

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 20 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-10078

Plaintiff-Appellee,

D.C. No.

v.

5:15-cr-00436-BLF-1

DAVID SALGADO-RAMIRO,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted November 16, 2017
San Francisco, California

Before: GOULD and MURGUIA, Circuit Judges, and FREUDENTHAL,** Chief District Judge.

In September 2014, while David Salgado-Ramiro was in state custody on sexual battery charges, federal prosecutors filed a criminal complaint against him charging him with illegal reentry in violation of 8 U.S.C. § 1326. In December

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Nancy Freudenthal, Chief United States District Judge for the District of Wyoming, sitting by designation.

2014, Salgado-Ramiro pleaded guilty to two charges of sexual battery. In September 2015, federal prosecutors filed an indictment against Salgado-Ramiro on the illegal reentry charge. It was not until March of 2016, immediately after the conclusion of his state sentence, that Salgado-Ramiro was made aware of the illegal reentry charge and brought to federal court for his initial appearance.

Salgado-Ramiro was thereafter convicted of illegal reentry after a bench trial on stipulated facts. He appealed, arguing (1) that the district court should have granted his motion to dismiss on Sixth Amendment speedy trial grounds and (2) that the district court imposed a substantively unreasonable sentence. We affirm, rejecting both challenges.

Under the Sixth Amendment, a person who stands accused of a crime has a right to a speedy trial. *Doggett v. United States*, 505 U.S. 647, 651 (1992). The Supreme Court has established a test considering four factors relevant to determining if the right to a speedy trial has been violated: (1) the length of delay, (2) who is to blame for the delay, (3) if the defendant asserted his or her right to a speedy trial, and (4) whether the defendant suffered prejudice because of the delay. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). These are known as the *Barker* factors. We have held that “none of these four factors alone [is] either a necessary or a sufficient condition to support a finding that there has been a speedy trial deprivation.” *United States v. Graham*, 538 F.2d 261, 263 (9th Cir. 1976).

Instead, each factor forms part of a related analysis and the factors must be considered together. *Id.*

The parties dispute when Salgado-Ramiro first was “accused” for the purposes of the Sixth Amendment: he contends that it was when the criminal complaint was filed against him, while the government argues that it was when he was actually indicted. Even if we were to accept Salgado-Ramiro’s position, his Sixth Amendment claim would still fail.

Assuming that the complaint started the clock for speedy trial purposes, there was a delay of eighteen months. Eighteen months is a presumptively prejudicial period of delay. *See United States v. Gregory*, 322 F.3d 1157, 1161–62 (9th Cir. 2003). This period of delay requires the court to analyze the remaining *Barker* factors, but an eighteen month delay is “not excessively long,” and does not weigh heavily in Salgado-Ramiro’s favor. *See id.* at 1162.

As to the second *Barker* factor, the district court found that the delay was merely negligent, and its finding of fact on this point is reviewed for clear error. *See United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008). Salgado-Ramiro offers insufficient evidence to warrant disturbing the district court’s finding of fact that the delay was not intentional. A negligent delay of less than twenty months requires a defendant to show actual prejudice. *See United States v. Beamon*, 992 F.2d 1009, 1014 (9th Cir. 1993).

Next, the panel must consider whether Salgado-Ramiro asserted his right to a speedy trial. *Barker*, 407 U.S. at 528. There is no evidence that Salgado-Ramiro asserted his right to a speedy trial during the period of delay; however, during the period of delay, Salgado-Ramiro was unaware of the accusation against him. Salgado-Ramiro cannot be required to assert a right that he is totally unaware has accrued. *See Doggett*, 505 U.S. at 654. This factor is neutral.

The final *Barker* factor is prejudice. Salgado-Ramiro must show actual prejudice because the duration of the delay was not excessively long and was due merely to negligence. *See Beamon*, 992 F.2d at 1014. Salgado-Ramiro contends that he was prejudiced by the loss of the opportunity to serve concurrent sentences on his illegal reentry and state sexual battery charges. Salgado-Ramiro had the opportunity to seek an adjustment in his sentence based on the loss of the opportunity to serve concurrent sentences. The district court rejected this argument, finding that concurrent sentences would not have been appropriate because of the very different nature of the crimes. As Salgado-Ramiro's attorney conceded at sentencing, the decision to run the sentences concurrently would always have been within the district court's discretion. This discretion to decline to give concurrent sentences renders speculative Salgado-Ramiro's argument on this point.

Further, in the period between the time the criminal complaint was filed against Salgado-Ramiro and the time he was sentenced, the United States Sentencing Guidelines were amended in a way that resulted in almost halving Salgado-Ramiro's Guidelines sentencing range, even taking into account any increase in his criminal history category during the delay. Salgado-Ramiro was not prejudiced by the delay—instead he benefited from the amendments to the Guidelines. We hold that the district court correctly denied the motion to dismiss on speedy trial grounds.

Salgado-Ramiro also argues that the district court should have varied or departed downward at sentencing to compensate for the prejudice caused by the delay in bringing him to trial. As explained above, in our view, no prejudice stemmed from the delay. In conclusion, the district court did not abuse its discretion in imposing a bottom-of-the-Guidelines sentence on Salgado-Ramiro. *See Armstead*, 552 F.3d at 776 (holding substantive reasonableness of sentence reviewed for abuse of discretion).

AFFIRMED.