

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL LLOYD TRAVIS A/K/A
SAMMY LLOYD TRAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38149

FILED

MAR 05 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary, one count of battery with the use of a deadly weapon causing substantial bodily harm, and one count of coercion. The district court sentenced appellant: (1) for burglary, to a prison term of 12 to 30 months; (2) for battery, to a prison term of 24 to 60 months; and (3) for coercion, to a prison term of 12 to 30 months. The district court ordered all sentences to run concurrently.

Initially, we note that appellant has not alleged any error with regard to the proceedings conducted in the district court in this matter. Rather, appellant's contentions all center on the conduct of this appeal.

Appellant first contends that he has been denied his right to an effective and timely appeal in violation of his due process rights. Specifically, appellant argues that his due process rights have been violated because he "has been waiting for well over two and one half years to file his opening brief with the Nevada Supreme Court." The United States Court of Appeals for the Ninth Circuit has held that an "excessive delay in obtaining an appeal may constitute a due process violation."¹ The

¹Coe v. Thurman, 922 F.2d 528, 530-31 (9th Cir. 1990).

Ninth Circuit further held that the factors enunciated in Barker v. Wingo² should be used in analyzing appellate delay claims.³ Those factors are: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant.⁴ The "four factors must be considered together and no single factor is either necessary or sufficient."⁵ But the length of the delay must be at least presumptively prejudicial before further inquiry into the other factors is warranted.⁶ There is no established time period that automatically constitutes undue delay; each case must be analyzed on an ad hoc basis.⁷

The length of the delay in this appeal has been more than two and a half years. Even assuming, arguendo, that this is sufficiently long enough to warrant further inquiry, and assuming that appellant has asserted his right to a speedy appeal, we nevertheless conclude that appellant's claim is without merit. In particular, appellant's claim fails upon consideration of the second and fourth factors.

As this court stated in a previous order in this appeal, although briefing was initially delayed by the unavailability of the trial transcript, appellate counsel's refusal to comply with the orders of this court and the provisions of NRAP 9(d) contributed significantly to the

²407 U.S. 514, 530 (1972).

³See Coe, 922 F.2d at 531.

⁴Id.

⁵Sheriff v. Berman, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983).

⁶Barker, 407 U.S. at 530.

⁷Id. at 530-31.

delay.⁸ For over a year, this court ordered counsel to prepare a statement of the evidence pursuant to NRAP 9(d). Instead of promptly complying with this court's order, counsel continued to seek the unavailable transcript, move for additional extensions, and move to remand for a new trial. Although the court reporter should have filed the transcript, it became clear within a year of the docketing of this appeal that the transcript was unavailable. Counsel's failure to comply with the directives of this court delayed briefing for an additional 17 months. The majority of the delay is therefore attributable to appellant.

As to the fourth factor, appellant fails even to allege any prejudice suffered by the delay in his appeal. In sum, after analyzing and considering the four factors together, we conclude that appellant has not been deprived of his right to due process by any delay in this appeal.

Appellant next contends that he cannot effectively appeal his conviction without a complete and accurate transcript of the trial. This court has previously held that where a transcript was unavailable, the "reconstructed record [was] adequate for this court to perform a meaningful appellate review."⁹

In the instant appeal, transcripts were available for two of the three days of trial. The missing day was the first day, when the jury was selected, opening arguments were made, and one witness testified. The reconstructed record demonstrates that the witness who testified on the first day stated that he heard screaming from the victim's apartment, and subsequently saw appellant walking out of the apartment. The summary

⁸Travis v. State, Docket No. 38149 (Order Directing Preparation of Statement of Proceedings Pursuant to NRAP 9(d), October 10, 2003).


⁹Lopez v. State, 105 Nev. 68, 76, 769 P.2d 1276, 1282 (1989).

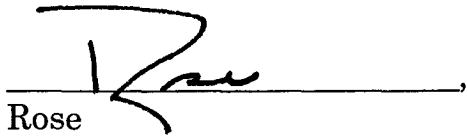
of his testimony as reconstructed by the parties is consistent with his testimony at the preliminary hearing.

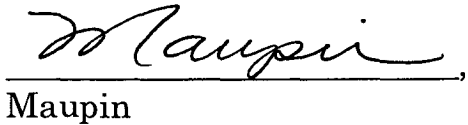
Appellant fails to specify any error that might have occurred that is not reflected in the reconstructed record and has failed to specify "sources of deficiency in the reconstructed record that are prejudicial to his defense."¹⁰ Appellant merely states in a conclusory fashion that a reconstructed record will not serve the interests of justice or the appellant. We conclude that appellant's argument is without merit.

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

ORDER the judgment of conviction AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

cc: Hon. Lee A. Gates, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁰Lopez, 105 Nev. at 76, 769 P.2d at 1282.