FILED
08/08/2023
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0435

DA 21-0435

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 153N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD RAY CHERRY,

Defendant and Appellant.

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AUG 08 2023
Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 17-1461
Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Tammy A. Hinderman, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Brett Linneweber, Julie Mees, Deputy County Attorneys, Billings, Montana

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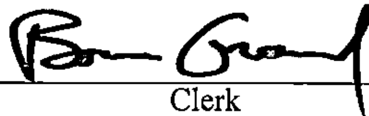
Submitted on Briefs: July 12, 2023

Decided: August 8, 2023

Filed:



Clerk

Justice Jim Rice 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 Donald Ray Cherry appeals from the judgment entered by the Thirteenth Judicial District Court convicting him of deliberate homicide upon his no contest plea. Cherry challenges the District Court's denial of his motion to dismiss for violation of his right to speedy trial, the granting of the State's motion to permit a witness to appear by two-way video, and the amount of credit for time served he was awarded toward his sentence. The State concedes the last issue, agreeing that Cherry should receive an additional nine days of credit.

¶3 Cherry was charged with Count I, Deliberate Homicide; Count II, Tampering with Witnesses and Informants; Count III, Tampering with Witnesses and Informants; Count IV, Intimidation; and Count V, Tampering with or Fabricating Physical Evidence, all felonies. The charges arose out of Cherry's involvement in the assaultive and decapitation killing of victim M.K. at a homeless camp in Billings in October 2017, and his subsequent actions to hinder prosecution of the homicide. Cherry and co-Defendant Jeffrey Haverty met M.K. in a Billings casino and, when M.K. expressed curiosity about homeless living, offered to show M.K. their camp. At the camp, also occupied by Cherry's girlfriend, Z.W.,

Cherry and Haverty attacked M.K. with brass knuckles, a log, and a framing hammer. M.K. lost consciousness, but because he was still breathing, Haverty slit his throat with a hunting knife. Taking the knife, Cherry then cut off M.K.'s head. M.K.'s head and body were discarded near the encampment, where officers later found them wrapped in a carpet and other materials among extensive debris.

¶4 About three weeks later, police responded to the encampment after receiving a citizen tip. Many items were broadly strewn in the area, including decomposing body parts and items containing blood stains. About 100 items were initially collected, and an autopsy was performed on M.K. Ultimately, 225 pieces of evidence were collected from multiple locations, including Haverty's trail hatchet containing blood stains. Recovered receipts led police to the casino, and upon review of surveillance video, police identified Cherry and Haverty drinking with M.K., and the three men leaving together. Cherry and Haverty were both charged in December 2017, and additional charges were filed against Cherry for his attempts to convince Z.W. to change her story. In June 2019, Haverty entered a plea agreement with the State and provided a detailed statement about his and Cherry's involvement in the homicide, and he was listed as a state witness for Cherry's trial. Police recovered two buried knives after Haverty provided their location. In November 2019, Cherry filed a motion to dismiss for lack of speedy trial, when the trial was scheduled for January 24, 2020, which was denied by the District Court. Prior to Cherry's trial, the State moved for leave to provide the testimony of Haverty, then incarcerated at the Montana State Prison (MSP), by two-way video, based upon Haverty's diagnosis of tuberculosis,

which the District Court granted. In September 2020, Cherry entered a no contest plea to the deliberate homicide charge pursuant to a plea agreement whereunder the State moved to dismiss the other charges pending against him, and Cherry reserved the right to appeal pre-trial rulings. The District Court accepted the plea, and sentenced Cherry to 65 years at MSP.

¶5 Cherry appeals, challenging the speedy trial and video testimony rulings.

¶6 This Court reviews a district court's denial of a motion to dismiss for lack of speedy trial to determine whether the district court's factual findings are clearly erroneous. *State v. Ariegwe*, 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815. Findings of fact are clearly erroneous if they are "not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made." *Ariegwe*, ¶ 119. Whether a speedy trial violation exists is a factual issue and question of constitutional law for which our review is de novo.

¶7 The Sixth and Fourteenth Amendments of the U.S. Constitution, and Article II, Section 24 of the Montana Constitution, grant to criminal defendants the right to a speedy trial. *State v. Ariegwe*, 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815. Drawing from the Supreme Court's analysis of the federal constitutional right in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972), we balance four factors to determine if a defendant's right to a speedy trial has been violated under the Montana Constitution: (1) the length of the delay, (2) the reasons for the delay, (3) the accused's

responses to the delay, and (4) prejudice to the accused caused by the delay. *Ariegwe*, ¶ 35. Given the "inherently case-specific nature of speedy trial claims," we weigh the four factors based upon the facts and circumstances of each case. *Ariegwe*, ¶ 105.

¶8 The initial inquiry is whether there has been sufficient delay to require application of the four-factor *Ariegwe* test. In *City of Billings v. Bruce*, 1998 MT 186, ¶ 55, 290 Mont. 148, 965 P.2d 866, this Court established that a lapse of 200 days was the necessary time between accusation and trial to trigger application of the speedy trial analysis. That time is satisfied here, as the total delay was 794 days. Further, under the first factor, the State's burden to justify the delay "increases with the length of delay." *Ariegwe*, ¶ 61 (citation omitted). The time period at issue here exceeds the 200-day threshold by 594 days and, without regard to attribution of fault for the delay, weighs in favor of Cherry's motion.

¶9 Under factor two, each period of delay is identified and attributed to the appropriate party. *Ariegwe*, ¶ 108. We assign a weight to each period of delay based on the cause and motive behind the delay. *State v. Couture*, 2010 MT 201, ¶ 71, 357 Mont. 398, 240 P.3d 987. Delays caused by the State's bad faith weigh heavily against the State whereas delays caused by the State's negligence or lack of diligence weigh against the State but less so. Institutional delays that are "inherent in the criminal justice system and caused by circumstances largely beyond the control of the prosecutor and the accused," such as overcrowded dockets, are valid reasons for delay and weigh even less heavily against the State. *Ariegwe*, ¶¶ 67-69. Further, we note that the State bears the burden of prosecution, and the defendant is under no obligation to ensure diligent prosecution of the case. *State*

v. Price, 2001 MT 212, ¶ 14, 306 Mont. 381, 34 P.3d 112. However, a defendant may not cause delay and later base a speedy trial violation thereon. If a defendant "caused a particular delay, it will be attributed to him." *State v. Heath*, 2018 MT 318, ¶ 19, 394 Mont. 41, 432 P.3d 141 (quoting *State v. Couture*, 2010 MT 201, ¶ 78 n.5, 357 Mont. 398, 240 P.3d 987).

¶10 The delay was categorized by the parties into multiple time periods. The first, from November 21, 2017 to December 21, 2017, was a thirty-day period between arrest and arraignment that Cherry acknowledges was institutional delay, and therefore, a minimal factor attributed to the State. The second, from December 21, 2017 to May 15, 2018, spanned 145 days from the arraignment to the first trial setting. The District Court concluded this delay was attributable to the State as institutional delay. On appeal, Cherry does not contest the District Court's designation of the 145-day delay as institutional delay attributable to the State, but argues the following third, fourth, and fifth periods of delay occurred as a result of the State's lack of diligence in submitting evidence during the second delay period. These periods occurred from May 15, 2018 to August 1, 2018, from August 1, 2018 to October 24, 2018, and from October 24, 2018 to January 29, 2019, respectively. The State filed three motions to continue because items of evidence previously submitted by the State to the Crime Lab during the second period of delay for testing had not yet been completed. This amount of delay is concerning, but we cannot conclude from the record that the State acted negligently, given the amount and nature of the evidence. The State undertook a difficult task in collecting and managing many pieces

of evidence from the crime scene, as well as other locations. The evidence was submitted to the Crime Lab only after careful consideration of which items to send and which were required to aid the ongoing investigation. The evidence required substantial analysis. As noted by the District Court, the processing "was particularly complex because of the amount of items found around the victim's body and the deteriorating nature of those items due to the lapse in time between when the crime was committed and when the victim's body was discovered." The testing of the many items of evidence made it necessary for a number of lab departments to coordinate to make sure the evidence was not destroyed or lost in the process. Further, the Crime Lab was then working on, as described by the District Court, "several other complex high priority homicide and sex cases," while experiencing a staff shortage. We thus conclude that the District Court properly attributed these time periods to the State as only institutional delay.

¶11 The sixth period of delay ran from January 29, 2019 to July 19, 2019, and the parties contest the reason for the delay. The District Court found this delay was caused, in substantial part, by the necessity of follow-up testing of complex evidence at a Utah-based crime lab. The District Court noted a minute entry reflected a request by defense counsel for independent testing, but it could not confirm that request because of the lack of a transcript. The Defense argues the State failed to exercise due diligence in seeking the forensic results, but multiple witnesses testified regarding the complexity of the evidence, the inability of the Crime Lab to process it, and the need to outsource the work. Again, given the nature of the evidence and the work for processing it, we conclude the District

Court did not err by rejecting Cherry's lack-of-diligence argument, and designating the delay as institutional.

¶12 The seventh and final period of delay, from July 19, 2019 to January 24, 2020, was appropriately attributed to Cherry when Cherry filed a motion to continue based on his defense counsel's recent assignment to the case.

¶13 In total, there were 605 days of delay attributable to the State and 189 attributable to Cherry. The District Court found the delays were primarily caused by valid case processing reasons that are supported by the record and constituted institutional delay, which weighed less heavily against the State.

¶14 Under the third factor, the District Court detailed Cherry's response to the delays, analyzing the "totality of the accused's various responses to the delays in bringing" him to trial. *Ariegwe*, ¶ 79. The District Court noted that Cherry failed to object to any of the pre-trial delays at the time they were requested by the State, although it received a letter from Cherry personally in February of 2019 suggesting that Cherry had opposed the continuances but that his attorneys had failed to object on his behalf, and therefore he requested appointment of new counsel. Cherry affirmatively waived his speedy trial right with respect to only the seventh time period. Cherry argues he filed a motion to compel evidence to move the trial forward and he points to one statement by the prosecution suggesting the defense wanted to move forward. We find more significant that Cherry did not object to any of the State's continuances along the way that would have heightened the issue and, even after being appointed new counsel, did not raise a complaint regarding the

progress of the proceeding. As such, we do not conclude Cherry established that factor three weighs significantly in his favor.

¶15 Under factor four, we ask whether the defendant has been prejudiced by the delay. Cherry's argument largely focuses on the psychological, physical, and emotional effects of his pre-trial incarceration, specifically, the anxiety and concern caused by the confinement. While those impacts can be substantial and prejudicial, we note for purposes of this appeal that the most significant consideration under the prejudice factor is the "accused's ability to present an effective defense." *Ariegwe*, ¶ 98. Cherry argues that trial delays can compromise the reliability of a trial, but does not point to any specific prejudice he experienced from the delay. During a hearing before the District Court, Cherry conceded that no evidence or witness availability had been lost due to the delay. We conclude the State met its burden and demonstrated its efforts to preserve all the evidence despite the delay, such that there was no prejudice to an effective defense.

¶16 Upon consideration of the *Ariegwe* factors in totality, we conclude that, while the delay was substantial, it was justified under the circumstances, and as such, we conclude the District Court properly denied the motion to dismiss.

¶17 Cherry next challenges the District Court's ruling allowing Haverty to testify in real time via two-way videoconferencing. We first note that, although the Defendant did not proceed to trial, he retained his right to challenge pre-trial rulings as a condition of his plea agreement. The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the

right . . . to be confronted with the witness against him." U.S. Const. amend. VI. Similarly, the Montana Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." Mont. Const. art. II, § 24. We have held that while physical, face-to-face confrontation is preferred, video testimony may be permissible where the district court has made a case-specific finding that the denial of face-to-face confrontation is necessary to further an important public policy, and the reliability of the trial is maintained. Here, the District Court made substantive, detailed findings regarding Haverty's ability to testify. The District Court's order detailed Haverty's tuberculosis diagnosis, the logistical challenges with transporting Haverty, and importantly, an unanswered question as to when Haverty would be safe to travel. The District Court noted that, in addition to safety concerns from the ongoing COVID-19 crisis, a witness who was currently testing positive for tuberculosis would place the staff, court, witnesses, and defendant himself in heightened danger. *See State v. Walsh*, 2023 MT 33, 411 Mont. 244, 525 P.3d 343. The District Court properly determined that permitting Haverty to appear by video was supported by appropriate public policy considerations. Further, while Cherry emphasizes the reasons in-person confrontation is preferred, he does not point to any specific manner in which the reliability of the trial would have been endangered by the video testimony. As such, we conclude the District Court did not err in allowing Haverty to testify in real time via two-way video.

¶18 Finally, Cherry argues, and the State concedes, that the District Court erred when it granted Cherry credit for time served starting on November 30, 2017 rather than

November 21, 2017. Cherry was arrested on November 21, 2017, and as such, his credit for time served should be calculated from that date. *Killam v. Salmonsen*, 2021 MT 196, ¶ 17, 405 Mont. 143, 492 P.3d 512.

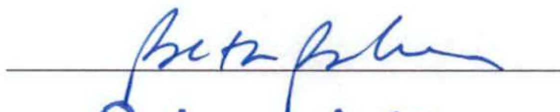
¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶20 We affirm in part and reverse and remand to the District Court for an amended judgment reflecting credit for an additional nine days of time served.

Justice

We concur:

Chief Justice



Justices