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No. 3--09--0554

Order filed June 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 06--DT--1356
)	
MICHAEL BROWN,)	Honorable
)	Michael J. Powers,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in
the judgment.

ORDER

Held: Although the four-year delay between the defendant's arrest and trial was presumptively prejudicial, the defendant was not denied his constitutional right to a speedy trial because: (1) announcing ready for trial and objecting to further delay were not sufficient actions to assert his right to a speedy trial; and (2) his defense at trial was not impaired by the delay.

The defendant, Michael Brown, was convicted of two counts of driving under the influence of alcohol (DUI) (625 ILCS 5/11--

501(a)(1), (a)(2) (West 2004)). On appeal, the defendant argues that he was denied his constitutional right to a speedy trial. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. We affirm.

On August 23, 2004, the defendant was originally charged by traffic citation with DUI. The case was filed in the circuit court of Will County under docket number 04--DT--1181. The matter was originally set for jury trial on July 18, 2005. On that date, the defendant appeared and answered ready for trial. The State could not answer ready for trial due to their witnesses failing to appear. The State asked for a continuance, which was denied. The trial court then granted the State's motion to *nolle prosequi* the case over the defendant's objection. The defendant, who had been released on bond, resumed his employment as a truck driver.

On July 31, 2006, the State filed 06--DT--1356, which contained the same counts as the 2004 case. One month later, the defendant filed his written speedy trial demand. On November 1, 2006, the defendant filed a motion to dismiss alleging, among other things, that the refiling of the charges violated his constitutional right to a speedy trial. The State did not respond in writing, and at the hearing on the motion to dismiss the State did not explain why the charges were refiled over a year later. The trial court denied the motion to dismiss without

discussing the defendant's constitutional claim.

From that point, both sides requested continuances until the defendant's trial began on October 14, 2008. At trial, the State's evidence consisted of: two witnesses who had seen the defendant's truck roll over as he attempted to merge onto Interstate 355; two state troopers who had arrived at the scene; and a nurse who was able to authenticate medical records indicating that his blood alcohol concentration was 0.244. The defendant also presented testimony, including two witnesses who stated that the defendant only consumed two beers before heading home. The defendant also presented an expert witness who testified that the enzymatic test used at the hospital could result in false positives.

The jury returned a guilty verdict. After the trial court denied the defendant's posttrial motion, he was sentenced to 24 months' conditional discharge, 20 days in the Will County jail, and 100 hours of community service. The defendant appealed.

On appeal, the defendant argues that he was denied his constitutional right to a speedy trial because the total number of days between his arrest and trial was 1,513 days, or over four years. On review, we will uphold the trial court's factual determinations unless they are against the manifest weight of the evidence. *People v. Crane*, 195 Ill. 2d 42 (2001). However, the trial court's determination of whether the defendant's

constitutional right has been violated is subject to *de novo* review. *Id.*

The United States and Illinois Constitutions guarantee a defendant the right to a speedy trial. *Id.* Courts consider four factors in determining whether a defendant's constitutional speedy trial right has been violated: (1) the length of the delay in bringing the defendant to trial; (2) the reasons for the delay; (3) whether the defendant asserted his right; and (4) the prejudice suffered by the defendant as a result of the delay. *Id.* The defendant's right "should always be in balance, and not inconsistent, with the rights of public justice." *Id.* at 47.

The first factor to consider is the length of the delay in bringing the defendant to trial. Because delay is common and sometimes justified, the delay must be "presumptively prejudicial" before the constitutional speedy trial analysis can continue. *Id.* at 53 (quoting *Barker v. Wingo*, 407 U.S. 514 (1972)). Generally, delays approaching one year are deemed presumptively prejudicial. *Crane*, 195 Ill. 2d 42.

In this case, it took over four years to bring the defendant to trial for the DUI charges. The delay is presumptively prejudicial, and is sufficient to trigger the rest of the speedy trial analysis. *Id.*

The second factor to consider is the reason for the delay. The State bears the burden of justifying the delay. *Id.* The

more culpable the State is for the delay, the heavier this factor will weigh against the State. *Id.*

The main thrust of the defendant's argument is based on the 12½ month period between the dismissal and refiling of the charges. The State's initial reason for moving to *nolle prosequi* the case was that its witnesses were unavailable on the day of trial. This is a legitimate reason to *nolle prosequi* a case. See *People v. Klein*, 393 Ill. App. 3d 536 (2009). However, that does not mean that the State was automatically justified in waiting over a year to refile the charges without giving some indication that it actually needed that year to secure the availability of its witnesses. In fact, the State did not provide any reason, either orally or in writing, for the delay. Since the burden is on the State to justify the delay, and the State did not meet that burden, this factor weighs in favor of the defendant.

The third factor to consider is whether the defendant asserted his speedy trial right. In this case, the defendant did not file a written demand for a speedy trial until after the charges were refiled. Nonetheless, the defendant argues that he asserted his right to a speedy trial when he announced ready for trial, and the trial court allowed the State to *nolle prosequi* the case over his objection. We find that the defendant did not sufficiently assert his right to a speedy trial for two reasons.

First, the defendant did not make any demand for trial until he announced he was ready for trial on the actual day of trial in 2005. When the defendant waits until the eve of trial before making a speedy trial demand, courts will generally weigh that fact against the defendant when determining whether he asserted his constitutional right. See *People v. Clark*, 188 Ill. App. 3d 130, 134 (1989) (stating "[d]efendant never once asserted his right, until immediately before trial"); see also *Smith v. State*, 550 So. 2d 406, 409 (Miss. 1989) ("the only *Barker* factor that weighs against [the defendant] is that he did not assert his right to a speedy trial until five days before trial began").

Second, the defendant's actions after announcing ready for trial in 2005 did not demonstrate a desire to be tried promptly. Although he filed a speedy trial demand when the charges were refiled, he requested or acquiesced in multiple continuances until the case was eventually tried in 2008. Absent any other objections from the defendant regarding the length of the delay, the record leaves us questioning whether the defendant actually wanted to be tried quickly. See *Barker*, 407 U.S. at 536 (holding that "barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates the defendant did not want a speedy trial"). Based on the above, it cannot be said that the defendant "vigorously asserted his right to a speedy

trial." *People v. Sanders*, 86 Ill. App. 3d 457 (1980).

The fourth factor to consider is the prejudice suffered by the defendant as a result of the delay. A finding that a delay is presumptively prejudicial does not imply that the defendant was actually prejudiced by the delay. *Crane*, 195 Ill. 2d 42. Instead, courts assess prejudice "in light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532. These interests include preventing oppressive pretrial incarceration, minimizing the defendant's anxiety and concern, and limiting the possibility that the defense may be impaired. *People v. Decatur*, 191 Ill. App. 3d 1034 (1989).

The defendant in this case was not incarcerated while he awaited trial. In addition, while the defendant indicated that he became more anxious after the charges were refiled, the defendant was not experiencing the same amount of anxiety he would have suffered if the charges were still pending. *Decatur*, 191 Ill. App. 3d 1034. In fact, the defendant's motion to dismiss states that "[s]ince the charges were dismissed on July 18, 2005, Defendant has resumed his career as an 'over-the-road' truck driver because he had no further concerns that this case could potentially affect him adversely."

Finally, the defendant has not alleged, and we have not found, that his defense was impaired by the delay. The defendant

produced two witnesses on his behalf who testified that he only consumed two beers before heading home. The defendant also sent reports to an expert witness who was able to use that information to testify in his favor. He has not suggested that any other witness was unavailable due to the length of the delay. Accordingly, this fourth factor also weighs against the defendant.

Having considered each factor individually, we must balance the factors to strike an accord between the defendant's constitutional right and the rights of public justice. *Barker*, 407 U.S. 514. Our decision must consider that the factors are interrelated, and that the presence or absence of any one factor is not dispositive. *Crane*, 195 Ill. 2d 42.

While we are disturbed that the State did not provide any reason for the 12½ month delay, we believe that the lack of prejudice the defendant suffered, coupled with his initial failure to assert his right to a speedy trial, precludes a finding that the defendant was deprived of his constitutional rights. While a defendant does not always have to demonstrate prejudice in order to show a violation of his rights, in such cases the other three factors must be so overwhelming that prejudice is presumed. *People v. Silver*, 376 Ill. App. 3d 780 (2007). However, in this case the defendant did not sufficiently assert his right to a speedy trial, and that factor weighs

heavily against him. *People v. Singleton*, 278 Ill. App. 3d 296 (1996). Therefore, we hold that the defendant was not denied his constitutional right to a speedy trial.

CONCLUSION

The judgment of the circuit court of Will County is affirmed.

Affirmed.