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

THE PEOPLE,

Plaintiff and Respondent,

v.

BERT AYNBINDER,

Defendant and Appellant.

C065993

(Super. Ct. No.
LF011460A)

This is a troubling case. Defendant Bert Aynbinder was charged with three counts of assault with a deadly weapon and by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)),¹ and single counts of felony reckless driving (Veh. Code, § 23105, subd. (a)) and hit and run with an injury (Veh. Code, § 20001), along with enhancements for personally inflicting great bodily injury (§ 12022.7, subds. (a), (d)). Following a jury trial, defendant was convicted of

¹ Further undesignated statutory references are to the Penal Code.

misdemeanor reckless driving (Veh. Code, § 23103) as a lesser included offense of the felony reckless driving count, and acquitted on all other counts, in spite of considerable evidence supporting defendant's guilt on all charges. The trial court sentenced defendant to 90 days in jail, with credit for time served, and imposed various fines and fees which were offset by defendant's excess presentence credits.

On appeal, defendant contends the trial court violated his statutory and constitutional rights to a speedy trial, there is insufficient evidence to support his conviction, and ineffective assistance of counsel. We affirm.

FACTS

On June 28, 2009, Sindy Mendoza was driving back to Sacramento from Lodi in her 1998 Honda Civic with her boyfriend Flacao Vazquez and her four-year-old daughter Brianna. Mendoza noticed a black Chevrolet HHR tailgating her as she drove in the fast lane of Interstate 5. At Vazquez's suggestion, she tapped her brakes to let the driver know he was too close. The HHR braked suddenly but did not back off, so Mendoza motioned for it to pass her, after which she pulled over into the right lane. The HHR pulled into the right lane, so Mendoza returned to the fast lane.

Mendoza lost sight of the HHR for a few minutes, but then came up to the HHR, which was now ahead of her. The HHR slowed down and waited for Mendoza to catch up with it; when the cars were side by side, Mendoza could see the driver, defendant, looking to her, smiling, and making an obscene gesture at her.

Defendant's HHR then swerved towards Mendoza without touching her Civic, causing her to swerve away. When Mendoza got back to the center of her lane, Vazquez suggested she drive close to the car ahead of her to make it harder for the HHR to swerve at her.

Defendant's HHR came next to Mendoza's Civic a second time, where he again swerved at her. As a result, Mendoza swerved into the right lane to avoid the car in front of her, and then back into the fast lane, and eventually to the median, where she lost control of her car. The brakes did not seem to work, so she stepped hard on them, causing her steering wheel to lock. After the car slid and went into a circle, Vazquez pulled on the emergency brake. The Civic crossed into oncoming traffic; two cars drove by, but Mendoza's car was then hit by a semitruck.

Mendoza, Vazquez, and Brianna escaped from the Civic, which then caught fire. Brianna seemed lifeless, so Vazquez administered CPR to her. Brianna came around, but she sustained a severe injury to her intestine and pancreatic duct. As a result of her injuries, Brianna no longer feels full after she eats. Vazquez was uninjured, and Mendoza sustained cuts to her hands and pain in her back and right knee.

Mendoza estimated she drove at speeds between 55 to 70 miles an hour during the incident. Her car was in good working condition before the incident, and she did not have a blowout.

Lawrence Giovanetti was driving nearby at the time. Prior to the crash, he saw defendant's HHR swerving back and forth so violently he thought it might roll over. At the time of the crash, he told his daughter, "Holy cow, that car just got pushed

off the road." Giovanetti then followed defendant's vehicle to get its license plate number.

Jeffrey Brown saw the HHR move to the right lane and the Civic come alongside it. The HHR then appeared to veer towards the Civic, but did not cross the line. The HHR repeated this 15 to 20 seconds later, this time slightly crossing the line. The Civic then slowed down.

Brown sped up and passed the HHR; he did not want it near him. The Civic was less than half a car length behind Brown. As Brown and the Civic started to pass the HHR, the HHR veered into the left lane towards the Civic. The Civic braked, traveled across the right lane into the shoulder, back into the left lane, and then into the median.

Brown identified defendant as the driver of the HHR. After defendant passed him, Brown followed to get the license plate number.

Defendant testified that the Civic cut him off. He signaled his intention to pass to the Civic by flashing his headlights; the Civic slowed sharply and moved, so defendant went to pass. Defendant then noticed the Civic's left front tire was flat, so he slowed down, activated his emergency flashers, flashed his headlights, and straddled the broken line between the fast and slow lanes. He then turned off his emergency flashers and pulled alongside the Civic to notify them about the tire. Next, defendant pulled in front of the Civic and again activated his emergency flashers. He then lost sight

of the car, and thought it had stopped. He never saw any smoke or fire and was not aware there had been an accident.

DISCUSSION

I

Defendant contends the trial court violated his statutory and constitutional rights to a speedy trial. We disagree.

A.

Defendant was arrested on July 6, 2009. He was charged in a felony complaint on July 8, 2009, and arraigned on July 10, 2009. He declined to waive time at the arraignment. An information was filed on August 6, 2009. Defendant again declined to waive time the following day. He continued to refuse to waive time at numerous hearings in August and September 2009.

On October 1, 2009, the day before the jury trial assignment, defendant made a *Marsden*² motion and declined to waive time. The trial court denied the *Marsden* motion, and then suspended proceedings after trial counsel declared doubt as to defendant's competence to stand trial pursuant to section 1368. Defendant was found competent to stand trial on November 12, 2009. Proceedings were reinstated and defendant again entered a no time waiver, with jury trial set for December 18, 2009. Defendant made another *Marsden* motion that day, which the trial court denied.

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

Defendant made another *Marsden* motion on December 3, 2009, which was again denied by the trial court. The trial court granted defendant's fourth *Marsden* motion on December 10, 2009. Defendant agreed to waive time for the appointment of new counsel until January 15, 2010.

On January 7, 2010, new counsel was appointed and defendant withdrew his time waiver. New counsel informed the trial court he was not ready for trial and needed at least 30 days to prepare, and suggested continuing the case until February 26, 2010. The trial court agreed, and found good cause to continue the case to February 26. On February 26, trial assignment was continued to March 2, 2010, with no time waiver.

On March 2, 2010, defendant filed a *propria persona* motion to dismiss pursuant to section 1382, and asserted his federal constitutional right to a speedy trial. The trial court denied the motion and continued the case to March 9, 2010.

On March 9, 2010, the trial court suspended proceedings pursuant to section 1368. Defendant was found competent to stand trial on April 8, 2010. Jury trial assignment was set for June 11, 2010, with no time waivers.

On June 11, 2010, defense counsel informed the trial court he had been in trial since May 24. Counsel noted the 60th day for defendant's statutory speedy trial right was on June 7, but counsel was in trial that day. The prosecutor told the court that defense counsel indicated he was still in trial at a June 3 readiness conference. The trial court then entered a ruling

nunc pro tunc to May 26, 2010, that good cause existed to continue the case to June 18, 2010.

On June 18, 2010, a trial date of June 22, 2010, was set. Jury selection began on June 22, 2010.

B.

Defendant's first trial counsel expressed doubts about defendant's competency to stand trial on October 1, 2009, 56 days from the filing of the information on August 6, 2009. When the trial court found defendant competent to stand trial on November 12, 2009, it noted that defendant did not waive time and that trial would be set within 60 days. After the clerk informed the court that the 60th day was on January 11, 2009, the trial court set December 10 for trial readiness and December 18 for jury trial assignment.

Defendant contends the trial court violated his statutory right to a speedy trial (§ 1382) because the 60-day time limit does not reset when proceedings are suspended pursuant to section 1368.

In a felony case, section 1382, subdivision (a)(2) requires dismissal of an action "when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2" absent a showing of good cause for delay.

In his opening brief, defendant asserts the trial court erred because an inquiry into defendant's competency under section 1368 merely suspends proceedings. In support of his

argument, defendant notes that if defendant is found competent or his competency is restored, "criminal proceedings are *resumed -- not begun anew*" (*Booth v. Superior Court* (1997) 57 Cal.App.4th 91, 100, original italics), and that section 1368 "does not *end* criminal proceedings, it merely *suspends* them." (*People v. Smith* (2003) 110 Cal.App.4th 492, 503, original italics.) Since the trial court did not find good cause to continue the trial, defendant asserts his statutory speedy trial right was violated.

Part 2, title 10, chapter 6 of the Penal Code covers the inquiry into a defendant's competency to stand trial, and includes section 1368. (See §§ 1367 through 1376.) Defendant's opening brief does not address the part of section 1382, subdivision (a)(2) regarding reinstatement of proceedings. The Attorney General argues this provision applies to proceedings suspended pursuant to section 1368 and then later reinstated. Since the proceedings were reinstated on November 12, 2009, the Attorney General asserts the trial court was correct in finding the 60-day time limit of section 1382 was reset on that day.

In his reply brief, defendant asserts for the first time that this provision applies only when the defendant is first found incompetent to stand trial and then later found competent to stand trial. He argues that where a defendant is found competent after proceedings were suspended under section 1368, the matter is simply "resume[d]." (See § 1370, subd. (a)(1)(A).) He further argues that allowing the 60-day trial

limit to be reset after a finding of competency in a section 1368 hearing "could become a method for delay."

The statutory language is clear. Pursuant to section 1368, a trial court suspends proceedings while an inquiry into defendant's competency to stand trial is made. Once defendant is found competent, proceedings are resumed. The provision in section 1382, subdivision (a)(2) regarding the "reinstatement of criminal proceedings" does not distinguish between whether a defendant was initially found competent or found incompetent and then later found to have restored his competency. The exception applies in both instances, causing the 60-day time limit of section 1382 to reset.

Since defendant was found competent to be tried on November 12, 2009, the 60-day time limit under section 1368 reset on that day. The trial court did not err when it set a trial date within 60 days of this time frame.

C.

Defendant asserts the 351-day delay between his arrest on July 6, 2009, and the beginning of his trial on June 22, 2010, violated his state and federal constitutional rights to a speedy trial.

"The right to a speedy trial is a fundamental right. [Citation.] It is guaranteed by the state and federal Constitutions." (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 776, citing Cal. Const., art. I, § 15; U.S. Const., 6th Amend.) The United States Supreme Court has set forth the

following four criteria by which the right to a speedy trial is to be judged: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Barker v. Wingo* (1972) 407 U.S. 514, 530 [33 L.Ed.2d 101, 117] (*Barker*), fn. omitted.)

The first factor -- length of delay -- serves as a triggering mechanism. (*Barker, supra*, 407 U.S. at p. 530.) Generally, a postaccusation delay is considered "'presumptively prejudicial'" when it approaches one year. (*Doggett v. United States* (1992) 505 U.S. 647, 652, fn. 1 [120 L.Ed.2d 520, 528, fn. 1].) Here, defendant was arraigned on July 10, 2009, and the trial began on June 22, 2010. It was therefore 347 days between defendant's arraignment on the information and his trial, so the delay requires "inquiry into the other factors that go into the balance." (*Barker, supra*, 407 U.S. at p. 530.)

The second factor -- the reasons for the delay -- requires "different weights [to] be assigned to different reasons." (*Barker, supra*, 407 U.S. at p. 531.) "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." (*Ibid.*, fn. omitted.)

The trial was suspended between October 1, 2009, and November 12, 2009, to address defense counsel's doubts as to defendant's competency to stand trial. The trial was delayed again from December 10, 2009, to January 7, 2010, in order to appoint new counsel after defendant's successful *Marsden* motion. The trial was continued from January 7, 2010, to February 26, 2010, to give new counsel time to prepare for the case. The trial was suspended yet again from March 9, 2010, to April 8, 2010, for another inquiry into defendant's competency. Finally, the trial was continued from May 26, 2010, until June 18, 2010, because defense counsel was in another trial. This totals 173 days, nearly half the delay between his arraignment and trial. There is no record that any of the remaining delay was attributable to delaying tactics by the People. Since nearly half of the delay was for valid reasons and the remaining delay was for neutral ones, this factor weighs heavily against defendant.

Defendant contends the delays attributable to the inquiries into his competence were not really for his benefit. He is wrong. An incompetent defendant has a due process right not to be tried (*Medina v. California* (1992) 505 U.S. 437, 453 [120 L.Ed.2d 353, 368]), and the section 1368 proceedings were initiated by the trial court, both times at the request of defense counsel, to protect this right. Although defendant was found competent after both hearings, there is no evidence of bad faith or negligence in his counsel's doubts about his competency that triggered both hearings. Defendant's argument incorrectly

presumes his right to a speedy trial is the only right worth protecting.

The third factor -- the defendant's assertion of his right -- weighs in defendant's favor. (*Barker, supra*, 407 U.S. at pp. 531-532.) Defendant explicitly and repeatedly asserted his right to a speedy trial and refused to enter time waivers other than to obtain new counsel.

The fourth and final factor -- prejudice to the defendant -- is to be assessed in light of the interests a speedy trial was designed to protect: preventing "oppressive" pretrial incarceration, minimizing "anxiety and concern of the accused," and "limit[ing] the possibility that the defense will be impaired." (*Barker, supra*, 407 U.S. at p. 532, fn. omitted.) Whether the defense is impaired is the most serious consideration for this final factor. (*Ibid.*)

Here, there is no evidence defendant was subject to "oppressive" pretrial incarceration or he was anxious or concerned other than the fact he repeatedly objected to further continuances. His pro persona speedy trial motion did not stress the oppressive nature of his continued incarceration. Most importantly, there was no evidence the defense was impaired by the delay in bringing this case to trial. None of his witnesses died or disappeared before trial (see *Barker, supra*, 407 U.S. at p. 532) and there was no demonstrated loss of exculpatory evidence.

In a leap of logic, defendant compares the length of his pretrial incarceration to the 90-day misdemeanor sentence he

received, and concludes this is proof that the delay was oppressive. Defendant was not charged with a misdemeanor, but instead faced numerous felony charges involving the potential death of three people and the serious, permanent injury of a child. Two of the assault with a deadly weapon charges would have been serious felonies if the jury convicted defendant on those counts and sustained the great bodily injury allegations. That defendant was convicted only of a single misdemeanor charge and given a 90-day jail sentence simply shows that he was not prejudiced by the delay.

Balancing these factors, we have no difficulty concluding defendant was not deprived of his right to a speedy trial. Defendant faced serious charges. While the delay before trial was lengthy, much of that delay was to defendant's benefit. Defendant was not prejudiced by the delay, as shown by the trial's highly successful outcome for him. His speedy trial argument fails.

II

Defendant contends there is insufficient evidence to support his conviction for misdemeanor reckless driving. The contention is frivolous.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant

guilty beyond a reasonable doubt. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

A person violates Vehicle Code section 23103, subdivision (a) if he or she “drives a vehicle upon a highway in willful or wanton disregard for the safety of persons or property” Defendant asserts the evidence shows he “intentionally swerved back-and-forth behind Ms. Mendoza’s car to warn others that the vehicle had a dangerous left front tire, and that he drove along side Ms. Mendoza attempting to indicate to her that her tire was dangerous, and that he pulled into the left lane when Mr. Brown suddenly pulled in front of him” While these acts were intentional, defendant claims this conduct does not show “a willful disregard for the safety of others with knowledge that injury to others is probable.”

The facts asserted by defendant’s argument are taken from his own trial testimony. As summarized above, the People’s evidence paints a very different story. Mendoza did not have a flat tire, and defendant intentionally swerved into her out of anger. Defendant’s actions caused Mendoza to lose control of her car and drive into oncoming traffic, causing her vehicle to get hit by a semitruck. As a result, both Mendoza and her four-year-old daughter sustained injuries. This evidence is more than sufficient to support his reckless driving conviction, and was enough to sustain his conviction on all of the charged offenses and enhancements.

Defendant is inexplicably fortunate he was convicted of a single misdemeanor. He ignores the testimony of at least two

objective independent eyewitnesses. Based solely on his own self-serving testimony, he asserts his conviction cannot stand. All this is remarkable for itschutzpah.

III

Defendant contends trial counsel was ineffective for failing to make a motion to dismiss for violation of his speedy trial rights. Since defendant's speedy trial rights were not violated, trial counsel was not ineffective. "Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance. [Citation.]" (*People v. Szadziejewicz* (2008) 161 Cal.App.4th 823, 836.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.