DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-1025
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOE MICHAEL RODRIGUEZ,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20010935

The Honorable William T. Kiger, Judge (Retired)

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
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T I M M E R, Presiding Judge

BACKGROUND

¶1 On November 19, 2000, at approximately 12:15 a.m., Prescott Valley Police Detective Danny Oen stopped Appellant Joe Rodriguez because of a broken taillight on his vehicle. When Oen asked Rodriguez for identification, driver's license, registration, and proof of insurance, Rodriguez was only able to produce an identification card. Upon further investigation, Oen discovered that Rodriguez's license had been suspended. Oen also detected an odor of alcohol. When asked, Rodriguez admitted to consuming beer earlier in the night. After conducting a series of field sobriety tests, Oen arrested Rodriguez for driving under the influence and brought him to the Prescott Valley Police Department for processing.

¶2 Once at the police station, Rodriguez refused to participate in any further testing. Oen then obtained a telephonic search warrant enabling him to conduct a blood test on Rodriguez. The results later indicated Rodriguez's blood alcohol concentration was .14 percent. Prescott Valley Police released Rodriguez from custody without charge.

¶3 On December 12, 2001, the State indicted Rodriguez on two counts of aggravated driving while under the influence with a suspended or revoked license (1) impaired to the slightest degree and (2) with an alcohol concentration of 0.10 or more within two hours of driving the vehicle. On December 14,

Sheriff George Buchanan attempted to serve Rodriguez with a summons at his listed Prescott address, but the residence was empty. On December 18, Sheriff Buchanan filed an affidavit of non-service, declaring that he had exercised due diligence in attempting to serve Rodriguez but was ultimately unsuccessful. Arraignment was scheduled for December 24, but Rodriguez did not attend, and the court issued a warrant for his arrest.

¶4 Five and a half years later on June 13, 2007, Rodriguez was arrested in Santa Cruz County on the warrant. The next day, he was arraigned in Yavapai County Superior Court via teleconference and released on bond. On the date of trial, January 16, 2008, Rodriguez did not appear, nor did he apprise his attorney of his planned absence. The trial court concluded Rodriguez had personal knowledge of the trial, and that he voluntarily decided not to attend. Thus, trial was conducted in absentia. During jury deliberation, the trial court found that Rodriguez had two prior historical felony convictions for aggravated DUI and was also on parole at the time of his arrest. The jury returned a guilty verdict for both counts of aggravated driving while under the influence, and a warrant was issued for Rodriguez's arrest.

¶5 On November 25, Rodriguez was arrested on the warrant. Rodriguez was sentenced on December 22 to two concurrent, presumptive ten-year prison terms for both counts. Almost two

years later, on November 29, 2010, pursuant to Arizona Rule of Criminal Procedure ("Rule") 32.1(f), the court granted Rodriguez's request to file a delayed notice of appeal. On December 16, Rodriguez filed his delayed notice of appeal challenging both his convictions and sentences.

DISCUSSION

¶6 Rodriguez argues the trial erred by failing to sua sponte dismiss the indictment because (1) the State violated his procedural right to a speedy trial pursuant to Rule 8.2 and (2) the delay in bringing his case to trial violated his state and federal constitutional rights to a speedy trial. Because Rodriguez failed to raise these arguments to the trial court, he has waived them absent fundamental error. *State v. Schaff*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). To gain relief, Rodriguez must prove error occurred, the error was fundamental, and he was prejudiced by the error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26, 115 P.3d 601, 608 (2005). Error is considered fundamental if it reaches the foundation of the defendant's case or removes an essential right to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982). With these principles in mind, we consider Rodriguez's arguments.

I. Rule 8.2(a) violation

¶7 At the time of Rodriguez's indictment,[1] Rule 8.2(a) (1998) (amended 2002) provided:

> Every person against whom an indictment, information or complaint is filed shall be tried by the court having jurisdiction of the offense within 150 days of the arrest or service of summons under Rule 3.1 except for those excluded periods set forth in Rule 8.4 below.

Among the Rule 8.4(a) exclusions are "[d]elays occasioned by or on behalf of the defendant, including . . . the defendant's absence or incompetence, or his or her inability to be arrested or taken into custody in Arizona." Ariz. R. Crim. P. 8.4(a).

¶8 Rodriguez argues the State violated the Rule 8.2(a) 150-day time limit and the Rule 8.4(a) exclusion did not apply because the State failed to exercise due diligence in attempting to serve him with the summons and indictment. *State v. Armstrong*, 160 Ariz. 159, 160, 771 P.2d 889, 890 (App. 1989) (holding that "where delay attributable to inability to serve the defendant is not intentionally occasioned by defendant, the

[1] The version of Rule 8.2 that existed at the time of Rodriguez's indictment was amended on May 31, 2002 to require trial within 150 days of arraignment instead of "arrest or service of summons." *Compare* Rule 8.2(a) (2011), *with* Rule 8.2(a) (1998) (amended 2002). Rodriguez was indicted December 12, 2001, and we therefore apply the former version of the Rule. Rule 8, Application note ("This rule, as amended May 31, 2002, effective Dec. 1, 2002, was applicable to all criminal cases in which the indictment, information or complaint was filed on or after Dec. 1, 2002.").

state must show that it attempted to achieve service with 'due diligence' in order for that time to be excluded . . . ."). We need not address the applicability of the Rule 8.4(a) exclusion, however, because the record does not support the predicate contention that the State violated the Rule 8.2(a) time limits.

¶9 Under Rule 8.2(a) as it existed at the time of Rodriguez's indictment, time is calculated from the time of arrest or service of the summons rather than from the time of the initial arrest without charges or issuance of the indictment. *State v. Acinelli*, 191 Ariz. 66, 69, 952 P.2d 304, 307 (App. 1997) (holding that under version of Rule 8.2(a) rule in effect at time Rodriguez arrested on the warrant, time is calculated from arrest or service of summons); *see also State v. Maldonado*, 92 Ariz. 70, 75-76, 373 P.2d 583, 586 (1962) (construing predecessor version of Rule 8.2(a) and holding time calculated from date accused "held to answer" by a magistrate); *State v. Medina*, 190 Ariz. 418, 421, 949 P.2d 507, 510 (App. 1998) (stating constitutional speedy trial right does not attach at time arrested without charges). Rodriguez's trial commenced 216 days after his arrest on the warrant and arraignment. Fifty-one days after his arrest, at a pretrial conference held August 6, 2007, Rodriguez explicitly waived all Rule 8 time necessary in order to set the trial date for January 16, 2008 and accommodate his attorney's schedule. Rodriguez does not

challenge either the validity of the waiver or the resulting exclusion of time. Consequently, the record does not reflect that the State violated Rule 8.2(a), and the trial court did not err by failing to sua sponte dismiss the indictment.

II. Constitutional right to speedy trial

¶10 Beyond the procedural safeguard of Rule 8, both the Arizona and United States Constitutions guarantee a right to speedy trial. Ariz. Const. art. 2, § 24; U.S. Const. amend. VI. In contrast to Rule 8, neither constitution prescribes a specific time frame for a "speedy trial." Ariz. Const. art. 2, § 24; U.S. Const. amend. VI; *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). Instead, under both constitutions, we apply a balancing test developed by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972), to determine whether a violation occurred. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71. Under *Barker*, a court must inquire "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651 (1992). Prejudice to the defendant is the most important factor, and length of delay is the least important. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71. The time of

delay is measured by the "interval between accusation and trial." *Doggett*, 505 U.S. at 651-52.

¶11 Examining the *Barker* inquiries in turn, we do not discern fundamental error. The six-year delay between Rodriguez's indictment and trial was uncommonly long. But Rodriguez did not assert his speedy trial rights and, as a result, no record was developed regarding who was to blame for the delay, and the trial court made no findings on that issue. *See Barker*, 407 U.S. at 531-32 (stating "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial"); *see also Doggett*, 505 U.S. at 652 (giving "considerable deference" to trial court's findings regarding fault for delay). Although Rodriguez attaches numerous documents to his opening brief in an effort to demonstrate how easy it would have been for the State to find and serve him after his move from the Prescott residence, none of these documents are in the appellate record, and consequently we must disregard them. *State ex rel. Goddard v. W. Union Fin. Servs., Inc.*, 216 Ariz. 361, 365 n.1, ¶ 20, 166 P.3d 916, 920 n.1 (App. 2007) ("In our review we consider only the materials considered by the superior court."). Sheriff Buchanan's return-of-service affidavit is in the record and reflects his avowal that he "made due search and inquiry and exercised due diligence" in attempting to serve Rodriguez. Nothing in the

record contradicts this avowal; to conclude that the Sheriff's "due search and inquiry" constituted only a single attempt to serve Rodriguez at his former residence would be to engage in speculation, which we cannot indulge. Additionally, Rodriguez's failure to raise a speedy trial objection deprived the State of an ability to demonstrate what efforts, if any, it made to locate Rodriguez after issuance of the warrant.

¶12 Finally, although Rodriguez was presumptively prejudiced by the six-year delay, "such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria." *Doggett*, 505 U.S. at 656; *see also id.* (recognizing that if government had pursued defendant with reasonable diligence from indictment to arrest, despite the presumption of prejudice, a speedy trial claim fails absent a showing of specific prejudice); *Snow v. Sup. Court*, 183 Ariz. 320, 325-26, 903 P.2d 628, 633-34 (1995) (distinguishing *Doggett* and deciding that without evidence of actual prejudice, the presumed prejudice of the delay was not enough to warrant relief). As previously explained, *see supra* ¶ 11, the limited evidence in the record supports the State's contention that it acted with due diligence in attempting to serve Rodriguez with the summons. Rodriguez does not argue he suffered actual prejudice, and the record does not reflect such prejudice. The presentation of evidence in this case was not apparently

affected by the passage of time. The State had preserved Rodriguez's blood sample and both the phlebotomist and law enforcement officials were available to testify. DUI cases do not often require the preservation of more "fleeting" evidence involved in other criminal prosecutions, e.g., "fingerprints, footprints, hair samples, and seminal fluid." *State v. Mendoza*, 170 Ariz. 184, 190-91, 823 P.2d 51, 57-58 (1992). As our Supreme Court has noted:

> the dimming over time of witness opinions and observations . . . may actually be less of a problem in DUI cases than in other criminal cases because identification of the defendant is rarely an issue, and DUI trials usually do not involve the questioning of numerous witnesses to piece together events and conversations that occurred over various periods of time.

Id. at 191, 823 P.2d at 58. Lastly, given that Rodriguez was not in custody during the delay, and he was purportedly unaware of his indictment, he did not suffer the "'major evils' against which the Speedy Trial Clause is directed [i.e.,] 'undue and oppressive incarceration' and the 'anxiety and concern accompanying public accusation.'" *Doggett*, 505 U.S. at 659 (Thomas, J., dissenting) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)).

¶13 Because Rodriguez failed to properly invoke his constitutional right to a speedy trial, because he cannot articulate any actual prejudice resulting from the delay, and

because no record exists with which to evaluate such a claim, he fails to meet his burden of establishing fundamental error.

CONCLUSION

¶14 For the foregoing reasons, we affirm Rodriguez's convictions and sentences.

/s/
Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

/s/
Daniel A. Barker, Judge