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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1116

Filed: 5 June 2018

Rowan County, Nos. 11 CRS 52570-76, 11 CRS 52579-83, 11 CRS 52589-90, 11 CRS 52598-604, 11 CRS 52608

STATE OF NORTH CAROLINA

v.

GALEN LEE SMITH

Appeal by defendant from judgments entered 6 December 2016 and corrected 30 March 2017 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 18 April 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.*

*Mark Montgomery for defendant.*

ARROWOOD, Judge.

Galen Lee Smith ("defendant") appeals from judgments entered on his conviction for various counts of indecent liberties with a child, first degree sex offense with a child, and first degree rape of a child. For the following reasons, we find no error.

## I. Background

Defendant was arrested in April 2011 and later indicted by a Rowan County Grand Jury in July 2011 on numerous sexual offense charges based on allegations by one of defendant's daughters and a step-daughter. Years later, after defendant rejected the State's plea offer in open court on 28 July 2016, defendant's counsel filed a demand for a speedy trial on 31 August 2016, followed by motions to dismiss on speedy trial grounds on 16 and 19 September 2016.

Defendant's motion to dismiss was heard in Rowan County Superior Court before the Honorable Christopher W. Bragg on 22 and 23 September 2016. The hearing ended with the judge taking the matter under advisement and indicating he would inform the parties of his ruling so that they knew whether or not they would be moving forward with the trial scheduled for 28 November 2016. The judge later denied defendant's motion and filed a written order on 16 February 2017, after the trial.

Defendant's cases were joined during a hearing on pretrial motions on 28 November 2016 and tried in Rowan County Superior Court before the Honorable Christopher W. Bragg beginning on 29 November 2016. During the trial, defendant renewed his motion to dismiss on speedy trial grounds. The trial court denied the motion.

On 6 December 2016, the jury returned verdicts finding defendant guilty of fourteen counts of indecent liberties with a child, six counts of sexual offense with a

child by an adult, two counts of rape of a child by an adult, and two counts of incest. The trial court arrested judgment on the two incest convictions and entered separate judgments imposing consecutive sentences for each of the remaining twenty-two convictions. The consecutive sentences total 2,144 to 2,656 months imprisonment. The trial court also ordered defendant to register as a sex offender and enroll in satellite-based monitoring upon his release for the remainder of his life. Defendant gave notice of appeal in open court. The trial court corrected the judgments on 30 March 2017 to indicate that the offenses are reportable convictions involving the physical, mental, and sexual abuse of a minor.

## II. Discussion

The sole issue raised on appeal is whether defendant was denied his constitutional right to a speedy trial. "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

"The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 18 of the North Carolina Constitution guarantee the right to a speedy trial." *State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986). Our Supreme Court has explained that

> [t]he right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to

> determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

*State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citation omitted). In other words, there is no formula to apply in speedy trial cases to precisely determine when the right is violated.

In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court adopted a balancing test, "in which the conduct of both the prosecution and the defendant are weighed[,]" to determine if a defendant's right to a speedy trial was violated. *Id*. at 530, 33 L. Ed. 2d at 116. Noting that the analysis must be done on an ad hoc basis, the Court identified the following four factors that "courts should assess in determining whether a particular defendant has been deprived of his right[:] . . . [1.] [l]ength of delay, [2.] the reason for the delay, [3.] the defendant's assertion of his right, and [4.] prejudice to the defendant." *Id*. at 530, 33 L. Ed. 2d at 117. The Court elaborated on each factor and then further explained as follows:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the

> accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

*Id.* at 533, 33 L. Ed. 2d at 118-19 (footnote omitted).

" 'We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution.' " *State v. Spivey*, 357 N.C. 114, 118, 579 S.E.2d 251, 254 (2003) (quoting *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001)). "The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case." *State v. Smith*, 289 N.C. 143, 148, 221 S.E.2d 247, 250 (1976).

In the present case, defendant contends "[t]he trial court relied on incomplete and unsupported factual findings and improperly analyzed the *Barker v. Wingo* factors in order to conclude his right to a speedy trial was not violated." Thus, defendant claims the trial court erred in denying his motion to dismiss and asserts his convictions should be vacated with prejudice. Upon review of the *Barker* factors, we are not convinced defendant's right to a speedy trial was violated.

1. Length of Delay

"First, the length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for

inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117.

> The United States Supreme Court has noted that "lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." However, " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry."

*Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992)).

In this case, there was over five and a half years between defendant's arrest in April 2011 and his trial in November 2016. As the parties agreed during the hearing, we now hold the approximately five and a half year delay in this case requires an examination of the remaining *Barker* factors.

2. Reason for Delay

In *Barker*, the Supreme Court noted that the reason for the delay is closely related to the length of delay and explained that

> different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

*Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117 (footnote omitted).

In this case, the trial court made findings of fact regarding the reasons for delay. The trial court then concluded as follows:

> 4. The State's reasons for the delay in the trial of defendant's cases . . . are reasonable and valid justifications for delay in this case.
>
> 5. The defendant has failed to offer any evidence to establish that neglect or willfulness by the State is the reason for delay in the trial of his cases.
>
> . . . .
>
> 10. The Court will not attribute defense delay "by failing to move the case forward" to the State.

Defendant now argues the trial court erred in analyzing the reason for delay for the following two reasons: (1) defendant asserts the trial court improperly placed the burden on him to prove that delays in his case were caused by the neglect or willfulness of the State; and (2) defendant contends the trial court's conclusion that the delay was not caused by the State's neglect or willfulness is not supported by the record. We are not convinced the trial court erred.

In *Spivey*, our Supreme Court explicitly stated that "defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution." 357 N.C. at 119, 579 S.E.2d at 255. The Court further explained that "[o]nly after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution

must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Id.*

Nevertheless, relying on this Court's decision in *State v. Strickland*, 153 N.C. App. 581, 570 S.E.2d 898 (2002), *petition for writ of certiorari denied*, 357 N.C. 65, 578 S.E.2d 594 (2003), *petition for writ of certiorari dismissed*, 602 S.E.2d 679 (2004), defendant argues that "[i]f a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor." *Id.* at 586, 570 S.E.2d at 902 (citations omitted). In *Strickland*, this Court further explained that

> [t]he prosecutor may rebut the prima facie case by showing a valid reason for the delay. Once the prosecutor offers a reason for the lengthy delay of defendant's trial, the burden of proof shifts back to the defendant to show neglect or willfulness by the prosecutor. If the delay is not proven to be purposeful or oppressive, this factor weighs in favor of the State.

*Id.* at 586, 570 S.E.2d at 902-903 (internal citations omitted). Based on *Strickland*, defendant contends the State had the burden of presenting valid reasons for the delay after it was established that the delay in this case was over five and a half years.

At the outset, we note that our Supreme Court's decision in *Spivey* is controlling over this Court's earlier decision in *Strickland*. Therefore, it is clear that defendant bears the initial burden of presenting *prima facie* evidence that the delay was caused by the neglect or willfulness of the State. To the extent *Strickland* provides otherwise, it is not controlling.

In any event, whether or not defendant met the initial burden, there is sufficient evidence in this case to support the trial court's conclusions that the State's reasons for delay were "reasonable and valid justifications for delay in this case" and defendant "has failed to offer any evidence to establish that neglect or willfulness by the State is the reason for delay in the trial of his cases."

On appeal, defendant only takes issue with the trial court's emphasis on the number of cases disposed of during his pretrial incarceration. Defendant contends that delays caused by overcrowded dockets weigh against the State and the State should have provided alternative explanations. A review of the record, however, indicates the State did provide other reasons for the delay. The trial court explicitly found as follows:

> 123. The State posited the following reasons for delay[:]
>
> (1) The number of pending criminal cases in Rowan County, North Carolina[;]
>
> (2) The recantation of the victim [ ] created the need for additional law enforcement investigation;
>
> (3) The defendant, due to no fault of his own, had new counsel appointed when [his initial counsel] was allowed to withdraw upon his election as a district court judge;
>
> (4) Since his arrest in April 2011, neither of defendant's attorneys . . . ever filed any motions or requests to calendar defendant's case for trial;
>
> (5) The [S]tate never refused to calendar any motions or

requests from the defendant for a trial date.

The trial court concluded these reasons were "reasonable and valid justifications for delay in this case." The record in this case supports the trial court's findings and conclusions.

Additionally, weighing against defendant, the court made findings that defendant's counsel discussed the pros and cons of filing a speedy trial motion with defendant early on in the case but they agreed not to push for a trial because time might work to their benefit. The trial court properly attributed any defense delays to defendant. *See Vermont v. Brillon*, 556 U.S. 81, 90-91, 173 L. E. 2d 231, 240 (2009) ("[D]elay caused by the defense weighs against the defendant[.] . . . That rule accords with the reality that defendants may have incentives to employ delay as a 'defense tactic': delay may 'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade' over time.") (quoting *Barker*, 407 U.S. at 521, 33 L. Ed. 2d at 111) (internal citations omitted).

Overall, we hold the trial court did not err in its analysis regarding the reason for the delay of defendant's case. Defendant had the burden to show the delay was the result of the prosecution's neglect or willfulness. The trial court's conclusions that the State presented reasonable and valid justifications for the delay and that defendant failed to show neglect or willfulness by the State are supported by the record in the case.

There is no evidence in this case that the delay in defendant's case resulted from willful misconduct by the State. The record instead shows that the delay was the result of the crowded docket in Rowan County Superior Court, a witness's recantation, the substitution of defense counsel after defendant's original counsel was elected to the bench, and the passive strategy of the defense. As discussed in *Barker*, the crowded docket is a neutral reason that ultimately weighs slightly in favor of defendant since the State ultimately bears responsibility for the circumstances. *Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117. However, delays attributable to the defense outweigh the crowded docket and tip this factor against defendant.

3. Assertion of Right

Regarding the assertion of the right to a speedy trial, the *Barker* Court explained that

> [w]hether and how a defendant asserts his right is closely related to the other factors . . . . The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

*Barker*, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18.

In this case, the trial court found that after defendant was given an anticipated trial date of 28 November 2016 during a court appearance on 28 August 2016, defendant's replacement counsel filed a demand for a speedy trial on behalf of defendant on 31 August 2016. The trial court also found that defendant, through the use of the Rowan County Detention Center messaging system, had previously requested that his replacement counsel file for a quick and speedy trial on 4 January 2015 and 22 June 2016. Defendant's replacement counsel, however, did not respond to defendant's 4 January 2015 request because he had been appointed for less than 30 days and had not yet received or reviewed all of the case materials. Based on these findings, the trial court concluded that "until his Demand for Speedy Trial filed on August 31, 2016, [defendant] never formally asserted his right to a speedy trial."

Defendant now argues these findings and conclusion ignore his informal assertions of his right to a speedy trial much earlier in his incarceration. Specifically, defendant contends "[h]e repeatedly attempted to move his case forward by contacting court officials beginning in June 2012 to inquire of the status of his case." Citing *State v. Washington*, 192 N.C. App. 277, 665 S.E.2d 799 (2008), defendant contends his inquiries were assertions of his right that should weigh in his favor in the speedy trial analysis. The present case is distinguishable from *Washington*.

In *Washington*, this Court considered motions to compel the SBI to expedite the testing of evidence filed by the defendant early in his incarceration to be informal assertions of the defendant's right to a speedy trial and held that defendant's informal assertions, along with defendant's formal assertion in a motion to dismiss on speedy trial grounds filed over a year and a half before the start of the defendant's trial, weighed this third *Barker* factor in the defendant's favor. *Id.* at 290-91, 665 S.E.2d at 808. We emphasize that it was the combination of the informal and formal assertions and the delay after both that tipped this factor in favor of the defendant in *Washington*.

In this case, we disagree with defendant's characterization of his inquiries as informal assertions of his right to a speedy trial. The record shows that between 6 June 2012 and 16 July 2014, defendant completed seven inmate request forms asking if his case was on the superior court docket. A response on each form indicates that defendant did not appear on the docket. Although these forms show that defendant was keeping track of his case, the forms do not show that defendant ever requested that his case be placed on the docket or otherwise attempted to advance his case. Additionally, defendant's formal assertion of his speedy trial right was made only months before the start of his trial, after the trial date had been set.

It is also significant that during the time period defendant submitted the inmate request forms, defendant was represented by counsel. In *Spivey*, our Supreme

Court held that "[the] defendant's *pro se* assertion of his right to a speedy trial is not determinative of whether he was denied the right[]" because "[w]hen defendant filed his *pro se* motion for a speedy trial . . ., he was represented by counsel." *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256. The *Spivey* Court explained that "[the defendant's] assertion of the right to a speedy trial was made in violation of the rule that a defendant does not have the right to be represented by counsel and to also appear *pro se*." *Id*. The Court emphasized that "[a d]efendant does not have the right to appear both by himself and by counsel." *Id*. Therefore, the Court did not consider the defendant's *pro se* speedy trial motion filed more than a year after his arrest, but instead considered the speedy trial motion filed by the defendant's counsel almost three years after the defendant's arrest. *Id*.

Even if defendant's *pro se* inquiries are considered informal assertions of his right to a speedy trial in this case, defendant was represented by his original counsel, who withdrew in December 2014 following his election as a district court judge in November 2014, at the times his inquiries were made. As noted above, defendant's counsel testified that he and defendant weighed the filing of a speedy trial motion early in the case but they decided against it because the delay might work to their benefit. Defendant's original counsel also testified that defendant never requested that he file a speedy trial motion and that had defendant told him to file a motion against his legal advice and opinion, he would have done so.

Although defendant was incarcerated for over five and a half years before the start of trial, defendant formally asserted his right to a speedy trial when defense counsel filed a demand for speedy trial on 31 August 2016, after the case was calendared for trial and less than three months before the case was tried. Given the timing of defendant's assertion of his right to a speedy trial, this factor weighs against defendant.

4. Prejudice to Defendant

The last *Barker* factor is the prejudice to defendant. The *Barker* Court explained that

> [p]rejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, 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, 33 L. Ed. 2d at 118 (footnote omitted).

During the hearing on defendant's motion to dismiss, the defense argued the prejudice to the first two interests, oppressive pretrial incarceration and anxiety of the accused, was apparent from the length of defendant's pretrial incarceration. The defense acknowledged that defendant was not called to testify about how his lengthy pretrial incarceration affected him, but asserted the court can take notice of the effects of a lengthy pretrial incarceration. Concerning the third and "most serious"

interest, the possibility the defense will be impaired, the defense argued they were unable to call one of defendant's daughters as a witness because she died in 2014, prior to trial. The deceased daughter was not one of defendant's accusers. Defense counsel acknowledged that it was uncertain what defendant's deceased daughter would have testified to, but stated defendant was convinced that she was an important witness.

Based on the testimony of defendant's original counsel, the trial court made the following findings of fact:

> 20. [Defendant's original counsel] was aware that the defendant hoped his younger daughter . . . would provide testimony to exonerate him.
>
> 21. [Defendant's original counsel] never received or was provided with any specific information from [the daughter], or on her behalf, refuting or pertaining to the sexual allegations in this case.
>
> 22. [Defendant's original counsel] was under the impression that we (the defense) did not have any favorable witnesses from the alleged victims.
>
> 23. In arguing this motion to the Court, the defense admitted "we certainly do not know what [the daughter] would have testified to."

Based on these findings, the trial court issued the following conclusions of law concerning prejudice to defendant:

> 8. The defendant failed to offer anything other than a "hope" that his daughter . . . would be a favorable and material witness for the defense.

> . . . .
>
> 11. The defendant failed to establish that he suffered actual substantial prejudice as a result of the delay in his trial.

On appeal, defendant's primary argument regarding prejudice is that the trial court required him to prove actual prejudice. Citing federal cases, defendant contends he is not required to prove actual prejudice and that prejudice may be presumed in cases where there is excessive delay. *See Doggett*, 505 U.S. at 655, 120 L. Ed. 2d at 530 ("affirmative proof of particularized prejudice is not essential to every speedy trial claim"); *Moore v. Arizona*, 414 U.S. 25, 26, 38 L. Ed. 2d 183, 185 (1973) (stating that "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial[.]"). A review of those cases cited by defendant show that the Supreme Court was discussing the difficulty in proving prejudice in some cases and the role presumptive prejudice plays in the overall speedy trial analysis. In *Doggett*, the Court recognized that

> excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

*Doggett*, 505 U.S. at 655-56, 120 L. Ed. 2d at 531 (internal citation omitted). We too recognize the role presumptive prejudice plays in the speedy trial analysis. However,

only considering presumptive prejudice from the length of delay would render the fourth *Barker* factor superfluous, as it is that same presumptive prejudice from the length of delay that triggers the analysis of the other *Barker* factors. *See Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.")

Here, the trial court's findings and conclusions address defendant's specific argument that the delay in his case prejudiced his defense because he was unable to call his deceased daughter as a witness at trial. We do not think it is proper to presume prejudice in this instance where there is no indication as to what defendant's deceased daughter would testify to and the prejudice would weigh heavily in defendant's favor. *See Id.* at 532, 33 L. Ed 2d at 118 ("If witnesses die or disappear during a delay, the prejudice is obvious."). In *Spivey*, the defendant argued he suffered prejudiced by a delay in the prosecution because two material witnesses could not be located. *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. Addressing the argument, our Supreme Court stated that "[a] defendant must show actual, substantial prejudice." *Id.*; s*ee also State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981) ("Courts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor."). The Court then determined the defendant failed to show he suffered significant prejudice as a

result of the delay because the "witnesses were either available or could have been located with diligent effort at the time the case was called for trial." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. We find *Spivey* is controlling in this instance.

The trial courts findings of fact, set forth above, accurately summarize the evidence regarding the potential testimony of defendant's deceased daughter. Defendant believed his daughter would be a favorable witness, but defense counsel admitted that "we certainly don't know what [the daughter] would have testified to." On appeal, defendant argues it is apparent that the deceased daughter would have denied having been sexually abused by defendant. However, there were no allegations against defendant by the deceased daughter.

Considering all the evidence in this case, the only prejudice established was that presumptive prejudice that naturally accompanies a prolonged pretrial incarceration. Absent a more concrete showing of actual prejudice by defendant, this fourth factor weighs only slightly in favor of defendant.

## III. Conclusion

Although five and a half years is a substantial delay, the record in this case shows that the delay does not amount to a violation of defendant's right to a speedy trial in this instance. The balancing of the *Barker* factors supports the trial court's determination that defendant was not denied his right to a speedy trial. The only factors in defendant's favor are the length of his pretrial incarceration and the

associated presumptive prejudice. As a result, we hold the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).