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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA **IN THE SUPREME COURT**

State of North Dakota,)
)
Plaintiff-Appellee,) Sup. Crt. Nos.: 20140142 & 143
)
vs.)
) Dist. Crt. Nos.: 53-2012-CR-01519 & 1520
Billy Owens,)
)
Defendant-Appellant.)

APPEAL FROM THE DISTRICT COURT CONVICTION,
THE HONORABLE JOSHUA RUSTAD PRESIDING

Brief of Appellee, State of North Dakota.

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Statement of the Case

[¶2] On January 3, 2013, Owens filed a motion for speedy trial. The case was set for trial to begin on April 1, 2013 in a January 17, 2013 scheduling order. On or about February 17, 2013, Attorney Rosenquist filed a motion to continue the trial due to a conflict with a case in Grand Forks. This motion was served on the State and Owens.

[¶3] From mid-February, 2013 until mid-March, 2013, Owens had no complaints to the court about the conflict noted in Attorney Rosenquists's motion. On March 11, 2013, Owens wrote a letter to the District Court complaining about his attorney's performance and wanting to fire him. The final pre-trial conference for the trial set to begin on April 1, 2013, was held on March 12, 2013. It was during this pre-trial conference that Owens fired Attorney Rosenquist on the record and agreed that this course of action would be good cause to schedule the trial outside of the ninety (90) day window.

[¶4] Owens received a second court appointed attorney, Nicole Foster. Attorney Foster then attempted to schedule the matter for a preliminary hearing, despite Owens

having previously waived the same. Once this matter was addressed, the case was put on the trial calendar.

[¶5] On May 16, 2013, Owens filed a motion for reconsideration of waiver of speedy trial. In the motion, Owens claimed that he "understandably never understood any subsequent actions he took to be waiving this right." He further claimed that he "was not informed that doing so [consenting to motion to continue], would cause such a great delay in the proceedings." He further contended that he never intended to waive his right to a speedy trial. The motion also contended that Owens believed that the District Court would be able to reschedule a five (5) day trial in just two weeks after the original scheduled date.

[¶6] The District Court subsequently rejected Owens' motion for reconsideration of the speedy trial demand. This seemed to have triggered a motion to dismiss which generally made arguments about timing and incarceration. This motion was also rejected by the District Court.

Law and Argument

I. The District Court correctly determined that Owens had waived his speedy trial demand.

[¶7] The District Court was correct in its determination that Owens waived his speedy trial demand. During the Final Pre-Trial Conference, the Court asked Owens about what he wanted to do with the attorney situation as Owens had fired Attorney Rosenquist prior to the conference. Attorney Rosenquiest had a scheduling conflict in which he had to try a case in Grand Forks County. The District Court expressly asked

Owens if he understood, and asked if he agreed that the situation was good cause for the trial to be reset. Owens answered yes.

[¶8] It was against this backdrop that Owens contended that he never understood that he was waiving his speedy trial demand/rights. E.g. (53-2012-CR-01519 Docs. No. 81 & 82). It is unclear precisely how much clearer the record need be than the actual asking of Owens by the District Court. While this exchange was omitted from both Owen's motion made by Attorney Foster and his current claims, the State notes it below:

> **The Court:** … I know previously you had requested a speedy trial and we did get the court date in with significant wiggling around of other court calendars so that you would get in within the 90 days from your request.
>
> You understand that the Court grants this continuance basically based on your request that we are going to be outside that 90 days and that stipulation to your counsel withdrawing or the stipulation to the trial being continued is going to indicate good cause for going outside of that 90 day speedy trial - -
> **The Defendant:** Yes.
> **The Court:** - - area, do you understand that? (Final Pre-Trial Conference transcript 6:4-18) (boldface added for contrast).

> **The Court:** Mr. Owens, obviously this means that the trial currently scheduled for April 1st through the 5th is going to be taken off the trial calendar. We will wait until you get assigned new counsel until we reschedule that trial and when we reschedule that obviously we hope that we won't have any further conflicts with other court dates because we do check with counsel as to whether they've got anything else schedule before we set these matters for trial. Don't know what happened in the current situation but I will indicate that it won't happen again. Do you have any questions?
> **The Defendant:** No, your honor. (Final Pre-Trial Conference transcript 6-7) (boldface added for contrast).

[¶9] This situation was created by Owens and his effective firing of Attorney Rosenquist. E.g. (53-2012-CR-01519 Doc. No. 56). The Defendant was informed that changing counsel would create even more delay than just attempting to reset the case due

to needing to appoint a new attorney. For all practical purposes, Owens created the delay by his actions. E.g. Everett v. State, 2008 ND 199, 757 N.W.2d 530.

[¶10] Owens would have also known of the difficulties in rescheduling as the Court told him that the first round of scheduling required moving other matters around to accommodate his demand instead of finding good cause to schedule the four-day trial outside of the 90 days due to docket congestion.

[¶11] Owens also moved to dismiss the case claiming: "Mr. Owens anticipated that his speedy trial demand would remain in place as he proceeded forward with his new attorney." E.g. (53-2012-CR-01519 Doc. No. 87). This is despite his obvious agreement that firing his attorney and the process for obtaining another one would be good cause to reschedule the trial outside of the ninety (90) day window. The District Court correctly rejected the motion.

[¶12] Owens has cited no authority for the position that after appointing a new attorney the court should have scheduled Owens' next trial within the 90-day speedy trial window, which would have been June 25, 2013. The District Court already juggled a congested schedule to meet his first demand with regard to a four day jury trial. He has cited no authority which states that a defendant can keep demanding ninety (90) day trial windows as he/she cycles through attorneys.

II. Owens was not prejudiced by the delay caused by his actions.

[¶13] Owens claims that he suffered prejudice as a result of the resetting of his trial date. He assumes that a cooperating witness would not have been available if the trial had been reset to within ninety (90) days of the final pre-trial hearing. Other than

pure speculation, he has presented nothing which definitively shows that such an outcome would occur.

[¶14] Owens further provides a date, ninety (90) days from the date of the first final pre-trial conference, to this court which was never in existence for purposes of scheduling this matter, and then claims that if the trial had been set on that newly fabricated date, the witness would not have been available. As this date was never present in any of the record, witness availability was never checked because there would never have been any reason to do so. For these reasons, any claims with regard to witness availability, or co-defendant cooperation, with regard to this date are pure fantasy. This claim is similar to appellants who raise new arguments solely on appeal and then

[¶15] Once Owens received new counsel, Attorney Foster, the matter was not returned directly to the trial calendar likely because Attorney Foster made a request for a preliminary hearing dated March 28, 2013. E.g. (53-2012-CR-01519 Doc. No. 77). The State noticed that Owens had waived the preliminary hearing earlier in the process, and objected to the same.

[¶16] During the period of time between his firing of Attorney Rosenquist and his ultimate trial date, Owens was released on bond. However, he repeatedly failed to comply with his conditions of bond, including failing to appear for court proceedings and leaving the State of North Dakota. While Owens was eventually transported back from Idaho, and returned to North Dakota custody, he had been released from jail which removes the potential for prejudice due to prolonged incarceration. See. State v. Moran,

2006 ND 62, 711 N.W.2d 915. Further, nothing in the record shows that Owens was suffering terrible anxiety or concern. Id.

III. The District Court properly allowed the receipts into evidence.

[¶17] One of the critical requirements of N.D.R.Crim.P 16 is that the materials must be in the possession of State. Here, the receipts were in the possession of a represented co-defendant who had been uncooperative for much of the pendency of the case. This was noted in the State's motion with regard to them. There was also some uncertainty as to which receipts still existed.

[¶18] As soon as the State received the information, it immediately provided copies to the defense. The State obtained the copies at about 2:41 P.M. on October 2, 2013. The State emailed the information to Attorney Foster at 4:43P.M. on October 2, 2013. The emails were attached to the State's motion for admissibility. Roughly two hours passed between the State receiving the information and it being transmitted to the defense, it is unclear what more the State is supposed to have done. E.g. United States v. Longie, 984 F.2d 955 (8th Cir. 1993)(one day turnaround of information).

[¶19] For comparison, this Court found the actions in Norman to be in compliance with N.D.R.Crim.P. 16. In Norman, the prosecutor realized that the murder weapon held six shots and that only five shots were accounted for. State v. Norman, 507 N.W.2d 522 (N.D. 1993). The prosecutor later learned that the defendant had stated he had test fired the weapon into a tree at a different location. Id. Once the prosecutor learned of the information, the day before trial, the prosecutor passed it on to the defense. Id. At 526-527.

[¶20] Here, the receipts were not in the possession of the State until defense counsel for the co-defendant provided them. The information was immediate passed to the defense. As the Norman Court noted: "Immediately upon discovering the information the prosecutor disclosed it to … counsel. The rule does not require more." Norman, 507 N.W.2d 522 at 527. The State submits that if the actions in Norman complied with N.D.R.Crim.P. 16, the actions here, where the information was not even in the possession of the State, would also comply.

IV. Sufficient evidence was presented at trial to convict Owens.

[¶21] There is little support in Owen's Brief to cover this issue. There are simply generic references to "transcript" without any indication as to what in the transcript is supposed to show that he did not conspire with others to commit aggravated assault on Kenneth Moore, or that he did not run a criminal organization for the purposed of committing felony offenses in North Dakota. However, the general claim that the transcript as a whole fails to show sufficient evidence is simply false.

[¶22] At trial, both Kenneth Moore and Dallas Wellard testified about the criminal activities of Owens. This testimony referenced Owens supplying drugs to individuals for sale and other matters.

[¶23] Dallas Wellard referenced discussions with Owens about dealing in methamphetamine. (Appeal Transcript Vol. III 377-378). He also noted that Owens had supplied him with methamphetamine. Id. At 377-378. He noted that Owens provided methamphetamine in large quantities to others for sale. Id. At 378. Wellard specified that Owens would provide methamphetamine to Paul Huckstep and an individual known as Steven, for purposes of sale. Id. At 378. Wellard stated that Owens got money back from

the sales of methamphetamine. Id. At 378. Wellad stated that he had personally observed transactions, and that the information he had received from Owens was that this was being done to make money. Id. At 379.

[¶24] Wellard was able to explain the process of "fronting," or buying drugs on credit from a supplier in anticipation of selling them and paying the supplier back out of the proceeds from the sale. He also explained how this process worked in Owen's operation. Id. At 380-81.

[¶25] Wellard next explained how the money side of the operation worked, including him returning money to Owens' residence itself or sending it to persons of Owens' choosing. Id. At 381-385. Wellard specified that these were drug proceeds. Id. At 382.

[¶26] Wellard described seeing and/or hearing Owens' reaction when he believed that people "shorted" him, or cheated him out of what he thought were his rightful proceeds. Wellard told the jury about Owens being angry at Kenneth Moore due to what Owens believed was Moore's breaking into his trailer and stealing items. Wellard stated that Owens offered $1,500.00 in bounty or reward for kicking Moore's teeth in. Id. At 388. Wellard also told the jury that Owens wanted proof brought back to him that the assault had occurred. Id. At 388.

[¶27] Later, Wellard testified that he had transported Paul Huckstep to the location where the shooting had occurred under the premise that the assault as going to take place and that he was going to watch it so that he could report back to Owens. Wellard testified that he called Owens at about 1:07A.M. on May 10 to report to what happened to Owens. Id. At 395. This testimony was later corroborated with information

provided to the jury about cell phone calls originating from Wellard's cell phone number between May 9th and May 10th. Id. At 431-436. Positional data provided by Wellard with regard to transporting Huckstep was later corroborated by information provided about cell phone positional data from Wellard's and Huckstep's cell phones. Id. At 431-436.

[¶28] Wellard also testified that he had been a business owner in the past, and was familiar with business organization, hiring and firing employees, etc. Based on this experience, he characterized what Owens was running as something similar to a business organization.

[¶29] Based on Wellard's testimony alone, the jury heard that Owens provided material support for the drug dealing operation, brought people into the operation, profited from the operation, and conducted his version of employee "discipline" within the organization. Drug dealing is a felony offense in North Dakota under the Uniform Controlled Substances Act. The State submits that the information presented about offering bounties, etc., for the infliction of serious injuries on Moore and directing others to bring back proof that he got what he paid for, represent overt acts to further the objectives of the conspiracy to commit aggravated assault.

[¶30] Kenneth Moore testified that there were expectations placed on him by Owens about how much methamphetamine Moore was supposed to sell per unit time, and that there was a staggered compensation scheme based on how much methamphetamine was sold per unit time. (Appeal Transcript Vol. II 288-292). He also explained the process by which methamphetamine was "fronted" to him by Owens, and Owens' reaction if he did not get paid as expected. Id. At 291-293.

[¶31] Kenneth Moore testified about the quantities of methamphetamine that Owens was moving, and referenced a "craft box" that was full of crystal methamphetamine. Id. At 295-296. He also testified that he would get about 1 ounce, or approximately 28 grams from Owens for purposes of sale when he would pick up his product. Id. At 295-296.

[¶32] Again, the jury heard testimony regarding what are obvious felony activities being orchestrated by Owens within North Dakota. This falls directly in line with one of the ways to arrive at leading a criminal organization under N.D.C.C. Chapt. 12.1-06.1

[¶33] The jury did hear testimony from Paul Huckstep, who essentially stated that what had been referenced before never happened. However, it is worth noting that Owens' counsel effectively discredited him by derogatory statements about him during closing. Further, as the jury was instructed on witness impeachment, and they heard that Huckstep is a felon, there was no requirement that the jury believe anything said by Huckstep. Owens did testify, but he has presented no authority that requires the jury to believe his story over the information provided by other witnesses.

[¶34] Ultimately, the question of sufficient evidence is whether a rational factfinder could find the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. State v. Ostby, 2014 ND 180, ¶20, 853 N.W.2d 556 citing State v. Coppage, 2008 ND 134, 751 N.W.2d 254.

[¶35] Here, the jury heard from two individuals who were directly involved in Owens' criminal organization. They heard how the drug and money distribution worked, and that Owens had even set up a scaled compensation program to encourage the sale of

more methamphetamine. They heard that Owens had large quantities of methamphetamine that he was selling in such a manner, to include a roughly 12" x 6" x5" craft box full of crystal methamphetamine. The jury heard that Owens directed members of this organization to "discipline" Kenneth Moore by kicking his teeth in, that Owens offered a bounty for the action, and that Owens demanded proof of results.

[¶36] The testimony of Dallas Wellard was in part corroborated by cellular telephone data from Wellard's and Huckstep's phones showing call times and locations of the calls/texts. Dallas Wellard's testimony was also corroborated by Kenneth Moore's statements regarding how Owens engaged in methamphetamine deals with him. Dallas Wellard's testimony regarding who Oweens was angry at Moore was corroborated by information provided from Moore. (Appeal Transcript Vol. II 296-298).

[¶37] This information provided more than sufficient evidence for a rational jury to convict Owens of leading a criminal organization to commit felony offenses in North Dakota, and to convict Owens of conspiring with others to commit aggravated assault.

V. Owens' prosecutorial misconduct claim lacks merit.

[¶38] While the comment was made, Owens has presenting nothing which shows the overwhelming amount of material presented against him was insufficient by itself to prove that the Defendant was guilty of what was charged beyond a reasonable doubt. See. State v. Skorick, 2002 ND 190, ¶17, 653 N.W.2d 698. As in Skorick, the jury received the statements by counsel and judge jury instruction regarding statements by the same. Id.

[¶39] Here, the jury heard testimony regarding the ongoing operations of Owens' criminal organization, including the "hit" that was still active until carried out. They also heard the testimony from Owens and Paul Huckstep, a person so difficult to control that

even defense counsel made reference to his lack of controllability. (Appeal Transcript 607-608 [including claims of Attorney Foster being able to read the prosecutor's mind as to witness choice]).

[¶40] The State submits that when one looks at the totality of the evidence presented to the jury, the statement is harmless beyond a reasonable doubt.

Conclusion

[¶41] For the above reasons, the State respectfully requests that this Court affirm the conviction and the District Court's decisions in these cases.

Dated this 24th day of November, 2014.

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vs.	)
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Billy Owens,	)
	)
Defendant-Appellant.	)

_____

[¶1] I, Nathan Kirke Madden, hereby certify that on November 24, 2014, a true and accurate copy of the State's Brief was served on Attorney Grossman via email.

Dated this 24th day of November, 2014.

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