Affirmed and Opinion Filed February 3, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01368-CR

VINCENT CROWLEY BERTRAND, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F12-56252-L

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Bridges

Appellant Vincent Crowley McLemore appeals the trial court's denial of his motion to dismiss for violation of his right to a speedy trial. We affirm the trial court's judgment.

Background

McLemore was arrested on May 27, 2012 for unlawfully, intentionally and knowingly possessing cocaine in the amount of less than one gram. The State indicted Bertrand on November 14, 2013 and filed the indictment with the trial court on February 17, 2014. The first trial setting was March 14, 2014. The record contains pass slips, all agreed to by Bertrand and his attorney, resetting the case to the following dates: (1) March 25, 2014, (2) July 8, 2014, and (3) July 18, 2014.

On July 15, 2014, Bertrand filed a motion to dismiss for violation of his right to a speedy trial. The trial court held a hearing on July 18, 2014. Bertrand testified he posted a bond with Delta Bonds after his arrest and was released. He then reported weekly to Delta Bonds for over two years. He explained it was burdensome to miss work and pay for the gas for his weekly check-in. He also claimed he had difficulty finding a new apartment because of the arrest and eventually moved in with his brother.

He testified he suffered anxiety and stress because the case was pending for almost two years. He also gave up many of his previous hobbies and "felt completely miserable having this thing hanging over [his] head." He also said he was embarrassed by his girlfriend's parents discovering his arrest.

On cross-examination, he admitted this was not his first criminal case so although this case alone may not have prevented him from getting an apartment and employment, he thought it likely contributed. He claimed some potential employers told him he did not get job offers because of the pending criminal action. He denied that any delay in the State prosecuting the case should be attributed to him.

The trial court denied his speedy trial motion on July 25, 2014. Bertrand then entered a guilty plea. The trial court deferred adjudication and placed him on three years community supervision.

Law and Analysis

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. CONST. amend. VI; *see also Gonzales v. State*, 435 S.W.3d 801, 808 (Tex. Crim. App. 2014). Courts determine a speedy trial claim on an "ad hoc basis" by analyzing and weighing four factors: (1) the length of the delay, (2) the

State's reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant because of the length of delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Gonzales*, 435 S.W.3d at 808. The State has the burden to justify the length of the delay, while the defendant has the burden to prove he asserted his right and is prejudiced. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008). The defendant's burden on the latter two factors "varies inversely" with the State's degree of culpability for the delay. *Id*. When conducting the balancing test, no single factor is determinative, and the conduct of both the State and the defendant must be weighed. *Barker*, 407 U.S. at 533.

To trigger a speedy trial analysis, the defendant must make an initial showing that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay. *Gonzales*, 435 S.W.3d at 808 (citing *Doggett v. United States*, 505 U.S. 647, 651–52 (1992)). If the defendant makes a threshold showing of presumptive prejudice, the court must consider and weigh the remaining *Barker* factors. *Id*.

If the right to a speedy trial has been violated, the remedy is dismissal of the charging instrument with prejudice. *Cantu*, 253 S.W.3d at 281. Because this is an extreme remedy, "courts must apply the *Barker* balancing test with common sense and sensitivity to ensure that charges are dismissed only when the evidence shows that a defendant's actual and asserted interest in a speedy trial has been infringed. The constitutional right is that of a speedy trial, not dismissal of the charges." *Id*.

When reviewing the trial court's ruling on a speedy trial claim, we apply a bifurcated standard of review. *Gonzales*, 435 S.W.3d at 808. We give almost total deference to historical findings of fact by the trial court that the record supports and draw reasonable inference from those facts necessary to support the trial court's findings, but we review de novo whether there was sufficient presumptive prejudice to proceed to a *Barker* analysis and the weighing of the

Barker factors, which are legal questions. *Id*. We must uphold the trial court's ruling if it is supported by the record and is correct under the applicable law. *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003).

We begin by considering the length of the delay. In its brief, the State acknowledges nearly one year and nine months elapsed between Bertrand's arrest and the indictment, and another five months elapsed until the court conducted a hearing on his motion to dismiss. The State then concedes, "[t]his delay is sufficient to trigger a speedy trial analysis under *Barker* . . . this factor weighs against the State and is presumptively prejudicial." Because the State concedes the delay was presumptively prejudicial, the first factor weighs in favor of Bertrand.

With respect to the reason for the delay, the State bears the initial burden of justifying the delay. *Emery v. State*, 881 S.W.2d 702, 708 (Tex. Crim. App. 1994). Different reasons for delay are assigned different weights: an intentional delay for tactical reasons is weighed heavily against the State; a neutral reason, such as overcrowded courts or negligence, is weighed less heavily against the State; and a valid reason is not weighed against the State at all. *State v. Munoz*, 991 S.W.2d 818, 822 (Tex. Crim. App. 1999).

The State explained at the hearing that the delay in returning the indictment occurred because it took some time for the drug evidence to be analyzed by a forensic laboratory. However, the drug evidence was not submitted to a laboratory for analysis until October 2013, which was almost a year-and-a-half after the arrest. Although the State argued it was its practice to defer indictment until it received lab results, the State failed to explain any reason for the delay in submitting the evidence. While we must presume the trial court resolved any disputed facts in the State's favor that are supported by the record, we cannot conclude the State's explanation—the delay in submitting and receiving the laboratory test results—justifies the delay in seeking and obtaining an indictment against Bertrand. *See Jackson v. State*, No. 05-14-00283-

CR, 2015 WL 1540800, at *3 (Tex. App.—Dallas Apr. 1, 2015, no pet.) (mem. op., not designated for publication) (concluding State's explanation for delay based on delayed laboratory test results did not justify delay in obtaining indictment). However, there is no evidence the State deliberately delayed the process for strategic gain. Therefore, we conclude the second *Barker* factor weighs only slightly against the State. *Id*.

Regarding the third *Barker* factor, the defendant bears the responsibility to assert his right to a speedy trial. *Cantu*, 253 S.W.3d at 282. Whether and how a defendant chooses to assert his right "is closely related to the other three factors because the strength of his efforts will be shaped by them." *Id*. A defendant's failure to timely seek a speedy trial does not amount to a waiver of the right. *Barker*, 407 U.S. at 532. However, a defendant's failure to timely demand a speedy trial makes it difficult for the defendant to prevail on a speedy trial claim because the failure to demand a timely speedy trial indicates strongly that he did not really want a speedy trial and was not prejudiced by not having one. *See Cantu*, 253 S.W.3d at 283. The longer the delay becomes, the more heavily a defendant's inaction weighs against him. *Shaw*, 117 S.W.3d at 890. Although a defendant cannot file a motion for speedy trial until formal charges are made, "his silence during the entire pre-indictment period works against him because it suggests that any hardships he suffered were either minimal or caused by other factors." *Cantu*, 253 S.W.3d at 284. The record does not show any efforts by Bertrand to move the case into court during the time between his arrest and indictment.

Bertrand argues he asserted his right by demanding a speedy trial at his first and second court settings and by filing his motion to dismiss. He also testified during the hearing that he demanded a speedy trial from his first court setting. The record, however, refutes Bertrand's claims. The original trial date was March 4, 2014 but Bertrand agreed to a pass, which reset the case to March 25, 2014. The pass slip does not indicate he requested a speedy trial. The second

pass slip for the March 25, 2014 setting indicates he requested a speedy trial; however, he again agreed to reset the case to July 8, 2014. On July 8, 2014, he agreed to reset the case again for the July 15, 2014 speedy trial hearing.

The fact that Bertrand kept passing the case indicates it was not a pressing issue for him to receive a speedy trial. Further, Bertrand first moved to dismiss the case on July 15, 2014, which was about five months after his indictment, but approximately two years after his arrest. Rather than file a motion for speedy trial, Bertrand filed a motion to dismiss, which generally weakens a speedy trial claim because it shows a desire to have no trial instead of a speedy one. *Id*. Bertrand's failure to "diligently and vigorously seek a rapid resolution is entitled to strong evidentiary weight." *Id*. As such, Bertrand's delay in attempting to assert his right weighs against him.

Lastly, we consider the fourth *Barker* factor, the prejudice to Bertrand from the delay. The prejudice must be assessed in light of the interests that the speedy trial right is meant to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, (3) and limiting the possibility the defense will be impaired. *Id*. at 285. Of these three interests, the possibility the defense will be impaired by dimming memories and the loss of exculpatory evidence is the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532.

Because Bertrand immediately posted bond after his arrest, oppressive pretrial incarceration was not an issue. The record does not indicate, and Bertrand does not argue, that his defense was impaired by the delay. Rather, Bertrand argues he was prejudiced because (1) it was inconvenient to report weekly to the bonding company because it caused him to miss work and to pay for gas; (2) he could not get employment or housing; and (3) his arrest caused him embarrassment and anxiety.

Although Bertrand testified no one would hire him or rent him an apartment because of the pending arrest, he admitted he had a prior criminal record involving a misdemeanor assault, and said it was likely the pending arrest alone did not prevent him from obtaining employment or an apartment.

He testified about the inconvenience of reporting to the bond company, but he admitted to having prior experience with bond conditions because of his past misdemeanor. He conceded that even if he had been indicted earlier, he knew he would still have needed to comply with bond conditions.

He claimed the pending case caused him "some anxiety, some depression" and he was embarrassed by his girlfriend's parents discovering his arrest, but he did not testify the delay caused him unusual anxiety or concern beyond the level normally associated with being arrested for possession of illegal drugs. *See Jackson*, 2015 WL 1540800, at *4. Further, the problems he complains about appear to stem from his arrest rather than any delay in going to trial. Accordingly, Bertrand has failed to demonstrate actual prejudice. Likewise, any presumptive prejudice created by the approximate two-year delay is extenuated by Bertrand's acquiescence to the delay, as shown by his failure to act and by his agreement to pass his case on more than one occasion. *Id.*; *see also Shaw*, 117 S.W.3d at 890. The fourth factor weighs in favor of the State.

Finally, we must balance the *Barker* factors with "common sense and sensitivity to ensure that charges are dismissed only when the evidence shows that a defendant's actual and asserted interest in a speedy trial has been infringed." *Cantu*, 253 S.W.3d at 218. Although the length of the delay and reason for the delay slightly weigh in favor of finding a violation of his right to a speedy trial, the other two factors weigh in favor of concluding there was no violation. There is no evidence that the State intentionally delayed for strategic gain, that Bertrand diligently tried to move his case during the months between his arrest and the indictment issuing,

and that he was prejudiced beyond the level normally associated with being arrested for possession of illegal drugs. We conclude the trial court did not err by denying Bertrand's motion to dismiss for violation of his right to a speedy trial.

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

VINCENT CROWLEY BERTRAND, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F12-56252-L.
No. 05-14-01368-CR V.	Opinion delivered by Justice Bridges. Justices Lang-Miers and Schenck
THE STATE OF TEXAS, Appellee	participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered February 3, 2016.