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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY

Court of General Sessions
The Honorable Michael S. Holt, Circuit Court Judge
The Honorable Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2023-000798

THE STATE,

Respondent,

v.

JAMES EARL SMITH,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the circuit court abused its discretion by refusing to dismiss indictments for first-degree criminal sexual conduct and kidnapping based on an alleged speedy trail violation where Smith was tried six months after he first asserted his right and the delay did not hinder his defense.

STATEMENT OF THE CASE

A Darlington County grand jury indicted Appellant James Earl Smith for first-degree criminal sexual conduct and kidnapping in 2017 and 2013, respectively. Smith filed a speedy trial motion on December 6, 2022, and a motion to quash the indictments on March 30, 2023. The Honorable Michael Holt, Circuit Court Judge, convened a hearing on the motions on April 3, 2023. Judge Holt denied the motion to quash, but granted the motion for a speedy trial and ordered the case tried "as the first case on the trial docket after any cases already noticed for trial." (R.p.410–11). Smith proceeded to trial on May 8–11, 2023, before the Honorable Thomas W. Cooper, Circuit Court Judge. He was convicted as charged and sentenced to concurrent terms of 18 years' incarceration. This direct appeal follows.

STATEMENT OF FACTS

This case arose from an allegation that Appellant Smith forcibly raped the victim, Shamika Cottingham. Cottingham testified she went for a late-night drink at a gentlemen's club called "Diamonds." (R.p.74). Smith approached her and asked if she remembered him, saying he had done some work on her car. (R.p.76–77). Cottingham testified she did not recognize Smith. (R.p.77). A while later, Smith asked Cottingham to give him a ride home and she agreed. (R.p.78). Smith said his home was less than five minutes away. On the way, Smith asked to stop at a gas station to buy beer and Cottingham agreed. (R.p.79).

When they arrived at Smith's home, Smith asked if Cottingham was going to get out. Cottingham said she was not. (R.p.79). Smith responded, "yes you are you black bitch." (R.p.79). Smith said he was going to have sex with her. (R.p.82). Smith took the keys from the ignition and pulled Cottingham out of the car and pushed her into his home. (R.p.80). Smith said his pit bull would bite Cottingham if she did not follow his instructions. (R.p.81). Cottingham begged Smith to let her go, but then decided to "do what he say[s] because if you don't it's gonna happen anyway." (R.p.80). Cottingham explained Smith's house was isolated and there were no neighbors. (R.p.80, 95). She didn't believe she could get away. (R.p.95).

Inside, Smith was sniffing some "yellow stuff." (R.p.81). He testified it was a prescription painkiller. (R.p.332). Smith took her to the bedroom and vaginally raped her. (R.p.86). Smith went to the kitchen and Cottingham ran out of the home. (R.p.87). She ran down the road, leaving her purse and car keys at Smith's

house. (R.p.87). Smith chased after her with his dog. They caught up to Cottingham and Smith fell down, scraping his leg. (R.p.90). He forced her back inside his home and raped her again. (R.p.88). When he was finished, he gave Cottingham her keys and told her to take him back to the gas station. (R.p.90). As they walked towards her car, Cottingham ran to the car, locked the door, and drove away. (R.p.90). She left her phone and purse behind. She stopped at a police officer's house nearby but he was not home. She then went back to the same gas station and asked the attendant to call the police. (R.p.90–92).

Police responded and found Cottingham "in hysterics" at the gas station. (R.p.152, 181). Cottingham reported she had been sexually assaulted by a man named "James Earl." (R.p.180). Officers went to Smith's residence to interview him. Smith was "dirty" and had grass on his back. (R.p.155–58; State's Exhibit #2). There were scratch marks on his back and side and an abrasion on his leg. (R.p.157–58). Smith agreed to speak with police and denied that anyone had been in his residence that night. (R.p.163). Smith eventually admitted a woman had been there. He called her a "trick." (R.p.164). Police viewed Smith's bedroom and observed what appeared to be blood, dirt and grass on his bed sheets. (R.p.164). Smith claimed his dog was in heat had dirtied the sheets. (R.p.164). Police arrested Smith.

An ambulance took Cottingham to the hospital. (R.p.92). A nurse performed a "rape kit" exam and police took her clothes as evidence. (R.p.127–28). The nurse who treated Cottingham testified Cottingham arrived at the hospital and reported

she had been vaginally and anally raped. (R.p.125). She noted slight bruising around Cottingham's neck. (R.p.125). Cottingham's heart was beating more than 100 beats per minute and her respiratory rate was elevated. (R.p.125–27). There was grass on her clothing. (R.p.134).

Police collected evidence from Smith's house, including the bed sheet with blood stains. (R.p.210, 252–53). DNA analysis determined it was Smith's blood. (R.p.270–71). A SLED expert testified to the results of the rape kit. There was not semen detected in the vaginal or anal swabs, but semen and Smith's DNA was found on item 1.8, identified as "suspected bodily fluids swabs" collected from somewhere on Cottingham's body. (R.p.238–39, 267). There was also semen found on Cottingham's underwear. (R.p.241, 271). DNA testing of the underwear revealed a mixture of three people's DNA, one of which was Cottingham. Smith could not be excluded from the DNA mixture. (R.p.271–72).

Smith testified that he had consensual sex with Cottingham in exchange for money and he refused to pay her afterward. (R.p.320–21). He admitted he originally lied to police by telling them that a male friend took him home that night and denying he went to the gas station, only to change his story later in the same interview. (R.p.335–38). He presented the testimony of three other witnesses who saw him at the club that night socializing with a woman, but they did not see anything out of the ordinary. None of them had any idea what happened at Smith's house.

STANDARD OF REVIEW

The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371–72 (2016). 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.

ARGUMENT

The circuit court acted within its discretion by refusing to dismiss the indictments and instead ordering the cases tried as soon as practicable where Smith's trial took place six months after he first filed a speedy trial motion and his defense was not hindered.

The lower court did not abuse its discretion by granting Smith's speedy trial motion and ordering the case to be tried as soon as possible rather than dismissing the indictments. Although there was a lengthy delay between Smith's arrest and his trial, there was no speedy trial violation because Smith waited ten years to assert his right, was tried shortly thereafter, and was not prejudiced by the delay. This Court should affirm.

The right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution, and by Article 1, section 14 of the South Carolina Constitution. The right to a speedy trial is "a more vague concept than other procedural rights," making it "impossible to determine with any precision when it has been violated." Barker v. Wingo, 407 U.S. 514, 521 (1972). Accordingly, "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case . . . ." Id. at 522.

In Barker v. Wingo, the Supreme Court adopted an "ad hoc" balancing test where the conduct of the prosecution and the defendant are weighed. Id. at 530. In Barker and subsequent cases, the Supreme Court "qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: [1.] whether delay before trial was uncommonly long, [2.] whether the government or

the criminal defendant is more to blame for that delay, [3.] whether, in due course, the defendant asserted his right to a speedy trial, and [4.] whether he suffered prejudice as the delay's result." Doggett v. United States, 505 U.S. 647, 651 (1992). The Barker court explained these are "some of the factors" courts should consider, along with "other such circumstances as may be relevant." Barker, 407 U.S. at 530, 533. The court explained the "amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried." Id. at 522. In an earlier case, the court explained: "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." Beavers v. Haubert, 198 U.S. 77, 87 (1905).

In balancing the respective conduct of the parties, the Barker court distinguished between: 1) deliberate attempts to delay trial in order to hinder the defense, which should be weighted "heavily" against the government; 2) delays owing to negligence, overcrowded courts, or another "more neutral" reason, which should be "weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government"; and 3) valid reasons, "such as a missing witness," which justify appropriate delay. Barker, 407 U.S. at 531. "Between diligent prosecution and bad-faith delay, official

negligence in bringing an accused to trial occupies the middle ground." Doggett, 505 U.S. at 656–57.

