

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONIA L. KIRKLAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41337

FILED

DEC 01 2004

ORDER OF AFFIRMANCE

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

Appeal from judgment of conviction, pursuant to a guilty plea, of leaving the scene of an accident. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

FACTUAL AND PROCEDURAL HISTORY

Appellant Tonia Kirkland was involved in a fatal automobile accident on January 11, 1997, in Clark County. After alerting a gas station attendant of the accident and requesting that the attendant call the police, Kirkland went to a nearby casino. She asked a parking attendant to summon a taxi, but before it arrived, police took her into custody and returned her to the accident scene. Police obtained Kirkland's name and other information, but she was unable to produce a driver's license. Police took her to a hospital for drug and alcohol testing, all of which rendered negative results. Police did not arrest Kirkland, failed to instruct her to keep authorities informed of her whereabouts, and failed to inform her that she might face criminal charges stemming from the accident. Thereafter, Kirkland returned to her home state of Florida and resumed life under her own name.

On March 10, 1997, the State filed a criminal complaint charging Kirkland with leaving the scene of an accident, a felony, failure to yield the right of way, and driving without a valid driver's license. On

March 11, 1997, a justice of the peace issued a bench warrant for her arrest. The State lodged the warrant with the National Crime Information Center (NCIC), but took no other measures to effect Kirkland's apprehension.

Four and a half years later, in August 2001, authorities in Florida arrested Kirkland on the outstanding warrant. Kirkland was returned to Nevada and arraigned in justice court, at which time the court set a preliminary hearing. The court continued the hearing multiple times due to Kirkland's pregnancy. On December 19, 2001, the justice court granted Kirkland's motion for bail on her own recognizance and released her on house arrest.

After attempts to negotiate the matter failed, the justice court reset the preliminary hearing for March 13, 2002. In the interim, however, on March 7, 2002, the State convened the grand jury and indicted Kirkland on the charges contained in the complaint, to wit: leaving the scene of the accident,¹ failure to yield the right-of-way,² and driving without a valid license.³

¹NRS 484.219; NRS 484.223.

²NRS 484.317; Clark County Ordinance 14.32.080.

³NRS 483.550. This appears to be an error in the indictment. NRS 483.550, the statute under which Kirkland was indicted, addresses the situation in which a driver of a motor vehicle lacks a valid driver's license, meaning it is cancelled, revoked, or suspended.

The proof before the grand jury addressed the situation in which a driver has a valid license, but is unable to provide it when requested. The prosecutor stated that a defense to such a charge is production of a valid license at court, which implicates NRS 483.350 rather than NRS 483.550.

On March 13, 2002, in Kirkland's absence, the justice court dismissed the previously filed criminal complaint in light of the grand jury indictment. When Kirkland failed to appear at her continued arraignment in district court on April 1, 2002, the district court ordered issuance of a second bench warrant for her arrest. Authorities rearrested Kirkland in Florida in September 2002, and extradited her back to Nevada. At no time up to that point did Kirkland invoke her speedy trial rights or assert any affirmative defenses to the charges.

On September 23, 2002, the district court arraigned Kirkland. She pleaded not guilty and invoked her rights to a speedy trial. On October 10, 2002, Kirkland filed a pretrial petition for a writ of habeas corpus, arguing that the district court should dismiss the criminal charges against her because the applicable statutes of limitations on the charges had run.⁴ The State opposed the petition, alleging that the filing of the criminal complaint in 1997 tolled the statutory limitation period. Kirkland filed a reply, arguing that the State had violated her speedy trial rights in failing to use due diligence in serving the complaint upon her. In this she relied upon the United States Supreme Court cases of Doggett v. United States⁵ and Barker v. Wingo.⁶ The prosecutor in turn asserted that the State did not know where Kirkland was between 1997 and 2001, and that it placed the warrant for her arrest into the NCIC, thus satisfying Doggett. The district court denied Kirkland's petition, ruling that the State filed the complaint within the statutory period, and that it

⁴See NRS 171.085; NRS 171.090.

⁵505 U.S. 647 (1992).

⁶407 U.S. 514 (1972).

met its burden in attempting to locate her by entering her information into the national data bank.

On December 9, 2002, Kirkland entered a negotiated guilty plea to one count of leaving the scene of an accident. The written plea agreement allowed Kirkland “to appeal her conviction on any legal ground.”

The district court sentenced Kirkland to a term of 35 to 156 months in the Nevada State Prison. The court also imposed a \$2000 fine and a \$25 administrative assessment, ordered payment of \$19,000 in restitution and \$6,842 in extradition fees, and granted Kirkland credit for 364 days of time served in local custody. As noted, Kirkland appeals.

DISCUSSION

Timeliness of indictment

On appeal, Kirkland asserts that the indictment was untimely filed and therefore barred under NRS 171.085. Specifically, she contends there was no pending indictment against her when the grand jury finally indicted her five years after the alleged offense.

NRS 171.085(2) states:

Except as otherwise provided in NRS 171.083, 171.084 and 171.095, an indictment for:

. . . .

2. Any felony other than murder, theft, robbery, burglary, forgery, arson, sexual assault or a violation of NRS 90.570 must be found, or an information or complaint filed, within 3 years after the commission of the offense.

We reject Kirkland's statute of limitations argument on the following grounds. First, under NRS 173.095(1),⁷ "[a] superseding indictment filed while the original indictment is validly pending is not barred by the statute of limitations if the new indictment does not broaden or substantially amend the original charges."⁸ Second, NRS 171.085(2) contemplates that an "indictment . . . or an information or complaint" commences a criminal action for the purpose of the statute of limitations. Third, the filing of a valid complaint tolls the statute of limitations; therefore, the subsequent return of an indictment for those offenses after the limitations period is not time-barred.⁹

In this case, the State filed the initial criminal complaint three months after the accident, well within the limitation period provided under NRS 171.085. It is immaterial that the State filed the grand jury indictment five years after the accident because the statute requires only

⁷NRS 173.095(1) states:

The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

⁸Benitez v. State, 111 Nev. 1363, 1364, 904 P.2d 1036, 1037 (1995).

⁹See State v. Martinez, 587 P.2d 438, 440 (N.M. Ct. App. 1978) ("Upon the filing of the indictment prior to dismissal of the complaint, the indictment was timely because the limitation period was tolled by the filing of the complaint."); Hicks v. State, 23 P.2d 219, 220 (Okla. Crim. App. 1933) (filing criminal complaint and issuance of arrest warrant tolls the statute of limitations); Bonner v. State, 832 S.W.2d 134, 135 (Tex. Ct. App. 1992) (filing of criminal complaint in district court tolled statute of limitations, permitting filing of indictment after period had expired).

that a complaint or an indictment be filed within the relevant statute of limitations, which in this case was three years. The indictment recited the same charges in the complaint, and therefore did not impermissibly broaden the charges.¹⁰ Accordingly, we conclude that the State's filing of the indictment in 2002 satisfied the statute of limitation provisions of NRS 171.085(2).

Right to speedy trial¹¹

Kirkland asserts that the State failed to exercise due diligence in serving the complaint upon her, thus violating her right to a speedy trial under the Sixth Amendment and NRS 178.556.¹²

¹⁰See NRS 173.095(1); Benitez, 111 Nev. at 1364, 904 P.2d at 1037.

¹¹We conclude that this court may reach the merits of Kirkland's speedy trial claim, notwithstanding her guilty plea, because the plea allows her to appeal her conviction on any legal ground.

¹²NRS 178.556 states the following:

1. If no indictment is found or information filed against a person within 15 days after he has been held to answer for a public offense which must be prosecuted by indictment or information, the court may dismiss the complaint. If a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the arraignment on the indictment or information, the district court may dismiss the indictment or information.

2. If a defendant whose trial has not been postponed upon his application is not brought to trial within in 60 days after the arraignment on the complaint for an offense triable in a justice's or municipal court, the court may dismiss the complaint.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹³ This right “attaches once a putative defendant is ‘accused’ by arrest, indictment, or the filing of a criminal complaint, which ever comes first.”¹⁴

“A court must conduct a balancing test to determine if a defendant’s Sixth Amendment right to a speedy trial was violated.”¹⁵ The court should consider the following factors in assessing a defendant’s speedy trial claim: (1) length of delay; (2) reason for delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant.¹⁶ The four factors are to be considered together and no single factor is necessary or sufficient.¹⁷ However, “[u]nless the delay is long enough to be presumptively prejudicial, inquiry into the other factors is not necessary.”¹⁸ Additionally, while the showing of prejudice to the defense from a delay is not necessary, such a showing, or lack thereof, may weigh more heavily than the other factors.¹⁹ This court is less likely to find the delay to be prejudicial if the defendant is primarily responsible for the

¹³U.S. Const. amend. VI.

¹⁴Sheriff v. Berman, 99 Nev. 102, 106, 659 P.2d 298, 301 (1983).

¹⁵Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310 (1998).

¹⁶Id. (citing Barker, 407 U.S. at 530).

¹⁷Berman, 99 Nev. at 107, 659 P.2d at 301.

¹⁸Middleton, 114 Nev. at 1110, 968 P.2d at 310.

¹⁹Berman, 99 Nev. at 107, 659 P.2d at 301.

delay.²⁰ However, as one court has stated, “[i]f the accused is out of state, the State must act diligently and in good faith to acquire jurisdiction.”²¹

“The United States Supreme Court has held that to trigger a speedy trial analysis, an accused must simply allege that the “interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.”²² And “post-accusation delay becomes ‘presumptively prejudicial’ as it approaches one year.”²³

An assessment of a defendant’s speedy trial claim depends upon the particular facts of the case. Therefore, determining whether the State has violated a defendant’s right to a speedy trial lies within the sound discretion of the trial court.²⁴

There are three time periods to review in considering the district court’s assessment of Kirkland’s speedy trial claim: (1) from the date of the accident in January 1997 to the date of Kirkland’s first arrest in August 2001; (2) the time frame between the first arrest and her failure to appear in district court in April 2002; and (3) the period thereafter that ended with her assertion of her speedy trial rights in September 2002 following her rearrest.

²⁰See Middleton, 114 Nev. at 1110, 968 P.2d at 310-11.

²¹State v. Longhorn, 49 P.3d 48, 52 (Mont. 2002).

²²Meegan v. State, 114 Nev. 1150, 1153, 968 P.2d 292, 294 (1998) (quoting Doggett, 505 U.S. at 651-52).

²³Id.

²⁴See id. at 1153, 968 P.2d at 294 (stating that the determination of whether to dismiss a case that has exceeded the sixty-day statutory time period falls within the sound discretion of the trial court).

The four-year time span between 1997 and 2001 triggers a speedy trial analysis because it exceeds one year. However, the length of delay is but one of several factors under Barker that this court considers in evaluating a speedy trial violation.

Under the second Barker factor, reason for delay, neither party is at fault for the period between March 1997 and her initial arrest in August 2001. Police did not immediately arrest Kirkland, and they failed to instruct her to keep them informed regarding her whereabouts. It was therefore not unreasonable for Kirkland to return to her home state of Florida in 1997. However, although the record indicates that authorities had sufficient information to locate Kirkland, they satisfied their duty to diligently acquire jurisdiction over her by entering the information into the NCIC database.²⁵

As to the time frame between her first arrest in August of 2001 and her failure to appear in April 2002, she made no effort during that period to assert her speedy trial rights. Finally, she herself is responsible for the delay within the third time frame between her failure to appear and her rearrest in September 2002. Thus, although she raised her speedy trial rights as required under the third Barker factor, she failed to raise them for some fourteen months after her initial arrest, *i.e.*, after she absconded and was rearrested.

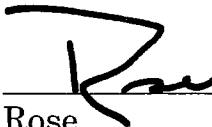
As for the fourth Barker factor, prejudice to the defendant caused by the delay, the prejudice to Kirkland's case appears slight. Although some of the witnesses at the grand jury hearing had trouble recalling details, not all witnesses suffered from memory lapse, and the


²⁵See Longhorn, 49 P.3d at 54.

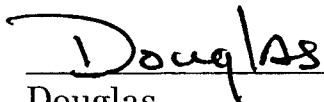
overall testimony sufficiently established Kirkland's identity and participation in the accident.

Given the lack of prejudice to her case and her failure to raise the speedy trial claim in excess of one year after her initial arrest, at which time a separate component of delay was attributable to her own actions, the balance of factors militates against any finding of a speedy trial violation. Therefore, we cannot conclude that the district court abused its discretion in its determination that Kirkland's speedy trial rights were not violated. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk