

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE HUBBARD,

Defendant-Appellant.

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UNPUBLISHED

April 2, 1999

No. 205329

Grand Traverse Circuit Court

LC No. 96-007208 FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of uttering and publishing, MCL 750.249; MSA 28.446. He was sentenced to serve, as a third habitual offender, enhanced sentences of five to twenty-eight years' imprisonment on each count. MCL 769.11; MSA 28.1083. Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court should have granted his motion for a mistrial after (1) a prosecution witness testified that the police asked if he would be willing to take a polygraph test; and (2) police witnesses testified that defendant had been in jail, had received a misconduct ticket while in jail, and had been investigated for another offense. We review a trial court's decision to grant or deny a mistrial for an abuse of discretion. *People v Lumsden*, 168 Mich App 286, 298-299; 423 NW2d 645 (1988). The test to determine whether a mistrial should be declared is not whether there were some irregularities, but whether the defendant had a fair and impartial trial. *Id.* at 298. A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can not be eliminated by other means. *Id.* at 299. Because defendant received a fair and impartial trial, the trial court's denial of defendant's motion for mistrial was not an abuse of discretion.

At the onset, we note that the challenged testimony was the product of unresponsive answers to questions properly propounded by the prosecution. Generally, an unresponsive volunteered answer to a proper question is not cause for granting a mistrial. *Lumsden, supra* at 299. However, because the testimony involved an unsolicited reference to a polygraph examination and three of the four witnesses

were police officers, additional factors are considered. See, e.g., *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983); *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981);

Defendant allegedly took two blank checks from the complainant's residence, signed the checks and then used the identification of Michael Cryderman to cash the checks. Cryderman denied endorsing the checks and further volunteered that the police asked if he would take a lie detector test. Defendant contends that he was prejudiced as a result of this unsolicited reference to a polygraph examination. We disagree.

Reference to a polygraph examination need not always constitute reversible error. *Rocha, supra* at 8. A number of factors are analyzed to determine whether reversal is mandated:

- (1) whether defendant objected and/or sought a cautionary instruction;
- (2) whether the reference was inadvertent;
- (3) whether there were repeated references;
- (4) whether the reference was an attempt to bolster a witness's credibility; and
- (5) whether the results of the test were admitted rather than merely the fact that a test was conducted. [*Id.* at 9.]

Weighing these factors, we conclude that defendant was not entitled to a mistrial. Defendant's objection to the reference was sustained by the court. Thereafter, no other mention of the polygraph was made. Cryderman's reference to the polygraph was non-responsive to the prosecutor's question. The reference did little to bolster Cryderman's credibility regarding his non-involvement in the crimes. While the jury could have inferred from Cryderman's testimony that he had taken and passed an examination this inference was harmless because his credibility was not seriously at issue.<sup>1</sup> In addition, the reference was not to test results or even to the fact that a test was given, but to the police having requested if Cryderman were willing to take a polygraph examination. We conclude, based upon the foregoing, that the reference was not a ground for mistrial.

We similarly hold that the admission of the testimony of the three police officers was not grounds for a mistrial. When an unresponsive remark is made by a police officer, this Court will scrutinize that statement to insure that the officer has not ventured into forbidden areas which may prejudice the defense. *Holly, supra* at 415. Because we find that under the circumstances, defendant was not prejudiced by the fleeting, isolated and unsolicited remarks, a mistrial was not warranted.

Trooper Bloom's comment that defendant had been in "jail" at the time he sought the handwriting sample was not only isolated and fleeting, but it was not particularly prejudicial since even in the absence of such a comment, the jurors would have likely assumed that defendant, as a person on trial for a felony, would have been in jail at some point. In any event, defendant has failed to demonstrate that he was prejudiced by the jury's knowledge that he was in jail. *People v Wells*, 103 Mich App 455, 460-461; 303 NW2d 226 (1981); *People v Herndon*, 98 Mich App 668, 672-673; 296 NW2d 333 (1980).

Corrections Officer Gilbert's fleeting reference to defendant's receipt of a misconduct ticket similarly did not warrant the entry of a mistrial. In addition to the comment being non-responsive and

isolated, the jury never learned the grounds for which the ticket was issued. Under these circumstances, it cannot be said that defendant was prejudiced to the extent that he was denied a fair and impartial trial.

Finally, Trooper Bush's comments to the effect that defendant had been under investigation in "another case" did not mandate the entry of a mistrial. Defendant's prompt objection was sustained by the court which precluded further elaboration by the witness and the jury never learned the nature of the other case or the extent of defendant's involvement. In *Lumsden, supra* at 299-300, this Court held that the defendant, on trial for felony murder, was not entitled to a mistrial when two witnesses, one a police officer, referred to the fact that the defendant had been involved in other homicides. This Court was persuaded by the fact that the remarks were "very fleeting and were not emphasized to the jury." *Id.* at 299. Considering that the comments in this case were, as in *Lumsden*, fleeting and isolated, and that the nature of the remarks were less prejudicial than those in *Lumsden*, we decline to hold that grounds existed for a mistrial.

## II

Next, defendant argues that the trial court should have granted his motion to dismiss based on a violation of the 180-day rule, MCL 780.131; MSA 28. 969.<sup>2</sup> We disagree. Because statutory interpretation is a question of law, our review on appeal is de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

The purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently. *People v Chavies*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No 199997, issued 2/26/99), slip op., p 2. This purpose is not served in a case where a mandatory consecutive sentence is required upon conviction of the pending charges. *Id.* at slip op., p 3; *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993); *People v Connor*, 209 Mich App 419, 425-429; 531 NW2d 734 (1995). When someone commits a crime while on parole, consecutive sentencing is mandatory. See MCL 768.7a(2); MSA 28.1030(1)(2). Therefore, it would be improper to apply the 180-day rule when the pending charge subjects the defendant to mandatory consecutive sentencing, for example, when the crime was committed while on parole. *Chavies, supra* at slip op., p 3. In this case, defendant was on parole at the time of the instant offenses. Therefore, concurrent sentences were impossible because, if found guilty on the pending charges, defendant was statutorily required to serve the sentence on the current offenses consecutively to the sentence he was serving at the time the offenses were committed. The 180-day rule simply does not apply to this defendant. *Chavies, supra* at slip op., p 3.

## III

Finally, defendant argues that his constitutional right to a speedy trial, US Const, Am VI; Const 1963, art 1, § 20, was violated when he was brought to trial approximately seven and one-half months after his arrest. Whether defendant was denied his right to a speedy trial is a mixed question of fact and law. We review the trial court's factual findings for clear error, while the ultimate constitutional question is an issue of law which we review de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). In *People v Collins*, 388 Mich 680, 687-688; 202 NW2d 769 (1972), the Supreme

Court, citing *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972), set forth the four factors to be considered in determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his or her speedy trial right; and (4) the prejudice to the defendant resulting from the delay.

A delay of six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v O'Quinn*, 185 Mich App 40, 47; 460 NW2d 264 (1990). However, when the delay is less than eighteen months, the defendant must establish prejudice. *Collins*, *supra* at 695. Scheduling delays and delays caused by the court system, while attributed to the prosecution, should be given a neutral tint and only minimal weight when determining whether defendant was denied a speedy trial. *Gilmore*, *supra* at 460.

Defendant's trial began approximately seven and one-half months after his arrest. His trial did not go forward on the date originally scheduled, but rather two months later, because of docket conflicts. Defendant did assert his right to a speedy trial, however, there was no showing of prejudice. There is no evidence in this case that witnesses' memories were affected by the delay. Nor is there an indication that witnesses or evidence became unavailable as a result of the delay. Defendant's failure to establish prejudice,<sup>3</sup> combined with the minimal delay and the neutral reason for much of the delay, leads us to conclude that defendant's right to a speedy trial was not violated.

Affirmed.

/s/ Stephen J. Markman

/s/ Joel P. Hoekstra

/s/ Brian K. Zahra

<sup>1</sup> Cryderman had been discharged from a hospital on the day before the checks were cashed and did not leave his home for several days after his discharge.

<sup>2</sup> The statutory version of the 180-day rule provides:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney . . . written notice of the place of imprisonment of the inmate and a request for final disposition . . . by certified mail." [MCL 780.131(1); MSA 29.969(1)(1).]

<sup>3</sup> Defendant argues that the delay prejudiced him because if the trial had begun on the originally scheduled date, the prosecutor likely would not have been able to call certain witnesses because there would have been insufficient notice between the date she moved to add these witnesses and the trial date. This argument is without merit, since it is entirely possible that the trial court would have allowed these witnesses even if the trial had not been delayed. Pursuant to MCL 767.40a; MSA 28.980(1), the

“prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.” A trial court’s decision to allow late endorsement of a witness is reviewed by this Court for an abuse of discretion.” *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). We will not speculate whether the trial court would have abused its discretion had it entertained and thereafter granted the prosecution’s motion to add additional witnesses.