Turning to the facts of this case, the first factor in the speedy trial analysis is the length of delay. A sufficiently long delay is presumptively prejudicial and triggers review of the other factors. State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). A presumptively prejudicial delay exists "when an accused is not prosecuted with ordinary promptness." State v. Hunsberger, 418 S.C. 335, 343, 794 S.E.2d 368, 372 (2016). The State agrees the delay in this case was sufficient to trigger review of the other factors. However, a lengthy delay is not enough in itself to establish a speedy trial violation. For example, in State v. Evans the supreme court held there had been no speedy trial violation despite a delay of twelve years, part of which was attributed to an interlocutory appeal. State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009). In State v. Barnes, this Court found no speedy trial violation where the defendant was originally tried eight years after his arrest and was retried fifteen years after his arrest following reversal on appeal. State v. Barnes, 431 S.C. 66, 77, 846 S.E.2d 389, 394 (Ct. App. 2020), aff'd as modified, 436 S.C. 202, 871 S.E.2d 421 (2022).

The next factor is the reason for the delay. The solicitor attributed the delay to staff turnover in the solicitor's office and public defender's office, and to the COVID-19 pandemic. (R.p.5–6). The State noted Smith had been assigned three different attorneys while his case was pending. (R.p.283). The State also noted that in 2014 Smith had agreed to the collection of a buccal swab to develop a DNA

profile, but never showed up, causing a delay in the case. (R.p.286). The State explained it "had some difficulty at times down through the years getting Mr. Smith into court." (R.p.286). The case had been prepared and scheduled for trial in 2017, but the record is unclear as to why trial did not proceed at that time. (R.p.31). There was no allegation of bad faith or intentional delay. See Barker, 407 U.S. at 531; see also Hunsberger, 418 S.C. at 352, 794 S.E.2d at 376 (finding speedy trial violation where "it appears the State's delay was not merely negligent but intentional"). Finally, the solicitor noted the circuit court had never docketed the case pursuant to its supervisory authority under State v. Langford, 400 S.C. 421, 735 S.E. 2d 471 (2012). (R.p.11).

The third factor is whether the defendant asserted his right to a speedy trial. A criminal defendant has a "responsibility to assert his right." Barker, 407 U.S. at 531. The defendant's assertion of his speedy trial right is entitled to "strong evidentiary weight" in determining whether the defendant is being deprived of the right. Id. The failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. Id. at 531–32.

As the trial court noted and defense counsel acknowledged, Smith waited ten years to assert his right to a speedy trial. Defense counsel conceded "it probably should have been filed before . . . ." (R.p.284). He also admitted Smith did not wish his trial to proceed earlier, noting that such a demand would not be "consistent with human nature." (R.p.285). The trial court correctly noted this did not "excuse the

legal obligation" for him to assert his right. (R.p.285). Judge Cooper characterized the delay as a "shared responsibility" between the State and defense. (R.p.284).

When the motion was filed, the State immediately took action to bring the case to trial. The State was prepared to go forward with trial on the week of April 3, when Judge Holt heard arguments on the speedy trial motion, but Smith requested a continuance. (R.p.8–9). Consistent with Judge Holt's order, the State called the case for trial on May 8, six months after Smith first filed a motion for a speedy trial. See State v. Robinson, 335 S.C. 620, 626, 518 S.E.2d 269, 272 (Ct. App. 1999) (finding no speedy trial violation where defendant "was tried within one year of [his] first formal motion to dismiss").

The fourth and "most important" factor is whether Smith was prejudiced by the delay. Evans, 386 S.C. at 425, 688 S.E.2d at 587. The Supreme Court has identified three different types of prejudice the right to a speedy trial seeks to prevent: (1) oppressive pre-trial incarceration; (2) anxiety stemming from being publicly accused of a crime; and (3) the possibility that the accused's defense will be impaired due to the death or disappearance of witnesses or the loss of memory with the passage of time. Langford, 400 S.C. at 445, 735 S.E.2d at 484. While a defendant may assert actual prejudice or presumptive prejudice, "presumptive prejudice cannot alone support a speedy trial claim . . . ." Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376. 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." Id.

Smith failed to show prejudice from the delay. First, he was not incarcerated while awaiting trial. Cf. Hunsberger, 418 S.C. at 346, 794 S.E.2d at 373 (noting defendant "was continuously in custody" pending trial). Second, Smith failed to show the passage of time caused the unavailability of defense witnesses. At the hearing on Smith's speedy trial motion, defense counsel told the court it had discovered a defense investigator's notes and a voucher for funding, which indicated the investigator had interviewed three witnesses. (R.p.13). Defense counsel identified the witnesses as "an owner at the club" where Smith and Cottingham met; a bouncer at the club; and another witness who was present at the club. (R.p.13). At trial, in addition to his own testimony, Smith presented the testimony of three witnesses. They were Leonard Thomas, who identified himself as an "assistant manager" at the club (R.p.295); James Brently Gainey, Smith's nephew who worked at the club as a cleaner (R.p.301); and Richard McKracken, who accompanied Smith to the club (R.p.311). It seems probable that these are same witnesses referred to in the investigator's notes. While the descriptions do not match exactly, the similarity is apparent.

When defense counsel renewed his speedy trial motion at the start of trial, he did not indicate he had been unable to get in touch with any witnesses. This further supports that the three witnesses produced at trial were the same identified in the investigator's notes. In any case, if defense counsel had been unable to locate witnesses, it was incumbent upon him to provide that information to the trial court

to show prejudice from the delay. Because he did not do so, Smith has not shown his ability to present a defense was impaired.

Third, Smith failed to show the delay adversely affected his ability to contest the State's evidence at trial. The State conceded Cottingham could be impeached with a distant conviction for possessing stolen firearms, even though the conviction was more than ten years old at the time of trial. (R.p.67, 94, 103). Conversely, the trial court ruled the State could not impeach Smith with convictions that occurred more than ten years before his trial—even though the convictions would have been proper ground for impeachment had the case been tried earlier—meaning the delay worked to his benefit in this regard. (R.p.291). Further, in his opening statement defense, counsel argued the passage of time weakened the State's case: "I would suggest to you that you look at the evidence presented in this case with somewhat of a jaded eye because it's been so long since these events occurred that it does impact a person's . . . recollection about whatever he or she testifies to." (R.p.27).

Smith argues he was prejudiced by his inability to cross-examine the lead investigator (who died before trial) about his collection of the bloody sheets and the circumstances of Smith's statement to police and his giving consent to search. Brief of Appellant at 11. It is unclear from the record when Investigator Mozingo passed away or whether he would have testified had the case been called sooner. (R.p.38). Regardless, Smith was able to cross-examine another officer who was with Investigator Mozingo when he searched the residence and was "right between investigator Mozingo and the defendant" when Smith gave consent to search.

(R.p.53–56). Smith admitted at trial he gave the officers consent to search and agreed to speak with them. (R.p.335–37). There was no legitimate question about the chain of custody for the sheet. DNA testing confirmed Smith's blood was on the sheets, which Smith claimed was his dog's blood. (R.p.270–71, 331). Smith was not prejudiced by the investigator's absence.

Finally, Smith never alleged he suffered anxiety from being publicly accused of this crime. Content to let the case drag on, he waited ten years to request a trial. Given his extensive prior record, including multiple convictions for domestic battery, and the fact that he had served prison time, it is dubious to assert Smith was anxious about his public image of lawfulness. (R.p.401–02). See Langford, 400 S.C. at 446, 735 S.E.2d at 484 (noting defendant did not "point to any evidence of anxiety caused by the stigma of being accused of these crimes").

While the delay in this case is regrettable, Smith's right to a speedy trial was not violated. He did not assert the right for approximately ten years, indicating he did not want a quick trial. When he finally did invoke his right, the case was tried within six months, and Smith failed to show prejudice from the delay. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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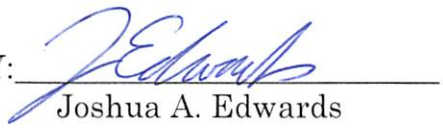
BY: 
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THE STATE, Respondent,

v.

JAMES EARL SMITH, Appellant.

PROOF OF SERVICE

I, Susan Spencer, certify that I have served the within Final Brief of Respondent on Lara M. Caudy, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 30th day of September, 2024.

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Good Afternoon,

Attached please find the Final Brief of Respondent in The State v. James Earl Smith (2023-000798). This document will be filed today to the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

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