

SUPREME COURT OF GEORGIA

Sosniak v. State

292 Ga. 35 (Ga. 2012) · Decided November 19, 2012

SUMMARY

The Supreme Court of Georgia dismissed Sosniak's direct appeal from the denial of his pretrial motion alleging a constitutional speedy-trial violation. The court overruled *Callaway v. State* and *Boseman v. State*, holding that such denials are not directly appealable and must instead be pursued through the interlocutory appeal procedures of OCGA § 5-6-34(b). The court additionally concluded that, under the prior precedent, the speedy-trial claim was properly denied under the *Barker v. Wingo* balancing test.

OPINION

MELTON, J.

Melton, Justice. Marcin Waldemar Sosniak appeals the trial court's denial of his motion to dismiss his indictment due to an alleged constitutional speedy trial violation. Because we find that *Callaway v. State*, 275 Ga. 332 (567 SE2d 13) (2002), and *Boseman v. State*, 263 Ga. 730, n. 1 (438 SE2d 626) (1994), wrongly decided that the denial of a pre-trial constitutional speedy trial claim may be directly appealed, we dismiss Sosniak's appeal for failure to follow the interlocutory appeal procedures of OCGA § 5-6-34 (b).

1. The record shows that Sosniak was arrested on March 20, 2006 for murder,* 1 and, with his co-defendants, Jason McGhee and Frank Ortegon, was indicted on September 10, 2007. On October 5, 2007, the *36State filed notice of its intent to seek the death penalty against all three defendants, and, after the completion of pre-trial proceedings, the trial court issued a pre-trial report and order for review on September 3, 2009.

Thereafter, this Court granted Sosniak's Application for Interim Review, and affirmed the rulings of the trial court. *Sosniak v. State*, 287 Ga. 279 (695 SE2d 604) (2010). Sosniak's trial was then scheduled for January 10, 2011, but the trial court continued the case until July 11, 2011 at Sosniak's request.

On July 1, 2011, Sosniak filed another motion for continuance, which the trial court granted and continued the case until October 10, 2011. Sosniak filed another motion for continuance on October 5, 2011. The court denied the motion on October 6, 2011. Sosniak then filed a motion to dismiss alleging a constitutional speedy trial violation on October 7, 2011, which the trial court denied on October 28, 2011.

2. OCGA § 5-6-34 (a) (1) authorizes direct appeals only from “final judgments [of the trial court], that is to say, where the case is no longer pending in the court below.”² Because “ ‘the only possible remedy’ ” for a constitutional speedy trial violation is dismissal of the indictment with prejudice, *Strunk v. United States*, 412 U. S. 434, 440 (93 SC 2260, 37 LE2d 56) (1973) (quoting *Barker v. Wingo*, 407 U. S. *37514, 522 (92 SC 2182, 33 LE2d 101) (1972)), when a trial court grants a constitutional speedy trial motion, it must dismiss the case, and that ruling is clearly a final judgment that the State may directly appeal.

See also OCGA § 5-7-1 (a) (1) (authorizing the State to appeal orders dismissing an indictment). However, when the trial court denies a speedy trial motion, the case remains “pending in the court below” and continues on to trial. OCGA § 5-6-34 (a) (2) through (12) authorize direct appeals of 11 specific types of trial court rulings that the General Assembly has deemed important enough to the case, or dispositive enough of the case, to warrant an immediate appeal, even though such rulings are often interlocutory rather than final judgments.

But orders related to speedy trial rights, statutory or constitutional, are not listed. The usual remedy for a party aggrieved by an order that does not terminate the case in the trial court, and is not authorized for direct appeal by OCGA § 5-6-34 (a) (2)-(12), is to seek a certificate of immediate review from the trial court and then file an application for interlocutory appeal.

Sosniak’s direct appeal rests instead on application of the so-called “collateral order” doctrine. This doctrine was originally developed by the United States Supreme Court as an interpretation of 28 USC § 1291, the federal statute that, much like OCGA § 5-6-34 (a) (1), authorizes direct appeals in federal cases only “from all final decisions of the district courts.” See also 28 USC § 1292 (authorizing appeals from specified interlocutory orders in subsection (a), like OCGA § 5-6-34 (a) (2)-(12), and authorizing other interlocutory appeals at the discretion of both the trial and appellate courts, like OCGA § 5-6-34 (b)).

In 1977, in *Abney v. United States*, 431 U. S. 651, 653 (97 SC 2034, 52 LE2d 651) (1977), the Supreme Court held that the collateral order doctrine authorized the pretrial appeal of an order denying a motion to dismiss an indictment on double jeopardy grounds. Less than a year later, in *United States v. MacDonald*, 435 U. S. 850 (98 SC 1547, 56 LE2d 18) (1978), the Supreme Court, in what it called a “straightforward” application of the collateral order doctrine, unanimously rejected the contention that a defendant is entitled to a pretrial appeal of an order denying a motion to dismiss an indictment based on the alleged violation of his constitutional right to a speedy trial.

Id. at 856. The Court first recognized that, “[i]n sharp distinction to a denial of a motion to dismiss on double jeopardy grounds, a denial of a motion to dismiss on speedy trial grounds does not represent ‘a complete, formal and, in the trial court, a final rejection’ of the defendant’s claim.” *Id.* at 858 (quoting *Abney*, 431 U. S. at 659). Looking to the factors that courts must weigh in

deciding a speedy *38trial claim, particularly the issue of prejudice to the accused, see *Barker v. Wingo*, 407 U. S. at 530-532, the Court explained: Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative.

The denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial — when prejudice can be better gauged — would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal, and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily “remains open, unfinished [and] inconclusive” until the trial court has pronounced judgment.

MacDonald, 435 U. S. at 858-859 (citation omitted). With respect to “the requirement that the order sought to be appealed be ‘collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged,’ ” *MacDonald*, 435 U. S. at 859 (quoting *Abney*, 431 U. S. at 659), the Court noted that, in contrast to a double jeopardy claim, “there exists no such divorce between the question of prejudice to the conduct of the defense (which so often is central to an assessment of a speedy trial claim) and the events at trial.

Quite the contrary, in the usual case, they are intertwined,” *id.* The Court added: Even if the degree of prejudice could be accurately measured before trial, a speedy trial claim nonetheless would not be sufficiently independent of the outcome of the trial to warrant pretrial appellate review.

The claim would be largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof. *Id.* Unlike a double jeopardy violation, the harm of which is not eliminated by the defendant's acquittal after being twice put in jeopardy, “[t]he essence” of a speedy trial claim “in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged.

Normally, it is only after trial that that claim may fairly be assessed.” *Id.* at 860. Most importantly, the Supreme Court flatly rejected the argument that the right to a speedy trial is, like the right against double jeopardy or to reduced bail before trial, the sort of right “the legal and *39practical value of which would be destroyed if it were not vindicated before trial.” *MacDonald*, 435 U. S. at 860.

There perhaps is some superficial attraction in the argument that the right to a speedy trial ■ — • by analogy to these other rights — must be vindicated before trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not,

either on its face or according to the decisions of this Court, encompass a “right not to be tried” which must be upheld prior to trial if it is to be enjoyed at all.

It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker v. Wingo*, supra, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered.

MacDonald, 435 U. S. at 860-861. See also *id.* at 860, n. 7 (“Certainly, the fact that this Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated does not mean that a defendant enjoys a ‘right not to be tried’ which must be safeguarded by interlocutory appellate review.” (citation omitted)).

Finally, the Court concluded that allowing direct appeals from pretrial denials of speedy trial motions would actually undermine the values reflected in the Speedy Trial Clause. “Many defendants, of course, would be willing to tolerate the delay in a trial that is attendant upon a pretrial appeal in the hope of winning that appeal.” *MacDonald*, 435 U. S. at 862.

However, unlike the other rights the Constitution guarantees to the accused, “ ‘there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.’ ” *Id.* (citation omitted). Among other things, delay may prejudice the prosecution’s ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention, and prolong the period during which defendants released on bail may commit other crimes.

Id. Thus, “[allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely the *40values manifested in the Speedy Trial Clause. And some assertions of delay-caused prejudice would become self-fulfilling prophecies during the period necessary for appeal.” *Id.* In conclusion, the Court noted that, unlike a double jeopardy claim, every criminal case involves some delay between the defendant’s arrest or indictment and trial, so “any defendant can make a pretrial motion for dismissal on speedy trial grounds and, if § 1291 is not honored, could immediately appeal its denial.” *Id.* at 862-863.

The Court “decline[d] to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review.” *Id.* at 863.

Therefore, persuasive precedent from the United States Supreme Court clearly indicates that rulings denying a pre-trial motion for speedy trial should be subject to interlocutory appeals procedures rather than being directly appealable. Nonetheless, this Court strayed from this precedent, and, in *Callaway* and *Boseman*, we extended the collateral order doctrine as developed

in *Abney*, and applied to statutory speedy trial claims in *Hubbard v. State*, 254 Ga. 694 (333 SE2d 827) (1985), to constitutional speedy trial claims in *Callaway* and *Boseman*.

We did this and continued to do so in spite of several opinions from our Court of Appeals which pointed out the error of this extension of the law in light of the Supreme Court's ruling in *MacDonald*. See *Callaway v. State*, 251 Ga. App. 11 (553 SE2d 314) (2001); *Callaway v. State*, 258 Ga. App. 118,121 (572 SE2d 751) (2002); *Smith v. State*, 260 Ga. App. 403 (579 SE2d 829) (2003) (physical precedent only); *Lamar v. State*, 262 Ga. App.

735 (586 SE2d 416) (2003). Today, in line with the United States Supreme Court precedent in *MacDonald* and our Court of Appeals' admonitions, we hereby overrule our decisions in *Callaway* and in *Boseman*. Both cases wrongly determined that a defendant has the right to bring a direct appeal from a denial of a pre-trial motion for a constitutional speedy trial. Defendants must follow the interlocutory appeal procedures of OCGA § 5-6-34 (b) when pursuing appellate review in these cases.

3. We recognize that, given the clear, though incorrect, mandate of our overruled case law, *Sosniak* may be caught somewhat by surprise with this opinion. To ameliorate this surprise, we note that, under our prior precedent, *Sosniak*'s speedy trial claim was properly denied by the trial court in any event. Alleged violations of the constitutional right to a speedy trial must be analyzed under the aegis of *Barker v. Wingo*, *supra*. "First, the court must determine whether the interval from the accused's *41arrest, indictment, or other formal accusation to the trial is sufficiently long to be considered 'presumptively prejudicial.' " (Punctuation and footnote omitted.)

Ruffin v. State, 284 Ga. 52, 55 (2) (663 SE2d 189) (2008). If the delay has crossed this threshold, the court must proceed to a "delicate, context-sensitive, four-factor balancing test" to determine whether a speedy trial violation has occurred. *Id.* This balancing test requires analysis of (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant.

See *id.* at 56 (2) (b). A trial court's ruling on a motion to dismiss on speedy trial grounds is reviewed for abuse of discretion. *Id.* at 65 (3). Also, "a trial court's findings of fact and its weighing of disputed facts will be afforded deference on appeal." (Citations omitted.) *Williams v. State*, 277 Ga. 598, 599 (1) (592 SE2d 848) (2004). Length of the delay.

Because there has not been a trial, the length of the delay must be calculated from the date of arrest or formal accusation to the date on which the motion to dismiss on speedy trial grounds was decided. *State v. Porter*, 288 Ga. 524, 526 (2) (b) (705 SE2d 636) (2011).

The delay of more than five years in this case is presumptively prejudicial, and, as the trial court found, and the State does not dispute, the length of the delay should be weighed against the State. *Id.* at 527 (2) (c) (1). Reasons for the delay. Whether the defendant or the State bears the primary

responsibility for delay in reaching trial is “pivotal in evaluating the strength of a constitutional speedy trial claim, as it can color the consideration of all other factors.” Ruffin, *supra*, 284 Ga. at 59 (2) (b) (ii).

Deliberate delay is weighed heavily against the State. Delay resulting from “neutral” causes, such as negligence, has lighter weight. *Vermont v. Brillon*, 556 U. S. 81, 90 (II) (129 SC 1283, 173 LE2d 231) (2009). Of course, delay caused by the defense weighs against the defendant. *Id.* at 90-91 (II).

The trial court’s order shows that it carefully considered the reasons for the delay, dividing the time between indictment and trial into a number of distinct periods. The trial court first found that the pre-indictment delay of eighteen months was caused by the State, was not purposeful delay, and would not weigh heavily against the State.

The trial court next considered the period of time from Sosniak’s arraignment in January through December of 2008, and weighed the time slightly against Sosniak, based on certain continuances he requested. The trial court weighed the time the case was under appellate review as neutral.

The remittitur from the interim review was returned on June 24, 2010, and the following day, the trial court scheduled trial for January 10, 2011. On December 10, 2010, Sosniak’s counsel requested a two-year continuance, contending that *42 inadequate funding precipitated the need for more time to prepare a mitigation defense.³ The trial court continued the case until July 10, 2011.

On June 23, 2011, Sosniak requested an additional continuance on the same ground as his request in December, and the trial court denied the motion on June 27, 2011. On July 1, 2011, Sosniak filed another continuance request, and the trial court granted the motion on July 6, 2011, thereby continuing the case until October 10, 2011. Sosniak filed yet another motion for continuance on October 5, 2011, on the same basis as requested in June and the previous December.

The trial court denied the motion on October 6, 2011. Based on this period of time, the trial court found that the delay since the return of the remittitur on the interim appeal in late June weighed heavily against Sosniak.

The trial court did not abuse its discretion in any of these findings, and Sosniak’s contentions that the delay should not be held against him because he lacked appropriate funding does not alter this result. The record supports the trial court’s finding that Sosniak’s counsel did not properly pursue funding for their client. Testimony clearly showed that, other than one invoice from February 2009 for an expert witness, Sosniak made no requests for payment for legal fees or otherwise.

Defendant’s assertion of the right. “The relevant question for purposes of the third [speedy trial] factor is whether the accused has asserted the right to a speedy trial ‘in due course.’ ” (Punctuation

and footnote omitted.) Ruffin, supra, 284 Ga. at 63 (2) (b) (iii). This factor “requires a close examination of the procedural history of the case with particular attention to the timing, form, and vigor of the accused’s demands to be tried immediately.” (Footnote omitted.)

Id. Because delay often works to the defendant’s advantage, see *Vermont v. Britton*, supra, 556 U. S. at 90 (II), this factor is afforded “ ‘strong evidentiary weight.’ ” (Punctuation omitted.) *Marshall v. State*, 286 Ga. 446, 447 (1) (c) (689 SE2d 283) (2010) (quoting *Barker v. Wingo*, supra, 407 U. S. at 531).

In this case, Sosniak waited over five years until the trial court would no longer grant his requests for a continuance to assert his right to a speedy trial. The trial court did not err in finding this eve-of-trial request untimely, and it properly weighed this factor against Sosniak. Prejudice.

To determine whether the defendant has been prejudiced by the delay, one must consider whether there has been *43oppressive pre-trial incarceration, whether the defendant has suffered undue anxiety, and, most importantly, whether the defense has been impaired by the passage of time. Ruffin, supra, 284 Ga. at 65 (2) (b) (iv).

Although Sosniak was incarcerated for a lengthy period of time, “there has been no oppressive pre-trial incarceration, as [Sos-niak] has made no showing that he has been subjected to substandard conditions in the county jail where he has been housed.” *Weis v. State*, 287 Ga. 46, 54 (1) (d) (694 SE2d 350) (2010). Furthermore, Sosniak has not shown that the anxiety he may have suffered was greater than that always present to some extent.

See *Higgenbottom v. State*, 290 Ga. 198, 202 (1) (D) (719 SE2d 482) (2011). Finally, with regard to prejudice to Sosniak’s defense, Sosniak contends that, because of delays in the indictment process and the lack of funding, he was unable to locate his father, who he has not seen since he was a child. Caroline Boddie, Sosniak’s mitigation specialist, testified that she believes Sosniak’s father now lives near Warsaw, Poland.

Boddie testified Sosniak’s father could possibly be a mitigation witness at the sentencing phase of the trial. Even if Sosniak’s father were located, whether he would be a witness is speculative at best, as conceded by Boddie. Sosniak has not had contact with his father for many years.

The trial court correctly found the potential for the father to be a witness as speculative, and, as a result, Sosniak failed to satisfy his burden of showing prejudice. Appeal dismissed. All the Justices concur. Sosniak has remained incarcerated since his arrest. OCGA § 5-6-34 (a) provides in full: Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state: (1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35 [requiring an application to appeal certain types of issues and

cases]; (2) All judgments involving applications for discharge in bail trover and contempt cases; (3) All judgments or orders directing that an accounting be had; (4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions; (5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors; (6) Any ruling on a motion which would be dispositive if granted with respect to a defense that the action is barred by Code Section 16-11-173; (7) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders; (8) All judgments or orders refusing applications for dissolution of corporations created by the superior courts; (9) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will; (10) All judgments or orders entered pursuant to subsection (c) of Code Section 17-10-6.2; (11) All judgments or orders in child custody cases including, but not limited to, awarding or refusing to change child custody or holding or declining to hold persons in contempt of such child custody judgment or orders; and (12) All judgments or orders entered pursuant to Code Section 35-3-37.

On August 26, 2010, by administrative order, the trial court had transferred \$50,000 from a trust account established for co-defendant Ortegon with money received from Georgia Public Defender Standards Council to an account for Sosniak.