STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Edgefield County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE A. ODOM,

APPELLANT

APPELLATE CASE NO 2015-001294

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

1. **The trial judge erred in sentencing Appellant to life without parole, pursuant to S.C. Code §17-25-45, for a burglary second degree conviction when a prior conviction for criminal sexual conduct with a minor second degree should not have been considered a most serious offense pursuant to the statute because there is evidence in the record that the conduct was consensual.**

The State argues that the sentence of life without parole was proper without using the prior conviction for criminal sexual conduct with a minor second degree because of a burglary second degree violent conviction from Newberry County. (BOR p. 7). This conviction was not included in the notice of intent to seek life without parole and was not introduced in evidence at trial. The trial judge properly refused to consider convictions not included in the notice of intent to seek life without parole. (R. p. 459, line 12 – p. 438, lines 1-22). This Court should not consider the Newberry conviction.

The State provided notice of intent to seek life without parole based on a prior conviction for criminal sexual conduct with a minor second degree, indictment # 97-GS-06-365, and a conviction for burglary second degree violent, indictment # 2012-GS-53-0311). (R. p. 448 - Notice of Intent to Seek Life Without Parole). The notice is part of the State meeting its burden in proving the prior convictions constitute strikes for purposes of S.C. Code §17-25-45. The State's reliance on State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) is misplaced because the notice in Burdette contained the prior 1979 armed robbery conviction relied upon by the State to seek life without parole. Burdette, at fn #3. The State failed to meet its burden in proving that the Newberry County conviction constituted a strike. The Newberry County conviction should not be considered in deciding if the sentence of life without parole was proper.

2. **The trial judge erred in refusing to dismiss the indictment for burglary second degree when the State failed to call the case for trial until August 6, 2013, almost six years after the arrest in October of 2007, and then when the first trial ended in a mistrial, the State failed to call the case again for trial until June 8, 2015, almost eight years after arrest in violation of Appellant's state and federal constitutional right to a speedy trial.**

Appellant was arrested for the IGA burglary in October 30, 2007. (R. p. 41, lines 10-14). The State did not seek an indictment until almost six years later in August of 2013, when the State initially called the case for a trial that ended in mistrial because of a hung jury. (R. p. 39, lines 1-5). The State did not call the case for trial a second time for almost two more years after the mistrial. Prior to trial on June 8, 2015, Appellant moved to dismiss the indictment based on the State's violation of Appellant's right to a speedy trial guaranteed under both the state and federal constitutions. (R. p. 33, lines 15-22).

The trial judge denied the motion to dismiss writing:

> I don't think – I know the State has the burden of proof in this case beyond a reasonable doubt. But it's almost, I guess, akin to civil laches, it rests back on your lawyers and your rights and then you have an "ah-ha" moment. And I realize he has to have a duty to -- to prove that he's not guilty, he's innocent. I would respectfully deny the motion based on that.

(R. p. 51, lines 18-24). The trial judge erred.

The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy ... trial." S.C. Const. art. I, § 14. 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.Ed2d 101 (1972).

The trial judge in the present case failed to properly address the Barker factors. As to the length of the delay, the almost six year time frame between the arrest on October 30, 2007, and indictment and the first trial in August of 2013, is presumptively prejudicial and triggers the speedy trial analysis with regard to the remaining three factors: (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant.

The State asserts that Odom caused the delay by changing lawyers and not appearing for court in February of 2009, sixteen months after his arrest in October of 2007. (BOR pp. 11-12). First, the State admitted that the reason Appellant may not have appeared for court was because he may have been incarcerated in another neighboring county. (R. p. 43, line 23 – p. 44, lines 1-19). Second, it appears Appellant was not indicted until August of 2013. The changing lawyers and incarceration in neighboring counties had no effect on the delay in indictment.

As to the assertion of the right to a speedy trial:

> Whether a defendant previously asserted the right to a speedy trial is not alone dispositive of whether he is entitled to relief. See Barker, 407 U.S. at 533 (holding none of the four factors are either necessary or sufficient to find a denial of the right to a speedy trial). The accused's assertion of the right, however, is entitled strong evidentiary weight in determining whether the accused is being deprived of the right. Barker, 407 U.S. at 531–32. Failure by the accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial. Id. at 532.

State v. Hunsberger, No. 2015-000083, 2016 WL 5930127, at *6 (S.C. Oct. 12, 2016). The assertion of the right is simply one factor to consider in a speedy trial analysis.

As to the fourth factor, Appellant has both actual prejudice in the death of a witness and presumptive prejudice. As the South Carolina Supreme Court recently noted in Hunsberger:

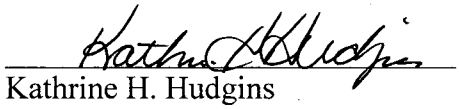
> As the United States Supreme Court held, "When the Government's negligence ... causes delay six times as long as that generally sufficient to trigger judicial review ... and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." Doggett, 505 U.S. at 658 (holding an accused's right to a speedy trial was violated when his trial was delayed eight years with no showing of actual prejudice); see also U.S. v. Ingram, 446 F.3d 1332, 1340 (11th Cir. 2006) (holding that a two-year delay from indictment to trial resulted in a speedy trial violation when the first three factors weighed against the State and there was no actual prejudice).

State v. Hunsberger, No. 2015-000083, 2016 WL 5930127, at *7 (S.C. Oct. 12, 2016).

Appellant's speedy trial rights were violated in the present case and dismissal is the only possible remedy. The trial judge abused his discretion in refusing to dismiss the charge. The trial judge failed to properly balance the presumptively prejudicial almost six year delay, attaching undue significance to the facts that Appellant was on bond, the speedy trial right was not asserted previously and that Appellant had other charges pending in other counties. (R. p. 50, line 17 – p. 51, lines 1-17). Properly balancing the Barker factors, the excessive delay and the fact that the State provided no valid explanation for failing to call the case to trial for almost six years outweigh the fact that the speedy trial right was not previously asserted. While Appellant can demonstrate particularized prejudice in the death of a potential witness during the six year delay in the State calling the case for trial, prejudice should be presumed. The charge must be dismissed.

CONCLUSION

Based on the argument presented in issue one, this Court should reversed the sentence and remand the case for re-sentencing outside S.C. Code §17-25-45. Based on the argument presented in issue two, the conviction and sentence should be reversed.



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This 1st day of February, 2017.

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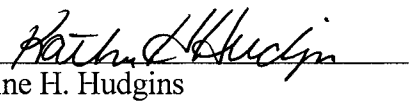
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

February 1, 2017



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