

70638-1

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NO. 70638-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

SILOAM SABIAN KAHLER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Judge's David R. Needy, Judge

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 APR 23 PM 1:46

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Siloam Kahler argues there was a violation of his constitutional right to a speedy trial for the period from the time of filing to arraignment of five months while he was in prison on other charges. He had filed a demand for disposition of the untried indictment three weeks before his arraignment. He then went to trial within two months of arraignment and was found guilty of Possession of a Controlled Substance and Making a False Statement to a Law Enforcement Officer.

Given the five-month period from filing to arraignment, the fact the defendant did not seek to be transported from the Department of Corrections, and the fact that the defendant has not established any prejudice by the claimed delay, there was no violation of his constitution right to speedy trial.

II. ISSUES

1. Is the start date the analysis of a constitutional time for trial claim the date of the incident, or the date of the filing of criminal charges?
2. Is a five month period of time between charging and arraignment sufficient threshold showing of a delay adequate to trigger an analysis of a claim of a violation of a constitutional right to speedy trial?

3. When a defendant is in prison on other charges and did not request to be transported from prison until three weeks before his arraignment, did the defendant make a timely assertion of right to speedy trial?
4. Where the charges are possession of a controlled substance and making a false statement to a law enforcement officer and the defendant only contended his memory of the incident was poor, has he established adequate prejudice to support a violation of his constitutional right to speedy trial?
5. In consideration of the *Barker*¹ factors, of the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant, was a violation of the constitutional right to speedy trial established?

III. STATEMENT OF THE CASE

On December 5, 2012, Silioam S. Kahler was charged with Possession of a Controlled Substance and Making a False or Misleading Statement to a Law Enforcement Officer both having alleged to occur on August 3, 2012. CP 1-2.

Two misdemeanor charges related to the incident had initially been charged into Burlington Municipal Court. CP 7, 6/23/16 RP 34. Once the

¹ *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

lab results dated October 3, 2012, came back from the crime lab about the suspected drugs, the Burlington prosecutor dismissed the misdemeanor charges on October 15, 2012, to have the case refiled in Superior Court. CP 14-15.

In January of 2013, Kahler was in prison on other charges and discussed his release date with his prison counselor. CP __ (Supplemental Declaration of Erin Dyer, Sub. No. 36, filed June 25, 2013, Supplemental Designation of Clerk's Papers Pending)

On April 17, 2013, Kahler's counsel filed a motion to dismiss contending there should have been a constructive arraignment date set pursuant to *State v. Striker*, 87 Wn.2d 870, 557 P.2d 847 (1976) based upon the filing of the misdemeanor charges and as a result his arraignment was untimely. CP 4-6.

On April 18, 2013, Kahler filed a demand for disposition on an untried indictment. CP __ (Request for Disposition, Sub. No. 13, filed April 18, 2013, Supplemental Designation of Clerk's Papers Pending). The State had a transport order entered the next day. CP __ (Order to Transport, Sub. No. 15, filed April 19, 2013, Supplemental Designation of Clerk's Papers Pending).

On April 19, 2013, the State noted the case for arraignment on May 2, 2013. CP __ (Note for Calendar, Sub. No. 16, filed April 19, 2013, Supplemental Designation of Clerk's Papers Pending).

On May 2, 2013, Kahler had not made it to Skagit County on the date of the transport order. CP __ (Order of Continuance, Sub. No. 18. filed May 2, 2013, Supplemental Designation of Clerk's Papers Pending).

On May 7, 2013, Kahler arrived at the Skagit County Jail. CP __ (Sheriff's Return on Bench Warrant at page 2, Sub. No. 22, filed May 8, 2013, Supplemental Designation of Clerk's Papers Pending).

On May 8, 2013, Kahler was arraigned. CP __ (Order Setting Dates, Sub. No. 24. filed May 8, 2013, Supplemental Designation of Clerk's Papers Pending). The defense made a claim for constructive arraignment back to the time of the filing of the Burlington Municipal Court case. 5/8/13 RP 2-10.²

Time for trial was calculated as July 8, 2013, based upon arraignment May 8, 2013. 5/8/13 RP 11. Trial was set for July 1, 2013. 5/8/13 RP 11.

² The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

5/8/13 RP – Arraignment – in volume with 6/12/13. 6/19/13, 6/26/13

5/30/13 RP - Motion Hearing Re Time for Trial – in volume with 7/1/13 RP

6/8/13 RP – Omnibus - in volume with 5/8/13. 6/19/13, 6/26/13

6/19/13 RP – 3.5 Hearing - in volume with 5/8/13. 6/8/13, 6/26/13

6/26/13 RP – Motion Hearing Speedy Trial -in volume with 5/8/13. 6/8/13, 6/19/13

7/1/13 RP - Stipulated Facts Trial – in volume with 5/30/13 RP.

On June 17, 2013, Kahler filed a motion to dismiss based upon a claim of a violation of his constitutional right to speedy trial. CP 20-32.

On June 26, 2013, the trial court heard Kahler's motion. 6/26/13 RP 32-52. The trial court denied the motion and made the following ruling:

I don't find that the delay here was unreasonably long in the constitutional context. The delay was for five months. As much as Mr. Nelson would like to convince me that Mr. Kahler was arrested on the charges that he's now facing, the documents simply do not support that. He was arrested on his failure to appear felony warrant, and he was cited with the offenses that are related to the ones he's now facing.

The reason for the delay? The reason for the delay here is that Mr. Kahler was at the Department of Corrections and thus not immediately amenable to appear in here without an order of transport.

Mr. Kahler was notified of the charges at least by January of this year. He knew about them, and did nothing in response to that knowledge, and didn't assert his right to be brought back here or send anything to Skagit County indicating that he wished to be brought back to deal with the charges.

And probably most important of all, I can't really find that there has been any prejudice to Mr. Kahler as a result of this five-month delay. If he can't remember something today that happened in August of 2012, he probably wouldn't be able to remember it if he was charged and tried in September of 2012. It has not yet been a year, and whatever the reason for his failing memory, I don't think delay is part of it.

There aren't really any other witnesses to the possession of a controlled substance and the making false statement whose memory could be at issue, and so therefore I don't find that he has established the necessary prejudice to even really go into any depth in the other factors, considering that the delay was five months.

6/26/13 RP 51-2.

On July 1, 2013, Kahler proceeded to a stipulated trial. CP 69-87. The trial court found him guilty and he was sentenced on July 1, 2013. CP 88-91. He was sentenced to 54 days of confinement with credit for time served. CP 96.

On July 10, 2013, Kahler timely filed a notice of appeal. CP 105-117.

IV. ARGUMENT

1. The defendant was tried within the time limits prescribed by CrR 3.3.

Although the defendant's contention on appeal is a claim of a violation of a constitutional right to speedy trial, this Court should consider the application of the time for trial rule as it reflects a construct set up to assure trials are held within the constitutionally required time. It has previously been held that the threshold for a constitutional violation is much higher than that for a violation of CrR 3.3. *State v. Whelchel*, 97 Wn.App. 813, 823, 988 P.2d 20 (1999), rev. denied, 140 Wn.2d 1024 (2000).

i. The defendant was tried within sixty days of arraignment.

Under CrR 3.3(b)(1)(i), an individual held in custody pending trial must be tried within 60 days of the commencement date. The commencement date for Mr. Kahler was his arraignment. CrR 3.3(c)(1).

Kahler was transported from the Department of Corrections and arraigned in Superior Court on May 8, 2013. His trial date was set for July 1, 2013. The trial occurred that day. Thus, his trial was within the sixty day time provided by the time for trial rule.

ii. The defendant was timely arraigned.

CrR 4.1 specifies the time frame for arraignment of a defendant detained in jail.

Defendant Detained in Jail. The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, **if the defendant is (i) detained in the jail of the county where the charges are pending** or (ii) subject to conditions of release imposed in connection with the same charges.

CrR 4.1(a)(1) (emphasis added).

Kahler was not detained in the jail of the county where the charges were filed until he arrived from prison on May 7, 2013. His arraignment the next day was timely within the provision of the rule.

iii. The defendant exercised his ability to demand a timely trial under RCW 9.98.010.

Kahler exercised his ability to see a timely trial under the intrastate detainer statute, RCW 9.98.010 by filing a demand. The statute requires his trial be conducted within 180 days of the demand being received by the State. He filed the demand on April 18, 2013. Here the trial occurred on

July 1, 2013, which was 73 days later. The trial was within the time frame provided by RCW 9.98.010.

2. A trial held within the time provided by the court rules and statutes does not preclude a claim of a violation of a constitutional right to speedy trial.

Although the trial was within the time frame provided by the court rules, that does not foreclose the possibility that there was a constitutional violation.

While the rule has the purpose of ensuring that a defendant's constitutional right to a speedy trial is effectuated, complying with it does not necessarily mean that no constitutional violation occurs. *Kenyon*, 167 Wn.2d at 136; see *Barker*, 407 U.S. at 531 (noting that the balancing test the Court adopted for Sixth Amendment speedy trial purposes requires courts to consider the constitutional right on an ad hoc basis, and no set time is constitutionally sufficient for all cases); see *State v. Iniguez*, 167 Wn.2d 273, 287, 217 P.3d 768 (2009) (“CrR 3.3 provides a framework for the disposition of criminal proceedings without establishing any constitutional standards”).

State v. Ollivier, 178 Wn. 2d 813, 823, 312 P.3d 1 (2013). So, despite Kahler’s trial date in compliance with the time for trial rules, he still can make a claim of a constitutional violation.

3. A trial within two months of appearance before the court and within seven months of charging did not violate the defendant's constitutional right to a speedy trial.

This Court's review of a claim of a constitutional violation of the right to trial is de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

In evaluating a claim of a violation of the constitutional right to speedy trial, Washington courts consider the *Barker* factors.

Among the nonexclusive factors to be considered are the “[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.” *Id.* at 530. None of these factors is sufficient or necessary to a violation. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 533). But they assist in determining whether a particular defendant has been denied the right to a speedy trial.

State v. Ollivier, 178 Wn.2d 813, 827, 312 P.3d 1(2013) (emphasis added).

i. The date of filing of the charges in Superior Court is the date from which to evaluate the alleged constitutional violation.

The charges were filed in Superior Court on December 5, 2012. CP 1-2. The charges included a felony of Possession of a Controlled Substance and gross misdemeanor of Making a False or Misleading Statement to a Law Enforcement Officer. Two misdemeanor charges arising from the incident had been charged in Burlington Municipal Court. CP 7, 6/23/16 RP 34.

At the trial court, Kahler's claim was based upon the date of the incident because Kahler had been held on other matters and had been cited

with misdemeanors in municipal court. On appeal, Kahler's contends that the delay for which he raises the constitutional claim was five months, from his arrest in August until the arraignment the following May. Appellant's Opening Brief at pages 1, 7.

However, as pointed out by the trial court Kahler was not arrested in August on the charges but was instead arrested on a felony failure to appear warrant. CP 14, 6/26/13 RP 36-7, 51. Charges were not filed in Superior Court until December 5, 2012, after the lab results came back showing the suspected drugs were in fact a controlled substance. CP 14-15. Kahler does not raise any claims of preaccusatorial delay in making the claimed constitutional violation of his time for trial.³

Thus, the trial court properly determined any claimed delay would be evaluated from the time of the filing in Superior Court to the arraignment five months later.

ii. The length of the delay does meet the threshold for allowing a constitutional claim.

The length of the delay acts as a triggering mechanism, meaning that unless the delay is unreasonable under the circumstance, there is no necessity to inquire further. *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct.

³ Preaccusatorial delay involves a due process claim and involves application of a three prong test which Kahler has not raised. *State v. Oppelt*, 172 Wn.2d 285, 290, 257 P.3d 653 (2011), see also *U. S. v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

2686, 120 L.Ed.2d 520 (1992), *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013).

The State contends that the five month delay here does meet the threshold level meriting further analysis.

In *State v. Iniguez*, the court evaluated the threshold and determined that a strict determination of an eight month to one year delay being presumptively prejudicial was inappropriate. *State v. Iniguez*, 167 Wn.2d 273, 291-2, 217 P.3d 768 (2009). Instead the court looked at the fact that the defendant was in custody on the charges, that the charges were not complex and the fact that eyewitness testimony was involved meant that the eight month period in that case was adequate presumptive prejudice. *State v. Iniguez*, 167 Wn.2d at 292.

In contrast to those facts, here Kahler was not held on the charges and there was no situation where the memories of eyewitnesses were crucial. Other case law also supports that the period of time here did not meet the threshold. *Barker v. Wingo*, supra (delay of over four years did not amount to a denial of the right to speedy trial); *State v. Lennon*, 94 Wn. App 573, 976 P.2d 121 (1999) (ten month delay not unreasonable); *State v. Whelchel*, 97 Wn. App. 813, 988 P.2d 20 (1999) (58 day delay is not unreasonable time); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984) (murder trial occurring within six months of arraignment not unreasonable (60 day period

under court rule is not a constitutional mandate); *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996) (trial occurring 75 days after start of time for trial).

iii. The five month delay was not long.

The delay here was only five months, from the filing on December 5, 2012, to arraignment on May 8, 2013. Appellant's Opening Brief at page 7. During that time, Kahler was not held on the charges. Even if adding in the time until the actual trial date of July 1, 2013, the delay was less than seven months. The State contends the evaluation of this *Barker* factor is in favor of a determination that there was not a constitutional violation.

iv. The reason for the delay was because the defendant's case was filed with a warrant and he did not seek transport on the detainer.

The trial court determined the delay was caused by the filing of the case while Kahler was in the Department of Corrections and thus not available to appear without a transport order. 6/26/13 RP 51. Thus, it was up to either the State or Kahler to arrange to get himself present in the county to move the case forward.

A court looks to each party's responsibility for the delay, and different weights are assigned to delay, primarily related to blameworthiness and the impact of the delay on defendant's right to a fair trial. *Barker*, 407 U.S. at 531. At one end of the spectrum is the situation where the defendant requests or agrees to the delay and is therefore "is deemed to have waived his speedy trial rights as long as the waiver is

knowing and voluntary.” *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 529).

State v. Ollivier, 178 Wn.2d at 831-32.

The State contends this weighs in favor of determining there was no violation, especially in light of the fact that Kahler did not seek to a demand for disposition on the untried indictment, to be present once he was aware of the case. 6/26/13 RP 51.

v. The defendant's assertion of his right was not until just before arraignment.

The trial court determined Kahler had been notified of the charges at least by January of 2013. 6/26/13 RP 51. Thus from that point he made no assertion of his right to be brought back here to deal with the charges until April 18, 2013, when he filed a demand for disposition on an untried indictment. CP __ (Request for Disposition, Sub. No. 13, filed April 18, 2013, Supplemental Designation of Clerk's Papers Pending). The State had a transport order entered the next day. CP __ (Order to Transport, Sub. No. 15, filed April 19, 2013, Supplemental Designation of Clerk's Papers Pending).

He was promptly transported to Skagit County and on May 8, 2013, he was arraigned and had a trial date set for July 1, 2013. CP __ (Order Setting Dates, Sub. No. 24. filed May 8, 2013, Supplemental Designation of Clerk's Papers Pending). He went to trial on that day.

The Court added in *Barker* that “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.” *Id.* at 532. Assertion of the speedy trial right is important in the balancing.

State v. Ollivier, 178 Wn.2d at 837.

Here Kahler was in the position to make his demand much sooner. Once he did he was tried promptly after his desire to have the case tried was made known. This factor weighs in favor of finding no violation.

- vi. **There was no prejudice to the defendant since the case involved charges related to him providing a false name and possession of drugs.**

Under the fourth factor, prejudice to the defendant as a result of delay may consist of (1) “oppressive pretrial incarceration,” (2) “anxiety and concern of the accused,” and (3) “the possibility that the [accused's] defense will be impaired’ by dimming memories and loss of exculpatory evidence.” *Doggett*, 505 U.S. at 654 (alteration in original) (quoting *Barker*, 407 U.S. at 532). **These particularized showings of prejudice are not just theoretical underpinnings to presumed prejudice, they are specific types of prejudice that a defendant can offer in any case but, as in the present case, a defendant must offer these or other particularized showings of prejudice** when the delay is not due to bad faith on the government's part and the delay is not sufficiently long for a presumption of prejudice to arise. *Id.* at 656-68

State v. Ollivier, 178 Wn.2d at 840 (emphasis added).

The trial court made a significant determination that Kahler had not established prejudice.

And probably most important of all, I can't really find that there has been any prejudice to Mr. Kahler as a result of this five-month delay. If he can't remember something today

that happened in August of 2012, he probably wouldn't be able to remember it if he was charged and tried in September of 2012. It has not yet been a year, and whatever the reason for his failing memory, I don't think delay is part of it.

There aren't really any other witnesses to the possession of a controlled substance and the making false statement whose memory could be at issue, and so therefore I don't find that he has established the necessary prejudice to even really go into any depth in the other factors, considering that the delay was five months.

6/26/13 RP 51-2.

In contrast to the trial court's determination, Kahler relies only on the declaration of Kahler's counsel. "During the course of my discussions with Mr. Kahler concerning the pending charge it became clear to me that Mr. Kahler's memory of the incident is poor. His rendition to me is fragmented at best. It differs greatly with other information." CP 30. There was no showing the passage of time was the cause of any claim difficulties in memory.

V. CONCLUSION

For the foregoing reasons, this Court should hold there was no violation of the defendant's constitutional right to a speedy trial, deny the defendant's appeal and affirm the conviction and sentence.

DATED this 2/5/14 day of April, 2014.

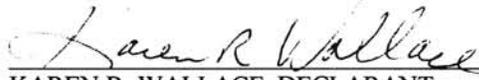
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David L. Donnan, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 2/5/14 day of April, 2014.


KAREN R. WALLACE, DECLARANT