>
> 31. The court finds that the testimony of the Defendant, Nathan Marks[, is] credible[.]
>
> 32. The court finds that the testimony of Jon Marks[, Nathan Marks's father, is] credible.

The State disputes these findings, but the record supports them. We accordingly defer to the trial court. *See Zamorano*, 84 S.W.3d at 648; *Munoz*, 991 S.W.2d at 821.

In its conclusions of law, the trial court ruled that Marks showed prejudice. We agree. The delay adversely affected his ability to get into a rehabilitative

[13]Marks also testified that pending charges would make him ineligible for a halfway house.

program, adversely affected the time he would have to spend in federal prison, and adversely affected the time he would later have to spend in a halfway house. As the Supreme Court has written,

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from undue and oppressive incarceration prior to trial. But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

Hooey, 393 U.S. at 378, 89 S. Ct. at 577 (cleaned up); *see Barker*, 407 U.S. at 532–33, 92 S. Ct. at 2193; *Cantu*, 253 S.W.3d at 286 n.69 (citing *Marion*, 404 U.S. at 320, 92 S. Ct. at 463); *Turner v. State*, 545 S.W.2d 133, 138 (Tex. Crim. App. 1976).

We also disagree with the State that dismissal was the wrong remedy. If a defendant is owed relief because the State violated his speedy-trial right, the only possible remedy is to dismiss the prosecution. *Strunk v. United States*, 412 U.S. 434, 439–40, 93 S. Ct. 2260, 2263 (1973); *Barker*, 407 U.S. at 522, 92 S. Ct. at 2188.

Conclusion

We overrule the State's issue and affirm the trial court's dismissal order.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 19, 2017