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NO. COA09-1514

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 07 CRS 61150
WYNN ROBERT WALKER 08 CRS 1591

Appeal by Defendant from judgments entered 24 February 2009 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Duncan B. McCormick for Defendant.

McGEE, Judge.

Wynn Robert Walker (Defendant) was arrested on 8 November 2007 on charges of alleged child sexual abuse. Defendant purportedly filed a demand for a speedy trial on 23 April 2008.¹ Defendant was indicted on 12 May 2008. Defendant filed a Motion to Dismiss Indictment for Denial of Speedy Trial on 9 February 2009. Defendant's motion was argued on 16 February 2009, and the trial court denied the motion on that date. Defendant was tried at the 16 February 2009 Criminal Session of the Superior Court of Forsyth

¹ Defendant does not include the demand for a speedy trial in the record on appeal.

County, and was found guilty on 20 February 2009 of two counts of first-degree rape of a child under the age of thirteen, and two counts of taking indecent liberties with a child. In 07 CRS 61150, Defendant was found to be a prior record level IV and was given an active sentence of 380 to 465 months in prison for one count of first-degree rape of a child under the age of thirteen and one count of taking indecent liberties with a child. Defendant was given credit for 471 days spent in confinement prior to that judgment. In 08 CRS 1591, Defendant was given an active sentence of 380 to 465 months in prison for one count of first-degree rape of a child under the age of thirteen and one count of taking indecent liberties with a child, to run concurrently with the sentence given in 07 CRS 61150. However, Defendant was not given credit for any time spent in confinement prior to the judgment in 08 CRS 1591. Defendant appeals.

I.

In Defendant's first argument, he contends the trial court erred in denying his "motion to dismiss due to the violation of his right to a speedy trial." We disagree.

Our Court reviews *de novo* Defendant's claim that his right to a speedy trial was violated. *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996) (citation omitted). The Sixth Amendment to the United States Constitution and Article I, Section 18 of the North Carolina Constitution guarantee an accused the right to a speedy trial. *State v. Hammonds*, 141 N.C. App. 152, 157-58, 541 S.E.2d 166, 171-72 (2000) (citations omitted). The

same analysis is employed under the United States and North Carolina Constitutions. *Id.* at 158, 541 S.E.2d at 172.

In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court established a balancing test involving four interrelated factors for courts to conduct on a case by case basis in determining whether a defendant's constitutional right to a speedy trial has been violated. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay.

"We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

. . . .

"The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial."

Id. The "length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy

trial." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (citations omitted) (four and one-half year delay did not deprive the defendant of his right to a speedy trial when all *Barker* factors were considered). However, a one-year delay is usually enough to trigger the inquiry set forth by the United States Supreme Court in *Barker*. *Id.* In the present case, Defendant was tried approximately fifteen months after his arrest. We find this delay sufficient to trigger a *Barker* analysis. *Id.*

The Length of the Delay

The length of delay, though long enough to trigger analysis under the remaining factors, was not long enough to warrant any significant weight in making our determination. *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975) ("The delay in the instant case is not insubstantial since it involves a period of some twenty-two months. However, we elect to view this factor merely as the 'triggering mechanism' that precipitates the speedy trial issue. Viewed as such, its significance in the balance is not great."); see also *State v. Berryman*, 360 N.C. 209, 219, 624 S.E.2d 350, 357-58 (2006); *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255.

The Reason for the Delay

Our Supreme Court has stated:

[D]efendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence.

"The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort."

Spivey, 357 N.C. at 119, 579 S.E.2d at 255 (internal citations omitted).

Defendant first argues there is no evidence that he was the cause of the fifteen-month delay between his arrest and his trial. Defendant's argument is insufficient to meet his burden of showing that the delay was caused by the neglect or willfulness of the State. The only argument Defendant advances, relevant to the State's conduct in this matter, is that "clogged dockets are ultimately the State's responsibility and a court should consider the delay when reviewing a motion to dismiss for lack of a speedy trial." However, as Defendant stated in his brief: "North Carolina courts often conclude that a delay caused by clogged dockets and overcrowded courts is not sufficient to establish neglect or willfulness on the part of the prosecution." It is insufficient for a defendant to merely state that the delay of his trial was caused by a clogged docket. The defendant must show that the State made choices concerning when to try the defendant's case based on some unjustifiable standard. *Id.* at 121, 579 S.E.2d at 256. In the present case, it is Defendant's burden to produce some evidence that the delay was caused by neglect or willfulness on the part of the State. *Id.* Defendant has failed to make this showing.

Therefore, as Defendant made no *prima facie* showing of neglect or willfulness, the State had no duty to present evidence explaining the delay. *Id.* at 119, 579 S.E.2d at 255.

Defendant's Assertion of his Right to a Speedy Trial

As we noted above, Defendant's purported demand for a speedy trial is not included in the record. We therefore have no competent evidence before us that Defendant filed this demand. The State does not contest Defendant's assertion of his right to a speedy trial. Assuming *arguendo* Defendant did file the demand on 23 April 2008, Defendant asserted his right to a speedy trial five and a half months after his arrest, and was tried just under ten months after his demand for a speedy trial. Defendant asserted his right for a speedy trial in a timely manner.

Prejudice to Defendant Resulting from the Delay

In *State v. Webster*, 337 N.C. 674, 447 S.E.2d 349 (1994), our Supreme Court stated that the prejudice analysis for lack of a speedy trial should be focused on three of the reasons explaining why a defendant has a right to a speedy trial:

"(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.*"

Id. at 681, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18).

Defendant makes no argument on appeal concerning the first two factors. Defendant does argue that the length of time between his

arrest and his trial impaired his ability to present a complete defense. However, Defendant's bald claims in this regard are unsupported by any evidence. Defendant first argues that: "The delay in bringing the charges and the delay in bringing the case to trial made timely investigation of the allegations difficult. The delay made it virtually impossible to locate quasi-alibi witnesses who could sort out and clarify what happened." Defendant does not identify the potential witnesses he could not locate, nor how the delay prevented him from locating them. It is presumed that the defense will conduct its investigations before trial. The crimes for which Defendant was indicted and convicted occurred in November of 2005. Defendant was arrested in November of 2007. Defendant was indicted approximately six months later. No prejudice related to this six-month delay is evident from the record, and Defendant fails to direct us to any specific manner in which the six month period between Defendant's arrest and indictment prevented Defendant from locating any witness necessary for his defense. Defendant fails to demonstrate any significant prejudice resulting from the delay.

Balancing Test

As in *Webster*, "[a]fter balancing the four factors - length of delay, cause of delay, assertion of the speedy trial right, and prejudice to defendant - we hold defendant's constitutional right to a speedy trial has not been violated[.]" *Webster*, 337 N.C. at 681, 447 S.E.2d at 353. Defendant's argument is without merit.

In Defendant's second argument, he contends the trial court erred in failing to credit Defendant with time spent in confinement while awaiting trial and judgment in 08CRS1591. We agree.

The trial court ordered the two judgments in this case to be served concurrently. The trial court credited Defendant with the 471 days he had been held prior to the judgment in 07 CRS 61150. The trial court did not credit Defendant with any of those days in 08 CRS 1591. The State agrees with Defendant that the trial court erred in not crediting Defendant with the time he was held before judgment was entered in 08 CRS 1591. Because we hold, pursuant to N.C. Gen. Stat. § 15-196.1 (2009), that Defendant should have received credit for the time spent in confinement for each of the consolidated judgments, we remand to the trial court with instruction to credit Defendant in 08 CRS 1591 with the 471 days he spent in confinement prior to judgment in that case.

No error in part, reversed and remanded in part.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).