IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1083

Filed: 17 July 2018

Brunswick County, Nos. 13 CRS 3290, 3292

STATE OF NORTH CAROLINA

v.

KEVIN LYNDELL DAVIS

Appeal by defendant by petition for writ of certiorari from judgments entered 26 January 2017 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 17 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

CALABRIA, Judge.

Kevin Lyndell Davis ("defendant") appeals by petition for writ of certiorari from judgments entered upon jury verdicts finding defendant guilty of two counts of possession with intent to manufacture, sell, or deliver cocaine and one count of sale of cocaine. On appeal, defendant contends that the trial court erroneously denied his

motions to dismiss all charges based on the State's violation of his Sixth Amendment right to a speedy trial. After careful review, we conclude that defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural Background

On 18 June 2013, Agent Jared Zeller ("Agent Zeller") of the Brunswick County Sheriff's Office met with Jeremy Potter ("Potter"), a drug user who had agreed to work as a confidential informant, for the purpose of conducting a controlled purchase of drugs. Potter was given a concealed camera to wear, along with cash, and instructed to purchase drugs in an area reputed for drug activity. Potter purchased a substance he identified as crack cocaine from defendant, then returned to Agent Zeller and gave the substance to him.

On 20 June 2013, Potter again met with Agent Zeller and other officers, who gave him more money and instructed him to make another controlled purchase in the same area. Potter made another purchase from defendant, and then returned with the purchased substance. Agent Zeller then began to approach defendant, at which point defendant fled. As he fled, defendant discarded a white object, discovered to be "more white rock substance[.]" Defendant was ultimately apprehended and arrested. The substance Potter purchased, as well as the substance defendant discarded while fleeing, were tested and shown to be "cocaine base," or crack cocaine.

On 9 September 2013, defendant was indicted on the following charges arising from the events of 18 and 20 June 2013: three counts of possession with intent to manufacture, sell, or deliver cocaine; two counts of sale of cocaine; and one count of possession of drug paraphernalia. At the time of his arrest for these offenses, defendant was on federal parole and was also under indictment in an unrelated case in Brunswick County in 13 CRS 680.

The trial court determined that defendant was indigent, and on 12 September 2013, appointed counsel to represent him. On 18 June 2014, however, defendant's appointed counsel moved to withdraw, due to an inability to agree with defendant "on how to proceed with representation in these matters[,]" as well as defendant's repeated requests for a different lawyer. On 9 September 2014, the trial court appointed new counsel to represent defendant; however, defendant rejected that attorney just 40 minutes later. A third attorney was appointed later that day.

In late 2014 or early 2015, defendant sent a profane letter to the trial court complaining that the superior court judges were "not doing their jobs," because defendant was still awaiting trial. Consequently, the presiding judge, who had just begun a six-month rotation in Brunswick County, recused herself from defendant's case. The State calendared defendant's trial for August 2015, when the next superior court judge would be available. However, on 6 April 2015, defendant filed a motion pursuant to N.C. Gen. Stat. § 15A-711(c) seeking expedition of the proceedings and

asserting his right to a speedy trial. Defendant filed another speedy trial motion on 30 July 2015.[1]

On 10 August 2015, less than two weeks before trial commenced in 13 CRS 680, defendant's third appointed attorney moved to withdraw, noting that defendant had "taken it upon himself to retain" other counsel. The trial court granted the motion on 17 August 2015. Defendant was subsequently convicted in 13 CRS 680. The conviction constituted a violation of defendant's federal parole, and he was taken into federal custody in Atlanta. In October 2016, defendant was granted early release and returned to North Carolina. However, the State did not learn of defendant's release from federal custody until 21 December 2016.

