31480-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JARROD E. VEILLEUX, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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COURT RULES

I.

ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it violated Mr. Veilleux's right to a speedy trial.

2. The court abused its discretion in failing to grant Mr. Veilleux's request for a downward departure in sentence.

II.

ISSUES

A. Was the defendant's right to speedy trial violated?

B. Can the defendant appeal a standard range sentence?

III.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with one count of Attempted Murder in the First Degree, one count of First Degree Assault, and one count of First Degree Unlawful Possession of a Firearm. CP 1-2. The information listed Terrance Dwayne Riley as a codefendant. CP 1-2.

The State has generated a list of the continuances and any reasons on the continuance forms.

The defendant was arraigned July 12, 2012. CP 1065.

On August 24, 2012, the case was continued with no reason listed. The defendant signed this continuance with no objection. CP 1066.

On Sept. 6, 2012, the trial was continued to October 8, 2012. The defendant objected. The court found good cause. CP 1067.

On October 5, 2012, the trial was set for November 5, 2012. Defendant objects. The court found good cause as both counsel and a witness were unavailable. CP 1068.

On October 18, 2012, the trial was set for November 26, 2012. Defense expert unavailable. Defendant signs continuance with no objection. CP 1069.

On November 27, 2012, trial is set for January 7, 2012. Court finds good cause. Defendant objects. CP 1070.

Trial begins January 7, 2013.

On January 18, 2013, the defendant was found not guilty of the crimes of Attempted First Degree Murder and First Degree Assault and guilty of the crime of First Degree Unlawful Possession of a Firearm. CP 865-876; RP 1120.

According to the court's Findings of Fact and Conclusions of Law dated September 17, 2012, the defendant was currently serving a sentence in Montana and was not eligible for parole until April 2013. CP 185.

This appeal followed.

IV.

ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN THAT HIS SPEEDY TRIAL RIGHTS WERE VIOLATED.

The defendant requested a severance as several of the continuances were at the request of the co-defendant. Review of a severance motion is under an "abuse of discretion standard." *State v. Dent,* 123 Wn.2d 467, 484, 869 P.2d 392 (1994). A continuance decision is reviewed under the same standard. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005).

"[T]he defendant ordinarily must establish actual prejudice to the ability to prepare a defense. The exception is when the delay is so lengthy that prejudice to the ability to defend must be conclusively presumed." *State v. Ollivier*, No. 86633-3, 2013 WL 5857220 (Oct. 31, 2013).

"To begin, the United States Supreme Court reminds us that 'pretrial delay is often both inevitable and wholly justifiable.'" *Doggett v. U.S.*, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Delays exceeding eight months are presumed prejudicial. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). The delays in this case did not exceed eight months, so the defendant must show prejudice. The defendant does not mention any prejudice he suffered due to the delays.

The defendant's only argument pertaining to prejudice is based on *State v. Kenyon*, 167 Wn.2d 130, 135-39, 216 P.3d 1024 (2009). The State submits that the defense has mis-read *Kenyon*. There is nothing in that case that supports the claim that "no showing of prejudice to the defendant is required." The word prejudice is mainly used to describe the type of dismissal, not in the evaluation of that case.

The defendant also cites to *Nguyen*, for the idea that if joined defendants are not severed, the case should be dismissed if the defendant's particular case is continued due to actions of the other defendant. *State v. Nguyen*, 131 Wn. App. 815, 129 P.3d 821 (2006). This is neither contained in *Nguyen* nor is that argument correct: When defendants are jointly charged, severance to protect the speedy trial right of one of the defendants is not mandatory. *State v. Eaves*, 39 Wn. App. 16, 19, 691 P.2d 245 (1984). The defendant did ask for a severance, which was not granted.

Separate trials are not favored. *State v. Torres*, 111 Wn. App. 332, 44 P.3d 903 (2002). A court may properly rely on the policy favoring joint trials and continue a defendant's case so that it will coincide with the trial of another defendant charged with a related crime. *State v. Melton*, 63 Wn. App. 63, 66–67, 817 P.2d 413 (1991).

It appears that there were five continuances in this case. Considering the problems of getting two defendants and their witnesses ready for trial, five

continuances does not seem an unnecessary delay. In any event, the defendant was not "going anywhere" as he was not eligible for parole until April of 2013. CrR 3.3(e)(2) provides that time served on unrelated charges is excluded. *State v. Chavez-Romero*, 170 Wn. App. 568, 589, 285 P.3d 195 (2012).

B. THE SENTENCE IN THIS CASE CANNOT BE APPEALED.

"A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed." 9.94A.585(1). The sentence of 116 months is at the top end of the standard range for possession of a firearm. The defendant does not argue that his sentence is outside the standard range. There are exceptions to the general "no appeal" statute pertaining to procedural issues. The defendant has not raised any arguments pertaining to the exceptions.

The defendant claims a number of points upon which he should receive an exceptional downward sentence. Despite the fact that case law frowns on the practice, the defendant puts forth sections of the SRA as justification for his request for a downward departure from the standard range. Merely citing to the purposes of the SRA as grounds for a downward sentence is not enough to justify a downward departure. *See former* RCW 9.94A.712(3)(c)(ii).

The defendant gives no specific reasons why he should have received a downward departure from the standard range for his crime. The defendant makes bald assertions such as "the gravity of Mr. Veilleux's prior offenses (that brought

his offender score to 14) is not commensurate of someone with a similar offender score of 14." Additionally, Mr. Veilleux's sentence of 116 months is not commensurate with the punishment imposed on others committing similar offenses of unlawful possession of a firearm. The defendant offers nothing to back up these broad claims.

If anything, the defendant should have received an exceptional *upward* sentence for the fact that he had considerably more criminal points than the "nine" at the top of the conventional scale.

Under the statutes, the defendant cannot seek an appeal on his sentence in this case. Even assuming the defendant could appeal his sentence, his briefing shows no reason why a trial court would consider an exceptional downward departure.

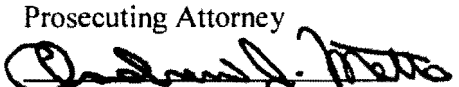
V.

CONCLUSION

For the reason stated above, the defendant's conviction should be affirmed.

Dated this 13TH day of November, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent