

FILED
JULY 12, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 28332-1-III
)	Consolidated with
Respondent,)	No. 28395-1-III
)	
v.)	
)	
DAVID P. WEBSTER,)	UNPUBLISHED OPINION
)	
Appellant.)	
_____)	
In re the Personal Restraint Petition of:)	
)	
)	
DAVID PHILLIP WEBSTER,)	
)	
Petitioner.)	
)	

Korsmo, C.J. • David P. Webster appeals his rape conviction, arguing that his constitutional speedy public trial rights were violated. In a consolidated personal restraint petition (PRP), he also asks this court to overturn two previous convictions. We conclude that his rights were not violated and affirm the rape conviction, and we dismiss the PRP

as successive, untimely, and frivolous.

FACTS

In light of the issue presented, a lengthy review of the procedural history of this case is necessary. Mr. Webster was convicted in 2003 of assaulting M.B., then soliciting an undercover police officer to kill her; he was acquitted of raping her. Mr. Webster was ultimately sentenced to 312 months for the two offenses. While awaiting sentencing, Mr. Webster was housed at the Franklin County Jail. On the night of September 30, 2003 and the early morning of the following day, he engaged in three acts of intercourse with his cellmate, R.K. The next morning, R.K. reported that he had been raped. Analysis determined that the semen found in R.K. contained Mr. Webster's deoxyribonucleic acid (DNA).

R.K. sued Franklin County. After settling that civil case, Franklin County referred prosecution of the criminal case to the Attorney General's Office in order to avoid the appearance of a conflict of interest. On August 30, 2005, Mr. Webster was arraigned on three counts of first degree rape. He was transported back to the Department of Corrections (DOC) in Walla Walla immediately thereafter. Attorney Robert Thompson represented him at arraignment, but was permitted to withdraw after advising the court of

a potential conflict. The court then appointed Patrick McBurney to represent Mr. Webster and set trial for November 15, 2005. Mr. McBurney asked the court to appoint co-counsel because of his limited felony trial experience.

On October 24, 2005, James Egan was appointed as co-counsel. He moved to transfer Mr. Webster to the Franklin County Jail in order to aid attorney/client communication. The State objected. The court ordered transfer to the Benton County Jail, but later rescinded the order.

On November 1, 2005, Mr. Egan moved to continue the trial because he needed additional time to review discovery, investigate, interview witnesses, and file suppression motions. He stated he could not be effective without the continuance. Mr. Webster himself objected to the continuance and refused to waive his right to a speedy trial. The State declared it was ready for trial. The court granted the motion and continued the trial until February 15, 2006.

On January 31, 2006, Mr. Egan moved to withdraw, citing a complete breakdown in communication, “animosity” from his client, and a bar complaint filed against him by Mr. Webster. Mr. McBurney advised he could not be effective alone and asked to withdraw as well. Mr. Webster joined the motions because he believed he would not receive a fair trial unless both attorneys withdrew. However, he refused to waive his speedy trial right. The State objected, but the court granted the motions to withdraw.

Christopher Swaby was appointed on February 10, 2006, and renewed Mr. Webster's speedy trial assertions.

On February 17, 2006, Mr. Swaby appeared in court with Mr. Webster, who again complained about his speedy trial right. However, he also demanded the effective assistance of counsel. The trial court set pretrial for March 31, 2006 and trial for April 19, 2006.

On March 31, 2006, Mr. Swaby moved to continue the trial from April to July because he needed more time to prepare. Mr. Webster eventually agreed to continue the case to July. The State objected to the continuance. The court granted the motion and continued the trial to July 26, 2006. Mr. Swaby also requested that Mr. Webster be transferred to the Franklin County Jail to await trial. The State again objected. The court granted the request.

On April 7, 2006, the previous trial continuance was discussed. Mr. Webster again agreed to the continuance; the State renewed its objection. Captain Long of the Franklin County Jail asked the court to return defendant to DOC because Mr. Webster presented serious security risks. The court declined to reverse its order.

On June 20, 2006, Mr. Swaby moved to continue the trial to August in order to continue interviewing witnesses. The State did not object, and the court continued trial to August 30, 2006. On August 15, 2006, Mr. Swaby again moved to continue the trial. He

told the court that the defense had interviewed 31 witnesses, and that Mr. Webster had provided him with names of other people he wanted interviewed. Mr. Swaby said he would be ineffective without additional time to interview witnesses and investigate the DNA evidence. The State did not object. Mr. Webster agreed to continue the trial to February 14, 2007.

On January 9, 2007, Mr. Swaby again moved to continue the trial because he needed more time to interview witnesses, review discovery, and investigate the DNA evidence. Mr. Webster again agreed to the continuance, waiving his speedy trial right. The State objected to the continuance, which was granted.

On April 4, 2007, Mr. Webster personally asked the court to continue his trial while the Washington State Bar Association and the Commission on Judicial Conduct reconsidered their rejection of complaints he had filed. When the court refused, he claimed that Mr. Swaby had violated attorney/client privilege while advocating his position regarding the complaints to the bar and the commission. The court issued a written ruling in which it found no violation of attorney/client privilege and that Mr. Webster had waived the privilege by discussing the matters in open court and asking Mr. Swaby to advocate for him.

On April 18, 2007, the State and defense jointly agreed to a continuance so as to examine newly discovered evidence. Trial was continued until June 20, 2007, with

pretrial set for June 5, 2007. Mr. Webster again waived his speedy trial right.

On June 5, 2007, the court granted the State's request to continue the June 20 trial one week due to a scheduling conflict. After the continuance was granted, Mr. Swaby informed the court that his client would like a longer continuance. The State objected. Mr. Webster told the court that he did not want a speedy trial dismissal. The court denied the motion, leaving trial set for June 27, 2007. The court set the pretrial hearing for June 19, 2007.

On June 19, 2007, Mr. Swaby asked for a continuance to further investigate R.K., who had informed the State he had incorrectly answered a question in his prior defense interview. Trial was continued to October 24, 2007.

On September 12, 2007, Mr. Swaby appeared in court with his own attorney and moved to withdraw because Mr. Webster had told jail staff that Mr. Swaby and his investigator were smuggling contraband to him by concealing it within legally privileged materials. The court allowed him to withdraw, citing concerns about attorney/client privilege, the confidence between counsel and defendant, and Mr. Swaby's ability to zealously represent a defendant who was accusing him of criminal misconduct.

On September 25, 2007, the State urged that Mr. Webster be returned to DOC because he was threatening witnesses who worked in the jail. The court denied the motion.

On October 9, 2007, the court held a hearing to potentially appoint Greg Scott as defense counsel. Mr. Webster again waived his speedy trial right, and then later attempted to withdraw the waiver. Office of Public Defense (OPD) Director, Raymond Gonzalez, advised the court that Mr. Webster's behavior was making it difficult for him to find counsel to represent him. The court granted a recess so Mr. Scott could confer with Mr. Webster. Mr. Scott refused to take the case.

On October 22, 2007, the court attempted to hold a hearing one day early because of a scheduling conflict. Mr. Webster refused to waive notice, so the matter was continued to October 30, 2007.

On October 30, 2007, Mr. Gonzalez informed the court that William McCool had conditionally agreed to represent Mr. Webster. The court continued the case for two weeks to allow Mr. McCool to speak with him. McCool later refused to take the case.

On November 13, 2007, the court ordered that Mr. Webster undergo a mental evaluation to determine his ability to assist counsel. On December 27, 2007, Mr. Gonzalez told the court he had contacted three attorneys to represent defendant "who have not turned us down cold." Mr. Gonzalez again stated that Mr. Webster's behavior was making it difficult to obtain counsel. Mr. Webster again told the court he did not want a dismissal based on speedy trial grounds.

On January 15, 2008, Mr. Gonzales advised the court that Michael Lynch had

agreed to represent Mr. Webster but that he had some behavioral concerns. The court reiterated its intention to have Mr. Webster evaluated for competency, explaining that his conflicting statements about prior counsel and his behavior gave him concern about his ability to proceed to trial. Jail counsel again asked that Mr. Webster be returned to DOC. The court appointed Mr. Lynch but deferred its ruling on the housing issue.

On April 18, 2008, Mr. Lynch moved to continue trial six months in order to review discovery. Mr. Webster refused to sign a speedy trial waiver, but nonetheless agreed to the continuance, which was granted. The trial was set for October 2, 2008. The trial court also signed an order of competency relating to Mr. Webster.

On April 30, 2008, the State asked that Mr. Webster be returned to DOC because his threatening behavior was escalating. He had threatened to cut a person's throat, cut a person's head off, blow up the jail, kill the prosecutor, an inmate, several jail staff members, and to rape two female jail officers. Counsel for the jail also reported that Mr. Webster had threatened staff on several occasions, and actually assaulted one corrections officer. Mr. Lynch informed the court that Mr. Webster wished to remain at the jail, and that remaining at the jail would also make attorney/client communications far easier in preparing for trial. When the court ordered that he be returned to DOC, Mr. Webster moved to have his attorney withdraw. The court denied the motion.

On September 5, 2008, Mr. Lynch asked for a six month continuance. He said that

he and his investigator had talked to 10 witnesses, but needed to interview more, including DNA experts and potential defense witnesses. He also said that if Mr. Webster wanted to go to trial quickly, he would ask to continue trial only 30 days and would then go to trial as best he could. Mr. Webster objected to any continuance. The State objected to any continuance past the October 31, 2008 speedy trial expiration. The court continued trial to October 22, 2008 to allow the defense more time to prepare.

On October 1, 2008, Mr. Lynch renewed his request for the six month continuance that had been previously denied. He noted the 2,400 pages of discovery, and said the prior investigator's information totaled 215 additional pages and an approximately equal number of attachments. He said he had interviewed 15 of the 42 witnesses on the State's witness list, and planned to interview 7 more the coming week. He further advised he intended to obtain the victim's prior medical records, information about his past incarcerations, contact the penal institutions where he had been housed, and interview his known associates to explore his reputation for truthfulness. Mr. Webster agreed to continue the case. The State again objected. The court continued the trial to April 1, 2009.

On December 15, 2008, the court heard argument regarding Mr. Webster's desire to represent himself. The court determined that Mr. Lynch would continue to represent Mr. Webster.

On December 29, 2008, the court again addressed Mr. Webster's desire to represent himself. At the same time, Mr. Lynch asked to withdraw due to a "breakdown in communication." The court set a hearing to determine whether Mr. Webster was competent to represent himself and ordered another competency evaluation. The evaluation report concluded that Mr. Webster was indeed competent to do so.

On February 17, 2009, the court considered Mr. Lynch's motion to withdraw as well as Mr. Webster's ability to represent himself. The court granted the motion to withdraw over the State's objection. The court also found Mr. Webster competent to represent himself and appointed standby counsel.

Trial began on April 1, 2009. Mr. Webster was found guilty of one count of second degree rape; the jury was unable to agree on the remaining two counts. He was sentenced to a minimum term of 245 months and a maximum of life. He timely appealed to this court.

ANALYSIS

The sole issue on appeal is whether Mr. Webster's constitutional speedy trial rights were violated. We also consider a consolidated PRP regarding his prior convictions. Each is addressed in turn.

Appeal

Article I, section 22 of the Washington Constitution and the Sixth Amendment to

the United States Constitution both guarantee a criminal defendant the right to a speedy public trial. The rights provided by the two constitutions are equivalent. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). We review de novo an allegation that these rights have been violated. *Id.* at 280.¹

Some pretrial delay is inevitable. Thus, when raising a constitutional speedy trial claim, the burden lies with the appellant to demonstrate that the delay between the initial accusation and the trial has crossed a line between ordinary and unreasonable to create a “presumptively prejudicial” delay. *Id.* at 280-81. Once this showing is made, we consider several nonexclusive factors in order to demonstrate whether the appellant’s constitutional speedy trial rights were violated. *Id.* These factors include the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay caused prejudice. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1982). None of the *Barker* factors are either sufficient or necessary to demonstrate a constitutional violation. *Iniguez*, 161 Wn.2d at 283.

Presumptively Prejudicial Delay

Our Supreme Court has expressly rejected any formulaic presumption that leads to a threshold showing of presumptive prejudice; rather, it has stated that this inquiry is necessarily dependent upon the specific circumstances of each case. *Id.* Several factors

¹ We pause to note that there is a distinction to be drawn from the constitutional “speedy trial” right and the “time for trial” rule under CrR 3.3. This case does not involve the latter.

to be considered in this initial inquiry include not only the length of the delay, but the complexity of the charges and reliance on eyewitness testimony. *Id.* at 292.

Here, Mr. Webster argues that the three and one-half year delay from the time the charges were filed until his trial was presumptively prejudicial because the case was a simple question of whether sexual intercourse took place, and whether it was rape or consensual in nature. He also asserts that the delay was presumptively prejudicial due to the fact that there was no eyewitness testimony, and the State was relying largely upon the testimony of those who encountered the two men shortly before or after the alleged events occurred. We agree. Under the nonexclusive factors iterated by the *Barker* court and adopted by our Supreme Court, Mr. Webster has met his burden to demonstrate presumptive prejudice, and this court must consider whether his speedy trial rights were violated using the nonexclusive *Barker* factors.

Length of Delay

The initial *Barker* factor is the length of the delay. *Id.* at 293. However, unlike the presumptive prejudice inquiry, this factor requires us to consider the length of time *beyond* that which triggers a *Barker* inquiry. *Id.* Thus, the more time that has elapsed since the “bare minimum” necessary to show presumptive prejudice, the more heavily this factor weighs in the defendant’s favor. *Id.*

Although our Supreme Court has expressly rejected the adoption of a bright line

rule, it has been suggested that the “bare minimum,” though factually contingent, runs somewhere between eight months and slightly over one year. Wayne R. Lafave, *Criminal Procedure*, § 18.2(b), at 119 (3rd ed. 2007); accord *Iniguez*, 167 Wn.2d at 293 (holding that under the facts of that case, eight plus months’ delay was only just beyond the bare minimum required to trigger a *Barker* inquiry). Here, we need not decide the precise point at which the “bare minimum” was reached, since the extreme length of the three and one-half year delay means that this factor necessarily weighs in Mr. Webster’s favor even under the most extreme threshold.

Cause of Delay

The second factor to be considered is the reason for the delay. *Iniguez*, 167 Wn.2d at 294. This inquiry requires us to consider each party’s level of responsibility for the delay and assign differing weights to the reasons for the delay. *Id.* The actual reasons for the delay were overwhelmingly attributable to Mr. Webster’s antics. Absent a one-week continuance requested by the State and a joint continuance to test newly discovered evidence, the other 10 continuances were all requested by the defense, mostly to permit each of Mr. Webster’s 5 attorneys to ensure that his representation was competent.²

² RP (Nov. 1, 2005) at 5, 13-14; RP (Mar. 31, 2006) at 328-31; CP at 1747; RP

Although he acknowledges that defense counsel were largely to blame for the delay, Mr. Webster attempts to delineate between continuances requested by counsel over his objection and continuances that he agreed to. He also claims that the trial court erred in granting those continuances to which he did not agree. However, it is well-settled that a trial court does not abuse its discretion when granting a continuance over the defendant's objection. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). Moreover, as the State correctly points out, delays caused by defense counsel are also attributed to the defendant because the attorney either acts or fails to act on the defendant's behalf. *Vermont v. Brillion*, ___U.S.___, 129 S. Ct. 1283, 1290-91, 173 L. Ed. 2d 231 (2009). Since the delays in this case are largely the responsibility of Mr. Webster, this factor weighs heavily in favor of the State, which declared itself ready to proceed to trial after a mere two months and opposed most of the ensuing delays.

Assertion of Constitutional Speedy Trial Right

The third factor we consider is whether the defendant asserted his constitutional right to a speedy trial, and the extent to which the assertion was made. *Barker*, 407 U.S. at 528-29. This court takes into account things such as the frequency and force of the objections, and the reasons why the defendant demands or fails to demand a speedy trial.

(Aug. 15, 2006) at 2; RP (Jan. 9, 2007) at 366; RP (Apr. 18, 2007) at 430, 456-58; RP (June 5, 2007) at 469, 501-08; RP (June 19, 2007) at 526; RP (Sept. 25, 2007) at 604; RP (Apr. 18, 2008) at 813; RP (Sept. 5, 2008) at 21; RP (Oct. 1, 2008) at 78; Br. of Resp't at 29-30.

Iniguez, 167 Wn.2d at 294-95. When a defendant asserts his constitutional speedy trial right, “strong evidentiary weight” is given. *Id.* at 295.

Although Mr. Webster personally asserted his speedy trial right on multiple occasions, his attorneys did not. Instead, they chose to request continuances to ensure their effective assistance. As also noted above, a defendant acts *through* his or her attorney. *Brillion*, 129 S. Ct. at 1290-91. We therefore do not agree that Mr. Webster asserted his constitutional speedy trial rights either vigorously or often. Only one assertion was made by counsel, and even that was as a pro forma matter since Mr. Swaby had just been appointed to represent Mr. Webster. Accordingly, this factor also weighs in the State’s favor.

Prejudice

Finally, this court must consider whether Mr. Webster suffered any prejudice by the delay. *Iniguez*, 167 Wn.2d at 295. We judge this by looking to the effect on the interests protected by the right to a speedy trial: (1) preventing harsh pretrial incarcerations; (2) minimization of defendant’s anxiety and worry; and (3) limiting defense impairments. *Id.* Since impairment to the defense by the passage of time is the most serious form of prejudice, its existence is presumed due to the difficulty in showing

it. *Barker*, 407 U.S. at 532. Thus, an appellant need not show actual impairment to demonstrate a constitutional speedy trial violation. *Id.* However, where actual impairment is shown, it weighs in favor of the appellant. *Iniguez*, 167 Wn.2d at 295.

Here, Mr. Webster argues that the delay was prejudicial because he was incarcerated throughout the time he was awaiting trial. Although he acknowledges that he would have been incarcerated regardless, he believes that his confinement at a correctional facility rather than the state penitentiary was prejudicial because his movements were significantly restricted during that time. We cannot agree.

Mr. Webster's placement in the Franklin County Jail was the result of defense requests that he be moved to facilitate attorney/client communication. Moreover, his movements at that facility were limited because of his behavior since he threatened various types of harm to the employees of that facility, many of whom were to be witnesses at his trial. Critically, he makes no showing that his ability to defend the case was prejudiced by the delay in bringing this matter to trial. In light of these facts, his argument that he was actually impaired is unpersuasive, and Mr. Webster must therefore only rely upon the presumption of prejudice due to the passage of time. At best, this factor weighs slightly in his favor.

When taken as a whole, the totality of the circumstances leads us to conclude that Mr. Webster's constitutional speedy trial rights were not violated. The only *Barker*

factors that weigh in his favor are the length of delay and prejudice factors, which do so by design. He has failed to strengthen those presumptions in any fashion, and their weight is easily overcome by the cause of delay and assertion of speedy trial rights factors. It is manifest from the record that the lengthy delay was almost exclusively self-inflicted; accordingly, there was no constitutional speedy trial violation. We also find his statement of additional grounds for review to be without merit.

Personal Restraint Petition

The PRP challenges the 2003 convictions involving M.B. This is his seventh collateral attack on that judgment in this court.³ This court upheld the convictions on direct appeal in 2005. *See State v. Webster*, 127 Wn. App. 1056 (2005), *review denied*, 156 Wn.2d 1011 (2006). In reverse order, the prior collateral attacks were assigned cause numbers 28571-5, 28084-5, 27921-9, 27347-4, 26097-6, and 24938-7. All were unsuccessful.

The Chief Judge dismissed cause no. 28084-5 on June 12, 2009, after concluding it was successive and frivolous. The Chief Judge dismissed cause no. 28571-5 on December 8, 2009, after concluding it was untimely, successive, and frivolous. A collateral attack is untimely if it is filed over one year after a judgment becomes final, unless it is *solely* based on one of the six exceptions to the timeliness requirement. RCW

³ We are advised that he also filed an identical PRP in the Washington Supreme Court. *See* no. 84829-7. That matter was dismissed and the certificate of finality issued March 7, 2011.

No. 28332-1; No. 28395-1-III
State v. Webster; PRP of Webster

10.73.090, .100. A petition is successive if it raises new issues without establishing good cause for not having raised the issues in an earlier collateral attack. RCW 10.73.140; RAP 16.4(d).

As with the ruling in cause no. 28571-5, this petition is also untimely, successive, and frivolous. Most of the issues presented were raised in previous petitions, and appellant has not shown cause for presenting any new issues. The grounds in the current petition are not solely ones that are exempted from the time bar. Accordingly, the petition is also untimely.

CONCLUSION

The conviction is affirmed. The PRP is dismissed.

A majority of the panel has determined this opinion will not be printed in the

No. 28332-1; No. 28395-1-III
State v. Webster; PRP of Webster

Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

Korsmo, C.J.

WE CONCUR:

Brown, J.

Kulik, J.