

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-001 DT

04/03/2015

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

KIRSTEN VALENZUELA

v.

DARNELL REUNA JACKSON (001)

ALAN ISSA TAVASSOLI
R J PARKER

CAPITAL CASE MANAGER

MINUTE ENTRY RULING

Pending before the Court is Defendant Wright's "Motion for Reconsideration Re: Motion to Dismiss, Alternatively to Preclude Co-Defendant Gittens From Testifying." The Motion was formally joined by Defendants Webber, Royalty, Cockhearn and Singleton. The parties have stipulated that this Court should rule on the Motion for Reconsideration because this Court ruled on the original Motion to Dismiss and managed the case during the time frames relevant to the Motion for Reconsideration.

Defendant's Motion is based on the State's failure to timely produce co-Defendant Eldridge Gittens' "free-talk" statement. This Court previously ruled that the State's failure to timely produce the statement violated Rule 15.1(b)(2), Arizona Rules of Criminal Procedure, but declined to either dismiss the case or preclude Defendant Gittens from testifying. Defendant Wright's Motion for Reconsideration asks the Court to re-visit its ruling in light of the Arizona Court of Appeals opinion in *Jimenez v. Chavez*, 234 Ariz. 448, 323 P.3d 731 (App. 2014).

After initial briefing, the Court held oral argument on the Motion on November 6, 2014. The Court ordered supplemental briefing. After review of the various filings and supporting documents, the Court rules as follows.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-001 DT

04/03/2015

Dismissal is not an appropriate sanction

Defendant Wright's Motion seeks dismissal of the charges, or in the alternative, preclusion of co-Defendant Gittens' testimony. As the Court stated at oral argument, dismissal is not an appropriate sanction here. The discovery violation in this case cannot be equated with the pre-indictment delay mandating dismissal in the cases cited by Defendant Wright. *E.g., Humble v. Superior Court*, 179 Ariz. 409, 880 P.2d 629 (App. 1993) (5 year delay in serving defendant warranted dismissal). There are no Arizona cases on point which support the proposition that dismissal is appropriate.

The Court notes Defendant Wright's continued insistence in his papers and at oral argument that the State's failure to produce the Gittens free-talk statement rises to the level of bad-faith. The Court disagrees. While the Court found that the plain language of Rule 15.1(b)(2) mandated production, the Court agrees with the State that such production was not the common practice, and there was uncertainty in this case regarding the State's obligation to produce such statements. In fact, counsel for Defendant Singleton previously supported the State's position and argued that Mr. Singleton's statement should not be produced to the other Defendants in the case. While the Court continues to believe that the defense had the far stronger argument regarding the State's obligation under Rule 15.1(b)(2), the Court believes that the State's position was taken in good-faith, and there is no basis for the Court to now re-visit its previous finding on this issue.

Preclusion under Jimenez

The Motion for Reconsideration "moves for this Court to reconsider its prior ruling on this issue due to the holding" in *Jimenez, supra*. In *Jimenez*, the State disclosed inculpatory DNA evidence the day before trial was to begin. The defendant argued that the only appropriate sanction for the late disclosure was preclusion, because the late disclosure would require weeks of further defense investigation to properly prepare for trial, resulting in a Rule 8 speedy trial violation. The trial court held that the State violated Rule 15.6, but denied defendant's motion to preclude the DNA evidence because the Court found that the State did not act in bad faith, that the evidence was "critical" to the State, and that the defendant could have gone forward within the last day if he chose "not to investigate" the DNA issue further.

The Court of Appeals reversed. The Court found that defendant was prejudiced because he was improperly forced to make a choice between (1) waiving his right to a speedy trial by requesting a continuance for a date beyond his last day and (2) sacrificing his right to be represented by counsel with sufficient opportunity to prepare for trial. The proper sanction instead was preclusion of the evidence (the "only appropriate sanction") in light of the trial court's rejection of dismissal as a sanction. *Id.*, 234 Ariz. at 453, 323 P.3d at 736.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-001 DT

04/03/2015

Here, the Court agrees with Defendant Wright that the State's failure to timely produce Gittens' free talk pursuant to Rule 15.1(b)(2) requires the same analysis conducted by the Court in *Jimenez* under Rule 15.6 and requires this Court to reconsider its previous determination that preclusion is not appropriate.

Preclusion is not an appropriate sanction

Applying *Jimenez*, the question is whether the State's untimely disclosure of the Gittens free-talk placed these Defendants in a position where they were (or would have been) forced to waive their speedy trial rights in order to properly respond to the disclosures contained in the Gittens free-talk. The State formally disclosed the Gittens free-talk on November 15, 2013. The trial date at the time was January 21, 2014. The trial date was vacated by this Court and re-set within the last day to February 3, 2014, so that the Court could conduct oral argument on Defendants' original Motion to Dismiss. This Court previously found that the additional preparation necessitated by the Gittens free-talk disclosure would have made it virtually impossible for the Defendants to be properly prepared for trial on February 3. The question for the Court here, therefore, is whether the case could reasonably have gone to trial on February 3, 2014 but for the untimely Gittens free-talk disclosure.

The parties have debated at length the status of the witness interviews, the schedules of the Court and various counsel, and further testing that the parties contemplated prior to the start of trial. It is almost impossible to identify and address all of the variables associated with analyzing whether the February, 2014 trial date was viable but-for the Gittens disclosure. Suffice to say, the Court had significant doubts then and has significant doubts now regarding whether, as to any of the Defendants, the case was truly in a position to go trial at that time.

There is one critical fact, however, that directly leads the Court to conclude that the case would not have been ready to proceed to trial in early February, 2014. During this time frame only *Knapp* counsel for Defendant Wright (Mr. Raynak) ever vocalized that he would be ready for trial in early February. Indeed, even now counsel for Defendant Cockhearn does not argue that she would have been ready in February, 2014 but instead seeks to cast the question as whether defense counsel would have been ready for trial "when it would have commenced." That is not the issue to be resolved under *Jimenez*. The question is whether the Gittens disclosure forced the Defendants here to effectively give up their speedy trial right in order to have sufficient opportunity to prepare for a trial that they otherwise would have been prepared for. The Court concludes that the Gittens free-talk disclosure did not put the Defendants in the untenable position prohibited by *Jimenez*.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-001 DT

04/03/2015

The simple fact is that counsel for Defendants Royalty and Cockhearn consistently stated that the case was not ready for trial in late 2013, and likely would not be ready for an extended period. In their October 3, 2013 Joint Motion to Continue Trial, counsel explained that 117 witnesses still needed to be interviewed, that the parties had not yet been able to review all of the evidence, that critical fingerprint evidence had not yet been processed, and that “pushing” counsel to trial in late October 2013 would “result in both attorneys being ineffective.” *See* Motion at page 3-4. Although the Motion only sought a 90 day continuance, this Court’s sense at the time, supported by the email information now provided by the State, reflect that as of January, 2014, the parties were nowhere near completing the tasks described in the October 3 Motion. *See* Exhibit 17 to State’s Response to Memorandum of Law.

If counsel for Defendants Royalty and Cockhearn were not ready for trial in early February, 2014, it makes no difference that *Knapp* counsel for Defendant Wright was. This is because when one defendant seeks and is given a trial continuance, then any properly joined defendant’s trial must also be continued, and there is no speedy trial violation. *See* Rule 8.4(f). Recognizing the effect of this Rule, Defendant Wright argues that he is entitled to a severance and thus his trial could have proceeded separately.

The Court notes that Defendant Wright previously sought a severance from all of the other Defendants as part of a “Motion to Continue and Motion to Sever” filed on August 28, 2012. Although the Court eventually did sever Mr. Wright’s case from the capital Defendants (Jackson and Gittens) and from Defendants Webber and Singleton, the Court denied his request to proceed alone. *See* Minute Entry date November 2, 2012. Defendant Wright has now provided a far more extensive argument regarding why severance is appropriate, asking the Court to revisit this finding.

As the State points out, this Court’s denial of Defendant Wright’s previous Motion to Sever can be fairly characterized as the “law of the case” pursuant to Rule 16.1(d) and should not be reconsidered absent “good cause.” Although the Court notes that Defendant Wright has advanced additional arguments in support of his request for a severance in addition to the “antagonistic defenses” argument raised in his 2012 Motion, the Court does not find that the renewed request raises any facts requiring that Defendant Wright be severed from Defendants Cockhearn and Royalty. Accordingly, the finding that Defendants Royalty and Cockhearn were not ready for trial in early February, 2014 has the practical effect of a finding that Defendant Wright was not ready either. Under these facts, *Jimenez* does not mandate preclusion of the late-produced Gittens free-talk.

The Court recognizes that the net result of its denial of the Defendants’ Motion to preclude Gittens from testifying is that there is no significant sanction for the State’s late

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-001 DT

04/03/2015

disclosure. However, for the reasons set forth above, the requested sanctions (dismissal or preclusion) are not appropriate in the Court's view. Accordingly,

IT IS ORDERED denying Defendant Wright's Motion for Reconsideration.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.