

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable L. Casey Manning, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHERWIN ALFONZO GREEN,

APPELLANT

APPELLATE CASE NO 2019-000441

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether Appellant was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution where the thirty-three month delay was caused by the state's intentional delay and where Appellant showed actual prejudice that he suffered due to the state delaying calling his case to trial?

STATEMENT OF THE CASE

During the May 2013 term, the Kershaw County Grand Jury indicted Appellant for kidnapping, burglary in the first degree, possession of a firearm/ammunition by a person convicted of a violent felon, and possession of a stolen pistol. R.242.

On July 31, 2013, a hearing was held for Appellant's speedy trial motion before the Honorable Deandra G. Benjamin. R. 4. Lir P. Derieg represented Appellant. Id. Brett A. Perry represented the state. Id. The motion for a speedy trial showed that Appellant requested a jury trial as soon as possible and that the delay caused him "extreme hardship." Motion. R. 1. Moreover, Appellant "assert[ed] his innocence in the strongest terms and welcome[d] an opportunity to answer" the charges against him. Id.

Judge Benjamin granted Appellant's speedy trial motion and ordered a status conference held during the next term of court. R. 5, l. 24 – 6, l. 2. No status conference was ever held, and Appellant languished in prison for two years.

On July 24, 2015, a hearing was held for Appellant's motion to dismiss for violation of his right to a speedy trial before the Honorable Robert E. Hood. R. 19. Lir P. Derieg represented Appellant. Id. Joanna McDuffie, Luck Campbell, and Meghan Walker represented the state. Id. Judge Hood filed an order on July 27, 2015 where he found that Appellant never raised his right to a speedy trial. R. 145. Judge Hood then denied Appellant's motion to dismiss. R. 147.

On September 28, 2015, a hearing was held for Appellant's second motion to dismiss for violation of his right to a speedy trial before the Honorable L. Casey Manning. R. 155, ll. 7 – 20; R. 63. Lir P. Derieg represented Appellant. Id. Meghan L. Walker and Kathryn Luck Campbell represented the state. Id. Judge Manning denied Appellant's motion to dismiss, ruling that Rule 4

precluded Appellant from making another motion to dismiss when Judge Hood's prior order denied the motion two months earlier. R. 172, l. 20 – 174, l. 4.

On September 29, 2015, the next day, Appellant pled guilty to kidnapping; burglary in the second degree, nonviolent; and two counts of possession of a stolen pistol. R. 188, l. 23 – 189, l. 7. Judge Manning accepted Appellant's plea as freely, voluntarily, knowingly, and intelligently made. R. 201, ll. 8 – 15. Judge Manning sentenced Appellant to twenty years' imprisonment for kidnapping, fifteen years' imprisonment for burglary in the second degree, and five years' imprisonment for both counts of possession of a stolen pistol. R. 201, ll. 8 – 15.

On August 15, 2017, Appellant made a motion to reconsider and a hearing was held before the Honorable L. Casey Manning. R. 216. Lir P. Derieg represented Appellant. Id. Kathryn Luck Campbell, Joanna A. McDuffie, and Meghan L. Walker represented the state. Id. In an order filed on March 7, 2019, Judge Manning again denied Appellant's motion to dismiss for violation of his speedy trial rights. R. 236. Judge Manning granted Appellant's motion to reconsider his sentence and resentenced Appellant to twelve years' imprisonment. Id.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that “Any person charged with an offense shall enjoy the right to a speedy and public trial.” S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

The remedy for a speedy trial violation is dismissal of the charges. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. Id. at 442, 735 S.E.2d at 482 (internal citation omitted). An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. at 442, 735 S.E.2d at 482 (internal citation omitted). See State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371–72 (2016).

ARGUMENT

Appellant was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution where the thirty-three-month delay was caused by the state's intentional delay and where Appellant showed actual prejudice that he suffered due to the state delaying calling his case to trial.

Relevant Facts

On November 25, 2012, Appellant and his wife got into a verbal altercation in her apartment. R. 193, l. 16 – 194, l. 16. The altercation allegedly turned physical. R. 194, ll. 17 – 21.

