DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. STEVEN YARRITO, Appellant.	)	No. 1 CA-CR 10-0205
	)	DEPARTMENT B
	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200900687

The Honorable Mark W. Reeves, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Steven Yarrito ("Defendant") was charged with two counts of sexual conduct with a person under 15 years of age and one

count of contributing to the delinquency of a minor. Defendant moved for dismissal, contending that the delay between his indictment in October 2002 and his arrest in November 2008 violated his Sixth Amendment right to a speedy trial. After briefing and oral argument, the trial court denied the motion. Defendant was tried and convicted. Defendant renews his Sixth Amendment claim on appeal. For the reasons stated herein, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On the evening of March 10, 2002, Defendant invited his 14-year-old cousin "C.H." out for a ride. Together they visited various homes, convenience stores and Defendant's wife's place of work, and during these visits Defendant obtained alcoholic beverages and supplied them to C.H. While C.H. was drunk Defendant had sex with her on two separate occasions.

¶3 Initially, C.H. kept the incident secret because she "felt that maybe I brought it onto myself." She avoided contact with Defendant, which troubled her mother. During this time, C.H. began to suffer from insomnia, started using methamphetamine heavily, and attempted suicide. When her best friend expressed concern about the changes in C.H.'s behavior,

[1] We view the facts in the light most favorable to upholding the verdict. *State v. Garza*, 216 Ariz. 56, 61 n.1, 163 P.3d 1006, 1011 n.1 (2007).

C.H. told her about the incident, and was advised to call the police.

¶4 On June 22, 2002, Yuma Police Officer Laura Scanlan was sent to meet with C.H., who had called to report "a rape." Scanlan interviewed C.H. and obtained a written statement from her. Because the crimes were reported three months after they occurred, there was no useful evidence to collect at C.H.'s residence. The case was later assigned to Yuma Police Detective Debbie Machin.

¶5 Because it was a delayed-reporting case and C.H. was not in danger, the case was given a lower priority than other cases.[2] Machin and C.H. "played phone tag on a couple instances" before finally meeting on July 23, 2002. At that meeting they decided to conduct a confrontation call with Defendant. C.H. made the call that same day, and in it Defendant implicitly admitted to having sex with C.H. After the confrontation call, Machin called four numbers through which C.H. said Defendant could be reached, identifying herself as "Detective Machin" and leaving a message asking that Defendant call her. Defendant did not respond to those messages.

[2] This pre-indictment delay does not implicate the Sixth Amendment right to a speedy trial. *State v. Medina*, 190 Ariz. 418, 421, 949 P.2d 507, 510 (App. 1997).

¶6 Machin did not visit Defendant's address because she was told he had left town. Machin also did not seek to locate the vehicle in which the crimes took place because the description she had for it was inadequate. Machin did not try to obtain the video surveillance tapes from the stores that Defendant and C.H. visited on March 10 because she believed they would have been erased before the police became involved. Nor did Machin contact people who might have corroborated some of the events.

¶7 Defendant was indicted on October 24, 2002, for one count of sexual assault, one count of sexual conduct with a minor, and one count of contributing to the delinquency of a minor. It is undisputed that the police had no idea where Defendant was at that time.[3] Eventually the U.S. Marshals Service began looking for Defendant, and determined that Defendant was using assumed names. Marshals went to arrest Defendant in Las Vegas but found he had moved out the previous day. In late 2007 marshals tracked Defendant to El Paso, Texas, but the record contains no evidence of the police acting on that knowledge for almost a year. Defendant was eventually arrested in El Paso on November

[3] Some of these facts are from the briefs and oral arguments concerning the motion to dismiss. "A trial court is not required to hold an evidentiary hearing" to determine whether the state diligently pursued a defendant, "but may consider the parties' motions containing undisputed facts as well as any evidence presented." *Humble v. Super. Ct. (Reinstein)*, 179 Ariz. 409, 414, 880 P.2d 629, 634 (App. 1993).

18, 2008, and extradited to Arizona on February 5, 2009. Defendant does not contend that there was any undue delay in bringing him to trial after his arrest.

¶8 On May 14, 2009, the state obtained a new indictment charging Defendant with the counts in the original indictment, an additional count of sexual assault and an additional count of sexual conduct with a minor. On May 18, 2009, the state moved to have the case based on the 2002 indictment dismissed without prejudice because of the new indictment. The motion was granted the next day.

¶9 On September 22, 2009, Defendant moved to have the case dismissed with prejudice for violation of his Sixth Amendment right to a speedy trial.[4] Defendant argued that the six-year delay between the indictment and his arrest was due to police negligence, and that he was "severely prejudiced by the delay" because 1) surveillance videos from retail locations mentioned in C.H.'s account no longer existed, 2) witnesses were unlikely to remember pertinent events of that day and 3) timecard records at Defendant's wife's employment had been destroyed. Defendant

[4] Defendant also argued that Ariz. R. Crim. P. 8.2(a)(1) (requiring that a defendant in custody be tried within 150 days of arraignment) had also been violated. Defendant argued that the new indictment was obtained to "avoid the Rule 8 deadline by . . . starting the clock anew." The trial court held that it had allowed the state to amend the indictment and that therefore there was no Rule 8 violation. Defendant does not raise the Rule 8 issue on appeal.

argued that as a result, evidence that might have contradicted C.H.'s testimony or established an alibi was "forever lost."

¶10 The state contended that the police were not negligent, and that as a result Defendant must prove actual, as opposed to speculative, prejudice resulting from the delay, citing *United States v. Corona-Verbera*, 509 F.3d 1105 (9th Cir. 2007). With respect to prejudice, the state contended that the surveillance videos had "most likely" already been taped over at the time the crimes were reported (three months later), that at the time of the report the alleged witnesses were unlikely to remember any pertinent details of the mundane events they witnessed, that the wife's employer's records were not probative of the essential facts of the case, and that the wife was still available to testify about facts that might be pertinent.

¶11 The trial court analyzed the Sixth Amendment claim using the four factors prescribed in *Doggett v. United States*, 505 U.S. 647 (1992). The court considered the first factor, and found the delay was uncommonly long. Regarding the second factor, which concerned whether defendant or the state was responsible for the delay, the court weighed the allegations of each side and found that the police had exercised due diligence. Regarding the third factor, the court found that Defendant had been asserting his right to a speedy trial since his arraignment.

¶12 With respect to the fourth factor, prejudice, the court found that the probative value of the evidence which had been lost was highly speculative. Further, the court found that the video surveillance evidence was already unavailable at the time the crime was reported. As to the records from wife's employer, the court found that no evidence had been adduced to show how or under what condition those records had been kept during the relevant time frame. The court concluded that Defendant had not shown sufficient prejudice, and denied the motion to dismiss.

¶13 Later, the state amended the indictment, dropping the two sexual assault charges. After a six-day jury trial, Defendant was convicted on all the remaining counts. Defendant was sentenced on February 16, 2010, and timely appeals.

DISCUSSION

¶14 We review Defendant's Sixth Amendment speedy-trial claim de novo, but accept the factual determinations of the trial court unless they are clearly erroneous. *United States v. Gregory*, 322 F.3d 1157, 1160 (9th Cir. 2003).

> Neither the United States nor the Arizona Constitution requires that a trial be held within a specified time period. In *Barker v. Wingo*, [407 U.S. 514 (1972)] the Supreme Court established a test by which courts decide whether trial delay warrants reversal. The four-factor *Barker* analysis examines (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) the prejudice to the defendant. In

> weighing these factors, the length of the delay is the least important, while the prejudice to defendant is the most significant.

State v. Spreitz, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997) (internal citations and quotation marks omitted).

¶15 That the length of the delay was uncommonly long and that the defendant has consistently demanded a speedy trial since his arraignment are both undisputed. These two factors could support Defendant's claim that his right to a speedy trial was violated, but neither is dispositive.

I. DILIGENCE BY THE STATE REQUIRES DEFENDANT TO SHOW PREJUDICE.

¶16 A delay can weigh strongly against the state when it is the product of a "deliberate attempt to delay the trial in order to hamper the defense." *Barker*, 407 U.S. at 531. Other "more neutral reason[s]" for state-engendered delay, such as negligence, weigh less heavily against the state. *Id.* A valid reason can justify delay, *id.,* or if the state has diligently pursued the defendant, then the defendant's rights are not violated unless the delay causes specific prejudice. *Doggett*, 505 U.S. at 656. The standard for due diligence "is constant: whether the state took reasonable steps to locate the accused based upon all of the information that it possessed." *Snow v. Super. Ct. (Jarrett)*, 183 Ariz. 320, 324, 903 P.2d 628, 632 (App. 1995).

¶17 Here, shortly after the confrontation call led Defendant to believe that he had impregnated his 14-year-old cousin, the Yuma police asked Defendant's relatives to put him in touch with them. Soon thereafter the police were told that Defendant had moved to San Diego. While this information may have caused the Yuma police to suspend their efforts, the U.S. Marshals Service picked up the pursuit of Defendant, whom they reported was using assumed names. At one point marshals attempted to arrest Defendant in Nevada. In 2007 Defendant was located in Texas, and in 2008 he was arrested and extradited to Arizona.

¶18 The trial court concluded that "under the facts and circumstances," the state had exercised due diligence. We review that conclusion with considerable deference, *Doggett*, 505 U.S. at 652, because "[i]t is not the function of the reviewing court to second-guess what might have been done by police officers in performing their investigative functions." *State v. Gutierrez*, 121 Ariz. 176, 180, 589 P.2d 50, 54 (App. 1978).

¶19 The evidence in the record supports a determination that the state took reasonable steps to apprehend Defendant based on the information it possessed, at least until Defendant was located in Texas in 2007. *See, e.g., Corona-Verbera*, 509 F.3d at 1115 (putting defendant's name in national crime database constituted diligence). The evidence also suggests that Defendant, by absenting himself from Arizona and living under

assumed names, has considerable responsibility for the delay, even if he was unaware of his indictment. *See Gutierrez*, 121 Ariz. at 180, 589 P.2d at 54 (where police sought the defendant through his relatives, the court assumed "that the reason for the failure of the deputies to locate [defendant] . . . was not from any lack of diligence on their part but through the hindrance of appellant or his relatives"); *Humble*, 179 Ariz. at 413, 880 P.2d at 633 (if state has been diligent, a delay caused by defendant's actions is attributable to defendant, even absent a showing of willful avoidance of prosecution). On this record, we agree with the trial court that the state pursued Defendant with due diligence between the indictment and January 2008.

¶20 Defendant also contends that the state was negligent between January 2008, when they were notified of Defendant's presence in El Paso, and November 2008, when he was arrested. The state offers no evidence to rebut this allegation. For purposes of our analysis, we will assume without deciding that the state was negligent during this period and analyze this period separately. *See State v. Burkett*, 179 Ariz. 109, 115, 876 P.2d 1144, 1150 (App. 1993) (analyzing delay that might be attributable to the state separately).

II. PREJUDICE TO DEFENDANT

¶21 Case law addressing the Sixth Amendment right to a speedy trial recognizes three kinds of prejudice that can result from

delay: infringements on liberty arising from formal accusation, anxiety engendered by public accusation, and impairment of the accused's ability to put on a defense at trial. *United States v. Marion*, 404 U.S. 307, 320 (1971). Defendant does not suggest that his liberty was infringed by the indictment before his arrest in November 2008, or that his knowledge of the indictment caused him anxiety. Therefore we need only address whether his ability to put on a defense at trial was impaired.

¶22 Defendant contended below that the delay caused specific prejudice because surveillance tapes from the stores he visited are no longer available, the memories of witnesses at those locations have degraded over time, and that the records of when his wife was working at the restaurant he visited no longer exist. On appeal, Defendant has abandoned these arguments, instead arguing that the seven-year delay alone is so prejudicial as to require dismissal.

¶23 We disagree. "[D]elay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). Therefore, the prejudice arising from excessive delays "cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its

importance increases with the length of the delay." *Doggett*, 505 U.S. at 655-56 (internal citation omitted).

¶24 For the period before January 2008, the state acted with due diligence -- especially in view of Defendant's concealment of his whereabouts -- and Defendant has not shown that any specific prejudice arose; therefore Defendant's right to a speedy trial was not violated during that time. *Doggett*, 505 U.S. at 656. As to the 11-month delay after January 2008, even if the state was negligent during this time, the delay was insufficient to obviate the need to show prejudice. *See McCutcheon v. Super. Ct. (Meehan)*, 150 Ariz. 312, 316, 723 P.2d 661, 665 (1986) ("The sixth amendment right to a speedy trial arises when a person becomes accused. . . . by either formal indictment, information, or actual restraint imposed by arrest or holding to answer."). *See also State v. Wassenaar*, 215 Ariz. 565, 572, ¶ 20, 161 P.3d 608, 615 (App. 2007) (no violation of speedy-trial right where no prejudice shown, even if one-year delay was assumed to be improper). The record here shows that no prejudice to Defendant arose during this time. The videotapes and records Defendant points to had been destroyed years before, and Defendant offers no reason to believe that witnesses were any less available or any less reliable after six years than they were after five. Therefore his right to a

speedy trial was not violated by any delay that occurred after January 2008.

CONCLUSION

¶25 We conclude that Defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution was not violated before or after the state learned of his location in January 2008. We therefore affirm.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
Daniel A. Barker, Judge

/s/
_____
Patricia K. Norris, Judge