IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20070874-CA
v.	)	
	)	F I L E D
Shawn David Larson,	)	(October 9, 2008)
	)	2008 UT App 360
Defendant and Appellant.	)	

Third District, Salt Lake Department, 031902498
The Honorable William W. Barrett

Attorneys: Jennifer K. Gowans and Randall K. Spencer, Provo, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Billings, Davis, and McHugh.

DAVIS, Judge:

Defendant Shawn David Larson appeals after entering his conditional guilty pleas to three counts of aggravated robbery. He argues that the district court erred in denying his Motion to Dismiss, which was based on his prior demand for disposition, as allowed by the then-in-force Utah Code section 77-29-1 (the speedy trial statute), see Utah Code Ann. § 77-29-1 (2003) (repealed 2007).

Under the speedy trial statute, when a defendant is not brought to trial within the required 120 days and moves to dismiss the action, the court must review the proceeding. See id. § 77-29-1(4). "If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice." Id. Here, the district court reviewed the proceeding and found that the delays in bringing Larson to trial were supported by good cause. Larson argues that these determinations of good cause were not supported by the evidence.

The speedy trial statute grants discretion to the district court "to make reasonable determinations concerning the existence of good cause." State v. Petersen, 810 P.2d 421, 424 (Utah 1991). The district court's factual findings underlying such determinations "will not be disturbed unless clearly erroneous." Id. at 425. See generally State v. Taylor, 947 P.2d 681, 685 (Utah 1997) ("We consider a trial court's findings of fact clearly erroneous when they 'are against the clear weight of the evidence.'" (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987))). And any challenge to the district court's interpretation of the speedy trial statute itself will be reviewed for correctness. See Petersen, 810 P.2d at 425.

The district court found that both parties stipulated to the June 10, 2003 continuance "due to the high number of preliminary hearings scheduled that day." Larson challenges this finding, arguing that the continuance was requested by the prosecution and was granted to benefit the prosecution. We see nothing in the record, including those parts of the record to which Larson cites, that convinces us that the district court's finding was clearly erroneous, i.e., against the clear weight of the evidence. And Larson provides no authority suggesting that such a situation, where the parties stipulate to a continuance because there is not adequate time to conduct the hearing, does not amount to good cause.

The district court also found that both parties stipulated to continuances on July 14, 2003, and July 28, 2003, to await the U.S. Attorney's decision regarding possible federal charges against Larson. Larson suggests that these continuances were a method for delay on the part of the State, but the record shows that both parties considered these continuances beneficial because the State would be dismissing charges if the U.S. Attorney decided to file federal charges. Larson's record citations do not support his assertion that the State "passively waited for the federal government to bring charges." Rather, the record shows that the prosecutor was actively trying to assess the situation so that the case could proceed if no federal charges were to be brought. And again, Larson provides no authority suggesting that this type of stipulation does not qualify as good cause.

Although Larson admits to requesting a continuance of the trial that was scheduled for November 2003, he argues that the State's actions in failing, and even refusing, to provide DNA evidence to the defense necessitated the continuance and that the delay was therefore not supported by good cause. We see no indication that the State was attempting to delay the defense from obtaining the requested information. The portions of the record to which Larson cites do not support his characterization

of the events. It appears that the defense wanted more than the "report of DNA" that the State currently had been using and that the defense "kn[e]w the content of." Instead, the defense was seeking "hard data . . . on the DNA," and they were required to go through the standard procedures to obtain this more detailed information from the crime lab. In fact, defense counsel testified that he had to follow the same procedure to obtain the requested DNA information in this case as was required in two other cases in which he was involved. Without evidence indicating that the delay caused by the crime lab in its fulfillment of the request was longer than was warranted or necessary, or some authority indicating that the State is under an obligation to provide the defense with this type of detailed evidence prior to any request for such, we cannot overturn the district court's finding of good cause for delay.

The district court granted another continuance on August 27, 2003, as a result of Larson's counsel's failure to appear. The district court determined, and we cannot disagree, that such delay was supported by good cause. Larson argues that an attorney cannot waive his client's right to a speedy trial. However, the question on Larson's Motion to Dismiss is only whether the delay was for good cause, which it clearly was, cf. Petersen, 810 P.2d at 426 (recognizing that one reason supporting a finding of good cause is "a relatively short delay caused by unforeseen problems arising immediately prior to trial"). Indeed, were it otherwise, any incarcerated defendant could thwart prosecution simply via the nonappearance of counsel until the 120 days had passed.

Larson argues that because the district court required him to waive his right to a speedy trial before the court would grant him a continuance so that defense counsel could adequately prepare for trial, he was forced to give up his constitutional right to a speedy trial in order to exercise his constitutional right to a fair trial. This argument is misplaced because it hinges on Larson's constitutional right to a speedy trial. The only issue on appeal is Larson's statutory right to a speedy trial, which is distinct from the constitutional right. Therefore, we need not address this argument further.[1]

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[1]Even if properly preserved for appeal, this argument is unavailing. We acknowledge that there is binding precedent to the effect that a defendant cannot be forced to give up one constitutional right in favor of another. See Simmons v. United States, 390 U.S. 377, 394 (1968) ("In these circumstances [where a defendant would ordinarily have to give up his Fifth Amendment right to not testify in order to have standing to assert that his
(continued...)

Larson also argues that the district court erroneously denied his motion without adequately considering the duty imposed on the State by section 77-29-1 and addressing what Larson perceives as the State's "repeated failures to comply with that statutory duty." Larson argues that the State failed to fulfill its statutory duty when it did not (1) "notify the district court that a detainer notice had been filed," (2) request the court "to make any determination of good cause for delay in open court as required under [the speedy trial statute] until after the 120 days expired,"[2] or (3) make a good faith effort to bring the matter to trial within the 120 days. We agree with Larson that the State has the burden of complying with section 77-29-1; however, we see no indication in the district court's decision

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[1](...continued) Fourth Amendment right against unreasonable searches and seizures was violated], we find it intolerable that one constitutional right should have to be surrendered in order to assert another."). However, Larson takes the language of this rule to an unsupported extreme. The only case he points to that suggests that such language is applicable in the context of this case found ineffective assistance of counsel only where, in an effort to comply with his right to a speedy trial, the defendant was arraigned and appointed counsel in the morning, and then told that he had to either waive his right to a speedy trial or proceed to trial that afternoon. See Hunt v. Mitchell, 261 F.3d 575, 584 (6th Cir. 2001). The instant case is not such an egregious situation. Larson was forced to waive his right to a speedy trial or to forgo further preparation, not to forgo any preparation at all. We are not convinced that had Larson proceeded to trial without the requested continuance, his counsel would have been unable to prepare sufficiently to render the effective assistance constitutionally guaranteed to Larson. Further, we note that under Larson's extreme reasoning, any incarcerated defendant whose defense was sufficiently complex such that it took longer than 120 days to optimally prepare could have his case dismissed under the speedy trial statute.

[2]To the extent Larson argues that the "plain language" of the speedy trial statute requires that determinations of good cause be made before the 120 days passes and may not be made "in hindsight," the language of the statute is contrary. Although the statute does provide that either party "may be granted any reasonable continuance" prospectively, Utah Code Ann. § 77-29-1(3) (2003) (repealed 2007), it also provides that when a motion to dismiss is made, the court shall evaluate whether the failure to come to trial within the 120 days is supported by good cause "whether a previous motion for continuance was made or not," id. § 77-29-1(4).

that the court was unaware of this burden, that the court placed the burden on Larson, that the court was under any other misunderstanding relating to the burden of compliance under the statute, or that the court failed to make any necessary findings related to this burden.

Finally, Larson argues that he was denied his constitutional right to effective assistance of counsel when his counsel failed to appear on time for the preliminary hearing and when his counsel failed to file a motion to dismiss based on delays "attributable solely to the State." But Larson has not shown ineffective assistance for either action. See generally Strickland v. Washington, 466 U.S. 668, 687 (1984) ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."). Concerning the failure to appear, Larson has not shown prejudice. He argues that the seventy-plus days that passed between the continuance based on failure to appear and the time that defense requested the November continuance would have been sufficient time to meet the 120 days and require dismissal. However, Larson makes no argument addressing the fact that the trial date would almost certainly have been earlier than the November date had the preliminary hearing been held as originally scheduled. Respecting the motion to dismiss, we have discussed above that the complained-of delays were not attributable to the State; therefore, counsel's failure to file a motion to dismiss did not amount to ineffective assistance, see State v. Kelley, 2000 UT 41, ¶ 26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel.").

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Judith M. Billings, Judge

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Carolyn B. McHugh, Judge