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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 30499-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JOHNATHON MICHAEL LAINE,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Sweeney, J. — This appeal follows a conviction for taking a motor vehicle without the owner's permission. The defendant assigns error to the court's refusal to dismiss the case for violation of his constitutional right to a speedy trial. He based his argument on a six-month delay in bringing him to trial. Even starting with a presumption of prejudice, we ultimately are unable to conclude that he was prejudiced by any delay in these proceedings. He also contends that the court abused its discretion by denying him the opportunity for treatment for his drug addiction (DOSA[1]) because the court misunderstood the time available for him to participate in the prison-based program. The

[1] Drug offender sentencing alternative, RCW 9.94A.660.

record reflects a number of sound reasons for the sentencing court's refusal to impose a DOSA sentence including Mr. Laine's failure at earlier attempts at drug treatment. We then affirm the conviction and the sentence.

FACTS

A Clallam County jury concluded that Johnathon Laine took a motor vehicle, a 2004 Mustang, without the owner's permission; that conclusion was based on ample evidence.

The State originally charged Mr. Laine with taking a motor vehicle without permission, second degree theft, and making false statements to a law enforcement officer. On January 7, 2010, Mr. Laine first appeared before a Clallam County Superior Court judge. On January 12, he pleaded not guilty. The court set a trial date for March 10. The time for trial period was set to expire on March 13.

On February 19, Mr. Laine moved to continue the trial date. The State did not object. The court reset the trial date to March 22. The time for trial period was then reset to April 21. On March 22, the parties agreed to reset the trial date due to court congestion. The court scheduled trial for May 17. Mr. Laine did not object to the new trial date and signed the order continuing the trial.

On March 23 or 24, Mr. Laine moved, without the assistance of counsel, to

dismiss the charges and argued that his right to a speedy trial had been violated. Neither Mr. Laine nor his attorney noted the matter for hearing until May 21. On April 19, again without the assistance of his lawyer, Mr. Laine moved to dismiss the charges against him, and argued both speedy trial and discovery violations. The motion was noted for hearing on May 21.

On April 29, the State moved to continue the May 17 trial date because the arresting officer was scheduled for leave. Mr. Laine objected. The court nonetheless found good cause and rescheduled the trial for June 1. Mr. Laine signed the order.

On May 28, Mr. Laine argued his motion to dismiss. The court noted that Mr. Laine did not object, or object in a timely fashion, to any of the previous scheduling orders nor could he show that his right to a fair trial was prejudiced by the delay. The court concluded there was no violation of the time for trial rule (CrR 3.3) or Mr. Laine's constitutional right to a speedy trial and denied his motion. Mr. Laine then moved to continue the trial date. The court scheduled trial for June 14. The speedy trial period was then set to expire on July 13. Mr. Laine signed the order.

On June 14, the court notified the parties that the trial date had to be reset due to court congestion. Clallam County had only three judges, two of whom were on vacation and so only one judge was available to handle the criminal and civil calendars. The court

reset the trial date for June 28. Mr. Laine did not object.

On June 15, Mr. Laine moved to continue the trial date. Mr. Laine said he was willing to accept a date that was two weeks beyond the time for trial period. The court reset the trial date to July 19. The time for trial period moved to July 27. Mr. Laine signed the order.

On July 19, trial started. The parties presented starkly different versions of what happened. The jury rejected Mr. Laine's version of things (he bought the car from his friend) and accepted the State's version (he stole the car). And the jury found Mr. Laine guilty of taking a motor vehicle without permission but acquitted him of the second degree theft charge.

On July 30, Mr. Laine asked that he be evaluated for a residential DOSA. The sentencing court found that Mr. Laine was ineligible for a residential DOSA with an offender score of 9+ points. The court noted that Mr. Laine had failed in previous drug treatment programs. And the court denied his request for a DOSA. The court said it might consider a prison DOSA, but that alternative would depend on Mr. Laine's offender score.

On August 26, the court proceeded to sentencing. The standard range sentence was 22 to 29 months. Mr. Laine requested a prison DOSA to address his drug addiction.

The court and Mr. Laine acknowledged his previous failed attempts to treat the addiction. And the court noted the time he had spent in jail and denied his request for a prison DOSA:

> The most I could give [Mr. Laine] is 12 [months] under the prison based DOSA and then he's only on supervision for another 3 or 4 months according to that scheme because you take half the standard range, you split it. So it's really not going to accomplish – you know, if we were early in the process here, you know, that might be a consideration. But it's not going to work here. So it's really not in my – well, I guess it's in my ability to do but I don't think it's the proper thing to do here.

Report of Proceedings (RP) (Aug. 26, 2010) at 21. The court sentenced Mr. Laine to 26 months in prison.

DISCUSSION

Speedy Trial Time

Mr. Laine contends that the multiple continuances violated his constitutional right to a speedy trial. We review the assignment of error de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

The United States Constitution and the Washington State Constitution both provide criminal defendants the right to a speedy public trial. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10). The Sixth Amendment speedy trial right attaches when a

charge is filed or an arrest is made that holds one to answer to a criminal charge, whichever occurs first. *State v. Corrado*, 94 Wn. App. 228, 232, 972 P.2d 515 (1999). The constitutional right to a speedy trial is violated at the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997).

The length of the delay can trigger a presumption of prejudice. *Iniguez*, 167 Wn.2d at 283. Whether it does or not turns on the actual duration of the delay, the complexity of the charges, and the reliance on eyewitness testimony. *Id.* at 292. A delay of eight months or longer is generally considered presumptively prejudicial, while a delay of less than five months is insufficiently prejudicial to trigger further constitutional inquiry. Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 Fordham L. Rev. 611, 623 n.71 (1980). There is some disagreement on delays of six to seven months but the majority of courts conclude that such delays are "presumptively prejudicial." *Id.*

After the presumption is triggered, we then balance four factors to decide whether a delay in bringing a defendant to trial violated his constitutional right to the prompt adjudication of the charges: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Iniguez*, 167 Wn.2d at 283 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

Here, the State arrested and charged Mr. Laine in early January 2010. A little over six months then passed between the arrest and the beginning of trial. Six months is not unreasonable when considered in isolation. But, Mr. Laine spent those six months in jail and the charges and necessary proof were not complex. The State's case also relied on a number of eyewitnesses. *See Iniguez*, 167 Wn.2d at 292. And, while it is a close call, we will start with a presumption that the six-month delay here was prejudicial. *See id.*; Joseph, *supra*, at 623 n.71. The State, then, must overcome that presumption. *See generally Iniguez*, 167 Wn.2d at 283, 295.

(1) *Length of delay.* This factor focuses on "'the extent to which the delay stretches beyond the bare minimum needed to trigger'" the four-step analysis. *Id.* at 293 (quoting *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). A longer pretrial delay requires that we look closer into the circumstances surrounding the delay. *Id.* Whether or not the six-month lapse between Mr. Laine's arrest and his trial should trigger the presumption of prejudice, as we have noted, is a close call. It is certainly at or very near the bare minimum needed to trigger this four-step analysis based on the circumstances of this case. We would not weigh this factor against the State.

(2) *Reason for delay*. Here, we consider responsibility for the delay. *Id.* at 294.

"If the defendant asks for the delay or agrees to the delay, then the defendant is deemed to have waived his speedy trial rights as long as the waiver is knowing and voluntary." *Id.* at 284. Mr. Laine requested multiple continuances to prepare for trial. Clerk's Papers (CP) at 155, 197, 200, 220, 247; RP (June 15, 2010) at 2-3. He also agreed to, and signed, the continuances requested by the State or the court. CP at 156, 199, 205, 209. Nothing is this record indicates that those waivers were anything other than knowing and voluntary.

The State's single request for a continuance was prompted by the arresting officer's scheduled leave. *See id.* ("[A] missing witness[ ] may justify a reasonable delay."). The courts' two continuances due to court congestion do, however, weigh against the State. *See id.* ("[D]elay . . . due to overcrowded courts . . . will still be weighed against the State, though to a lesser extent.").

(3) *Assertion of right.* We also consider the extent to which the defendant asserted his speedy trial right. *See id.* ("[D]efendant is more likely to complain the more serious the deprivation is."). We consider Mr. Laine's assertion of his right to a speedy trial in the light of his overall conduct. *Id.* Here, the trial court granted several continuances, and Mr. Laine signed those orders without objection. Mr. Laine did file two pro se motions to dismiss on speedy trial grounds but did not ask for a hearing until

May. After the court eventually denied the motions to dismiss, Mr. Laine requested at least two more continuances. He did assert his right to a speedy trial.

(4) *Prejudice.* We consider this factor in light of the interests the right to a speedy trial was designed to protect: (1) oppressive pretrial incarceration, (2) excessive anxiety and worry over the pending charges, and (3) impairment of an accused's ability to present a defense. *Id.* at 295. The burden is on the State to show that the defendant suffered no serious prejudice beyond that associated with the typical and unavoidable delay. *See generally Iniguez*, 167 Wn.2d at 283, 295. A defendant, however, makes a stronger case for a speedy trial violation if he can affirmatively demonstrate prejudice. *Id.* at 295.

Here, the State emphasizes Mr. Laine's acquiescence to the pretrial delay and the fact that he requested and agreed to several continuances even after he filed the two pro se motions to dismiss violations of his right to a speedy trial. *See Barker*, 407 U.S. at 534-36 (presumption of prejudice extenuated by defendant's acquiescence in the delay). The State argues there is nothing in the record to show oppressive pretrial incarceration or anxiety and worry over the pending charges. The State further notes that if there was any prejudice from the delay, it was to the State; two of its witnesses struggled to reconcile their testimony with the statements they gave police.

Mr. Laine does not show any oppressive pretrial incarceration or that he had

anxiety and worry. Indeed, he is no stranger to the system or incarceration. He also does not demonstrate any prejudice to his ability to present his defense or challenge the State's case. Mr. Laine's essential complaint here is that he probably would have received a prison DOSA, but for the delay. His contention is based on the sentencing court's suggestion: "[I]f we were early in the process here, you know, that might be a consideration." RP (Aug. 26, 2010) at 21. The inquiry here focuses on his ability to defend himself not the opportunity to rehabilitate himself. *Iniguez*, 167 Wn.2d at 295. And, more importantly, the sentencing court was concerned about whether Mr. Laine would succeed in any program given his track record. This sentencing decision fell within the court's discretion and there is no prejudice. This factor does not weigh against the State.

The court did not, then, violate Mr. Laine's constitutional right to a speedy trial.

The court sentenced Mr. Laine within the standard range and so, generally, that would mean he has no right to appeal his sentence. *State v. White*, 123 Wn. App. 106, 113, 97 P.3d 34 (2004) (quoting *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003)). We will, however, review claims of legal or procedural error including claims that the sentencing court abused its discretion. *State v. Mail*, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993).

Mr. Laine contends that the court abused its discretion by denying his request for a DOSA. Mr. Laine believes the court's miscalculation or misunderstanding of the remaining time for confinement and supervision resulted in a decision based on untenable grounds.

The sentencing court has discretion to impose a DOSA sentence if the offender meets certain requirements and if the court determines that such a sentence is appropriate. RCW 9.94A.660(2); *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519 (1998). A DOSA provides drug offenders with the opportunity for "treatment-oriented sentences." *Conners*, 90 Wn. App. at 53.

Mr. Laine requested a prison-based DOSA. RCW 9.94A.660. His standard sentencing range was 22 to 29 months. Mr. Laine would have been required to spend 12.75 months in confinement to qualify for treatment. RCW 9.94A.662(1)(a). The sentencing court noted the time as 12 months, instead of 12.75. But that observation does not make a difference here. The court was concerned with how much treatment Mr. Laine would receive after being credited with approximately eight months of time already served. And, more significantly, the court did not believe Mr. Laine was a good candidate for a DOSA sentence because he had failed other attempts. These are tenable grounds for the court to deny the request for a DOSA.

Ineffective Assistance of Counsel

Finally, Mr. Laine contends that his lawyer was not effective because the lawyer failed to argue that Mr. Laine would be under community supervision for more than 12 months after his release from confinement and, thus, available for a DOSA.

We have already addressed this challenge. The court was concerned Mr. Laine would not receive treatment in a state correctional facility for the fully prescribed time (12.75 months). This is a valid concern that counsel most likely recognized. And the court noted that Mr. Laine was not a good candidate for a DOSA. There is, then, no prejudice by anything Mr. Laine's lawyer did or did not do on this issue. Clearly, the court's decision would have been the same.

We affirm the conviction and the sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

_____ _____
Korsmo, C.J. Siddoway, J.