

APPENDIX 1

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United States of America, Plaintiff - Appellee v. Muzammil Ali, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
47 F.4th 691; 2022 U.S. App. LEXIS 24382
No. 21-2286
May 13, 2022, Submitted
August 30, 2022, Filed

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from United States District Court for the Southern District of Iowa - Central.Ali v. Polk County Sheriff's Office, 2020 U.S. Dist. LEXIS 249843, 2020 WL 8482689 (S.D. Iowa, Oct. 27, 2020)

Counsel

For United States of America, Plaintiff - Appellee: Kyle J. Essley, Craig Peyton Gaumer, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Des Moines, IA; Margaret Anne Steindorf, Special Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Chicago, IL.

Muzammil Ali, Defendant - Appellant, Pro se, Pollock, LA.

For Muzammil Ali, Defendant - Appellant: Gerald B. Feuerhelm, FEUERHELM LAW OFFICE, Des Moines, IA.

Judges: Before SMITH, Chief Judge, COLLTON and SHEPHERD, Circuit Judges.

CASE SUMMARYThe Sixth Amendment right to a speedy trial was not violated where much of the 14-month delay resulted from delays requested by co-defendants or were ordered by the court and acquiesced to by defendant, and the resulting three-month delay did not trigger presumptive prejudice.

OVERVIEW: HOLDINGS: [1]-The trial court did not abuse its discretion in denying defendant's motion for a continuance where his replacement attorney had more than five months to prepare for trial, the attorney and defendant acknowledged that they were ready for trial, and the last-minute nature of the continuance motion undermined the court's interest in the orderly administration of justice; [2]-The Sixth Amendment right to a speedy trial was not violated where much of the 14-month delay resulted from delays requested by co-defendants or were ordered by the court and acquiesced to by defendant, and the resulting three-month delay did not trigger presumptive prejudice; [3]-The admission of jail call excerpts into evidence was not an abuse of discretion where his statements to his girlfriend evinced a clear intent to dissuade her from testifying against him.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances
Criminal Law & Procedure > Trials > Continuances
Criminal Law & Procedure > Pretrial Motions > Continuances

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An appellate court reviews the denial of a motion for continuance for abuse of discretion, considering the amount of time granted for preparation, the conduct of counsel at trial, and whether prejudice appears from the record.

**Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Speedy Trial
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial
Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Constitutional Right
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial**

With respect to a claimed violation of his Sixth Amendment right to a speedy trial, the appellate court reviews the district court's findings of fact for clear error and its legal conclusions de novo. To decide whether this right has been violated, the appellate court considers (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay. Where no presumptively prejudicial delay existed, the appellate court need not examine the remaining three Barker factors.

**Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Constitutional Right
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial**

Normally, 14 months would be sufficient delay to give rise to a presumption of prejudice for purposes of a Sixth Amendment speedy trial claim. A delay approaching a year may meet the threshold for presumptively prejudicial delay requiring application of the factors.

**Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence
Evidence > Procedural Considerations > Rulings on Evidence**

An appellate court reviews a trial court's evidentiary rulings for abuse of discretion.

Evidence > Relevance > Confusion, Prejudice & Waste of Time

Evidence of threats against witnesses are generally admissible, even if prejudicial.

**Evidence > Documentary Evidence > Completeness
Evidence > Demonstrative Evidence > Recordings**

Fed. R. Evid. 106 operates to ensure fairness where a misunderstanding or distortion created by the other party can only be averted by the introduction of the full text of the out-of-court statement. While in some cases Rule 106 may require that all or portions of a series of recorded conversations be played to avoid misleading the jury, the party urging admission of an excluded conversation must specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted. In addition, the district court has broad discretion to conduct the trial in an orderly and efficient manner, and to choose among reasonable evidentiary alternatives to satisfy the rule of completeness reflected in Rule 106. Moreover, the Rule does not empower a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay

exception.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Sentences

Criminal Law & Procedure > Sentencing > Imposition > Findings

An appellate court reviews the district court's application of the Sentencing Guidelines de novo and its factual findings for clear error.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Substance Schedules > Cocaine

Criminal Law & Procedure > Sentencing > Ranges

Criminal Law & Procedure > Sentencing > Imposition > Factors

District courts may grant downward variances from the Sentencing Guidelines range based on a disagreement with the sentencing disparity between crack and powder cocaine.

Criminal Law & Procedure > Sentencing > Imposition > Factors

Case law language imparts permissive authority to courts to grant downward variances to sentences. It does not require them to do so.

SMITH, Chief Judge.

After a three-day trial, a jury convicted Muzammil Ali of conspiracy to distribute tetrahydrocannabinol (THC), in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. Ali appeals, arguing that the district court¹ (1) abused its discretion by denying his motion for a continuance; (2) erred by admitting into evidence portions of recordings of phone calls that Ali made from jail; (3) permitted trial delays that violated Ali's Sixth Amendment right to a speedy trial; and (4) erred at sentencing by declining to vary downward. We affirm.

I. Background

A. Indictment and Continuances

On November 14, 2019, Muzammil Ali and five associates were indicted for conspiracy to distribute^{2022 U.S. App. LEXIS 2} THC. Joshua Hendrickson, the leader of the conspiracy, bought vape pens from Hong Kong, THC from California and Nevada, and flavoring from California; he had all of these materials shipped to his co-conspirators' residences in Des Moines, Iowa, for assembly and distribution in the area. Ali, for his part, received shipments and helped to assemble the components into the final product, THC-filled vape pens, at his residence.

In late 2019, several of Ali's co-conspirators were arrested. The district court set their trial for July 13, 2020. Ali was arrested on February 18, 2020. At his arraignment the following day, Ali, though aware of his rights, made no objection to his trial date being the same as his co-defendants. A July 13, 2020 trial would trespass the April 29 deadline under the Speedy Trial Act. The exchange was as follows:

THE COURT: [B]y our calculation, the Speedy Trial Act deadline is April 29, but the co-defendants are set for trial for July 13.

So [does Ali have] any objection to going ahead and using the July 13 trial date?

[Ali's Counsel]: I'm sorry?

THE COURT: Is there any objection to going ahead to use the July 13 trial date?

[Ali's Counsel]: No, Your Honor.R. Doc. 318, at 4.

In May 2020, co-defendant^{2022 U.S. App. LEXIS 3} Hendrickson moved to continue the trial date until September. Ali initially objected to the continuance, but he later withdrew his objection and joined Hendrickson's motion along with several other co-defendants. The district court granted the motion, "find[ing] that the ends of justice served by a continuance outweigh the best interest of the public and Defendants in a speedy trial." R. Doc. 165, at 1. Trial was rescheduled for September 14, 2020.

In late July 2020, Ali moved pro se for his counsel to be replaced. The court granted his request. A new attorney was appointed on August 4. The next day, Ali's new counsel was provided with all discovery material produced to date. Ali thereafter moved for a continuance, stating that "the ends of justice served by granting this continuance outweigh the best interest of the public and the defendant in a speedy trial." R. Doc. 272, at 1. He further acknowledged that the time between the motion and the new trial date would be excluded from Speedy Trial Act calculations. See 18 U.S.C. § 3161. The court concurred and reset trial for October 19, 2020.

In late September 2020, Ali alleged that his speedy trial rights were being violated and moved to dismiss the charge against him.^{2022 U.S. App. LEXIS 4} The district court rejected Ali's motion because (1) "Ali [had] consented to the trial continuances," (2) "the ends of justice served by the continuances outweighed the best interest of the public[] and . . . [of] Ali in a speedy trial," and (3) the

court's issuance of a series of Public Administrative Orders had postponed all jury trials until October 12, 2020, due to the COVID-19 pandemic, "exclud[ing] the intervening time from consideration [in] Speedy Trial Act calculations." R. Doc. 319, at 1-2.

In early October, the government requested that Ali's trial be continued for two months. In support of its motion, the government cited, among other things, the following: (1) that the only co-conspirator who had not yet pleaded guilty had recently become a fugitive, (2) the preference for co-conspirators to be tried jointly, (3) the ongoing COVID-19 pandemic, and (4) the fact that a continuance would not violate the Speedy Trial Act. Ali resisted the motion, indicating that he "wishe[d] to proceed to trial." R. Doc. 359, at 1. The court denied the government's motion. However, due to scheduling issues, the court pushed trial back three days, to October 22, 2020.

A few weeks later, the government reasserted its motion,{2022 U.S. App. LEXIS 5} asking for permission to call a witness via two-way video or, in the alternative, for a continuance. In addition to the reasons set forth in its initial motion, the government disclosed that an essential witness was unavailable to appear in-person at trial due to personal circumstances related to the COVID-19 pandemic.² The court granted the continuance "[f]or the reasons stated in the [g]overnment's motion" and set trial for January 11, 2021. *Id.* at 1.

Five days before trial, on January 6, 2021, Ali sought a continuance until "a time when C[OVID-19] vaccinations ha[d] been administered." R. Doc. 457, at 2. Ali argued that restrictions at the jail where he was detained rendered him "unable to meet with his attorney in person on an unlimited basis to review discovery and prepare for trial." *Id.* at 1. In a pro se letter to the court, Ali added that neither he nor his attorney was prepared for trial and that he needed additional time "to go over the discovery with [his attorney] face to face." R. Doc. 460, at 1. A hearing was held the next day. There, Ali's attorney represented that he was prepared for trial and that he was "familiar with all the evidence" but that Ali did not "believe{2022 U.S. App. LEXIS 6} [they were] prepared for trial" because Ali had only recently shifted his focus from challenging his pre-trial detention to trial matters. R. Doc. 573, at 6, 33.

The district court rejected Ali's request for a continuance, noting Ali's repeated "insistence in October [2020] that any continuance would be a violation of his rights and that he needed to go to trial in October despite pandemic circumstances." *Id.* at 6. In the interim, said the court, the only change had been "a constriction of evidence . . . to be presented at trial." *Id.* at 5. And the restrictions on in-person communication at the jail where Ali was incarcerated did not result in a due process violation or call for a continuance, because Ali "ha[d] had adequate time to prepare for trial." *Id.* at 25.

The court did not ignore Ali's concerns about time for trial preparation. The court scheduled the hearing early in the morning so that Ali and his attorney would have the remainder of the day to work together at the courthouse where they would not be subject to the jail's COVID-19 restrictions. The court arranged for a private room in which Ali and his attorney would be able to review discovery materials. The court also permitted{2022 U.S. App. LEXIS 7} Ali and his attorney several hours the following day to work together at the courthouse. Ali's attorney stated to the court that he appreciated the court "going way over the top to try to help us here," and Ali acknowledged that the court's efforts had "addressed [his] concerns." *Id.* at 28, 29.

B. Jail Calls

In the two days before trial, Ali placed multiple telephone calls to his former girlfriend, Samantha Kendall, from his jail cell. Kendall lived with Ali during the time when his co-conspirators used his residence as home base for their drug operation. The government also called Kendall as a witness

for the government at Ali's trial. Kendall answered only the first two calls she received from Ali.

During his two recorded conversations with Kendall, Ali made several statements that the government sought to introduce at trial. The government believed the calls were attempts to influence her testimony or to persuade her not to testify at all. In the first call, for example, Ali said:

[Y]ou want to help these people [the government], and you don't know what the f*ck they're going to do to you? . . . [Y]ou know what the f*ck's going to happen? They don't give a f*ck about you or anybody{2022 U.S. App. LEXIS 8} else. You're going to testify? That's fine, do what you have to do. But you do have to be careful. They will turn around and charge you too. This is the federal government. You know the government doesn't give a f*ck.R. Doc. 577, at 33 (second, third, fourth, sixth, seventh, and eighth alterations in original). Ali said similar things in the second call. Specifically, Ali told Kendall that she "made a big mistake all last year" and was "still making mistakes" by cooperating with the government. *Id.* When she told him that she was not concerned about being charged with a crime, he claimed that she was culpable in the criminal activity that occurred at their residence.

At trial, the government offered into evidence two exhibits which contained excerpts of the two recorded calls. The first exhibit contained nearly 9 minutes of the first call, which was around 13 minutes in total, and the second contained 3 minutes of the 20-minute second call.

Ali objected to the exhibits, arguing that the risk of unfair prejudice substantially outweighed their probative value. Ali asked, in the alternative, that, if the court admitted the exhibits, it would admit them in their entirety. The district court{2022 U.S. App. LEXIS 9} overruled Ali's objection. The court reasoned that portions of the calls were "relevant to [Ali's] attempt to influence [Kendall's] testimony," to "intimidate" her, and to persuade her "to not testify about his involvement in this case." R. Doc. 555, at 46. In addition, the court viewed such evidence as showing Ali's "consciousness of [his own] guilt." *Id.* at 8.

To protect against unfair prejudice, the court also instructed the government to excise certain statements, such as those concerning Ali's potential punishment and terms of plea negotiations. The court rejected Ali's request that the entirety of the calls be played. The court considered that most of the additional statements in the recordings either constituted inadmissible hearsay or were irrelevant, unfairly prejudicial, or potentially confusing to the jury. Before playing the recordings, the court advised the jury that segments of the recorded calls had been "omitted because the [c]ourt found that those portions were not relevant." *Id.* at 79.

After a three-day trial, the jury convicted Ali of conspiracy to distribute THC. The presentence report (PSR) attributed 46,167 grams of THC to Ali. THC is not listed in the Sentencing{2022 U.S. App. LEXIS 10} Guidelines; however, it is referenced in the drug-equivalency tables, where each gram of THC equates to 167 grams of "converted drug weight." U.S.S.G. § 2D1.1, cmt. n.8(D). The district court, based on the parties' submissions and the PSR's findings, adopted the PSR recommendation that Ali was responsible for 46,167 grams of THC, which, based upon the drug-equivalency tables, comes to 7,709 kilograms in converted drug weight. This calculation put Ali's base offense level at 32. See *id.* § 2D1.1(c)(4).

At sentencing, the court imposed two upward variances—one for "maintain[ing] a premises for the purpose of . . . distributing a controlled substance" pursuant to U.S.S.G. § 2D1.1(b)(12) and one for obstruction of justice in regard to Ali's jail calls to Kendall—for a total offense level of 36. As the statutory maximum sentence was 20 years, Ali's offense level, combined with a criminal history category of III, established his advisory Guidelines range at 235 to 240 months' imprisonment. The court sentenced Ali to 235 months' imprisonment.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-2286

United States of America

Appellee

v.

Muzammil Ali

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cr-00213-RGE-5)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 03, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans