Opinion issued July 7, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00789-CR

STATE OF TEXAS, Appellant

V.

JAMES MARVIN PELL, Appellee

On Appeal from the County Court at Law No. 1
Wise County, Texas[1]
Trial Court Case No. CR-79089

MEMORANDUM OPINION

In October 2017, James Marvin Pell was arrested for the misdemeanor offense of violating a protective order. Nearly 17 months later, the State of Texas filed a

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Second District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

formal complaint against Pell. The trial court granted Pell's motion to dismiss the complaint on speedy trial grounds. The State appeals, contending that the trial court erred by applying the Speedy Trial Clause of the Sixth Amendment to the United States Constitution to the time between when Pell allegedly committed the offense and the filing of a formal complaint, and that the court also erred by failing to consider Pell's failure to assert his speedy trial right.[2] We reverse.

Background

Police arrested Pell in October 2017. Officers took his statement, collected evidence, including texts from his cell phone that allegedly showed him communicating with someone protected by a no-contact order, created an arrest and offense report, and forwarded these items to the Wise County Attorney's Office. On March 15, 2019, the State filed a formal complaint alleging that Pell had violated a protective order. More than two months later, Pell moved to dismiss on federal constitutional speedy trial grounds, arguing that the delay between Pell's arrest and the filing of the complaint violated the Speedy Trial Clause.

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[2] The State has appended to its brief several items outside the record, including a supplement to the offense report, a copy of the protective order at issue, Pell's bond paperwork, and his arraignment and court settings. Although the State cites TEX. R. APP. P. 38.1(l)(2), we may not consider documents outside the record. *Green v. Kaposta*, 152 S.W.3d 839, 841 (Tex. App.–Dallas 2005, no pet.). We do not consider the extra-record materials appended to the State's brief.

The trial court held the hearing on the motion to dismiss in August 2019, 22 months after the alleged offense. J. Smith, the office manager for the county attorney's office, testified that the delay was due to not receiving video and a supplement to the offense report from the Rhome Police Department. The employee at the county attorney's office who requested the missing information from the police department was no longer with the office. Although the employee had called and emailed to request the information, no one had followed up in person. The office had still not received the information as of the hearing. Smith testified that the delay was abnormal.

The trial court granted the motion to dismiss. Upon the State's request, the court entered these findings of fact and conclusions of law:

Findings of Fact

1. Defendant was arrested for this offense in October 2017.

2. It was undisputed that Defendant has resided at the same address from then until the present date.

3. No case was filed until March 2019.

4. The delay in filing occurred because the prosecutor's office was waiting all that time for the basic information from the arresting agency's office, that is needed for filing a criminal cause, in spite of repeated requests from them during that time period.

Conclusions of Law

1. The delay was uncommonly long for the nature of this case.

2. The State (through agents) was solely responsible for the delay in filing the case.

3. Because the delay complained of is until time of filing of the case, Defendant could not demand a speedy trial.

4. The delay was of a length to bring about a presumed prejudice, which was not rebutted by the State.

The Speedy Trial Guarantee

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI. The Due Process Clause of the Fourteenth Amendment applied this right to state criminal prosecutions. *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967); *see also Gonzales v. State*, 435 S.W.3d 801, 808 (Tex. Crim. App. 2014). In its first issue, the State argues that the Sixth Amendment only protects the accused once formal charges have been filed and that because it filed charges before the two-year statute of limitations expired, the trial court erred in granting Pell's motion to dismiss. Pell responds that the speedy trial guarantee applies to the time before charges were filed because he was arrested. In its second issue, the State contends that the trial court erred by failing to consider Pell's failure to assert his speedy trial rights and by limiting its inquiry to the time between when Pell allegedly committed the offense and the filing of the complaint. Pell responds that the *Barker* factors weigh in his favor.

A. Standard of review and applicable law

To assert a speedy trial violation, the defendant must first adduce evidence showing that "the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Gonzales*, 435 S.W.3d at 808 (quoting *Doggett v. United States*, 505 U.S. 647, 651–52 (1992)).

Once a defendant makes the threshold showing of presumptive prejudice, the court weighs several factors. We analyze speedy trial claims by balancing: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant resulting from the delay. *Zamorano v. State*, 84 S.W.3d 643, 647–48 (Tex. Crim. App. 2002) (en banc) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). In conducting the balancing test, no single factor is determinative. *Barker*, 407 U.S. at 530, 533.

In reviewing the trial court's ruling on an accused's constitutional speedy trial claim, we apply a bifurcated standard of review: an abuse of discretion standard for the factual components, and a de novo standard for the legal components. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). Review of the *Barker* factors involves fact determinations and legal conclusions, but "[t]he balancing test as a whole . . . is a purely legal question." *Zamorano*, 84 S.W.3d at 648 n.19. Here, none of the facts are disputed, but the legal import of those undisputed facts is at issue.

Analysis

The right to a speedy trial attaches once a person becomes an accused. *Henson v. State*, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013). This can be when he is either arrested or charged with an offense.[3] *Id*. (citing *United States v. Marion*, 404 U.S. 307, 321 (1971)). The burden of proof is divided: The State has the burden of justifying the length of the delay, but the accused has the burden of proving the assertion of the right as well as showing prejudice. *Cantu*, 253 S.W.3d at 280. "[T]he greater the State's bad faith or official negligence and the longer its actions delay a trial, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial." *Id.* at 280–81.

The length of the delay

To trigger an inquiry into a violation of the Speedy Trial Clause, a defendant must present evidence that the time "between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Gonzales*, 435 S.W.3d at 808 (quoting *Doggett*, 505 U.S. at 651–52). The tolerable length of delay is case-specific in that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S.

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[3] The State argues that the Speedy Trial Clause does not apply to the time before formal charges are filed. Under *Henson*, however, Pell became "an accused" for speedy trial purposes when he was arrested in October 2017. *Henson*, 407 S.W.3d at 767. Thus, the Speedy Trial Clause applies here.

at 531; *see Zamorano*, 84 S.W.3d at 649 (finding presumptively prejudicial a delay of two years and 10 months in a "plain-vanilla DWI case").

Although there is no bright-line rule, the United States Supreme Court found post-accusation delay "presumptively prejudicial" at least as it approaches one year. *Doggett*, 505 U.S. at 651–52; *Zamorano*, 84 S.W.3d at 649 ("Because the length of the delay stretched well beyond the bare minimum needed to trigger judicial examination of the [speedy trial] claim, this factor—in and of itself—weighs heavily against the State."). Given that Pell was arrested for contacting someone by text who was protected by a no-contact order, a delay of 17 months to charge him and 22 months until the hearing on Pell's motion weighs heavily against the State.

The reason for the delay

The burden of justifying the delay falls on the State. *Cantu*, 253 S.W.3d at 280. The particular reasons for the delay will determine how heavily this factor should weigh against the State. *Zamorano*, 84 S.W.3d at 649. While intentional or deliberate prosecutorial delay will weigh heavily against the State, neutral reasons, such as negligence or overcrowded courts, weigh less heavily. *Id.* at 649–50 (citing *Barker*, 407 U.S. at 531). The State offered no justification for the delay, aside from waiting for the police department to provide a supplement to its report and a video and a change in personnel. The State admitted that they did not follow up on the needed information in person, they just called and emailed their requests "a few

times" with no results. Although there is no evidence that the State deliberately delayed the case to prejudice the defendant, the State proffered no valid reason for the delay. This factor too, weighs against the State, but not heavily. *See Barker,* 407 U.S. at 531.

Pell's assertion of his right

The accused has the responsibility to assert his right to a speedy trial. *Cantu*, 253 S.W.3d at 282 (noting that nature of speedy-trial right makes it impossible to pinpoint precise time when right must be asserted, but "the burden of protecting the right" does not fall "solely on defendants" because "[t]he defendant has no duty to bring himself to trial; that is the State's duty"). Although an accused cannot file a motion for a speedy trial before the State files formal charges, an accused can assert his right to a speedy trial in other ways. *Id*. at 283. "Invocation of the speedy trial provision . . . need not await indictment, information, or other formal charge." *Marion*, 404 U.S. at 321; *see also Dillingham v. United States*, 423 U.S. 64, 65 (1975) (per curiam).

Pell was arrested in October 2017, but he never asked for a speedy trial, even after the State filed a formal complaint in March 2019. His only assertion of his rights was in his motion to dismiss, after the case had been pending for more than four months. *See Cantu*, 253 S.W.3d at 283 ("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."); *State v. Harbor*, 425 S.W.3d 508, 514 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("While failure to assert a right to a speedy trial does not constitute waiver, it does 'indicate strongly that he did not really want a speedy trial.'").

Implicit in Pell's argument and the trial court's conclusion of law is the assumption that he was relieved of his burden on this factor because he based his speedy trial complaint on the pre-complaint delay only. Pell cites no authority for circumscribing the inquiry this way and we find none. So this factor weighs against Pell.

Prejudice to the defendant resulting from the delay

The accused bears the burden of showing prejudice. *Cantu*, 253 S.W.3d at 280. When a court assesses the prejudice to the defendant, it must do so in light of the interests that the speedy trial right protects: (1) preventing oppressive pretrial incarceration; (2) minimizing the defendant's anxiety and concern; and (3) limiting the possibility that the defendant's defense will be impaired. *Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003) (citing *Barker*, 407 U.S. at 532). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Id*. "[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655. "On

the other hand, this 'presumption of prejudice' is 'extenuated . . . by the defendant's acquiescence' in the delay." *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) (quoting *Doggett*, 505 U.S. at 658).

Though the delay is considered presumptively prejudicial, Pell still had a burden to show he had been prejudiced. *See id.* at 315–16 ("prejudice" factor weighed against violation of defendant's speedy trial right even though 3 ½-year delay was "patently excessive" and "presumptively prejudicial" because defendant acquiesced in the delay and failed to show prejudice). Though Pell bore the burden to show prejudice, he put on no evidence that the delay affected his ability to defend himself against the accusation that he violated the protective order. Although Pell argued that he was re-arrested and detained pending trial, this information does not appear in the record and would be insufficient to show "oppressive incarceration." *See Russell v. State*, 90 S.W.3d 865, 873 (Tex. App.—San Antonio 2002, pet. ref'd). Because the record does not show that Pell was rearrested, much less why he was rearrested, we cannot determine whether Pell suffered "oppressive pretrial incarceration," committed a new offense, or suffered "no serious prejudice beyond that which ensued from the ordinary and inevitable delay." *See State v. Munoz*, 991 S.W.2d 818, 826 (Tex. Crim. App. 1999) (en banc). Although pending charges cause an accused anxiety regardless of detention, that anxiety, even if demonstrated, is not sufficient proof of prejudice under *Barker*, "especially when it is no greater anxiety

or concern beyond the level normally associated with a criminal charge or investigation." *Cantu*, 253 S.W.3d at 285–86. This factor weighs against Pell.

Balancing the factors

Having addressed the four factors, we now balance them. "[C]ourts 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." *Cantu*, 253 S.W.3d at 281. No single factor is either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial. *Barker*, 407 U.S. at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id*.

The first two factors, the length of the delay and the reason for the delay, weigh against the State, with the first factor weighing heavily and the second factor less so. The second two factors, Pell's assertion of the speedy trial right and the demonstration of prejudice, both weigh against Pell. We hold that the weight of the four factors, balanced together, militate against finding a violation of Pell's right to a speedy trial. *See Barker*, 407 U.S. at 534 (where defendant was not seriously prejudiced by five-year delay between arrest and trial and he did not really want a speedy trial, his right to a speedy trial was not violated); *Dragoo*, 96 S.W.3d at 315 (where defendant showed no serious prejudice by 3 ½ year delay between arrest and

trial and he waited until just before trial to assert his right to a speedy trial, his right to a speedy trial was not violated); *Phipps v. State*, 630 S.W.2d 942, 946 (Tex. Crim. App. 1982) (where defendant demonstrated no prejudice by four-year delay between arrest and trial and he waited until one month before trial to assert his right to a speedy trial, his right to a speedy trial was not violated); *Voda v. State*, 545 S.W.3d 734, 745 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (defendant not denied right to speedy trial where first two factors weighed in defendant's favor, but second two factors weighed in the State's favor).

Weighing all the *Barker* factors, we hold that Pell failed to establish a violation of the right to a speedy trial that was grave enough to warrant a dismissal of his case.

Conclusion

We reverse the trial court's judgment and remand the case to the trial court for further proceedings.

Sarah Beth Landau
Justice

Panel consists of Justices Landau, Kelly, and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).