Opinion issued July 7, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00307-CR

JASON EHRIG HODGES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Harris County, Texas
Trial Court Case No. 1498171

MEMORANDUM OPINION

A jury found appellant, Jason Ehrig Hodges, guilty of indecent exposure and assessed punishment at 180 days' confinement. In his sole issue on appeal,

appellant contends the trial court erred in overruling his motion to dismiss the information based on a violation of appellant's constitutional right to a speedy trial. We affirm.

BACKGROUND

The following timeline is relevant to the disposition of appellant's point of error:

12/20/07 Appellant was charged by information with the offense of indecent exposure.

12/21/07 A warrant was issued for his arrest and was entered into its database by the criminal warrants division of the Harris County Sheriff's Office.

12/28/07 Notification of the warrant was mailed to appellant's address. The letter was not returned.

6/16/09 Appellant was arrested.

6/18/09 Appellant and State sign a case reset form.

7/8/09 Appellant and State sign a case reset form.

7/29/09 Appellant and State sign a case reset form.

8/20/09 Appellant and State sign a case reset form.

9/15/09 Appellant and State sign a case reset form.

9/30/09 Appellant and State sign a case reset form.

10/17/09 Appellant and State sign a case reset form.

10/21/09 Appellant and State sign a case reset form.

11/13/09 Appellant files an unsworn Motion to Dismiss Information alleging a violation of his constitutional right to a Speedy trial.

11/18/09 The State files a Response to Defendant's Motion to Dismiss the Information.

12/4/09 The State files an affidavit by Sergeant Mary Reed of the Harris County Sheriff's office detailing the issuance of an arrest warrant for appellant and his subsequent arrest.

12/15/09 Appellant files an affidavit in support of his motion to dismiss alleging that he did not know about the arrest warrant against him until he was arrested for another offense and that he had no recollection of his whereabout on the date of the charged offense.

12/15/09 The trial court holds a hearing on appellant's motion to dismiss, takes judicial notice of its file, and receives appellant's affidavit. Appellant waives the presence of a court reporter at this hearing.

3/29/10 Trial commences. Appellant reurges his Motion to Dismiss, which the trial court denies.

DENIAL OF MOTION TO DISMISS BASED ON SPEEDY TRIAL VIOLATION

In his sole point of error, appellant contends the trial court erred in ruling that the 24-month delay between the filing of the information and the hearing on appellant's motion to dismiss did not violate his right to a speedy trial under the Texas and United States Constitutions.

Applicable Law and Standard of Review

The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution and is applicable to the states through the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S. Ct. 2182, 2184 (1972); *see*

U.S. CONST. amends. VI, XIV. The Texas Constitution also guarantees a speedy trial, but Texas courts apply the same *Barker* test for speedy-trial analysis under state law as under federal law. *Harris v. State,* 827 S.W.2d 949, 956 (Tex. Crim. App. 1992); *see* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 2005). The *Barker* test requires that the following non-exclusive factors be balanced against each other to determine whether a defendant's right to a speedy trial has been violated: (1) the length of delay, (2) the reason for the delay, (3) appellant's assertion of his speedy-trial right, and (4) the prejudice to appellant from the delay. *Barker,* 407 U.S. at 530, 92 S. Ct. at 2192; *Shaw v. State,* 117 S.W.3d 883, 888–89 (Tex. Crim. App. 2003).

A trial court's conclusion on the balancing analysis is a purely legal question to be reviewed de novo on appeal. *Cantu v. State,* 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). However, fact determinations made by the trial court and on which the balancing test is performed are to be given the deference generally afforded to such fact-findings. *Id.*

Absence of Hearing Record

The State argues that we cannot perform a *Barker* balancing test because we do not have a complete record. We agree.

In *Newman v. State*, 331 S.W.3d 447 (Tex. Crim. App. 2011), the defendant filed an unsworn motion to dismiss his intoxication assault case, alleging that his

constitutional right to a speedy trial had been violated because of an 8-year delay between his indictment and his trial. *Id.* at 448. Despite the lack of a reporter's record from the speedy trial hearing, the Fourteenth Court of Appeals held that even though the record was "sparse" and was silent on the second and fourth *Barker* factors, it could nonetheless perform the *Barker* balancing test. After doing so, the court of appeals held that appellant's speedy trial rights were violated. *Id.* at 449.

The Court of Criminal Appeals reversed, holding that appellant had failed to present a sufficient record showing a violation of his right to a speedy trial. *Id.* In so holding, the court stated that "[w]ith appellant having had a hearing, having lost in the trial court on his speedy trial claim, and then having presented no record at all of a . . . hearing on this claim, appellant should also have lost on direct appeal." *Id.* at 450 (citing *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002) (stating that when defendant loses on speedy trial motion, appellate court presumes that trial court resolved disputed fact issues in State's favor)).

It is true that in *Newman*, the defendant filed an unsworn motion, and here, appellant eventually supported his motion with an affidavit. The State also filed an affidavit. Thus, the record contains some of the evidence that was before the trial court at the hearing. Based on this record, the first *Barker* factor weighs against the State. Indeed, the State concedes this. However, without a reporter's record from

the hearing, it is impossible to know whether the facts alleged in the appellant's affidavit were disputed or proved false by the State regarding the remaining *Barker* factors. Because appellant had a hearing on his motion to dismiss, lost on his speedy trial claim, and presented no record from the hearing on that claim, we overrule his speedy trial claim on appeal. *See Newman*, 331 S.W.3d at 450.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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