

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2001-547

JUNE TERM, 2002

State of Vermont

v.

Ronald Patterson

}	APPEALED FROM:
}	
}	District Court of Vermont, Unit No. 1,
}	Orange Circuit
}	
}	DOCKET NO. 50-2-01 Oecr
}	
}	Trial Judge: Amy M. Davenport
}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of driving while intoxicated (DWI), arguing that he was deprived of his right to counsel during processing, and that the trial court erred by granting the State's motion for a continuance and denying his motion to dismiss for lack of a speedy trial. We affirm.

On February 16, 2001, defendant was taken to the police barracks in the Town of Bradford and processed for DWI. After speaking to his attorney, defendant indicated that he would submit to a breath test, but that he wanted to wait until his attorney arrived. When the officer explained that defendant would have to take the test within thirty minutes from the time he made his initial attempt to contact his attorney, defendant submitted to the test, which revealed a blood-alcohol content of .155 percent. On March 5, 2001, defendant was arraigned on a charge of DWI, first offense, and released with the first three standard conditions. Following two status conferences, the parties indicated that they were ready for trial, and the matter was scheduled for a jury draw on May 17, 2001. A jury was not drawn on that date, however, because of the large number of cases on the jury draw list and the limited number of trial dates available. On July 18, the jury was drawn, and trial was scheduled for July 25. Two days before trial, the State filed a motion for a continuance on the grounds that no Department of Health chemist would be available to testify July 25, and that, without such expert testimony, the State would be unable to present sufficient evidence to prosecute the case. The court granted the motion over defendant's objection, and the trial was rescheduled for August 30. This time, defendant's attorney filed a motion to continue two days before trial, explaining that he had fallen down a flight of stairs and incurred injuries that would require surgery.

After the court granted the motion, defendant's attorney withdrew from the case, and defendant hired a new attorney, who entered an appearance and filed a motion to dismiss on October 5, arguing that the trial delay violated V.R.Cr.P. 23(d) and defendant's right to a speedy trial. After the court denied the motion, defendant asked for reconsideration, asserting that he was entitled to a hearing on the motion. In an October 22 decision, the court denied the motion for reconsideration, and a trial was scheduled for November 29, 2001. At the trial on that date, the jury found defendant guilty of the DWI charge.

On appeal, defendant argues that he was deprived of his constitutional rights when the arresting officer refused to wait until his attorney arrived before requiring him to submit to the breath test, and when the trial court granted the State's motion for a continuance and denied his motion to dismiss. Neither argument has any merit. Regarding the first issue,

although defendant had a statutory right to consult with an attorney before deciding whether to submit to a breath test, that right was qualified by the requirement that he decide whether to submit to a breath test within thirty minutes of his initial attempt to contact counsel. See 23 V.S.A. 1202(c) ("The person must make a decision about whether or not to submit to the test or tests at the expiration of the 30 minutes regardless of whether a consultation [with an attorney] took place."). Defendant had no constitutional right to counsel at the time of his decision to take or refuse to take the test. State v. West, 151 Vt. 140, 143-44 (1988). It is undisputed that defendant was accorded, and took advantage of, his statutory right to counsel. He was entitled to no more.

Defendant's second argument fails for the reasons stated by the district court in its October 22 decision, to which defendant has no response. As the court stated, V.R.Cr.P. 23(d) which requires that trial commence not more than 30 days after jury selection, does not apply in this misdemeanor case because a new jury was drawn and defendant was tried within thirty days of the second jury draw. As for defendant's claim that his constitutional right to a speedy trial was violated, the court examined the relevant factors set forth in our case law - the length of the delay, the reason for the delay, defendant's efforts at obtaining a speedy trial, and the prejudice to defendant, see State v. Keith, 160 Vt. 257, 267 (1993) - and concluded that there was no constitutional violation in this case. The court found that much of the six-month delay was not the fault of the State, that the State had good reason for the one continuance it had sought, that defendant's attorney had later sought a continuance as the result of unforeseen consequences, and that defendant had neither been incarcerated pending trial nor subjected to onerous conditions of release. Noting that defendant's only real complaint was for lost legal fees, the court concluded that his claim of prejudice amounted to nothing more than an "unsupported assertion that delay is per se prejudicial." State v. Recor, 150 Vt. 40, 42 (1988). We conclude that the court acted within its discretion in granting the States' motion for a continuance and denying defendant's motion to dismiss. See Keith, 160 Vt. at 266 (determination of claim of speedy trial violation is within discretion of trial judge).

Finally, we find no error in the court's decision to deny defendant's motion to dismiss without holding a hearing. "A hearing on a motion is not required unless the motion papers indicate a real dispute for one or more relevant facts." State v. Senecal, 145 Vt. 554, 560 (1985) (internal citation omitted). Here, the trial court correctly observed that the State had not challenged the factual assertions defendant made in his motion to dismiss, and thus the only issue was whether those assertions were sufficient to demonstrate a violation of his right to a speedy trial. The court also correctly determined that defendant's assertions fell so far short of what is required to find a speedy trial violation under prevailing case law that a hearing would have been a waste of valuable court time, and would have served only to cause defendant to incur yet more attorney's fees.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice