IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM BOO'ZE,	)	
	)	No. 331, 2003
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. ID. No. 0203011805
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: January 12, 2004
Decided: March 25, 2004

Before **BERGER, STEELE**, and **JACOBS**, Justices.

O R D E R

This 25th day of March 2004, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. William Boo'ze appeals jury convictions for multiple offenses relating to a land investment transaction. He seeks review of the trial judge's denial of a motion for acquittal on the offenses relating to the unlawful sale of securities. On appeal he also raises claims of cruel and unusual punishment, speedy trial violation, and unreasonable bail. For the reasons set forth below, we affirm the judgment of the Superior Court.

2. In January 2002, Jean Cordell met Boo'ze, who convinced her that he was an experienced land developer. Boo'ze proposed a transaction in which

Cordell would invest $40,000 (to be paid from cash advances on her credit cards) in land that would be sold in three months for a large profit. She gave Boo'ze a certified check in that amount, which she believed would be used for the down payment on the land.

3. At the meeting to sign the contract on the land, however, Boo'ze took Cordell's check and then handed the realtor a $5,000 check drawn on the account of Boo'ze Investment and Development, Inc.[1] ("BIDI"), to pay the deposit. Boo'ze also gave Cordell a promissory note labeled "Promissory Note Secured by Collateral $40,000," wherein he promised to pay 8.25% interest per-year until maturity. Although the note recited that the BIDI stock securing the promissory note was worth $40,000, in fact, BIDI's assets were less than $40,000 at all relevant times. Boo'ze cashed Cordell's check the same day and deposited $30,000 of the proceeds into his BIDI account. At Boo'ze's request, Cordell also telephoned one of her credit card companies to add Boo'ze as an authorized user on her account.

4. In the following days, Cordell became concerned and asked Boo'ze for her money back. She also demanded payment of $8,000 in unauthorized charges he had made on her credit card. Boo'ze gave Cordell a ten-day post-dated check for $48,000 drawn on his BIDI account. When Cordell attempted to cash

[1] Boo'ze's corporation was re-incorporated in Delaware during the preceding month.

the check, the bank dishonored it because BIDI's accounts had been closed that same morning with a negative balance.

5. Boo'ze was arrested on March 19, 2002 on theft, stock, credit card, and bad check charges relating to Cordell, theft of services offenses relating to vendors from which he purchased services with Cordell's credit card, and issuance of a bad check to George Chamberlain, his landlord. Boo'ze was incarcerated in lieu of eleven million dollars cash bail. Although his bail was later reduced to $78,500, Boo'ze has remained incarcerated since his arrest.

6. Boo'ze's first trial, which began January 28, 2003, ended in a mistrial. A second trial began March 25, 2003 and a jury convicted him of eight of the sixteen charged offenses. On June 13, 2003, Boo'ze was sentenced to fourteen years incarceration followed by one-year work release.

7. Boo'ze raises four claims of error on appeal: (1) the trial court erred by denying his motion for judgment of acquittal on the three unlawful sale of securities charges, (2) the fourteen year period of incarceration violates his Eighth Amendment rights against cruel and unusual punishment, (3) his speedy trial right was violated, and (4) the bail set by the court violated his right against the imposition of excessive bail.

8. We review the denial of a motion for judgment of acquittal to determine "whether any rational trier of fact, viewing the evidence in the light

most favorable to the state, could find a defendant guilty beyond a reasonable doubt."[2]

9. Boo'ze argues that his act of giving a promissory note secured by stock in his company to Cordell did not constitute a "sale" of a "security" under the Delaware Securities Act. But, 6 *Del. C.* § 7302(a)(11) defines a "sale" as "every…contract to sell or disposition of a security or interest in a security for value," and 6 *Del. C.* § 7302(a)(13) defines a "security" as "any note." In addition, the note states that stock in BIDI was "deposited as collateral security for the payment of this note." It is settled law that a pledge of stock as collateral for a loan is a security for the antifraud purposes of the Delaware Securities Act.[3]

10. Boo'ze further argues that under the "family resemblance" test set forth in *Reves v. Ernst & Young,*[4] the note is not "a security" and that fact mandates a judgment of acquittal on the securities charges. The *Reves* analysis begins with the presumption that all notes are securities. If, however, a note bears a strong "family resemblance" to one of six enumerated types of notes, the presumption is overcome and the note will not be deemed a security.[5]

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[2] *Bryson v. State,* 2003 Del. LEXIS 45 at *2-3 (Del. 2003).
[3] *XComp, Inc. v. Ropp,* 2000 Del. Ch. LEXIS 79 (Del. Ch. 2000), *aff'd, XComp, Inc. v. Ropp,* 825 A.2d 239 (Del. 2003), adopting *United States v. Rubin,* 449 U.S. 424 (1989).
[4] 494 U.S. 56, (1990).
[5] These types are a "note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the

11. There are four factors that courts must consider to determine whether a note is a security. The first is the motivation of the reasonable seller and buyer for entering into the transaction. "If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'"[6] Here, Cordell clearly entered into the transaction with the expectation of profit.

12. Second, the court evaluates whether the instrument is one in which there is "common trading for speculation or investment."[7] In this case, the note recited that it was transferable to any third party, which would include a broad spectrum of individuals. In *Reves,* the fact that a note was "offered and sold to a broad segment of the public" was all the United States Supreme Court held was necessary to establish the requisite "common trading" in an instrument.[8]

13. The third factor is the reasonable expectation of the investing public. "The Court will consider instruments to be 'securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used

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ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized)." *Exchange Nat'l Bank v. Touche Ross & Co.,* 544 F.2d 1126 (2d Cir. 1976), cited with approval in *Reves.*

[6] *Reves,* 494 U.S. at 66.

[7] *Id.*

[8] *Id.* at 68.

in that transaction."[9] As stated above, Cordell expected to return a significant profit on her investment; she was not otherwise disposed, or in a position, to make a business loan to BIDI.

14. Fourth, the court must determine "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary."[10] Boo'ze argues that Title 11 of the Delaware Code is an alternative regulatory scheme that makes application of the Securities Act unnecessary in this instance. His argument is misconceived, because the *Reves* court contemplates a regulatory, risk-reduction scheme such as the Federal Deposit Insurance Corporation or ERISA. The criminal code is not designed to regulate the distribution of promissory notes, and therefore is not an alternative regulatory scheme.

15. The promissory note pledging shares of BIDI stock as collateral for the $40,000 Cordell gave to Boo'ze satisfies the criteria listed above. Therefore, the trial judge correctly determined it was "a security," and did not err by denying Boo'ze's motion for judgment of acquittal.

16. This Court reviews the sentence of a defendant in a criminal case under an abuse of discretion standard.[11] Appellate review of a sentence generally

[9] *Id.*
[10] *Id.* at 69.
[11] *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

ends if the sentence falls within the statutory limits prescribed by the legislature.[12] Thus, in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record that a sentence has been imposed on the basis of demonstrably false information or information lacking minimal indicia of reliability.[13] In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.[14]

17. Boo'ze claims that his fourteen-year sentence violates his Eighth Amendment right against cruel and unusual punishment, because his sentence is grossly disproportionate to the crimes committed, even when compared to those sentences handed down under the habitual offender statute.

18. Sentences under the habitual offender statute are unconstitutional if they are grossly disproportionate to the conduct being punished. *Crosby v. State,*[15] established a two-step analysis to determine whether an habitual offender's sentence is grossly disproportionate to the conduct being punished. First, the sentence is compared to the crime committed, and only if that comparison gives rise to an inference of gross disproportionality will the Court then proceed to the

[12] *Mayes v. State,* 604 A.2d at 843.
[13] *Id.*
[14] *Fink* at 790.
[15] 824 A.2d 894 (Del. 2003).

second step: a comparison of the defendant's sentence with similar cases.[16] To date, this test has only been applied to habitual offenders. The State did not petition to have Boo'ze declared an habitual offender pursuant to 11 *Del. C.* § 4214, despite a record of 17 convictions between 1965 and 1998, which included 7 felonies. Boo'ze urges us to apply a disproportionality analysis here.

19. The State argues that absent habitual offender status, "appellate review of sentences is extremely limited."[17] Because the sentence falls within the statutory guidelines, the State asserts, the inquiry should end there, but even if the Court were inclined to review the appropriateness of the sentence, it still was proper. Here, the State argues that the trial judge acted appropriately by exceeding the presumptive sentence on each count because of aggravating factors, namely, (1) the severity of the offense, (2) Boo'ze's status as a probationer, (3) his criminal history of conviction on seventeen sets of offenses from 1965 to 1998, and (4) the fact that his conduct qualified as aggravating circumstances under SENTAC guidelines.[18]

20. Boo'ze was convicted of three securities-related charges, which are classified for sentencing purposes as Nonviolent Felony E. That classification

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[16] *Id.* at 906.
[17] *Mayes v. State*, 604 A.2d 839 (Del. 1992).
[18] These are: Repetitive criminal conduct, need for correctional treatment, undue depreciation of offense, major economic offense or series of offenses, custody status at the time of the offense, and lack of amenability.

carries a statutory range of 0-5 years, with an aggravated presumptive sentence of up to 12 months at level 5.[19] Boo'ze received 2 years at level 5 for each offense, plus one-year level 4 reintegration. Boo'ze was also convicted of two counts of Issuing a Bad Check Over $1,000,[20] Theft of Services Over $1,000,[21] Unlawful Use of Credit Card Over $1,000.[22] Each of these offenses is classified as a Nonviolent Felony G, which carries a statutory range of 0-2 years and an aggravated presumptive sentence of up to 12 months at level 5. Boo'ze was acquitted on the charge of Conspiracy Second Degree.[23]

21. Boo'ze urges that he should have received the aggravated sentence only for the most serious offense. The SENTAC guidelines provide that "[w]hen sentencing on multiple charges, prior criminal history should be considered only in determining sentence for the "lead" or most serious offense. Sentences for other current charges shall be calculated on zero criminal history."[24]

22. A trial judge may impose a sentence outside the presumed sentence if there are "substantial and compelling reasons justifying an exceptional sentence."[25] Here the trial judge acted appropriately within his discretion by relying on the

[19] Appellant erroneously states that the aggravated presumptive sentence is up to 15 months; this was reduced to 12 months effective May 31, 2003; Boo'ze was sentenced on June 13, 2003.
[20] One of these counts was indicted as "Issuing a Bad Check Over $10,000," however, the state provides no statutory authority for the distinction. 11 *Del. C.* § 900(a).
[21] 11 *Del. C.* § 841, 845.
[22] 11 *Del. C.* § 903.
[23] 11 *Del. C.* § 512.
[24] SENTAC Benchbook, 2003-2004 (Jan. 2004) p. 67.
[25] *Id.* at 63.

aggravating factors as "substantial and compelling reasons" that justify sentencing Boo'ze outside the presumptive range.

23. Boo'ze next claims that his right to a speedy trial was violated. The standard of review for a legal determination that a defendant did not establish a violation of his speedy trial right is *de novo.* "[T]he factual underpinnings of these legal conclusions are reviewed for clear error."[26]

24. In Delaware, the four-part *Barker*[27] test applies to determine whether a defendant received a speedy trial. The court evaluates: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial rights, and (4) prejudice to the defendant.[28] If, however, the length of the delay is not presumptively prejudicial, the court will not examine the remaining three factors.[29]

25. Boo'ze's first trial began just over ten months after his arrest, and the case was concluded within one year and fifteen days. The case was a complex financial case that involved one mistrial, which the trial court did not attribute to intentional conduct by the State. A delay of this length might be considered presumptively prejudicial in some circumstances.[30] Accordingly, the remaining factors will be considered.

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[26] *Burkett v. Fulcomer,* 951 F.2d 1431, 1437 (3d Cir. 1991).
[27] *Barker v. Wingo,* 407 U.S. 514, 530 (1972).
[28] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002), citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972).
[29] *Id.*
[30] *Tramill v. State,* 425 A.2d 142 (Del. 1980).

26. The reasons for the delay included a defense request for a continuance in September 2002, the withdrawal of five attorneys representing the defendant due to conflicts, and then two continuances in January 2003 because of the recent appointment of acceptable defense counsel. Where, as here, the reason for the delay is attributable to the defendant, then defendant has waived speedy trial claims for that delay.[31]

27. The next *Barker* factor is the defendant's assertion of his rights. Boo'ze did not assert his speedy trial rights until January 27, 2003, after he had already received the benefit of the delay. Waiting until the day before trial to assert speedy trial rights is at best impermissible and at worst a waiver of this claim.

28. Finally, Boo'ze fails to demonstrate prejudice. He does not claim that any defense witness died or became unavailable because of the delay, or that he was unable to present a defense, or that witness recollections had faded. Minimal prejudice to a defendant weighs against a claim of speedy trial violation.[32] We find none here.

29. A trial judge has discretion to set bail and to modify bail conditions for a defendant charged with noncapital felonies.[33] We review a trial judge's bail

[31] *Id.* at 143-4.
[32] *Barker* at 534.
[33] *See* 11 *Del. C*. ch. 21. *Moxley v. State,* 1995 Del. LEXIS 452 *4-5 (Del. 1995).

determination for abuse of discretion.[34] Here, the trial judge evaluated the statutory factors in setting Boo'ze's bail and properly denied his motion for reduction of bail found in 11 *Del. C.* § 2105:

> (b) In determining whether the accused is likely to appear as required and that there will be no substantial risk to the safety of the community the court shall, on the basis of available information, take into consideration the nature and circumstances of the crime charged, the family ties of the accused, the accused's employment, financial resources, character and mental condition, the length of residence in the community, record of convictions, record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[35]

30. Boo'ze had no residence or address in Delaware at the time of his arrest. He also had a history of non-appearance (from 12/28/98 until 3/14/01 he was on outstanding *capias* status in an unrelated fraud case and had to be extradited to Delaware). In the 1998 case, the victim had lost $30,000 in a nearly identical scheme. Boo'ze had an extensive criminal history and had continued to commit crimes of theft and dishonesty despite periods of incarceration and probation. Finally, the crimes charged constituted a major economic crime; and the crimes against Cordell occurred while Boo'ze was on probation status for a virtually identical crime.

31. Given these factors, the trial judge acted appropriately within his discretion by setting the cash bond at a high level designed to ensure that Boo'ze

[34] *State v. Flowers,* 330 A.2d 146 (Del. 1974).
[35] 11 *Del. C.* § 2105.

would appear for trial. Furthermore, Boo'ze offers no basis for his argument that, had the bail been excessive, it would justify reversal of his convictions. The only prejudice claimed is that "defendant's release from custody was vital to the understanding of those [thousands of] documents and the assistance he could have rendered counsel in preparing for trial." It is difficult to imagine what additional assistance in understanding documents Boo'ze could have provided if released on bail, that he could not have provided while he was incarcerated.

NOW, THEREFORE, IT IS ORDERED, that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

/s/ Myron T. Steele
Justice