Cite as 2010 Ark. App. 583

# ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-1386

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| | Opinion Delivered September 8, 2010 |
| EMMETT LEE HILLARD<br>APPELLANT | APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR-08-4438] |
| V. | |
| STATE OF ARKANSAS<br>APPELLEE | HONORABLE WILLARD PROCTOR JR., JUDGE |
| | AFFIRMED |

**WAYMOND M. BROWN, Judge**

Appellant Emmett Hillard was found guilty of delivery of a controlled substance and sentenced to three years' probation. He argues on appeal that the trial court erred by denying his motion to dismiss the charge against him because of prejudicial pre-arrest delay, which occurred between when the warrant was issued for his arrest and his arrest. We affirm.

Hillard was accused of delivering cocaine to undercover officers on June 9, 2006. A warrant for Hillard's arrest was issued on June 28, 2006; however, Hillard was not arrested until October 10, 2008. Hillard filed a motion to dismiss for speedy trial and due process violations on August 13, 2009. Hillard's bench trial took place on August 26, 2009. Hillard moved to have his charges dismissed prior to his trial. Hillard's attorney argued that due to the passage of time, Hillard had no way to defend himself against the charges. The State

responded that Hillard fled from police "whenever they were coming in his direction." The State also contended that Hillard's due process argument was covered by the statute of limitations. The motion was denied, and Hillard proceeded to trial.

Sergeant David Potter testified that he worked for the Pulaski County Sheriff's Department and that he made contact with Hillard on June 9, 2006. According to Potter, he worked in the Narcotics Division at that time as an undercover officer. Potter stated that he and his partner were working the Perkins and Edwards area because of numerous complaints of drug activity. On June 9, 2006, Potter was driving by Hillard's residence located at 14200 Edwards Street when Hillard approached him and asked what did he need. Potter told Hillard he needed a "20, which is street slang for $20 worth of crack cocaine." Potter handed Hillard twenty dollars and Hillard told Potter to "make the block." Potter said that he went around the block once and when he returned, Hillard told him to "make it again." According to Potter, he looked over and saw Hillard sitting in a lawn chair "manipulating a small item in his lap." Potter went around the block again, and when he returned Hillard approached and gave him the drugs. Potter testified that he did not know Hillard's name at the time. Potter also stated that two other men were in the yard with Hillard; however, only Hillard approached the car. Potter said that he was sure that Hillard was the person who gave him the drugs on June 9, 2006. Potter stated that a warrant was issued for Hillard after the crime lab results came back and after Hillard was identified.

Potter testified on cross that he did not know Hillard's height or weight but that he "remembered what he looked like." Potter said that he believed that Hillard's brother was

one of the men in the yard with Hillard on the night of June 9, 2006. According to Potter, Hillard was identified by a known photograph. On re-cross, Potter stated that Sergeant Lett "went and identified the individuals standing in the yard and provided me with their names and dates of birth." According to Potter, he knew that Hillard was the person who sold him the drugs as soon as he saw Hillard's photograph. Potter testified that he had sent numerous deputies to Hillard's residence to serve the warrant. He also stated that he made several attempts to serve the warrant on Hillard both as a narcotics officer and a patrol officer. Potter said that on one occasion, Hillard fled from a vehicle when police stopped it.

Upon questioning by the court, Potter stated that he was very sure that Hillard was the person who sold him the drugs on June 9, 2006.

Chris Harrison testified that he was a chief illicit laboratory chemist with the Arkansas Crime Lab and that the substance submitted to the lab following the June 9, 2006 undercover buy was cocaine.

At the conclusion of the State's case, Hillard renewed his motion to dismiss based on speedy trial and due process grounds. He also moved to dismiss arguing that the State failed to make a prima facie case. The motions were denied, and the defense presented its case.

Hillard testified on his own behalf. He stated that he lived at 14200 Edwards Street and that he had lived there for fifty years with his mother. Hillard said that he cuts grass and does carpentry for a living. According to Hillard, he did not remember the incident testified about. Hillard denied having any injury or accident since June 9, 2006 that would have affected his memory.

On cross, Hillard stated that it was impossible for him to be in his yard on June 9, 2006, and forget about it. According to Hillard, it was not him. Hillard said that he was sure he was not out there because he "don't hang around with them guys like that."

Hillard unsuccessfully renewed his motions for dismissal. He was found guilty of delivery of a controlled substance and was sentenced to three years' probation. This appeal followed.

As an initial matter, Hillard asks this court to adopt a mixed question of law and fact when dealing with this type of due process issue. However, we decline Hillard's invitation to conduct a de novo review of the application of the balancing test used by the lower court in pre-arrest due process cases. We review matters concerning pre-arrest delay under an abuse-of -discretion standard.

Under the Fifth Amendment to the United States Constitution, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" Within the context of criminal matters, the Supreme Court in *United States v. Marion*[1] and *United States v. MacDonald*[2] considered whether this due process requirement would provide a basis for dismissal of charges against a defendant if a pre-arrest delay resulted in actual prejudice. The United States Supreme Court and our courts answered in the affirmative provided the

[1]404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971).

[2]456 U.S. 1, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

defendant has made a showing that the pre-arrest delay caused substantial prejudice to his right to a fair trial and that the delay was done intentionally to gain a tactical advantage over him.[3]

Hillard asserts that he was prejudiced by the delay because he does not remember anything about sitting in his yard with two other individuals and selling cocaine to undercover officers on June 9, 2006. However, he maintains that he was not the person that Sergeant Potter testified had sold him drugs. In *Forgy v. State*[4] this court held that Forgy's denial of having committed robbery along with his testimony that he was unable to establish his whereabouts on the day of the crime due to the passage of time was a sufficient showing of prejudice caused by delay to shift the burden to the State to explain the delay. This case is distinguishable because unlike Forgy, Hillard did not testify that the passage of time prevented him from explaining his whereabouts on June 9, 2006. Instead Hillard's testimony was that he did not commit the crime and he is sure he was not in his yard on that date because he does not hang around with "them guys like that." Thus, Hillard has failed to show any prejudice.

Even if Hillard were able to prove actual prejudice caused by the two-and-one-half-year delay, his argument for reversal would still fail. Hillard maintained at trial that his address has been the same for fifty years; however, Sergeant Potter testified that several attempts had been made to serve the warrant on Hillard at his residence to no avail. The State offered a

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[3]*Coleman v. Lofton*, 289 Ark. 573, 715 S.W.2d 435 (1986). *See also Forgy v. State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985); *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985).

[4]*Supra.*

reason for its delay, and there is no evidence that the State delayed arresting Hillard in order to gain a tactical advantage. Nor is there any evidence that negligence played a role in Hillard's delayed arrest as Hillard contends. Therefore, we affirm the conviction.

Affirmed.

VAUGHT, C.J., and GRUBER, J., agree.