

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-395

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

STATE OF NORTH CAROLINA

v.

Wake County
No. 99 CRS 78143

TRAVARES WILLIAM BROWN

Appeal by Defendant from judgment entered 16 December 1999 by Judge Wiley F. Bowen in Superior Court, Wake County. Heard in the Court of Appeals 11 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

The Kelly Law Firm, by George E. Kelly, III, for defendant-appellant.

WYNN, Judge.

Defendant Travares William Brown appeals his conviction for robbery with a dangerous weapon. Defendant argues he was denied his right to a speedy appeal, and that the trial court erred in admitting certain evidence. For the reasons stated herein, we find no error by the trial court.

The State adduced evidence at trial tending to show as follows: On the evening of 7 September 1999, taxicab driver McKeever Rubin Dunn, Jr. was dispatched to Fisher Street in Raleigh, North Carolina, where he picked up Defendant and Jerry

Pulley. After directing Dunn to an apartment building on Rose Lane, one of the men exited the cab and looked around the area briefly. Dunn next drove Defendant and Pulley to a grocery store, where Defendant used the telephone, and to the parking lot of an apartment building on Dacian Road. After a second visit to the grocery store, Defendant and Pulley directed Dunn back to the apartments on Rose Lane.

As he reached the apartments, Dunn observed law enforcement officers tending to a motor vehicle accident in the center of Rose Lane. Using a side street to avoid the accident, Dunn delivered his two passengers to the dead end of Rose Lane. After stepping out of the cab, Pulley drew a handgun "and stuck it right . . . in [Dunn's] face[,] " ordering him out of the cab and taking his keys. Pulley then handed the gun to Defendant and told him to hold it up to Dunn while Pulley searched the car. Dunn handed Defendant \$15.00 which had been hidden in his sock. Defendant pointed the gun at Dunn's chest and said that "they needed more money or he was going to hit [Dunn] with something." After retrieving the gun from Defendant, Pulley ordered Dunn to lie down on the ground. Dunn refused. When Defendant and Pulley got back into the cab, Dunn "took off running" toward the area of Rose Lane where he had seen the police. Pulley caught up to Dunn and blocked his path. Dunn asked Pulley in a loud voice not to shoot, and Pulley "just walked off." When Dunn returned to his cab, Defendant was gone.

Dunn drove his cab to the accident scene and reported the robbery to Raleigh Police Officer J.W. Bunch, who broadcast Dunn's

description of the robbers over the police radio. Responding to the report, Officer R.E. Nance drove his patrol vehicle to Dacian Road, approximately one-half mile from the end of Rose Lane, where he saw two men "side by side, within two or three feet of each other[,] " who matched the radioed description of the robbers. As Nance exited his vehicle, one of the two men ran. The second man, Defendant, obeyed Nance's instruction to stop. Nance pursued the fleeing suspect but could not locate him. As Sergeant Dale Mead was approaching Nance's location, he observed Defendant walking at a "very brisk pace" toward his patrol car. Mead stopped Defendant and asked him why he was running. Defendant, who was "sweating profusely" and "breathing very hard[,] " denied running and claimed he had just left his girlfriend's house. Mead handcuffed Defendant, placed him in a fellow officer's patrol car, and notified Bunch that he had detained a suspect. Bunch drove to Mead's location with Dunn, who positively identified Defendant.

Defendant waived his *Miranda* rights and gave a statement to police. After initially denying that he had been in Dunn's cab, Defendant acknowledged he and an associate known as "J" took the cab to Rose Lane and Dacian Road looking for marijuana. After purchasing cigars at the grocery store, they returned to Rose Lane to look for the source's car. J then pulled a gun and held up the driver. Defendant told the driver "to go ahead and give it up so he wouldn't get hurt[,] " but also yelled at J, demanding to know why he was "doing this" and why he was involving Defendant. When J tried to force the driver to lie down on the ground, Defendant

ran. J caught up to Defendant on Dacian Road, however, just as the police arrived. Defendant insisted he did not participate in the robbery but sought to keep the driver from getting hurt.

Defendant told police that J dated his sister, Takita Brown ("Takita"), and drove a white Mercury-brand automobile. Defendant telephoned Takita's apartment and spoke to a woman named Keya, who revealed that J was at the residence. When police arrived at Takita's apartment with Defendant, the Mercury automobile was gone. Defendant placed another call and learned that Takita and J had driven Keya home. Police watched Takita's apartment until J returned in the Mercury automobile later that evening. Officers spoke to J, who identified himself as Milton Tweety. Takita allowed police to search her apartment for the gun used in the robbery. She led the officers to the bedroom, where she indicated her boyfriend kept his gun. Beneath the mattress of the bed, police found a blue steel .25-caliber handgun with seven rounds in the magazine. Police then arrested J, who was later confirmed to be Pulley.

Defendant testified he and Pulley were looking for marijuana on 7 September 1999. When Pulley drew the gun and put it to the cab driver's head, Defendant "start[ed] cussing him out, asking him why, why are you robbing this man, why are you putting me in this." Pulley brought the driver outside and ordered him to the ground. Defendant continued to ask him, "[W]hy are you doing this[?]" As Pulley was looking in the trunk of the cab, Defendant and the driver ran toward opposite ends of the apartment building. When

Defendant reached the street, he saw Pulley "pointing the gun back at the cab driver[,]" who was "pleading for his life." Defendant ran past the apartments on Dacian Road. Seeing Pulley following him, Defendant ran behind a house but came upon a ditch which had "overflowed[.]" Unable to cross the ditch, Defendant emerged from behind the house and was met by Pulley just as the police arrived. Pulley ran, and the officer sent a police dog after him. Hearing additional police sirens, Defendant walked up to Dacian Road to meet them. Defendant initially lied about the incident because he was afraid. Ultimately, however, he told the truth and helped the police find Pulley through his sister.

Upon the conclusion of the evidence, the jury found Defendant guilty of robbery with a dangerous weapon. The trial court subsequently sentenced Defendant to a minimum term of imprisonment of thirty-eight months, and a maximum term of fifty-five months. Defendant appealed.

In his first assignment of error on appeal, Defendant contends he was denied his right to a speedy appeal, due to the court reporter's four-year delay in producing a complete stenographic transcript of his trial. Defendant shows that the court reporter was served with the transcript order on 16 December 1999. His attorney received an incomplete transcript on 23 January 2001; and the full transcript was not delivered until 30 December 2003. In asserting a violation of his constitutional right to due process, Defendant points to the following factors: (1) the length of the

delay; (2) his counsel's numerous attempts to contact the court reporter, as detailed in an affidavit; (3) the State's failure to take any action to obtain the transcript; (4) Defendant's lack of acquiescence to the delay; and (5) Defendant's service of his entire prison sentence while awaiting the transcript. Defendant also alleges that he "press[ed] his attorney to obtain the transcript," but we find nothing in the record to support this assertion.

Although a criminal defendant's right to appeal is purely statutory, we have recognized a constitutional right to a "speedy appeal" akin to the right to a speedy trial. See *State v. China*, 150 N.C. App. 469, 475, 564 S.E.2d 64, 69 (2002), *appeal dismissed*, 356 N.C. 683, 577 S.E.2d 899 (2003); *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 175 (2000). In determining whether a delay in a defendant's appeal violated his right to due process, this Court has adopted the analytical framework developed by the United States Supreme Court for evaluating speedy trial claims, as follows:

We must analyze the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), to determine if there was a due process violation caused by a delay in processing an appeal. See *State v. Hammonds*, 141 N.C. app. 152, 541 S.E.2d 166 (2000). The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy appeal; and (4) any prejudice to defendant. *Id.* at 158, 541 S.E.2d at 172 (citing *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 116-17.) No one factor is dispositive; the four are related factors and must be considered together with such other circumstances as may be relevant.

China, 150 N.C. App. at 473, 564 S.E.2d at 68.

In *Hammonds*, a two-and-one-half-year delay in the preparation of the defendant's trial transcript was held not to violate his right to a speedy appeal. While noting the "number of extensions and enlargements of time" granted to the court reporter by this Court, as well as the defendant's "timely assertion of his right to a speedy appeal," we found no constitutional injury, absent any prejudicial impact to the defendant's "ability ultimately to perfect the appeal and bring before this Court the issues he sought to have decided." *Id.* at 164-65, 541 S.E.2d at 175-76. Likewise, in *China*, 150 N.C. App. at 475, 564 S.E.2d at 69, a seven-year delay caused by the dilatoriness of the defendant's appellate counsel did not constitute a due process violation, inasmuch as the delay was not attributable to the prosecution, the defendant waited more than six years to assert his rights, and there was no evidence of prejudice to his appeal.

In light of our prior holdings, we find Defendant's claim without merit. The four-year delay at issue here is "sufficient to trigger the examination of the remaining [*Barker*] factors[,]" falling between the delays in *China* and *Hammonds*. *Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 175. As in those cases, however, the court reporter's delay cannot be attributed to the prosecution. Defendant bore the appellant's responsibility of obtaining the transcript and serving the State with a proposed record. Moreover, as in *China*, Defendant took no action to alert the courts to the problem. He further failed to seek the necessary extensions of

time in which to settle and file the record on appeal. See N.C. R. App. P. 7(b), 11(a), 12(a), 27(c). Finally, Defendant obtained a complete transcript of his trial and thus suffered no substantive prejudice to his appeal. We overrule this assignment of error.

Defendant next argues the trial court erred in admitting into evidence State's Exhibit 4, the gun found in Takita's apartment. Citing his capture by police on Dacian Road, Defendant notes he could not have returned the gun to the apartment following the robbery. Defendant argues that the gun was either irrelevant to his case or unduly prejudicial, absent any evidence linking him to the gun, or linking the gun to the robbery. We do not agree.

Under Rule 401 of the North Carolina Rules of Evidence, evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). If evidence is relevant, the balancing of its probative value against the risk of unfair prejudice arising from its admission at trial lies within "the sound discretion of the trial court." *State v. Stager*, 329 N.C. 278, 308, 406 S.E.2d 876, 893 (1991).

Here, the presence of State's Exhibit 4 in Takita's bedroom had at least some tendency to establish Pulley's access to a handgun and was thus relevant under Rule 401. The prosecution and defense agreed that Dunn was robbed at gunpoint on 7 September 1999. They further agreed that Pulley, not Defendant, produced the gun. Contrary to Defendant's assertions on appeal, the prosecutor

never sought to link Defendant to the gun beyond his brief handling of the weapon during the crime. Finally, although Dunn did not identify State's Exhibit 4 at trial, Defendant offered the following testimony regarding the exhibit:

Q: Does this look like the same gun that [Pulley] pointed at [Dunn]?

A: Yes, sir.

The introduction of the gun at trial was not unfairly prejudicial to the defense, and the trial court did not abuse its discretion in admitting it.

In conclusion, we hold Defendant received a fair trial, free from prejudicial error.

No error.

Judges TYSON and GEER concur.

Report per Rule 30(e).