


NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1637



STATE OF LOUISIANA

VERSUS

KELVIN C. THOMAS

Judgment Rendered: May 6, 2011

On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa
Trial Court No. 98313 "H"

Honorable Zorraine M. Waguespack, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Kelvin C. Thomas, was initially charged by grand jury indictment with one count of first degree murder, a violation of LSA-R.S. 14:30, and pled not guilty. Thereafter, the State amended the indictment to charge one count of second degree murder, a violation of LSA-R.S. 14:30.1, and the defendant pled not guilty. Following a jury trial, the defendant was found guilty of the responsive offense of manslaughter, a violation of LSA-R.S. 14:31. He was sentenced to twenty-five years at hard labor. He now appeals, contending his incarceration prior to trial “shocks one’s sense of justice,” and his conviction by a non-unanimous verdict violated his rights under the United States Constitution. For the following reasons, we affirm the conviction and sentence.

FACTS

On March 26, 2001, the victim, Vincent Bacile, was shot to death during an attempted armed robbery by two masked robbers at the Piggly Wiggly in Independence, Louisiana. After fatally shooting the victim, the robbers jumped over his body and unsuccessfully tried to force their way into the store’s office. Gary Matthews¹ was working in the store at the time of the crime. He identified the defendant at trial and indicated that prior to the crime, the defendant had told him that the defendant owed Darnell Milton (Matthews’ cousin) money and asked Matthews if he worked at the grocery store. According to Matthews, approximately two days later, he, the defendant, and Christopher Johnson² planned that the defendant and Johnson would rob the Piggly Wiggly after it closed at 9:00 p.m. Matthews told the defendant and Johnson about an attic in the store where

¹ Matthews indicated he was charged with second degree murder and armed robbery following the crime and, in exchange for an eight-year sentence and his agreement to testify truthfully about the crime, was allowed to plead guilty to conspiracy to commit armed robbery.

² Johnson was charged with first degree murder following the crime. In exchange for a twenty-five year sentence and his agreement to testify truthfully about the crime, Johnson was allowed to plead guilty to manslaughter.

they could hide. Immediately prior to the crime, Matthews' cousin, Angela Taylor, telephoned him and stated, "They in the store."

CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

In assignment of error number one, the defendant argues that the delay between his arrest and the trial violated his constitutional right to a speedy trial.

A defendant's right to a speedy trial is a fundamental right imposed on the states by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See also LSA-Const. art. I, § 16; **State v. Love**, 2000-3347 (La. 5/23/03), 847 So.2d 1198, 1209. The underlying purpose of this constitutional right is to protect a defendant's interests in preventing oppressive pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. **Id.** (citing **Barker v. Wingo**, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972)). The right to a speedy trial is a more vague concept than other procedural rights. **Love**, 847 So.2d at 1209. It is, for example, impossible to determine with precision when the right has been denied. **Id.** The amorphous quality of the right leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. **Id.** This is indeed a serious consequence, because it means that a defendant who may be guilty of a serious crime will go free without having been tried. **Love**, 847 So.2d at 1209-10.

In determining whether a defendant's right to speedy trial has been violated, courts are required to assess the following factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. **Love**, 847 So.2d at 1210 (citing **Barker**, 407 U.S. at 530, 92 S.Ct. at 2192). Under the rules established in **Barker**, none of the four factors listed above is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." **Id.** 407 U.S. at 533, 92 S.Ct. at 2193. Instead, they are "related factors and must be considered together ... in a

difficult and sensitive balancing process.” **Id.** Unless the delay in a given case is “presumptively prejudicial,” further inquiry into the other **Barker** factors is unnecessary. **Love**, 847 So.2d at 1210. Barring extraordinary circumstances, courts should be reluctant indeed to rule that a defendant has been denied a speedy trial. **State v. Alfred**, 337 So.2d 1049, 1057 (La. 1976) (on rehearing).

The defendant was arrested on March 27, 2001. He first asserted his right to speedy trial on April 23, 2001. However, this motion was invalid for failure to include an affidavit by defense counsel certifying that the defendant and his counsel were prepared to proceed to trial within one hundred twenty days. See LSA-C.Cr.P. art. 701(D)(1)(a). Thereafter, on May 3, 2001, the defendant was indicted for first degree murder. On April 21, 2003, the defendant moved to quash for violation of his speedy trial rights. However, on October 13, 2004, the defense indicated this motion was “premature” and withdrew the motion. The defense advised the court that the chief public defender had indicated he was anticipating funds from the legislature in January or February of 2005, and at that time, he would allocate the defense funds for experts. Additionally, on November 20, 2007, the defense advised the court that discovery was still “at the initial stages” and it was not prepared to go forward. On September 29, 2009, the defense again moved to quash for violation of speedy trial rights. Following a hearing, the motion was denied, and trial commenced on October 27, 2009.

At the hearing on the motion to quash, the trial court questioned the validity of the motion for speedy trial, noting the defense had moved for multiple continuances in the case. The defense indicated it had asked for continuances primarily due to funding issues and, thereafter, due to discovery issues. The State pointed out the large number of continuances in the case (approximately fifteen motions for continuance by the defense between September 3, 2002, and February 17, 2009, and six joint motions for continuance between January 15, 2002, and

November 9, 2005), and the fact that the case had been continued until at least 2003 because attorneys from the public defender's office had withdrawn from the case. Thereafter, also in 2003, the public defender's office withdrew from the case due to conflict of interest and appointed the present defense attorneys, but further delays occurred because they had to attend a seminar to satisfy public defender regulations for certification. The State also pointed out that the defense had formally withdrawn its claim of denial of speedy trial in 2004. The State indicated that on June 24, 2008, it reduced the charge against the defendant from first degree murder to second degree murder to expedite movement of the case to trial. Additionally, the State argued that the defense had failed to show it had suffered prejudice in its ability to defend the case. The State indicated one of its witnesses had died during the delay, and at least two of its other witnesses were no longer available. The defense replied that any prejudice from the delay should benefit the defendant and, moreover, it had alibi witnesses (whom it did not name), who had become unavailable due to the delay.

The trial court noted the case had initially been delayed because one defense attorney withdrew, the next attorney was not certified, and then the Office of the Public Defender withdrew due to a conflict of interest. The court also noted funding issues had arisen in the case in 2004 and 2006. The funding issue in 2006 concerned a refusal to pay the defense because of lack of certification, which required delays while the certification was obtained. The court found that the defense had asked for multiple continuances and denied the motion to quash.

Prejudice to the defendant should be analyzed in light of the following three interests that the right to speedy trial was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. **Love**, 847 So.2d at 1212.

In the instant case, the pretrial incarceration of the defendant was not oppressive. Until the State amended the charge to second degree murder, the defendant had no right to bail because he was charged with a capital offense. See LSA-C.Cr.P. art. 331(A).

The defendant also failed to establish specific prejudice to the defense arising from the delay. In **State v. Dyer**, 2006-0619 (La. 7/11/06), 933 So.2d 788, 792 (per curiam), cert. denied sub nom., **Thomas v. Louisiana**, 549 U.S. 1122, 127 S.Ct. 945, 166 L.Ed.2d 722 (2007), the supreme court found that the defendants' claim that they had lost two important witnesses, one whom they named and claimed had died, failed to show specific prejudice from the delay without details as to why those witnesses were material. Further, the court noted the delay in the case did not necessarily inure solely to the detriment of the defendants because "time can tilt the case against either side ... [and] one cannot generally be sure which [side] it has prejudiced more severely." **Dyer**, 933 So.2d at 792 (quoting **Doggett v. United States**, 505 U.S. 647, 655, 112 S.Ct. 2686, 2693, 120 L.Ed.2d 520 (1992)). In **Love**, 847 So.2d at 1212-13, the supreme court rejected the defendant's claims that the loss of his two "best" witnesses established sufficient prejudice to prove violation of his right to a speedy trial. The court noted the defendant could not describe the efforts he had made to locate the allegedly missing witnesses.

A thorough consideration of the **Barker** factors as applied to the facts of this case does not warrant the "unsatisfactorily severe remedy" of dismissal of the indictment. The record does not indicate the delay in this case was the result of a bad faith effort by the State to secure a tactical advantage over the defendant or from negligence in failing to press forward with the case. Rather, this case was delayed because of the complexities of trying a capital case, funding problems, and

counsel certification problems. The State was reasonably diligent in prosecuting the case. See Dyer, 933 So.2d at 791-92.

This assignment of error is without merit.

CONSTITUTIONALITY OF NON-UNANIMOUS VERDICT

In assignment of error number two, the defendant argues that his conviction by a non-unanimous verdict under LSA-C.Cr.P. art. 782(A) violated his federal constitutional rights. In the alternative, he reserves his right for further review should the United States Supreme Court rule that unanimous verdicts are required in criminal felony cases.

Prior to trial, the defendant moved to have LSA-C.Cr.P. art. 782(A) and LSA-Const. art. I, § 17 declared unconstitutional. At the hearing on the motion, he argued that the United States Supreme Court had granted review in a case from Oregon on the issue of non-unanimous verdicts and he wanted to reserve his rights in the event of a favorable ruling, which could be retroactively applied. The State noted no decision had been rendered in the Oregon case, and under the existing law, the non-unanimous verdict scheme was constitutional. The trial court denied the motion, but reserved the defendant's rights in the event of a ruling favorable to his position from the United States Supreme Court. Following the verdict, jury polling indicated eleven of the twelve jurors had voted to convict the defendant of manslaughter.

Louisiana Code of Criminal Procedure article 782(A) is constitutional and does not violate the Fifth, Sixth, and Fourteenth Amendments. **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, 743; **State v. Jones**, 2009-0751 (La. App. 1st Cir. 10/23/09), 29 So.3d 533, 540. There is no authority to the contrary. Accordingly, we are not at liberty to ignore the controlling jurisprudence of superior courts on this issue. See Bertrand, 6 So.3d at 743.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and “error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.” LSA-C.Cr.P. art. 920(2).

The trial court did not wait twenty-four hours after denying the motions for a new trial and for a post-verdict judgment of acquittal before imposing sentence.³ See LSA-C.Cr.P. art. 873; **State v. Wilson**, 526 So.2d 348, 350 (La. App. 4th Cir. 1988), writ denied, 541 So.2d 851 (La. 1989) (“[LSA-C.Cr.] P. art. 873 refers to both motions for a new trial and in arrest of judgment when it requires the twenty-four hour delay. Thus, the trial court’s failure to delay after denying ... a motion for postverdict judgment of acquittal should be analogously treated.”). However, the issue was neither assigned as error, nor was the sentence challenged, nor does the defendant cite any prejudice resulting from the court's failure to delay sentencing. Thus, any error which occurred is not reversible. See **State v. Augustine**, 555 So.2d 1331, 1334 (La. 1990).

CONVICTION AND SENTENCE AFFIRMED.

³ The sentencing minutes indicate the defense waived sentencing delays following the denial of the post-trial motions, but the corresponding transcript does not reflect a waiver. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).