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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN WALTER DUBOIS III,

APPELLANT

APPELLATE CASE NO. 2023-001307

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err by failing to properly weigh the factors surrounding the almost six-year delay between arrest and trial and then refusing to grant the motion to dismiss as a violation of Appellant's state and federal constitutional right to a speedy trial?

STATEMENT OF THE CASE

In May of 2018, the Jasper County Grand Jury indicted Appellant, Benjamin Walter Dubois, III, for murder, indictment #2017-GS-27-00582. (R. p. 1185-1186). On October 31, 2019, Appellant appeared before the Honorable Ferrell Cothran, Jr. for a pre-trial hearing. (R. pp. 1-8). Carolyn Carmody represented Appellant. Patrick Hall represented the State. On July 13, 2023, Appellant appeared before the Honorable Robert Bonds for a pre-trial hearing. (R. pp. 9-137). Carolyn Carmody represented Appellant. Reed Evans represented the State. On July 31, 2023, Appellant proceeded to jury trial before the Honorable Carmen T. Mullen. Carolyn Carmody again represented Appellant and Reed Evan again represented the State. The jury found Appellant guilty of murder and pursuant to S.C. Code §17-25-45 Judge Mullen sentenced Appellant to life without parole. (R. p. 1168). A timely notice of intent to appeal was served on August 14, 2023. This appeal follows.

STANDARD OF REVIEW

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

ARGUMENT

The circuit court erred by failing to properly weigh the factors surrounding the almost six-year delay between arrest and trial and then refusing to grant the motion to dismiss as a violation of Appellant's state and federal constitutional right to a speedy trial.

In the early morning hours of June 22, 2017, Jerry Holmes was found stabbed to death in his cell at Ridgeland Correctional Institution. (R. p. 13, line 3 – p. 14, lines 1-10). At the time of the death both Appellant and Holmes were serving sentences in the Ridgeland Correctional Institution. Tyreece Griffin, the corrections officer who was in charge of the wing when Holmes was stabbed was charged with misconduct in office and obstruction of justice for being absent without just cause and providing false information during the course of the investigation of the death of Holmes. (R. pp. 22-27; R. pp. 797-802). A video showed the officer walking out of the prison during his shift, leaving the wing unsupervised for several hours. (R. p. 51, line 8 – p. 52, lines 1-6). As the prosecutor characterized it, "And, essentially, left the unit as the sole guard and left the prison to run itself." (R. p. 14, lines 1-3).

At the time of Holmes' death at least ten of the individual cell doors on the wing were not locked. (R. p. 13, line 20 – p. 14, lines 1-3; p. 30, lines 11-22; R. p. 844, lines 1-23). On the night of the death numerous inmates were seen out of their cells. (R. p. 31, lines 1-8). One of the agents from the South Carolina Law Enforcement Division [SLED] who assisted with the investigation of the case was asked why weapons found in the common bathroom on the wing of the prison were not collected. (R. p. 393, lines 1-7). The agent answered, "There were so many weapons recovered in this case, it was hard to determine – we didn't deem that they were applicable. None of them had any suspected blood staining, and they were just found in the shower." (R. p. 393, lines 8-12).

Appellant was arrested and charged with murder on August 15, 2017. (R. p. 119, lines 17-23). Two other inmates were also charged in connection to the death. (R. p. 48, line 22 – p. 49, 50, lines 1-4). Appellant's trial took place almost six years later on July 31, 2023. Appellant's federal and state constitutional speedy trial rights were violated requiring dismissal of the indictment.

On September 13, 2017, Appellant filed a letter with the Jasper County Clerk of Court asking for a public defender, requesting Rule 5 and Brady material, and noting, "I want to file for a fast and speedy trial. Because of this pending charge I now have to remain in security detention (Isolation) until this is resolved." (R. p. 1189). Appellant was indicted on May 31, 2018.

On September 13, 2019, Appellant filed another letter with the Jasper County Clerk of Court. (R. p. 1191). In the letter Appellant wrote:

> I filed for a fast and speedy trial 2 years ago and haven't received a word about it! I've never met my public defender or received any correspondence back from him. I would like for you to file a motion to dismiss for me please. I sent him a letter to do it but got not no response. I would also like all Rule 5 and Brady material sent to me. I am way past sick and tired of being on lock up for a crime I did not commit and being denied proper legal counsel. There is really no excuse for never meeting my public defender in the whole 2 years he's been assigned my case. I have serious disabilities and feel like I'm being discriminated against because I have these disabilities and your waiting for my cancer/ seizures to kill me before I have a chance at court. Please get this dismissed for me. As far as I know there is nothing fast and speedy about waiting over 2 years for trial after properly filing for a fast and speedy trial. It's supposed to be within 6 months or it gets dismissed. Thank you for your help and time.

(R. p. 1191).

On October 31, 2019, over two years after arrest, a hearing was held before the Honorable Ferrell Cothran, Jr. During the hearing the assistant solicitor representing the State told the judge, "He [Appellant] had sent a letter to the Clerk of Court, which I believe you have a

copy of that letter. In that letter he's talking about making a speedy trial demand, about how he has not met his public defender, about how he has not received his discovery." (R. p. 3, lines 8-13). The assistant solicitor was concerned about Appellant filing *pro se* motions. (R. p. 3, lines 17-22). The public defender representing Appellant at the hearing had only been with the Public Defender Office for a little over a month. (R. p. 4, lines 16-18). The clerk advised that the prior attorney appointed to represent Appellant was Bob Hughes. The assistant solicitor told the judge, "Well, Madam Clerk is informing me that Mr. Hughes was his only prior attorney, which causes me some concern because Mr. Hughes hasn't done work in general sessions in quite some time. And we have had two other public defenders in place since that time that were doing Mr. Hughes' cases." (R. p. 5, line 23 – p. 6, lines 1-4).

The Appellant told the judge, "I wrote him a million times, never got one letter back. Never got to meet him or nothing. I couldn't even walk when they charged me. I went through cancer surgery. I couldn't even walk to get my food from the cafeteria. I wanted to get this done because I'm supposed to go home in two years, and I want to get this done. I have wrote him a lot of letters." (R. p. 6, lines 5-12). Judge Cothran ordered the State to provide full discovery to counsel within 30 days and asked when the State planned to call the case for trial. (R. p. 6, lines 13-18). The assistant told the judge they planned to try the case in the first six months of 2020. Judge Cothran said, "Okay. If it hasn't been, then they can make a motion in front of whatever judge is here, you know, for a speedy trial, and they can go back under Judge Newman's cases and see what kind of relief they can get. Okay?" (R. p. 6, line 23 – p. 7, lines 1-2)[1].

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[1] Presumably Judge Cothran's reference to "Judge Newman's cases" is a reference to State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368 (2016).

The case was not called for trial until October/November of 2022. At that time, however, defense counsel had to move for a continuance because she was sick. (R. p. 123, lines 9-18). The case was then scheduled for trial in December of 2022. The State, however, moved for a continuance to analyze phones that the State had been aware of since the beginning of the investigation. (R. p. 123, line 19 – p. 124, lines 1-11).

On December 1, 2022, Appellant completed his sentence on the underlying charge and was transferred to the Jasper County Detention Center. (See Order Denying Defendant's Motion to Dismiss for Alleged Speedy trial Violation, R. p. 1201). It appears that the case had to be continued a third time because the detention center failed to provide prescription medications Appellant needed, and was apparently given in the Department of Corrections, to maintain competency. (See Order Denying Defendant's Motion to Dismiss for Alleged Speedy trial Violation, R. p. 1201).

