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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/25/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0821
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JAMAL SHAREEF BRADLEY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-142931-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

Theresa M. Armendarez, P.L.C. Phoenix
By Theresa M. Armendarez
Attorney for Appellant

B R O W N, Judge

¶1 Jamal Shareef Bradley appeals from his convictions and sentences for three counts of child abuse, two counts of sexual conduct with a minor, six counts of kidnapping, one count of

sexual abuse, one count of attempted molestation of a child, and three counts of molestation of a child. For the following reasons, we affirm.

BACKGROUND

¶12 In July 2007, Bradley was indicted on eighteen felony counts for offenses allegedly committed against his girlfriend and her five children between July 2000 and September 2001. On June 29, 2009, Bradley moved to dismiss based on pre-indictment delay, contending that the delay violated his rights under both the United States and Arizona Constitutions. Bradley pointed to the State's delay in waiting until 2007 to file charges relating to two child abuse offenses that were part of a 2001 police investigation, as well as the State's delay in filing the remaining charges, the basis for which arose from subsequent police investigations occurring in 2004. He further contended that the State waited between three and six years to indict him and that it did so to gain an advantage over him. Following oral argument, the court denied the motion without explanation.

¶13 An eleven-day jury trial commenced on July 23, 2009. The jury acquitted Bradley of two counts of child abuse, but found him guilty of all remaining charges. The trial court sentenced Bradley to two consecutive life terms, without the possibility of parole for thirty-five years on the sexual misconduct convictions, and imposed presumptive, consecutive

terms of imprisonment on the remaining counts. Bradley timely appealed.

DISCUSSION

¶4 Bradley argues that (1) the trial court erred in denying his motion to dismiss for pre-indictment delay, and (2) his rights to a speedy trial were violated under both the state and federal constitutions.

I. Pre-Indictment Delay

¶5 Independent of the Speedy Trial Clause of the Sixth Amendment, the Due Process Clause has a "limited role to play in protecting against oppressive [pre-indictment] delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977). To prevail on such a claim, a defendant must show (1) intentional delay by the prosecution to obtain a tactical advantage, and (2) actual and substantial prejudice as a result of the delay. *State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384 (App. 1997). We review the court's denial of a motion to dismiss for an abuse of discretion. *Id.* at 460, 937 P.2d at 382.

A. Intentional Delay to Gain a Tactical Advantage

¶6 Bradley argues that the delay in filing "old unsubstantiated charges" was "a tactical decision by the State and not due to a lack of manpower or priorities in investigations." We disagree.

¶17 Prosecutors are under no duty to file charges if they are not satisfied that they will be able to establish a suspect's guilt beyond a reasonable doubt. *Lovasco*, 431 U.S. at 791. As such, investigative delay, as distinguished from intentional tactical delay, does not violate due process. *Lemming*, 188 Ariz. at 462, 937 P.2d at 384.

¶18 Bradley fails to point to any evidence in the record supporting his contention that the prosecution in this case intended to obtain a tactical advantage by waiting to file criminal charges against him. Rather, Bradley simply makes a general assertion that "the six-year delay . . . was a tactical decision by the state."

¶19 In 2001, officers investigated child abuse allegations against Bradley after family members discovered bruising on three of the victims. According to Bradley's motion to dismiss, a police report from the 2001 investigation indicated "[t]here is little likelihood of successful criminal prosecution" and "CPS intervention [is believed to be] in the best interest of the family." When allegations of sexual abuse were made in 2003, an investigating officer was unable to obtain cooperation from the victims despite numerous attempts to contact them via telephone and the postal service. It was not until February, 2004 that Bradley's girlfriend responded to the officer's interview requests and a forensic interview specialist conducted

an interview with both Bradley's girlfriend and one of the minor victims. A few days later, officers conducted forensic interviews with the remaining victims. As a result of the information obtained in the interviews, officers attempted to interview Bradley, but were unable to locate him until July 3, 2007. After questioning Bradley, the State promptly indicted him.

¶10 Based on this record, there is no support for Bradley's contention that the prosecution intentionally delayed filing the indictment. Instead, the record shows that much of the evidence was not gathered until 2004, after which police investigators determined they wanted to locate and interview the Bradley prior to seeking prosecution. Bradley does not direct us to any evidence in the record supporting the notion that the State delayed bringing charges for the purpose of harassment or to gain a strategic advantage. Therefore, the trial court did not abuse its discretion in denying his motion to dismiss for pre-indictment delay. See *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996) (recognizing that "[a]bsent proof of an intentional delay for strategic or harassment purposes, . . . [a] claim [of pre-indictment delay] must fail").

B. Actual and Substantial Prejudice

¶11 Even if Bradley established intentional delay, he has failed to show the requisite prejudice. A defendant has a

"heavy burden to prove that pre-indictment delay caused actual prejudice; the proof must be definite and not speculative." *State v. Broughton*, 156 Ariz. 394, 397-98, 752 P.2d 483, 486-87 (1988). To make a showing of prejudice, "it is not enough to show the mere passage of time nor to offer some suggestion of speculative harm; rather the defendant must present concrete evidence showing material harm." *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996) (internal citation and quotation omitted).

¶12 Bradley argues that he suffered actual prejudice because he was unable to call witnesses due to his lack of memory of his whereabouts at the time of the alleged offenses. But his general assertion is insufficient to show actual and substantial prejudice because it is purely speculative. Bradley has not suggested which witnesses he may have called or what the nature of their testimony would have been, nor has he alleged the existence of any concrete evidence tending to show material harm caused by the State's delay. See *State v. Everidge*, 188 Ariz. 46, 47, 932 P.2d 802, 803 (App. 1996) ("The mere claim that a possible witness might have been found is nothing more than speculation."); *State v. Torres*, 116 Ariz. 377, 379, 569 P.2d 807, 809 (1977) (defendant did not establish substantial prejudice when she failed to show how an unavailable eyewitness

would have aided in defense). Therefore, the trial court did not abuse its discretion in denying Bradley's motion to dismiss.

II. Constitutional Right to a Speedy Trial

¶13 Bradley also argues that the post-indictment delay violated his state and federal constitutional rights to a speedy trial. However, he failed to raise this issue before the trial court and therefore has forfeited review, absent fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under this standard of review, a defendant must establish that: (1) error occurred; (2) the error is fundamental; and (3) the error caused the defendant prejudice. *Id.* at 568, ¶¶ 23-26, 115 P.3d at 608. Error is fundamental if it "goes to the foundation of [the] case, takes away a right that is essential to [the] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Id.* at ¶ 24. Evidence required to prove prejudice "varies, depending upon the type of error that occurred and the facts of a particular case." *Id.* at ¶ 26.

¶14 Provisions in the United States and Arizona Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. Neither provision, however, requires that the trial be held within a specific time period. *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). We apply the following factors to determine

whether post-indictment delay requires reversal: (1) length of the delay; (2) reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). None of these factors have "talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.* at 533. However, in weighing the factors, length of the delay is the least important and prejudice to the defendant is the most significant. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71.

¶15 Speedy trial rights are calculated from the date defendant is charged by indictment. *McCutcheon v. Superior Ct.*, 150 Ariz. 312, 316, 723 P.2d 661, 665 (1986). As the post-indictment delay approaches one year, the delay is "presumptively prejudicial" and therefore triggers a speedy trial analysis. *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992). However, constitutional speedy trial protections apply only to delay caused by the State, not "delay . . . attributable to the defendant." *Barker*, 407 U.S. at 529; see *State v. Burkett*, 179 Ariz. 109, 115, 876 P.2d 1144, 1150 (App. 1993).

¶16 Here, Bradley was indicted on July 13, 2007, and trial began on July 23, 2009. Thus, because the delay was a little more than two years, it is presumptively prejudicial, triggering a speedy trial analysis under *Barker*. Although the delay Bradley experienced was substantial, Bradley was

responsible for nearly half of it.¹ Delays occurred on four separate occasions due to defendant's motions to continue and trial was rescheduled twice due to defense counsel's withdrawals from the case. Moreover, although Bradley asserted his right to a speedy trial eight months after indictment, he subsequently requested four continuances. See *Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271 (finding no speedy trial violation where, *inter alia*, defendant moved to continue trial after asserting his speedy trial rights).

¶17 Bradley argues he was prejudiced by the delay because he was unable to accurately recall his "whereabouts at the time

¹ The delay attributable to Bradley is as follows: after defense counsel filed a motion to withdraw, the court vacated the February 5, 2008, trial date and rescheduled trial for April 1, 2008. When Bradley filed a motion to continue, the trial court rescheduled the trial date from August 4, 2008, to October 1, 2008. The trial court subsequently extended the trial date from October 1 to November 5, 2008, when the State filed a motion to continue, which was joined by the defense. Bradley again filed a motion to continue, resulting in an extension of the trial date from December 11, 2008, to January 5, 2009. After defense counsel filed a motion to withdraw, trial was rescheduled from January 5 to April 6, 2009. The trial date was further delayed from April 6 to July 16, 2009, when defense counsel filed a motion to continue and the State filed a notice of conflicts. Therefore, the delay attributable to Bradley totals 366 days. Moreover, we note that Bradley failed to object to a further delay when the trial court granted the State's motion for complex case designation on March 27, 2008. See *Snyder v. Donato*, 211 Ariz. 117, 124, ¶ 27, 118 P.3d 632, 639 (App. 2005) (explaining that a "complex" case is one that is so complicated that the ordinary time limits for trial must be extended to allow the parties more time to prepare and fully present their case).

of the alleged offenses," and therefore was unable to call appropriate witnesses to support his defense. However, the "possibility of prejudice is not sufficient to support [a defendant's] position that [his] speedy trial rights were violated." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). As explained, *supra* ¶ 11, Bradley's argument is entirely speculative—nothing in the record reveals what witnesses he would have called or how they would have aided in his defense.

¶18 In sum, after weighing each of the *Barker* factors, and in particular the lack of actual prejudice to Bradley, we conclude that his constitutional rights to a speedy trial were not violated. Therefore, the court did not commit any error, much less fundamental error, by failing to *sua sponte* dismiss the charges filed against Bradley.

CONCLUSION

¶19 For the following reasons, we affirm Bradley's convictions and sentences.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DANIEL A. BARKER, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge