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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TONY NIXON, Appellant.	2 CA-CR 2011-0344 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101758001

Honorable Terry L. Chandler, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Tony Nixon was convicted after a jury trial of criminal damage in the amount of $10,000 or more. He was sentenced to a minimum term of 1.5 years' imprisonment. On appeal, he contends the trial court abused its discretion by granting the state's motion to dismiss the case without prejudice when the state was not ready to proceed on the eve of trial in his original case. He also contends the court erred in finding extraordinary circumstances that "outweighed" his right to a speedy trial when it later granted the state's motion to continue the trial date over his objection. Finally, he argues the trial court erred by precluding him from introducing certain evidence. For the following reasons, we affirm his conviction and sentence.

Factual and Procedural Background

¶2 Based on the partial destruction of a home he was renting, Nixon was charged with criminal damage in September 2008 in cause number CR20083762. Shortly before his January 2010 trial, the state moved for a continuance based on the absence of the victim, who was a witness in the case. The court denied the state's motion the day before the trial, and the state immediately moved to dismiss the case without prejudice. Nixon did not oppose the motion to dismiss, stating that he believed he had no grounds to ask for dismissal with prejudice at that time but that he would "file a motion" if "something c[ame] through investigation" showing dismissal with prejudice would be warranted. The court granted the motion to dismiss without prejudice "subject to reconsideration at a later date if something is filed." Nixon did not file a motion for reconsideration challenging the dismissal, nor did he file a special action in this court.

¶3 The state filed a new indictment in the instant cause number four months later, bringing the same charge of criminal damage against Nixon. In October 2010, the case was set for a jury trial on March 15, 2011, and Nixon waived the time between October and March for the purposes of his speedy trial rights. At the end of the trial in March 2011, a mistrial was granted both because the jurors could not reach a verdict and because one of them had committed misconduct by conducting independent research. The next day the court reset the trial for April 12, but at a status conference at the end of March, the court granted the state's motion to continue the trial until August, finding extraordinary circumstances existed and the delay would be in the interests of justice. The trial was reset for August 2011, and Nixon was convicted and sentenced as set forth above. This timely appeal followed.

Discussion

Rule 8 Speedy Trial Right[1]

¶4 Nixon argues the initial case should have been dismissed with prejudice because his speedy trial rights were violated. He contends the violation occurred when the state moved to dismiss the initial charge to avoid the application of Rule 8, which requires that defendants be tried within a certain number of days from arraignment in non-capital cases. *See generally* Ariz. R. Crim. P. 8.2(a). He bases his argument on the language of Rule 8.6, which instructs the court to dismiss a case in which the Rule 8 time limits have been violated, together with Rule 16.6(a), Ariz. R. Crim. P., which allows a prosecution to be dismissed so long as "the purpose of the dismissal is not to avoid the

[1]Rules 8.1 through 8.7, Ariz. R. Crim. P., govern speedy trial procedures.

provisions of Rule 8." We generally review a trial court's ruling on a motion to dismiss charges for an abuse of discretion. *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988).

¶5 But as the state correctly observes, we have no jurisdiction over the dismissed first case. "An order of dismissal without prejudice may not be appealed by a defendant." *Duron v. Fleischman*, 156 Ariz. 189, 191, 751 P.2d 39, 41 (App. 1988); *accord State v. Meza*, 203 Ariz. 50, ¶ 18, 50 P.3d 407, 411-12 (App. 2002) (special action, not appeal, proper avenue to challenge motion to dismiss). As we have instructed under analogous circumstances, the "proper method to raise the issue was through a motion for reconsideration or petition for special action" filed in the initial case, "not by a motion to dismiss filed in a different case." *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 23, 154 P.3d 1046, 1054 (App. 2007). If Nixon had properly raised the issue in a timely fashion as to the initial case, "the reviewing court could have provided h[im], if appropriate, the relief Rule 16.6(a) contemplates—denial of the state's motion to dismiss." *Paris-Sheldon*, 214 Ariz. 500, ¶ 24, 154 P.3d at 1054. Because he failed to properly challenge it, we have no jurisdiction to address the dismissal of the first indictment. *See id.* ¶ 20.

¶6 Nixon also argues the trial court erred when it denied his motion to dismiss with prejudice the instant case for a violation of his speedy trial rights. We will not disturb a trial court's ruling on a motion to dismiss for a violation of Rule 8 "unless an appellant demonstrates that the court abused its discretion and that prejudice resulted." *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997). After the indictment

had been refiled, Nixon moved to dismiss the case with prejudice, claiming the state's "delays, dismissal, and ultimate re-filing of the charges in this matter" had violated the rules of criminal procedure. But Nixon's complaint about the delay included the time from when he was first arraigned in 2008. It is well-established in Arizona that the speedy trial clock begins anew when a case is dismissed without prejudice and a new charging document is filed. *State v. Mendoza*, 170 Ariz. 184, 187, 823 P.2d 51, 54 (1992); *accord State v. Pogue*, 113 Ariz. 478, 479, 557 P.2d 163, 164 (1976); *Johnson v. Tucson City Court*, 156 Ariz. 284, 287, 751 P.2d 600, 603 (App. 1988); *State v. Gutierrez*, 121 Ariz. 176, 179, 589 P.2d 50, 53 (App. 1978).

¶7 After the new indictment was filed in this case in May 2010, Nixon was arraigned on July 20, 2010. Because he was out of custody, the state had until January 17, 2011, to try him, unless any time was excluded. *See* Ariz. R. Crim. P. 8.2(a)(2) (requiring trial within 180 days from arraignment for out-of-custody defendants); *see also* Ariz. R. Crim. P. 1.3(a). He conceded below that he waived the time from October 7, 2010, until March 15, 2011, so that his counsel could "schedule a trial date that did not conflict with then-existing trial dates set in other matters." Thus, that time was properly excluded from the 180-day calculation. *See Spreitz*, 190 Ariz. at 137, 945 P.2d at 1268. Accordingly, when Nixon filed his motion to dismiss the case in February 2011, his speedy trial time limits had not been exceeded, and the court did not err in denying the motion.

¶8 Even assuming we were to find a violation, however, Nixon has not shown prejudice, and therefore, cannot prevail on appeal. He has not argued, nor does the

record reveal, that his defense was "harmed by the delay" or that he was "deprived of a fair trial." *State v. Wassenaar*, 215 Ariz. 565, ¶ 16, 161 P.3d 608, 614 (App. 2007). At most, he contends he was inconvenienced by having to travel to Arizona several times from his out-of-state home. Such inconvenience is insufficient to show prejudice necessary to overturn a conviction. *Cf. id.* ¶ 20 (acknowledging anxiety and stress among factors court can consider in determining whether defendant suffered prejudice from trial delay, but alone such factors insufficient to establish prejudice).

Constitutional Right to Speedy Trial

¶9 Nixon also contends his speedy trial right under the United States Constitution was violated. The Sixth Amendment to the United States Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." However, the constitution does not provide a specific time period within which a trial must be held. Indeed, "Rule 8 grants even 'stricter speedy trial rights than those provided by the United States Constitution.'" *Spreitz*, 190 Ariz. at 136, 945 P.2d at 1267; *see State v. Tucker*, 133 Ariz. 304, 308, 651 P.2d 359, 363 (1982).

¶10 Nonetheless, to determine whether a defendant's constitutional rights to a speedy trial have been violated, we apply the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. Those factors are the length of the delay, the reason for the delay, whether the defendant demanded a speedy trial, and the prejudice to the defendant. *Barker*, 407 U.S. at 530-32. Contrary to Nixon's assertion that he need not show prejudice to prevail on this argument because of the length of the delay, the Court in *Barker* expressly stated that "none of the four factors

. . . [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id*. at 533.[2] If anything, "[t]he length of the delay is to some extent a triggering mechanism[; u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id*. at 530.

¶11 Here, the length of the delay, even including the time from the original indictment in September 2008, was not nearly as long as the delays in *Doggett*, *Barker*, or *Spreitz*—some of the cases Nixon relies on here. *See Doggett v. United States*, 505 U.S. 647, 648 (1992) (8.5-year delay); *Barker*, 407 U.S. at 533 (over five-year delay); *Spreitz*, 190 Ariz. at 136, 945 P.2d at 1267 (over five-year delay). However, even a delay of one year has been considered to be significant enough in some cases to trigger the *Barker* inquiry. *Doggett*, 505 U.S. at 652 n.1.

¶12 Nixon argues the reason for the delay—the second *Barker* factor—was the state's negligence in securing the victim's presence for trial. The record does not clearly reveal whether Nixon's characterization of the state's actions is correct. But even assuming the state had been negligent, official negligence "unaccompanied by particularized trial prejudice" is weighed more lightly in the *Barker* analysis than

[2]Nixon appears to contend that the delay in this case was presumptively prejudicial and that he therefore does not have to show actual prejudice. *See Doggett v. United States*, 505 U.S. 647, 652 & n.1, 658 (1992) (8.5-year delay presumptively prejudicial). However, even if we were to so categorize the delay here, "such presumptive prejudice cannot alone carry a Sixth Amendment claim." *Doggett*, 505 U.S. at 656. Rather, the term "presumptive prejudice," as used in this context, "simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett*, 505 U.S. at 652 n.1; *accord Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271.

"negligence demonstrably causing such prejudice." *Doggett*, 505 U.S. at 657; *see also Barker*, 407 U.S. at 531 (listing "negligence or overcrowded courts" as neutral reasons for delay that weigh less heavily against state than deliberate delay).

¶13 The third factor is "[w]hether and how" Nixon asserted his speedy trial rights. *Barker*, 407 U.S. at 531. Although he asserted his rights by filing the motion to dismiss, he did so only after he had already waived the time from October 2010 to March 2011 for speedy trial purposes. He arguably again asserted his rights when he objected to the continuance of his retrial from April 2011 to August 2011, but he never moved to dismiss the prosecution based on a violation of Rule 8 at that time. Thus, Nixon's efforts to assert his speedy trial rights were untimely and incomplete, and this factor does not weigh heavily in his favor.

¶14 Finally, and most importantly, Nixon has not shown he suffered any prejudice from the delay. *See Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71. He was not "subject to prolonged confinement," nor does he contend "that he was unable to fully investigate his case, that he could not adequately prepare for trial, that he was unable to locate evidence or witnesses, that he lost the opportunity to present any evidence or testimony or that he otherwise could not present his entire defense as intended." *Wassenaar*, 215 Ariz. 565, ¶ 20, 161 P.3d at 615. Under such circumstances, we have found no violation of a defendant's constitutional right to a speedy trial. *E.g.*, *id.* Likewise, after weighing the *Barker* factors, we find no violation here.[3]

[3]Although Nixon's motion to dismiss also raised a speedy trial argument under article II, § 24 of the Arizona Constitution, he has abandoned this argument on appeal.

Extraordinary Circumstances

¶15 Nixon argues the trial court erred in finding extraordinary circumstances that outweighed his right to a speedy trial under Rule 8.5(b). That rule provides a court may grant a continuance if "extraordinary circumstances exist and th[e] delay is indispensable to the interests of justice." Ariz. R. Crim. P. 8.5(b). "When it is alleged that the superior court improperly granted a Rule 8 continuance '[w]e will not disturb a ruling on a motion for continuance absent a clear abuse of the trial court's discretion.'" *Snyder v. Donato*, 211 Ariz. 117, ¶ 7, 118 P.3d 632, 634 (App. 2005), *quoting State v. Lukezic*, 143 Ariz. 60, 68, 691 P.2d 1088, 1096 (1984) (alteration in *Snyder*).

> [T]he trial court is the only party in a position to judge the inconvenience of a continuance to the litigants, counsel, witnesses, and the court, and further is the only party in a position to determine whether there are "extraordinary circumstances" warranting a continuance and whether "delay is indispens[a]ble to the interests of justice."

State v. Hein, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983), *quoting* Ariz. R. Crim. P. 8.5(b).

¶16 Nixon's trial ended in mistrial on March 17, 2011, and the court's order was filed the following day. Under Rule 8.2(c), he was to be tried within sixty days after entry of the order declaring a mistrial. After setting the trial for April 12, the parties held a status conference on March 29. At that conference, before Nixon was present by telephone, both parties objected to the trial date of April 12. Nixon's attorney moved the

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See State v. Carver, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). In any event, the analysis under the Arizona Constitution is the same as under the United States Constitution, *see, e.g.*, *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71; therefore, we would find no violation under either document.

court to vacate the trial date of April 12 so that she could further discuss the state's pending plea offer with Nixon. However, when Nixon joined the conference by telephone, he informed the court he had rejected the state's plea offer and was ready to proceed to trial. The state then moved to continue the trial date because the victim was "literally not available" to testify, and the state intended to file a motion to declare him unavailable. If he was declared unavailable, the state explained it would then need the transcript of his testimony from the previous trial. Defense counsel essentially agreed to the continuance, stating she needed "time to get those transcripts together . . . [a]nd also . . . we have other considerations that we need to make on our end."

¶17 Because Nixon's counsel agreed to the continuance requested by the state, we could interpret that agreement as binding on Nixon, thereby preventing him from complaining about this error on appeal. *See Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270 ("[D]elays agreed to by defense counsel are binding on a defendant, even if made without the defendant's consent."); *cf. State v. Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007) (applying invited error doctrine when defense counsel expressly stated he did not object to testimony and believed it admissible under specific provision of evidentiary rules).

¶18 However, even if Nixon effectively objected to the continuance, the trial court did not abuse its discretion in granting it. The court's reasons for granting the continuance were that the state and the defense needed additional time to prepare in light of the victim's unavailability; the court would have to assign the case to another judge if tried in April and not many other judges would be available at that time; and the August

trial date was better for the school schedule of Nixon's children, whom he apparently had removed from school for the first trial.

¶19 Nixon relies on *State v. Heise*, 117 Ariz. 524, 526, 573 P.2d 924, 926 (App. 1977), and *Snyder*, 211 Ariz. 117, n.6, 118 P.3d at 638 n.6, to support his argument that the court abused its discretion in granting a continuance on the record before it. However, in *Heise* we found no extraordinary circumstances for granting a continuance when the sole reason for the witness's unavailability was the prosecutor's failure to timely inform the court of the witness's vacation. 117 Ariz. at 526, 573 P.2d at 926. As stated above, the continuance here was not granted solely on the ground of witness unavailability. Nor was a prosecutorial omission the sole reason for the need for a continuance in this case. *Heise* is distinguishable.

¶20 Nixon relies on *Snyder* for the proposition that "[o]rdinary court calendar congestion is not an acceptable reason for deviating from the ordinary Rule 8 time limits." 211 Ariz. 117, n.6, 118 P.3d at 638 n.6. Again, the court here gave several reasons for the continuance, and court calendar congestion was not the sole reason. We conclude the continuance here was properly granted, the time between March 29 and August 23 was excluded time, and accordingly, there was no violation of Rule 8. *See* Ariz. R. Crim. P. 8.4(e), 8.5(b). Even had there been a Rule 8 violation, however, as stated above, Nixon has not shown or even argued he was prejudiced by that delay. *See State v. Vasko*, 193 Ariz. 142, ¶ 8, 971 P.2d 189, 191 (App. 1998) (to obtain relief from continuance in violation of speedy trial rights, appellant must show prejudice); *see also*

State v. Amarillas, 141 Ariz. 620, 622, 688 P.2d 628, 630 (1984) (appellate court will not disturb ruling on motion for continuance absent showing of prejudice).

Evidence Preclusion

¶21 Finally, Nixon argues the trial court erred by precluding him from "introducing evidence which would have changed the outcome of the trial." We generally review evidentiary rulings for an abuse of discretion. *See State v. Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d 604, 618 (2009). Specifically, Nixon contends he "was denied his fundamental right to call witnesses in his own defense when in a pretrial hearing the Court told him that none of his witnesses could provide testimony relevant to 'what happened during the time frame that's alleged in the indictment.'" He then explains how each proposed witness would have been relevant to the charge against him.

¶22 The state contends "[t]he argument is based on a misreading of the record and should be disregarded." On the morning of the first day of trial, Nixon's counsel informed the court that Nixon wanted to represent himself. When the trial court questioned Nixon about his reasons, Nixon stated, *inter alia*, he had "witnesses that [he] wanted to be here today in trial" and his counsel's "superiors" had "told her not to allow these witnesses to come here to represent [him]." He stated he had wanted police officers and members of the fire department to testify on his behalf about damage that had happened to the house before he was accused of causing it. He also wanted the property manager and former tenants of the house to testify on his behalf.

¶23 After a lengthy discussion about exercising his right to represent himself, the trial court stated, "And some of those witnesses that you say you want to . . . call

. . . they're not relevant to what happened during the time frame that's alleged in the indictment." The court further explained, "I know [your counsel] to be careful. She's had other trials in front of me. I know her to be careful and thoughtful. And she needs to evaluate which witnesses to call, if any, whether to put on any witnesses. The defense doesn't have to put on any witnesses." Nixon eventually rescinded his request to represent himself and agreed to proceed with counsel. His attorney never moved to introduce the evidence on his behalf, and his remarks to the court in the context of discussing his request to represent himself could not have been construed as denying such a motion. *See generally* Ariz. R. Crim. P. 15.2(b)–(d), 15.6(c), (d), 16.1(b), (c) (governing notice of defenses, disclosure of witnesses and evidence, and pretrial motions). Therefore, the trial court never actually precluded the evidence, and this court has no ruling to address.

Disposition

¶24 For the foregoing reasons, Nixon's conviction and sentence are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge