AFFIRM; and Opinion Filed July 29, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00083-CR

CHAD ELDON HUDSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F-1451555-I

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Brown

Appellant Chad Eldon Hudson appeals his conviction for intoxication assault. In a single issue, appellant contends he was denied his constitutional right to a speedy trial. For the following reasons, we affirm the trial court's judgment.

Background

On January 19, 2014, appellant crashed his vehicle into a light pole. Whitney Taylor was a passenger in the vehicle and suffered serious bodily injuries as a result of the collision. Appellant was arrested at the scene for DWI. The following day, he was arraigned and released on bond. Just over eight months later, appellant was indicted for intoxication assault. Appellant filed a motion to dismiss asserting the State's failure to diligently proceed to indictment violated his right to a speedy trial under the United States Constitution.

The trial court held a hearing on appellant's motion to dismiss. At the hearing, appellant called Taylor to support his motion. Although Taylor acknowledged that appellant was intoxicated on the night of the offense and that she suffered serious bodily injuries as a result of the collision, she did not want appellant prosecuted. Instead, she testified that appellant suffered prejudice from the State's delay in obtaining an indictment. Specifically, Taylor claimed that her memory had dimmed because of the delay. However, on cross-examination, Taylor admitted she could not remember details about that night because she too was intoxicated. She also admitted that she had told the prosecutor after the offense that she was "black out drunk" that night and that she thought appellant was as well.

Appellant also testified at the hearing. He testified he was suspended from his job and was unable to find other commensurate employment because of the pending charges. Appellant also testified he lacked memory of the night of the offense, "at least in part," because of the passage of time. Appellant, however, also acknowledged that he had known since his arrest he was likely to be indicted.

After the hearing, the trial court denied appellant's motion.[1] Appellant subsequently pleaded guilty to the offense pursuant to a plea bargain agreement. The trial court assessed appellant's punishment, in accordance with the plea agreement, at ten years' confinement, probated for five years and a fine of $2000.

[1] According to the State, appellant waived his complaint because the trial court did not rule on his motion to dismiss. To preserve error, the record must show the trial court either expressly or implicitly ruled on the appellant's motion. Tex. R. App. P. 33.1(a). A trial court's ruling need not be expressly stated if its actions or other statements unquestionably indicate a ruling. *Dahlem v. State*, 322 S.W.3d 685, 691 (Tex. App.—Fort Worth 2010, pet. ref'd); s*ee also Montanez v. State*, 195 S.W.3d 101, 104 (Tex. Crim. App. 2006). Here, the record shows that, at the conclusion of the hearing, the trial court stated it was going to take a break to finish reading the cases appellant had provided . The reporter's record does not include any further proceedings. The clerk's docket sheet, however, contains a notation, dated the same date as the hearing on the motion to dismiss, stating that appellant's motion was denied. The trial court subsequently certified appellant's right to appeal stating the case involved matters that were raised by written motion and ruled on prior to trial. We conclude the record, including the docket sheet entry, the trial court's certification, as well the trial court's failure to actually dismiss the indictment, is sufficient to show the trial court denied appellant's motion to dismiss. *See Lasyone v. State*, 12-14-00050-CR, 2014 WL 3662567, at *1 (Tex. App.—Tyler July 23, 2014, no pet.) (docket sheet notation and certification of right to appeal sufficient to show trial court ruled on motion to suppress).

Speedy Trial

In a single issue, appellant asserts he was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. *See* U.S. Const. amend VI. In determining whether a defendant was denied his right to a speedy trial, we must balance four factors: (1) the length of the delay, (2) the State's reasons for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Before we consider these factors, the accused is required to make a threshold showing that the length of the delay was presumptively prejudicial. *See Gonzalez v. State*, 435 S.W.3d 801, 808 (Tex. Crim. App. 2014). The length of the delay is measured from the time the accused is arrested for the offense or formally charged by indictment or information. *United States v. Marion*, 404 U.S. 307, 320 (1971). There is no per se time period that is considered presumptively prejudicial, but generally a delay of eight months or longer will trigger a speedy trial analysis, but a delay of four months will not. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008); *see Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992).

Once a threshold showing is made, the trial court considers and weighs the factors in light of the respective burdens on the accused and the State. *See Cantu*, 253 S.W.3d at 280. Specifically, while the State has the burden to justify the length of delay, the defendant has the burden to show assertion of the right and prejudice. *Id*. The defendant's burden of proof on the latter two factors "varies inversely" with the State's degree of culpability for the delay. *Id.* The longer the State's actions delay a trial, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial. *Id*. at 280–81.

We review a trial court's speedy trial decision under a bifurcated standard of review; an abuse of discretion for factual components and a de novo standard for legal components. *Cantu*, 253 S.W.3d at 281; *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002). With

respect to factual issues, the trial court is the sole judge of the credibility of the witnesses, and may disbelieve any evidence so long as there is a reasonable basis for doing so. *Cantu*, 253 S.W.3d at 282.

1. Length of the Delay

Here, appellant complains of the eight-month delay between his arrest and his indictment. An eight-month delay is at the bare minimum courts have indicated may suffice to warrant a speedy trial analysis. *See Harris*, 827 S.W.2d at 956. We will assume this delay was sufficient to meet appellant's threshold burden to show a presumptively prejudicial delay. *See Knox v. State*, 934 S.W.2d 678, 681 (Tex. Crim. App. 1996) (assuming, without deciding, ten-month delay presumptively prejudicial); *Harris*, 827 S.W.2d at 956 (assuming, without deciding, thirteen-month delay presumptively prejudicial). However, because the delay extended no further than the bare minimum necessary to trigger a speedy trial review, this factor does not weigh against the State. *See Zamorano*, 84 S.W.3d at 649.

2. Reasons for Delay

We assign different weights to different reasons for a delay. *Id.* at 649–50. Intentional prosecutorial delays are weighed heavily against the State, while more neutral reasons such as negligence or overcrowded dockets are weighed less heavily against the State. *Id.* If the record is silent as to the reasons for the delay, we may presume neither a deliberate attempt to delay nor a valid reason. *Id.*

Here, the State did not present any evidence of the reasons for the delay. Appellant also failed to show the delay was deliberate. Because the record is silent as to the reasons for the delay, this factor weighs against the State, but not heavily. *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003).

3. Assertion of the Right

Even if an appellant has not been formally charged with an offense, it is incumbent upon him to make some showing that he tried to get the case to court so that he could be tried for the offense in a timely manner. *Cantu*, 253 S.W.3d at 284. A defendant's failure to make such efforts makes it difficult for the defendant to prevail on a speedy trial claim. *Barker*, 407 U.S. at 532. This is because a defendant's failure to take such actions strongly indicates that he did not really want a speedy trial and that he was not prejudiced by not having one. *See Cantu*, 253 S.W.3d at 284; *Dragoo*, 96 S.W.3d at 314.

Here, appellant failed to show he made efforts to diligently seek a speedy trial during the eight-month delay he claims violated his right to a speedy trial. *See Cantu*, 253 S.W.3d at 282 (although defendant may not demand a speedy trial prior to indictment, he may take other actions to indicate desire for speedy trial); *see also United States v. Avalos*, 541 F.2d 1100, 1115 (5th Cir. 1976) (defendant failed to assert desire for speedy trial either before after indictment). Appellant nevertheless asserts this factor weighs in his favor because after the State presented the indictment, he requested the first possible trial date and the State failed to show it then made any attempt to secure him an expedited appearance date. However, appellant also acknowledged that his attorney and the State were discussing his case since his indictment was returned and had begun plea discussions. We conclude the record as a whole supports a finding that appellant did not actually want a speedy trial, but no trial at all. *See Cantu*, 253 S.W.3d at 283. Regardless, to the extent this factor weighs in favor of appellant, it does so only slightly.

4. Prejudice

Finally, we consider whether appellant showed prejudice resulting from the delay. We assess this factor in light of the interests the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize the accused's anxiety and concern; and

(3) to limit the possibility that the accused's defense will be impaired. *Barker*, 407 U.S. at 532. The most serious form of prejudice is the last because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*. While a defendant has the burden to make some showing of prejudice, a showing of actual prejudice is not required. *See State v. Munoz*, 991 S.W.2d 818, 826 (Tex. Crim. App. 1999).

According to appellant, he showed prejudice because, when he was arrested, he was suspended from his job pending resolution of the case and he had difficulty finding other employment because the charges remained pending. However, this prejudice can only marginally be attributed to any unjustified delay rather than ordinary and expected delay. Appellant also claims his defense was prejudiced because his and Taylor's memories had both dimmed due to the delay. However, the trial court could have concluded that their lack of memory was not due to the delay, but because they were both intoxicated on the night of the offense. Further, appellant acknowledged that he knew from the start that he was likely to be indicted for the offense. Yet he failed to explain why he could not have preserved any evidence he may have needed to defend himself. We conclude appellant has failed to show his defense was impaired as a result of the delay and that any prejudice he may have otherwise suffered can only be minimally attributed to any unjustified delay. We conclude this factor weighs against appellant.

5. Conclusion

Having reviewed the *Barker* factors in light of the minimal delay in this case, we cannot conclude the trial court erred in denying appellant's motion to dismiss. Specifically, the record fails to show any improper conduct on the part of the State caused the delay, appellant's actions during the delay fail to show he genuinely desired a speedy trial, appellant has failed to show his defense was prejudiced as a result of the delay, and finally any other prejudice he suffered from

the pendency of the charges can only be minimally attributed to any unjustified delay. *See Cantu*, 253 S.W.3d at 286-87 (defendant charged with DWI was not denied his right to speedy trial by sixteen-month delay, including a one-year delay between his arrest and indictment). Therefore, we resolve this issue against appellant.

Reformation of the Judgment

In a cross-issue, the State asserts we should reform the trial court's judgment to include a deadly weapon finding. The record shows the indictment contained an allegation that appellant used a deadly weapon in the commission of the offense, specifically his vehicle. The trial court's judgment, however, does not contain a finding that appellant used a deadly weapon in the commission of the offense. According to the State, because appellant pleaded guilty to the allegations in the indictment and the trial court found appellant guilty "as charged in the indictment," we have sufficient information to reform the judgment to include a deadly weapon finding. We disagree.

An affirmative deadly weapon finding must be an express determination by the trier of fact in order to be effective. *Guthrie-Nail v. State*, PD-0125-14, 2015 WL 5449642, at *2 (Tex. Crim. App. Sept. 16, 2015). At the plea hearing, the trial court found appellant "guilty of the offense of intoxicated [sic] assault as charged in the indictment." However, the trial court made no reference to the deadly weapon allegation, which was alleged in a separate paragraph of the indictment. The trial court did not otherwise make an affirmative finding that appellant used a deadly weapon in the commission of the offense. This Court is permitted to reform a judgment only if the record indisputably shows the trial court made a deadly weapon finding and thus its failure to enter the finding on the judgment was a clerical error. *See id.* at 5. Because the record before us is insufficient to enable us to make that determination, we may not reform the judgment.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHAD ELDON HUDSON, Appellant	On Appeal from the Criminal District Court No. 2, Dallas County, Texas
No. 05-15-00083-CR V.	Trial Court Cause No. F-1451555-I.
	Opinion delivered by Justice Brown. Justices
THE STATE OF TEXAS, Appellee	Lang and Whitehill participating.

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

Judgment entered this 29th day of July, 2016.