STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RONZELL BILAH OLDS,

APPELLANT

APPELLATE CASE NO. 2022-000336

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the judges err in refusing to grant the motion to dismiss based on pre-indictment delay of over four years between arrest and indictment violating Appellant's right to Due Process?

2. Did the judges err in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial?

STATEMENT OF THE CASE

On February 7, 2022, the Charleston County Grand Jury indicted Appellant, Ronzell Bilah Olds, for armed robbery and possession of a weapon during the commission of a violent crime, indictments #2022-GS-10-549, 550[1]. (R. p. 544-545, 548-549). On March 8, 2022, Appellant proceeded to jury trial before the Honorable Jennifer B. McCoy. Jason King and Katherine Mangan represented Appellant at trial. Benjamin Chad Simpson and Mallory Haliena prosecuted the case. The jury found Appellant guilty as charged. Judge McCoy sentenced Appellant to twenty (20) years for armed robbery and five (5) years concurrent for the weapon charge. Appellant served a timely notice of intent to appeal on March 15, 2022. This appeal follows.

[1] It is unclear who testified before the grand jury as the witness is listed as the Charleston City Police Department.

STANDARD OF REVIEW

The trial court's decision regarding pre-indictment delay is a mixed question of law and fact and will only be reversed if clearly erroneous. State v. Lee, 360 S.C. 530, 537–38, 602 S.E.2d 113, 117 (Ct. App. 2004), aff'd, 375 S.C. 394, 653 S.E.2d 259 (2007) citing United States v. Lynch, No. 94–5350, 56 F.3d 62, 1995 WL 325670, at *2 (4th Cir. June 1, 1995) (recognizing district court's decision regarding pre-indictment delay was a mixed question of law and fact and will only be reversed if clearly erroneous) (citing United States v. Beszborn, 21 F.3d 62 (5th Cir.1994), *cert. denied,* Westmoreland v. United States, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288 (1994)).

The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. 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. State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368 (2016).

FACTS

Appellant was arrested on January 16, 2018, and charged with several counts of armed robbery of convenience stores. Over two years later on May 26, 2020, Appellant filed a written motion to dismiss – speedy trial and pre-indictment delay. (R. pp. 1-4). The State filed a response on June 15, 2020. (R. pp. 5-11). On June 17, 2020, a hearing was held before the Honorable R. Markley Dennis. (R. pp. 12-21). In a written order signed June 23, 2020, and filed June 24, 2020, Judge Dennis denied the motion to dismiss. (R. pp. 23-24). Appellant was released on bond on July 6, 2020, and remained out of jail but on house arrest and electronic monitoring. (R. p. 28).

On January 27, 2022, Appellant filed a second written motion to dismiss – speedy trial and pre-indictment delay. (R. pp. 25-28). The State filed a motion for continuance because Appellant had still not been indicted. (R. pp. 29-41). On January 27, 2022, a hearing was held before the Honorable Deadra L. Jefferson. (R. pp. 42-84). On February 7, 2022, Appellant was indicted for the armed robbery of the Sunoco convenience store on Sam Rittenberg Boulevard. (R. pp. 544). In a written order signed and filed on February 18, 2022, Judge Jefferson denied the motion to dismiss. (R. pp. 85-90). When the case was called for trial on March 7, 2022, before the Honorable Jennifer B. McCoy, Appellant renewed both the motion to dismiss based on pre-indictment delay and the motion to dismiss based on the speedy trial violation. (R. p. 104, line 20 – R. p. 106-107, lines 1-7). Judge McCoy denied the motion to dismiss. (R. p. 107, lines 3-7). At the close of the State's case Appellant renewed both motions to dismiss based on the unavailability of two additional witnesses. (R. p. 454, line 18 – p. 455, lines 1-22).

ARGUMENTS

1. **The judges erred in refusing to grant the motion to dismiss based on pre-indictment delay of over four years between arrest and indictment violating Appellant's right to Due Process.**

Appellant was arrested on January 16, 2018, for the Sunoco armed robbery but was not indicted for that armed robbery until February 7, 2022, over four years later. It appears that the Charleston County Grand Jury did not meet from March 2020, until April 2021[2], because of emergency protocols due to the COVID 19 pandemic. (See State's motion for continuance filed January 27, 2022, R. p. 31). Excluding this year long period of time, there is still over a two- year pre-indictment delay between arrest in January of 2018, and pandemic shutdown in March of 2020. There is an additional period of pre-indictment delay between the time the grand jury resumed in April of 2021, and the date of indictment on February 7, 2022. The length of pre-indictment delay, excluding the year of COVID, was almost three years.

In the first motion to dismiss based on pre-indictment delay filed on May 26, 2020, over two years after arrest, Appellant argued that the delay caused substantial actual prejudice because a witness, Mark A. Maschke, died on May 17, 2019. (R. p. 3). The witness could have testified that Appellant was under the influence of drugs when he was arrested and gave an incriminating statement.

On June 17, 2020, a hearing was held before Judge R. Markley Dennis on the motion to dismiss based on pre-indictment delay. In a written order dated June 23, 2020, and filed June 24, 2020, Judge Dennis denied the motion to dismiss based on pre-indictment delay. (R. pp. 23-24). In the written order Judge Dennis wrote, "After reviewing both briefs submitted by the State and

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[2] Footnote #10 in Judge Jefferson's order indicates that in-person grand jury proceedings were suspended from April 3, 2020, until June 1, 2021. (R. p. 89).

the Defendant, hearing oral arguments, and reviewing the Defendant's interview in its entirety, this Court finds the Defendant has failed to show pre-indictment delay has caused substantial actual prejudice." (R. p. 24). This judge erred in finding no substantial actual prejudice based on the unavailable witness and refusing to dismiss the case due to an over two year period of pre-indictment delay.

In State v. Lee, 375 S.C. 394, 397, 653 S.E.2d 259, 260 (2007), the South Carolina Supreme Court wrote:

> We have adopted a two-prong inquiry when pre-indictment delay is alleged to have violated a defendant's due process rights. State v. Brazell, 325 S.C. 65, 72–73, 480 S.E.2d 64, 68–69 (1997) (citing U.S. v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). First, the defendant must prove that the delay caused substantial actual prejudice to his right to a fair trial. Id. The second prong requires the court to consider the reason for the State's delay and to balance the justification for the delay against the prejudice to the defendant. Id.

Describing "substantial prejudice" the South Carolina Supreme Court in State v. Brazell, 325 S.C. 65, 73, 480 S.E.2d 64, 69 (1997), wrote:

> Substantial prejudice requires a showing that "he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely effected [sic]." Jones v. Angelone, 94 F.3d 900 (4th Cir.1996). When the claimed prejudice is the unavailability of a witness, courts require that the defendant identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish that he made serious attempts to locate the witness; and finally, show that the information the witness would have provided was not available from other sources. Howell, supra.

Appellant showed substantial actual prejudice on May 26, 2020, the first time the first time he moved for dismissal based on pre-indictment delay. A critical witness, Mark A. Maschke, was unavailable. The witness could have testified that Appellant was under the influence of drugs when he was arrested and gave an incriminating statement. (R. p. 15, lines 2-13). The testimony was not available from other sources. The testimony would have supported Appellant's argument

at trial, to both the judge as a basis of suppression and to the jury if not suppressed, that his statement was not made voluntarily. Appellant argued to the jury in closing argument to disregard Appellant's statement to police. (R. pp. 495-506). The argument was severely weakened by the fact that Appellant was unable to provide testimony that Appellant was under the influence at the time he made the statement. Although the statement was recorded and Judge Dennis reviewed the recording and portions were played for the jury, impairment may not be detectable on the recording. The judge erred in refusing to find substantial prejudice resulting from the over two-year pre-indictment delay.

Appellant showed substantial prejudice. The next step in the analysis is to balance the reason for the delay against the prejudice. In the response to the motion to dismiss the State argues, "The reason the State failed to indict the cases was simply an oversight and not done for any tactical advantage." (R. p. 11). The State, however, acknowledges that the test adopted by our courts does not require a showing that the government intentionally delayed the indictment so as to gain a tactical advantage. (R. p. 11). See State v. Lee, 360 S.C. 530, 537, 602 S.E.2d 113, 117 (Ct. App. 2004), aff'd, 375 S.C. 394, 653 S.E.2d 259 (2007).

In State v. Lee, 375 S.C. 394, 400, 653 S.E.2d 259, 262 (2007), the South Carolina Supreme Court addressed the second part of the pre-indictment delay analysis writing, "Accordingly, the second part of the due process inquiry requires the court to consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant. Brazell, supra. When balancing the prejudice and the justification, the basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." Id. (quoting U.S. v. Automated Med. Laboratories, Inc., supra at 404)."

During the June 17, 2020, hearing the State offered no valid explanation for the delay of over two years in indicting Appellant. Balancing the prejudice against the lack of justification for the delay, the judge should have dismissed the case. The judge erred in refusing to find that the pre-indictment delay violated Appellant's right to Due Process.

Almost two years later on January 27, 2022, Appellant filed a second motion to dismiss based on pre-indictment delay because the State still had not indicted Appellant for the Sunoco robbery that he was arrested for on January 16, 2018, four years earlier. (R. p. 25). The State responded by moving for a continuance. (R. pp. 31-41). A hearing on the second motion to dismiss was held on January 27, 2022, before Judge Deadra L. Jefferson. (R. pp. 42-84). In a written order dated February 18, 2022[3], Judge Jefferson denied the motion to dismiss based on pre-indictment delay. (R. pp. 85). In the written order Judge Jefferson wrote:

> The Court finds that the Defendant has failed to establish, by a preponderance of the evidence, that pre-indictment delay has caused substantial actual prejudice. Further, the Court finds that the Defendant has failed to show that he was meaningful impaired in his ability to defend against the State's charges to such an extent that the disposition of the criminal proceeding was likely effected. The fact that the State "erroneously believed that the defendant's charges were indicted," and "held out to the Court in prior hearings that the case was indicted, even providing the Court with erroneous 'indictment numbers' taken from [the State's] tracking system," does not reach the level of substantial actual prejudice. Once the State discovered its oversight, the Defendant's above captioned charges were presented at the next Grand Jury. Moreover, as Judge Markley Dennis's June 23, 2020 Order states, the death of the Defendant's potential witness in this case does not cause substantial actual prejudice to the Defendant's right to a fair trial.

(R. pp. 88-89). In footnote #9 of the order Judge Jefferson wrote, "The Court has no retroactive authority to reconsider the findings of Judge Markley Dennis' Order of June 23, 2020 as suggested by Defense Counsel." (R. p. 89). Although the judge ruled on the motion to dismiss

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[3] On February 7, 2022, after the hearing but before the order issued, the State obtained indictments for the Sunoco robbery.

based on pre-indictment delay it appears from the footnote that she believed that she had no discretion to reconsider Judge Dennis' ruling on the motion made two years earlier. As the motion was a second motion to dismiss based on pre-indictment delay and two years had passed with no indictment, the second judge should have reconsidered the ruling by Judge Dennis. Any failure to exercise discretion is an abuse of discretion. "A failure to exercise discretion amounts to an abuse of that discretion." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) (citations omitted). This judge erred in refusing to dismiss the case due to pre-indictment delay.

Two years after the first motion to dismiss based on pre-indictment delay and four years after arrest, Appellant was still not indicted. At the second hearing on the motion to dismiss based on pre-indictment delay Appellant again showed substantial actual prejudice based on the fact that critical witness, Mark A. Maschke, was unavailable. As to the second prong of the pre-indictment delay analysis, reason for the delay, the State argued that the delay was justified due to COVID and a mistaken belief that the case had been indicted. (R. pp. 31-41). Excluding the year-long shut down because of COVID, from March of 2020, until April of 2021, when the grand jury reconvened, there remained an almost three-year delay between arrest in January of 2018 and indictment on February 7, 2022, for which the State offered no valid explanation. Balancing the prejudice to Appellant against the lack of justification for the almost three-year delay in indictment, the prosecution of Appellant over four years after arrest violated fundamental concepts of justice and the community's sense of fair play.

When the case was finally called to trial on March 7, 2022, Appellant renewed the motion to dismiss based on pore-indictment delay. (R. p. 104, line 20 – p. 106, 107, lines 1-7). The motion was again denied. (R. p. 107, lines 3-7). By the time the case was called to trial the manager of the Sunoco that was robbed, Tom Cullum, had passed away. (R. p. 279, lines 10-14).

The State instead called a Sunoco regional training manager to testify about general policies and procedures. The regional manager testified that, "One of the policies of the Sunoco was that we had a 2 dollar bill which was attached to a money clip and anytime they were robbed the cashier would pull the money clip and give it to the robber. These numbers were called into what would be like our own monitoring company. At the time it was called Central Monitoring Facility and they would record the serial numbers." (R. p. 273, lines 2-9). The regional manager admitted, however, that he did not know when the two-dollar bill was put in the store that was robbed or when the serial numbers were reported. (R. p. 278, line 18 – p. 279, lines 1-9).

During the trial Lieutenant Thomas Bailey with the Charleston Police Department testified that a two-dollar bill associated with the Sunoco robbery had been collected from Deonna Greene at her apartment, approximately a quarter mile from the Sunoco. (R. p. 336, lines 3-19; p. 327, lines 1-8). Sergeant Yolanda Brown with the Charleston Police Department testified that Deonna Greene was an ex-girlfriend of Appellant and that he sometimes stayed at her apartment. (R. p. 378, lines 4-8). Sergeant Brown testified that the two-dollar bill collected from Greene matched the serial number of the two-dollar bill stolen in the robbery. (R. p. 379, lines 3-5).

At the close of the State's case Appellant renewed the motion to dismiss based on the unavailability of witness Mark A. Maschke, as argued in the previous motions to dismiss, as well as the two additional unavailable witnesses, Tom Cullum, the Sunoco manager at the time of the robbery and Deonna Greene. (R. p. 454, line 18 – p. 455, lines 1-22). The inability to question the manager and Green about the two-dollar bill was prejudicial. The trial judge did not rule on the motion but instead said, "I think that's noted for the record. I don't think that motion obviously is not squarely before me but you've had an opportunity now to delve into that a little bit more deeply and that is certainly in the record." (R. p. 455, line 23 – p. 456, lines 1-2). The trial judge

erred in not ruling on the motion to dismiss based on pre-indictment delay when two additional witnesses were unavailable at trial. Appellant's due process rights were violated by the four-year pre-indictment delay. All three judges erred in refusing to dismiss the charges based on pre-indictment delay. As in State v. Lee, this Court should vacate the convictions.

2. The judges erred in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial.

The motions discussed above with regard to pre-indictment delay also included motions to dismiss based on the violation of Appellant's federal and state constitutional right to a speedy trial. (R. pp. 1-4; pp. 25-30). Appellant was arrested on January 16, 2018, for the Sunoco armed robbery and the State did not call the case for trial until March 7, 2022, over four years later. Appellant was released on bond on July 6, 2020, but remained on house arrest with electronic monitoring until trial. (R. p. 28).

Appellant first asserted his right to a speedy trial in a written motion filed May 26, 2020, over two years after arrest. (R. pp. 1-4). In response to the written motion to dismiss the State, in regard to the speedy trial analysis, wrote:

> The Defendant has been incarcerated since January 16, 2018. Even if this delay triggers a violation of speedy trial analysis, the remaining factors show there has been no violation of the Defendant's right to a speedy trial. The procedural history shows, the Defendant has not asserted a right to a speedy trial until now. The Defendant has made no request asking the State to consent to have the case tried sooner than now. In fact, the State requested the case be placed on the priority docket for the trial week of August 17, 2020, not the Defendant. For the above stated "Substantial Actual Prejudice" analysis, the Defendant has not shown prejudice by the pre-indictment delay.

(R. p. 11). As will be discussed below, actual prejudice for purposes of a speedy trial analysis, as opposed to a pre-indictment delay analysis, does not have to be shown and is just one factor the court considers.

A hearing on the motion to dismiss was held on June 17, 2020, before Judge R. Markley. In the written order denying the motion to dismiss based on a speedy trial violation Judge Dennis wrote, "In considering the factors in determining whether the Defendant has been denied the right to a speedy trial, this Court has reviewed the procedural history of this case provided in the State's brief and finds the Defendant was not prejudiced by any delay in trial." (R. p. 24). The judge erred in focusing solely on prejudice without considering other Barker v. Wingo speedy trial factors such as the length of and reason for the delay.

In State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016), the South Carolina Supreme Court wrote, "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)). In Smith v. Hooey, 393 U.S. 374, 374–75, 89 S. Ct. 575, 575, 21 L. Ed. 2d 607 (1969), the United States Supreme Court wrote, "In Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1, this Court held that, by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.' Id., at 226, 87 S.Ct. at 995." 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).

In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S.

514, 530, 92 S.Ct. 2182, 33 L.Ed 2d 101 (1972). Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978). In a footnote in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the Court wrote, "Depending on the nature of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett Fn. 1

In Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) the Court wrote:

> We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. Barker, 407 U.S. at 530, 92 S.Ct. 2182. We should not even examine the remaining factors "[u]ntil there is some delay which his presumptively prejudicial." Id. The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

The over two-year delay between arrest and the first assertion of the speedy trial right in the present case triggers the speedy trial analysis. Considering the other factors in a speedy trial analysis, the only reason given for the delay by the State was "an oversight." (R. p. 11). In the response to the first motion to dismiss the State submits that on December 6, 2019, at a docket meeting for trials for January 6, 2020, the case was continued without objection from either party. (R. p. 8). The case, however, had not yet been indicted and could not have proceeded to trial without waiver of grand jury presentment. Appellant did not assert his right to a speedy trial prior to filing the motion on May 26, 2020. The prejudice to Appellant was, as discussed with regard to pre-indictment delay, the fact that a critical witness, Mark A. Maschke, died on May 17, 2019, and was unavailable to testify at trial. (R. p. 2).

While Appellant showed actual prejudice, actual prejudice is not required to establish a speedy trial violation. The Court in Barker wrote:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972).

In Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the Court granted relief while noting that Doggett "did indeed come up short" in making "any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." As a result, the Court explained "we 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." In light of the difficult nature of proving prejudice, the Court held that the importance of presumptive prejudice increases with the length of delay. Doggett, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state's negligence and a substantial delay will compel relief unless the presumption of prejudice is either "extenuated, as by the defendant's acquiescence, or persuasively rebutted" by the prosecution. Id. at 658. The presumption of prejudice in the present case was neither extenuated by Petitioner's acquiescence, nor persuasively rebutted by the prosecution. Prejudice should be presumed.

In Moore v. Arizona, 414 U.S. 25, 26, 94 S. Ct. 188, 189-90, 38 L. Ed. 2d 183 (1973) the United States Supreme Court wrote:

> A defendant is not required to show prejudice affirmatively to win a speedy trial claim. The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim. Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial:

'We regard none of the four factors identified above (length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant) as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.' 407 U.S., at 533, 92 S.Ct., at 2193 (footnote omitted).

In addition to possible prejudice, any court must thus carefully weigh the reasons for the delay in bringing an incarcerated defendant to trial. In the face of petitioner's repeated demands, did the State discharge its 'constitutional duty to make a diligent, good-faith effort to bring him (to trial)'? Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969).

In Hunsberger the South Carolina Supreme Court wrote:

First, we note that the trial court's ruling was influenced by an error of law in so much as it rested on a belief that actual prejudice—to the exclusion of presumptive prejudice—was the only type of prejudice that would support a speedy trial claim. In fact, an accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial. Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. See Doggett, 505 U.S. at 655, 112 S.Ct. 2686 (accepting the State's definition of actual prejudice). 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. (internal citation omitted). This is so because "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" Doggett, 505 U.S. at 655, 112 S.Ct. 2686 (citing Barker, 407 U.S. at 532, 92 S.Ct. 2182). When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim. Doggett, 505 U.S. at 657–58, 112 S.Ct. 2686. While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time. Doggett, 505 U.S. at 656, 112 S.Ct. 2686 (internal citation omitted).

418 S.C. at 351, 794 S.E.2d at 376. In addition to the actual prejudice resulting from the unavailable witness, prejudice should also be presumed in the present case.

In Langford, 400 S.C. 421, 441-442, 735 S.E.2d 471, 482 (2012) the Court wrote:

> The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. 2182. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." Id. Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." Id. at 529–30, 92 S.Ct. 2182.

The over two- year delay triggers the speedy trial analysis. Balancing the fact that the State had no valid reason for the delay, the assertion of the right and the actual and presumptive prejudice to Appellant, the judge erred in denying the motion to dismiss. The delay violated Appellant's right to a speedy trial.

Almost two years later, Appellant's case still had not been indicted, as discussed above in issue one, and still had not been called for trial. As a result, on January 27, 2022, Appellant filed a second motion to dismiss based on the violation of Appellant's federal and state constitutional right to a speedy trial. (R. p. 25-30). The State responded by moving for a continuance. (R. pp. 31-41). A hearing on the second motion to dismiss based on a speedy trial violation was held on January 27, 2022, before Judge Deadra L. Jefferson. (R. pp. 42-84).

In a written order dated February 18, 2022[4], Judge Jefferson denied the motion to dismiss based on pre-indictment delay. (R. p. 85). In the written order Judge Jefferson wrote:

> The Court finds that the Defense has failed to establish the "trigger" required of the interval between accusation and trial crossing the threshold dividing ordinary from "presumptively prejudicial" delay. The South Carolina Supreme Court in Hunsberger defines presumptively prejudicial as a delay that exists when an accused is not prosecuted with ordinary promptness. 418 S.C. at 343, 797 S.E.2d at 372.

(R. p. 87). Judge Jefferson additionally wrote in the written order, "The total delay in this case is not sufficient to trigger a review of the other factors for speedy trial. As a result of the delays

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[4] On February 7, 2022, after the hearing but before the order issued, the State obtained indictments for the Sunoco robbery.

precipitated by the COVID-19 pandemic, this was a routine delay in light of the Nation's state of emergency and the resulting inability to conduct jury trial in the State of South Carolina." (R. p. 89). In footnote #13 of the order the judge wrote, "During the COVID-19 pandemic, the courts were closed, by Administrative Order, beginning March 18, 2020 and did not begin to resume Jury trials until April 5, 2021, assuming the County had an approved Safety Plan. The Defendant's [sic] was arrested o August 17, 2020." (R. p. 90). Earlier in the order, however, the judge correctly noted that Appellant was arrested on January 16, 2018, not August 17, 2020. (R. p. 85).

Finally, the judge wrote in the order, "The Court finds the Defense has not established an inordinate delay; the reasons for the delay in the disposition of the charges are well with the usual course of trial preparation and COVID-19 pandemic and no "presumptive" prejudice has been established by the accused. Therefore, as the Court has found that the Defense has not established "presumptive delay," the Court need not reach the other three factors. Barker v. Wingo, 470 U.S.415, 530 (1972). (R. p. 90). The judge erred, as a matter of law, in finding that the four-year delay between arrest on January 16, 2018, and the second assertion of the right to speedy trial on January 27, 2022, was not sufficient to "trigger" a review of the Barker factors. See State v. Hunsberger, 418 S.C. 335, 345, 794 S.E.2d 368, 373 (2016) ("See Langford, 400 S.C. at 442–443, 735 S.E.2d at 482 (holding a twenty-three month delay was presumptively prejudicial) (internal citation omitted); State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) (reaching the Barker factors when there was a forty-four month delay); State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978) (holding a twenty-eight month delay triggered speedy trial analysis). "The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard." Hunsberger, 418 S.C. at 342, 794 S.E.2d at 371.

"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 342, 794 S.E.2d at 371–72. The four-year delay triggered the speedy trial analysis and the judge should have considered the other Barker v. Wingo factors: the reason for the delay; the defendant's assertion of the right; and, prejudice to the defendant.

As to the second Barker v. Wingo factor, reason for delay, the only reason given by the State for the first over two-year period of delay from the time of arrest on January 16, 2018, until the first assertion of the right to a speedy trial on May 26, 2020, was "an oversight." (R. p. 11). This period of time should be weighed heavily against the State. The reasons given by the State for the second period of delay between May 26, 2020, and January 27, 2022, were "oversight" and COVID. (R. pp. 31-41). The year-long shut down due to COVID that began in March of 2020, is a neutral factor and should not be weighed against either party. It appears that jury trials resumed in September of 2021. (R. p. 30). Appellant's case was finally called for trial on March 7, 2022. The additional six-month period of delay between jury trials resuming in September of 2021, and the call of the case in March of 2022, due to an "oversight" should be weighed heavily against the State.

As to Appellant's assertion of the right to a speedy trial, Appellant first asserted his right on May 26, 2020, by filing a motion to dismiss based on the speedy trial violation. Appellant again asserted his right to a speedy trial on January 27, 2022, by filing a second motion to dismiss based on the speedy trial violation. The State responded to the second motion to dismiss by moving for a continuance. Appellant asserted his right to a speedy trial on two separate occasions before the case was finally called to trial in March of 2022, over four years after arrest. As to prejudice to the Appellant, as discussed above, Appellant showed both actual and presumed

prejudice from the delay. Balancing the length of the two and a half year delay, excluding the Covid shutdown, against the fact that the State did not have a valid reason for the delay, Appellant twice asserted his right to a speedy trial and the prejudice, both actual and presumed, Appellant established a speedy trial violation. The judge erred in refusing to dismiss the charges based on the speedy trial violation.

When the case was finally called to trial on March 7, 2022, Appellant renewed the motion to dismiss based on the speedy trial violation. (R. p. 104, line 20 – p. 106, 107, lines 1-7). The motion was again denied. (R. p. 107, lines 3-7). At the close of the State's case Appellant renewed the motion to dismiss for the speedy trial violation based on the unavailability of witness Mark A. Maschke, as argued in the previous motions to dismiss, as well as the two additional unavailable witnesses, Tom Cullum, the Sunoco manager at the time of the robbery and Deonna Greene. (R. p. 454, line 18 – p. 455, lines 1-22). The trial judge did not rule on the motion but instead said, "I think that's noted for the record. I don't think that motion obviously is not squarely before me but you've had an opportunity now to delve into that a little bit more deeply and that is certainly in the record." (R. p. 455, line 23 – p. 456, lines 1-2). The trial judge erred in not ruling on the motion to dismiss based on a speedy trial violation when two additional witnesses were unavailable at trial. As discussed in the first issue with regard to pre-indictment delay, the inability to question the manager and Green about the two-dollar bill was prejudicial. Adding the two additional unavailable witnesses into the prejudice of the speedy trial balancing analysis further demonstrates the violation of the state and federal constitutional right to a speedy trial. All three judges erred in refusing to dismiss the charges based on the speedy trial violation.

CONCLUSION

Based on the due process violation resulting from pre-indictment delay, this Court should vacate the convictions. Based on the speedy trial violation, this Court should dismiss the charges.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of May, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this final brief of appellant complies 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."

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 9th day of May, 2023.