TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00095-CR

The State of Texas, Appellant

v.

Mark Brandon Dominguez, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR-2015-352, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellee Mark Brandon Dominguez was arrested for multiple felony offenses in December 2012, for which he was not formally charged until August 5, 2015. On September 10, 2015, he filed a motion to dismiss the indictment on speedy-trial grounds. After a hearing on Dominguez's motion, the trial court granted the motion and dismissed the indictment. The State appealed. For the following reasons, we will reverse the trial court's order.

BACKGROUND

Dominguez was arrested on December 4, 2012, and was magistrated on four felony offenses—evading arrest with a vehicle, aggravated assault of a public servant, and two counts of assault of a public servant—as well as various misdemeanor offenses. He was released on bond on January 28, 2013. The case was investigated by the Comal County Sheriff's Office, which did not refer the case to the District Attorney's Office until May 20, 2015. On August 5, 2015, Dominguez

was indicted on the four felony offenses. He was also charged by the same indictment with two additional counts of aggravated assault of a public servant that arose from the same criminal episode. He was arrested on the two new felony charges on August 21, 2015, and was released on bond the following week.

On September 10, 2015, Dominguez filed a motion to dismiss the indictment on speedy-trial grounds. After a hearing, the trial court granted the motion and dismissed the indictment. In two issues, the State challenges the dismissal of (1) the four felony charges on which Dominguez was magistrated after his initial arrest in 2012 and (2) the two felony charges that were first raised in the 2015 indictment that arose from the same criminal episode.

DISCUSSION

I. The trial court erred in dismissing the original charges for which Dominguez was arrested in December 2012

In its first issue, the State contends that the trial court erred in granting Dominguez's motion to dismiss the indictment for lack of a speedy trial as to the four felony charges for which Dominguez was arrested on December 4, 2012, and indicted on August 5, 2015.

A. The right to a speedy trial

The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008). The right attaches once a person is either arrested or formally charged. *Id.* Speedy-trial claims are analyzed on an ad hoc basis by weighing and balancing the four factors enumerated in *Barker v. Wingo*:

(1) length of the delay, (2) reason for the delay, (3) assertion of the right, and (4) prejudice to the accused. 407 U.S. 514, 530-33 (1972); *Cantu*, 253 S.W.3d at 280.

The State has the burden of justifying the length of the delay, and the accused has the burden of proving that he asserted the right and that he suffered prejudice as a result of the delay. *Cantu*, 253 S.W.3d at 280. A lengthy delay reduces an accused's burden to show prejudice, but increases his burden to show that he timely asserted the right. *See Zamorano v. State*, 84 S.W.3d 643, 649 (Tex. Crim. App. 2002) ("[T]he presumption that pretrial delay has prejudiced the accused intensifies over time.") (internal quotations omitted); *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) ("[I]naction weighs more heavily against a violation the longer the delay becomes.") (internal quotations omitted).

No single factor is necessary or sufficient. *Dragoo*, 96 S.W.3d at 314. Instead, the four factors are related and must be considered together along with other relevant circumstances. *Cantu*, 253 S.W.3d at 281. We must apply the "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." *Id.*

B. Standard of review

In reviewing a trial court's ruling on a speedy-trial claim, we apply a bifurcated standard of review: we review factual components for an abuse of discretion and legal components de novo. *Id.* at 282. We defer to a trial court's resolution of disputed facts and reasonable inferences from those facts. *Id.* We view the evidence in the light most favorable to the trial court's ultimate

ruling. *Id.* Review of the individual *Barker* factors necessarily involves fact determinations and legal conclusions, but the balancing test as a whole is a purely legal question. *Id.*

Because the trial court granted Dominguez's motion to dismiss, we presume that the trial court resolved any disputed fact issues in his favor, and we defer to the findings of fact that the record supports. *See id.*

C. The trial court erred in dismissing the four felony charges for which Dominguez was arrested in December 2012

With the foregoing principles in mind, we now turn to analysis of the four *Barker* factors to determine whether the delay of which Dominguez complains violated his right to a speedy trial.

1. Length of the delay

Delay is measured from the time the accused is arrested or formally charged. *Id.* at 280. *Barker* analysis is triggered by a delay unreasonable enough to be considered "presumptively prejudicial." *Id.* at 281. Texas courts have generally held that a delay of eight months or more is presumptively prejudicial. *See Zamorano*, 84 S.W.3d at 649 n.26. If the delay is presumptively prejudicial, we must consider the extent to which the delay exceeds the minimum needed to trigger *Barker* analysis. *Id.* at 649.

In this case, Dominguez was arrested for the four felony offenses on December 4, 2012, and he was not indicted on those offenses until August 5, 2015—a delay of two years and eight months. The State concedes that the delay is sufficient to trigger *Barker* analysis, and we agree. And because the length of the delay stretched well beyond the bare minimum needed to trigger

judicial examination of the claim, this factor weighs heavily against the State. *See id.* (delay of two years and ten months triggered *Barker* analysis and "weigh[ed] heavily against the State").

2. Reasons for the delay

Related to the length of the delay is the reason that the State provides to justify the delay. *Id.* A deliberate attempt by the State to delay the trial to hamper the defense weighs heavily against the State. *Id.* A "more neutral reason" for delay—such as prosecutorial negligence or overcrowded courts—should be weighed less heavily against the State, but should still be considered since the State is responsible for the delay. *Id.*

Here, the trial court found that the State's delay "was not intentional to gain a tactical advantage or otherwise in bad faith, but was apparently the result of an inadvertent failure of the investigators to pass the case on to the District Attorney." We conclude that the record supports the court's finding. This factor thus weighs against the State, though not heavily. *See id.*

3. Assertion of the right

Although it is the State's duty to bring an accused to trial, the accused does have the responsibility to assert his right to a speedy trial. *Cantu*, 253 S.W.3d at 282; *Zamorano*, 84 S.W.3d at 651. Whether and how an accused chooses to assert his right "is closely related to the other three factors because the strength of his efforts will be shaped by them." *Cantu*, 253 S.W.3d at 282-83. An accused's failure to timely seek a speedy trial does not waive the right. *Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003). However, his failure to timely demand a speedy trial makes it difficult for him to prevail on a speedy-trial claim because it "indicates strongly that he did

not really want [a speedy trial] and was not prejudiced by not having one." *Id.*; *Zamorano*, 84 S.W.3d at 651 ("[A] failure to assert the right makes it difficult for a defendant to prove that he was denied a speedy trial."). Accordingly, the longer the delay, the more heavily an accused's inaction weighs against him. *Dragoo*, 96 S.W.3d at 314.

The trial court did not make findings or conclusions as to whether Dominguez timely asserted his right, but it did find that Dominguez filed his motion to dismiss about a month after he was indicted. Dominguez contends that, in doing so, he asserted his right as quickly as possible. He argues that, "[u]ntil the indictment was returned . . . the District Court did not acquire jurisdiction creating a forum where [Dominguez] could assert his right. This he did quickly by putting the Court and the State on notice that his right to a speedy trial had been violated." The court of criminal appeals, however, has rejected that argument.

In *Cantu v. State*, the court of criminal appeals held that "invocation of the speedy trial provision . . . need not await indictment, information, or other formal charge." *Cantu*, 253 S.W.3d at 284 (internal quotations omitted). Although an accused cannot file a motion for speedy trial (or a motion to dismiss an indictment) until formal charges are filed, "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." *Id.* (internal quotations omitted). The court explained that an accused who has been arrested but not charged has a choice: (1) wait until he is charged, file a motion for a speedy trial, and, if the trial court does not grant the motion, file a motion to dismiss; or (2) wait until he is charged and file a motion to dismiss, but only "if he can show that he diligently tried to move the case into court before formal charges were filed." *Id.*; *see also*

Sinclair v. State, 894 S.W.2d 437, 440 (Tex. App.—Austin 1995, no pet.) (weighing against defendant her limited efforts to assert her speedy-trial right during delay between arrest and indictment). The court further held that "[f]iling for a dismissal instead of a speedy trial will generally weaken a speedy-trial claim because it shows a desire to have no trial instead of a speedy one." *Cantu*, 253 S.W.3d at 283. Therefore, if a defendant asks only for a dismissal rather than a speedy trial, it is "incumbent upon him to show that he had tried to get the case into court so that he could go to trial in a timely manner." *Id.* at 284.

Dominguez filed a motion to dismiss the indictment about a month after the indictment was returned, but 33 months after he was initially arrested. And because he sought only a dismissal of the indictment rather than a speedy trial, "it was incumbent upon him to show" that he had made some efforts to get the case into court before formal charges were filed. *See id*. However, the record reveals no efforts by Dominguez to move the case into court during the time between his arrest and his motion to dismiss, despite having been appointed counsel at the time of his arrest.[1] *See Barker*, 407 U.S. at 534 (noting that "the record shows no action whatever" during the delay "that could be construed as the assertion of the speedy trial right" despite the fact that Barker was represented by appointed counsel throughout the delay). In fact, at the hearing on Dominguez's motion to dismiss, defense counsel "stipulate[d] that there was no request made by defendant to a court because there was no court to make a request to." As discussed, however, *Cantu* requires a showing of some efforts to assert the right even before an indictment is returned. *See* 253 S.W.3d at 283-84.

[1] The record shows that Dominguez was appointed counsel at time of arrest and that he retained new counsel after he was indicted.

The key evidence on the assertion-of-the-right factor came from Dominguez himself, who admitted at the hearing that he had never asked for a trial in the hope that his case would not be prosecuted:

> State: The fact is, Mr. Dominguez, is that you were hoping that this case had been forgotten, and you were just going to get by with it, right?
>
> Dominguez: That's what I was hoping for.
>
> State: And you were just hoping that it would quietly go away, that no one would notice it, and that's why you never asked for a trial or anything else. You were hoping it would just disappear, right?
>
> Dominguez: Yes, sir.
>
> State: And, unfortunately, somebody found your case, and now you're being prosecuted. And you just want it dismissed, right?
>
> Dominguez: Yes, sir.

The record thus establishes that Dominguez did not seek or desire a speedy trial and deliberately did not assert his right for tactical reasons.

Evidence of an accused's affirmative desire to avoid a speedy trial substantially compromises his ability to demonstrate that he was unconstitutionally denied his right to a speedy trial.[2] The *Barker* Court commented that, "barring extraordinary circumstances, we would be

[2] Professors Dix and Schmolesky have observed that "[w]hile the *Barker* balancing test contains few if any absolutes," evidence that shows not merely passive acquiesce in the delay but an affirmative desire for delay "comes close to absolutely barring a finding that the right to speedy trial was violated." 42 George E. Dix & John M. Schmolesky, Texas Practice: Criminal Practice & Procedure § 28:17, at 682-83 (3d ed. 2011). At least one Texas appellate court has held that such a showing effectively waives the right:

> The constitutional right to a speedy trial exists to ensure speedy trials, not to create

reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates . . . that the defendant did not want a speedy trial." 407 U.S. at 534-36 (holding no speedy-trial violation, despite five-year delay and ten months' pretrial incarceration, because record showed that defendant had intentionally not asserted the right, "gambling on" acquittal of co-defendant); *see also County v. State*, 668 S.W.2d 708, 711 (Tex. Crim. App. 1984) (no violation, despite three-year pretrial incarceration, where record showed "that appellant and his counsel agreed to a large part if not all of the delay in that they wished to see appellant's co-indictee tried first"), *overruled on other grounds by Holladay v. State,* 709 S.W.2d 194 (Tex. Crim. App. 1986); *State v. Jolly*, 446 S.W.3d 613, 616-17 (Tex. App.—Amarillo 2014, no pet.) (reversing dismissal of indictment, despite eight-year delay, where defendant testified that he did not timely assert the right because he "didn't want to kick the sleeping dog"). Therefore, Dominguez's deliberate decision to avoid attempting to move his case into court for 32 months weighs very heavily against him. *See Barker*, 407 U.S. at 534-36; *see also Cantu*, 253 S.W.3d at 283 (defendant's failure to diligently assert his right "is entitled to strong evidentiary weight"); *Dragoo*, 96 S.W.3d at 315 (defendant's failure to assert right for three-and-a-half years, despite being represented by counsel, weighed "very heavily" against him); *Shaw*, 117 S.W.3d at 890 (lengthy delay, during most of which

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> an opportunity for a criminal defendant to have his case dismissed by voluntarily accepting delay and then strategically asserting the right and relying on the very delay he purposefully endured. When a criminal defendant invites the delay made the basis of a speedy trial complaint, any resulting denial of constitutional rights is directly attributable to him.

Johnson v. State, 901 S.W.2d 525, 530 (Tex. App.—El Paso 1995, pet. ref'd) (holding that "[b]y admitting that he voluntarily decided not to file [a motion for speedy trial] because he simply had no interest in actually obtaining a speedy trial as a form of relief, Appellant effectively waived his speedy trial claim").

defendant quietly acquiesced, weighed "very heavily against" defendant); *McDonald v. State*, No. 03-07-00696-CR, 2008 WL 3877711, at *3 (Tex. App.—Austin Aug. 20, 2008, no pet.) (mem. op., not designated for publication) (defendant's acquiescence in four-year delay "indicate[d] strongly that he did not really want a speedy trial") (internal quotations omitted); *cf. Zamorano*, 84 S.W.3d at 652 (reversing conviction on speedy-trial grounds, noting that it was not "a case in which evidence shows a defendant's affirmative desire for *any* delay").

4. Prejudice caused by the delay

We must assess the prejudice to an accused caused by the delay in the light of certain interests: (1) preventing oppressive pretrial incarceration, (2) minimizing the accused's anxiety and concern, and (3) limiting the possibility that the accused's defense will be impaired. *Barker*, 407 U.S. at 532; *Dragoo*, 96 S.W.3d at 316. Of these interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532; *see also Gonzales v. State*, 435 S.W.3d 801, 812 (Tex. Crim. App. 2014).

Dominguez provided the only testimony on the issue of prejudice. He did not testify that he was prejudiced by oppressive pretrial incarceration[3] and instead testified that the delay had caused him anxiety and concern and had impaired his defense. The trial court found that Dominguez's testimony "established that he suffered restriction of movement, loss of opportunity, and loss of employment opportunity" and "disclosed some prejudice to his ability to defend the

[3] The record shows that Dominguez was released on bond less than two months after he was arrested. *See Robinson v. State*, No. 03-14-00407-CR, 2015 WL 4515128, at *4 (Tex. App.—Austin July 22, 2015, pet. ref'd) (mem. op., not designated for publication) (no oppressive pretrial incarceration where defendant released on bond approximately three months after arrest).

charges occasioned by the delay." Because Dominguez prevailed on his speedy-trial claim below, we defer to the trial court's resolution of disputed facts and reasonable inferences from those facts and view the evidence in the light most favorable to the court's ruling. *See Cantu*, 253 S.W.3d at 282.

a. Anxiety and concern

Dominguez testified that, because of the delay, he had suffered "[e]xcessive nightmares, high anxiety, anxiety, panic attacks," had "lost friends," and had "disconnected with certain family." He testified that he had foregone applying for college because of the arrest. He further testified that it had "been hard to get a job and secure a job." He explained that he had had to report to bondsman weekly, who had placed restrictions on his travel. He stated that those restrictions had affected his job opportunities and that he had been "released" from a job because of his inability to travel.

The State argues that it effectively rebutted that evidence at the hearing, citing Dominguez's admission on cross-examination that he had been prosecuted on a felony charge in a different case during the delay in the present case. The record shows that Dominguez pled guilty to that charge in July 2013 and was placed on deferred-adjudication community supervision for five years. Dominguez acknowledged that the other case had also limited his ability to travel and "require[d] [him] to report." But he disputed that it had been the source of his "nightmares and anxiety," explaining that it was a case "where I was caught with drugs. Obviously, I made that mistake. But this—this is completely different."

Viewing the evidence in a light most favorable to Dominguez, we conclude that the record supports the trial court's finding that Dominguez "suffered restriction of movement, loss of opportunity, and loss of employment opportunity" as a result of the 2012 arrest on the original four felony offenses in this case.

b. Impairment of Dominguez's defense

i. Dimming memories

With regard to how the delay had impaired his defense, Dominguez testified that his memory of the events was not "as intact today as it might have been three years ago." However, "*Barker* requires a defendant to show that 'lapses of memory' are in some way 'significant to the outcome' of the case." *State v. Munoz*, 991 S.W.2d 818, 829 (Tex. Crim. App. 1999) (quoting *Barker*, 407 U.S. at 534) (holding that court of appeals erred in concluding that defendant "made 'some showing' of an 'impairment to his defense' based on defendant's bare assertion of 'dimming memories'"). Because Dominguez failed to explain how (or even claim that) his faded memory of the events would have been significant to the outcome of the case, his testimony does not tend to show that the delay impaired his defense.

ii. Unavailable witnesses

Dominguez also testified that, of the five witnesses listed in the State's witness list, he had succeeded in contacting two of them, but he did not know the whereabouts of the other three. He explained that he had "tried contacting them on Facebook" and "in other areas." When the State

asked him what those witnesses could have testified to that other evidence would not show, Dominguez replied only, "The beginning. The most important part."

Before a defendant's contention that he was unable to locate witnesses will amount to "some showing of prejudice," he must show (1) that the witnesses are unavailable, (2) that their testimony might be material and relevant to his case, and (3) that he exercised due diligence in his attempt to find them and produce them for trial. *Harris v. State*, 489 S.W.2d 303, 308 (Tex. Crim. App. 1973); *see also Dragoo*, 96 S.W.3d at 313 n.3. Assuming, as we must, that the trial court found Dominguez's testimony credible, we nevertheless conclude that his testimony was insufficient to demonstrate prejudice under the unavailable-witness standard.

No unavailability showing

Dominguez did not testify as to when he made efforts to contact the purportedly unavailable witnesses. And the record contains no other evidence showing (1) that the witnesses would have been unavailable at the time of trial or (2) they would have been available had the case proceeded to trial without delay. *See Deeb v. State*, 815 S.W.2d 692, 706 (Tex. Crim. App. 1991) (no evidence presented as to when witness became unavailable); *Jackson v. State*, No. 05-14-00283-CR, 2015 WL 1540800, at *4 (Tex. App.—Dallas Apr. 1, 2015, no pet.) (mem. op., not designated for publication) (defendant's testimony did not establish that missing witness would have been available but for delay); *McGregor v. State*, 394 S.W.3d 90, 116 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (no evidence as to whether witness died during delay between arrest and indictment). We thus conclude that the record does not support a finding that the witnesses were unavailable due to the delay.

No materiality showing

We further conclude that the record does not support a finding that the witnesses could have provided testimony that would have been material and relevant to Dominguez's case. Assuming the credibility of Dominguez's testimony that the purportedly missing witnesses could have testified to "[t]he beginning. The most important part[,]" we conclude that this conclusory testimony, without more, is insufficient to support a materiality finding. Even assuming that Dominguez was suggesting that the witnesses could have testified to "the beginning" of the criminal episode, he provided no details as to the testimony those witnesses might have provided and failed to explain how the testimony would have been relevant or contributed to his defense. *See Deeb*, 815 S.W.2d at 706 (defendant failed to demonstrate that testimony of missing witnesses would have been "exculpatory or otherwise beneficial to appellant"); *Harris*, 489 S.W.2d at 308-09 (defendant's testimony that witnesses knew officer and were with him day after offense occurred did not show that witnesses could have provided testimony that was material and relevant to case); *State v. Gilliland*, No. 05-16-00547-CR, 2017 WL 3276004, at *8 (Tex. App.—Dallas Aug. 1, 2017, no pet. h.) (mem. op., not designated for publication) (reversing dismissal of indictment where no evidence that "the witnesses would have been willing to testify on [defendant's] behalf or that their testimony would have been material to his defense"); *State v. Estrada*, No. 10-16-00062-CR, 2016 WL 3977487, at *4 (Tex. App.—Waco July 20, 2016, no pet.) (mem. op., not designated for publication) (reversing dismissal of indictment where defendant's testimony that the witness was with him "in the hours before [defendant]'s arrest" did not show that " witness would have provided was material and relevant to [defendant]'s defense"); *Jackson*, 2015 WL 1540800, at *4 (no evidence

that missing witness would have testified favorably to defendant); *McGregor*, 394 S.W.3d at 116 (defendant failed to explain how death of witness "prejudiced him in any way, rather than benefitting him"); *State v. Pyburn*, No. 03-02-00269-CR, 2002 WL 31026832, at *4 (Tex. App.—Austin Sept. 12, 2002, pet. ref'd) (not designated for publication) (reversing dismissal of indictment where no evidence that witness "who was at the night club with appellee on the night of" the offense could have provided testimony that "would have contributed to appellee's defense"); *Ervin v. State*, 125 S.W.3d 542, 548 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (although defendant testified that deceased witness "was present when the events occurred" and "would [have been] a material witness," no showing of prejudice because he did not describe what she would have testified to or explain "why her testimony was material"). Dominguez's testimony thus did not demonstrate relevance and materiality under the applicable standard.

No due-diligence showing

Finally, we conclude that the record does not support a finding that Dominguez exercised due diligence in locating the witnesses and producing them for trial. The court of criminal appeals has held that the due-diligence requirement is not met when the record does not show that the witnesses were unsuccessfully subpoenaed. *See Phipps v. State*, 630 S.W.2d 942, 947 (Tex. Crim. App. 1982) ("[T]he appellant has not shown diligence in procuring the witnesses as the record fails to indicate that the witnesses were subpoenaed."); *Harris*, 489 S.W.2d at 308 (no due diligence where "record [did] not indicate that the two missing witnesses were subpoenaed"); *see also Comeaux v. State*, 413 S.W.3d 176, 191-92 (Tex. App.—Beaumont 2013) (no due diligence where record did not show that defendant "attempted to subpoena or call witnesses to testify for him during

his trial"), *aff'd on other grounds*, 445 S.W.3d 745 (Tex. Crim. App. 2014). And even assuming that other efforts to locate witnesses may satisfy the due-diligence requirement, we conclude that Dominguez's testimony—that he attempted to contact witnesses on Facebook and unspecified "other areas"—does not satisfy that standard. *See*, *e.g.*, *Green v. State*, 555 S.W.2d 738, 742 (Tex. Crim. App. 1977) (no due diligence where defendant tried to locate witnesses through bookkeeping service); *Swisher v. State*, 544 S.W.2d 379, 381 (Tex. Crim. App. 1976) (no due diligence where defendant went to house associated with witnesses and checked the telephone directory for a witness's address); *McCarty v. State*, 498 S.W.2d 212, 218 (Tex. Crim. App. 1973) (no due diligence where defendant did not attempt to subpoena witnesses, did not move for continuance to locate witnesses, and did not request statutorily provided investigative funds for that purpose); *Johnson v. State*, No. 03-06-00590-CR, 2007 WL 2330743, at *1 (Tex. App.—Austin Aug. 15, 2007, no pet.) (mem. op., not designated for publication) (no due diligence where defendant testified that he had told his attorney about the witness "[a]t times" and that witness had moved without leaving a forwarding address, but he had not attempted to subpoena witness); *State v. Munoz*, 960 S.W.2d 191, 200 (Tex. App.—Corpus Christi 1997) (no due diligence where defendant asserted "that he thought some witnesses may have been lost" and that his "attorney hired an investigator, but the results of the investigation were not disclosed"), *rev'd on other grounds*, 991 S.W.2d 818 (Tex. Crim. App. 1999).

We thus conclude that the record does not support the trial court's finding that the delay impaired Dominguez's defense when reviewed under the applicable standards.

c. The record does not support a finding of burden-relieving presumptive prejudice

Dominguez alternatively cites the presumptive-prejudice doctrine set forth in *Doggett v. United States*, which observed that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter identify." 505 U.S. 647, 655 (1992). Although a very long delay can absolve a defendant of his burden to show prejudice, *Gonzales*, 435 S.W.3d at 813, a defendant is entitled to that benefit only if the record shows that he did not acquiesce in the delay, *Doggett*, 505 U.S. at 658 (observing that presumptive prejudice was not extenuated by defendant's acquiescence); *see also Hopper v. State*, 520 S.W.3d 915, 929 (Tex. Crim. App. 2017) (holding that "[a]ny presumptive prejudice due to the passage of time was extenuated by appellant's acquiescence in the delay"); *Dragoo*, 96 S.W.3d at 315 (no violation despite three-and-a-half-year delay because presumption of prejudice is "extenuated by appellant's longtime acquiescence in the delay"); *Shaw*, 117 S.W.3d at 890 (same); *Barringer v. State*, 399 S.W.3d 593, 601-02 (Tex. App.—Eastland 2013, no pet.) (eight-year delay between indictment and arrest did not violate right where defendant "quietly acquiesced" by inaction during delay); *Murphy v. State*, 280 S.W.3d 445, 454 (Tex. App.—Fort Worth 2009, pet. ref'd) (six-year delay did not violate right where defendant did not assert right until eve of trial and did so by way of motion to dismiss).

Here, even if the delay had been long enough to relieve Dominguez of his burden to demonstrate prejudice (which we do not decide), he quietly acquiesced in the delay in hopes that the case "would just disappear." He was therefore required to produce evidence of prejudice sufficient to entitle him to relief. *See Hopper*, 520 S.W.3d at 929.

In sum, the record does not show that Dominguez suffered oppressive pretrial incarceration or that his defense was impaired by the delay. However, because the record supports the trial court's finding that Dominguez suffered some personal hardship as a result of the arrest, we conclude that the fourth *Barker* factor weighs in favor of Dominguez, but only slightly.

5. Balancing of the *Barker* factors

The delay of 32 months between Dominguez's arrest and his indictment well exceeds the time necessary to trigger a speedy-trial analysis. *See Zamorano*, 84 S.W.3d at 649 n.26. The entire delay was attributable to the State, though it was the result of prosecutorial negligence and not bad faith. *See id.* at 649. Most importantly, the record establishes that Dominguez deliberately did not assert his right to a speedy trial at any time during the 32-month delay because he did not desire a speedy trial but instead sought only to avoid prosecution. *See Barker*, 407 U.S. at 534-36; *Cantu*, 253 S.W.3d at 283; *Dragoo*, 96 S.W.3d at 315; *Shaw*, 117 S.W.3d at 890. And when he finally did raise a speedy-trial claim, it was in a motion to dismiss after he was indicted and not a motion for speedy trial, further indicating that he at no time desired a speedy trial. *See Cantu*, 253 S.W.3d at 283. Further, we conclude that the prejudice demonstrated by the record was insufficient to offset his strategy of delay: although the record supports the trial court's finding that Dominguez suffered restriction of travel and loss of opportunity due to the delay, it does not show that he suffered oppressive pretrial incarceration or that his defense was impaired by the delay. Moreover, his acquiescence in the delay tends to show that "any hardships he suffered were either minimal or caused by other factors." *See Cantu,* 253 S.W.3d at 284; *see also Shaw*, 117 S.W.3d at 890 ("[T]he

longer the delay becomes, the more likely it is that a defendant who really wanted a speedy trial would take some action to obtain one.").

This case is factually similar to *Barker*. Although the record in *Barker* demonstrated some prejudice—that Barker had suffered ten months' incarceration and some anxiety, as well as minor witness-memory lapses—the Court observed that "[m]ore important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial." 407 U.S. at 534. The Court found no speedy-trial violation despite an "extraordinary" five-year delay because the record "strongly suggest[ed]" that Barker did not want to be tried, but had instead "hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges," which Barker's counsel had conceded at oral argument. *Id.* at 535. Like the *Barker* Court, we cannot conclude that this case presents the "extraordinary circumstances" necessary to demonstrate a speedy-trial violation when the record shows that the defendant did not seek or want a speedy trial. *See id.* at 536.

Similarly, in *Sinclair v. State*, this Court found no speedy-trial violation despite a delay of nearly four years from arrest to the return of the indictment. 894 S.W.2d at 439-40. As in the present case, the evidence showed some prejudice—compromised potential employment, public embarrassment, anxiety, and faded memories. *Id.* at 440. But we observed that "[w]eighing most heavily against appellant is her failure to diligently assert her right to a speedy trial during the four-year hiatus between her arrest and her indictment." *Id.* We thus concluded that the balance of the factors did not demonstrate a speedy-trial violation. *Id.*

Applying the "balancing test with common sense and sensitivity to ensure that charges are dismissed only when the evidence shows that an accused's actual *and asserted* interest in a speedy trial has been infringed," we conclude that Dominguez failed to establish a speedy-trial violation. *See Cantu*, 253 S.W.3d at 281 (emphasis added). The nature of the State's pre-indictment negligence, Dominguez's admitted strategy of not asserting his right to exploit the delay, and the lack of substantial personal or defense prejudice resulting from the delay demonstrate that the delay in this case, although lengthy, did not violate Dominguez's right to a speedy trial.[4] *See id*. at 286-87.

We thus conclude that the trial court abused its discretion in granting Dominguez's motion to dismiss the four felony charges for which he was arrested in December 2012. We sustain the State's first issue.

II. The trial court erred in dismissing the two felony counts that were first charged in the August 2015 indictment

The State argues that the standard for delay between the commission of an offense and an indictment for that offense governs the analysis of the two additional charges and not the speedy-trial standard. Implicit in the State's argument is that the speedy-trial standard is inapplicable because Dominguez was first "accused" of the two additional felony offenses when the indictment was returned in August 2015—one month before Dominguez filed his motion to dismiss. *See Cantu*, 253 S.W.3d at 280 (right attaches when person is arrested or formally charged). Dominguez argues

[4] Dominguez also observes that the State failed to obtain an indictment within the parameters set forth in Texas Code of Criminal Procedure article 32.01. However, he did not raise that argument below and thus waived it. *See* Tex. R. App. P. 33.1(a); *see also Brooks v. State*, 990 S.W.2d 278, 285 (Tex. Crim. App. 1999) ("Article 32.01 has no application once an indictment is returned.").

that, because the facts supporting the additional charges were known to the lead investigator at the time of 2012 arrest, the delay in indicting him on those charges should be measured, not from the time of indictment, but from the time he was arrested for the other offenses in December 2012. Even if we had determined that the charges for which Dominguez was arrested in 2012 violated his speedy-trial right, we conclude that the two additional charges first presented in the 2015 indictment did not.

A. The record does not show that Dominguez was "accused" of the additional felony offenses prior to the 2015 indictment

At the hearing on Dominguez's motion to dismiss, Dominguez called the lead investigator assigned to the case, Detective Doug Phillips with the Comal County Sheriff's Office, to testify about the State's handling of the case during the period of delay. Detective Phillips's testimony supported the trial court's finding that "Detective Phillips conceded that all of the acts defined by the Counts of the Indictment were known to him in December, 2012," and that Dominguez "could have initially been charged with all three of the Counts of Aggravated Assault on a Public Servant in December, 2012."[5] However, the trial court made no conclusion of law regarding the legal significance of those findings.

Dominguez cites no authority, and we have found none, that supports either (1) that the right to a speedy trial attaches when an investigator learns of facts that would support a charge or (2) that an arrest for an offense arising from a criminal episode triggers a right to speedy trial for

[5] Detective Phillips confirmed that in December 2012, he "had full knowledge of all the deputies that were involved, any of the injuries, or any of the property damage that was sustained as a result of this occurrence."

any charge that could later arise from that episode. Rather, it is well established that statutes of limitations generally provide adequate protection against protracted delay from the date of a criminal episode to an indictment or arrest for charges arising from that episode. *See United States v. Marion*, 404 U.S. 307, 322 (1971) (statute of limitations is "the primary guarantee against bringing overly stale criminal charges") (internal quotations omitted); *Moore v. State*, 943 S.W.2d 127, 128 (Tex. App.—Austin 1997, pet. ref'd) ("The limit on preindictment delay is usually set by the statute of limitations."). In the absence of law compelling use of a different standard, we must measure the delay from the time Dominguez was arrested or formally charged with the offenses and not from the time Detective Phillips learned of facts that would have supported the charges. *See Cantu*, 253 S.W.3d at 280.

B. This Court has rejected an argument like Dominguez's

We further note that this Court has recently rejected the argument advanced by Dominguez. In *Vadnais v. State*, we disagreed with Vadnais's contention that the State's delay in bringing an indictment on a felony offense should have been measured, not from the date of the indictment, but from the date of his arrest for a misdemeanor offense that arose from the same criminal episode as the felony offense, citing as support *Ex parte Cathcart*, 13 S.W.3d 414, 416-17 (Tex. Crim. App. 2000). No. 03-14-00578-CR, 2017 WL 474059, at *3 (Tex. App.—Austin Jan. 31, 2017, no pet.) (mem. op., not designated for publication).

In *Cathcart*, the court of criminal appeals was tasked with deciding when Cathcart had been arrested, charged, or otherwise "restrained in her liberty" for purposes of determining habeas eligibility. 13 S.W.3d at 415. Cathcart had been arrested and indicted for driving while

intoxicated (DWI). *Id.* The State later sought dismissal of the DWI charge and obtained a new indictment on intoxication assault, citing the same facts that had supported the DWI charge. *Id.* The court considered whether Cathcart's right to pursue habeas relief from the intoxication-assault charge attached at the time that she was arrested on the DWI charge since the intoxication-assault charge arose from the same transaction as the DWI charge. *Id.* The court observed that documents generated at time of offense, including reports by various law-enforcement personnel, contained references to, and facts relevant to, an intoxication-assault offense. *Id.* at 416. But the court explained that those documents did not constitute a "criminal accusation" and thus held that Cathcart's habeas eligibility did not arise until she was formally indicted on the intoxication-assault charge. *Id.* at 416-17. The court commented that offenses noted in police reports are often not the offenses "complained of in any subsequent criminal accusation or charging document." *Id.* It therefore concluded that Cathcart "was never arrested for, charged with, or held to bail on intoxication assault until the 1997 indictments, which were presented . . . well within the statute of limitations." *Id.* at 416.

Although the present case concerns the attachment of the speedy-trial right and not habeas eligibility, *Cathcart* is instructive. Unlike Cathcart, Dominguez does not contend that he was arrested or charged with the two additional felony counts until the indictment was returned in August 2015. Nor does he contend that documents generated at the time of his 2012 arrest demonstrated that he had been "accused" of the additional charges at that time. Rather, Dominguez seems to contend that he was "accused" for speedy-trial purposes once the lead investigating officer knew about facts that supported the additional charges. Given that *Cathcart* held that police reports

citing certain offenses are not "criminal accusations" of those offenses, we cannot conclude that an investigating officer's knowledge of facts that would support a charge for an offense is tantamount to a criminal accusation of that offense. *See id.* at 416-17. We thus conclude that Dominguez's right to a speedy trial did not attach until he was first accused, which was when the indictment was returned on August 5, 2015. *See Cantu*, 253 S.W.3d at 280.

Because the record does not show, and Dominguez does not contend, that the delay between the indictment and the proceedings on his motion to dismiss (which also sought to dismiss the two additional felony counts first charged in August 2015) was presumptively prejudicial, we need not consider the remaining *Barker* factors. *See Barker*, 407 U.S. at 530; *Munoz*, 991 S.W.2d at 821.[6]

CONCLUSION

We reverse the trial court's order granting Dominguez's motion to dismiss and remand the cause to the trial court for further proceedings consistent with this opinion.

[6] Dominguez has never argued, the trial court did not find, and the record does not show that his rights were violated by pre-indictment delay under *United States v. Marion*, 404 U.S. 307, 322-24 (1971).

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Reversed and Remanded

Filed: October 12, 2017

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