

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL EDWARD CLARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50911

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to violate the controlled substances act (count I), sale of a controlled substance (count II), and possession of a controlled substance with the intent to sell (count III). Eighth Judicial District Court, Clark County; Valerie Adair, Judge. The district court sentenced appellant Michael Edward Clark to serve a prison term of 24-60 months for count I, a concurrent prison term of 32-72 months for count II, and a concurrent prison term of 19-48 months for count III.

Clark contends that (1) the district court's failure to appoint alternate standby counsel violated his constitutional right to counsel and due process; (2) the bail amount was excessive; (3) the district court improperly denied his request for funds to hire an investigator; (4) his Sixth Amendment right to a speedy trial was violated; and (5) the prosecutor committed misconduct during the grand jury proceedings. For the reasons discussed below, we conclude that Clark's contentions are without merit.

Standby Counsel

Clark contends that the district court's failure to appoint alternate standby counsel violated his constitutional right to counsel and

due process. Specifically, Clark claims that, as a result, he “was unable or unqualified” to properly prepare for trial and obtain an allegedly exculpatory videotape, present an entrapment defense, and establish that the arresting officer planted the controlled substance seen dropping from his person during the arrest. We disagree.

“When an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel.” Faretta v. California, 422 U.S. 806, 835 (1975). A defendant who waives his right to counsel and chooses to represent himself does not have a constitutional right to standby counsel. See Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997); see also Miller v. State, 86 Nev. 503, 506, 471 P.2d 213, 215 (1970) (holding that a defendant is not “entitled to have his case presented in court both by himself and by counsel acting at the same time or alternatively at the defendant’s pleasure”). The district court retains the discretion to appoint standby counsel. See Hollaway v. State, 116 Nev. 732, 741, 6 P.3d 987, 994 (2000) (citing Harris, 113 Nev. at 804, 942 P.2d at 155).

The district court encouraged Clark to use appointed counsel, yet he insisted on representing himself. At Clark’s arraignment, the district court appointed a public defender to serve as standby counsel. After the public defender’s office withdrew due to a conflict of interest, the district court appointed Robert Langford to serve as standby counsel. The district court eventually excused Langford from serving as standby counsel after it appeared to the court that Clark mistakenly assumed that standby counsel would serve more as co-counsel. The district court again offered to appoint Langford to represent Clark, but Clark refused.

Clark has failed to demonstrate that he was prejudiced by the district court’s failure to appoint alternate standby counsel because

standby counsel would not be required to perform the tasks Clark claims he was “unable or unqualified” to complete. Therefore, we conclude that the district court did not abuse its discretion by not appointing alternate standby counsel to assist Clark.

Excessive Bail/Investigator Expenses

Clark contends that the bail amount was excessive and, as a result, when considered with the fact that the district court denied his request for funds to hire an investigator, he “was dispatched to the arena to face Goliath with little more than the proverbial rock!” Clark asked to be released on his own recognizance (OR) prior to the start of the trial. We disagree with Clark’s contention.

A court abuses its discretion and imposes excessive bail when the court fixes bail at an amount greater than is necessary to ensure the defendant’s appearance at trial. See Stack v. Boyle, 342 U.S. 1, 5 (1951). In this case, we conclude that the district court properly considered the factors enunciated in NRS 178.4853 and NRS 178.498 before denying Clark release on OR and setting bail. Among other factors, the district court noted Clark’s extensive criminal history which included numerous failures to appear at court proceedings. Therefore, we conclude that the district court did not abuse its discretion by requiring excessive bail.

Further, pursuant to NRS 7.135, the district court has discretion to authorize expenses related to investigative services. See Kirksey v. State, 112 Nev. 980, 1003, 923 P.2d 1102, 1117 (1996). In his motion, Clark asked for expenses to hire “a chemist other than Metro” to analyze the controlled substances already tested by the State. The district court denied Clark’s motion, finding that he failed to present a valid reason for additional testing, and noting that “most of the PD’s cases, they don’t go retesting all these drugs.” We agree with the district court’s

finding and conclude that the district court did not abuse its discretion by denying Clark funds to hire an investigator. See generally Sonner v. State, 112 Nev. 1328, 1340, 930 P.2d 707, 715 (1996) (holding that the district court properly refused defendant's request for further medical examinations because he had already been examined by three psychiatrists and further testing would not be reasonably necessary for a proper diagnosis).

Speedy Trial Right

Clark contends that his Sixth Amendment right to a speedy trial was violated. U.S. Const. amend. VI. Clark claims "court overcrowding" was "no excuse," and that he was prejudiced by the loss of evidence and witnesses as a result of the delay in bringing him to trial. We disagree with Clark's contention.

In assessing a claim that a defendant has been deprived of his constitutional right to a speedy trial, the court must weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. See Barker v. Wingo, 407 U.S. 514, 530 (1972); see also Doggett v. United States, 505 U.S. 647 (1992); Furbay v. State, 116 Nev. 481, 484-85, 998 P.2d 553, 555 (2000). The four factors "must be considered together, and no single factor is either necessary or sufficient." Sheriff v. Berman, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983). But the length of the delay must be at least presumptively prejudicial before further inquiry into the other factors is warranted. Barker, 407 U.S. at 530. There is no established time period that automatically constitutes undue delay; each case must be analyzed on an ad hoc basis. Id. at 530-31; see also State v. Fain, 105 Nev. 567, 569-70, 779 P.2d 965, 966-67 (1989) (holding that a 4 1/2 year delay did not

violate the appellant's right to a speedy trial because no specific witness, piece of evidence, or defense theory was lost due to the delay).

Clark has failed to demonstrate that he was prejudiced by the approximately three-month delay to the start of his trial. Further, standby counsel, Langford, was appointed with only four days' notice and required additional time to familiarize himself with the case. Therefore, we conclude that Clark's constitutional right to a speedy trial was not violated.

Prosecutorial Misconduct/Grand Jury

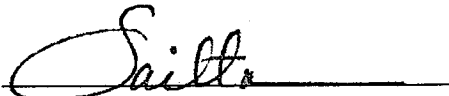
Clark contends that the prosecutor committed misconduct during the grand jury proceedings. Specifically, Clark argues that the prosecutor improperly violated his right against self-incrimination by bringing him before the grand jury under the pretext of testifying as a witness in the case against his codefendant and not as the subject of the grand jury inquiry. Clark claims that he would not have appeared before the grand jury if he knew the State was seeking an indictment against him. Further, Clark notes, without any assignation of error or allegation of prejudice, that he was presented to the grand jury in shackles.

This court has stated that “[a]ny irregularities which may have occurred in the . . . grand jury proceeding were cured when [the defendant] . . . was tried and his guilt determined under the higher criminal burden of proof.” Echavarria v. State, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992); see also United States v. Mechanik, 475 U.S. 66, 71-73 (1986); Dettloff v. State, 120 Nev. 588, 596, 97 P.3d 586 (2004) (concluding that “the jury convicted Dettloff under a higher burden of proof [which thus] cured any irregularities that may have occurred during the grand jury proceedings”).

In this case, any irregularities which may have occurred during the grand jury proceeding were cured when Clark was ultimately found guilty beyond a reasonable doubt of the charges listed in the indictment. Further, the State claims that Clark was not asked to testify at the grand jury proceeding and, accordingly, was not subpoenaed; instead, more than two weeks before the grand jury convened, Clark wrote to the Clark County District Attorney's Office and stated, "I Michael Edward Clark would like to testify before the Grand Jury on the scheduled proceeding of the Grand Jury." At the grand jury proceeding, Clark testified that he signed a written waiver of constitutional privilege against self-incrimination, pursuant to NRS 172.241(1), which he stated he had read and understood. Therefore, we conclude that the prosecutor did not commit misconduct in this regard.

Having considered Clark's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


Saitta, J.


Gibbons, J.

CHERRY, J., concurring:

In my opinion, the district court abused its discretion by refusing to authorize expenses for an investigator, however, the district court's abuse of discretion was harmless beyond a reasonable doubt.

Cherry, J.
Cherry

cc: Hon. Valerie Adair, District Judge
Amesbury & Schutt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk