

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1999 SESSION

FILED

February 29, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee

VS.

MICHAEL DEWAYNE SIMMONS,

Appellant.

* No. 01C01-9903-CR-00075
* No. M1999-00099-CCA-R3-CD
* DAVIDSON COUNTY
* Hon. Seth Norman, Judge
* (Theft and Aggravated Robbery)
*

For the Appellant

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(At Guilty Plea and On Appeal)

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OPINION FILED:

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

Appellant, Michael Dewayne Simmons, pled guilty to theft of property over \$1,000, a Class D felony, and aggravated robbery, a Class B felony. This appeal is based upon a certified question of law: whether the delay between the return of the indictment and appellant's arrest denied him his right to a speedy trial. Upon our review of the record, we conclude there is no speedy trial violation. Therefore, the judgment of the trial court is AFFIRMED.

I. Factual Background

In July 1995, the Davidson County Grand Jury indicted appellant for theft of property and aggravated robbery. Although appellant at that time was incarcerated with the Tennessee Department of Correction (T.D.O.C.) on an unrelated charge, authorities neither served him with a *capias* nor placed a hold on him with the T.D.O.C.

On June 9, 1997, T.D.O.C. paroled appellant for the unrelated offense (hereinafter, "parole offense"). Authorities arrested appellant eleven days later on yet another unrelated charge, at which time they also served the *capias* in this case.

Appellant filed a motion to dismiss the instant charges based on the denial of his right to a speedy trial. The trial court conducted a hearing on the motion and the parties reached the following stipulations:

1. On May 30, 1994, the theft and aggravated robbery in this case were committed.
2. On January 17, 1995, appellant was incarcerated with the Tennessee Department of Correction (T.D.O.C.) for the unrelated parole offense.
3. On July 14, 1995, the Grand Jury returned the indictment in this case.
4. On June 9, 1997, T.D.O.C. paroled appellant on the parole offense.
5. On June 20, 1997, appellant was arrested on another unrelated charge, at which time authorities served the *capias* for the instant charges as well.

Appellant claimed the almost twenty-four month delay between the indictment's return and his arrest resulted in prejudice requiring the charges' dismissal. Specifically, he claimed to be prejudiced by the loss of opportunity to possibly serve the sentence for these charges concurrently with the parole offense sentence.

The trial court denied appellant's motion, and appellant subsequently pled guilty to theft and aggravated robbery. The plea agreement provided for an effective twelve-year sentence to be served at 35%.¹ The agreement also allowed appellant to present a certified question of law on appeal: "whether the defendant was denied his right to a speedy trial?" See T.R.Cr.P. 37(b)(2)(i).

II. Analysis

Without question, criminal defendants are constitutionally and statutorily entitled to a speedy trial. U.S. Const. Amend. VI; Tenn. Const. Art. I, § 9; Tenn. Code Ann. § 40-14-101. There is no set time limit within which the trial must commence; rather, consideration must be given to the circumstances of each case.

The right to a speedy trial is implicated when there is an arrest or a formal grand jury accusation. State v. Utley, 956 S.W.2d 489, 491 (Tenn. 1997). When an appellant claims a denial of this right, the reviewing court must conduct the balancing test set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), to determine whether the right to a speedy trial has been violated. State v. Wood, 924 S.W.2d 342, 346 (Tenn. 1996); State v. Baker, 614 S.W.2d 352, 353 (Tenn. 1981); State v. Bishop, 493 S.W.2d 81, 83-85 (Tenn. 1973). If, after conducting this balancing test, it is concluded that the appellant was in fact denied a speedy trial, constitutional principles require that the conviction be reversed and the criminal charges dismissed. Bishop, 493 S.W.2d at 83.

In conducting this balancing test, we are required to examine the conduct of both the prosecution and the appellant, focusing primarily on: (1) the length of the delay; (2) the reason for the delay; (3) whether appellant asserted his right to a speedy trial; and (4) whether appellant was prejudiced by the delay. Wood, 924 S.W. 2d at 345; Bishop, 493 S.W.2d at 84; State v. Jefferson, 938 S.W.2d 1, 12-13 (Tenn. Crim. App. 1996); State v. Vance, 888 S.W.2d 776, 778 (Tenn. Crim. App. 1994). The most important factor is whether the defendant was prejudiced by the delay. Vance, 888 S.W.2d at 778. The most important inquiry with regard to prejudice is whether the delay impaired the defendant's ability to prepare a defense.

¹Appellant received a minimum Range II sentence of twelve years for aggravated robbery, a Class B felony, and a mid-range Range II sentence of six years for theft over \$1,000, a Class D felony.

Id. A delay of as long as two years standing alone will not support a finding of a speedy trial violation. *Id.*

A. Length of Delay

The triggering factor is the length of the delay. "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, 92 S.Ct. at 2192.

In this case, the indictment was returned almost two years prior to appellant's arrest. This delay clearly triggers an evaluation of the other Barker factors. And, while "[t]he presumption that pre-trial delay has prejudiced the accused intensifies over time," Utley, 956 S.W.2d at 494 (citing Doggett v. United States, 505 U.S. 647, 654, 112 S.Ct. 2686, 2692, 120 L.Ed.2d 520 (1992)), twenty-three months is not particularly egregious. Compare State v. Wood, 924 S.W.2d 342, 346 (Tenn. 1996)(delay of thirteen years).

B. Reason for Delay

There are four general categories of reason for delay: (1) intentional delay for tactical advantage or harassment of the appellant; (2) delay caused by bureaucratic indifference or negligence; (3) delay necessary for fair and effective prosecution; and (4) delay caused or acquiesced in by the appellant. Wood, 924 S.W.2d at 346-47.

The record reflects that the prosecution in this case knew, or should have known, that appellant was in custody. The appellant was incarcerated with T.D.O.C. when the indictment was returned, and the capias listed appellant's address as "c/o Davidson County Sheriff's Department." At the motion to dismiss, the Assistant District Attorney General offered no valid reason for the delay but stated that it was "[a]t most . . . oversight."

Such negligent delay must be weighed in the appellant's favor, although not given the same weight or consideration as an intentional or deliberate delay purposely caused for improper purposes. See Wood, 924 S.W.2d at 347.

C. Assertion of Right

Assertion of right to a speedy trial by an appellant is given great weight in the determination of whether the right was denied. Barker, 407 U.S. at 531-32, 92 S.Ct. 2192-93. “Failure to assert the right implies [an appellant] does not actively seek a swift trial.” Wood, 924 S.W.2d at 348. However, when an accused is unaware of pending charges against him, failure to assert the right cannot be weighed against him. Doggett, 505 U.S. at 653-54, 112 S.Ct. at 2691.

In this instance, appellant was incarcerated when the Grand Jury returned the sealed indictment against him. Authorities failed to place a hold on appellant, and T.D.O.C. released him on parole. Thus, appellant had no way to know of the need to assert his right to a speedy trial and may not be penalized for his failure to do so. See State v. Wallace, 648 S.W.2d 264, 270 (Tenn. Crim. App. 1980)(defendant cannot be faulted for failure to make demand for speedy trial when never informed of charges while incarcerated; inquiries would have yielded no information due to lack of detainer; and parole implicitly informed defendant there were no other outstanding charges against him).

D. Prejudice

The most important prong in the balancing test recited by Barker is the prejudice factor. Baker, 614 S.W.2d at 355-56. In determining the existence of prejudice to an appellant, we focus on three primary concerns:

- (1) was there any undue or oppressive incarceration;
- (2) was there anxiety accompanying the public accusation;
and
- (3) was there any impairment to the appellant’s ability to prepare his defense?

Bishop, 493 S.W.2d at 85.

In this instance, appellant does not claim any prejudice with regard to these three considerations. He was already incarcerated on an unrelated charge when the indictment was returned; the indictment was sealed and served on him after his arrest for yet another unrelated charge less than a month after release on parole; and he acknowledged no impairment of his defense at the motion to dismiss.

Nevertheless, appellant claims he suffered prejudice since he “has lost the possibility of serving concurrent sentences” (i.e., the sentence received on these

charges concurrently with his parole offense sentence). While we acknowledge appellant's interest in concurrent sentencing, see Smith v. Hooley, 393 U.S. 374, 378, 89 S.Ct. 575, 577, 21 L.Ed.2d 607, 611 (1969); Wallace, 648 S.W.2d at 270, we find nothing which indicates that loss of that possible opportunity automatically requires dismissal of charges.

In light of the paramount concerns enumerated by the Bishop court, we conclude that loss of potential opportunity for concurrent sentences in this case is not determinative, but rather a single consideration the court should factor into its determination regarding the existence of prejudice. The record in this case reveals an appellant with a long criminal history which the state clearly intended to use in support of a request for enhanced punishment and denial of concurrent sentencing.² Thus, "there is little to suggest any delay in this prosecution bore any relationship to the imposition of concurrent sentences." State v. Horace C. Gaddis, C.C.A. No. 01C01-9511-CC-00389, Williamson County (Tenn. Crim. App. filed December 13, 1996, at Nashville). We conclude that appellant has failed to show that he suffered prejudice as a result of the state-caused delay in this case.

III. Conclusion

Balancing the four Barker factors, we conclude appellant was not denied his right to a speedy trial. Therefore, the judgment of the trial court is AFFIRMED.

Norma McGee Ogle, Judge

CONCUR:

Gary R. Wade, Presiding Judge

John H. Peay, Judge

²The state's Notice of Intent to Seek Enhanced Punishment lists eleven prior convictions, four of which were for offenses committed after the charges at issue here.