

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY 13 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0283
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JARED LOSEY,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062886

Honorable Deborah Bernini, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 In this appeal from his conviction for possession of equipment for manufacturing a dangerous drug, appellant Jared Losey maintains his conviction should

be reversed based on the state having violated his right to a speedy trial. We disagree and therefore affirm his conviction and sentence.

Background

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In April 2006, after a deputy United States marshal arrested Losey on an arrest warrant for an unrelated federal charge, Losey admitted to him that the vehicle he was driving contained “the ingredients to make methamphetamine.” The deputy marshal contacted Tucson police officers who investigated the incident and interviewed Losey. They did not arrest him, but he was taken into federal custody on unrelated charges. Losey was indicted in August 2006 on state charges of possession of equipment for manufacturing a dangerous drug and manufacturing a dangerous drug, and a warrant was issued for his arrest, with orders to keep the indictment secret pending his apprehension.

¶3 Meanwhile, in July 2007, Losey pled guilty to a federal charge of conspiracy to transport and harbor illegal aliens. He then was in federal custody for three of the next five years. Losey was not arrested or arraigned on the drug-manufacturing charges until March 2011. He first asserted his speedy-trial rights had been violated in February 2012, in a motion to dismiss the charges against him. After a hearing on the matter, the trial court denied the motion. Following a trial in absentia, the court dismissed the manufacturing count pursuant to Rule 20, Ariz. R. Crim. P., and Losey was convicted of the possession count. The court sentenced him to a mitigated, five-year term of imprisonment. This appeal followed.

Discussion

¶4 As the sole issue raised on appeal, Losey argues his “conviction should be reversed because the delay between indictment and arrest prejudiced [him] by preventing the possibility of” his serving the prison term for this offense concurrent to his federal sentence. As he did below, Losey bases his argument primarily on his right to a speedy trial under the Sixth Amendment to the United States Constitution.¹ We review speedy-trial claims 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).

¶5 “Neither the United States nor the Arizona Constitution requires that a trial be held within a specified time period.” *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). But if a delay is more than “customary,” that is, if it “crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay,” a court must determine if that delay has violated a defendant’s speedy-trial rights. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992), quoting *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). To do so courts consider four factors: “(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.” *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270, quoting *State v. Lukezic*, 143 Ariz. 60, 69, 691 P.2d 1088, 1097 (1984). “In weighing these factors, the length of the delay is the least important, while the prejudice to defendant is the most

¹Losey also raised a claim under Rule 8, Ariz. R. Crim. P., and the Arizona Constitution below. He expressly abandons the Rule 8 claim on appeal and makes no separate argument based on the Arizona Constitution. In any event, the state speedy-trial right is essentially coterminous with that provided by the Sixth Amendment. See *State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991).

significant.” *Id.* at 139-40, 945 P.2d at 1270-71. And none of the factors are dispositive; rather, they “must be considered together with such other circumstances as may be relevant.” *Barker*, 407 U.S. at 533.

¶6 The length of delay is measured by the “interval between accusation and trial.”² *Doggett*, 505 U.S. at 651. And courts have generally considered a delay “‘presumptively prejudicial’ at least as it approaches one year.” *Id.* at 652 n.1. But, as an initial matter, such presumptive prejudice “marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.” *Id.* In this case, the delay between Losey’s indictment and his arrest was nearly five years; it thus was sufficient to trigger a *Barker* analysis.

¶7 In terms of evaluating the length of the delay within that analysis, the delay here was a lengthy one. And the weight of the prejudice “compounds over time as the presumption of evidentiary prejudice grows.” *Id.* at 657. In *Barker*, the Supreme Court considered a five-year delay an “extraordinary” one and weighed it against the state. 407 U.S. at 533-34. We likewise conclude the lengthy delay here weighs in favor of a finding of a violation of Losey’s speedy-trial rights.

¶8 In considering the next *Barker* factor—the reason for a delay in arresting a defendant—negligence weighs less heavily against the state than does an intentional delay. *Id.* at 531; *Goodrum v. Quarterman*, 547 F.3d 249, 258 (5th Cir. 2008). And Losey cites nothing in the record here to suggest that the delay was caused by anything

²The delay is thus measured from “the return of an indictment . . . whether or not the return is secret.” *Yucupicio v. Superior Court*, 108 Ariz. 372, 373, 498 P.2d 460, 461 (1972).

other than inaction by the state. Nor was the delay as lengthy as the eight-and-a-half-year delay present in *Doggett*, on which Losey primarily relies in support of his argument that the delay here was sufficiently protracted to require reversal. 505 U.S. at 652. Thus, although the delay here weighs against the state, it does not weigh so heavily as to require reversal independent of the other *Barker* factors.

¶9 We next consider the third factor—“whether the defendant has demanded a speedy trial.” *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. Because the indictment against Losey was kept secret until his arrest, Losey, like *Doggett*, was unaware of the charges against him and therefore was unable to assert his speedy trial rights before his arrest. 505 U.S. at 653. After his arrest, however, *Doggett* apparently moved promptly to dismiss the indictment against him. *Id.* at 650. In contrast, Losey waited until February 2012, nearly a year after his arrest, to assert his speedy-trial rights. “The defendant’s assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” *Barker*, 407 U.S. at 531-32. And, “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.” *Id.* at 532. Although Losey did not entirely fail to assert his right, his significant delay in asserting it weighs against a finding of a violation of his speedy-trial rights.³

³The state argues on appeal that Losey waived his speedy-trial rights by failing to promptly assert them. Indeed, “[t]he right to a speedy trial may, . . . like other constitutionally protected rights, be waived. Generally the right to a speedy trial is waived unless it is promptly asserted.” *State v. Adair*, 106 Ariz. 58, 60, 470 P.2d 671, 673 (1970) (citations omitted). But, as Losey points out in his reply on appeal, the state did not assert this argument below.

¶10 Finally, case law addressing the Sixth Amendment right to a speedy trial recognizes several categories 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). As Losey points out, the United States Supreme Court has recognized that a defendant may suffer undue incarceration before trial even if he or she is already serving a prison term because “the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.” *Smith v. Hooyey*, 393 U.S. 374, 378 (1969).

¶11 In this case, however, the possibility of a concurrent sentence may have been remote. The prosecutor informed the trial court that she would not have agreed to negotiate a plea agreement for a concurrent sentence. And, Rule 26.13, Ariz. R. Crim. P., provides that “[s]eparate sentences of imprisonment imposed on a defendant for 2 or more offenses, whether they are charged in the same indictment or information, shall run consecutively unless the judge expressly directs otherwise.” Thus, although a court may impose a sentence concurrent with a federal sentence, it is under no obligation to do so, *see State v. Prevost*, 118 Ariz. 100, 105, 574 P.2d 1319, 1324 (App. 1977), and in fact the court must affirmatively direct that sentences be concurrent.

¶12 Furthermore, because Losey was unaware of the charges against him, he cannot be said to have suffered anxiety as a result of his indictment. But it is the third type of prejudice—the possibility of damage to a defendant’s ability to present a

defense—that is of most concern. *Barker*, 407 U.S. at 532. The Supreme Court has noted that a defendant who is incarcerated is in even a worse position than someone who is not already confined in relation to his ability to defend himself from the charge: “Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired.” *Smith*, 393 U.S. at 379-80.

¶13 But, as the state points out, in this case Losey has not identified “any aspect of his trial defense that was impaired by the post-indictment delay.” Losey admitted to officers that he possessed materials to produce methamphetamine and such materials were in fact found in his vehicle. The photographs and police reports, as well as Losey’s statements are still available. He has not claimed that there are witnesses who are now unavailable or that any other evidence has deteriorated over time in such a way as to impede his defense. Indeed, “delay 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).

¶14 In this analysis it is the defendant who bears the burden to show more than the possibility of prejudice in order to establish a violation of speedy-trial rights. *Id.*; see also *United States v. Baker*, 63 F.3d 1478, 1497 (9th Cir. 1995) (not examining other *Barker* factors when defendant failed to show prejudice). Losey has shown no more than a possibility of prejudice arising from the potential loss of concurrent sentences. We

consider this showing in conjunction with the remaining *Barker* factors: the least important—the length of delay—weighs in Losey’s favor, the reason for the initial delay weighs in his favor as well, but his failure to assert his rights promptly upon his arrest weighs against him. On balancing these factors, we find no violation of Losey’s right to a speedy trial under the Sixth Amendment of the Constitution.

Disposition

¶15 Losey’s conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge