

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2054
(Summary Calendar)

JOE BOB KOWEY

Petitioner-Appellant

versus

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTION DIVISION and
STATE ATTORNEY GENERAL OF TEXAS

Respondent-Appellee

Appeal from the United States District Court for the
Southern District of Texas
(CA-H-91-1117)

(December 10, 1992)

BEFORE KING, DAVIS, and WIENER, Circuit Judges

PER CURIAM:*

In this petition for a federal writ of habeas corpus, Petitioner-Appellant Joe Bob Kowey, proceeding pro se, appeals the district court's determination that he was denied neither a speedy trial nor appointment of counsel. As we find no error, we affirm.

I. FACTS AND PROCEEDINGS

On September 6, 1984, Kowey was indicted in Harris County for

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

aggravated sexual assault. At the time of his indictment, Kowey was in custody in Collin County on a similar charge. After Kowey was convicted in Collin County in July of 1986, he was sent to the Texas Department of Corrections (TDC). While in the TDC, a bench warrant was issued to bring him to Dallas County to stand trial for another sexual assault. In October 1986, Kowey was convicted of this crime as well and was returned to the TDC. At this point, Harris County was notified that the previous prosecutions had been completed, so Harris County officials obtained a bench warrant to bring Kowey to Houston for trial. Kowey arrived in Houston on November 5, 1990 and received appointed counsel on November 10, 1986.

Choosing to stand trial, Kowey was convicted and sentenced to life imprisonment. He appealed his conviction and his sentence, both of which were affirmed by the state appellate court. When this action failed, Kowey sought a state writ for habeas corpus, alleging, inter alia, violation of his Sixth Amendment rights to a speedy trial and timely appointment of counsel. Kowey's petition was denied without written order by the state trial court, and that denial was affirmed on appeal.

When Kowey obtained no relief in state court, he sought federal habeas corpus relief, asserting the same Sixth Amendment violations. The case was submitted to a United States Magistrate Judge, who concluded that Kowey was not entitled to habeas relief. The district court agreed and denied Kowey's petition for habeas corpus.

On appeal, Kowey preserves only his two Sixth Amendment claims: denial of a speedy trial and untimely appointment of counsel.¹ Kowey argues that Harris County had an obligation to secure his presence for trial and but failed to fulfill this obligation by waiting until the other prosecutions had been completed. Moreover, he argues, this inaction illegally deprived him of counsel for the period between his indictment and his trial.

II. ANALYSIS

A. STANDARD OF REVIEW

We review the district court's legal conclusions in a habeas action de novo, but the court's factual findings "should not be set aside unless they are clearly erroneous."² When, as here, the state court has made factual findings, they are presumptively correct and will be upheld unless they lack "fair support" in the record.³

B. SPEEDY TRIAL CLAIM

Kowey's first claim that he was denied his right to a speedy trial is governed by the balancing test set forth in Barker v. Wingo.⁴ This test contains four factors: (1) length of delay; (2)

¹ Kowey presented additional claims before the district court. He fails to raise these issues on appeal and they are thereby abandoned. Fransaw v. Lynaugh, 810 F.2d 518, 523 n.7 (5th Cir. 1987).

² Self v. Collins, 973 F.2d 1198, 1203 (5th Cir. 1992) (quoting Guzman v. Lensing, 934 F.2d 80, 82 (5th Cir. 1991)).

³ Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

⁴ 407 U.S. 514, 530 (1972); see Millard v. Lynaugh, 810 F.2d 1403 (5th Cir.) cert denied, 484 U.S. 838 (1987).

the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

In the instant case, the length of delay was eighteen months. We have held previously that a delay of eighteen months is presumptively unreasonable.⁵ We balance the length of delay, however, against the reasons for the delay. Here, the delay resulted from Kowey's intervening trials for crimes in other counties. As the state court found, there is no evidence that the state attempted to delay the proceedings. Rather, Harris County simply waited until Kowey was available for trial, his unavailability being caused by his own criminal activities.

The third inquiry is whether and how the petitioner has raised his speedy trial claim. Kowey first raised his claim on December 10, 1986, four months after he became available in Harris County and two months before his trial. As the state court of appeals concluded, this was a timely assertion of Kowey's speedy trial right. On the other hand, as the state court of appeals observed, this is fourteen months after his indictment. Thus, although Kowey's claim was timely, it was also somewhat belated. Accordingly, we do not give substantial weight to this factor, one way or the other.

The final factor, the issue of prejudice, weighs heavily against Kowey. The Supreme Court identified three interests a petitioner has in receiving a speedy trial: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and

⁵ Millard, 810 F.2d at 1406.

concern of the accused; and (3) to limit the possibility that the defense will be impaired.⁶ Obviously, Kowey suffered no oppressive pretrial incarceration from the delay in this case because he was legally in custody for other crimes for the entire period. Similarly, we find that any anxiety would be minimal given Kowey's detention and pending trials on similar claims. Finally, we conclude that Kowey suffered no impairment of his defense, a conclusion supported by the state court of appeals' finding that Kowey's attorney presented a sound defense on his behalf.

Nevertheless, Kowey insists that he was prejudiced because the delay prevented his sentences from running concurrently and prevented him from earning "good time" credits. He also claims that he cannot be classified as "trustee two" while in prison. Kowey does not, however, allege that witnesses became unavailable or evidence was lost. Kowey's assertions do not constitute prejudice because they are not linked directly to trial delay. Kowey's sentences have been "stacked" because of the serial nature of his crimes. Moreover, his classification is based on his behavior in prison and not on any delay.

An application of the Barker test leads to the inescapable conclusion that Kowey has not been denied his right to a speedy trial. The eighteen-month delay was necessitated by the criminal charges pending against Kowey in other counties. Moreover, Kowey can show no prejudice resulting directly from the delay. Accordingly, we affirm the district court's denial of habeas

⁶ Barker, 407 U.S. at 532 (citations omitted).

relief.

C. UNTIMELY APPOINTMENT OF COUNSEL

The Sixth Amendment right to counsel attaches at the initiation of adversarial proceedings,⁷ which includes the issuance of an indictment.⁸ In United States v. Cronin,⁹ the Supreme Court emphasized that the "core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."¹⁰

In the instant case, Kowey was not confronted with the intricacies of his case or the advocacy of the prosecutor between the time he was indicted and the time he came to trial. Rather, during that time he was being tried for other crimes, and appointment of counsel would have been an unnecessary and premature action under the circumstances. Accordingly, we hold, that because the prosecutor did not proceed against Kowey during the delay, he had no need for counsel.

III. CONCLUSION

For the reasons explained above, the district court's denial of Kowey's petition for habeas corpus is
AFFIRMED.

⁷ Kirby v. Illinois, 406 U.S. 682, 690 (1972).

⁸ Id. at 689.

⁹ 466 U.S. 648 (1984).

¹⁰ Id. at 654 (citations omitted).