

No. 29439-1-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Appellant,

vs.

STEPHEN WADE HOLMES,
Respondent.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Michael P. Price, Judge

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Was Mr. Holmes' constitutional speedy trial right violated, where the seven-year delay was extreme, the State deliberately attempted to delay the trial, Mr. Holmes asserted his right and did not actively try to avoid prosecution, and the excessive delay presumptively compromised his ability to present a defense?

B. STATEMENT OF THE CASE

On July 29, 2003, Mr. Holmes was charged by information with indecent exposure and two counts of possession of a controlled substance, arising from two separate incidents. CP 1-2.

Less than two months later, on September 18, 2003, the Spokane County prosecutor was notified by the Humboldt County Sheriffs Office that Mr. Holmes was residing in Winnemucca, Nevada and given his current address. CP 1-2, 44. The Prosecutor's Office declined to have Mr. Holmes arrested in Nevada. RP 3; Finding of Fact 3 at CP 52.

In 2005, Mr. Holmes first became aware of the charges pending in Washington while he was incarcerated in Nevada, and wished to get the Washington matter resolved. Finding of Fact 4 and 5 at CP 52-53.

Although Spokane County had not filed a detainer, Mr. Holmes (upon advice of the institution) completed an Interstate Agreement on Detainers

("IAD") form requesting a final disposition of the Washington charges and providing his own identifying and status information. Brief of Appellant, p. 7; CP 7, 9, Finding of Fact 5 at CP 53. Through no apparent fault of Mr. Holmes, the request was received by the Spokane County Superior Court Clerk but not by the prosecutor's office. Finding of Fact 6, 7, 8, 9 and 10 at CP 53–54.

After release from the Nevada institution in July 2006 and except for a short stay during 2007 in a county jail in Reno Nevada, Mr. Holmes was living openly in the community. Finding of Fact 11, 12 and 13 at CP 54.

In June 2010, police in Rexburg, Idaho questioned Mr. Holmes during investigation of a noise complaint and ultimately arrested him on the outstanding Spokane County warrant. Finding of Fact 13 at CP 54. On June 18, 2010, Mr. Holmes was transported to Spokane and thereafter booked on the outstanding warrant. CP 61. On June 29, 2010, Mr. Holmes was arraigned on the Spokane County charges. CP 73.

In August 2010, defense counsel filed a motion to dismiss for the State's failure to bring Mr. Holmes to trial within the 180-day rule under the Interstate Agreement on Detainers (RCW 9.100.010). CP 74–75.

After hearing on September 16, 2010, the trial court ordered dismissal of the charges and thereafter entered written findings of fact and conclusions of law. RP 2–20; CP 47, 51–69. The State appealed. CP 48–50.

C. ARGUMENT

Mr. Holmes' Sixth Amendment right to a speedy trial was violated where the state deliberately refused to seek Mr. Holmes' return to Washington and the extraordinary seven-year delay presumptively prejudiced Mr. Holmes.

a. The Sixth Amendment speedy trial violation may be raised for the first time on appeal.

Although this issue was not raised with the trial court, it may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (*quoting* State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Appellate courts determine whether an error is a manifest constitutional error by applying a four-step process: (1) first determine whether the alleged error is in fact a constitutional issue; (2) next, determine whether the error is manifest, that is, whether it had "practical and identifiable consequences"; (3) then address the merits of the

constitutional issue; and (4) determine whether the error was harmless.

State v. Barr, 123 Wn. App. 373, 380, 98 P.3d 518 (2004) (citing State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Constitutional Issue. The Sixth Amendment guarantees an accused person the right to a “speedy and public trial.” U.S. Const. amend 6. The Sixth Amendment right to a speedy trial is enforceable against the states through the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Article 1, section 22 of the Washington Constitution also guarantees the right to a speedy trial. Const. art 1, § 22 (“In criminal prosecutions the accused shall have the right ... to have a speedy public trial.”) Article 1, section 22 “requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights.” State v. Iniquez, 167 Wn.2d 273, 290, 217 P.2d 768 (2009). Therefore, the issue here is constitutional.

Manifest Error. An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." Lynn, 67 Wn. App. at 345, 835 P.2d 251. As discussed more fully below, the evaluation of a Sixth Amendment speedy right claim involves a four part factual inquiry into the reasons for the delay and resulting prejudice. Barker v. Wingo,

407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Here, there are sufficient facts in the record to evaluate Mr. Holmes' claim and therefore, the error is manifest. McFarland, 127 Wn.2d at 333.

Merits of the Constitutional Issue. The argument in support of Mr. Holmes' challenge to the violation of his speedy trial right under the federal and Washington constitutions is set forth below.

Harmless Beyond a Reasonable Doubt. The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." Barker, 407 U.S. at 516 n.2. When a defendant's constitutional speedy trial rights are violated, the remedy is to dismiss the charges with prejudice. Id. at 522. Here, Mr. Holmes' Sixth Amendment and state constitutional rights to a speedy trial were violated. The trial court was correct in dismissing the charges with prejudice.

b. Mr. Holmes' Sixth Amendment and state constitutional right to a speedy trial was violated where the state deliberately refused to seek Mr. Holmes' return to Washington and the extraordinary seven-year delay presumptively prejudiced Mr. Holmes.

The right to a speedy trial is triggered by filing charges or arresting the defendant, whichever comes first. State v. Iniguez, 143 Wn. App. 845, 855, 180 P.3d 855 (2008), *reversed on other grounds*, 167 Wn.2d 273, 217

P.3d 768 (2009). To determine whether a defendant's fundamental right to a speedy trial has been violated, courts consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant. Barker, 407 U.S. at 530. The primary burden is on the courts and the prosecutors to assure that cases are brought to trial. Id. at 529.

Length of delay. The first factor involves a threshold determination of whether the delay is sufficient to trigger judicial examination of the claim. Doggett v. United States, 505 U.S. 647, 651-52, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). A delay long enough to be considered presumptively prejudicial triggers an inquiry into the remaining Barker factors. Barker, 407 U.S. at 530. The federal courts have held that generally post-accusation delay of more than one year is “presumptively prejudicial.” “See Doggett, 505 U.S. at 652, n. 1; United States v. Mendoza, 530 F.3d 758, 762 (9th Cir.2008).

In Doggett, the Court concluded that an eight and one-half year delay between indictment and arrest was “extraordinary” and “clearly suffice[d] to trigger the speedy trial inquiry.” Doggett, 505 U.S. at 651-52. In Iniguez, the Washington Supreme Court determined that an eight-month delay between arrest and trial was “substantial” and sufficient to

trigger the Barker inquiry. Iniguez, 167 Wn.2d at 292. Factors relevant to the Court's inquiry included the lack of complex charges and importance in avoiding delays where eyewitness testimony was necessary. Id. Here, the charges of possession of a controlled substance and indecent exposure were not complex, but would require testimony of a number of witnesses. In light of all the circumstances, the nearly seven-year delay between accusation and arraignment is presumptively prejudicial and sufficient to require application of the remaining Barker factors.

Reason for the delay. The second factor, the reason for the delay, requires an inquiry into the government's efforts to pursue the defendant. Mendoza, 530 F.3d at 762-63. "The government has 'some obligation' to pursue a defendant and bring him to trial." Id. (quoting United States v. Sandoval, 990 F.2d 481, 485 (9th Cir.), *cert. denied*, 510 U.S. 878, 114 S.Ct. 218, 126 L.Ed.2d 174 (1993)). If the government pursues the defendant with reasonable diligence, the speedy trial claim fails unless the defendant can demonstrate specific prejudice. Doggett, 505 U.S. at 656. But if the government is negligent in its pursuit of the defendant, prejudice is presumed. Id. at 657. Most federal courts, including the Ninth Circuit, have held that the prosecution bears the burden of explaining the delay. McNeely v. Blanas, 336 F.3d 822, 827 (9th Cir.2003).

Here, less than 60 days after the Information was filed, the prosecutor was notified by the Humboldt County Sheriffs Office that Mr. Holmes was residing in Winnemucca, Nevada and given his current address. Humboldt County offered to arrest and hold Mr. Holmes for extradition. CP 1-2, 44. Despite the opportunity to bring Mr. Holmes to trial within the 90-day period for out-of-custody defendants provided by CrR 3.3(b)(2)(i), the State deliberately chose not to do so. RP 3; Finding of Fact 3 at CP 52.

The State may contend it had no duty to bring Mr. Holmes to trial, because he was residing out of state. The State misunderstands its obligation under the Sixth Amendment. The Constitution “requires the State to make a diligent and good faith effort to secure the presence of an accused from another jurisdiction if a mechanism is available to do so.” State v. Anderson, 121 Wn.2d 852, 858, 855 P.2d 671 (1993) (citing Dickey v. Florida, 398 U. S. 30, 37-38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969)). The Sixth Amendment requires the government to pursue the accused “with reasonable diligence” even if it believes the accused is outside the jurisdiction. Doggett, 505 U.S. at 656. Doggett requires the government to “make some effort” to notify an out-of-state accused of a

pending charge and attempt to bring him to trial. Mendoza, 530 F.3d at 763.

Even where the accused is not incarcerated in a foreign jurisdiction, the State has a duty of due diligence and good faith to make *some* reasonable effort to bring the accused to trial. Doggett, 505 U.S. at 656. In Mendoza, for instance, the government was aware that Mendoza had left the country but made no effort to inform him of the charge or bring him to trial; the government simply entered his arrest warrant in a law enforcement database. Mendoza, 530 F.3d at 763–64. Where Mendoza was not actively attempting to avoid detection, the Ninth Circuit held the government was negligent by not conducting a serious effort to find him. Id.

Similarly, in United States v. Judge, 425 F.Supp. 499, 501–02 (D. Mass. 1976), the government knew of Judge’s address in Ecuador but did not seek extradition or even mail a copy of the indictment to him and request his voluntary return. The court held the government’s unnecessary delay was inexcusable. Id. at 504; *see also* United State v. Ostroff, 340 F.Supp.2d 362 (S.D.N.Y. 2004) (government’s failure to try to find

defendant after learning he had moved to Florida, where defendant resided openly under his own name at the same address, was inexcusable).

Washington courts have held that under the speedy trial court rule, the State has no obligation to bring an accused to trial who resides out of state, because such a person is not “amenable to process.” *See State v. Lee*, 48 Wn. App. 322, 325, 738 P.2d 1081 (1987); *State v. Hudson*, 130 Wn.2d 48, 921 P.2d 538 (1996) (“For purposes of CrR 3.3, an out-of-state defendant who is not in custody is not amenable to process in the usual sense of the term.”). Because Washington has no “power” over the out-of-state defendant or the foreign jurisdiction, the court rule does not require the State to seek extradition. *Id.*, 48 Wn. App. 1t 325.

But concepts of “power” and “authority” cannot submerge the practical demands of the constitutional right to a speedy trial.” *Hooey*, 393 U.S. at 381. In *Hudson*, 130 Wn.2d at 57–58, the Washington Supreme Court acknowledged that under the Sixth Amendment, the State may have an obligation to contact an out-of-state accused whose address is known, even if the State has no such obligation under the speedy trial court rule. The time for trial provisions of CrR 3.3 provide a right to a speedy trial that is separate from and inferior to the constitutional right. *Id.*

Here, even when handed a known address and the offer of assistance by Humboldt County, and for seven years thereafter, the State made absolutely no effort to provide Mr. Holmes a speedy trial. In 2003, the State could have sought Mr. Holmes return through the Uniform Criminal Extradition Act, RCW 10.88 *et. seq.*—which it finally did in 2010. Finding of Fact 13 at CP 54. Or, the State could simply have tried to notify Mr. Holmes directly of the pending charges and sought his voluntary return. Instead, by deliberately refusing to pursue any of those options, the State ran the risk of a constitutional speedy trial violation. The State failed to fulfill its obligation under the Sixth Amendment. This Barker factor—reason for the delay—weighs against the State.

Mr. Holmes asserted his speedy trial right. “A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.” Barker, 407 U.S. at 527. But “the defendant’s assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.” Id. at 528.

Mr. Holmes first became aware of the charges pending in Washington in 2005, while he was incarcerated in Nevada, and wished to

get the Washington matter resolved. Finding of Fact 4 and 5 at CP 52-53. Although Spokane County had not filed a detainer, Mr. Holmes (upon advice of the institution) completed an Interstate Agreement on Detainers (“IAD”) form requesting a final disposition of the Washington charges and providing his own identifying and status information. Brief of Appellant, p. 7; CP 7, 9, Finding of Fact 5 at CP 53.

Thus, as soon as Mr. Holmes became aware of the pending charges, he attempted to get the matter resolved. Through no apparent fault of Mr. Holmes, the request was received by the Spokane County Superior Court Clerk but not by the prosecutor’s office. Finding of Fact 6, 7, 8, 9 and 10 at CP 53-54. After release from the Nevada institution in July 2006 and except for a short stay during 2007 in a county jail in Reno Nevada, Mr. Holmes was living openly in the community. Finding of Fact 11, 12 and 13 at CP 54. He had openly disclosed his whereabouts to the prosecutor and thereafter made no attempts to keep his current whereabouts unknown. On balance and in light of the State’s obligation to ensure a speedy trial, Mr. Holmes had asserted his right to a speedy trial and was not at fault for the State’s delay in obtaining that trial. This Barker factor—assertion of the right to speedy trial—weighs against the State.

Mr. Holmes was presumptively prejudiced by the delay. The last factor is prejudice to the defendant. Prejudice is judged by looking at the effect on the interests protected by the right to a speedy trial: (1) to prevent harsh pretrial incarceration, (2) to minimize the defendant's anxiety and worry, and (3) to limit impairment to the defense. Barker, 407 U.S. at 532. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. Id. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Id.

Even though impairment to the defense by the passage of time is the most serious form of prejudice, no showing of actual impairment is required to demonstrate a constitutional speedy trial violation. Id. Impairment to the defense is difficult to prove, and as a result, courts must presume this prejudice to the accused “intensifies over time.” Doggett, 505 U.S. at 652.

In Doggett, the Court concluded the eight-and-one-half-year delay between the charge and Doggett’s arrest would not be presumptively prejudicial “if the Government had pursued Doggett with reasonable

diligence from his indictment to his arrest.” Doggett, 404 U.S. at 656. ON the other hand, prejudice would be presumed and “present an overwhelming case for dismissal” if “the Government had intentionally held back in its prosecution of him to gain some impermissible advantage at trial.” Id. (citing Barker, 407 U.S. at 531 (official bad faith in causing delay will be weighed heavily against the government)). The facts in Doggett lay somewhere in between reasonable diligence and bad faith. The Court concluded that the length of delay in combination with the government’s negligent but “egregious persistence in failing to prosecute Doggett” was “clearly sufficient” to demonstrate presumptive prejudice. Doggett, 505 U.S. at 657; *see also* Mendoza, 530 Fo.3d at 767 (prejudice presumed where length of delay was 10 years and the government was negligent); United State v. Cardona, 302 F.3d 494, 499 (5th Cir. 2002) (prejudice presumed where length of delay was 5 years and the government was negligent).

Here, given the extreme length of the delay—seven years—and the State’s deliberate attempt to delay prosecution by failure to pursue a known current address, the facts “present an overwhelming case for dismissal.” Doggett, 505 U.S. at 656. This Court must presume Mr. Holmes was prejudiced in his ability to present a defense.

In sum, in light of the extraordinary length of the seven-year delay, the State's deliberate attempt to delay the trial, Mr. Holmes' assertion of his speedy trial right with the corresponding absence of any showing that he intentionally attempted to avoid prosecution, and the presumption that the seven-year delay prejudiced his ability to present a defense, the trial court did not err in dismissing the charges because his speedy trial right was violated.

c. The trial court was correct to dismiss the charges.

Dismissal of the charges against the accused is "the only possible remedy" for a deprivation of the constitutional right to a speedy trial. Strunk v. United States, 412 U.S. 434, 440, 93 C.Ct. 2260, 37, L.Ed.2d 56 (1973). Thus, the trial court correctly dismissed the charges.

D. CONCLUSION

For the reasons stated, the trial court's dismissal of the charges should be affirmed.

Respectfully submitted on May 16, 2011.


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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	Spokane County No. 03-1-02411-3
Plaintiff/Appellant,)	Court of Appeals No. 29439-1-III
vs.)	
)	
STEPHEN WADE HOLMES,)	PROOF OF SERVICE (RAP 18.5(b))
Defendant/Respondent.))	

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 16, 2011, I mailed to the following as appropriate, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), or personally served, a true and correct copy of brief of respondent:

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