

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 30 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JERRY DEAN McCOY,

Appellant.

)
)
) 2 CA-CR 2006-0183
) DEPARTMENT B
)

MEMORANDUM DECISION

)
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044538

Honorable Christopher C. Browning, Judge
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe, Joseph T. Maziarz,
and Alane M. Roby, a student certified pursuant
to Rule 38, Ariz. R. Sup. Ct., 17A A.R.S.

Phoenix
Attorneys for Appellee

DiCampli & Elsberry, LLC
By Anne Elsberry

Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a bench trial, Jerry McCoy was convicted of three counts of kidnapping, three counts of aggravated assault with a deadly weapon or dangerous instrument, and one count each of burglary in the first degree, aggravated robbery, and armed robbery. He was sentenced to concurrent terms of imprisonment on all counts, the longest of which was twenty-one years. On appeal, McCoy contends the trial court reversibly erred in granting the state's motion to continue the trial, violating his speedy trial rights as provided in Rule 8, Ariz. R. Crim. P., 16A A.R.S. We disagree and affirm.

¶2 McCoy was arraigned in December 2004 on the charges at issue here and one additional count that was later dismissed. He was released from custody on an appearance bond on or about December 29. On May 25, 2005, within 180 days from McCoy's arraignment, Judge Christopher Browning scheduled a trial for December 13. The minute entry of May 25 states that McCoy waived applicable time limits, and McCoy does not contend otherwise. *See* Ariz. R. Crim. P. 8.2. The record shows a trial confirmation conference was held on December 2, at which time Judge Michael Cruikshank continued the trial to January 31, 2006, and found both that extraordinary circumstances existed to do so and that the delay would be indispensable to the interests of justice. However, there seems to be no further mention in the record of the January 31 trial date. Instead, on December 5, 2005, Judge Browning entered an "in chambers" order directing that "the trial scheduled for December 13, 2005" would now be heard by Judge Howard Fell instead of Judge

Browning because of a conflict in the court's calendar. A December 13 minute entry (Judge Fell presiding) states the following:

Defendant is not present, out of custody.

The State filed a motion to continue because a witness was not available.

THE COURT FINDS that the delay is indispensable to the interests of justice.

THE COURT FURTHER FINDS that the defendant is not prejudiced by the delay.

[Defendant's counsel] acknowledges that the defendant is not prejudiced by the delay.

¶3 McCoy was eventually tried on March 28, 2006, and he now appeals his resulting convictions on the ground that Judge Fell's order impermissibly violated the speedy trial limits set forth in Rule 8.2, Ariz. R. Crim. P.

A continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. A continuance may be granted only for so long as is necessary to serve the interests of justice. In ruling on a motion for continuance, the court shall consider the rights of the defendant and any victim to a speedy disposition of the case. If a continuance is granted, the court shall state the specific reasons for the continuance on the record.

Ariz. R. Crim. P. 8.5(b).

¶4 The record before us contains neither a copy of the state's motion to continue nor a transcript of the December 13 hearing. Also absent from the record is any evidence

of an objection by McCoy to the continuance of which he now complains. The state is correct that under such circumstances, we both presume the record before the trial court supported its findings, *State v. Spinks*, 156 Ariz. 355, 360, 752 P.2d 8, 13 (App. 1987), and reverse only if the appellant shows the presence of prejudicial fundamental error, *see State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶5 On this record, we cannot say the trial court erred, much less fundamentally so. Moreover, we could hardly find any conceivable error to have been prejudicial where counsel acknowledged below that the delay did not prejudice McCoy. We therefore affirm his convictions and sentences.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge