TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00759-CR

James Green, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 1 OF COMAL COUNTY
NO. 2015CR0991, HONORABLE RANDAL C. GRAY, JUDGE PRESIDING

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

A jury convicted appellant James Green, Jr., of the misdemeanor offense of driving while intoxicated and assessed punishment at 180 days' confinement in county jail and a $2,000 fine.[1] The trial court rendered judgment on the verdict. In two points of error on appeal, Green asserts that the trial court erred in denying Green's motion to dismiss the case for failure to afford Green his right to a speedy trial. We will affirm the judgment of conviction.

BACKGROUND

Because it is relevant to the issues raised in this appeal, we will briefly summarize the procedural history of the case. Green was arrested for driving while intoxicated on the night of February 23, 2015. On September 1, 2015, Green waived his arraignment and requested a pre-trial

[1] *See* Tex. Penal Code § 49.04.

hearing. A plea hearing was held on September 15, 2015, and a second plea hearing, scheduled for October 13, 2015, was canceled. The record does not indicate what occurred during the first plea hearing or why the second plea hearing was canceled, although it appears that during that time period, Green was in custody for other offenses that he had committed in Comal County and was also awaiting trial for an unspecified offense that he had committed in Hays County.[2] At a subsequent plea hearing held on November 10, 2015, Green's counsel informed the trial court that Green was unavailable at that time:

> [Counsel]: Mr. Green was in TDC. He was transported out. I have let [the court coordinator] know, along with Hays County. I have had Hays County issue a Bench Warrant for December. We will get him here.
>
> [The Court]: All right. It's a no show on Mr. Green because—
>
> [Counsel]: It's because he's in the Holiday Unit of TDC.
>
> [The Court]: We will recall the warrant. Thank you.

There was no December hearing in the case. On January 7, 2016, Green's counsel filed a motion to withdraw and substitute counsel, which the trial court granted.

The trial court issued a bench warrant for Green on February 8, 2016. However, the warrant was returned unexecuted with a notation that Green "belongs to TDCJ." An entry on the court's docket sheet indicated that Green was "benched to Hays Co. only to take care of a case

[2] Although the record does not specify the nature of the offense committed in Hays County, the record reflects that Green was convicted in Comal County for the third-degree felony offense of intoxication assault and the second-degree felony offense of aggravated assault with a deadly weapon.

there." Another plea hearing was held on April 4, 2016. At this hearing, Green's counsel informed the court that Green remained unavailable because he was in custody in Hays County, and the trial court reset the case, with no objection from Green. Shortly thereafter, the trial court issued another bench warrant for Green. The warrant was again returned unexecuted, with a notation that Green "belongs to TDCJ," that "Hays Co[unty] benched him from TDCJ," and that Green "can be benched [to Comal County] when he returns to TDCJ."

On May 17, 2016, Green filed a motion to dismiss the case for failure to afford Green his right to a speedy trial. Following a hearing, the trial court denied the motion. On August 9, 2017, Green filed his second motion to dismiss, again asserting that his right to a speedy trial had been violated. At the hearing on this motion, the parties and the trial court discussed the prior bench warrants, and the court instructed the court coordinator to issue a bench warrant "one more time." The court explained, "We'll give it one more shot. I'll deny [the motion to dismiss] at this time; but I will revisit the issue."

On October 4, 2016, Green filed his third motion to dismiss. The trial court held a hearing on the motion but withheld its ruling "until we can see if Mr. Green could be benched from TDCJ for trial." Shortly thereafter, Green was released from TDCJ to Comal County. On October 11, 2016, the day that trial began, Green re-urged his motion to dismiss, arguing that Green had suffered prejudice from the approximately twenty-month delay in bringing the case to trial, "not just in the anxiety of the experience" of waiting for trial, "but also in the fact that he has not had time to prepare for this [case] with counsel." Green presented no testimony in support of his motion but offered into evidence his medical records from the Comal County Jail, which indicated that he had

visited the jail doctor on August 6, 2015, and had been prescribed Seroquel, a medication to treat anxiety, among other conditions. The trial court denied the motion to dismiss, and the case proceeded to trial. Green was subsequently convicted of driving while intoxicated and assessed a punishment of 180 days' confinement in county jail and a $2,000 fine as noted above. The district court rendered judgment on the verdict. This appeal followed.

STANDARD AND SCOPE OF REVIEW

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, guarantees a speedy trial to an accused."[3] "The Supreme Court has listed four factors that a court should consider in addressing a speedy-trial claim: (1) the length of 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."[4] "If the defendant can make a threshold showing that the interval between accusation and trial is 'presumptively prejudicial,' then a court must consider each of the remaining *Barker* factors and weigh them."[5]

"Once the *Barker* test is triggered, courts must analyze the speedy-trial claim by first weighing the strength of each of the *Barker* factors and then balancing their relative weights in light

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[3] *Gonzales v. State*, 435 S.W.3d 801, 808 (Tex. Crim. App. 2014) (citing U.S. Const. amend. VI; *Kloper v. North Carolina*, 386 U.S. 213 (1967)).

[4] *Id*. (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

[5] *Balderas v. State*, 517 S.W.3d 756, 767 (Tex. Crim. App. 2016) (citing *State v. Munoz*, 991 S.W.2d 818, 821-22 (Tex. Crim. App. 1999)).

of 'the conduct of both the prosecution and the defendant.'"[6] "No one factor is 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.'"[7] "Instead, the four factors are related and must be considered together along with any other relevant circumstances."[8] "[D]ismissal of the charges is a radical remedy."[9] Therefore, "a wooden application of the *Barker* factors would infringe upon 'the societal interest in trying people accused of crime, rather than granting them immunization because of legal error.'"[10] "Thus, 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."[11] "The constitutional right is that of a speedy trial, not dismissal of the charges."[12]

We apply a bifurcated standard of review to speedy-trial claims.[13] "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 that we review de novo."[14]

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[6] *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008) (quoting *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002)).

[7] *Id*.

[8] *Id*.

[9] *Id*. (citing *Barker*, 407 U.S. at 422).

[10] *Id*. (quoting *United States v. Ewell*, 383 U.S. 116, 121 (1966)).

[11] *Id*. (citing *Barker*, 407 U.S. at 534-35).

[12] *Id*.

[13] *See id*. at 767-68 (citing *Gonzalez*, 435 S.W.3d at 808-09).

[14] *Balderas*, 517 S.W.3d at 768 (citing *Johnson v. State*, 954 S.W.2d 770, 771 (Tex. Crim. App. 1997)).

ANALYSIS

In his first point of error, Green asserts that he was denied his right to a speedy trial as required under the Texas Constitution and the Texas Code of Criminal Procedure.[15] In his second point of error, Green asserts that he was denied his right to a speedy trial as required under the United States Constitution. We will address these issues together.[16]

Length of delay

"The right [to a speedy trial] attaches once a person becomes an 'accused'—that is, once he is arrested or charged."[17] In this case, Green was arrested on February 23, 2015. He was tried on October 11, 2016, over nineteen months later. "In general, courts deem delay approaching one year to be 'unreasonable enough to trigger the *Barker* [i]nquiry.'"[18] The State concedes that the length of the delay in this case was sufficient to trigger the *Barker* inquiry, and we agree that it was.

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[15] *See* Tex. Const. art. I, § 10; Tex. Code Crim. Proc. art. 1.05.

[16] *See Cantu*, 253 S.W.3d at 280 n.16 (explaining that state speedy-trial right "exists independently of the federal guarantee" but that Texas courts analyze "claims of a denial of the state speedy-trial right under the same four *Barker* factors"); *see also Alba v. State*, No. 03-13-00345-CR, 2014 Tex. App. LEXIS 12185, at *3 (Tex. App.—Austin Nov. 7, 2014, no pet.) (mem. op., not designated for publication) ("Whether [a speedy-trial claim is] raised under the federal or state constitution, we weigh and balance four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice inflicted by the delay.")

[17] *Cantu*, 253 S.W.3d at 280; *see also United States v. Marion*, 404 U.S. 307, 320-21 (1971) ("[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge.").

[18] *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) (quoting *Doggett v. United States*, 505 U.S. 647, 651-652 (1992)).

We must next consider how long the delay stretches beyond the "bare minimum" needed to trigger the inquiry.[19] The longer the delay, the more heavily this factor weighs in favor of finding a speedy-trial violation.[20] Moreover, the nature of the charged offense must also be considered.[21] As the Supreme Court has explained, "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."[22] Here, there was a delay of over nineteen months between Green's arrest for the misdemeanor offense of DWI and his trial, which is seven months longer than the one-year minimum needed to trigger the *Barker* inquiry. We conclude that the length of the delay in this case weighs against the State.[23]

Reason for delay

It is undisputed that multiple attempts by the trial court to bench-warrant Green to Comal County were unsuccessful due to Green being in the custody of TDCJ for other offenses and then being bench-warranted to Hays County so that Green could be tried for the offense that he had allegedly committed there. Texas courts have repeatedly held that being detained or tried in another jurisdiction for a separate offense is a valid reason for delay that should not be held against the

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[19] *See Balderas*, 517 S.W.3d at 768.

[20] *See id.*; *Dragoo*, 96 S.W.3d at 314.

[21] *See Zamorano*, 84 S.W.3d at 649

[22] *Barker*, 407 U.S. at 531.

[23] *See Balderas*, 517 S.W.3d at 768; *Phillips v. State*, 650 S.W.2d 396, 399 (Tex. Crim. App. 1983); *see also State v. Rangel*, 980 S.W.2d 840, 843 (Tex. App.—San Antonio 1998, no pet.).

State.[24] Moreover, the trial court could have reasonably concluded that the delay was not due to any attempt by the State to "hamper the defense" or to prolong the case because the State was not ready to proceed to trial.[25] On the contrary, at the May 2016 hearing on Green's first motion to dismiss, the State argued, "If we can get him released, we'll be happy to try it. Put it No. 1 on the jury docket, a couple down the road. I don't know how long it will take to get him here. We'll be happy to try it." And, at the August 2016 hearing on Green's second motion to dismiss, the State represented, "We are ready. I have got six witnesses subpoenaed and we are ready to roll . . . ." Thus, this factor does not weigh against the State.[26]

Green's assertion of right

"The defendant has no duty to bring himself to trial; that is the State's duty. But a defendant does have the responsibility to assert his right to a speedy trial."[27] "Therefore, the defendant's assertion of his speedy-trial right (or his failure to assert it) is entitled to strong

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[24] *See Dragoo*, 96 S.W.3d at 314 n.4; *Easley v. State*, 564 S.W.2d 742, 745 (Tex. Crim. App. 1978); *Black v. State*, 505 S.W.2d 821, 824 (Tex. Crim. App. 1974); *McGregor v. State*, 394 S.W.3d 90, 114 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *McIntosh v. State*, 307 S.W.3d 360, 367 (Tex. App.—San Antonio 2009, pet. ref'd); *Thompson v. State*, 983 S.W.2d 780, 783 (Tex. App.—El Paso 1998, pet. ref'd); *Kowey v. State*, 751 S.W.2d 587, 590 (Tex. App.—Houston [14th Dist.] 1988, no pet.); *Apple v. State*, 744 S.W.2d 256, 258 (Tex. App.—Texarkana 1987, no pet.); *see also Vadnais v. State*, No. 03-14-00578-CR, 2017 Tex. App. LEXIS 837, at *8-9 (Tex. App.—Austin Jan. 31, 2017, no pet.) (mem. op., not designated for publication).

[25] *See Vermont v. Brillon*, 556 U.S. 81, 90 (2009) ("Deliberate delay 'to hamper the defense' weighs heavily against the prosecution." (citing *Barker*, 407 U.S. at 531)).

[26] *See Easley*, 564 S.W.2d at 745; *Black*, 505 S.W.2d at 824; *McGregor*, 394 S.W.3d at 114.

[27] *Cantu*, 253 S.W.3d at 282 (citing *Barker*, 407 U.S. at 527-28).

evidentiary weight in determining whether the defendant is being deprived of the right."[28] "Filing 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."[29] "If a defendant fails to first seek a speedy trial before seeking dismissal of the charges, he should provide cogent reasons for this failure."[30] "Repeated requests for a speedy trial weigh heavily in favor of the defendant, while the failure to make such requests supports an inference that the defendant does not really want a trial, he wants only a dismissal."[31]

Here, Green filed his first motion to dismiss on May 17, 2016, approximately fifteen months after his arrest, and he sought only a dismissal at that time. At no point in the motion or during the hearing on the motion did he ask for a trial setting. Green's subsequent motions to dismiss similarly failed to seek a trial. Moreover, at the hearings on his motions to dismiss, Green provided no explanation for why he did not first demand a trial before requesting dismissal of the charges. Thus, this factor weighs against Green.[32]

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[28] *Id*. at 283.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *See id*. at 283-84; *Dragoo*, 96 S.W.3d at 314; *see also Henson v. State*, 407 S.W.3d 764, 769 (Tex. Crim. App. 2013) (explaining that "[a] speedy-trial demand should be, at the very least, unambiguous" and that announcing "ready" for trial is insufficient); *Smith v. State*, 436 S.W.3d 353, 366 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (observing that "continually acquiesc[ing] in resetting the case . . . cuts against showing an assertion of the right").

Prejudice

Prejudice to the defendant from delay "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect."[33] These interests are: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired.[34] The defense may be impaired, for example, "[i]f witnesses die or disappear during a delay" or are "unable to recall accurately events of the distant past."[35]

At the hearing on his third and final motion to dismiss, Green argued that he was prejudiced as a result of "anxiety" from waiting for trial and not having "time to prepare for this [case] with counsel." The only evidence that Green presented of anxiety was a prescription for Seroquel, an anti-anxiety medication. However, the medication was prescribed in August 2015, approximately nine months before Green filed his first motion to dismiss, and when Green was in custody for the two felony offenses committed in Comal County. The trial court could have reasonably inferred that it was these offenses, and not the pending misdemeanor charge, that was the cause of Green's anxiety. As the State observed at the hearing, "[H]e did have two felony offenses where he was facing ten years . . . I think that would cause a whole lot more stress than a pending misdemeanor." Moreover, even if Green's anxiety was a result of his pending misdemeanor charge, the trial court could have reasonably concluded that Green failed to show "that the delay had caused

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[33] *Barker*, 407 U.S. at 532; *Zamorano*, 84 S.W.3d at 652.

[34] *Barker*, 407 U.S. at 532.

[35] *Id*.

him any unusual anxiety or concern, i.e., any anxiety or concern beyond the level normally associated with being charged with [a crime]."[36] "[E]vidence of generalized anxiety, though relevant, is not sufficient proof of prejudice under the *Barker* test, especially when it is no greater anxiety or concern beyond the level normally associated with a criminal charge or investigation."[37]

As for Green's claim that his defense was impaired, Green did not argue at the hearing that any witnesses were missing or had difficulty recalling the events surrounding the offense. Instead, he claimed that he was prejudiced by not having adequate time to consult with counsel prior to trial. However, the record reflects that Green's trial counsel had been representing him since January 7, 2016, nine months prior to trial, and counsel acknowledged at the hearing that he had made multiple visits to see Green while the case was pending. Thus, the trial court could have reasonably concluded that Green's defense had not been impaired by the delay.

In sum, although the first *Barker* factor weighs in favor of a conclusion that Green's right to a speedy trial was violated, the other three factors do not. The trial court could have reasonably concluded that the State asserted a valid reason for the delay, that Green failed to ask for a speedy trial prior to seeking dismissal of the charges, and that Green failed to show that he was prejudiced by the delay beyond "evidence of generalized anxiety." On this record, we cannot conclude that the trial court erred in denying Green's motion to dismiss.

We overrule Green's first and second points of error.

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[36] *Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003).

[37] *Cantu*, 253 S.W.3d at 286.

CONCLUSION

We affirm the judgment of the district court.

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Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: August 25, 2017

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