The instant case came on for trial on 24 January 2017. At the close of the State's evidence, the trial court dismissed one count of possession with intent to manufacture, sell, or deliver cocaine; one count of sale of cocaine; and the sole count of possession of drug paraphernalia. On 26 January 2017, the jury returned verdicts finding defendant guilty of the two remaining counts of possession with intent to manufacture, sell, or deliver cocaine, and the remaining count of sale of cocaine. The trial court sentenced defendant to a minimum of 19 and a maximum of 32 months on the charge of sale of cocaine, and a minimum of 11 and a maximum of 23 months on

[1] During this period, defendant also filed multiple *pro se* motions in this matter. However, any *pro se* motions filed while defendant was represented by counsel were improper. *See State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) (explaining that a party represented by appointed counsel "cannot also file motions on his own behalf").

each charge of possession with intent to manufacture, sell, or deliver cocaine, the sentences to be served consecutively in the custody of the North Carolina Division of Adult Correction.

II. Petition for Writ of Certiorari

On 26 January 2017, defendant filed a *pro se* notice of appeal with the Brunswick County Superior Court, stating his intent to appeal:

> convictions that were reached by a jury verdict
> Docket numbers: 13 CRS 3290, 1 count PWIMSD
> Doct [sic] numbers: 13 CRS 3292, 1 count PWIMSD
> January 26, 2017 1 count of sell/deliver.

The document does not bear a certificate of service demonstrating that it was ever served upon the State. Accordingly, defendant's notice of appeal is deficient. *See* N.C.R. App. P. 4(a)(2) (providing that a criminal defendant may appeal from the trial court's judgment by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment").

However, on 3 November 2017, defendant's appellate counsel filed a petition for writ of certiorari with this Court requesting review of the trial court's judgments. N.C.R. App. P. 21(a)(1). Since it is evident that defendant intended to appeal, in our discretion, we grant defendant's petition for writ of certiorari and proceed to the merits of his appeal.

III. Speedy Trial

In his sole argument on appeal, defendant contends that the trial court erred by denying his motions to dismiss all charges based on the State's alleged violation of his Sixth Amendment right to a speedy trial. We disagree.

A. Standard of Review

"Whether the undisputed evidence supports the implied conclusion of the trial court that defendant's constitutional rights to a speedy trial were not violated requires application of legal principles and thus is reviewable *de novo*." *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996).

B. Analysis

Defendant raised his speedy trial motions at the outset of trial. After some discussion, the trial court found that there was "no actual prejudice" and denied defendant's motions. On appeal, defendant contends that this ruling constituted reversible error. We disagree.

In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court articulated four factors to determine whether a defendant has been deprived of the right to a speedy trial: (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay. *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117. North Carolina courts apply the same analysis when reviewing such claims under Article I, section 18 of our State Constitution. *Grooms*, 353 N.C. at 62,

540 S.E.2d at 721. "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

1. Length of Delay

The length of the delay acts as a "triggering mechanism" for consideration of the other factors. *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." *Id.* "[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Id.* However, our courts have determined that even a delay of sixteen months may be "enough to cause concern and to trigger examination of the other factors." *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994).

In the instant case, 1,314 days—or approximately three and one-half years—elapsed between defendant's arrest and trial. If a sixteen-month period was sufficient to trigger examination of defendant's right to a speedy trial, certainly more than three years would be a sufficient period of time to trigger such an examination. Accordingly, we conclude that the delay shown by defendant is sufficient to trigger further examination, and we must therefore consider the remaining *Barker* factors.

2. Reason for Delay

Much of defendant's argument is premised upon his contention that the State did not offer adequate reasons for the delay in trial. Defendant contends that the State "did not present any evidence [as to the reason for its delay], and relied instead upon the assertions of the prosecutor, and did not appear to recognize its burden to fully justify the delay."

While it is true that the State did not present evidence, the State did offer a substantial explanation for the delay. The State explained that it had initiated a "rush request" in 13 CRS 680, due to defendant's "very disruptive" behavior in jail. Subsequently, however, multiple events beyond the State's control arose, which contributed to the delay in calendaring the instant case for trial. Specifically, the State noted that: (1) each time the case was calendared, defendant sought to renegotiate a plea agreement, but ultimately rejected it; (2) defendant was represented by a succession of attorneys and required a continuance each time new counsel was appointed; (3) defendant sent a profane letter to the presiding judge complaining about her job performance, which led to her recusal and delayed calendaring trial until another judge's rotation began; (4) defendant was taken into federal custody for violating his parole, due to his conviction in 13 CRS 680; and (5) defendant failed to notify the State when he was released from federal custody and returned to North Carolina in October 2016.

Our precedent on this matter is clear. "A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice." *State v. Tindall*, 294 N.C. 689, 695-96, 242 S.E.2d 806, 810 (1978). Moreover, our Supreme Court has held that even the delay resulting from a defendant's being taken into federal custody is, in slight part, chargeable to him, "for it was his action in . . . committing violations of federal law which complicated and obstructed the process of bringing him to trial in North Carolina." *Id*. at 696, 242 S.E.2d at 810.

"The defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution." *Webster*, 337 N.C. at 679, 447 S.E.2d at 351. Nevertheless, in the instant case, the State offered ample justification tending to show that defendant, not the State, was the primary cause of delay. We hold, therefore, that this factor weighs in favor of the State.

3. Assertion of Right

With respect to defendant's assertion of his right to a speedy trial, there is no question that defendant filed at least two motions through counsel exercising that right. "A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not." *State v. Strickland*, 153 N.C. App. 581, 587, 570 S.E.2d 898, 903 (2002). Accordingly, this factor weighs in favor of defendant.

4. Prejudice

At the close of the hearing on defendant's speedy trial motions, the trial court expressly cited this factor, finding that there was "no actual prejudice." The trial court correctly noted that a mere possibility of prejudice is insufficient to show a violation of a defendant's right to a speedy trial; rather, the defendant bears the burden of showing actual prejudice. *State v. Graham*, 200 N.C. App. 204, 215, 683 S.E.2d 437, 445 (2009).

Defendant offers three arguments in support of his position that he was prejudiced by the delay. First, defendant contends that he suffered "oppressive pretrial incarceration," citing this Court's decision in *State v. Washington*, 192 N.C. App. 277, 665 S.E.2d 799 (2008). In *Washington*, this Court noted that the defendant's life was disrupted by his 782-day incarceration. However, that case is distinguishable from the instant case. In *Washington*, this Court focused on the impact that the defendant's incarceration had on his family, specifically the defendant's "sudden separation from his child[.]" 192 N.C. App. at 292, 665 S.E.2d at 809. By contrast, here, defendant does not argue that the extended delay had any impact on his work or family life. Rather, he merely contends that the delay was prejudicial by nature of its duration.

Next, defendant contends that he suffered "anxiety and concern," which caused him prejudice. However, defendant's reliance on this principle is misplaced; his argument here goes to his assertion of his right to a speedy trial, which we have

already held favors him. Defendant offers no other explanation of prejudice resulting from "anxiety and concern."

Finally, defendant contends that the delay resulted in "impairment to the defense." In order to show that delay has impaired defendant's ability to defend himself, and thus show prejudice, a defendant "must show that the resulting lost evidence or testimony was significant and would have been beneficial to his defense." *State v. Marlow*, 310 N.C. 507, 521-22, 313 S.E.2d 532, 541 (1984). Here, defendant argues that Agent Zeller could not recall how he came to know Potter, or why he initially began investigating defendant. However, these matters are, at best, tangential to the case. To succeed at trial, the State needed to prove that defendant twice sold crack cocaine to Potter, not the circumstances of Agent Zeller and Potter's first meeting. Moreover, although some of Agent Zeller's memories had faded by trial, Potter's recollections of the controlled buys conducted on 18 and 20 June 2013 were clear and damning. The jury also viewed video footage of the transactions, which was captured by the concealed camera worn by Potter.

We conclude, therefore, that defendant has failed to demonstrate that the delay prejudiced his ability to mount an effective defense.

IV. Conclusion

The 1,314-day delay between defendant's arrest and trial was sufficient to trigger an examination of the remaining *Barker* factors. Furthermore, defendant's

prior assertion of his Sixth Amendment right to a speedy trial weighs in his favor. Nevertheless, defendant failed to demonstrate that the delay was caused by neglect or willfulness by the State, or that such delay prejudiced his ability to mount an effective defense. Therefore, we conclude that the trial court did not err in denying defendant's motions to dismiss due to alleged violations of his Sixth Amendment right to a speedy trial.

NO ERROR.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).