

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H026889

Plaintiff and Appellant,

(Santa Clara County  
Superior Court  
No. CC303969)

v.

DANIEL LOWE,

Defendant and Respondent.

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The People appeal from an order dismissing the charges against defendant Daniel Lowe. The trial court concluded that defendant's right to a speedy trial under the California Constitution had been violated. We affirm.

**I. Statement of Facts**

On October 18, 2002, Officer David Lee responded to a call about a suspicious person at a mobile home park. Lee spoke to Mandy Isbell, defendant's estranged wife. She reported that defendant had been sending her threatening text messages as he was sitting nearby in his vehicle. Lee found defendant in his vehicle, which was parked within 75 to 100 feet of Isbell's trailer. After observing that defendant was under the influence of methamphetamine, Lee arrested him. When Lee searched defendant's vehicle, he found a pipe bomb that was filled with gun powder, several knives, a toy gun with a laser sight, several pairs of yellow gloves, a black cotton sleeve that was large enough to fit over a head, hair extension pieces, and several pairs of nylons.

## **II. Statement of the Case**

On April 3, 2001, defendant pleaded no contest to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) in Alameda County. The trial court continued the case for sentencing on May 7, 2001. On May 7, 2001, the trial court issued a bench warrant for defendant. On June 4, 2001, the trial court placed defendant on probation on condition that he serve 270 days in jail.

On October 18, 2001, defendant was arrested in San Jose for possession of a destructive device (Pen. Code, § 12303.2) and being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)). On October 22, 2002, defendant was released from custody.

On November 29, 2002, the San Jose Police Department arrested defendant for a probation violation relating to the Alameda County case. On February 6, 2003, defendant admitted that he had violated the terms of his probation in the Alameda County case, and the trial court sentenced defendant to one year in county jail.

On February 10, 2003, the complaint in the instant case was filed, and an arrest warrant was issued for defendant. On June 26, 2003, the Santa Clara County warrant was received and booked by Alameda County. On July 8, 2003, defendant finished serving his Alameda County sentence. Defendant was transported to Santa Clara County on July 10, 2003. The following day, defendant was arraigned in the instant case. A preliminary hearing was then held. On September 19, 2003, the information was filed.

On October 23, 2003, defendant filed a motion to dismiss and claimed that his rights to due process and a speedy trial were violated. He argued that he had been deprived of his right to a speedy trial, because he had been denied the possibility of receiving a concurrent sentence. Following a hearing, the trial court found that the five-month delay between the filing of the felony complaint and his arraignment was

prejudicial, that the People had provided no justification for the delay, and granted the motion to dismiss.

### **III. Discussion**

Both the state and federal Constitutions guarantee a criminal defendant the right to a speedy trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1.) The instant case focuses on the defendant's state constitutional right. Under the California Constitution, the filing of a felony complaint triggers the right to a speedy trial. (*People v. Denise Martinez* (2000) 22 Cal.4th 750, 754 (*Denise Martinez*)). In order to prevail on a motion to dismiss for violation of this right, a defendant must demonstrate prejudice. (*Id.* at p. 755.) Once the defendant has established prejudice, "the burden then shifts to the prosecution to justify the delay. . . . [T]he court [then] balances the harm against the justification." (*People v. Dunn-Gonzales* (1996) 47 Cal.App.4th 899, 910.) Whether the defendant has established prejudice is a factual question to be determined by the trial court, and a reviewing court will uphold this determination if it is supported by substantial evidence. (*People v. Salvador Martinez* (1995) 37 Cal.App.4th 1589, 1594 (*Salvador Martinez*)).

The issue of prejudice in the context of a defendant's speedy trial right was considered by this court in *Salvador Martinez, supra*, 37 Cal.App.4th 1589. In *Salvador Martinez*, the defendant was arrested on narcotics charges, and released. He was then arrested and pleaded guilty to other felony charges. (*Id.* at p. 1592.) While the defendant was serving his prison sentence, the complaint on the initial charges was filed. (*Ibid.*) The police department then requested that a hold be placed on the defendant. However, when the defendant inquired as to any outstanding warrants, there was no record of the warrant. (*Ibid.*) After the defendant was released, he was arrested on drunk driving charges. Following the preliminary hearing, an information that charged him with the original narcotics possession charges was filed. (*Id.* at p. 1593.) The trial court then granted the defendant's motion to dismiss, finding that

he had been denied his state Constitutional right to a speedy trial and that the defendant had demonstrated prejudice, because he lost the opportunity to serve his sentence on the narcotics charges concurrently with the prison term he had been serving during the delay. (*Ibid.*)

Relying on *Barker v. Municipal Court* (1966) 64 Cal.2d 806, this court held that the possible loss of a concurrent sentence is protected by the right to a speedy trial under the state Constitution. (*Salvador Martinez* at pp. 1594-1595.) This court specifically rejected the People's argument that "the only prejudice encompassed by either speedy trial or due process rights is prejudice to a fair trial, as generally manifested by missing witnesses or evidence or failing memories." (*Id.* at p. 1594.)

The People contend that a defendant's right to a speedy trial under the California Constitution is violated only when a defendant proves prejudice to his ability to defend at trial. They argue that the *Salvador Martinez* court's reasoning cannot be reconciled with the California Supreme Court's decision in *Denise Martinez, supra*, 22 Cal.4th 750.

In *Denise Martinez*, the defendant was arrested for driving under the influence. After a complaint was issued and notice was sent to the defendant, she failed to appear and the magistrate issued a warrant for her arrest. (*Id.* at p. 756.) Almost four years later, the defendant was arrested on unrelated charges and the warrant was discovered. (*Ibid.*) The defendant filed a motion to dismiss for a violation of her state and federal Constitutional rights to a speedy trial. The trial court denied the motion without prejudice. (*Id.* at p. 757.)

The *Denise Martinez* court rejected the defendant's arguments that the differences between the state and federal speedy trial rights should be eliminated. The court first held the filing of a felony complaint or the issuance of an arrest warrant is insufficient to trigger a defendant's speedy trial right under the federal Constitution. (*Id.* at p. 765.) The court also held that there is no presumption of prejudice under the

California Constitution. (*Id.* at p. 766.) In *Denise Martinez*, there was no discussion of concurrent sentences or of the holding in *Salvador Martinez*.

The People, however, rely on the discussion in *Denise Martinez* regarding the interests protected by the state constitution. “The state Constitution’s speedy trial guarantee protects the accused . . . against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and . . . it prevents him from being exposed to the hazard of a trial, after so great a lapse of time that the means of proving his innocence may not be within his reach – as, for instance, by the loss of witnesses or the dulling of memory. [¶] . . . When . . . the defendant is not subject to restraints following arrest and has not been held to answer or formally charged in the court having jurisdiction to try the offense or offenses alleged, the first two concerns are implicated little or not at all, . . . .” (*Denise Martinez, supra*, 22 Cal.4th 750, 767-768, internal citations and quotation marks omitted.) Thus, they claim that the only possible concern implicated in the instant case is defendant’s ability to defend at trial. We disagree.

The *Denise Martinez* court did not consider whether the possible loss of concurrent sentences implicated undue incarceration concerns. However, in *Barker v. Municipal Court, supra*, 64 Cal.2d 806, the court did consider this issue, stating that “[e]ven the purpose of preventing undue imprisonment is of some concern to a California prisoner, because if he is promptly convicted of an additional offense he may be sentenced to serve a term of imprisonment concurrently with the term already imposed; if a defendant is brought to trial only after his sentence on another charge has been completed, the possibility of concurrent sentences is denied him.” (*Id.* at p. 813.)

Accordingly, under *Barker*, the right to a speedy trial under the California Constitution protects a criminal defendant from the possible loss of a concurrent sentence.<sup>1</sup>

The People also focus on the following language in *Denise Martinez*: “[W]hen the claimed speedy trial violation is not also a violation of any statutory speedy trial provision, this court has generally required the defendant to affirmatively demonstrate that the delay has prejudiced the ability to defend against the charge.” (*Denise Martinez, supra*, 22 Cal.4th at p. 766.) This sentence must be considered in context. The court was discussing the differences between the statutory and constitutional rights to a speedy trial; a defendant must show prejudice to establish a constitutional violation, but he or she need not show prejudice for a statutory violation. Thus, the phrase “ability to defend against the charge” refers to all of the interests protected by the California Constitution.

Citing *People v. Gutierrez* (1994) 30 Cal.App.4th 105, the People argue that California case law holds that “the lost possibility for concurrent sentences cannot be ‘actual prejudice.’” In *Salvador Martinez*, this court rejected this argument, stating: “General language asserting the need for a showing of prejudice more than the loss of concurrent sentencing in *People v. Gutierrez* ... is not helpful here because of the different procedural context. *Gutierrez* concerned the prejudice required for a second dismissal under Penal Code section 1381, after the first motion to dismiss on speedy trial grounds had been granted, and neither Penal Code section 1381 demand complied

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<sup>1</sup> The People correctly note that *People v. Barker, supra*, 64 Cal.2d 806 is factually distinguishable from the instant case. Nevertheless, as in *Salvador Martinez*, we rely on the *Barker* court’s analysis of the right to a speedy trial under the state constitution. (*Salvador Martinez, supra*, 37 Cal.App.4th at pp. 1594-1595.)

The People also assert that statutes (§§ 1381, 1381.5, 1389-1389.8) provide prisoners with the means to have their charges brought to trial in a timely manner. However, a prisoner cannot make a statutory speedy trial request where he or she has no notice of the charges.

with statutory requirements.” (*Salvador Martinez, supra*, 37 Cal.App.4th at p. 1597, fn. 10.)<sup>2</sup>

The People next argue that defendant failed to show prejudice. They point out that the complaint alleged that he had previously suffered a prior conviction of assault with a deadly weapon within the meaning of the Three Strikes Law, and thus defendant did not show that he lost the opportunity for concurrent sentencing.

Pursuant to the Three Strikes Law, the trial court would sentence defendant, if convicted of the instant crime, to at least twice the minimum term for possession of a destructive device. (Pen. Code, § 1170.12, subd. (c)(1).) The trial court would then order that this term be served consecutively to his prior term for assault. (Pen. Code, § 1170.12, subd. (a)(6)-(8).) However, as the People concede, the trial court could impose a concurrent sentence if it dismissed defendant’s strike pursuant to Penal Code section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

The People contend that the trial court has exclusive authority to dismiss a strike, and thus defendant’s opportunity for a concurrent sentence is merely speculative. However, we agree with defendant’s argument that the trial court’s power to dismiss a strike is similar to its ability to impose a concurrent sentence. Case law involving the lost possibility for concurrent sentences was decided in the context of trial court’s discretionary power to impose concurrent sentences. In those cases, the reviewing courts did not consider a defendant’s possibility of concurrent sentencing too speculative. (See *Barker v. Municipal Court, supra*, 64 Cal.2d 806; *Salvador Martinez, supra*, 37 Cal.App.4th 1589.)

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<sup>2</sup> The People’s reliance on *Crockett v. Superior Court* (1975) 14 Cal.3d 433, *People v. Hannon* (1977) 19 Cal.3d 588, *Scherling v. Superior Court* (1978) 22 Cal.3d 493, and *Serna v. Superior Court* (1985) 40 Cal.3d 239, is also misplaced. None of these cases involved the issue of whether the possible loss of concurrent sentences constituted prejudice.

The People rely on *People v. Madrigal* (2000) 77 Cal.App.4th 1050, 1055, for the proposition that defendant was required to show a reasonable likelihood that he would have received a concurrent sentence but for the delay. This standard, however, ignores language in controlling authority. The California Supreme Court has stated that the prompt disposition of criminal cases prevents undue imprisonment, because a prisoner, who is promptly convicted of an another offense, “may” be sentenced to serve a concurrent term. (*Barker v. Municipal Court, supra*, 64 Cal.2d at p. 813.) The United States Supreme Court has also stated that the “possibility” that a defendant might receive a sentence even partially concurrent constitutes prejudice. (*Smith v. Hooey* (1969) 393 U.S. 374, 378.) Moreover, the *Madrigal* court’s discussion of prejudice is in the context of the standard of review on appeal.

The People also argue that the trial court erred by failing to set a hearing to allow the prosecutor to present evidence justifying the delay. We find no merit to this argument. Defendant brought a motion to dismiss on speedy trial grounds. After the parties submitted briefing, the trial court conducted a hearing on the motion. At no time during this hearing did the prosecutor provide any justification for the delay. Accordingly, the trial court found that the People provided no justification for the delay.<sup>3</sup>

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<sup>3</sup> Relying on *People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th 899, the People claim that they were “not required to argue justification for the delay in order to be allowed the opportunity to present such evidence.” Their reliance on *Dunn-Gonzalez* is misplaced. In that case, the prosecutor introduced evidence justifying the delay. Here there was no such evidence.



**IV. Disposition**

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.

Filed 2/18/05

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BY THE COURT:

The written opinion which was filed on January 24, 2005, is certified for publication.

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Mihara, J.

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Rushing, P.J.

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Premo, J.

The written opinion which was filed on January 24, 2005, has now been certified for publication in its entirety pursuant to California Rules of Court, rule 976(b), and it is therefore ordered that it be published in the Official Reports.

Dated: \_\_\_\_\_, P.J.

Trial Court: Santa Clara County Superior Court

Trial Judge: Honorable Marcel Poche

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