

FILED: December 29, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DUSTIN BRUCE McFARLAND,
Defendant-Appellant.

Josephine County Circuit Court
06CR0797

A139991

Thomas M. Hull, Judge.

Argued and submitted on March 08, 2011.

Shawn E. Wiley, Chief Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Matthew J. Lysne, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and David B. Thompson, Interim Solicitor General.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Rosenblum, Senior Judge.

SERCOMBE, J.

Reversed and remanded for entry of a judgment of dismissal.

1 SERCOMBE, J.

2 Defendant appeals a judgment of conviction for identity theft, ORS
3 165.800. He assigns error to the trial court's denial of his motion to dismiss the case for
4 lack of a speedy trial under ORS 135.747. That statute requires dismissal of criminal
5 proceedings when a defendant is "not brought to trial within a reasonable period of time."
6 The trial court concluded that the 17-month delay between defendant's indictment and his
7 arraignment was reasonable. On review for errors of law, [State v. Johnson](#), 339 Or 69,
8 74-87, 116 P3d 879 (2005), we reverse and remand for entry of a judgment of dismissal.

9 We begin with the relevant procedural facts. On October 19, 2006, a
10 Josephine County grand jury indicted defendant for one count of identity theft. On that
11 date, defendant was in custody at the Josephine County Jail due to an arrest on unrelated
12 charges. The Josephine County Circuit Court issued an arrest warrant on October 23,
13 2006. That arrest warrant included a standard return of service form, which read, "The
14 undersigned Peace officer hereby returns that he has executed the within warrant by
15 arresting the within-named defendant on [date]." After the return of service declaration,
16 the warrant contained spaces reserved for the arresting officer's signature, printed name,
17 and agency affiliation.

18 On October 24, 2006, defendant was transferred to the Douglas County Jail.
19 Unknown persons at the Douglas County Jail received the arrest warrant, partially
20 completed the return of service form, and then returned it to Josephine County.
21 Josephine County filed the return of service form on November 2, 2006. Although parts

1 of the return of service form had been filled out,¹ it lacked a signature and printed name
2 of an officer to indicate that it had been served on defendant.

3 Defendant remained in custody at various county and state facilities. In
4 February 2008, defendant received notice regarding the identity theft charge in Josephine
5 County, and, shortly thereafter, he requested a 90-day speedy trial under ORS 135.760.
6 Defendant was arraigned on March 21, 2008. On May 19, 2008, defendant moved to
7 dismiss the charge, arguing that the 17-month delay between his indictment and
8 arraignment was unreasonable under ORS 135.747. At the hearing on that motion,
9 defendant testified that he was not served with the arrest warrant in November 2006 and
10 that he did not learn of the charge until February 2008. The state asserted that the delay
11 was reasonable due to a lack of law enforcement resources in Josephine County dedicated
12 to executing warrants on defendants incarcerated in other jurisdictions.

13 The trial court denied defendant's motion to dismiss, finding that defendant
14 had received notice of the identity theft charge when the arrest warrant was executed on
15 November 1, 2006, and that his knowledge of the charge rendered the delay reasonable.
16 Alternatively, the trial court found that the delay was reasonable due to a lack of law
17 enforcement resources in Josephine County. The trial court explained its ruling as

¹ The arrest warrant was stamped "received" on October 24, 2006. An unknown person filled in the date, November 1, 2006, and wrote "Douglas County Jail" on the line reserved for the name of the participating agency. Additionally, the document contained two notations accompanied by two different sets of initials: "Cleared 11-1-06 NM[;] Entered 10-24-06 BM[.]" No evidence appears in the record regarding the identity of the person who partially filled out the form or the identities of the persons who authored and initialed the notations.

1 follows:

2 "In this case, the court must take judicial notice of its own file, and
3 as I have pointed out to counsel, the original secret indictment warrant of
4 arrest is located in the court's file. It does show that there was a warrant
5 issued by Judge Wolke on the 23rd of October, 2006.

6 "It also shows that * * * there is a return of service, and that is an
7 original return of service that has been completed by Douglas County Jail,
8 and that was done on November 1, 2006. And it does contain the initials of
9 the official from Douglas County Jail.

10 " * * * * *

11 "Now the court recognizes that the defendant has testified in this
12 proceeding to the effect that he is not aware of * * * the execution of that
13 warrant while he was in Douglas County.

14 " * * * * *

15 "Looking at everything as a whole--again, the court must
16 acknowledge the execution of this warrant, and does find that based on the
17 official documentation^[2] that the defendant appears to have been given
18 notice, and was actually arrested on this particular charge back in
19 November--the 1st of November in 2006. Therefore, the timeliness appears
20 to--or the court must conclude that since the defendant was made aware of
21 the Josephine County case back in November, 2006, and has been * * * in
22 custody of either Douglas County, Jackson County, or the Department of
23 Corrections since then, that there has not been an unreasonable delay in
24 proceeding on the Josephine County case.

25 " * * * * *

² The record suggests that the trial court intended the term "official documentation" to include, in addition to the return of service form, an Oregon Judicial Information Network (OJIN) entry from November 2, 2006, indicating that the form was returned to Josephine County on that date, and an OJIN entry from December 11, 2007, indicating that defendant was in custody at Douglas County Jail and that a hold had been placed on him by Josephine County. However, as the state acknowledged in oral argument, it is apparent from the record that the trial court mistakenly believed that the December 2007 OJIN entry was made a year earlier, in December 2006.

1 "The court is finding that the defendant was notified of the charges
2 on November 1, 2006, when the warrant was executed, and that he has now
3 been arraigned and is set for trial. And while it has taken a fair amount of
4 time, the time has been really because the defendant has been otherwise
5 involved in his other cases in other counties, and it has just now come back
6 to Josephine County to address.

7 "So the court is denying the defense motion to dismiss really on two
8 bases: one, finding that there has not been an unreasonable delay. Again,
9 basing its findings on the execution of the warrant.

10 "But also if in fact the defendant had not been given notice back in *
11 * * November 2006, then alternatively the state has presented an
12 appropriate reason for the delay in the evidence that was presented with
13 respect to the lack of law enforcement resources, and the inability to follow
14 up on these cases when someone is in custody somewhere else other than
15 the local jurisdiction."

16 Defendant then entered a conditional plea of guilty to the identity theft
17 charge, reserving his right to appeal the trial court's denial of his motion to dismiss. On
18 appeal, defendant contends that the trial court's factual finding that he received notice of
19 the charge on November 1, 2006, is not supported by sufficient evidence in the record.
20 Further, defendant argues that, even if he was informed of the charge on November 1,
21 2006, that fact does not render the delay reasonable under ORS 135.747. Finally,
22 defendant asserts that the trial court erred in concluding, in the alternative, that the delay
23 was reasonable due to a lack of law enforcement resources in Josephine County.

24 The state responds that the trial court's finding is supported by sufficient
25 evidence in the record and contends, for the first time, that defendant waived his statutory
26 speedy trial rights under ORS 135.747 by not demanding a speedy trial pursuant to ORS
27 135.760. ORS 135.760(1) allows an incarcerated person who is charged with a crime to
28 "give written notice to the district attorney of the county in which the inmate is so

1 charged requesting the district attorney to prosecute and bring the inmate to trial on the
2 charge forthwith." ORS 135.763 requires the district attorney to bring the inmate to trial
3 within 90 days of the notice. In the state's view, by failing to request a speedy trial under
4 ORS 135.760, defendant waived his speedy trial rights with regard to all but 12 days of
5 the delay--the time between defendant's indictment and the execution of the arrest
6 warrant on November 1, 2006. *See State v. Vawter*, 236 Or 85, 88-89, 386 P2d 915
7 (1963) (failure of represented and incarcerated defendant to demand 90-day speedy trial
8 as waiver of all statutory speedy trial rights).

9 Defendant could not have waived his statutory speedy trial rights by failing
10 to demand a trial on a charge that was unknown to him. *See Vawter*, 236 Or at 90
11 ("There certainly should be no room for debate about the proposition that a person who
12 does not know that he has been indicted cannot be expected to demand a trial.").
13 Accordingly, as the state correctly acknowledges, to support its waiver theory on appeal,
14 there must be sufficient evidence in the record demonstrating that defendant had
15 knowledge of the identity theft charge on November 1, 2006. We conclude that there is
16 no evidence in the record to support that factual finding. Therefore, we need not decide
17 whether a waiver of speedy trial rights occurs under ORS 135.747 by the failure of this
18 unrepresented defendant to demand a speedy trial under ORS 135.760.

19 We are bound by the trial court's findings of historical fact if there is
20 evidence in the record to support them. *State v. Doak*, 235 Or App 351, 356, 231 P3d
21 1181 (2010). The state contends that the following evidence supports the trial court's

1 finding: (1) the return of service form that was partially completed by unknown persons
2 at the Douglas County Jail and (2) the OJIN entry, dated December 11, 2007, that
3 indicated that defendant was in custody at the Douglas County Jail and that Josephine
4 County had placed a hold on him.

5 The trial court based its finding primarily on the arrest warrant's return of
6 service form. That form, however, is of no evidentiary value. Because the form lacks the
7 signature and printed name of an officer, there is nothing on the face of the form that
8 indicates that an officer actually executed the arrest warrant. Moreover, there is no
9 evidence in the record establishing the identity of any officer who purportedly executed
10 the warrant. The handwritten markings on the form, including the date, the name of the
11 jail, and two administrative notations accompanied by separate sets of initials, support, at
12 most, a conclusion that the arrest warrant was received by the Douglas County Jail and
13 processed by its staff. They do not support the trial court's finding that *defendant had*
14 *notice of the charge* on November 1, 2006. Similarly, the OJIN entry indicating that
15 Josephine County had placed a hold on defendant with Douglas County in December
16 2007 does not support the trial court's finding that *defendant had notice of the charge*, or
17 even that defendant had notice of the Josephine County hold. In fact, we can find nothing
18 in the record that indicates that defendant was personally informed, before February
19 2008, of the arrest warrant or the fact that he had been indicted for identity theft.

20 The state contends that, although the trial court did not make explicit
21 credibility findings, its ruling indicates that it disbelieved defendant's testimony that he

1 did not receive notice of the identity theft charge until February 2008. In the state's view,
2 the trial court's implicit disbelief of defendant's testimony is sufficient to support the trial
3 court's ultimate factual finding that defendant was made aware of the charge on
4 November 1, 2006. We disagree. It was the state's burden below to prove that defendant
5 had notice of the charge. See [State v. Bellah](#), 242 Or App 73, 80, 252 P3d 357 (2011)
6 ("Because it is the state's obligation to bring a defendant to trial within a reasonable time,
7 it is the state's burden to show the reasonableness of any delay."); [State v. Ayers](#), 207 Or
8 App 668, 689, 143 P3d 251, *rev den*, 342 Or 253 (2006) (the state has the "functional
9 burden of demonstrating that a defendant has waived rights under ORS 135.747 or
10 consented to a delay"). Even assuming that the trial court disbelieved defendant's
11 testimony, there is still no affirmative evidence in the record that supports a finding that
12 defendant had notice of the charge on November 1, 2006. See [State v. Reed](#), 339 Or 239,
13 245, 118 P3d 791 (2005) (disbelieving a witness's testimony "does not add anything
14 affirmative to the state's evidence"). We conclude that there is no evidence in the record
15 to support the trial court's factual finding that defendant had notice of the charge on
16 November 1, 2006. There could not have been, then, any waiver of speedy trial rights by
17 defendant under ORS 135.747.

18 Accordingly, we are left to decide whether the entire 17-month delay
19 between defendant's indictment and his arraignment was reasonable under ORS 135.747.
20 That statute provides:

21 "If a defendant charged with a crime, whose trial has not been
22 postponed upon the application of the defendant or by the consent of the

1 defendant, is not brought to trial within a reasonable period of time, the
2 court shall order the accusatory instrument to be dismissed."

3 The Supreme Court has outlined a two-step process for reviewing a trial court's decision
4 on a motion to dismiss brought pursuant to ORS 135.747. The first step is to "determine
5 the relevant amount of delay by subtracting from the total delay any periods of delay that
6 [the] defendant requested or consented to." [State v. Glushko/Little](#), 351 Or 297, 305, ___
7 P3d ___ (2011). The second step is to determine whether that delay is reasonable, which
8 requires an examination of "all the attendant circumstances." *Id.* at 315-16 (citing *State v.*
9 *Johnson*, 339 Or at 88). More specifically, "*the circumstances that cause the delay*
10 generally will determine whether the delay (and thus, the overall time period for bringing
11 the defendant to trial) is reasonable." *Id.* (quoting *Johnson*, 339 Or at 88) (internal
12 quotation marks omitted; emphasis in original).

13 Here, the state concedes that the 17-month delay was unreasonable. That
14 concession is well taken and we accept it. See [State v. Davids](#), 193 Or App 178, 183, 90
15 P3d 1 (2004), [aff'd](#), 339 Or 96, 116 P3d 894 (2005) (observing that "the courts generally
16 have concluded that state-caused delays to which a defendant has not consented of 15
17 months or more are generally unreasonable"). Finally, the state does not ask us to
18 remand the case to the trial court to allow it to consider whether there is "sufficient
19 reason" to continue the case under ORS 135.750, and we decline to do so.³

³ ORS 135.750 provides:

"If the defendant is not proceeded against or tried, as provided in
ORS 135.745 and 135.747, and sufficient reason therefor is shown, the

1

Reversed and remanded for entry of a judgment of dismissal.

court may order the action to be continued and in the meantime may release the defendant from custody as provided in ORS 135.230 to 135.290, for the appearance of the defendant to answer the charge or action."