

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2013-000116-001 DT

05/16/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
J. Eaton  
Deputy

STATE OF ARIZONA  
v.  
CLYDE SUELL (001)

ANDREA A GUTIERREZ  
  
LAURIE A HERMAN  
  
PHX MUNICIPAL CT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 2011-9001182.**

Defendant-Appellant Clyde Suell (Defendant) was convicted in Phoenix Municipal Court of driving under the influence and driving on a suspended license. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the State violated his speedy trial rights. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On January 27, 2011, the State filed a Misdemeanor Complaint charging Defendant with driving under the influence while impaired, A.R.S. § 28-1381(A)(1); driving under the influence with an alcohol concentration of 0.08 or more within 2 hours of driving, A.R.S. § 28-1381(A)(2); and driving on a suspended license, A.R.S. § 28-3473(A). On May 15, 2012, Defendant's attorney filed a hand-written motion asking the trial court to dismiss the charges based on his claim that Defendant was denied his right to a speedy trial under Rule 8 of the Arizona Rules of Criminal Procedure, the United States Constitution, and the Arizona Constitution. On May 24, 2012, Defendant's attorney filed a Supplemental Motion To Dismiss (Delay).

Defendant was originally ordered to appear for arraignment on February 15, 2011, but failed to appear for that arraignment, so the court issued a warrant for his arrest. (R.T. of Aug. 15, 2012, at 31-32.) Defendant was subsequently arrested on that warrant and appeared for arraignment on December 13, 2011.

At the hearing on Defendant's Motion To Dismiss, Loretta Young testified she had met Defendant in August or September 2010. (R.T. of Aug. 15, 2012, at 2-3.) On December 7, 2010, Defendant was living near 19<sup>th</sup> Avenue and Bethany Home Road. (*Id.* at 4.) Defendant asked her to come to his home and drive a friend of his home. (*Id.* at 4-5.) Ms. Young told Defendant she would not drive that person home, but he could use her car, so she drove her car to Defendant's home near 19<sup>th</sup> Avenue. (*Id.* at 6-7.) When Defendant drove Ms. Young's car, he collided with at tree. (*Id.* at 7.)

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Officer Vincent Cole testified he completed an alcohol influence report after Defendant was arrested. (R.T. of Aug. 15, 2012, at 11–12.) He testified he spoke to Defendant, and Defendant gave his address as 5021 North 18<sup>th</sup> Avenue. (*Id.* at 12–14, 16, 18.) At that time, Defendant's driver's license was suspended, and there was a warrant for his arrest. (*Id.* at 20.)

Officer Blake Richey testified he prepared the collision report on December 7, 2010, for a collision on 19<sup>th</sup> Avenue in which Defendant was the driver. (R.T. of Aug. 15, 2012, at 27–28.) He did not speak to Defendant, so he obtained Defendant's address from the MVD records, which showed Defendant's address as 1951 East Marguerite Avenue. (*Id.* at 28–30.)

The trial court noted the Complaint was signed on January 27, 2011; the arraignment on the charges was set for February 15, 2011; Defendant was ordered to appear for that arraignment; the notice was sent to the 5021 North 18<sup>th</sup> Avenue address; and Defendant did not appear for that arraignment. (R.T. of Aug. 15, 2012, at 31–32.) Defendant presented no witnesses, and the trial court denied Defendant's Motion To Dismiss. (*Id.* at 33.)

Defendant then submitted the matter on the record. (R.T. of Aug. 15, 2012, at 33–34.) The prosecutor stated the parties had stipulated restitution was \$9,794.29 and was to be paid to Ms. Young. (*Id.* at 42.) Defendant's attorney said Defendant accepted that stipulation, and Defendant personally advised the trial court he was stipulating to that amount. (*Id.* at 43.) The trial court found Defendant guilty of both DUI charges and the driving on a suspended license charge. (*Id.* at 48.) The trial court then imposed sentence. (*Id.* at 49.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did the trial court abuse its discretion in determining the State did not violate Defendant's right to a speedy trial.*

Defendant contends the trial court abused its discretion in determining the State did not violate his right to a speedy trial under the United States Constitution. In determining whether a delay violated the defendant's right to a speedy trial, the trial court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice caused to the defendant. *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). In weighing these four factors, the length of the delay is the least important, while the prejudice to the defendant is the most significant. *Spreitz*, 190 Ariz. at 139–40, 945 P.2d at 1270–71. *State v. Henry*, 176 Ariz. 569, 79, 863 P.2d 861, 871 (1993).

1. *The length of the delay.* Defendant cites *Doggett v. United States*, 505 U.S. 647 (1992), for the proposition that a delay over 1 year is presumptively prejudicial. *Doggett* did not hold a delay of 1 year or more is presumptively prejudicial; it held, instead, there is a dividing line over which the delay must cross before it will raise an issue of speedy trial, and noted other courts have generally set 1 year as that line:

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The first of these is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from “presumptively prejudicial” delay, since, by definition, he cannot complain that the government has denied him a “speedy” trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter enquiry is significant to the speedy trial analysis because, as we discuss below, the presumption that pretrial delay has prejudiced the accused intensifies over time. In this case, the extraordinary 8½ year lag between Doggett’s indictment and arrest clearly suffices to trigger the speedy trial enquiry;<sup>1</sup> its further significance within that enquiry will be dealt with later.

<sup>1</sup>Depending on the nature of the charges, the lower courts have generally found post-accusation delay “presumptively prejudicial” at least as it approaches 1 year. We note that, as the term is used in this threshold context, “presumptive prejudice” does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.

505 U.S. at 652–53 & n.1 (citations omitted). The delay for Doggett was 8½ years, which the Court held was enough to trigger further inquiry to determine whether the other three factors showed Doggett was denied his right to a speedy trial.

In *Spreitz*, the delay was over 5 years from arraignment to trial, which court found presumptively prejudicial. 190 Ariz. at 140, 945 P.2d at 1271. In *Henry*, the delay was 17 months, which the court noted was lengthy, but held other factors showed there was no violation of the defendant’s right to a speedy trial. 176 Ariz. at 578–79, 863 P.2d at 870–71. In the present matter, Defendant was ordered to appear for arraignment on February 15, 2011, but failed to appear, and subsequently appeared for arraignment on December 13, 2011, 10 months later. Because this delay of 10 months was less than the 1 year discussed in *Doggett*, it was not long enough to trigger an inquiry into the issue of a speedy trial. The trial court thus did not abuse its discretion in denying Defendant’s Motion To Dismiss.

2. *The reason for the delay.* The courts have found no violation of the right to a speedy trial when the defendant has caused the delay. In *Spreitz*, the delay of over 5 years was caused by defendant’s fighting admission of DNA evidence. 190 Ariz. at 139–40, 945 P.2d at 1270–71. In *Henry*, the delay of 17 months was mostly due to defendant’s motions and pleadings. 176 Ariz. at 578, 863 P.2d at 870. In the present case, on the night of the collision, Defendant gave his address to Officer Vincent Cole, and the address he gave was 5021 North 18th Avenue. (R.T. of Aug. 15, 2012, at 12–14, 16, 18.) The trial court noted the Complaint was signed on January 27, 2011; the arraignment on the charges was set for February 15, 2011; Defendant was ordered to appear for that arraignment; the notice was sent to the 5021 North 18<sup>th</sup> Avenue address; and Defendant did not appear for that arraignment. (*Id.* at 31–32.) Defendant chose not to testify, so we

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do not know what exactly happened. It appears, however, there are two possibilities. One possibility was Defendant was living at the 5021 North 18th Avenue address, which was where the summons was sent, and he chose not to appear for the arraignment. The second possibility was Defendant was actually living at the 1951 East Marguerite Avenue and therefore never received the summons and thus did not know about the arraignment, which is why he did not appear. Under either possibility, it was Defendant's fault he did not appear for the arraignment, thus he caused the delay from February 15, 2011, to December 13, 2011. Because Defendant caused the delay, this would support the trial court's decision to deny Defendant's Motion To Dismiss.

3. *The defendant's assertion of the right to a speedy trial.* The third factor the court must consider is whether the defendant asserted the right to a speedy trial. In *Henry*, although the delay of 17 months was lengthy, because the defendant did not assert his right to a speedy trial until 14 months after the indictment, the court found no violation of the defendant's right to a speedy trial. 176 Ariz. at 579, 863 P.2d at 871. In the present case, Defendant failed to appear for arraignment on February 15, 2011, and subsequently appeared for arraignment on December 13, 2011, but did not assert his right to a speedy trial until May 15, 2012, when his attorney filed the Motion To Dismiss the charges. Because Defendant waited for over 5 months before asserting his right to a speedy trial, this again would support the trial court's decision to deny Defendant's Motion To Dismiss.

4. *The prejudice caused to the defendant.* The final and most important factor is whether the defendant suffered any prejudice as a result of the delay. In *Spreitz*, over 5 years elapsed from arraignment to trial, but the only prejudice defendant claimed was having to remain in custody, which court held was not sufficient to establish a speedy trial violation. 190 Ariz. at 140, 945 P.2d at 1271. In *Henry*, although the delay of 17 months was lengthy, the defendant failed to show any prejudice because of that delay, thus the defendant failed to show a violation of his right to a speedy trial. 176 Ariz. at 579, 863 P.2d at 871. In *State v. Schaaf*, 169 Ariz. 323, 819 P.2d 909 (1991), because the defendant made no showing his attorney would have been ready to go to trial on the day in question, the defendant failed to show prejudice. 169 Ariz. at 327, 819 P.2d at 913. In *State v. Wassenaar*, 215 Ariz. 565, 161 P.3d 608 (Ct. App. 2007), the defendant was tried within 1 year from arraignment; because defendant made no claim that delay caused him to be subject to prolonged confinement, or that he was unable to investigate case fully, that he could not prepare adequately, that he was unable to locate evidence or witnesses, that he lost opportunity to present evidence or testimony, or that he could not present his entire case, defendant failed to establish prejudice, and thus failed to establish violation of speedy trial. *Id.* at ¶¶ 19–20. In the present case, Defendant chose not to testify at the hearing on his Motion To Dismiss, thus he failed to put anything on the record showing he suffered any prejudice. Again this would support the trial court's decision to deny Defendant's Motion To Dismiss.

In Defendant's Supplemental Motion To Dismiss (Delay), in addition citing the Sixth Amendment to the United States Constitution, Defendant cited the Arizona Constitution and Rule 8 of the Arizona Rules of Criminal Procedure. If a party raises a claim at trial but does not include it in the appellate brief on appeal, or raises a claim of error in the appellate brief but does

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not argue it and include appropriate references to the record, the appellate court will consider the claim abandoned. *State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (Ct. App. 1991) (because appellant merely claimed that admission of notebooks violated confrontation provision of Arizona Constitution, but failed to argue why Arizona provision was any different than federal provision, the court considered that issue abandoned on appeal). In Defendant's Opening Brief, he makes no argument why the delay violated either Article 2, Section 24 of the Arizona Constitution, or Rule 8.2(a)(2) of the Arizona Rules of Criminal Procedure. This Court therefore considers those issues abandoned on appeal.

*B. Has Defendant waived any issue about restitution by not objecting at trial.*

Defendant contends the trial court erred in ordering him to pay restitution to the victim, Loretta Young, rather to Medicare. To preserve an issue for appeal, a party must make a specific and timely objection; if the party fails to object, the party will have waived the issue on appeal. *State v. Alvarez*, 228 Ariz. 579, 269 P.3d 1203, ¶ 16 & n.3 (Ct. App. 2012) (court rejected defendant's contention that he should be excused from objecting to award of restitution because he was "surprised" when trial court ordered restitution; court follows rule that party must make timely and specific objection). In the present case, Defendant not only failed to object, he stipulated that the trial court would order a specific amount of restitution, and stipulated it would be paid to Ms. Young. (R.T. of Aug. 15, 2012, at 42-43.) Moreover, if in fact Medicare provided treatment to Ms. Young, that fact would not alter the trial court's obligation to order Defendant to make the restitution payment to Ms. Young. *State v. Steffy*, 173 Ariz. 90, 93-94, 839 P.2d 1135, 1138-39 (Ct. App. 1992) (fact that victim did not ask for restitution because he expected his insurance company to pay medical bills did not alter trial court's obligation to order restitution to victim).

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in denying Defendant's Motion To Dismiss. This Court further concludes Defendant has waived any issue about the restitution payment by not objecting.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Phoenix Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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