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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
Honorable Bentley Price, Circuit Court Judge
Appellate Case No. 2021-001500

THE STATE,

Respondent,

vs.

OSMAN UVALDO JIMENEZ BENITEZ,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Whether Appellant's fundamental right to a speedy trial was violated where Appellant was held for over two years in pre-trial incarceration without bond before his case was brought to trial, where Appellant did not contribute to the delay, and where he was prejudiced due to pretrial incarceration, anxiety, and the loss of potential witnesses in the interim?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the two circuit court judges who were presented with Appellant's speedy trial dismissal motions abuse their broad discretion by declining to dismiss Appellant's hit and run with death resulting charge when the approximately twenty-five-month period of delay between Appellant's arrest and trial: (1) did not result from any intentional efforts on the part of the State to hinder Appellant's defense; (2) did not cause any meaningful prejudice to Appellant; and (3) resulted in large part from staffing changes at the solicitor's office, the ongoing nature of plea negotiations for a substantial period of time, and difficulties caused by the unexpected onset of a global pandemic?

STATEMENT OF THE CASE

In November of 2019, Appellant Osman Uvaldo Jimenez Benitez was arrested following an investigation into the death of a man who was fatally asphyxiated by Appellant's vehicle a few days earlier. On December 2, 2021, the Jasper County Grand Jury indicted Appellant for one count of hit and run with death resulting. On December 6, 2021, a jury trial was commenced in the Jasper County Court of General Sessions with the Honorable Bentley Price, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a four-year term of imprisonment. Thereafter, Appellant moved for a new trial and then filed a notice of appeal before that motion was ruled upon. On February 18, 2022, the trial judge conducted a hearing on Appellant's post-trial motion. At the conclusion of the hearing, the motion was orally denied, and the trial judge subsequently issued a written order confirming that ruling.[1] Appellant then timely filed a second notice of appeal.

[1] Amongst the issues raised through the new trial motion, defense counsel renewed an earlier request for Appellant's case to be dismissed for a purported speedy trial violation, and the trial judge—consistent with his earlier ruling on the matter—declined that request. (Trl. Tr. p. 61; Post-Trl. Tr. pp. 5-6; p. 9).

STATEMENT OF FACTS

In the early morning hours of October 26, 2019, officers from the Hardeeville Police Department were dispatched to the intersection of Paynesville Road and Young Street in Hardeeville, South Carolina, in response to an emergency call reporting someone's brother was underneath a car.[2] (Trl. Tr. pp. 95-96; p. 123; p. 126; p. 137; p. 254). Officer Rhonda Watson was first to arrive at the scene, and, when she did, she observed a dark-colored Dodge Avenger with its rear in the roadway of Paynesville Road and its front in a ditch.[3] (Trl. Tr. p. 126; pp. 129-130; pp. 135-136). In response, Officer Watson began to approach the car, which was locked and empty, and, as she neared it, she spotted what appeared to be feet and legs sticking out from underneath the front of the vehicle. (Trl. Tr. p. 126; p. 132). She then quickly looked underneath and spotted someone's head near the vehicle's front tire. (Trl. Tr. p. 131). Following her shocking discovery, other emergency responders began arriving at the scene, and the vehicle was moved off the person underneath it as quickly as possible. (Trl. Tr. pp. 134-135; p. 219; p. 230; p. 387). Sadly though, the victim—Yobani Morales Roblero ("Victim")—was already deceased by that point, and his cause of death was mechanical asphyxia due to being suffocated by the weight of the vehicle on top of him.[4] (Trl. Tr. pp. 134-135; p. 226; p. 262; p. 498).

Based on Victim's unnatural death, an investigation was rapidly initiated to determine what had occurred. (Trl. Tr. pp. 387-388). As part of that investigation, Detective Thomas

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[2] At many points throughout the trial transcript, Paynesville Road was misidentified as Haynesville Road. (Trl. Tr. p. 123; pp. 125-126; p. 130; p. 208; p. 212; p. 243; p. 389; p. 391; p. 398; p. 405; p. 408; pp. 412-414; p. 443; p. 465; p. 507; pp. 517-518).

[3] Officer Watson also observed a white Chevy Suburban stopped on Young Street nearby. (Trl. Tr. pp. 136-137).

[4] Later on during trial, expert testimony was presented establishing it would have taken four to eight minutes for Victim to die under the circumstances involved. (Trl. Tr. p. 498).

Hubbard checked the information related to the Dodge Avenger found on top of Victim and discovered the vehicle was registered to Appellant, whom he quickly began attempting to locate. (Trl. Tr. p. 388; p. 390). Unable to find Appellant at the scene, Detective Hubbard responded to the registered address associated with Appellant's vehicle and was advised Appellant no longer lived at that location. (Trl. Tr. pp. 388-390). However, an individual at that address advised the detective where Appellant currently lived, and Detective Hubbard made contact with Appellant's wife at that location. (Trl. Tr. pp. 390-393). Appellant's wife reported she last saw Appellant on the porch of their home around 10:30 p.m. on the preceding night, but Appellant was not at the residence at that time. (Trl. Tr. pp. 393-394).

As the investigation continued, Detective Hubbard obtained surveillance footage from various locations in the vicinity. (Trl. Tr. p. 405). Through it, he was able to determine Victim visited Appellant's residence around 10:00 p.m. or 11:00 p.m. a few hours before he was killed, the two went to a gas station together a little bit later, and they bought beer there. (Trl. Tr. pp. 405-408). He further determined Appellant returned to the gas station in his vehicle around 2:14 a.m. with another individual determined to be Anibal Berdugo, and the two bought more beer from the gas station. (Trl. Tr. pp. 409-410). In addition to that, he determined Appellant's vehicle returned to Appellant's residence around 4:00 a.m., Berdugo ran away from the residence on foot a short time later, Victim's vehicle followed behind Berdugo, Victim picked Berdugo up in his vehicle, the two began driving away, and then Appellant pursued them in his own vehicle. (Trl. Tr. pp. 411-414).

As a result of what he uncovered in the investigation, Detective Hubbard spoke with Berdugo on two separate occasions. (Trl. Tr. pp. 348-349; p. 418). Initially, in the first interview, Berdugo was not forthcoming and falsely claimed he last saw Victim around 9:00

p.m. prior to his death. (Trl. Tr. p. 290; p. 336; pp. 419-420). However, in the second interview, he finally revealed what had occurred. (Trl. Tr. p. 290; pp. 338-339; pp. 419-420). More specifically, he revealed he and Victim visited with Appellant on the night of the incident at his residence, the three drank beer together throughout the night, an argument ensued at some point after he and Victim criticized Appellant for driving at a high rate of speed, Appellant angrily pushed him when they arrived back at Appellant's residence after that, he left Appellant's residence on foot, Victim picked him up in his vehicle, they started driving home, and Appellant followed after them. (Trl. Tr. pp. 274-282; p. 420). Berdugo further reported Victim stopped his vehicle near their house, Victim got out and approached Appellant due to him following them, and the two began arguing. (Trl. Tr. pp. 282-283; p. 420). At that point, Berdugo reported he returned to the nearby house he shared with Victim, and, when he got there, he heard a noise that sounded like a vehicle trying to get out of a ditch.[5] (Trl. Tr. pp. 283-284). In response, Berdugo indicated he went to investigate, he saw Appellant standing near his vehicle, and Appellant told him to get out of there or the same thing that happened to his friend would happen to him, which prompted Berdugo to run back to his home. (Trl. Tr. pp. 284-285; p. 420).

Likewise, Detective Hubbard—with the assistance of a bilingual officer—conducted two separate interviews of Appellant. (Trl. Tr. pp. 65-67; p. 88; p. 70; pp. 93-94). During the first interview, Appellant—after being advised of and waiving his rights—admitted he drank beer with Victim and one of Victim's friends at his residence on the date of the incident. (Trl. Tr. pp. 91-92). On the same date, he claimed he let Victim's friend drive his car, and they went to the store to get more beer. (Trl. Tr. p. 92). Following that, Appellant stated he went to sleep in his

[5] Berdugo and Victim lived in a residence located at the corner of Young Street along with Victim's sister, Sara Roblero Morales, and several others. (Trl. Tr. pp. 227-228; pp. 262-265; p. 269; pp. 273-274).

car's backseat, was awakened by the vehicle jarring or shaking, got out, and found Victim underneath the vehicle. (Trl. Tr. p. 92). At that point, Appellant alleged Victim's friend ran away, he unsuccessfully attempted to move the car off Victim, he then walked away from the scene and continued walking for three days, and he later obtained a ride to North Carolina. (Trl. Tr. p. 92). Meanwhile, during the second interview, Detective Hubbard confronted Appellant with what he discovered through the surveillance footage, and Appellant denied knowing what the officer was talking about. (Trl. Tr. pp. 95-98). Ultimately, at the conclusion of that interview, Appellant was arrested in connection to Victim's death.[6] (Trl. Tr. pp. 98-99; pp. 427-428; Arrest Warrant).

Following his arrest, Appellant, who was from Honduras and had only been in the United States for a few years at the time of the incident, was denied bond because he was subject to an immigration detainer. (Pre-Trl. Tr. p. 4). As a result, he remained in custody pending trial. (Pre-Trl. Tr. p. 4).

Thereafter, on October 26, 2021, Appellant's defense counsel filed a motion seeking bond and requesting a speedy trial be granted. (Oct. 2021 Motion). In response, a hearing was conducted on the motion a few days later with the Honorable Carmen T. Mullen, circuit court judge, presiding. (Pre-Trl. Tr. p. 4). During that hearing, the solicitor noted Appellant had not been granted bond in light of the immigration detainer and, thus, had been in custody for approximately 734 days by that point. (Pre-Trl. Tr. p. 4). She further noted she was the third prosecutor assigned to Appellant's case, intended to present an indictment to the grand jury at the beginning of December, and would be ready to proceed to trial on December 6, 2021. (Pre-Trl. Tr. p. 4). At the conclusion of the solicitor's remarks, defense counsel recounted some details

[6] The date of Appellant's arrest was November 1, 2019. (Trl. Tr. p. 57; Arrest Warrant).

about the procedural history of the case and—consistent with the filed motion—requested a speedy trial be granted. (Pre-Trl. Tr. pp. 7-8). However, defense counsel quickly followed that request by asserting Appellant had supposedly been prejudiced by the delays in his case because he had been in custody for over two years, and, therefore, defense counsel requested Appellant's case be dismissed. (Pre-Trl. Tr. pp. 8-9). However, in doing so, defense counsel acknowledged Appellant's case had to be reassigned several times to different solicitors and she further acknowledged "[w]e were going to work a plea." (Pre-Trl. Tr. pp. 8-9). At that point, the solicitor noted plea negotiations had been ongoing, multiple offers had been extended, Appellant had expressed a willingness to enter a guilty plea, and Appellant had simply not accepted what had been offered up to that point. (Pre-Trl. Tr. pp. 9-10). After considering what had been presented, Judge Mullen denied Appellant's request for bond upon explicitly finding Appellant was a flight risk. (Pre-Trl. Tr. p. 10; Bond Order, dated Nov. 4, 2021). She then indicated Appellant would be granted a speedy trial and scheduled the case for trial on December 6, 2021. (Pre-Trl. Tr. p. 10; Bond Order, dated Nov. 4, 2021).

Subsequent to that, Appellant was formally indicted for hit and run with death resulting, and, consistent with Judge Mullen's earlier ruling, his case was called to trial as scheduled. (Trl. Tr. p. 61). Toward the outset of trial, defense counsel again moved for Appellant's case to be dismissed for a speedy trial violation. (Trl. Tr. p. 56). As support for the motion, defense counsel noted Appellant had been in custody since November of 2019 but had only been indicted one week earlier. (Trl. Tr. p. 57). Furthermore, she contended Appellant had indicated in February of 2021 he was "willing" to go to trial "as soon as jury trial[s] resumed,"[7] she

[7] Due to a global pandemic that began within just a few months of Appellant's arrest, the operation of trial courts and grand juries throughout South Carolina was significantly impacted for a period of approximately two years, and, during substantial portions of that time period, no

maintained the docket in Jasper County was not overcrowded, and she alleged Appellant was prejudiced because: (1) his wife and child were purportedly forced to leave the country due to his incarceration;[8] (2) 911 calls were lost and supposedly would have been exculpatory;[9] and (3) some unspecified witnesses were lost because they had now left the country. (Trl. Tr. pp. 58-60). However, she conceded some of the delays resulted from turnover in the solicitor's office. (Trl. Tr. pp. 58-59). In response, the solicitor confirmed staffing changes had contributed to the delays, and she noted the issuance of an indictment shortly before trial was not uncommon. (Trl. Tr. pp. 60-61). The solicitor further noted Judge Mullen had previously declined to dismiss the case after hearing the same contentions. (Trl. Tr. p. 60). Upon considering the matter, the trial judge declined to dismiss the case, and the trial proceeded on. (Trl. Tr. p. 61).

As the trial continued forward, the law enforcement officers who responded to the incident testified about the discovery of Victim's body underneath Appellant's car and the details of the ensuing investigation that culminated in Appellant's arrest in connection to Victim's death, and the incriminating surveillance footage was admitted into evidence and played for the

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jury trials were able to be conducted at all. See, e.g., RE: In-Person Proceedings and Jury Trials in the Trial Courts, S.C. Sup. Ct. Order dated March 1, 2022 ("For the last two years, the South Carolina Judicial Branch has been forced to alter normal operating procedures in the trial courts due to the dangers caused by COVID-19. To protect the public, attorneys, judges, and court personnel, courts have been directed to halt or limit jury trials and in-person proceedings at various times due to rising rates of infection and percent positive rates.").

[8] Although defense counsel claimed Appellant's wife and child were forced to leave the country as a result of Appellant's pre-trial incarceration, she informed the trial judge during the sentencing proceedings his family was, in fact, actually in the United States, his wife was "here," and his child was in school there. (Trl. Tr. pp. 569-570).

[9] Later on during trial, Phillip Cothran, a coordinator for Jasper County Emergency Services, confirmed only a single emergency call was placed in connection to the incident, and, in that call, the caller reported a car was on top of her brother. (Trl. Tr. p. 249; p. 252; p. 254). However, he explained the actual recording of the call had been lost due to a malware attack on the county's systems that began in September of 2019 and spread throughout the county's network. (Trl. Tr. pp. 252-253).

jury. (Trl. Tr. pp. 123-152; pp. 211-241; pp. 386-466). Likewise, Victim's sister testified about her discovery of her brother underneath Appellant's car and her ensuing emergency call seeking help. (Trl. Tr. pp. 262-272). In addition to that, Berdugo recounted what occurred on the night of the incident and identified Appellant as the person who argued with Victim just before Victim's death and as the person who threatened him if he did not leave the area near Victim's body. (Trl. Tr. pp. 273-367). Moreover, an expert forensic DNA analyst testified about the results of his analysis of evidence collected from Appellant's car after that incident, and, unsurprisingly, that analysis revealed suspected blood found on the underside of Appellant's vehicle likely was Victim's. (Trl. Tr. pp. 472-486). Furthermore, a forensic pathologist testified about the autopsy she performed on Victim's body, which revealed Victim slowly died as a result of mechanical asphyxia. (Trl. Tr. pp. 491-500).

Following the presentation of all that testimony and evidence, the State rested its case, and Appellant elected not to testify in his own defense. (Trl. Tr. p. 501; p. 509). Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Trl. Tr. pp. 515-557). Notably, as part of his jury instructions, the trial judge expressly included a charge on spoliation of evidence. (Trl. Tr. pp. 551-552). Subsequent to that, the case was submitted to the jury, and, after a little less than an hour of deliberations, the jury convicted Appellant as indicted. (Trl. Tr. pp. 558-559). The trial judge then sentenced Appellant to a four-year term of imprisonment and expressly awarded him credit for all the time served in pre-trial custody.[10] (Trl. Tr. p. 573).

[10] During the sentencing proceedings, Appellant personally addressed the court, apologized, and attributed everything that happened to drinking alcohol. (Trl. Tr. pp. 570-571).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing on appeal a ruling on a dismissal motion predicated upon an alleged speedy trial violation, the appellate court reviews the trial judge's ruling under an abuse of discretion standard. State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371-372 (2016); see State v. Reaves, 414 S.C. 118, 132, 777 S.E.2d 213, 220 (2015) ("[A] trial court's decision as to whether to dismiss an indictment based on speedy trial grounds is reviewed for an abuse of discretion."). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006); see United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

The two circuit court judges who were presented with Appellant's speedy trial dismissal motions did not abuse their broad discretion by declining to dismiss Appellant's hit and run with death resulting charge because the approximately twenty-five-month period of delay between Appellant's arrest and trial: (1) did not result from any intentional efforts on the part of the State to hinder Appellant's defense; (2) did not cause any meaningful prejudice to Appellant; and (3) resulted in large part from staffing changes at the solicitor's office, the ongoing nature of plea negotiations for a substantial period of time, and difficulties caused by the unexpected onset of a global pandemic.

Appellant contends both circuit court judges involved in his case erred by failing to dismiss his charge based on an alleged violation of his constitutional speedy trial rights. In support of that contention, Appellant maintains his charge should have been dismissed based on the delay incurred between his November 2019 arrest and December 2021 trial because he was held in pre-trial custody during that entire time period, he allegedly did not contribute to any of the delay, and he was supposedly prejudiced by the delay due to the unavailability of several witnesses and the fact he was incarcerated from arrest until trial. To the contrary, the two circuit court judges in no way abused their discretion by refusing to dismiss Appellant's case based on an alleged speedy trial violation because the twenty-five-month period of delay involved was not the result of any willful or intentional efforts on the part of the State to hinder Appellant's defense, did not result in any meaningful prejudice to Appellant, and resulted in large part from staffing changes at the solicitor's office, the ongoing nature of plea negotiations for a substantial period of time, and difficulties caused by the unexpected onset of a global pandemic. Under such circumstances, Appellant's constitutional speedy trial rights were not violated, and the extreme sanction of dismissal was not warranted. Appellant's conviction should be affirmed.

Pursuant to both the United States Constitution and the South Carolina Constitution, an accused in a criminal prosecution has a constitutionally-guaranteed right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. That right is designed to protect against anxiety

stemming from public accusation of a crime and to limit the possibility of a lengthy pre-trial delay impairing an accused's defense. State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012). However, most importantly, the right to a speedy trial is chiefly designed to prevent undue pre-trial impairment of liberty. United States v. Loud Hawk, 474 U.S. 302, 312 (1986). Critically though, the criminal trial process is designed to move at a deliberate pace due to the many procedural safeguards involved, and, thus, the essential guarantee provided by the right to a speedy trial is the orderly expedition of a charge as opposed to mere speedy expedition. United States v. Ewell, 383 U.S. 116, 120 (1966); see Beavers v. Haubert, 198 U.S. 77, 87 (1905) ("The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.").

In order to trigger a speedy trial analysis, a criminal defendant's trial must have been delayed for a period of time that is presumptively prejudicial, which is necessarily dependent on the particular circumstances of *each individual case*. Langford, 400 S.C. at 442, 735 S.E.2d at 482. Notably, "a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case." Id. In South Carolina, a delay of over two years—under *normal* circumstances—has previously been found to be sufficient to trigger a speedy trial analysis. State v. Waites, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978). Likewise, the United States Supreme Court has suggested a delay of roughly one year could—in certain circumstances—be presumptively prejudicial. See Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). However, even where a delay that is presumptively prejudicial exists, a speedy trial

determination "is *not based on the passage of a specific period of time*" and delay alone is not singularly dispositive. State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (emphasis added); see State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (recognizing "delay alone is not dispositive"); see also Ratchford v. State, 785 A.2d 826, 828 (Md. Ct. Spec. App. 2001) ("Along the delay continuum, the trigger of 'constitutional dimensions' is not itself part of the ultimate merits of a speedy trial claim. It simply marks the minimal point, short of which a court will dismiss a claim summarily and will not waste its time even inquiring into such things as reason for delay, demand-waiver, or prejudice. Beyond that minimal or triggering point, however, the claim may not necessarily have merit, but it is worthy at least of thoughtful consideration. The trigger of 'constitutional dimensions' is exclusively a procedural phenomenon that justifies a further analysis and then drops out of the picture.").

Ultimately, once a speedy trial analysis has been triggered, the question of whether a defendant's speedy trial rights have been violated is necessarily dependent on the specific circumstances of the defendant's particular case. State v. Robinson, 335 S.C. 620, 625, 518 S.E.2d 269, 272 (Ct. App. 1999). When attempting to answer that question, several factors should be considered. State v. Kennedy, 339 S.C. 243, 249, 528 S.E.2d 700, 703-704 (Ct. App. 2000). Specifically, a court analyzing a speedy trial claim should consider: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) whether any prejudice was suffered by the defendant as a result of the delay. Barker v. Wingo, 407 U.S. 514, 530 (1972). Notably though, none of the four factors is alone necessary or sufficient for a finding of a speedy trial violation. Id. at 533. Instead, "they are related factors and must be considered together with such other circumstances as may be relevant." Id. "In sum, these

factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Id.

In the case at bar, a period of roughly twenty-five months elapsed between Appellant's November 2019 arrest in connection to Victim's horrific death by mechanical asphyxia and his December 2021 trial related to that incident. Looking to that period of delay, it was likely sufficiently lengthy to warrant consideration of the relevant speedy trial factors. See id. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."); Brazell, 325 S.C. at 75, 480 S.E.2d at 70 (recognizing the length of the delay may be sufficient to trigger review of the relevant speedy trial factors); cf. Waites, 270 S.C. at 108, 240 S.E.2d at 653 (finding a delay of twenty-eight months sufficient to warrant review of the pertinent factors in a speedy trial analysis). However, it was not excessively or unreasonably long in light of the unusual circumstances of Appellant's case, which was particularly true given the fact the pendency of Appellant's case largely coincided with an unexpected global pandemic. See United States v. Serna-Villarreal, 352 F.3d 225, 232 (5th Cir. 2003) (instructing courts conducting speedy trial analyses "generally have found presumed prejudice only in cases in which the post-indictment delay lasted at least five years"); cf. Elias v. Superior Ct., 294 Cal. Rptr. 3d 178, 190 (Cal. Ct. App. 2022) ("Courts have recognized that health quarantines to prevent the spread of infectious diseases have long been recognized as good cause for continuing a trial date. A contrary holding would require trial court personnel, jurors, and witnesses to be exposed to debilitating and perhaps life-threatening illness. Public health concerns trump the right to a speedy trial. We acknowledge the unfortunate hardship to defendant from the delays in this case, but . . . neither the prosecution nor the court is responsible for the emergency that has overwhelmed the nation and much of the world."

(citations, brackets, and internal quotations omitted)). As a result, the length of the delay involved—the first of the relevant factors in a speedy trial analysis—did not and should not weigh heavily against the State for purposes of a speedy trial analysis.

Turning to the second of the relevant factors, some portion of the delay was incurred as part of the normal process involved in getting any criminal case ready to go to trial and could not legitimately be held against the State for speedy trial purposes. See Ratchford, 785 A.2d at 830 (explaining the initial seven-month period of time between the date of the arrest and the case initially being scheduled for trial was "necessary for the orderly administration of justice and is not considered an unreasonable delay that calls for further accounting"); see also State v. Smith, 307 S.C. 376, 380, 415 S.E.2d 409, 411 (Ct. App. 1992) (finding the defendant bears the burden of showing a speedy trial delay was due to the neglect and willfulness of the State's prosecution). Similarly, some portion of the delay involved was caused by the solicitor and the defense engaging in good faith plea negotiations that were still ongoing until *at least* February of 2021. See Vermont v. Brillon, 556 U.S. 81, 92-93 (2009) (recognizing delays caused by defense counsel's actions are attributable to the defendant and not the State when conducting a speedy trial analysis); see also State v. Dukes, 256 S.C. 218, 223, 182 S.E.2d 286, 288 (1971) ("The delay must be attributable to the State before the appellants can complain."); cf. United States v. Anderson, 902 F.2d 1105, 1110 (2d Cir. 1990) (finding no speedy trial violation where "defense counsel agreed to delays and continuances for purposes of plea negotiations"); People v. Garcia, 822 N.Y.S.2d 322, 325 (N.Y. App. Div. 2006) ("Defendant's attempts to negotiate a favorable preindictment plea may have contributed to the delay."); People v. LoPizzo, 543 N.Y.S.2d 88, 88 (N.Y. App. Div. 1989) (rejecting a claim of a constitutional speedy trial violation when "[n]early all of the preindictment delay was directly attributable to the defendant's repeated requests for

adjournments so that plea negotiations could be considered"). Furthermore, some of the delay was attributable to the global pandemic as reflected by defense counsel's statement Appellant was willing—by February of 2021—to go to trial *as soon as trials resumed*, which was a circumstance entirely beyond the control of the solicitor, the court, and Appellant himself and was not something that could be fairly held against any party for purposes of a speedy trial analysis. See State v. Paige, 977 N.W.2d 829, 838 (Minn. 2022) ("[W]e conclude that trial delays due to the statewide orders issued in response to the COVID-19 global pandemic do not weigh against the State."); Vlahos v. State, 518 P.3d 1057, 1072 (Wyo. 2022) ("Delays due to COVID-19 pandemic are neutral because the pandemic was an extraordinary circumstance not attributable to either the State or [the defendant]." (citation and internal quotations omitted)). Beyond that, some portion of the delay resulted from the need to reassign Appellant's case to a new solicitor following staffing changes at the solicitor's office, which was a period of delay that could only be held slightly against the State if it could fairly be held against the State at all. See Strunk v. United States, 412 U.S. 434, 436 (1973) (instructing factors leading to unintentional delays such as "understaffed prosecutors" should be weighed less heavily than intentional delays in a speedy trial analysis); Manix v. State, 895 So. 2d 167, 176 (Miss. 2005) ("The State's discretion as to which prosecutor will try a particular case is a basic tenet of our criminal justice system. This Court has never held that the State's replacement of prosecutors amounts to a speedy trial violation warranting a reversal of a criminal conviction. Therefore, this factor is slightly weighed against the State."); Hallowell v. State, 178 A.3d 610, 628 (Md. Ct. Spec. App. 2018) (finding the resignation of the original prosecutor assigned to the case, which resulted in delays that were needed for a new prosecutor to get familiar with and prepare the case for trial, constituted a more neutral reason for delay in a speedy trial analysis and only weighed slightly

against the State). Meanwhile, to the extent Appellant complained—and continues to complain—about the solicitor's failure to strictly comply with the ninety-day time period set out in Rule 3 of the South Carolina Rules of Criminal Procedure for the preparation of the indictment, that failure in no way violated Appellant's speedy trial rights or warranted dismissal. See State v. Culbreath, 282 S.C. 38, 39-40, 316 S.E.2d 681, 681 (1984) ("While the rule is designed to secure a prompt handling of cases, it was not intended to be the criterion for determining whether the constitutional guaranty of a speedy trial has been met. Therefore, the failure of the solicitor to act upon a warrant within ninety (90) days, as required by [what has now become Rule 3], does not within itself invalidate a warrant or prevent a subsequent prosecution."); see also United States v. Baker, 424 F.2d 968, 970 (4th Cir. 1970) ("[A] mere showing of delay in indictment and arrest is not sufficient to show a constitutional violation[.]"); cf. State v. Edwards, 374 S.C. 543, 571-572, 649 S.E.2d 112, 126-127 (Ct. App. 2007) (affirming the trial judge's denial of a motion to dismiss that was based on the fact over 800 days elapsed between when Edwards was arrested and indicted), rev'd on other grounds, 384 S.C. 504, 682 S.E.2d 820 (2009). Therefore, when considering the actual reasons underlying all the delay involved, the non-willful and non-intentional period of delay incurred prior to Appellant's trial did not warrant a finding Appellant's speedy trial rights were infringed.

Turning to the third of the relevant factors, Appellant unquestionably did request a speedy trial at some point, but, significantly, he waited to first formally do so until almost two full years after his arrest. See Waites, 270 S.C. at 109, 240 S.E.2d at 653 (considering the length of time Waites waited before first attempting to assert his speedy trial rights and characterizing it as "significant" when conducting a speedy trial analysis); see also Arnett v. State, 551 So. 2d 1158, 1160 (Ala. Crim. App. 1989) (instructing "the fact that [the defendant] waited over one

year to assert his rights weighs heavily against him" in a speedy trial analysis and further instructing a defendant "cannot delay the assertion of his rights for as long as possible and then claim he was harmed by the delay"). Meanwhile, his informal expression of a willingness to go to trial in February of 2021 was not synonymous with an actual request for a speedy trial, and, even if it somehow was, it came at a point in time when jury trials were not capable of being conducted due to the global pandemic. Cf. Osman v. Commonwealth, 883 S.E.2d 249, 277 (Va. Ct. App. 2023) ("[T]he third Barker factor—assertion of the right to a speedy trial—weighs only moderately in [Osman]'s favor due to the timing and frequency of his assertions. Despite having already spent sixteen months in jail, [Osman] did not assert his right to a speedy trial until March 25, 2020, only after the Supreme Court issued its first emergency order and the trial court administratively adjourned this case to a status date on May 21, 2020, in connection with the COVID-19 pandemic."). And, notably, Appellant's case was brought to trial just over *one month* after he first formally requested a speedy trial. See State v. Barnes, 431 S.C. 66, 88, 846 S.E.2d 389, 400 (Ct. App. 2020) (finding the factor related to the assertion of speedy trial rights weighed against Barnes because he did not assert his speedy trial rights after his case was sent back for a retrial until just two months before his second trial was set to commence), aff'd as modified, 436 S.C. 202, 871 S.E.2d 421 (2022); cf. Robinson, 335 S.C. at 626, 518 S.E.2d at 272 (considering the fact "Robinson's trial began only ten months after his first motion [asserting his right to a speedy trial] was filed" in finding no speedy trial violation occurred in Robinson's case). Thus, considering the delayed nature of Appellant's first formal request for a speedy trial, and his prompt receipt of a trial shortly after he made that request, Appellant's assertion of his speedy trial rights did not weigh heavily in his favor and could not have legitimately supported a finding those rights were violated.

Finally, turning to the fourth of the relevant factors, Appellant's claims of prejudice were primarily focused on his pre-trial incarceration, his purported anxiety, the fact his wife and child were supposedly forced to leave the country, and the loss or unavailability of purported witnesses. Importantly though, Appellant's incarceration prior to trial was largely unavoidable due to the fact he was subject to an immigration detainer and deemed a flight risk, which greatly diminished the significance of that particular assertion of prejudice. Cf. People v. Catalan, 166 N.Y.S.3d 405, 409 (N.Y. App. Div. 2022) (explaining Catalan's liberty interest "was not impacted" by his pre-trial incarceration from arrest to trial for purposes of a speedy trial analysis since "there was an immigration detainer lodged against him"). Relatedly, although Appellant remained incarcerated from his arrest until trial, Appellant did, in fact, receive full credit toward his sentence for *all* the time he was in pre-trial custody, which helped to minimize any harm that could have possibly resulted from the delay in his case. Cf. Millard v. Lynaugh, 810 F.2d 1403, 1406-1407 (5th Cir. 1987) (concluding the prejudice resulting from pre-trial incarceration was mitigating by the fact Millard received credit for the time served in pre-trial detention toward his sentence); State v. Monroe, 262 S.C. 346, 350, 204 S.E.2d 433, 435 (1974) (considering the fact Monroe received full credit for the time he spent incarcerated prior to his trial in finding his speedy trial rights were not violated). Meanwhile, to the extent Appellant has alleged anxiety from his pre-trial incarceration, Appellant did not identify any undue or unusual factors involved in that incarceration, which undermined the significance of that identified harm for purposes of a speedy trial analysis. See United States v. Henson, 945 F.2d 430, 438 (1st Cir. 1991) (explaining "considerable anxiety normally attends the initiation and pendency of criminal charges" and, as a result, only undue pressures are considered when conducting a speedy trial analysis); Langford, 400 S.C. at 445, 735 S.E.2d at 484 ("While we are cognizant of not minimizing the deleterious

effects of lengthy pre-trial incarceration, the two-year delay in bringing this case to trial does not amount to a constitutional violation in the absence of any actual prejudice to Langford's case."). Furthermore, although defense counsel claimed some witnesses were supposedly lost due to the passage of time, no specific information of any kind was provided about those witnesses or the nature of their expected testimony, which prevented any meaningful assessment of prejudice as far as those alleged witnesses were concerned. See Smith, 307 S.C. at 381, 415 S.E.2d at 412 (recognizing it is not possible to determine whether prejudice occurred due to the unavailability of a witness when no proffer was made as to what the witness's testimony would have been); cf. Waites, 270 S.C. at 109, 240 S.E.2d at 654 (instructing Waites's "bare assertion of prejudice because his principal witness moved to another state is insufficient to warrant the lower court's conclusion that respondent suffered actual prejudice thereby"). Likewise, defense counsel's pre-trial claims regarding Appellant's wife and child being forced to leave the country were subsequently contradicted by defense counsel's later acknowledgement the two were, in fact, still there at the time of Appellant's trial, which meant Appellant did not actually experience the prejudice he claimed to have experienced in connection to his immediate family.[11] See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot be asserted later on appeal). Finally, to the extent Appellant alleged he was prejudiced due to fading memories, such issues appeared to hamper the State more than the defense and, thus, did not truly prejudice Appellant.[12] See Robinson, 335 S.C. at 626, 518 S.E.2d at 272

[11] Puzzlingly, despite defense counsel's acknowledgment during trial Appellant's "wife is here," Appellant—for the first time on appeal—suggests his wife very well may have been one of the defense witnesses that was supposedly missing and unavailable. (Trl. Tr. pp. 569-570; App. Br. p. 14).

[12] Notably, defense counsel suggested during trial Berdugo's memory issues were present *at the time of his interviews with law enforcement* shortly after Victim was killed and heavily relied

("[L]ost witnesses and documents are also disadvantages that hamper the State."); cf. Smith, 307 S.C. at 381, 415 S.E.2d at 412 ("His argument that he was prejudiced because his witnesses' memories faded also lacks merit because the same disadvantage hampered the State."). Therefore, because Appellant's defense was not truly hampered by any of the delay and because he did not suffer any undue prejudice as a result of the delay, Appellant was not sufficiently prejudiced by the delay between his arrest and trial to justify a finding his constitutional speedy trial rights were violated.

Accordingly, because the relevant circumstances in Appellant's case—including the fact it had to be prosecuted during a global pandemic that necessitated a lengthy shutdown of South Carolina's trial courts and grand juries—do not support a conclusion the twenty-five month period of delay was the result of any intentional or willful actions on the part of the State or resulted in any undue prejudice to Appellant, Appellant's speedy trial rights were not violated. Cf. Loud Hawk, 474 U.S. at 317 ("We cannot hold, on the facts before us, that the delays asserted by respondents weigh sufficiently in support of their speedy trial claim to violate the Speedy Trial Clause. They do not justify the severe remedy of dismissing the indictment."); Robinson, 335 S.C. at 626-627, 518 S.E.2d at 272 (finding—despite a total period of delay of five years—no speedy trial violation occurred when Robinson was tried within one year of his first assertion of his speedy trial rights, adequate justification was presented for delay, and no evidence of actual prejudice was introduced). Based on that, the circuit court judges who considered Appellant's speedy trial dismissal motions did not abuse their discretion by refusing

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upon those issues in arguing to the jury for an acquittal. (Trl. Tr. p. 341; pp. 531-533). Therefore, to the extent they existed, Berdugo's memory issues did not appear to be the product of the delay in bringing Appellant's case to trial and helped—rather than hurt—Appellant's defense. Cf. Reaves, 414 S.C. at 132, 777 S.E.2d at 220 (concluding Reaves's claim evidence was lost as a result of delays was not supported by the record when the evidence was most likely lost earlier during the investigation as opposed to later).

to impose the extreme—and unwarranted—sanction of dismissal in Appellant's case. See Langford, 400 S.C. at 442, 735 S.E.2d at 482 ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."); cf. Serna-Villarreal, 352 F.3d at 232 (affirming the denial of a speedy trial dismissal motion upon concluding a forty-five-month period of delay that was largely attributable to negligence on the part of the prosecution did "not weigh heavily" in the defendant's favor); State v. Evans, 386 S.C. 418, 425-426, 688 S.E.2d 583, 587 (Ct. App. 2009) (finding no error in the denial of a motion to dismiss based on an alleged speedy trial violation where the delay prior to trial was approximately twelve years); State v. Cooper, 386 S.C. 210, 217-218, 687 S.E.2d 62, 66-67 (Ct. App. 2009) (affirming the denial of Cooper's speedy trial motion where the delay in bringing the case to trial was at least forty-four months). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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