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NO. COA14-714

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Davidson County  
Nos. 11CRS53220, 12CRS2656

HARVIS LOVON PATTERSON

Appeal by defendant from judgment entered 13 March 2014 by Judge W. David Lee in Davidson County Superior Court. Heard in the Court of Appeals 23 October 2014.

*Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender, Paul M. Green, for Defendant.*

BELL, Judge.

Defendant appeals from a judgment sentencing him to life imprisonment without the possibility of parole for aiding and abetting a robbery with a dangerous weapon and for attaining violent habitual felon status. On appeal, Defendant contends

that the trial court erred when it denied his motion to dismiss, which was predicated on an assertion that his constitutional right to a speedy trial had been violated. After a careful consideration of the parties' arguments in light of the record and the applicable law, we conclude that Defendant's contention lacks merit.

### I. Factual Background

A warrant for Defendant's arrest was issued on 30 June 2011. On 5 December 2011, the Davidson County grand jury returned bills of indictment charging Defendant with aiding and abetting a robbery with a dangerous weapon, being an accessory after the fact to a robbery with a dangerous weapon, and attaining habitual felon status. Defendant was appointed counsel on 17 June 2011. In response to a handwritten *pro se* "motion" for a speedy trial submitted to the court by Defendant, Judge W. Erwin Spainhour ordered that Defendant's case be heard within 120 days of 30 April 2012. Defendant declined a plea agreement offered to him on 24 May 2012. On 4 June 2012 the Davidson County grand jury returned a bill of indictment charging Defendant as a violent habitual felon.

On 27 June 2012, at Defendant's request, his court-appointed attorney, Lori I. Hamilton-Dewitt, filed a motion to withdraw her representation on the basis that Defendant did not

feel that she was "serving and protecting his best interests." However, on the same date, the motion was withdrawn after Defendant stated in open court that he had decided to proceed with Ms. Hamilton-Dewitt as his counsel and his case was set for trial during the 6 August 2012 session of Superior Court, well within 120 days as required by Judge Spainhour's order. The State withdrew its original plea offer after Defendant declined to enter into any plea agreement.

Defendant filed a *pro se* motion to dismiss on 6 July 2012 alleging that multiple continuances of his probable cause hearing violated his due process rights. The motion was denied by the court on 11 July 2012. On 17 July 2012, Defendant gave written notice of appeal from the interlocutory order denying his motion to dismiss. The trial court ordered that Defendant be appointed an appellate defender. The appellate defender determined that Defendant had no statutory right to appeal and that law would not support the filing of a writ of *certiorari*.

Defendant wrote a letter to the State on 8 July 2012, less than one month before his scheduled trial date, claiming that he had information to share on a pending murder case. In a second letter written on 16 July 2012, Defendant disclosed that the defendant in the pending murder case, with whom he was acquainted, had admitted to Defendant that he had committed the

murder for which he was charged. In both letters, Defendant sought to negotiate a better deal for himself in exchange for his cooperation as a witness against his acquaintance. In response to Defendant's representations, the State moved to continue Defendant's trial from the 6 August 2012 date on the belief that Defendant would be called as a witness in the separate murder trial. Defendant discussed continuing his case with his trial attorney and the two determined that it would be appropriate. Defendant's case was then continued with his consent to a "reasonable time set by the State" after the disposition of the trial in which Defendant would testify.

In December 2012, Defendant rejected a plea offer from the State in which he would plead guilty to being an accessory after the fact and to attaining habitual felon status and serve an active term of 101 to 119 months imprisonment. In exchange, the State would dismiss the aiding and abetting a robbery with a deadly weapon and violent habitual felon charge. On 10 December 2012, Defendant, in open court, requested a new court-appointed attorney, at which time Ms. Hamilton-Dewitt made a second motion to withdraw. The trial court allowed Ms. Hamilton-Dewitt to withdraw and appointed Shawn Fraley to serve as Defendant's attorney. Defendant also waived his right to have his case heard on 28 January 2013.

Mr. Fraley requested time to review discovery in Defendant's case and to have an opportunity to speak with Defendant. After that time, the State and defense counsel drafted what they considered to be a favorable plea agreement; specifically that Defendant would plead guilty to aiding and abetting an armed robbery and receive an active sentence in the mitigated range of 67 to 90 months in exchange for the State dismissing all other charges. On 8 April 2013, the trial court noted that Defendant had rejected the plea offer.

Defendant filed an inmate grievance on 12 June 2013 alleging that his right against cruel and unusual punishment had been violated because he had not received a speedy trial despite filing motions for the same, had only been called to court for plea offers, was innocent of all criminal activity and had maintained his innocence from the beginning, and had a statement from his codefendant exonerating him of any wrongdoing. Defendant also alleged that a "statute of limitations" had been set by Judge Spainhour and that, because the "statute" had run, he should be immediately tried or released from custody. In response, the prosecutor wrote a letter to Mr. Fraley on the following day informing him that Defendant's trial had been calendared for the 4 November 2013 superior court session.

Superseding indictments were returned against Defendant on 9 July 2013 charging Defendant as a habitual felon and as a violent habitual felon. Defendant filed a second *pro se* motion to dismiss on 12 July 2013 on the basis that his due process rights had been violated and that he "asserted his right to a speedy trial over a year ago" and that his "counsel allowed continuances despite [his] request to expedite [the] process." Although Defendant pleaded not guilty to the superseding indictments, trial counsel for Defendant refused to consent to the trial date of 4 November 2013 in light of Defendant's request for a speedy trial.

Defendant filed identical motions to dismiss on 11 and 14 October 2013 re-alleging the same accusations as in his motion of 12 July 2013. Additionally, on 14 October 2013, less than three weeks prior to Defendant's trial, Mr. Fraley filed a motion to withdraw as counsel at the request of Defendant on the basis that Defendant requested that Mr. Fraley not engage in any trial preparation, which Mr. Fraley was concerned violated his ethical responsibility as Defendant's attorney. The trial court informed Defendant that the repeated firing of his attorneys would result in the delay of his trial proceedings due to the fact that each new attorney would have to familiarize themselves with his case. After Defendant acknowledged that he understood,

the court advised him that granting the motion would cause his trial date to be continued. The court granted the motion to withdraw on 17 October 2013 and appointed Charles Harp as Defendant's attorney. Defendant's case was then re-scheduled for trial for the 3 March 2014 superior court session.

Defendant filed a fifth motion to dismiss on 18 December 2013 based on similar contentions and assertions as his previous four. Defendant's motion was summarily denied on 31 January 2014. On March 3, 2014, prior to the start of Defendant's trial, Defendant renewed his motion to dismiss all charges based upon the deprivation of his right to a speedy trial. The trial court denied the motion and entered an order on 10 March 2014 making numerous findings of fact and conclusions of law, and ultimately determining that Defendant had not been denied his right to a speedy trial and that Defendant, not the State, had caused the delay of Defendant's trial.

At the conclusion of the trial, the jury returned guilty verdicts against Defendant on the charges of aiding and abetting a robbery with a dangerous weapon and being a violent habitual felon. The trial court entered judgment against Defendant on 13 March 2014 sentencing him to life imprisonment without the possibility of parole. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

Defendant claims on appeal that the delay of his trial constituted a violation of his right to a speedy trial. According to Defendant, the trial court committed error when it denied his motion to dismiss, which was predicated on the denial of his right to a speedy trial. We disagree.

Both our State and federal constitutions provide accused individuals the right to a speedy trial. *State v. Pippin*, 72 N.C. App. 387, 390, 324 S.E.2d 900, 903 (1985). The "four factors that 'courts should assess in determining whether a particular defendant has been deprived of his right' to a speedy trial under the federal Constitution . . . are: (i) the length of delay, (ii) the reason for delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant suffered prejudice as a result of the delay." *State v. Spivey*, 357 N.C. 114, 118, 579 S.E.2d 251, 254 (2003) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972)).

Although "length of the delay is not *per se* determinative of whether a defendant has been deprived of his right to a speedy trial," a post-accusation delay is presumptively prejudicial as it reaches one year. *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 803-04 (2008). Here, the



two year and nine month delay is presumptively prejudicial, and therefore triggers an "examination of the other factors." *Id.* at 283, 665 S.E.2d at 804.

We therefore look to whether Defendant asserted his right to a speedy trial. While a "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial," the assertion of that right "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32, 92 S. Ct. at 2192-93, 33 L. Ed. 2d at 117. After a careful review of the record, we are unwilling to conclude that this factor weighs in Defendant's favor. While it is true that Defendant filed numerous motions for a speedy trial, all were filed *pro se* while Defendant was represented by counsel. "Having elected for representation by appointed defense counsel, [a] defendant cannot also file motions on his own behalf or attempt to represent himself," meaning, a defendant "has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000). The record reflects that on 4 March 2014, Defendant's third attorney indicated that Defendant was adamant about having his motion to dismiss heard and he was endorsing Plaintiff's *pro se* motion. If this endorsement by counsel is effective, it is the only assertion of the right to a

speedy trial for which the Defendant did not waive appellate review by failing to properly raise the constitutional issue in the trial court. However, Defendant filed multiple motions to dismiss. The last motion, dated 18 December 2013, was summarily denied by the court. It is unclear from the record which of Defendant's motions his attorney endorsed or if he was endorsing all motions which had not been disposed of by the court. Therefore, it is unclear as to whether this Court can consider the motions for a speedy trial made by Defendant. Assuming *arguendo* that at least one of Defendant's *pro se* motions was properly endorsed by counsel and preserved this issue for appellate review, we find that, under the facts of this case, the factor that carries the most weight against Defendant's argument is the reason for the delay.

"The defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution." *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994). Although Defendant alleges in his brief that "most of his thirty-three months of pretrial incarceration [was] attributable to the State's caseload and crowded court dockets," the record does not support this conclusion.

It is apparent from the record that Defendant sought to sabotage his right to a speedy trial early in the pretrial process.

The court, in response to a *pro se* written request from Defendant, ordered that Defendant's case be tried within 120 days of 30 April 2012. Fifty-eight days later, Defendant requested that his court-appointed attorney be replaced, then withdrew the request. Nine days later and thirty-one days before the scheduled trial date, Defendant filed a *pro se* motion to dismiss. Eleven days later and less than three weeks before the scheduled trial date, Defendant, *pro se*, gave notice of an interlocutory appeal of the trial court's order denying his motion to dismiss. Twenty-nine days and twenty-one days prior to his trial date, Defendant wrote to the assistant district attorney offering to exchange information about a pending murder case for a more favorable deal for himself. Three days before his scheduled trial date, Defendant consented to a continuance to allow him to reap the benefit of testifying for the State in the unrelated case. In December 2012, Defendant fired his trial counsel, despite her being ready to proceed with trial on 28 January 2013. Defendant waived his right to have his case heard in January 2013. New counsel was appointed, who had to familiarize himself with Defendant's case. Defendant's case was

then set to be heard 4 November 2013. Nineteen days before his scheduled trial date, Defendant requested that his second trial counsel be removed. Despite being warned that this would again delay his trial, Defendant agreed and a third attorney was appointed. On 20 December 2013, Defendant again filed a *pro se* motion to dismiss, which was summarily denied by the court. The case was set to be heard in March 2014. At the call of the trial, the trial court heard and denied Defendant's motion<sup>1</sup> and the trial proceeded as planned. We find that of particular relevance to the issue of the reason for the delay is that both Defendant's first and second appointed counsel's motions to withdraw are predicated on Defendant's unwillingness to cooperate or effectively participate in his own defense, his continual filing of *pro se* motions, and his consistent rejection of each attorney's attempts at providing representation and sound advice.

It is clear from the record that Defendant is unable to carry his "burden of presenting *prima facie* evidence that the delay was caused by the neglect or willfulness of the prosecution" when each substantial delay in the process stemmed

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<sup>1</sup>As noted above, it is not clear from the record which of Defendant's *pro se* motions were endorsed by counsel or heard by the court. However, the record does reflect that the State consented to the court hearing the motion.

from a willful decision by Defendant. *Washington*, 192 N.C. App. at 283, 665 S.E.2d at 804. "A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. *State v. Tindall*, 294 N.C. 689, 695-96, 242 S.E. 2d 806, 810 (1978).

III. Conclusion

For the reasons set forth above, we conclude that Defendant's argument that his right to a speedy trial was violated to be without merit. Therefore, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges GEER and STROUD concur.

Report per Rule 30(e).