When the police arrived, they arrested Appellant. Id. A handgun, allegedly belonging to Appellant, was found in the apartment. Id. Appellant allegedly “pulled” the handgun during the incident. Id.

On July 31, 2013 Appellant made a motion for speedy trial and a hearing was held before the Honorable Deandrea G. Benjamin on July 31, 2013. R. 4; R.28, ll. 7 – 9. Judge Benjamin granted the motion and ordered a scheduling conference be held during the next term of court to determine the earliest time Appellant’s trial could be held. R. 5, l. 24 – 6, l. 19. No scheduling conference was ever held.

Two years later, Appellant’s trial was still pending, and a hearing was held on July 24, 2015, before the Honorable Robert E. Hood to hear Appellant’s motion to dismiss his charges for violation of his right to a speedy trial. R. 19.

At the July 24, 2015 hearing, defense counsel Derieg argued that the thirty-three-month delay of Appellant’s trial violated his right to a speedy trial. R. 22, ll. 17 – 21. He explained that Appellant and another inmate, Vincent Missouri, aided law enforcement by tipping officers off

to a scheme by a third inmate, Nickolas Miller, to have people killed and to escape incarceration. R. 22, l. 22 – 23, l. 15. The state’s purported reason for delaying Appellant’s trial was to testify against Miller. R. 30, ll. 17 – 20. However, defense counsel pointed out that Missouri’s guilty plea hearing was held two months after both he and Appellant aided law enforcement. R. 23, l. 25 – 25, l. 4. In contrast, Appellant was left with his charges hanging over his head for thirty-three months. R. 36, ll. 16 – 17. Defense counsel reasoned that there was no meaningful difference between Appellant’s and Missouri’s case that would warrant such dissimilar treatment. R. 24, ll. 16 – 25.

Defense counsel argued that the dissimilar treatment of Missouri and Appellant showed that the state’s intentional delay of Appellant’s trial was to “gain an impermissible advantage” because they intentionally held Appellant back to prosecute Miller. R. 40, ll. 1 – 19. He furthered that, “the government allowing... Missouri to plead showed there was no reason to delay [Appellant’s] case.” Id.

While Appellant’s suffered an excessive thirty-three-month delay, defense counsel explained that Appellant can show actual prejudice as well. R. 35, l. 21 – 36, l. 15. Due to the excessive delay, Appellant’s witnesses, Roshita McKall and Katrina Lewis could no longer be located to testify to what occurred on the night of the alleged incident, nearly three years earlier. Id.; Memo Supporting Motion to Dismiss, R. 67. In addition, Appellant stated there were tapes of the incident that he recorded from the night of the incident that were no longer available as well. Id.

The state argued that since there was no written order from July 31, 2013 on record with the Kershaw County clerk of court, Appellant’s speedy trial motion during must have never been ruled on. R. 44, l. 25 – 45, l. 12. That was not the case, Appellant’s speedy trial motion was ruled

on during the July 31, 2013 hearing when Judge Benjamin *clearly* stated, “I’ll grant the motion for a speedy trial.” R. 5, l. 24 – 6, l. 2.

The state further argued that the reason for the delay to Appellant’s trial was because the state was unsure if Appellant was going to testify against Miller. R. 46, l. 15 – 47, l. 15. The solicitor also stated that she was unaware of any tapes that Appellant said were missing and stated that Appellant was not prejudiced by the now unavailable witnesses. R. 49, ll. 7 – 12; Memo Supporting Motion to Dismiss, R. 67.

Moreover, the state argued that a letter from Appellant to defense counsel, where Appellant complained that the solicitor was delaying his trial, was a concession from Appellant that he “agreed” to wait until Miller’s case was resolved. R. 50, ll. 8 – 23. Nothing in that letter indicated that Appellant waived his right to a speedy trial. That letter was Appellant asserting the state’s wrongful delay of his trial. Appellant never waived his right to a speedy trial, nor did any of the judges at Appellant’s multiple hearings ever find that Appellant waived his right to a speedy trial.

In an order filed on July 29, 2015, Judge Hood denied Appellant’s motion to dismiss his charges for violation of his right to a speedy trial. R. 145. Judge Hood found that Appellant’s right to a speedy trial was not violated because the state, “attempted to call the case... [and] at that time it was defense counsel who delayed proceedings further,” by making a motion for a continuance. R. 146.

Judge Hood also found that Appellant’s motion for a speedy trial was never ruled on, despite the fact that Judge Benjamin granted the motion on the record during the July 31, 2013 hearing. *Id.*; R. 5, l. 24 – 6, l. 2. This finding was erroneous and later Judge Manning would rely on this erroneous finding to deny Appellant’s motion to dismiss on September 28 – 29, 2015. R.

172, l. 20 – 174, l. 4. Judge Hood also determined that Appellant did not present evidence on how the length of the delay contributed to his inability to procure the missing witnesses. R. 147.

On September 28 – 29, 2015, now after a thirty-five-month delay, Appellant reasserted his right to a speedy trial and another hearing was held for his motion to dismiss his charges for violation of his right to a speedy trial before the Honorable L Casey Manning. R. 154.

During that hearing, the defense counsel argued that Judge Benjamin did grant the speedy trial motion. R. 156, l. 9 – 157, l. 16; R. 5, l. 3 – 6, l. 2. He explained that a status conference was ordered by Judge Benjamin but delayed at the state’s request. R. 158, ll. 2 – 18. Defense counsel also informed the court that both of the continuances that he requested were not Appellant’s fault and that Appellant had “no control” over them. R. 158, l. 19 – 159, l. 3. The first continuance was because defense counsel had suffered an injury to his knee that required medication “where the doctor said [he] wasn’t allowed to appear in court.”¹ Id. The second was for a phone expert to extract text messages off the complaining witness’ phone. Id. Appellant needed those messages ostensibly to replace the testimony of the witnesses that were no longer available to testify due to the state’s intentional delay of his trial.

The state argued that Appellant’s motion for dismissal for violation of his speedy trial right was a violation of Rule 4 of the South Carolina Rules of Criminal Procedure because Judge Hood already denied Appellant’s motion in a written order from July 27, 2015. R. 172, ll. 5 – 19.

Judge Manning denied Appellant’s motion for dismissal under Rule 4 SCRCrimP because Judge Hood had already denied Appellant’s motion two months earlier. R. 172, l. 20 – 174, l. 4. Since Judge Manning relied on Rule 4, his ruling was based on Judge Hood’s erroneous

¹ Undersigned counsel mistakenly wrote in the Initial Brief of Appellant that plea counsel suffered a “broken leg” that caused him to request a continuance; however, as opposing counsel correctly pointed out in the Initial Brief of Respondent, plea counsel characterized that injury as a “swollen knee” to the plea court. Int. Br. App. p. 8; Int. Br. Res. p. 9; R. 155, ll. 19 – 23.

finding that Appellant's speedy trial motion was never ruled on. R. 5, l. 24 – 6, l. 2. Judge Manning specifically stated, "that's not what Judge Hood said" when he denied Appellant's motion to dismiss because Rule 4 controlled the disposition of the motion. Id.

Discussion

An accused is entitled to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 14, of the Constitution of South Carolina. See Klopfer v. North Carolina, 386 U.S. 213 (1967); see also State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978). "This right 'is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" Id. (quoting United States v. MacDonald, 456 U.S. 1, 8 (1982)). Notably, "[w]hether or not a person accused of a crime has been denied his constitutional right to a speedy trial is a question to be answered in the light of the circumstances of each case." State v. Dukes, 256 S.C. 218, 222, 182 S.E.2d 286, 288 (1971) (quoting Wheeler v. State, 247 S.C. 393, 400 147 S.E.2d 627, 630 (1966)).

As an initial matter, Appellant's guilty plea did not waive his right to appeal the violation of his speedy trial rights. In State v. Sims, 423 S.C. 397, 401, 814 S.E.2d 632, 634 (Ct. App. 2018) this Court held a guilty plea waived immunity under the Protection of People and Property Act. Sims, at 402, 814 S.E.2d at 634. However, in Sims this Court cited Class v. U.S., 138 S.Ct. 798 (2018) for the proposition that, "a criminal defendant who entered an unconditional plea of guilty does not waive his right to challenge the constitutionality of the statute of conviction on direct appeal." Sims, at 401, 814 S.E.2d at 634.

The Sims Court also cited the Second Circuit's analysis in United States v. Curcio, 712 F.2d 1532, 1539 (2d Cir. 1983) where the Second Circuit held that an a defendant who makes an unconditional guilty plea can still appeal his conviction on any ground "that if asserted before trial, would forever preclude the state from obtaining a valid conviction against him." Id.

Under Class v. U.S., the United States Supreme Court determined that a guilty plea does not prohibit an Appellant from challenging the "government's power to criminalize... conduct." Class, at 805. Class was convicted of possession of a firearm on U.S. Capitol grounds. Id. at 802. Class possessed firearms in his locked Jeep parked on United States Capitol grounds. Id. Class pled guilty and was sentenced to twenty-four days' imprisonment and one year of probation. Id.

Class appealed his conviction alleging that he was denied fair notice that weapons were banned in the parking lot on U.S. Capitol grounds and that the statute violated his second amendment right to possess firearms. Id. The Court recognized that a guilty plea barred "antecedent constitutional violations," for example grand jury proceedings. Id. at 803. However, the Court held that where a claim implicates "the very power of the state to prosecute the defendant, a guilty plea *cannot* bar it." Id. (emphasis added) (See Blackledge v. Perry, 417 U.S. 21, 30 (1974)). The Court furthered that while guilty pleas can waive "other accompanying constitutional guarantees such as the right to a jury trial or against compulsory self-incrimination, guilty please do not waive, "the privileges which exist beyond the confines of the trial." Class, at 805.

In Blackledge v. Perry, 417 U.S. 21 (1974) the United States Supreme Court held that Perry was allowed to proceed on a direct appeal of his guilty plea on the grounds of vindictive prosecution by the state. Blackledge, at 25. The Court determined that Perry's guilty plea did not waive his right to appeal where Perry was appealing the right not to be "haled into court at all...

[since] the very initiation of the proceedings against him... operated to deny him the due process of law.” Id. at 30.

In this case, Appellant is appealing the “very power of the state to prosecute” him. Class, at 803. A defendant’s right to a speedy trial is one that, “exist[s] beyond the confines of [a] trial.” Id. at 805. Moreover, in accordance with the principle in Curcio, Appellant’s guilty plea did not waive his right to challenge the violation of his right to a speedy trial because a defendant’s right to a speedy trial is a constitutional issue “that if asserted before trial, would forever preclude the state from obtaining a valid conviction against him.” Curcio, 712 F.2d at 1539.

Here, if Appellant’s right to a speedy trial was violated by the state’s 33-month delay in calling his case to trial, then his charges must be dismissed. The remedy for a speedy trial violation is dismissal of the charges. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). Therefore, the state would not have the power to prosecute him. Accordingly, under Class v. U.S., supra, Appellant’s guilty plea did not waive his right to appeal the violation of his right to a speedy trial because that claim is of a class that implicates the “very power” of the state to convict him and cannot be waived via guilty plea. Class, at 803.

Another preliminary matter is that it was an error for the plea court to use SCRCrimP Rule 4 to deny Appellant’s motion to dismiss at the September 28 – 29, 2015 guilty plea hearing. R. 172, 1. 20 – 174, 1. 2. Rule 4 states, “If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion *upon the same set of facts* shall be made to any other judge in that action. If upon such subsequent motion any order be made, it shall be void.” SCRCrimP 4. (emphasis added)

A subsequent motion to dismiss for violation of a defendant’s speedy right, by its nature, cannot be based “upon the same set of facts” as the initial motion to dismiss because time has

passed between them. The length of delay is the crux of the speedy trial inquiry. Since the length of delay has increased between the two motions to dismiss, the facts cannot be said to be the same for purposes of Rule 4. Accordingly, Rule 4 is inapplicable in the speedy trial context, and it was an error to deny Appellant's reassertion of his right to a speedy trial.

Notwithstanding the plea court's wrongful use of Rule 4 to deny the September 28 – 29, 2015 motion to dismiss, Appellant's right to a speedy trial was violated under the test put forth by the Supreme Court of the United States in Barker v. Wingo, 407 U.S. 514 (1972).

In Barker, the United States Supreme Court identified several factors to be used when resolving a speedy trial issue: (1) the length of the delay; (2) the reason the government asserts to justify the delay; (3) when and how the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant. See State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973) (recognizing these factors in South Carolina). However, "[i]n order to establish the denial of a speedy trial, it must be demonstrated the delay was attributable to the State." See Waites, 270 S.C. at 108, 240 S.E.2d at 654 (citation omitted). The constitutional guarantee of a speedy trial only protects a criminal defendant against delay which is arbitrary or unreasonable. Id.

In Doggett v. United States, 505 U.S. 647, 652, n. 1 (1992), the United States Supreme Court suggested that a delay of more than a year is "presumptively prejudicial." See Waites, 270 S.C. at 108, 240 S.E.2d at 653. The Court has also noted, "[W]e generally have to recognize that excessive delay *presumptively* compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Doggett, 505 U.S. at 655 (emphasis added). There is also a presumption that the prejudice to the accused "intensifies over time." Id. at 652. Therefore, "a delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors." Pittman, 373 S.C. at 549, 647 S.E.2d at 155.

In State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368 (2016) the South Carolina Supreme Court held that Hunsberger's right to a speedy trial violated by a ten-year delay where the reason for the delay, like Appellant here, was to try to coerce Hunsberger's testimony in a different capital case. Hunsberger, at 352 – 353, 794 S.E.2d at 376 – 377. Hunsberger was arrested in March 2002 and moved for a speedy trial in November 2004. Id. at 342, 794 S.E.2d at 371.

Judge Keesley offered to hold a special February 2005 term of court to allow the state to try Hunsberger then, but the state refused because the state wanted Hunsberger to testify in a capital case against Steven Barnes. Id. at 341, 794 S.E.2d at 371. Hunsberger repeatedly declined to testify against Barnes. Id. Hunsberger's trial was called in January of 2012, where Hunsberger made a motion to dismiss because his state and federal rights to a speedy trial were violated. Id. at 342, 794 S.E.2d at 371.

The South Carolina Supreme Court applied the Barker test to the facts of Hunsberger's case. In spite of the recognition that the ten-year delay was not entirely attributable to the state, the length of the delay was sufficient to trigger the speedy trial analysis. Id. at 344 – 345, 794 S.E.2d at 373. The state was not held responsible for the time period that Hunsberger spent while extradited to Georgia to face separate charges, but the Court determined that the state was responsible for eight years of the delay, which “weigh[ed] heavily against the state.” Id. at 346 – 347, 794 S.E.2d at 373.

The state admitted it delayed trying Hunsberger in hopes he would agree to be a witness against Barnes in Barnes' South Carolina's capital trial, which itself did not take place until approximately nine years after the murder occurred. Id. at 348, 794 S.E.2d at 374-375. However, the Court determined that the state's true reason for delay was its hope that Hunsberger would be coerced by the delay in his trial into testifying against Barnes. Id.

The Court cited the principle in Barker that it is improper for the prosecution to intentionally delay [calling a case] to gain a tactical advantage over a defendant.” Id. That purpose is not served when the constitutional right of a low priority defendant is sacrificed in hopes that that defendant will help the state in a higher priority trial. Id. Moreover, “the State’s desire to present the strongest case against Barnes, especially when the three other eyewitnesses who had pled guilty to the Georgia charges in 2003 were available and willing to testify against him, does not justify the delay in prosecuting [Hunsberger’s] case.” Id. at 348, 794 S.E.2d at 375. The Court held that the impermissible reason for delay weighed heavily against the state. Id. at 349, 794 S.E.2d at 375.

This is exactly what the state did in the present case. The state delayed Appellant’s case to coerce him into testifying against Miller, but had another witness in Vincent Missouri, whose case it did not delay, available and willing to testify. R. 40, l. 1 – 41, l. 3. Therefore, the state’s delay is not justified here either and the state’s impermissible reason for delaying Appellant’s case should weigh heavily against it.

The Court determined that although Hunsberger asserted his right to a speedy trial three times before his trial was held, “his seven-year silence” rendered this factor of the Barker test neutral. Hunsberger, at 349 – 350, 794 S.E.2d at 375.

The Court stated that the trial court’s determination that Hunsberger must show actual prejudice from the delay was an error because an “accused can assert presumptive prejudice as the result of the State’s violation of his right to a speedy trial.” Id. at 351, 794 S.E.2d at 376. Thus, the lower court’s ruling “was influenced by an error of law” because “the United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify.” Id. Accordingly, because the

state's reason for delay was intentional rather than negligent, the length of delay resulted in presumptive prejudice to Hunsberger and the lower court's decision was reversed. Id. at 351 – 352, 794 S.E.2d at 351 – 352.

In State v. Buckner, 292 Ga. 390, 738 S.E.2d 65 (2013) the Georgia State Supreme Court held that the state violated Buckner's right to a speedy trial and dismissed his charges. Buckner was charged with kidnapping, molestation, and murder of a minor. Id. at 390, 738 S.E.2d at 68. The Georgia Supreme Court used the tests put forth in Barker and Doggett. Id. at 392, 738 S.E.2d at 69. The Buckner Court determined that although Buckner *waited nearly four years* to assert his right to a speedy trial, the state's delay of 53 months was presumptively prejudicial. Id. at Id. at 397 – 398, 738 S.E.2d at 72 – 73. (emphasis added)

The Court held that when a delay is presumptively prejudicial a more searching inquiry is warranted where a court must consider, “whether [the] delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.” Id. at 393, 738 S.E.2d at 69 – 70. No one factor is dispositive, they must be weighed together. Id.

After weighing the Barker factors, the lower court in Buckner determined that Buckner's right to a speedy trial had been violated. Id. at 391, 738 S.E.2d at 68. The length of the fifty-three-month delay was uncommonly long and thus weighed in favor of Buckner. Id. at 393, 738 S.E.2d at 394. The Buckner Court held that although three months of the delay was attributed to trial counsel, the reason for the delay weighed in favor of Buckner because the state reassigned the case “from one prosecuting attorney to another.” Id. at 394, 738 S.E.2d at 70 – 71. Moreover, a portion of the delay “was attributable to unknown circumstances to which the record is silent.”

Id. Furthermore, the third factor, when and how Buckner raised his right to a speedy trial, weighed “heavily” against Buckner because he waited “almost four years” to assert his right to a speedy trial. Id. 396 – 97, 738 S.E.2d at 72 – 73.

The lower court also found that Buckner was prejudiced because the delay caused Buckner to be unable to “adequately prepare his case.” Id. at 398, 738 S.E.2d at 73. Additionally, Buckner showed that officers tampered with evidence at the scene of the alleged crime before it was “secured by the proper authorities,” and because of the delay Buckner could not identify what evidence was removed from the scene. Id.

The Georgia Supreme Court held upon balancing the Barker factors, that the lower court’s decision should not be reversed. Id. at 399, 738 S.E.2d at 74. Although the late assertion of Buckner’s speedy trial right “weighed significantly” against him, the other three factors indicated that Buckner’s right to a speedy trial had been violated. Id.

The Buckner Court stated repeatedly that it needed to follow the factual findings of the lower court *unless they were clearly erroneous*. Id. at 393, 738 S.E.2d at 70. (emphasis added) In this case, the lower court’s findings *were* clearly erroneous because Judge Hood stated in his order denying Appellant’s motion to dismiss that Appellant’s July 31, 2013 motion for a speedy trial was never ruled on. R. 146. The record showed that Judge Benjamin granted Appellant’s speedy trial motion. R. 5, l. 24 – 6, l. 2

Two months later, Judge Manning denied Appellant’s motion for dismissal for violation of his speedy trial rights based on Rule 4 SCRCrimP and Judge Hood’s order. R. 174, ll. 3 – 4. Therefore, this Court is not required to follow Judge Hood’s flawed order, nor does it need to follow Judge Manning’s subsequent denial, because they were based on the erroneous finding

that Appellant's speedy trial motion was never ruled on when Judge Benjamin ruled, "I grant the motion," during the July 31, 2013 hearing. R. 5, l. 24 – 6, l. 2.

In applying the four-part test of Barker v. Wingo, *supra*, to Appellant's case, the length of delay weighs in Appellant's favor. In this case, more than thirty-five months passed since while Appellant waited for his trial. R. 170. That delay was sufficient to find presumptive prejudice and trigger further review of the other three factors enumerated in Barker v. Wingo. See Waites, 270 S.C. at 108, 240 S.E.2d at 653; See also Doggett, *supra*.

The second prong of the Barker test was the government's reason for the delay. In Appellant's case, as defense counsel argued, the state's reason for delaying Appellant's trial was illusory. R. 40, l. 1 – 41, l. 3. The state purported that the reason for the delay was because they wanted him to testify against Miller in Miller's case. Id.

However, that reasoning was undercut by the dissimilar treatment of Appellant's and Missouri's cases. R. 40, ll. 10 – 19. Both Appellant and Missouri went to the police together to inform them about Miller, and Missouri's case was resolved two months later. R. 23, l. 10 – 25, l. 4; R. 28, ll. 19 – 24. The state showed, by their treatment of Missouri, that they did not need to delay Appellant's trial to procure his testimony against Miller. Accordingly, the second prong of the Barker test cut in favor of Appellant. Hunsberger, at 346 – 349, 794 S.E.2d at 374 – 375.

Appellant asserted his right to a speedy trial on July 31, 2013 before the Honorable Deandrea G. Benjamin. R. 5, l. 24 – 6, l. 2. Judge Benjamin ruled on the record, "I grant the speedy trial motion." Id. Accordingly, the contention by the state and the finding by Judge Hood, that Appellant's speedy trial motion had never been ruled on was incorrect. R. 146. Therefore, the third prong in the Barker test weighed toward Appellant.

The prejudice requirement under a speedy trial analysis is exceptional because often it is

impossible to a defendant to define the nebulous damage that occurred during the delay. Hunsberger, at 351, 794 S.E.2d at 376. In addition to the presumptive prejudice of the thirty-five month delay, Appellant showed that the delay actually prejudiced him as well. Barker, at 530; R. 34, l. 23 – 35, l. 12; See Doggett, supra. Due to the delay, Appellant was unable to locate witnesses Roshita McKall and Katrina Lewis to testify in his defense. R. 32, l. 4 – 33, l. 15; Memo Supporting Motion to Dismiss, R. 67; See Hunsberger, supra, (where Hunsberger suffered actual prejudice because of discrepancies between witness statements due to the delay in his trial). Moreover, Appellant contended there were tapes of the conversations that occurred at his wife's apartment on the night of the incident that were now missing as well. R. 35, l. 21 – 36, l. 15; Memo Supporting Motion to Dismiss, R. 67.

Accordingly, Appellant was denied his right to a speedy trial and was prejudiced by the state's unreasonable delay. See Doggett, supra; see also Strunk v. United States, 412 U.S. 434 (1973) (finding the relief granted where an accused has been denied the right to a speedy trial is generally dismissal of the criminal charge). The state's delay in calling Appellant's case to trial was unreasonably long. R. 36, ll. 16 – 17; See Doggett, supra. Appellant asserted his right to a speedy trial during the July 31, 2013 hearing before Judge Benjamin, which she granted. R. 5, l. 24 – 6, l. 2. The state's reason for delay was impermissible because Appellant and Missouri provided the same information to law enforcement about Miller, but Missouri's case was resolved in two months and Appellant's in *thirty-five* months. Moreover, Missouri was available to testify against Miller as well. R. 23, l. 10 – 25, l. 4; R. 28, ll. 19 – 24; R. 40, ll. 10 – 19; Hunsberger, at 348 – 349, 794 S.E.2d at 375.

Lastly, Appellant experienced prejudice due to the delay because he was unable to adequately mount a defense to the charges against him without exculpatory witnesses or the lost

tapes of what transpired on the night of the incident. R. 31, l. 18 – 33, l. 15; Memo Supporting Motion to Dismiss, R. 67; Hunsberger, at 351 – 352, 794 S.E.2d at 351 – 352. Therefore, Appellant’s right to a speedy trial was violated, and his charges should be dismissed.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests this Court vacate his convictions and order the charges dismissed on the grounds that his right to a speedy trial was violated.

s/ Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of June, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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Respectfully Submitted,

s/ Victor R. Seeger

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This 16th day of June, 2020.