COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-21-00038-CR
Appellant,	§	Appeal from the
v.	§	143rd Judicial District Court
BENJAMIN VILLALOBOZ,	§	of Ward County, Texas
Appellee.	§	(TC#s 19-08-06123-CRW)

OPINION

Pending before the Court is the State's motion for rehearing. We deny the motion for rehearing, withdraw our opinion and judgment dated July 22, 2022, and substitute the following opinion in its place.

Appellee Benjamin Villaloboz[1] was charged by information with multiple felony offenses in August 2019. On January 21, 2021, Villaloboz filed a motion to dismiss charges filed against him due to a failure to timely indict in violation of TEX. CODE CRIM. PROC. ANN. art. 32.01.[2] After

[1] The reporter's record, clerk's record, and parties' briefs present alternative spellings for Appellee Villaloboz's last name. We proceed with the spelling used in the challenged order and the parties' briefs.

[2] Villaloboz's motion was titled, "Motion to dismiss for denial of speedy indictment." Although the motion title implies a right to "a speedy indictment," Villaloboz principally argued the State violated article 32.01 by its failure to indict within statutory time limits; and good cause did not exist for the delay. As we discuss in this decision, there are no added constitutional, speedy-trial rights under article 32.01, but we apply the test for a speedy-trial violation to a

a consolidated hearing[3] on the motion, the trial court granted the motion and dismissed the charges without prejudice. In three issues, the State challenges the trial court's ruling asserting: (1) the trial court erred in both its interpretation and application of article 32.01; (2) even when utilizing the trial court's interpretation of article 32.01, dismissal was still improper; and (3) facts demonstrated that good cause existed for any delay. We affirm.

I. BACKGROUND

A. The status hearings

On August 8, 2019, Villaloboz was charged by information with criminal mischief over $2,500 and under $30,000, and repeated violation of a protective order two or more times within twelve months. *See* TEX. PENAL CODE ANN. §§ 28.03(b)(4)(A) and 25.072(a). Initially, Villaloboz was released on bond and was out on bond when a status hearing was held on December 10, 2019. At this hearing, Villaloboz, through counsel, informed the trial court that Villaloboz had been found incompetent by one doctor and that there was a pending order from the trial court ordering him to submit to a second competency evaluation. The State responded that after Villaloboz bonded out, he had failed to attend the competency evaluation the trial court ordered. In view of Villaloboz's failure to appear, the State requested that his bond be revoked and that no bond be set. The trial court revoked Villaloboz's bond and ordered an exam to be scheduled.

32.01 claim. *Ex parte Martin*, 6 S.W.3d 524, 529 (Tex. Crim. App. 1999). We address this motion as a motion to dismiss alleging a failure to timely indict pursuant to TEX. CODE CRIM. PROC. ANN. art. 32.01.

[3] Villaloboz was was charged by felony information with criminal mischief causing pecuniary loss of $2,500 or more but less than $30,000 (Trial Cause No. 19-08-06122-CRW), and with repeated violation of a protective order two or more within twelve months (Trial Cause No. 19-0816123-CRW). Villaloboz filed a motion to dismiss in each of his cases. After a consolidated hearing, the trial court granted Villaloboz's motions and dismissed his charges without prejudice. The State challenges the trial court's ruling in two separate appeals—08-21-00037-CR and 08-21-00038-CR. We address each appeal separately. This particular appeal solely addresses appellate cause number 08-21-00038-CR, involving the repeated violations of a protective order charge.

At a second status hearing held on January 21, 2020, Villaloboz, through counsel, informed the trial court that a competency trial would need to be held because there were conflicting reports as to whether Villaloboz was competent. The State agreed that a competency trial would be necessary, and the trial court scheduled it for May 4, 2020. Villaloboz personally asked the trial court if he would be able to bond out, but the court stated that that issue was not before the court. Villaloboz remained incarcerated for the next thirteen months. Villaloboz's competency trial was reset several times throughout 2020 and was set to take place on January 11, 2021. However, it did not take place because Villaloboz retained new counsel and opted to proceed by filing a motion to dismiss.

B. Motion to dismiss hearing

On January 21, 2021, Villaloboz filed a motion to dismiss in both of his cases alleging that he had been in custody since December 10, 2019 and had not been indicted on any of his charges. Villaloboz claimed that he was not aware of any reason for the delay and, therefore, the State violated article 32.01.

On February 2, 2021, the trial court held a consolidated hearing on Villaloboz's motions to dismiss. Villaloboz argued that pursuant to *King v. State*, 473 S.W.2d 43, 51-52 (Tex. Crim. App. 1971), an information cannot be substituted for an indictment absent a waiver. Villaloboz also relied on *Ex Parte Martin*, which held that if the State does not indict the defendant by the next term of the grand jury, the defendant's case shall be dismissed unless the State shows good cause. *Ex Parte Martin,* 6 S.W.3d at 526-27. Villaloboz claimed that the State had failed to show that there was good cause for delaying the indictment given that it had multiple opportunities to present the cases in 2019 and 2020, as even in the midst of the pandemic, the grand jury met eight

times during that period. Villaloboz further argued that because no indictment was returned by the next term of the grand jury, his cases should be dismissed.

The State began its response by emphasizing that the court's file in both cases reflected that the information in each case was filed soon after the date of offense. The State claimed the cases had thus far been pursued via information and that Villaloboz had sat "on his laurels," since he never brought up an issue throughout the entire time that the parties were attempting to resolve his competency issues. The State argued that had the case gone to trial, Villaloboz could have insisted on an indictment.

In terms of excuses for the indictment delay, the State said it had been unable to go to the grand jury and that the COVID pandemic had put them behind on presenting matters to the grand jury. The State argued that article 32.01's objective is "getting the court jurisdiction," which is what the information accomplished, and that once jurisdiction is established, everything, except a jury trial, can be pursued. Essentially, the State's position was that the information was sufficient because the issue of competency was being explored and article 32.01 specifically states, "if an indictment or information be not presented," which means that either one may be presented for the court to have jurisdiction.

Thus, the issue at the hearing was whether an information satisfies article 32.01 or whether an indictment is required. The State emphasized once more that it had been unable to get before the grand jury because of the pandemic and that if Villaloboz had been indicted, his article 32.01 motion would be moot. The State cited to *Ledbetter v. State*, No. 05-07-00481-CR, 2008 WL 2190982, at *2 (Tex. App.—Dallas May 28, 2008, pet. ref'd) (not designated for publication), which held that if article 32.01 applies and the case is dismissed, the dismissal must be without prejudice so that the State could go forward and seek indictments at a later date. The State also

cited *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001), which held that the dismissal pursuant to article 32.01 must be without prejudice, as the court has no authority to dismiss with prejudice. Finally, the State reiterated that the statute's wording referred to either an indictment or an information and did not distinguish between felonies and misdemeanors.

Villaloboz responded that *Seidel* did not hold that you can charge someone with a felony by information. Villaloboz also argued that the law requires that an accused charged with a felony must be charged by indictment unless good cause is shown, which the State had failed to show given that the grand jury met once a month in Ward County and had met eight times during the last year.

After the trial court reviewed the provided case law, it stated that the current version of article 32.01 differed from the older version in effect prior to the amendment because the older statute applied only to district courts. The trial court granted Villaloboz's motions and dismissed his cases without prejudice. This appeal followed.

II. DISCUSSION

A. Standard of Review and Applicable Law

1. Standard of Review

We apply a bifurcated standard of review when reviewing a trial court's ruling on a speedy-trial claim. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). We review factual components for an abuse of discretion and review the legal components de novo. *Id.* We must evaluate whether the court abused its discretion by determining whether the court acted without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.3d 372, 380 (Tex. Crim. App. 1999). However, "an abuse of discretion review of trial court decisions is not necessarily appropriate in the context of application of law to facts when the decision does not turn

on the credibility or demeanor of witnesses." *Ex parte Martin*, 6 S.W.3d at 526. Instead, when "the trial judge is not in an appreciably better position than the reviewing court" to make credibility determinations, appellate courts must conduct a de novo review. *Id.* (quoting *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997); *see also Ex parte Turner*, No. 12-19-00357-CR, 2020 WL 500780, at *2 (Tex. App.—Tyler Jan. 31, 2020, no pet.) (mem. op., not designated for publication).

When our review requires us to analyze a decision based on a trial court's interpretation of a statute, we first construe the statute according to its plain language. *Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2009). "Statutory construction is a question of law; thus, this Court conducts a *de novo* review." *Id.* "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Id.*

2. Applicable Law

Typically, a trial court has no inherent authority to dismiss a case without the consent of the prosecutor. *State v. Mungia*, 119 S.W.3d 814, 816 (Tex. Crim. App. 2003). However, a trial court may dismiss a case without the prosecutor's consent, if dismissal is authorized by constitution, statute, or common law. *Id.* These limited instances generally apply when a defendant is denied a right to speedy trial, when there is a defect in the charging instrument, when necessary to remedy certain Sixth Amendment violations, or when a defendant is detained without a charging instrument in violation of article 32.01 of the Texas Code of Criminal Procedure. *Id.* Here, we focus on the last of those circumstances, dismissal based on article 32.01.

Article 32.01 provides:

> When a defendant has been detained in custody or held to bail for the defendant's appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented

> against such defendant on or before the last day of the next term of the court which is held after the defendant's commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

TEX. CODE CRIM. PROC. ANN. art. 32.01(a). "By operation article 32.01 prevents citizens from being left in jail or on bail for long periods of time without being indicted." *Ex parte Martin*, 6 S.W.3d at 529. "The statute gives a person held in custody without indictment a means to obtain his release, because the statute requires the State to 'indict within the period set by article 32.01, show good cause for the delay, or suffer the dismissal of the charges.'" *Schroeder v. State*, 307 S.W.3d 578, 579 (Tex. App.—Beaumont 2010, pet. ref'd) (quoting *Ex parte Martin*, 6 S.W.3d at 529).

"[A]rticle 32.01 does not create a substantive right that frees a person from prosecution for the commission of an offense." *Id.* at 580 (citing *Ex parte Seidel*, 39 S.W.3d 221, 224 (Tex. Crim. App. 2001)). Rather, "article 32.01 creates a procedural right to be dismissed from custody under certain circumstances until the grand jury has been presented with an indictment." *Id.* "After the presentment to the grand jury of an indictment on the offense at issue, article 32.01 is no longer applicable." *Id.* (citing *Brooks v. State*, 990 S.W.2d 278, 285 (Tex. Crim. App. 1999)).

B. No waiver of the right to be accused by an indictment

As a threshold issue, we first address whether Villaloboz waived his right to an indictment. The Texas Constitution requires that the State obtain a grand jury indictment in a felony case unless the defendant waives that requirement. *See* TEX. CONST. art. 1, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05. Article 1.141 of the Code of Criminal Procedure sets out the specific means for waiving one's right to trial of felony charges by indictment and provides:

> A person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony. On waiver as provided in this article, the accused shall be charged by information.

TEX. CODE CRIM. PROC. ANN. art. 1.141.

On appeal, the State argues that the plain language of article 32.01 provides that either an indictment or an information may be presented against a defendant in order to prevent the prosecution from being dismissed. The State also maintains that the trial court incorrectly concluded that an information is insufficient to confer jurisdiction in a felony prosecution.

The State acknowledges that in order to proceed by information, there is a requirement that a defendant waive indictment, but it claims that there is no indication in the record "that such a course was not contemplated." However, there is nothing in the record to suggest that Villaloboz waived indictment or that he contemplated such a course.

The State relies on the following statement from *King v. State*, "[i]t is well to bear in mind that a felony information acts in lieu of or as a substitute for an indictment and its validity is therefore essential to the court's jurisdiction." *King*, 473 S.W.2d at 51-52. However, the State omits the statement that comes immediately after, which states that "[i]f an accused has not effectively waived his right to an indictment in full accordance with [article 1.141 of the code of criminal procedure] the felony information is void." *Id.* at 52. "An indictment is still mandatory in absence of a valid waiver." *Id.* Thus, because we are not persuaded that Villaloboz waived his right to an indictment, we reject the State's threshold argument.

C. Analysis

1. Article 32.01 does not allow for an information to substitute for an indictment in felony cases

In its first two issues, the State asserts the trial court erred in its interpretation and application of article 32.01. It further asserts the amendments made to article 32.01 did not permit

dismissal of charges. We address the first issues together as they both argue dismissal was not proper under article 32.01.

As noted above, the State asserts that its position is supported by a plain reading of article 32.01. In its appellate brief, the State sets out the history of article 32.01, which was first enacted in 1856 and has remained substantially unchanged since that time. *See Cameron v. State*, 988 S.W.2d 835, 843 (Tex. App.—San Antonio 1999, pet. ref'd). One of the few changes made to article 32.01 took effect in 2005. Prior to 2005, article 32.01 applied only to defendants with criminal accusations pending before the district court. *See Uptergrove v. State*, 881 S.W.2d 529, 531 (Tex. App.—Texarkana 1994, pet. ref'd) (holding article 32.01 applies only to a criminal accusation before a district court). However, in 2005, article 32.01 was amended and "before the district court" was removed from the text. *See* Act approved June 17, 2005, 79th Leg., R.S., ch. 743, § 6, 2005 Tex. Gen. Laws 2559, 2560 (codified at TEX. CODE CRIM. PROC. § 32.01). This deletion made article 32.01 applicable not only to a defendant with a criminal accusation pending before a district court, but to any defendant who was detained or held to bail, which included misdemeanor offenders who appeared before a court other than a district court. *See* House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 2767, 79th Leg., R.S. (2005).

The State argues that because the wording in article 32.01, ". . . if indictment or information be not presented against such defendant . . .," has remained unchanged, this means that either an indictment or information may be obtained by the State in order to satisfy article 32.01. This interpretation of article 32.01 is faulty because the State ignores the fact that even before the terms "before the district court" were omitted in 2005, district courts had jurisdiction over felony and certain misdemeanor offenses, which means that under a plain reading, the term "indictment" applies to felony offenses and the term "information" applies to the applicable misdemeanor

offenses. *See* House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 2767, 79th Leg., R.S. (2005) ("In a criminal case, district courts have jurisdiction over felony and misdemeanor cases"); TEX. CODE CRIM. PROC. ANN. art. 4.05 (providing that district courts shall have original jurisdiction of all misdemeanors involving official misconduct). Additionally, because the terms "before the district court" were removed in 2005 making article 32.01 applicable to felony cases and all misdemeanor cases, it was not unreasonable for the trial court to have interpreted the statute as requiring the State obtain indictments on Villaloboz's two felony charges.

2. Case law does not support the State's position

The State's assertion that the filing of an information in a felony case relieves it of its obligation to secure an indictment under article 32.01 is unsupported by the case law. Cases that have interpreted article 32.01 refer to the State's need to obtain an indictment and none of them state that the filing of an information is a valid substitution. *See Brooks*, 990 S.W.2d at 285 (the Texas Court of Criminal Appeals noted that "[w]e have held that Article 32.01 has no application once an indictment is returned"); *Schroeder*, 307 S.W.3d at 580 ("[Article 32.01] gives a person held in custody without indictment a means to obtain his release, because the statute requires the State to 'indict within the period set by article 32.01, show good cause for the delay, or suffer the dismissal of the charges.'" (citing *Ex parte Martin*, 6 S.W.3d at 529)); *Cameron*, 988 S.W.2d at 843 ("The purpose of article 32.01 is to encourage the State to seek and obtain an indictment or release the defendant without undue delay.").

Having found that the State has failed to show that Villaloboz waived his right to an indictment and that an information satisfies the requirements of article 32.01, we overrule the State's first and second issues. We turn next to the issue of whether the State showed that it had good cause for failing to timely indict Villaloboz.

D. Good cause for failing to perform an act required by law

In its third issue, the State contends the totality of the circumstances demonstrated good cause under article 32.01.

Pursuant to article 32.01, the State is required to indict a defendant by the next term of the grand jury after the one in which the defendant was arrested or show good cause, supported by affidavit, for the failure to do so. TEX. CODE CRIM. PROC. ANN. art. 32.01. Good cause is not defined in article 32.01, but it "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *See Ex parte Martin*, 6 S.W.3d at 526 (quoting BLACK'S LAW DICTIONARY 692 (6th ed. 1990)). The Court of Criminal Appeals has held that the test for good cause under a 32.01 violation complaint should be patterned after that used to determine whether a defendant's speedy trial right has been violated. *See id.* at 528; *see also Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). The Court of Criminal Appeals adopted a "*Barker*-like" test due to the similarities this issue presents without adding constitutional, speedy-trial rights to article 32.01. *Ex parte Martin*, 6 S.W.3d at 529 ("How do courts determine when the right to be discharged in the absence of an indictment or the right to a speedy trial has been violated? The protections are different, but the problem presented is the same; a fact-intensive situation calls for a balancing of the interests served by the rule and the interests of the parties.").

Thus, the factors to consider are the length of the delay, the State's reason for delay, whether the delay was due to lack of diligence on the part of the State, and whether the delay caused harm to the accused. *See Martin*, 6 S.W.3d at 528. De novo review is appropriate in this situation because the only issue before the reviewing court is whether the facts submitted by the State for not indicting the defendant amounted to good cause. *See id.* at 526.

1. Length of delay

As far as length of delay, Villaloboz was arrested in August of 2019. The parties disagree on the length of delay. Villaloboz claims that it is 542 days, whereas the State claims that it is 418 days. It is unnecessary for us to decide which calculation is correct because under either calculation, the length of delay is more than one year. Because a delay approaching one year is sufficient to trigger a speedy trial inquiry, we find that the indictment delay in this case was presumptively prejudicial. *See Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003). Additionally, because the State bore the responsibility for timely indicting Villaloboz, we conclude this factor weighs in favor of Villaloboz. *See Land v. State*, 695 S.W.2d 712, 714-15 (Tex. App.—Austin 1985, pet. ref'd) (per curiam) (the State has the discretion to decide which cases to present to the grand jury and is properly charged with any delay attributable to the exercise of that discretion).

2. The State's reason for delay and whether the delay was due to lack of diligence on the part of the State

In assessing the State's reason for the delay and whether the delay was due to the State's lack of diligence, we first note that the State did not present an affidavit to support its claim of good cause, which is a requirement under article 32.01(a). TEX. CODE CRIM. PROC. ANN. art. 32.01(a). At the hearing, the State claimed that it was unable to go before the grand jury and that the pandemic had caused it to fall behind on indicting cases, but it did not present any evidence to substantiate its claim or further explain why it was unable to go before the grand jury. Villaloboz responded that the grand jury had met eight times during the period that he was incarcerated and while he did not present any evidence in support of this claim, the State did not contradict his assertion. In fact, the State admitted that grand juries had convened during the pandemic but said that the State was way behind. The State argues that the delay was justified because the parties had

mutually agreed to proceed without an indictment while they addressed Villaloboz's competency issues. However, as Villaloboz states in his brief, there is nothing in the record that indicates that he waived his right to an indictment and as previously established, an indictment is necessary absent a waiver. *See King*, 473 S.W.2d at 52. Because the State failed to present any evidence regarding the reasons for the indictment delay, we conclude these factors weigh in favor of Villaloboz.

3. *Whether the delay caused harm to the accused*

The State claims that Villaloboz was not prejudiced by the delay because Villaloboz's position remains unchanged and he can be indicted at any time. Villaloboz disagrees. On appeal, Villaloboz argues that the delay hindered his ability to present his defense. Villaloboz did not present any evidence at the hearing to support this claim in terms of whether the delay affected the availability of certain witnesses whose testimony was material to his defense. *Harris v. State*, 489 S.W.2d 303, 308 (Tex. Crim. App. 1973). However, Villaloboz showed that he was detained for over thirteen consecutive months without being indicted, which supports his claim that his detention caused him anxiety and concern. *See Barker*, 407 U.S. at 532 ("The time spent in jail awaiting trial has a detrimental impact on the individual."). Additionally, his detention under such circumstances constitutes a prima facie showing of oppressive pretrial incarceration. *See Torres v. State*, No. 04-04-00219-CR, 2005 WL 708434, at *3 (Tex. App.—San Antonio, Mar. 30, 2005, pet. ref'd) (mem. op., not designated for publication) (in a speedy-trial analysis, the fifteen-month period that defendant spent in jail awaiting trial constituted a prima facie showing of oppressive pretrial incarceration (citing *State v. Munoz*, 991 S.W.2d 818, 828 (Tex. Crim. App. 1999))). This prima facie showing of oppressive pretrial incarceration coupled with the State's failure to rebut Villaloboz's prejudice claim weighs against the State.

Accordingly, having reviewed the record de novo, we conclude that good cause was not shown by the State. We overrule the State's third issue.

E. The State's motion for rehearing

The State asserts in its motion for rehearing that this Court's holding is in direct conflict with the Court of Criminal Appeals' holding in *Ex Parte Ulloa*, 514 S.W.3d 756, 759 (Tex. Crim. App. 2017). First, we note the State's reliance on *Ulloa* is presented for the first time in its motion for rehearing. But even so, the central holding in *Ulloa* is irrelevant to the central issue in this case.

In *Ulloa*, a defendant filed a pretrial habeas corpus application alleging that the three-year limitations period for offenses had run before the indictment was eventually returned. *Ex Parte Ulloa*, 514 S.W.3d at 757. The Court of Criminal Appeals affirmed the decision of the Court of Appeals and the trial court and held an information is sufficient to toll limitations during the pendency of the information. *Id.* at 760. Within its opinion, the Court of Criminal Appeals stated Article V, § 12 of the Texas Constitution confers jurisdiction over a person upon the filing of an indictment or information. *Id.* at 759. The State argues this statement shows "either an indictment or an information, filed 'before the last day of the next term of the court which is held after the defendant's commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail,' prevents the dismissal of a case under Article 32.01[.]" (emphasis by State). However, this is not what *Ulloa* held. In fact, *Ulloa* does not address article 32.01 or the requirement for an indictment at all.

Although *Ulloa* states an information gives the trial court subject matter jurisdiction, it does so by looking to whether an information tolls the limitations period, not in the context of meeting the requirement of article 32.01. Furthermore, the issue in this case is not whether a trial court has jurisdiction or whether the limitations period can be tolled. Rather, the issue is whether

the trial court has the authority to dismiss a case under article 32.01. Concluding the proper disposition was made in the original submission, the State's motion for rehearing is overruled.

III. CONCLUSION

Because we conclude that the State has failed to show that article 32.01 allows for an information to substitute for an indictment when a defendant stands accused of a felony, or that good cause was shown for the complained-of indictment delay, we affirm the trial court's order granting Villaloboz's motion to dismiss.

GINA M. PALAFOX, Justice

September 15, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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