

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-165609-001 DT

08/14/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

BENJAMIN J DOLINKY (001)

RICHARD D COFFINGER

REMAND DESK-LCA-CCC

UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number LC 2011–165609.

Defendant-Appellant Benjamin J. Dolinky (Defendant) was convicted in the University Lakes Justice Court of driving under the influence. Defendant contends the trial court erred in denying his motion to dismiss based on a claim of a speedy trial violation. Defendant further contends his conviction was barred by double jeopardy principles. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 23, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1); driving with drugs or metabolite in system, A.R.S. § 28–1381(A)(3); and speed greater than reasonable and prudent, A.R.S. § 28–701(A). Judge Meg Burton-Cahill, denied Defendant’s Motion To Suppress. Defendant’s attorney subsequently advised Judge Burton-Cahill Defendant was going to submit the matter on the record, which would include the testimony at the hearing on Defendant’s Motion To Suppress and the police reports. (R.T. of Aug. 16, 2012, at 7.) Judge Burton-Cahill also considered the report showing the results of the testing of Defendant’s blood. (*Id.* at 8.) After taking a recess, Judge Burton-Cahill stated she was finding Defendant guilty, but she did not specify of what she was finding Defendant guilty. (*Id.* at 9.) Judge Burton-Cahill then attempted to impose sentence. (*Id.* at 10–12.) On that same day, Defendant filed a timely notice of appeal. On June 13, 2013, this Court issued its ruling affirming the judgment, but remanding for resentencing.

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On July 25, 2013, Defendant filed a Petition for Post-Conviction Relief in which he alleged he would not have submitted the matter on the record if Judge Burton-Cahill had followed the proper procedure and advised him of the matters required by *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980). The matter proceeded before a different trial judge, Judge Clayton Hamblin, who concluded Defendant had established prejudice and therefore granted Defendant a new trial. (R.T. of Jan. 9, 2014, at 12, 15, 17.) On January 23, 2014, the State filed a motion to stay the proceedings so it could file a petition for review, and on February 5, 2014, filed a timely Petition for Review. On May 23, 2014, this Court issued its ruling wherein it granted review but denied relief to the State. It remanded the matter to the University Lakes Justice Court so that Defendant could either proceed to trial, enter a plea of guilty, or submit the matter on the record.

On July 10, 2014, the trial court entered the following order:

The Court, having reviewed the 05/23/14 Minute Entry issued by the Honorable Crane McClennen of the Maricopa County Superior Court, and noting that neither party has filed any subsequent pleadings with this Court,

THE COURT FINDS:

1. Judge McClennen remanded this matter back to this Court “so that the Defendant may either proceed to trial, enter a plea of guilty, or submit the matter on the record, . . .”
2. Approximately 48 days has elapsed since the 5/23/14 Minute Entry.
3. Neither party has filed a pleading to indicate that the Defendant will enter a plea of guilty or submit this matter on the record.
4. After approximately 48 days of silence, therefore, this Court finds that the Defendant wants to exercise his right to trial.

IT IS ORDERED setting this matter to jury trial on Friday, October 3, 2014, at 8:00 am.

On July 16, 2014, Defendant’s attorney filed a Notice of Impending Expiration of Rule 8.2(c) Speedy Trial Time Limit, contending the trial had to commence within 60 days of this Court’s May 23, 2014, ruling, which would have been July 22, 2014. On July 21, 2014, the State filed a Response, contending the trial had to commence within 90 days of the mandate from this Court (which the State contended was issued May 29, 2014), so the trial had to commence on or before August 23, 2014. On July 22, 2014, Defendant’s attorney filed a Reply.

On August 26, 2014, the trial court denied Defendant’s motion with the following order:

IT IS FURTHER ORDERED,

That Defendant waived his right to the Rule 8.2 speedy trial limit by remaining silent on his option to either “proceed to trial, enter a plea of guilty or submit this matter on the record” (see the 5/23/14 Maricopa County Superior Court Minute Entry). Because of the Defendant’s waiver and failure to alert the Court of his procedural choice, on July 10, 2014, the Court on its own motion set the matter for a jury trial on Friday, October 3, 2014. By the extremely late filing of his Notice of Impending Expiration of Rule 8.2(c) on July 16, 2014—well AFTER the Court already set the trial date in its 7/10/14 Order, the Defendant’s actions continue to be a waiver of his Rule 8.2 speedy trial limit.

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On September 2, 2014, Defendant's attorney filed a Motion To Dismiss Prosecution With Prejudice for Violation of Rule 8 Speedy Trial Limit, contending that, regardless of whether the last day was July 22, 2014, or August 23, 2014, it was now past the last day. On September 16, 2014, the State filed a Response, and on September 23, 2014, Defendant's attorney filed a Reply. On September 23, 2014, the trial court denied Defendant's motion and affirmed the October 3, 2014, trial date.

On October 2, 2014, Defendant's attorney filed a motion to continue the October 3, 2014, trial date, which the trial court granted. On October 13, 2014, Defendant's attorney filed a motion to continue the October 17, 2014, trial date, which the trial court granted and set the trial for November 11, 2014. Trial then began on November 14, 2014, and on that date the jurors found Defendant guilty of the (A)(3) charge and not guilty of the (A)(1) charge. The trial court imposed sentence, and 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 finding Defendant had waived the Rule 8 time limits.*

Defendant contends the trial court abused its discretion in finding he had waived the Rule 8 time limits. The applicable rule of procedure provides as follows:

c. New Trial. A trial ordered after a mistrial or upon a motion for a new trial shall commence within 60 days of the entry of the order of the court. A trial ordered upon the reversal of a judgment by an appellate court shall commence within 90 days of the service of the mandate of the Appellate Court.

Rule 8.2(c), ARIZ. R. CRIM. P. The Arizona cases further provide as follows:

A defendant, however, can waive his objection to denial of even the constitutional right to a speedy trial by not raising it in a timely manner.

State v. Guerrero, 159 Ariz. 568, 570, 769 P.2d 1014, 1016 (1989).

Although *Guerrero* did not determine precisely what constitutes a timely objection to a potential Rule 8 violation, we now hold that *Guerrero* requires a defendant to object *before* the 150-day period expires in order to avoid a waiver of the Rule 8 violation. . . .

The defendant cannot wait until after the 150-day period has expired and then claim a Rule 8 violation after it is too late for the trial court to prevent the violation.

State v. Swensrud, 168 Ariz. 21, 22-23, 810 P.2d 1028, 1029-30 (1991) (emphasis original); *accord*, *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997) ("Here, we find that although the period between defendant's arraignment and trial was unprecedented [more than 5 years], defendant waived his right to object by not objecting when the violation was occurring.").

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1. *What was the applicable time period.*

The State contends the applicable time period was 90 days, while Defendant contends the applicable time period was 60 days. Under Rule 8.2(c), the time period is 90 days “upon the reversal of a judgment by an appellate court.” The present matter did go to an appellate court (this Court), but this Court did not order a “reversal of a judgment,” and instead affirmed the decision of the trial court granting Defendant a new trial. Thus, in the present matter, “trial [was] ordered . . . upon a motion for a new trial” (the petition for post-conviction relief). The applicable time period was therefore 60 days.

2. *When was the last day.*

As noted above, because the trial court ordered a new trial, the trial was required to be held “within 60 days of the entry of the order of the [trial] court.” Judge Hamblin entered his order for a new trial on January 9, 2014, thus the trial had to commence within 60 days of that date, or March 10, 2014. On January 23, the State filed a motion to stay the proceedings so it could file a petition for review, and did so on February 5. The time after January 23 was excluded, and on that date 14 days had already elapsed, leaving 46 of the 60 days remaining. On May 23, 2014, this Court issued its ruling denying relief to the State, which meant time was no longer excluded, so the trial was required to be held within the remaining 46 days, or by July 8, 2014. On July 10, 2014, the trial court set the matter for trial on October 3, 2014.

3. *Did Defendant waive the Rule 8 time limits.*

As noted above, a defendant is required to object *before* the time period expires in order to avoid a waiver of the Rule 8 violation. *Swensrud*, 168 Ariz. at 23, 810 P.2d at 1030. As discussed above, the last day was July 8, 2014. Defendant’s attorney did not give notice of the expiration of the Rule 8.2(c) speedy trial time limits until July 16, 2014, which was 8 days *after* the time period expired. The trial court therefore correctly ruled that Defendant had waived the Rule 8.2 speedy trial limit.

B. *Does the record show a double jeopardy violation.*

Defendant contends his conviction violates double jeopardy. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant’s case, error that takes from the defendant a right essential to the defendant’s defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). It is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. West*, 176 Ariz. 432, 440–41, 862 P.2d 192, 200–01 (1993); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988). In the present case, Defendant contends on appeal his conviction for driving under the influence violated double jeopardy, but he never made that argument to the trial court. Although Defendant alleges error, he fails to argue how any error was fundamental. Defendant has thus waived this issue.

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Because Defendant never raised the issue with the trial court, there is nothing in the record to support Defendant's claim of double jeopardy. Defendant has attached to his Appellant's Memorandum documentation showing he was charged in CR 2012-109165 with possession or use of marijuana, and that the matter was dismissed because Defendant completed a drug diversion program. Assuming this Court were to take judicial notice of these documents, they would show the State dismissed the charges *ab initio*, which has the same effect as though Defendant were never charged with this offense, thus Defendant never was in jeopardy. And because Defendant never was in jeopardy, there could be no double jeopardy violation.

Moreover, even if it were construed that Defendant was placed in jeopardy in the marijuana charge, the record appears to show the basis of the charge was that Defendant *possessed* marijuana. Thus, to the extent the DUI charge was based on the marijuana in his system and thus his use of the marijuana, different facts supported that charge, so again there was no double jeopardy.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly found Defendant had waived the Rule 8 time limits by not objecting in a timely manner. This Court further concludes Defendant has waived any claim of double jeopardy by not raising that claim with the trial court.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the University Lakes Justice Court.

IT IS FURTHER ORDERED remanding this matter to the University Lakes Justice 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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