On May 16, 2023, Appellant filed[2] a notice of motion to dismiss based on the speedy trial violation. (R. p. 1192, Notice of Motion to Dismiss- Speedy Trial; See Order Denying Defendant's Motion to Dismiss for Alleged Speedy trial Violation). On July 13, 2023, a hearing was held before the Honorable Robert Bonds on Appellant's motion to dismiss based on the speedy trial violation. (R. pp. 9-137). Judge Bonds denied the motion to dismiss and asked the State to prepare an order. (R. p. 136, lines 12-15). The judge noted that the motion to dismiss was filed in May of 2023, and stated, "May of '23. And, of course, that is two months ago, a month ago. And so I do hear you that, basically – you know, I don't understand why this motion wasn't filed a year ago, or two years ago, or 18 months ago, and, now that does resonate with me. And I think you were making a reference to that, Mr. Evans." (R. p. 135, lines 2-8). The

[2] The notice is dated May 12, 2023, but appears to have been filed July 21, 2023.

judge also noted that most of the items listed as missing or destroyed in paragraph five of the notice relating to prejudice would have been missing or destroyed if the case had been tried in 2019. (R. p. 135, lines 9-24; R. p. 1193).

On July 21, 2023, Appellant filed the memorandum in support of the motion to dismiss based on the speedy trial violation. (R. pp. 1194). The written order denying the motion was filed on July 27, 2023. The written order correctly found that the nearly six-year delay was sufficient to trigger the speedy trial analysis. (R. p. 1204). The order, however, failed to properly weigh the factors surrounding the almost six-year delay. The judge erred in failing to properly weigh the factors and dismiss based on the speedy trial violation.

The trial started on July 31, 2023. The State made the trial judge aware of Judge Bonds' ruling denying the motion to dismiss based on the speedy trial violation. (R. p. 143, line 13 – p. 144, lines 1-13). Appellant renewed the motion to dismiss at the close of the State's case. (R. pp. 997 – 1003). The trial judge denied the motion. (R. p. 1012, line 15 – p. 1013, 1014, lines 1-21). The trial judge noted the lockdown, turnover in both the Solicitor's office and the Public Defender office and found that the three continuances were all necessary. (R. p. 1012, line 15 – p. 1013, lines 1-21). The judge stated, "So with that said I do not think, again, that the time of trial is contrary or unreasonable in this case, given all those things, which might even be called." (R. p. 1014, lines 18-21). The trial judge failed to acknowledge that the almost six-year delay was sufficient to trigger the speedy trial analysis. The trial judge failed to properly weigh the factors surrounding the almost six-year delay. The trial judge erred in refusing to dismiss based on the speedy trial violation.

In State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) the South Carolina Supreme Court wrote:

> 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. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

Appellant's constitutional rights to a speedy trial guaranteed by both the United States Constitution and the South Carolina Constitution were violated in the present case.

In State v. Hunsberger, 418 S.C. 335, 342–43, 794 S.E.2d 368, 372 (2016), the South Carolina Supreme Court wrote:

> An accused's speedy trial right begins when he is "indicted, arrested, or otherwise officially accused." Langford, 400 S.C. at 442, 735 S.E.2d at 482 (citing United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. Doggett v. U.S., 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness. See Doggett, 505 U.S. at 651–52, 112 S.Ct. 2686 (1992). Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied. Barker v. Wingo, 407 U.S. 514, 530–31, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also Langford, 400 S.C. at 441, 735 S.E.2d at 482. These factors are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused. Barker at 531–32, 92 S.Ct. 2182. A speedy trial claim must be "analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing Barker, 407 U.S. at 530, 92 S.Ct. 2182).

The State agreed that the almost six-year delay triggered the speedy trial analysis stating, "Going through the Barker v. Wingo factors, I agree with Miss Carmody that the length of delay is sufficient to trigger the rest of the analysis." (R. p. 128, lines 13-16). The written order

correctly found that the nearly six-year delay was sufficient to trigger the speedy trial analysis. (R. p. 1204). Both judges, however, erred by failing to properly weigh the factors surrounding the almost six-year delay and dismiss the charge based on the speedy trial violation.

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 [Barker 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. If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy." Id. at 522, 92 S.Ct. 2182.

Viewing the four Barker v. Wingo factors in terms of the circumstances of this case and balancing the conduct of the prosecution and the defense, Appellant's constitutional rights to a speedy trial were violated. As in Hunsberger, because the timeline is essential to determining that Petitioner's speedy trial rights were violated, important dates are outlined below:

- August 15, 2017 – arrest
- September 13, 2017 – letter to clerk of court
- May 31, 2018 – indictment
- September 13, 2019 – letter to clerk of court
- October 31, 2019 – hearing before Judge Cothran
- October 2022 – defense motion for continuance – defense counsel illness
- November 2022 – prosecution motion for continuance – evidence not analyzed
- December 2022 – Appellant completed sentence on underlying charge
- January 2023 – continuance - failure to receive medications
- April 2023 – bond denied

- May 2023 – notice of motion to dismiss based on speedy trial violation
- July 13, 2023 – hearing on motion to dismiss
- July 31, 2023 - trial

1. Length of Delay

As to the first Barker factor, length of delay, as discussed above, the written order correctly finds that the nearly six-year delay was sufficient to trigger the speedy trial analysis. The written order, however, does not assign responsibility for the length of the delay. In Hunsberger, the South Carolina Supreme Court determined that the full ten-year delay between arrest and trial was not wholly attributable to the State. In the present case, for over two years, from the time of Appellant's arrest in August of 2017, until October 31, 2019, when a hearing was finally held before Judge Cothran, the State made no attempt to call this case for trial. During this over two-year time frame Appellant was without the assistance of counsel, despite Appellant's request for representation in his letter to the Jasper County Clerk of Court filed September 13, 2017, and numerous attempts to contact the public defender. (R. p. 1189; October 31, 2019, R. p. 6, lines 5-12). In a letter to Appellant from the Jasper County Clerk of Court dated September 18, 2017, a clerk stated that a copy of Appellant's letter was given to the Public Defender's Office and the Solicitor's Office. (R. p. 1190). Appellant was indicted on May 31, 2018. The over two-year delay when the State made no attempt to call the case for trial is wholly attributable to the State.

The next three-year time frame from the hearing before Judge Cothran on October 31, 2019, to when defense counsel moved for a continuance because she was sick in October of 2022, can not be wholly attributable to the State because part of that time involved lockdown due

to the COVID-19 pandemic. Some of this three-year time frame though, perhaps half - eighteen months, must be attributed to the State. None of this time frame should be attributed to Appellant. The month-long delay from October 2022 to November 2022, due to defense counsel's illness, should not be attributed to either the State or Appellant. The eight-month time frame from November 2022, until the time of trial on July 31, 2023, is wholly attributable to the State. The State is responsible for an over four-year delay in calling the case for trial. The four-year delay should be weighed heavily against the State.

When the motion was renewed at trial the trial judge also failed to assign responsibility for the length of the delay, instead finding that the delay was reasonable. (R. p. 1014, lines 18-21). The trial judge erred. The delay was not reasonable. Appellant was not responsible for the delay. Both judges erred in failing to assign responsibility to the State for four years of the almost six-year delay and weighing that factor heavily against the State.

2. Reasons for Delay

As to the second Barker factor, reasons for delay, in State v. Hunsberger, 418 S.C. 335, 346, 794 S.E.2d 368, 374 (2016), the South Carolina Supreme Court wrote:

> The State's justifications for delay in trying a defendant are weighted differently: (1) a deliberate attempt to delay trial as a means to hamper the defense weighs heavily against the State; (2) negligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility; (3) a valid reason, such as a missing witness, justifies an appropriate delay; and (4) delays occasioned by the accused weigh against him. Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted). Ultimately, justifying the delay between charge and trial is the responsibility of the State. Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted).

In the written order denying the motion to dismiss for a speedy trial violation the judge wrote, "The State argued that the significant General Sessions backlog in Jasper County, while

regrettable, was a legitimate contributing factor to the delay in bringing this case to trial. The State further noted that it had previously informed Judge Cothran of its hope to try the case in the first six months of 2020, but was deterred by the onset of the COVID-19 pandemic. Finally, the State noted that the last three delays were caused by legitimate continuances set forth above. The Court is persuaded that the State's delays were valid." (R. p. 1204). The judge erred in failing to weigh some of the reasons for the delay against the State. The State offered no valid reason for the two-year delay between Appellant's arrest in August of 2017, until October 31, 2019, when a hearing was finally held before Judge Cothran.

While the significant General Sessions backlog in Jasper County weighs less heavily against the State than a deliberate attempt to delay, the overcrowded docket is ultimately the State's responsibility. See Hunsberger. This reason must be weighed against the State. The reasons for the second and third continuances must also be weighed against the State. The second continuance was due to negligence on the part of the State. After the case was first continued in October of 2022, due to defense counsel's illness, the case was scheduled for trial on November 28, 2022. In the written order denying the motion to dismiss for a speedy trial violation the judge wrote:

> Prior to the November term, the State invited Counsel for Defense to join a meeting with SLED and SCDC personnel to view the various pieces of physical evidence, in person in Columbia. During this visit, SCDC pulled out a bag containing cell phones which had been seized from prisoners in the aftermath of Holmes' death. While the phones were packaged together, making identification of which phone came from which inmate impossible, the bag had written on it "possible video of incident" or words to that effect. The State had been aware of the existence of the phones, but not the note or potential video evidence. Concerned for the possibility of exculpatory evidence going undetected, the State moved before Judge Mullen to continue the case just prior to the Thanksgiving holiday, in a hearing held over Webex. The Defendant did not oppose the State's motion.

(R. p. 1202-1203). The State's motion for a continuance was made five years after the arrest of Appellant, four years after indictment, and after the case had already been continued once due to defense counsel's illness. During the hearing on the motion to dismiss counsel for Appellant argued that this was the first time since 2017, that anyone from the Solicitor's Office had actually looked at the physical evidence. (R. p. 123, line 19 – p. 124, lines 1-11). The State was negligent in failing to have the phones analyzed earlier. This reason must be weighed against the State.

The third continuance was granted "to ensure that the Defendant was placed on the proper medication" after being transferred from the South Carolina Department of Corrections to the Jasper County Detention Center. (R. p. 1203). The delay caused by the detention center's failure to provide prescription medications Appellant needed, and was apparently given in the Department of Corrections, to maintain competency cannot be attributed to Appellant. This reason must also be weighed against the State.

When the motion was renewed at trial the trial judge also erred in failing to weigh some of the reasons for the delay against the State. As discussed above, the State offered no valid reason for the two-year delay between Appellant's arrest in August of 2017, until October 31, 2019, when a hearing was finally held before Judge Cothran. The trial judge noted as reasons for the delay the lockdown, turnover in both the Solicitor's office and the Public Defender office and found that the three continuances were all necessary. (R. p. 1012, line 15 – p. 1013, lines 1-21). Turn over in offices, like overcrowded dockets, should weigh against the State, not Appellant. See Vermont v. Brillon, 556 U.S. 81, 94, 129 S. Ct. 1283, 1292, 173 L. Ed. 2d 231 (2009) ("The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic "breakdown in the public defender system," 183 Vt., at 479 – 480, 955

A.2d, at 1111, could be charged to the State. Cf. Polk County, 454 U.S., at 324–325, 102 S.Ct. 445."). As to the continuances, the trial judge also failed to weigh the second and third continuances against the State. Both judges erred in failing to weigh most of the reasons for the delay against the State.

3. The Accused's Assertion of the Right to a Speedy Trial

As to the third Barker factor, the accused's assertion of the right to a speedy trial, Appellant first asserted his right to a speedy trial in his letter to the clerk of court dated September 13, 2017. In the letter Appellant wrote, "I want to file for a fast and speedy trial. Because of this pending charge I now have to remain in security detention (Isolation) until this is resolved." (R. p. 1189). It is unclear when counsel was appointed, but Appellant was effectively without representation for two years despite his request for representation in his letter to the Jasper County Clerk of Court filed September 13, 2017, and numerous attempts to contact the public defender. (R. p. 1189; R. p. 6, lines 5-12). In a subsequent letter to the clerk of court dated September 13, 2019, Appellant wrote that he had filed a motion for a speedy trial two years earlier. He also wrote that had never met or heard back from his public defender. (R. p. 1191).

The judge failed to address the two *pro se* letters in the written order denying defendant's motion to dismiss. (R. p. 1201, Order Denying Defendant's Motion to Dismiss). The judge erred in refusing to consider the *pro se* assertion of the right to a speedy trial when Appellant was effectively deprived representation. In the written order the judge referenced the hearing before Judge Cothran on October 31, 2019, where the State indicated the plan to try the case in the first six months of 2020. (R. p. 1205). The judge wrote:

Of course, neither the State nor Judge Cothran were aware that we would enter a global pandemic in that time frame.

The Court notes that since that time, even following a resumption of jury trials as the pandemic began to wane, the Defense has never filed a written motion for a speedy trial. The Defendant has made reference to his desire for one during several bond hearings, but the present motion to *dismiss* the case is the first filing on the subject.

I find the Defendant has asserted his right, but that the State has never been subject to an order to try the case by a particular date. I also find that the Defendant and his counsel were satisfied with the previous trial dates in November of 2022, December of 2022, and January of 2023, prior to the continuances which were granted on each occasion.

(R. p. 1205). The judge correctly found that Appellant asserted his right to a speedy trial. The judge erred in not weighing this factor in favor of Appellant. Defense counsel did not need to file a written motion for a speedy trial when Appellant had already requested a speedy trial. There is no requirement that a judge order the State to try the case by a particular date in order to prevail on a motion to dismiss based on a speedy trial violation. There is no requirement that a defendant assert the right to a speedy trial, although the Appellant in the present case asserted his right and then filed a motion to dismiss based on the violation of the speedy trial right.

In Barker the Court wrote:

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Barker v. Wingo, 407 U.S. 514, 528-529, 92 S.Ct. 2182, 2191 (1972).

Appellant asserted his right to a speedy trial on September 13, 2017, following his arrest in August of 2017. (R. p. 1189). Two years later on September 13, 2019, Appellant, having not received any response from the public defender, wrote to the clerk of court again and advised that he moved for a speedy trial two years ago. (R. p. 1191). The written order denying the motion to dismiss references the fact that Appellant expressed his desire for a speedy trial during bond hearing. As the South Carolina Supreme Court in Hunsberger wrote, citing Barker, "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, 92 S.Ct. 2182." 418 S.C. at 349, 794 S.E.2d at 375. Appellant asserted his right to a speedy trial and the assertion of the right weighs in favor of Appellant.

4. Prejudice

As to the fourth Barker factor, prejudice to the accused, in State v. Barnes, 431 S.C. 66, 89, 846 S.E.2d 389, 400–01 (Ct. App. 2020), aff'd as modified, 436 S.C. 202, 871 S.E.2d 421 (2022), this Court wrote:

> "The final factor—prejudice to the defendant—requires a reviewing court to analyze the three different types of prejudice the speedy trial right seeks to prevent: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility the defense will be impaired." Reaves, 414 S.C. at 131, 777 S.E.2d at 219. "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." Langford, 400 S.C. at 445, 735 S.E.2d at 484 (quoting Barker, 407 U.S. at 532, 92 S.Ct. 2182); but see Loud Hawk, 474 U.S. at 312, 106 S.Ct. 648 ("[T]he Speedy Trial Clause's core concern is impairment of liberty ....").

In the order denying the motion to dismiss the judge wrote:

> The Defendant's argument that he has suffered prejudice from the delay of his trial is without merit. While the Defendant did raise issues concerning the preservation of evidence in this case which may have hampered his defense, those issues were present as soon as SLED declined to collect the items, just hours after the incident. It may well be that the Defense only learned of those issues recently, but that does not mean they were caused by delay.
>
> The Defendant has been awaiting trial for more than five and a half years on this case. However, this pre-trial incarceration can hardly be said to be oppressive, given that he had been serving a ten year active sentence at the time of the incident and arrest, and was only released from said sentence on December 1, 2022. All prior incarceration in this case was concurrent with his previous sentence. For the same reason, having already pled *nolo contendre* to a "Most Serious" offense (Voluntary Manslaughter), the Defendant cannot credibly claim that he has suffered anxiety from the charge.

(R. p. 1205-1206). The judge erred.

First, as to the judge's finding that Appellant did not suffer from prejudicial oppressive pre-trial incarceration because he was serving a sentence on an unrelated charge, in Smith v. Hooey, 393 U.S. 374, 378–79, 89 S. Ct. 575, 577, 21 L. Ed. 2d 607 (1969) (n. 7, 8 omitted), the United States Suprĕme Court wrote:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.
>
> And while it might be argued that a person already in prison would be less likely than others to be affected by 'anxiety and concern accompanying public accusation,' there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.

As a result of the pending charge, Appellant's conditions in prison on the unrelated charge worsened. In his letter filed with the clerk dated September 13, 2017, Appellant wrote, "Because of this pending charge I now have to remain in security detention (Isolation) until this is resolved." (R. p. 1189). In his letter filed with the clerk dated September 13, 2019, two years after the first letter and after not receiving any response from the public defender, Appellant wrote, "I am way past sick and tired of being on lock up for a crime I did not commit and being denied proper legal counsel." (R. p. 1191). Appellant suffered prejudice from the delay in the form of oppressive pre-trial incarceration that required lock down while serving the sentence on the unrelated charge.

Second, a defendant is not required to show prejudice affirmatively to win a speedy trial claim. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6th Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5th Cir. 2009); United States v. Frith, 181 F.3d 92 (4th Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11th Cir. 1996). 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 Appellant's acquiescence, nor persuasively rebutted by the prosecution. Prejudice should be presumed because of the excessive almost six year delay.

In Barnes this Court wrote:

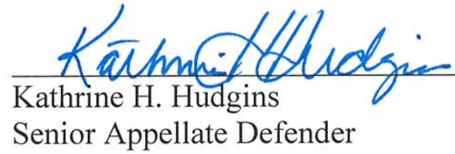
> "[A]n accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial." Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376. "Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." Id. "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. "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." Id.

431 S.C. at 89, 846 S.E.2d at 401. Appellant suffered actual prejudice in the form of oppressive pre-trial incarceration as the result of the State's violation of Appellant's speedy trial rights as well as presumptive prejudice because of the almost six-year delay.

Both judges erred as a matter of law in failing to weigh the Barker factors. The error of law constitutes an abuse of discretion. Balancing the Barker factors, four years of the almost six-year delay in trying the case is wholly attributable to the State and that delay should be weighed heavily against the State. The reasons for the delay must be weighed against the State. Appellant's assertion of his right to a speedy trial weighs in Appellant's favor. Appellant showed actual and presumptive prejudice, weighing in Appellant's favor. The weighing of the Barker factors shows that the State violated Appellant's speedy trial rights. The violation requires dismissal of the charges.

CONCLUSION

Based on the argument above, this Court should reverse the decision of the circuit court to deny the motion to dismiss based on the violation Appellant's right to a speedy trial.



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2025.

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SC Court of Appeals

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."

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This 5th day of March, 2025.

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Mar 05 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN WALTER DUBOIS III,

APPELLANT

APPELLATE CASE NO. 2023-001307

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Kaylee C. Kemp, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 5th day of March, 2025.

Katrine H. Hudgins
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Subject:	2023-001307 - The State v. Benjamin Walter Dubois, III - Final Brief of Appellant
Date:	Wednesday, March 5, 2025 3:58:00 PM
Attachments:	2023-001307 - The State v. Benjamin Walter Dubois, III - Final Brief of Appellant.pdf

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Ms. Kemp,

Please find attached for service the Final Brief of Appellant for Benjamin Walter DuBois' appeal which will be filed today with the Court of Appeals.

Thank you.

Chris Stock
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