Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Jun 10 2010, 9:21 am
CLERK
of the supreme court, court of appeals and tax court

APPELLANT PRO SE:

CAYLIN P. BLACK
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CAYLIN P. BLACK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A04-0909-CR-501
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall Johnson, Judge
Cause No. 27D02-0802-FA-14

June 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Caylin P. Black, *pro se*, appeals from his conviction after a jury trial of Dealing in Cocaine[1] as a class A felony. Black raises the following restated issues for our review:

1. Was Black's right to a speedy trial violated?

2. Did the trial court err by limiting Black's cross-examination of the confidential informant?

3. Did the State commit a *Brady* violation with respect to discovery of the confidential informant's criminal history?

4. Was Black's trial lawyer ineffective?

We affirm.

On September 25, 2007, the Grant County JEAN team drug task force conducted a controlled buy of cocaine from Black. Marion Police Department Detective Ross Allen was the lead detective, while Marion Police Department Detective Sergeant Mark Stefanatos and Grant County Sheriff's Department Lieutenant Michael Andru also participated in the operation. They used a confidential informant, Maurice Rogers, to select the dealer. Rogers was working with the police in exchange for the dismissal of three class B felony cocaine delivery charges.

The officers equipped Rogers with a camera and a listening device, searched him prior to the buy, provided him with five hundred dollars of buy money, and dropped Rogers off in Black's neighborhood. Rogers had telephoned Black in advance to arrange the buy. Once there, Rogers met with Black, went inside Black's home, gave him the buy money, and Black gave Rogers the cocaine. The cocaine weighed 6.94 grams. The transaction was recorded.

[1] Ind. Code Ann. § 35-48-4-1(b) (West, Westlaw through 2009 1st Special Sess.).

The State charged Black with one count of dealing in cocaine as a class A felony and filed an habitual offender enhancement. A jury found Black guilty of dealing in cocaine as a class A felony and the State dismissed the habitual offender enhancement. The trial court sentenced Black to a term of forty years executed. Black now appeals.

1.

Black argues that his right to a speedy trial was violated because he was brought to trial on this charge seventeen months after he was arrested. Black refers to the state and federal constitutional provisions as well as Ind. Crim. R. 4 in his argument.

Crim. R. 4 (C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

Subsection (F) of that same rule also provides in part that "[w]hen a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in this rule shall be extended by the amount of the resulting period of such delay caused thereby."

The State's duty to try the defendant within one year is an affirmative duty, and the defendant is under no obligation to remind the State of its duty. *Rivers v. State*, 777 N.E.2d 51 (Ind. Ct. App. 2002). Whether a particular delay in bringing a defendant to trial violates the speedy trial guarantee is determined by the specific circumstances of the case. *Id*. The purpose of Crim. R. 4 is to ensure early trials, not to allow defendants to manipulate the means designed for their protection and permit them to escape trials. *Id*.

Generally, a defendant is responsible for any delay caused by his action including seeking or acquiescing in any continuance. *Id*. Moreover, when a trial court, acting within the one-year period of the rule, schedules trial to begin beyond the one-year limit, the defendant must make a timely objection to the trial date or waive his right to a speedy trial. *Id*.

In the present case, Black was arrested on this charge on February 29, 2008 and his trial was set for June 16, 2008. On June 16, 2008, the trial court continued the cause because of the congestion of the court's calendar specifically referring to another case to be tried on that date. Black's trial was rescheduled for September 22, 2008. On September 17, 2008, Black filed a motion to continue his jury trial date, and the trial court rescheduled Black's trial for January 12, 2009. On October 10, 2008, Black filed a motion objecting to the new trial date, but that objection was withdrawn by agreement of the parties on October 27, 2008. On January 12, 2009, the jury trial was rescheduled by the trial court due to congestion of the court's calendar, again specifically referring to another case to be tried on that date. The trial was rescheduled for April 13, 2009. On that date, the trial court continued the case until August 10, 2009 because of congestion of the court's calendar specifically referring to

another trial occurring on that date. On July 6, 2009, Black filed a motion for discharge and a hearing on that motion was held on July 20, 2009. The trial court denied Black's motion and Black's jury trial was held on August 10, 2009.

We review a trial court's ruling on a Crim. R. 4 motion for an abuse of discretion. *Smith v. State*, 802 N.E.2d 948 (Ind. Ct. App. 2004). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effects of the facts and circumstances before it. *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999). The record reveals that the delay in bringing Black to trial was the result of congestion of the trial court's calendar and by a motion for continuance filed by Black, exceptions allowed for by rule. Furthermore, when a trial court schedules a trial beyond the one-year limit, the defendant must make a timely objection to the trial date or waive his right to a speedy trial. *Cole v. State*, 780 N.E.2d 394 (Ind. Ct. App. 2002). Black waited until July 6, 2009 to object to the August 10, 2009 trial date. We find no abuse of discretion in the trial court's decision to deny Black's Crim. R. 4(C) motion for discharge.

Black also claims that his constitutional right to a speedy trial was violated. In reviewing claims of speedy trial right violations, Indiana and federal courts apply the analysis established in *Barker v. Wingo*, 407 U.S. 514 (1972). The four factors involved in the *Barker* analysis are: (1) the length of the delay, (2) the defendant's assertion of his or her right, (3) the government's reason for the delay, and (4) the prejudice to the defendant. *Rivers v. State*, 777 N.E.2d 51. Our review of the record before us leads to the conclusion that Black's constitutional right to a speedy trial was not violated. The delay between the time of Black's arrest and his trial is attributable to congestion of the court's calendar and Black's own

request for a continuance. The prosecution had no reason for delay. Black did not object to the August 10, 2009 trial date until July 6, 2009. Further, Black has failed to establish prejudice. We conclude that Black has failed to show that his constitutional right to a speedy trial was violated.

2.

Black contends that the trial court improperly limited his cross-examination of Rogers, the confidential informant. Prior to trial, the State filed a motion in limine seeking to exclude evidence pertaining to Rogers's criminal history that was more than ten years old, or any evidence of a crime that did not involve dishonesty or was otherwise listed in Evid. Rule 609. After a hearing on the motion, the trial court granted the State's motion, but ruled that Black could elicit testimony or evidence that Rogers was facing three class B felonies when he agreed to work as an informant for the police. The trial court ruled that Black could not elicit evidence of the sentencing range Rogers had faced because it was too speculative.

During re-cross-examination of Rogers, Black attempted to introduce an exhibit setting forth Rogers's criminal history. Black made an offer to prove and after hearing the argument of counsel, the trial court denied the motion to admit the exhibit into evidence. The exhibit containing Rogers's criminal history included many criminal dispositions that were uncertain and many of the entries involved criminal dispositions more than ten years old. Black attempted to elicit testimony through the use of that exhibit related to Rogers's potential sentencing exposure that he sought to avoid by serving as a confidential informant.

The Confrontation Clause of the Sixth Amendment has long been read as securing an adequate opportunity to cross-examine adverse witnesses. *Jarrell v. State*, 852 N.E.2d 1022

(Ind. Ct. App. 2006). The right to cross-examination is satisfied if the defendant has the opportunity to bring out such matters as a witness's bias, lack of care and attentiveness, poor eyesight, or even bad memory. *Id*. The Confrontation Clause of the Sixth Amendment does not prevent a trial judge from imposing limits on defense counsel's inquiry into the potential bias of a prosecution witness. *Collins v. State*, 835 N.E.2d 1010 (Ind. Ct. App. 2005). Rather, trial judges retain wide latitude with respect to the Confrontation Clause. *Id.* Only a clear abuse of discretion warrants reversal. *Id*.

We conclude that the trial court did not abuse its discretion by limiting Black's examination of Rogers regarding his criminal history. Ind. Evid. R. 609 presumes the exclusion of convictions more than ten years old, and the party seeking the admission of such evidence must provide the trial court with specific facts and circumstances in support of its admissibility. *Scalissi v. State*, 759 N.E.2d 618 (Ind. 2001). Here, Black argued only that the evidence established Rogers's bias because of the sentence he faced. Yet, Black was allowed to elicit testimony from Rogers that he faced three class B felony charges "serious charges" when he contracted with the State to work as a confidential informant. *Transcript* at 383. Black elicited testimony that Rogers was doing what he had to do in order to avoid prison time, and that he "desperately" did not want to go to prison. *Id*. Rogers testified that he is or was a heroin addict, and Black elicited the dates of three different charges against Rogers for cocaine delivery or conspiracy to commit cocaine delivery. Rogers also testified that he selected the dealer involved in the controlled buy.

Further, the trial court did not abuse its discretion by limiting Black's ability to introduce evidence of Rogers's potential sentencing exposure had he not chosen to work for

the State as a confidential informant. The sentence Rogers potentially faced could have been anything ranging between six and sixty years without consideration of an habitual offender enhancement. Black had already established Rogers's bias and his desire to help the State in order to avoid a prison sentence. Even if we were to conclude that the trial court abused its discretion by so limiting Black's cross-examination of Rogers, a conclusion we do not reach here, any error would be harmless given the strength of the State's case against Black.

3.

Black asserts that the State committed a *Brady* violation with respect to discovery of Rogers's criminal history. He claims that he learned of the existence of Rogers's criminal history only days before trial and that the State erroneously withheld that information from him.

The State has an affirmative duty to disclose evidence favorable to a criminal defendant. *Badelle v. State*, 754 N.E.2d 510 (Ind. Ct. App. 2001). In *Brady v. Maryland*, the United States Supreme Court held: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To prevail on a claim that the prosecution failed to disclose exculpatory evidence, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. *Badelle v. State*, 754 N.E.2d 510. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

Black's argument fails for several reasons. First, a *Brady* violation is almost always based on evidence that comes to light after trial. *Hubbell v. State*, 754 N.E.2d 884 (Ind. 2001). In that situation, the violation is raised by a motion for a new trial based on newly discovered evidence, or in a motion to correct error. *Id*. Pursuant to Crim. R. 16(A), a defendant must file a motion to correct error in order to address newly discovered material evidence capable of production within thirty days of final judgment which with reasonable diligence could not have been discovered and produced at trial. *Id*. Our review of the record reveals that Black did not file a motion to correct error or a motion for new trial. His claim is waived.

Waiver notwithstanding, the State filed its motion in limine regarding Rogers's criminal history prior to trial. Black argued for the admission of Rogers's complete criminal history at the hearing on the motion, and did not pursue an interlocutory appeal of the trial court's ruling on the State's motion. The defense not only knew about the existence of Rogers's prior criminal history before trial, but attempted to have Rogers's entire criminal history introduced as Defense Exhibit E.

The record presented to us on appeal fails to establish that the State suppressed or failed to disclose Rogers's criminal record. The record shows that the State filed discovery notices and turned over discovery, although what items were included in that discovery is not clear. Nonetheless, assuming without deciding that the State possessed the criminal records, but did not disclose them, Black has failed to establish a *Brady* violation. If favorable

evidence becomes known to the defendant before or during the course of a trial, *Brady* is not implicated. *Farris v. State*, 732 N.E.2d 230 (Ind. Ct. App. 2000).

Black also has failed to show that the evidence was material to an issue at trial. Black was allowed to cross-examine Rogers, within reasonable limits, about his criminal history and that he was facing three class B felony charges when he decided to work as a confidential informant for the State. Black argued that Rogers's complete criminal history should be admitted for the purpose of establishing the range of penalties Rogers was facing. There was no *Brady* violation here.

4.

Black also advances the claim that he received ineffective assistance of trial counsel. In particular, he argues that his counsel was ineffective because he failed to challenge the accuracy of the scales used to weigh the cocaine he sold to Rogers.

A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings. *Jewell v. State*, 887 N.E.2d 939 (Ind. 2008). If the defendant chooses to raise the issue on direct appeal, the appellate resolution of the issue acts as res judicata and precludes its relitigation in subsequent post-conviction relief proceedings. *Id*. Because Black's claim is a "record error", *i.e.*, one that can be evaluated on the face of the record, it is appropriate for us to examine it on direct appeal. *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998).

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State*, 779 N.E.2d 1158 (Ind. Ct. App. 2002). As for counsel's performance, we give considerable

deference to counsel's discretion in choosing strategy and tactics. *Id*. Accordingly, a defendant must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Law v. State*, 797 N.E.2d 1157 (Ind. Ct. App. 2003).

To establish a violation of the Sixth Amendment right to effective assistance of counsel a defendant must prove two components: (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) the deficient performance prejudiced the defendant to the extent that, but for counsel's errors, the result of the proceeding would have been different. *Id*. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id*.

Our review of the record leads us to the conclusion that Black did not receive ineffective assistance of trial counsel. Black claims that his trial counsel failed to challenge the accuracy of the scales used to test and weigh the cocaine sold by Black to Rogers during the testimony of Nicole Jacobs, a forensic drug chemist from the Indiana State Police Laboratory, who tested and weighed the cocaine. While this is correct, Black's trial counsel did raise an objection based on chain of custody at that time.

More importantly though, during the testimony of Detective Ross Allen, the State moved to admit State's Exhibit 3, the cocaine, and State's Exhibit 5, the evidence sheet. Black's trial counsel objected to their admission on chain of custody grounds, a discrepancy regarding the weight of the cocaine, and the lack of evidence that the laboratory scales used to weigh the cocaine were certified. Black's trial counsel made the very argument that Black

claims his counsel failed to make. Trial counsel simply made the argument during the State's attempt to admit the evidence, not earlier. We conclude that Black has failed to establish that he received ineffective assistance of trial counsel.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.