

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SANDY LEE MORRIS, JR.,

Defendant and Appellant.

C064462

(Super. Ct. No.
09F04210)

Defendant Sandy Lee Morris, Jr., asks us to reverse his conviction of first degree robbery and participating in a criminal street gang because he allegedly was not brought to trial timely. Due to a court clerk's calendaring error, the trial court, without objection from the parties, set a trial date on the 62nd day after defendant was arraigned, two days beyond the 60-day limit established by Penal Code section 1382.¹

¹ Undesignated references to sections are to the Penal Code.

Defendant claims the court wrongly denied his subsequent motion to dismiss the case and thereby violated his speedy trial right provided him by section 1382. We disagree and affirm the judgment.

PROCEDURAL BACKGROUND

The court arraigned defendant, along with two codefendants, on November 13, 2009. The 60th day following arraignment was January 12, 2010. However, the court clerk wrote on the arraignment minute order that the 60th day after the arraignment was January 14, 2010. The record does not disclose why the clerk made the error.

The court set trial for January 7, 2010. On that day, the prosecution requested the court trail the case for trial to January 12. Defendant did not object, and the court granted the request.

On January 12, defendant and his two codefendants did not appear for trial. Likewise, defendant's counsel, James Warden, and one of the codefendant's counsel, Rodrigo Mayorga, did not appear for trial. Instead, Warden and Mayorga arranged for the third defendant's attorney, Clemente Jimenez, to appear for them and their clients.

During the hearing on January 12, the trial court trailed the case to January 14, 2010, two days beyond the 60-day period required under section 1382. The record does not disclose who requested the extension or what, if anything, the court said when it granted the extension. Jimenez asked the court to confirm the last day for trial, and the court did so, again

mistakenly confirming that date as January 14. Jimenez did not object to starting trial on that date.

The clerk's handwritten minute order of the January 12 hearing also perpetuated the calendar error, stating January 14 would be the "last day."

On January 14, the case was called for trial, and defendant filed a motion to dismiss pursuant to section 1382. At the hearing on that motion, defendant's counsel, Warden, did not dispute that he had authorized Jimenez to appear in his place to represent defendant in the January 12 proceedings. Jimenez stated he did not object to the court setting trial for January 14 because he thought the court was merely trailing the case within the 60-day period based on the clerk's representation that the 60-day period ended on January 14. The prosecutor also stated the court "said the 14th was the last day," and the parties "were all mistaken as to what the 60th day was and the timeline."

The court denied defendant's motion to dismiss. It did not explain its reasoning. After denying the motion, the court went on to hear additional in limine motions in the case.

After January 14, trial did not resume until January 21, 2010.² On that day, nine days after the 60-day period provided

² The court stated on January 14 trial would not resume until January 21 because the following day, January 15, was a Friday and no court is held on a Friday; the next Monday was Martin Luther King Day, a court holiday; the court would be absent on Tuesday, and Wednesday, the 20th, was a court closure day resulting from the state's budget crisis.

under section 1382 had expired, the jury panel was sworn and voir dire commenced. On January 26, during voir dire, the two codefendants entered no contest pleas, leaving defendant as the sole defendant in the case. Defendant filed a *Marsden*³ motion, which the court denied.

Defendant then asked the court to impanel a new jury, claiming the current jury would draw improper inferences from the two codefendants no longer appearing in the case. The court denied this request.

When proceedings resumed in the jury panel's presence, the court instructed the jurors they were not to speculate why they would not decide the cases against the codefendants, nor were they to consider the codefendants' absence as bearing in any way on defendant's guilt or innocence.

On January 28, defendant moved to continue the trial so that one of the codefendants could testify on his behalf. The codefendant was unavailable to testify until after he had been sentenced. At that time, he was scheduled to be sentenced on March 10, 2010. The court continued this motion until later in the day. The jury was then sworn, and the prosecution called its first witness. Later that day, the court denied defendant's motion to continue the trial.

Ultimately, the jury convicted defendant of first degree robbery (§ 211) and actively participating in a criminal street

³ *People v. Marsden* (1970) 2 Cal.3d 118.

gang. (§ 186.22, subd. (a).) The jury also found true an allegation that defendant committed the robbery in association with a criminal street gang. (§ 186.22, subd. (b)(1).) In a bifurcated hearing, the court determined defendant had previously been convicted of a serious felony within the meaning of the "Three Strikes" law. (§ 1170.12.)

The court sentenced defendant to 16 years in state prison, calculated as follows: the lower term of three years on the robbery count, doubled to six years due to the prior conviction, plus 10 years for the gang enhancement. The court stayed sentence on the gang participation count under section 654.

Defendant asserts the court abused its discretion when it denied his motion to dismiss the case due to trial not commencing within 60 days of his arraignment.

DISCUSSION

Defendant's appeal fails because he consented to continuing trial beyond the 60th day, and because, even if the court erred, he fails to show he was prejudiced by the error.

First, defendant consented to continuing trial beyond the 60th day and thus cannot complain here. The attorney representing defendant at the hearing on January 12 did not object, and in fact agreed to trailing the case to January 14. By so doing, counsel waived defendant's right under section 1382 on defendant's behalf.

Except under circumstances not present here, consent of counsel, without defendant's consent, is sufficient to waive a defendant's right under section 1382 to trial within 60 days of

arraignment. (*Townsend v. Superior Court* (1975) 15 Cal.3d 774, 780.) Moreover, the consent need not be express. Consent is presumed if no objection is made at the time trial is set. (*People v. Taylor* (1959) 52 Cal.2d 91, 93.) Jimenez did not object to continuing trial to January 14. His failure to object waived defendant's right to enforce the 60-day limit.

Second, and assuming for the sake of argument the court erred, defendant fails to show he was prejudiced by the court's action. Initially, defendant claims he is not required to show prejudice. He is incorrect. "Although a defendant seeking *pretrial* relief for a speedy trial violation is not required to make an affirmative showing of prejudice [citation], the situation is different after judgment. [Citations.] 'Upon *appellate review* following conviction, . . . a defendant who seeks to predicate reversal of a conviction upon denial of his right to speedy trial must show that the delay caused prejudice: this court, in reviewing the judgment of conviction, must "weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself.'" [Citation.]" (*People v. Lomax* (2010) 49 Cal.4th 530, 557, italics added.)

Defendant claims he was prejudiced because, had the court started trial within 60 days of arraignment, he arguably would have been tried with the other two codefendants and they may have testified on his behalf at trial. Further, he claims their departure after the jury was aware of them and before they were able to testify affected the fairness of his trial.

We disagree with defendant's argument. Defendant's claims of prejudice are speculation. There is no rational basis to support his assertion that starting trial two days earlier somehow would have prevented the codefendants from changing their plea. Moreover, their departure did not affect the fairness of defendant's trial. The trial court instructed the jurors not to consider the codefendants' absence and we presume the jurors followed that instruction.

The procedural history of this case also demonstrates defendant suffered no prejudice by a two-day delay. On January 12, 2010, when this case was called for trial, neither defendant nor his attorney appeared in court. Then, on January 28, defendant asked to continue trial for at least an additional six weeks in order to obtain a codefendant's testimony. Defendant is trifling with us by claiming he was prejudiced by a two-day delay when he and his attorney found no need to appear at trial when the case was called, and they sought to continue the trial for weeks after that date.

Defendant suffered no prejudice by his trial commencing two days after the 60-day period expired.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

MURRAY, J.