REL: September 7, 2018

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-17-0482

David Lee Sanders

v.

State of Alabama

Appeal from Lee Circuit Court
(CC-11-79.01 and CC-11-80.01)

JOINER, Judge.

David Lee Sanders appeals his guilty-plea convictions for first-degree rape, see § 13A-6-61, Ala. Code 1975, and first-degree sodomy, see § 13A-6-63, Ala. Code 1975. Sanders was

sentenced to 40 years' imprisonment for each conviction; those sentences were to run concurrently.

Facts and Procedural History

Because of the nature of Sanders's claim on appeal, a recitation of the procedural history underlying this claim is necessary. On September 10, 2010, Sanders was arrested and charged with first-degree rape and first-degree sodomy for engaging in sexual intercourse with a six-year old relative. Sanders entered into a plea agreement with the State and, on June 8, 2012, he pleaded guilty to first-degree rape. His first-degree-sodomy charge was dismissed pursuant to the agreement. He was sentenced to 20 years' imprisonment; that sentence was split, and he was ordered to serve 5 years' imprisonment followed by 5 years' supervised probation. Sanders served his split sentence of five years and was released from prison and placed on probation in November 2015.

In April 2016, Sanders's probation officer filed a delinquency report, which alleged that Sanders had violated the terms and conditions of his probation by failing to report his change of address and failing to pay supervision fines. A revocation hearing was held on May 2, 2016, at which Sanders

appeared and was represented by counsel. Following the hearing, the circuit court found that it was reasonably satisfied that Sanders had violated the terms and conditions of his probation by failing to report his change of address. As a result, it revoked Sanders's probation and ordered him to serve his original 20-year prison sentence. Sanders filed a motion to reconsider, but that motion was denied.

On May 31, 2016, Sanders appealed the circuit court's decision to revoke his probation to this Court. See Sanders v. State, 237 So. 3d 900 (Ala. Crim. App. 2016). On appeal, this Court remanded the case to the circuit court to determine whether Sanders had been illegally sentenced when his sentence was split. Specifically, we determined that,

> "because the nature of Sanders's guilty-plea conviction may exempt him from application of the Split-Sentence Act,[2] the circuit court may have had no authority to apply the Split-Sentence Act to him and no authority to impose a term of probation on Sanders. See § 15-18-8(a) and (b), Ala. Code 1975. If Sanders was convicted of the rape of a child under 12 years of age, the court further had no authority to conduct a probation-revocation hearing and revoke Sanders's probation under § 15-18-8(c), Ala. Code 1975. If the circuit court had no authority to impose a term of probation or to revoke that probation, the circuit court's order revoking Sanders's probation would be void. See also Hicks v. State, 138 So. 3d 338, 342 (Ala. Crim. App. 2013)('Because the circuit court did not have the

authority to sentence Hicks to the split sentences or to impose terms of probation, the circuit court did not have authority to revoke Hicks's probation; thus, its order revoking Hicks's probation is void.').

"This case is therefore due to be remanded for the circuit court to determine if Sanders was convicted of the rape of a child under the age of 12. If so, Sanders is due to be resentenced. Because his 20-year sentence was valid, the circuit court may not change it. Enfinger [v. State], 123 So. 3d [535, 538 (Ala. Crim. App. 2012)]. Thus, if the court determines that Sanders was convicted of the rape of a child under the age of 12, the circuit court must conduct another sentencing hearing and vacate that portion of its judgment splitting Sanders's sentence.

"Additionally, we note that the record indicates that Sanders was convicted as the result of a plea bargain; however, the record is unclear as to whether the sentence was part of the plea bargain. 'Thus, "it is impossible for this Court to determine whether resentencing [Sanders] will affect the voluntariness of his plea." Austin [v. State], 864 So. 2d [1115] at 1119 [(Ala. Crim. App. 2003)]. If [Sanders is due to be resentenced and] the split sentence was a term of [Sanders's] "plea bargain," and, if he moves to withdraw his guilty plea, the circuit court should conduct a hearing to determine whether withdrawal of the plea is necessary to correct a manifest injustice. See Rule 14.4(e), Ala. R. Crim. P.' Enfinger, 123 So. 3d at 539. See also Hicks v. State, 138 So. 3d at 342 ('[T]he record is unclear whether Hicks's sentences were the result of a plea agreement. Thus, this Court is unable to determine whether resentencing Hicks will affect the voluntariness of his pleas. If the split sentences were the result of any plea agreements and, if Hicks moves to withdraw his guilty pleas, the circuit court should conduct a hearing to determine whether

> withdrawal of the pleas is necessary to correct a manifest injustice.').
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> "This case is remanded to the circuit court for proceedings consistent with this opinion. Due return, including findings of fact and, if Sanders is resentenced, a transcript of the proceedings conducted on remand, shall be made to this Court within 42 days of the date of this opinion.
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> "_____
>
> "[2]First-degree rape is defined by § 13A-6-61(a)(3), Ala. Code 1975, as follows: 'A person commits the crime of rape in the first degree if [h]e or she, being 16 years or older, engages in sexual intercourse with a member of the opposite sex who is less than 12 years old.' Rape in the first degree is a Class A felony."

Id. at 901-02.

On January 23, 2017, the circuit court conducted a hearing on remand and determined that the victim was under the age of 12. As a result, the court resentenced Sanders by imposing a straight sentence of 20 years' imprisonment, thereby vacating the portion of the sentence that dealt with probation. When Sanders appealed the court's revocation of his probation for a second time, we, again, remanded the case and, on April 20, 2017, issued an order instructing the circuit court to determine if Sanders had entered his guilty plea based on his belief that he would receive a split sentence.

On May 2, 2017, the circuit court held a hearing in compliance with our order. During that hearing, the court allowed Sanders to withdraw his guilty plea after it determined that the split sentence was a material part of his decision to enter a guilty plea in 2012. On return to second remand, this Court dismissed the appeal.

On May 16, 2017, Sanders moved to dismiss the charges against him because, he said, he was denied his Sixth Amendment right to a speedy trial. According to Sanders, since his initial arrest in September 2010, he had remained incarcerated with the exception of the five and a half months he was released on probation, and, as of May 2, 2017, he had been incarcerated for a total of six years. Citing the factors from the United States Supreme Court's decision in Barker v. Wingo, 407 U.S. 514 (1972), Sanders argued that "it is obvious that the delay in this case experienced by [him] has prejudiced him to a degree that would warrant the dismissal of his indictment."[1] (Supp. I, C. 6-14.) On May 17, 2017, the State filed its response to Sanders's motion. Following a

[1]Citations to the clerk's record found in the first supplemental record on appeal are denoted with "Supp. I, C. ____."

hearing on July 24, 2017, the circuit court denied Sanders's motion.

On February 15, 2018, Sanders pleaded guilty to first-degree rape and first-degree sodomy. He reserved for appeal the issue of the denial of his motion to dismiss on speedy-trial grounds. He was sentenced to 40 years' imprisonment for each conviction, and those sentences were ordered to run concurrently. Thereafter, Sanders filed a timely notice of appeal.

Discussion

On appeal, Sanders argues that the circuit court erred in denying his motion to dismiss on speedy-trial grounds. According to Sanders, the more than seven-year delay between his arrest and his second guilty plea was caused by the State's offering him an illegal split sentence. Sanders argues that all four factors announced in the United States Supreme Court's decision in Barker v. Wingo, 407 U.S. 514 (1972), weigh in his favor and that, therefore, his Sixth Amendment right to a speedy trial under the United States Constitution has been violated. We disagree.

Generally, "[w]hether a trial court's denial of a motion to dismiss an indictment was error is reviewed under an abuse-of-discretion standard of review." Burt v. State, 149 So. 3d 1110, 1112 (Ala. Crim. App. 2013) (internal quotation marks and citations omitted). Where, as here, the facts are undisputed, however, "[t]he only question to be decided is a question of law, and our review is therefore de novo." State v. Pylant, 214 So. 3d 392, 394 (Ala. Crim. App. 2016) (internal quotations and citations omitted).

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Alabama Constitution guarantees the same. See Art. I, § 6, Ala. Const. 1901. In determining whether a defendant has been denied his or her constitutional right to a speedy trial, this Court applies the test established in the United States Supreme Court's decision, Barker v. Wingo, supra. See, e.g., Pylant, 214 So. 3d at 394. In Barker, the Court set out the following four factors to be weighed when determining whether an accused has been denied his constitutional right to a speedy trial: (1) the length of the delay; (2) the reasons for

the delay; (3) the accused's assertion of his right to a speedy trial; and (4) the degree of prejudice suffered by the accused due to the delay. In Ex parte Walker, 928 So. 2d 259, 263 (Ala. 2005), the Alabama Supreme Court stated:

> "'A single factor is not necessarily determinative, because this is a "balancing test, in which the conduct of both the prosecution and the defense are weighed."' Ex parte Clopton, 656 So. 2d [1243] at 1245 [(Ala. 1985)] (quoting Barker [v. Wingo], 407 U.S. [514] at 530 [(1982)]). We examine each factor in turn."

With these principles in mind, we analyze Sanders's speedy-trial claim.

1. Length of Delay

Sanders argues that the length of delay in this case was presumptively prejudicial. (Sanders's brief, pp. 10-11.) Typically, "'[t]he length of delay is measured from the date of the indictment or the date of the issuance of an arrest warrant--whichever is earlier--to the date of the trial.'" Ex parte Walker, 928 So. 2d at 264 (quoting Roberson v. State, 864 So. 2d 379, 394 (Ala. Crim. App. 2002)). As noted above, Sanders urges this Court to consider the more than seven years that elapsed from his initial arrest in September 2010 until the entry of his second guilty plea in February 2018. When

evaluating a speedy-trial claim in the context of a guilty-plea conviction that is subsequently reversed, however, this Court has measured the length of delay in different ways, depending on the circumstances in the case.

For example, in State v. Clay, 577 So. 2d 561 (Ala. Cr. App. 1991), Mary Louise Clay had pleaded guilty to first-degree theft of services but, as a result of an appeal, was later permitted to withdraw her guilty plea. Her case was returned to active status, and, approximately one month later, the circuit court dismissed her case on speedy-trial grounds. This Court, however, reversed that dismissal.

In holding that Clay had not been denied a speedy trial, this Court noted: "While it appears that the trial judge considered the entire time period from the indictment until the day he dismissed the case as the relevant time frame, this is not the correct way to determine the length of delay with regard to the speedy trial right." 577 So. 2d at 563. This Court then divided the time from the date of the indictment until the date of the dismissal into the following four periods for the purposes of analyzing whether the delay during any particular period was presumptively prejudicial: (1) the

time from the indictment until Clay entered her guilty plea; (2) the time from the entry of her guilty plea until Clay was sentenced; (3) the time between the notice of appeal until the date the final judgment of remand, reversing Clay's conviction, was issued; and (4) the time the final judgment of remand was issued until the case was dismissed. This Court held that the delay in each of those periods was not presumptively prejudicial.

In Nickerson v. State, 629 So. 2d 60, 63 (Ala. Crim. App. 1993), this Court further stated:

> "'The time between a conviction and a reversal which requires retrial is clearly not counted for speedy trial purposes. See United States v. Ewell, 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966).' United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982), cert. denied, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed.2d 286 (1982). Other states that base their analysis of the speedy trial issue in situation on the constitutional standards set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), also begin the period on the date of reversal, where appellate action requires the retrial. State v. Ferguson, 576 So. 2d 1252 (Miss. 1991)."

For the purposes of addressing the issue presented here, only the fourth time period considered in Clay is relevant. That period begins with the "'action occasioning the

retrial.'" Nickerson, 629 So. 2d at 63 (quoting United States v. Rivera, 844 F.2d 916, 919 (2d Cir. 1988)).

In Sanders's case, the "action requir[ing] a retrial" occurred, at the earliest, on April 20, 2017, when this Court issued its second remand order in Sanders's appeal of his probation revocation. The April 20, 2017, remand order of this Court resulted in the circuit court's permitting Sanders to withdraw his first guilty plea. Sanders subsequently pleaded guilty on February 15, 2018. Thus, the relevant time period in this case is the approximately 10-month delay between April 20, 2017, and February 15, 2018. Such a short period is not presumptively prejudicial. See, e.g., Ex parte Walker, 928 So. 2d 259, 265 (Ala. 2005) (recognizing that federal cases that generally hold that a delay of approximately one year or more is presumptively prejudicial). Accordingly, no further analysis of the Barker factors is required in this case. Even so, given the unique nature of Sanders's case, we have provided a brief analysis of each of the remaining Barker factors.

2. Reasons for the Delay

Sanders contends that the State's own negligence created undue delay in this case. (Sanders's brief, pp. 11-14.) Specifically, he argues that the State's failure to recognize that his initial plea agreement offered an illegal split sentence constituted negligent delay. Id.

The Alabama Supreme Court has stated:

> "Courts assign different weight to different reasons for delay. Deliberate delay is 'weighted heavily' against the State. [Barker v. Wingo,] 407 U.S. [514,] 531 [(1982)]. Deliberate delay includes an 'attempt to delay the trial in order to hamper the defense' or '"to gain some tactical advantage over (defendants) or to harass them."' 407 U.S. at 531 & n.32 (quoting United States v. Marion, 404 U.S. 307, 325, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)). Negligent delay is weighted less heavily against the State than is deliberate delay. Barker, 407 U.S. at 531; Ex parte Carrell, 565 So. 2d [104,] 108 [(Ala. 1990)]. Justified delay--which includes such occurrences as missing witnesses or delay for which the defendant is primarily responsible--is not weighted against the State. Barker, 407 U.S. at 531; Zumbado v. State, 615 So. 2d 1223, 1234 (Ala. Crim. App. 1993) ('"Delays occasioned by the defendant or on his behalf are excluded from the length of delay and are heavily counted against the defendant in applying the balancing test of Barker."') (quoting McCallum v. State, 407 So. 2d 865, 868 (Ala. Crim. App. 1981))."

Ex parte Walker, 928 So. 2d at 265. Importantly, "[d]elays occasioned by the defendant or on his behalf are excluded from the length of the delay and are heavily counted against the

defendant in applying the balancing test of Barker." Morris v. State, 60 So. 3d 326, 354 (Ala. Crim. App. 2010) (internal quotation marks and citations omitted)(emphasis added).

Sanders's argument regarding the reasons for the delay focuses on the more than seven-year period from the time of his initial arrest until the entry of his second guilty plea. As noted above in our discussion of the first Barker factor, however, the relevant period for this analysis is approximately 10 months--from our remand of his case for the second time on April 20, 2017, until Sanders entered his second guilty plea on February 15, 2018. The record does not indicate the reason for the delay during that period, and this factor does not weigh in Sanders's favor.

Moreover, even if we were to accept Sanders's position that the length of delay was more than seven years, the delays during that time were just as attributable to Sanders as they were to the State. Sanders pleaded guilty and accepted the plea agreement with the illegal split sentence. He then served his five-year split sentence and was placed on probation in November 2015. In May 2016, his probation was revoked after the circuit court found that he had violated the terms of his

probation, and Sanders appealed that revocation. After this Court remanded his case to determine if his split sentence was illegal and if his guilty plea was based on his belief that he would receive that illegal sentence, Sanders withdrew his guilty plea. Thus, because the reasons for the "delay" in his case are at least as attributable to him as they are to the State, this factor does not weigh in his favor.

3. Assertion of Right to a Speedy Trial

Sanders argues that he asserted his right to a speedy trial "as soon as it was realized that the original split sentence was illegal." (Sanders's brief, p. 14.) Thus, Sanders says, "there has been no delay on behalf of Mr. Sanders in asserting his right." Id.

This Court has previously stated:

> "[C]ourts applying the Barker factors are to consider in the weighing process whether and when the accused asserts the right to a speedy trial, [Barker,] 407 U.S. at 528–29, 92 S. Ct. 2182, and not every assertion of the right to a speedy trial is weighted equally. Compare Kelley v. State, 568 So. 2d 405, 410 (Ala. Crim. App. 1990)('Repeated requests for a speedy trial weigh heavily in favor of an accused.'), with Clancy v. State, 886 So. 2d 166, 172 (Ala. Crim. App. 2003) (weighting third factor against an accused who asserted his right to a speedy trial two weeks before trial, and stating: '"The fact that the appellant did not assert his right to a speedy trial sooner 'tends to suggest

> that he either acquiesced in the delays or suffered only minimal prejudice prior to that date.'"')(quoting Benefield v. State, 726 So. 2d 286, 291 (Ala. Crim. App. 1997), additional citations omitted), and Brown v. State, 392 So. 2d 1248, 1254 (Ala. Crim. App. 1980)(no speedy-trial violation where defendant asserted his right to a speedy trial three days before trial)."'"

State v. Jones, 35 So. 3d 644, 654 (Ala. Crim. App. 2009)(quoting Ex parte Walker, 928 So. 2d at 265–66).

In the present case, the record shows that Sanders asserted his right to a speedy trial in his motion to dismiss the charges against him on May 16, 2017. That motion was addressed by the circuit court and denied approximately two months later. This factor does not weigh in Sanders's favor.

4. Prejudice to Defendant

Finally, Sanders contends that he has been unduly prejudiced as a result of the "negligent" delay he says was caused by the State's unlawful plea agreement in 2012. (Sanders's brief, pp. 15-17.) Citing the types of harm that can result from the delay of a defendant's trial found in Barker, supra, Sanders specifically contends that this final factor weighs in his favor because, he says, this delay has resulted in his oppressive pretrial incarceration, has caused him significant anxiety and distress, and has likely resulted

in witnesses' memories fading and loss of exculpatory evidence. Id.

In Ex parte Walker, 928 So. 2d 259, 267-68 (Ala. 2005), the Alabama Supreme Court wrote:

> "The United States Supreme Court has recognized three types of harm that may result from depriving a defendant of the right to a speedy trial: '"oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence.' Doggett [v. United States], 505 U.S. [647,] 654, 112 S. Ct. 2686 [(1992)] (quoting Barker [v. Wingo], 407 U.S. [514,] 532, 92 S. Ct. 2182 [(1972)], and citing Smith v. Hooey, 393 U.S. 374, 377-79, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969); United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966)). 'Of these forms of prejudice, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."' 505 U.S. at 654, 112 S. Ct. 2686 (quoting Barker, 407 U.S. at 532, 92 S. Ct. 2182)."

Sanders contends that all three of the harms listed by the Barker Court are present here. In his appellate brief, however, Sanders fails to demonstrate how all three of those harms existed in his case during the periods discussed above, and nothing in the record supports his contention. Because Sanders failed to establish that he suffered prejudice during

any of the periods relevant in this case, this factor does not weigh in his favor.

Conclusion

Applying the factors set out by the United States Supreme Court in Barker, supra, we cannot say that Sanders was denied his constitutional right to a speedy trial. Accordingly, he is not entitled to relief on this claim, and the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Welch, Kellum, and Burke, JJ., concur. Windom, P.J., concurs in the result , with opinion.

WINDOM, Presiding Judge, concurring in the result.

The majority correctly recognizes that the relevant period for an analysis of Sanders's speedy-trial claim should begin with the "'action occasioning the retrial.'" Nickerson v. State, 629 So. 2d 60, 63 (Ala. Crim. App. 1993) (quoting United States v. Rivera, 844 F.2d 916, 919 (2d Cir. 1988)). However, I respectfully disagree with the majority's statement that the action occasioning a retrial in this case could have occurred as early as "April 20, 2017, when this Court issued its second remand order in Sanders's appeal of his probation revocation." In its order issued on April 20, 2017, this Court did not mandate that the circuit court allow Sanders to withdraw his plea. On the contrary, this Court ordered "the circuit court to determine if Sanders had entered his guilty plea based on his belief that he would receive a split sentence," and was thus entitled to withdraw his guilty plea if he desired. Consequently, "it was not the appellate court's remand that constituted the action requiring retrial and triggered the beginning of that period for speedy trial purposes, but rather the trial court's determination [that Sanders was entitled to withdraw his guilty plea]."

Nickerson, 629 So. 2d at 63. The circuit court granted Sanders relief on May 2, 2017. Therefore, I believe the relevant period for an analysis of Sanders's speedy-trial claim should begin on that date.

For the foregoing reasons, I respectfully concur in the result.