

DA 16-0476

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 162N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTY ANN CUMMINGS,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC 15-163
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle, Assistant Appellate
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Karla Painter, Deputy
County Attorney, Missoula, Montana

Submitted on Briefs: June 6, 2018

Decided: July 3, 2018

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Christy Ann Cummings appeals from a judgment of conviction for theft by threat or deception entered by the Fourth Judicial District Court, Missoula County. We affirm.

¶3 In 2008, Cummings applied to receive Section 8 housing assistance from the United States Department of Housing and Urban Development (HUD) in coordination with the Missoula Housing Authority (MHA). The program pays landlords a portion of a qualifying recipient's rental payments. Recipients must obey certain enumerated rules; relevant here, "The family must use the assisted unit for residence by the family. The unit must be the family's only residence." Cummings acknowledged and signed these rules in March 2012, and thereafter the program contributed towards Cummings's rental payments for an apartment she lived in with her child, for whom she had partial custody, on California Street. Later, Cummings added her sister as an additional occupant of the unit.

¶4 Throughout the period relevant to this appeal, Cummings was on probation for an unrelated offense and provided her probation officers with monthly probation reports. The reports asked her to identify her address. In various reports, Cummings listed an

address on Rustic Road, her boyfriend's home, sometimes in conjunction with the California Street address. Probation officers visiting the California Street address several times noted that Cummings, her personal items, her child, and her child's personal items were not there and that it appeared as though only Cummings's sister and sister's boyfriend lived in the apartment.

¶5 In May 2014, Cummings represented to the MHA that she was moving from California Street and began accepting housing assistance for an apartment on Foothills Road. Cummings never listed the Foothills Road address on her probation reports nor did Cummings disclose to the MHA that her boyfriend owns the apartment unit on Foothills Road. Cummings's brother, who is also on probation, listed both the California Street and the Foothills Road addresses in his own monthly probation reports. Cummings's brother reported that no one lived with him in the Foothills Road apartment, but that his other sister (not Cummings) occasionally stayed with him.

¶6 Beginning on June 3, 2014, Cummings served a period of intensive supervision or "house arrest," wherein she wore a GPS tracking device. Cummings served this period at Rustic Road, the only address she listed on several of her preceding monthly probation reports. On June 25, 2014, probation officers visited Cummings at Rustic Road and noted that there were weapons and ammunition on the property. The terms of Cummings's supervision prohibited her from residing on property where weapons or ammunition were located. The probation officers notified her that she either needed to move or that the weapons needed to be removed from the property. Although Cummings

was accepting housing assistance for the Foothills Road apartment, on June 26, 2014, she filed a motion to maintain her residence at Rustic Road despite the presence of weapons. In her motion, Cummings represented that she had been living at Rustic Road for “over 2 years” and that if she were forced to move, she would be homeless. On July 9, 2014, the MHA ceased providing housing assistance to Cummings.

¶7 Thereafter, the State charged Cummings with theft by threat or deception, a felony, for fraudulently accepting housing assistance for apartments she admittedly lived in only part-time and allowing her sister and brother to live in them instead. The MHA provided benefits to Cummings from approximately April 2012 until July 2014. The MHA determined Cummings ceased residing, or never resided, in the California Street apartment and never resided in the Foothills Road apartment and that, because of Cummings’s misrepresentations that she and her child lived only in those residences, it provided assistance of approximately \$18,600 for the California Street apartment and \$2,200 for the Foothills Road apartment. A jury found Cummings guilty of felony theft and the District Court sentenced her as a persistent felony offender to five years of commitment with the Department of Corrections, \$17,787 in restitution, and \$1,778.70 in fees. Cummings appeals.

¶8 First, Cummings argues the State violated her right to a speedy trial and that the District Court erred by denying her motion to dismiss. Speedy trial challenges are analyzed using a four-factor balancing test that considers: (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right; and (4) the prejudice to the

defendant. *State v. Ariegwe*, 2007 MT 204, ¶ 34, 338 Mont. 442, 167 P.3d 815. Under factor one, we first count the length of the delay measured by the interval between accusation (the date the State charged the defendant) and trial (or projected trial date). *Ariegwe*, ¶¶ 37-43. If the interval is less than 200 days, the delay was insufficient and our analysis ends. *Ariegwe*, ¶ 41. If a trial ends in mistrial, the speedy trial clock resets and thereafter begins on the date the court declared mistrial. *Ariegwe*, ¶ 42 n.3 (stating, “[W]hen a mistrial is declared, the speedy trial clock is reset and begins to run from the date of the mistrial”) (quoting *State v. Olmsted*, 1998 MT 301, ¶ 61, 292 Mont. 66, 968 P.2d 1154, *overruled on other grounds by Ariegwe*, ¶ 102 n.9).

¶9 Here, the State charged Cummings by complaint on March 5, 2015. After numerous delays, the District Court tried Cummings on January 7, 2016. That trial ended in mistrial. Cummings and the State stipulated to mistrial and agreed that Cummings’s stipulation would not waive her right to move for dismissal based on a speedy trial violation. On February 1, 2016, Cummings moved to dismiss the State’s proceeding, arguing the State violated her right to a speedy trial. Before ruling on her motion, the District Court tried Cummings again on March 7, 2016, and a jury convicted her. On July 1, 2016, the District Court denied Cummings’s motion to dismiss.

¶10 The State charged Cummings on March 5, 2015, and this date began her speedy trial clock. *See Ariegwe*, ¶ 42. Cummings’s speedy trial clock reset and thereafter began on January 7, 2016, when she stipulated to the declaration of mistrial. *See Ariegwe*, ¶ 42 n.3 (quoting *Olmsted*, ¶ 61). Cummings and the State agreed, however, that

stipulating to a mistrial would not impede her ability to move for dismissal based on a speedy trial violation. It is unfortunate that the parties agreed to a position which is plainly contrary to our precedent. This Court has been clear that when a trial ends in mistrial, the speedy trial clock resets, beginning on the date the court declared mistrial. Here, the District Court tried Cummings on March 7, 2016, or sixty-one days after she stipulated to mistrial. Therefore, the District Court correctly denied Cummings's motion to dismiss because the relevant interval of sixty-one days—beginning January 7, 2016 (mistrial) and ending March 7, 2016 (second trial)—was less than 200 days. *See Ariegwe*, ¶¶ 41-43. Pursuant to our jurisprudence, Cummings cannot demonstrate that the State violated her right to a speedy trial.

¶11 When litigants agree to a position contrary to the law, as here, it places this Court in the untenable position of having to apply our precedent inconsistently to assure inequities do not occur. Accordingly, we will address Cummings's alleged speedy trial violation using the parties' agreed-upon interval of 368 days. In doing so, however, we nonetheless conclude that there was no violation. We consider the remaining speedy trial factors: (2) the reason for the delay; (3) the assertion of the right; and (4) the prejudice to the defendant. *Ariegwe*, ¶ 34. Under the second factor, we recognize the following occurrences delayed Cummings's ultimate trial date: the State first charged Cummings in the Missoula County Justice Court and then re-filed in the District Court; Cummings moved for disqualification of the first judge assigned to this case, Judge Deschamps; Cummings's counsel was out-of-town and unavailable for more than two months;

Cummings moved for substitution of the second judge assigned to this case, Judge Larson; the State's investigator was out-of-town and unavailable for more than three weeks; the State's counsel was out-of-town and unavailable; the January 7, 2015, trial ended in mistrial; and, finally, Cummings's counsel underwent a medical procedure and was unavailable. Under the third factor, Cummings's assertion of her right to a speedy trial was inconsistent and she, at various times, waived her right to a speedy trial and asserted her right to a speedy trial. Finally, under the fourth factor, Cummings was incarcerated for one day; she traveled out-of-state to compete in a body-building competition; there was minimal publicity; and the delay did not limit Cummings's ability to present a defense.

¶12 When we consider and balance the length of the delay, reasons for the delay, Cummings's assertion of her right, and any prejudice Cummings may have suffered during the parties' agreed-upon interval, we conclude that the State did not violate Cummings's right to a speedy trial. It is, given the facts relevant to each of the four factors, unnecessary to conduct a more onerous speedy trial analysis.

¶13 Second, Cummings argues the District Court abused its discretion by instructing the jury on the legal definition of "residence." The District Court gave the jury "Instruction no. 18A," which provided:

Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:

- (1) It is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

(2) There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.

(3) A residence cannot be lost until another is gained.

On appeal, Cummings argues that this instruction, derived from § 1-1-215, MCA, “provided unfair and inapplicable law” to her alleged violation of federal rules—that “The family must use the assisted unit for residence by the family. The unit must be the family’s only residence.”

¶14 District courts have broad discretion to instruct the jury and we review a court’s determinations for an abuse of that discretion. *State v. Reopelle*, 2017 MT 196, ¶ 18, 388 Mont. 271, 399 P.3d 903. Further, the court’s instructions to the jury are presumed correct and the appellant bears the burden of proving they were incorrect. *Reopelle*, ¶ 18. Here, neither the HUD’s rules nor the MHA’s rules provide a definition for “residence.” Cummings initially included a residence instruction largely similar to “Instruction no. 18A” in her proposed jury instructions. Cummings argued her proposed instruction for the definition of “residence” quoted § 1-1-215, MCA, and that “courts apply [that provision in] many circumstances.” Cummings later withdrew that instruction and, when the State proposed a similar one, opposed the State’s instruction. In giving “Instruction no. 18A,” the District Court concluded the instruction accurately reflected the MHA’s rules that require the recipient use the assisted residence as “the family’s only residence.”

¶15 Here, Cummings fails to overcome the presumption that the District Court’s conclusion was correct. The MHA’s rules related to accepting housing assistance clearly

required Cummings to use the assisted unit as her residence. There was substantial evidence supporting the jury's determination that Cummings received the assistance for a unit that she did not use as her residence, let alone her only residence. Furthermore, Cummings must prove that the erroneous jury instruction prejudicially affected her substantial rights. *State v. Reynolds*, 2017 MT 25, ¶ 36, 386 Mont. 267, 389 P.3d 243. Even if we assumed the jury instruction was incorrect, based upon our review of the record, the jury instruction did not prejudice Cummings. Accordingly, the District Court did not abuse its discretion by giving "Instruction no. 18A."

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶17 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ DIRK M. SANDEFUR

/S/ BETH BAKER

/S/ INGRID GUSTAFSON