

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1999

FILED

February 16, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

TAMBORA N. SIMMONS,)

Appellant.)

C.C.A. NO. 03C01-9905-CR-00188

KNOX COUNTY

HON. RICHARD R. BAUMGARTNER,
JUDGE

(Delivery of Drugs)

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Tambora N. Simmons, appeals as of right his conviction pursuant to a jury verdict of one count of delivery of a schedule III controlled substance, codeine. He argues that the trial court erred in denying his motion to dismiss on speedy trial grounds and in failing to instruct the jury on the lesser included offense of simple possession. We find no error and affirm the judgment of the trial court.

The Defendant was indicted by the Knox County Grand Jury on June 23, 1998 for both the sale and delivery of a schedule III drug, codeine. In March 1999, a jury acquitted him of the sale of codeine but convicted him of the delivery of codeine.

At trial, Officer Chris Wilhoit of the Knox County Sheriff's Department testified that he was working as an undercover agent on February 13, 1996 and that he had made arrangements to buy a quantity of pills on that date. The sale was to occur at a Conoco station in Knox County and had been arranged through Ms. Lisa Elliot, an attendant at the Conoco. Officer Wilhoit arrived at the Conoco and talked with Ms. Elliot for about half an hour. Then, the Defendant arrived and all three engaged in "small talk." After some conversation, Officer Wilhoit told the Defendant that "he needed to see what he had," and the two moved to the back of the store. Officer Wilhoit said the Defendant pulled a package containing many red and white capsules from his coat and indicated that the pills were codeine pills, a schedule III narcotic. The Defendant told the officer that there were 100 pills and that he could either have all 100 for \$75 or purchase the pills for \$4 each. The officer told the Defendant he only wanted ten pills. The Defendant opened the package and let Officer Wilhoit count out ten pills. Officer Wilhoit said the Defendant then gave him five additional pills, stating that the extra pills were "just for fun." Officer Wilhoit gave the Defendant \$40 for the pills

and left the store.

Officer Wilhoit testified that he did not know the Defendant before this transaction and did not engage in further transactions with the Defendant. The transaction was arranged through Ms. Elliot, who had been working as a confidential informant for several months prior to this incident and who continued to work as an informant after this meeting. Officer Wilhoit said he lost contact with Ms. Elliot sometime around October of 1996. He testified that an arrest warrant for the Defendant was issued on October 22, 1996, explaining that the delay occurred because he was working undercover.

The Defendant testified on his own behalf. He said that he had known the confidential informant, Ms. Elliot, since high school and had become better acquainted with Ms. Elliot through his girlfriend. The Defendant, the Defendant's girlfriend, and Ms. Elliot often smoked marijuana together, and sometimes they exchanged marijuana among themselves. The Defendant testified that Jim Honeycutt, the person from whom he generally purchased marijuana, gave him some codeine pills to "try." He shared some of those pills with his girlfriend and Ms. Elliot. He said that on February 13, 1996, Ms. Elliot called him and offered to trade marijuana for the pills, and he agreed to the trade. He went to the Conoco station expecting to trade the pills for marijuana. When he arrived, Ms. Elliot was talking to Officer Wilhoit. Ms. Elliot introduced Officer Wilhoit to the Defendant, telling the Defendant that Officer Wilhoit was her friend, Chris. She then told the Defendant to sell the pills to "Chris" and purchase the marijuana from her with the money.

The Defendant stated that he and Officer Wilhoit went to the back of the store, where he allowed the officer to pick ten pills from the package. He said he then gave the officer five additional pills, which were the remainder of the codeine pills. He asserted that the other pills in the package were his girlfriend's iron pills.

Officer Wilhoit gave the Defendant \$40 and then left the store. The Defendant gave the money to Ms. Elliot, who in return gave the Defendant the marijuana and a case of beer. The Defendant continued to smoke marijuana with Ms. Elliot after this exchange. Ms. Elliot asked him on several occasions if he had more codeine pills, and he told her that he did not. The Defendant said nothing further occurred until he was arrested in November 1996.

SPEEDY TRIAL VIOLATION

The Defendant first argues that his case should be dismissed on speedy trial grounds. Both the United States and Tennessee Constitutions guarantee the defendant in a criminal proceeding the right to a speedy trial. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. That right is also guaranteed statutorily in Tennessee. See Tenn. Code Ann. § 40-14-101. The purpose of this guarantee is to protect the accused against oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that evidence will be lost or memories diminished. Doggett v. United States, 505 U.S. 647, 654 (1992). The right attaches at the time of the actual arrest or formal grand jury action, whichever occurs first, and continues until the date of trial. State v. Utley, 956 S.W.2d 489, 493 (Tenn. 1997). In determining whether the right to a speedy trial has been violated, the court is to conduct a balancing test considering four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted a claim to this right, and (4) whether the defendant was prejudiced by the delay. Barker v. Wingo, 407 U.S. 514, 530 (1972); State v. Bishop, 493 S.W.2d 81, 83-85 (Tenn. 1973).

The Defendant testified that he was arrested in November of 1996, but the trial did not occur until March of 1999. Thus, there was approximately a two year and four month delay between the time the right to a speedy trial attached and the Defendant was tried. In Doggett v. United States, the United States Supreme Court noted that a delay approaching one year is generally sufficient to trigger the

Barker analysis). 505 U.S. at 652 n.1. Therefore, we will consider the four factors set forth in Barker.

In State v. Bishop, 493 S.W.2d 81 (Tenn. 1973), the Tennessee Supreme Court found that a delay of a little over two years, standing alone, was not sufficient to support the finding of a speedy trial violation. Id. at 84-85. Thus, the length of the Defendant's delay, without more, will not constitute a violation of his right to a speedy trial.

The reason for the delay is not entirely clear from the record, though it appears that the Defendant was at least partially responsible for the delay. Discussion between counsel at the pre-trial hearing indicates that the preliminary hearing could not be held until March of 1997 because the Defendant was on forfeiture status for failure to appear. Counsel for the Defendant stated that he believed the five-month delay between arrest and the preliminary hearing was "expeditious." There is then no explanation for the fourteen-month delay between the preliminary hearing and the indictment, which was filed in June of 1998. The Defendant was scheduled for arraignment in September of 1998, but he again failed to appear, so he was not arraigned until January of 1999. The trial was then held in March of 1999, two months after the arraignment.

The Defendant also did not assert his right to a speedy trial. The speedy trial issue did not even come before the trial court until the day of trial, when the Defendant filed a motion to dismiss pursuant to Tennessee Rule of Criminal Procedure 48 because of unnecessary delay. While the failure to assert the right to a speedy trial is not a waiver of that right, it is one of the factors to be considered. See id. The Defendant argues that he was unrepresented and unable to assert his right during the delay between the preliminary hearing and the indictment, but we note that there was opportunity for the Defendant to assert his right or file a motion to dismiss because of a speedy trial violation after the

indictment but before the trial, which he did not do.

The last and most important factor to consider is prejudice to the Defendant. See Barker, 407 U.S. at 532; State v. Vance, 888 S.W.2d 776, 778 (Tenn. Crim. App. 1994). The Defendant argues that he was prejudiced because the delay resulted in the disappearance of Ms. Elliot, the confidential informant. Characterizing Ms. Elliott as a vital witness, he asserts that her testimony would have supported his version of the events. Both the State and the defense indicated that Ms. Elliot could not be found at the time of trial, and Officer Wilhoit testified that he lost contact with Ms. Elliot in October 1996, before the Defendant was arrested. Therefore, Ms. Elliot was unavailable before the Defendant's right to a speedy trial attached, rendering it implausible for her disappearance to have been actually caused by the delay in adversarial proceedings. Consequently, the Defendant suffered no prejudice because of the delay. Having considered these factors, we conclude that there was no violation of the Defendant's right to a speedy trial, particularly in view of the indication that the delay was in part caused by the Defendant's failure to appear at the appointed time.

Although he does not differentiate this argument from that of the speedy trial violation, the Defendant also argues that his rights were violated due to delay in initiating criminal proceedings against him. Because the right to a speedy trial does not attach until a defendant is accused either by arrest or indictment, delay between the commission of an offense and the beginning of adversarial proceedings does not violate a defendant's constitutional right to a speedy trial. See State v. Gray, 917 S.W.2d 668, 671 (Tenn. 1996); State v. Dykes, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990). However, a pre-accusatorial delay may violate a defendant's right to due process. See id. In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court stated, "[T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the preindictment delay. . . caused substantial prejudice to

appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." Id. at 324. Relying on Marion, this Court set forth the test to be applied in assessing pre-accusatorial delay:

Before an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to harass the accused.

Dykes, 803 S.W.2d at 256. Although it altered this analysis somewhat in situations where the State is unaware of the offense during the period of delay, our supreme court has indicated that the Dykes test is the appropriate test in cases involving pre-accusatorial delay where the State is aware of the offense. See State v. Carico, 968 S.W.2d 280, 284-85 (Tenn. 1998); State v. Utley, 956 S.W.2d at 495; State v. Gray, 917 S.W.2d at 673. Therefore, we will apply the test to this case.

The first factor, that there was a delay, is obvious. The transaction between the Defendant and Officer Wilhoit occurred on February 13, 1996, but the Defendant was not arrested until November of 1996, eight or nine months later. The second factor, that the Defendant sustained actual prejudice because of the delay, is more complicated. The Defendant asserts that he sustained prejudice because a witness became unavailable during the delay. Both the State and the Defendant indicated before trial that Ms. Elliot, the confidential informant, could not be found. Officer Wilhoit testified that he remained in contact with Ms. Elliot after she arranged the purchase from the Defendant, but he lost contact with her sometime before the arrest warrant for the Defendant was issued. The Defendant argues that he was prejudiced because her disappearance during the delay resulted in “the loss of the most important witness” in the case. He asserts that had Ms. Elliot been available as a witness, she could have testified as to how the meeting between Officer Wilhoit and the Defendant was arranged, what she told the Defendant, and what she told Officer Wilhoit. The Defendant does not, however, offer any proof of what her actual testimony would be. He implies that Ms. Elliot would have corroborated the Defendant’s testimony that he only went to the Conoco because Ms. Elliot was

his friend and wanted to exchange marijuana for the codeine pills, but he never talked to her to determine what her testimony might be. This implication alone is not sufficient to establish actual prejudice due to the delay. Without proof of actual prejudice, as opposed to potential prejudice, we cannot find a due process violation.

In addition, the Defendant was unable to establish the third factor. When asked about the reason for the delay, Officer Wilhoit testified that he was working undercover during this time and that the delay was to protect his undercover status. Although the Defendant questions the sufficiency of Officer Wilhoit's explanation because Officer Wilhoit also admitted that he was still doing some undercover work at the time the Defendant was arrested and at the time of trial, the Defendant points to no proof that the State caused the delay in order to gain a tactical advantage over or to harass the Defendant. Because the Defendant was unable to prove that he sustained actual prejudice as a direct and proximate result of the delay and that the State caused the delay in order to gain a tactical advantage over or to harass him, we find no due process violation.

FAILURE TO INSTRUCT ON SIMPLE POSSESSION

Finally, the Defendant argues that the trial court erred in failing to instruct the jury on the offense of simple possession as a lesser included offense. The trial court is under the mandatory duty to instruct the jury on a lesser included offense, even if such an instruction is not requested, when "any evidence exists that reasonable minds could accept as to the lesser-included offense" and when that evidence "is legally sufficient to support a conviction for the lesser-included offense." State v. Burns, 6 S.W.3d 453, 469 (Tenn. 1999); see also Tenn. Code Ann. § 40-18-110(a). Neither party disputes that simple possession is a lesser included offense of delivery of a controlled substance, the offense of which the Defendant was convicted, but the State argues that the evidence does not warrant an instruction on simple possession. We agree.

Tennessee Code Annotated § 39-17-418(a) sets forth the crimes of both simple possession and casual exchange as follows:

It is an offense for a person to knowingly possess or casually exchange a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice.

Because simple possession only requires that a person “knowingly possess” a controlled substance and because other statutes make it an offense to knowingly sell or otherwise dispose of a controlled substance, it follows that the offense of simple possession contemplates possession of a controlled substance without selling or otherwise disposing of the substance. See id.; id. § 39-17-417(a). Both the Defendant and Officer Wilhoit testified that Officer Wilhoit gave the Defendant \$40 in exchange for fifteen codeine pills. Based on this evidence, reasonable minds could not accept the proposition that the Defendant merely possessed the codeine. Therefore, it was not error to fail to instruct the jury on simple possession.

Moreover, the trial court did instruct the jury on the offense of casual exchange, which is covered by the same statute. As we said in State v. Copeland, 983 S.W.2d 703 (Tenn. Crim. App. 1998), a “casual exchange” contemplates a spontaneous passing of a small amount of drugs Money may or may not be involved.” Id. at 708. Had the jury completely accepted the Defendant’s version of events, it could have convicted the Defendant of the lesser offense of casual exchange. Because the jury convicted the Defendant of the greater offense instead of the lesser, we can safely assume that the jury determined that the Defendant intended to do more with the drugs than simply casually exchange them. It follows that the jury would have also rejected the contention that the Defendant meant to simply possess the codeine. Accordingly, the failure to instruct on simple possession, if found to be error, would be harmless. See State v. Williams, 977 S.W.2d 101, 105-06 (Tenn. 1998).

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JERRY L. SMITH, JUDGE