IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. BRAWNER, JR. A/K/A RICHARD ALLEN BRAWNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39598

FILED

FEB 18 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 guilty plea, of four counts of lewdness with a child under the age of fourteen years.[1] The district court sentenced appellant Richard A. Brawner to serve four life prison terms with the possibility of parole in 10 years, ordering three of the life prison terms to run consecutively to each other.

Brawner first contends that the district court erred in denying his pretrial motion to dismiss the indictment because his constitutional right to a speedy trial was violated. While acknowledging that Brawner pleaded guilty and did not specifically preserve the right to appeal the district court's ruling on his pretrial motion pursuant to NRS 174.035(3), Brawner argues that the issue regarding the validity of the indictment is a "reasonable constitutional, jurisdictional or other ground" challenging the

[1]Brawner was originally indicted on five counts of lewdness with a minor under the age of 14 years for lewd acts committed upon five different male victims ranging in age from 8 to 13 years old, and one count of visual presentation depicting the sexual conduct of a person under the age of 16 years for possessing pornography depicting a minor.

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legality of the proceedings and, therefore, this court should consider the merits of the claim. We conclude that Brawner's contention lacks merit.

Brawner waived his right to challenge the district court's denial of his motion to dismiss by entering a guilty plea without expressly preserving in writing the right to raise the issue on direct appeal.[2] Nonetheless, even assuming Brawner's argument was preserved for our review, we conclude that his right to a speedy trial was not violated.[3]

In determining whether a defendant's Sixth Amendment right to a speedy trial was violated, this court considers four factors: the "[l]ength of [the] delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[4] Here, although the length of the delay -- approximately thirteen months -- warrants further inquiry, the delay was not so long as to be presumptively prejudicial.[5] Second, most of the delay was attributable to the defense: defense counsel moved to continue the trial on one occasion, Brawner switched attorneys, and

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[2]See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

[3]The record indicates that when Brawner waived his right to a trial within sixty days, Brawner attempted to preserve the violation of his constitutional right to a speedy trial, stating: "There is a 60-day rule that I will be willing to waive preserving the Sixth Amendment, of course, with my right to a speedy trial. We'll see what comes along with that, but the 60-day rule, I'll be happy to waive, yes."

[4]Barker v. Wingo, 407 U.S. 514, 530 (1972).

[5]Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998) (holding that a 2 1/2 year delay did not give rise to a finding of presumptive prejudice, especially when the appellant was responsible for most of the delay).

new defense counsel again moved to continue the trial. Although Brawner argues that he should not be held responsible for the delay caused by his attorneys,[6] we cannot attribute that delay to the State.[7] Finally, we conclude that Brawner was not prejudiced by the delay because, even though Brawner was in custody during the delay period, there is no allegation in this case that valuable witnesses or evidence were lost as a result of the delay.[8] We therefore conclude that, assuming Brawner preserved this issue for review, Brawner's right to a speedy trial was not violated.[9]

Brawner next contends that the district court erred as a matter of law and abused its discretion at sentencing by failing to consider probation as a sentencing option. In particular, Brawner contends that the district court erred in ruling that he was ineligible for probation

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[6]To the extent that Brawner contends that his trial counsel was ineffective with regard to the delay, we note that Brawner may seek relief in the district court by filing a post-conviction petition for a writ of habeas corpus alleging ineffective assistance of counsel.

[7]See Brinkman v. State, 95 Nev. 220, 223, 592 P.2d 163, 164-65 (1979).

[8]Cf. Barker, 407 U.S. at 534 (concluding that "prejudice was minimal" despite the fact that the appellant spent 10 months in jail prior to trial because no evidence was lost due to the delay); State v. Fain, 105 Nev. 567, 779 P.2d 965 (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).

[9]To the extent that Brawner contends that the district court erred in denying his motion to dismiss the indictment because he was not adequately notified of the grand jury proceedings, we reject that contention. The State provided Brawner with written notice of the grand jury proceedings satisfying the requirements of NRS 172.241.

because probation was a sentencing option in his case since there was no written report submitted certifying that Brawner was a high risk to reoffend. We conclude that Brawner's contention lacks merit.

The sentencing court shall not grant probation in cases where a psychosexual evaluation is required, pursuant to NRS 176.139, unless a psychologist or psychiatrist certifies in writing that the defendant does not represent "a high risk to reoffend."[10]

In this case, before imposing sentence, the district court expressly stated that: "the law does not allow me to give you probation in this circumstance." We conclude that the district court neither misunderstood the law nor abused its discretion in reaching that conclusion. At the sentencing proceeding, Dr. Stephen Ing, the psychologist who administered Brawner's psychosexual evaluation, testified that on two separate tests Brawner scored moderate and medium-high to reoffend, respectively. Dr. Ing also testified that he did not "see any kind of bright prognosis for treatment" for Brawner, and that his written evaluation was deficient, in that "it should have said clearly [Brawner had] a very high risk" to reoffend. In light of Dr. Ing's testimony that Brawner was a high risk to reoffend, we conclude that Brawner has failed to show that the district court erred or abused its discretion in concluding that he was ineligible for probation.[11]

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[10]NRS 176A.110(1)(a).

[11]According to Dr. Ing's testimony, the written psychosexual evaluation concluded that Brawner should not receive probation, but instead that "a period of incarceration would impress on [Brawner] the seriousness of his offense." Brawner, however, has not provided the psychosexual evaluation for this court's review. We emphasize that it is the responsibility of counsel to provide documents or transcripts necessary

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Having considered Brawner's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

. . . *continued*
to resolve an appeal. See NRAP 28(e), 30(b); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). We have therefore relied on the sentencing transcript to ascertain the contents of the written report, as neither party has questioned the accuracy of Dr. Ing's testimony.