STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

APPELLANT

APPELLATE CASE NO. 2012-207290

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial judge err in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder?

STATEMENT OF THE CASE

In March[1] of 2002, the Edgefield County Grand Jury indicted Appellant for murder, indictment #2002-GS-19-110. On January 9, 2012, Appellant proceeded to jury trial before the Honorable R. Knox McMahon. Attorney Randall D. Williams represented appellant at trial. Attorneys Ervin J. Maye and H. Franklin Young, III prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge McMahon sentenced Appellant to life in prison without parole. A timely notice of intent to appeal was filed on January 19, 2012. This appeal follows.

[1] The indictment states the March 2002, term but the date under the signature of foreperson of the Grand Jury appears to be May 25, 2002.

ARGUMENT

The trial judge erred in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder.

On January 25, 2002, Appellant was served with arrest warrant #G-679758 for the murder of Samuel J. Sturrup on September 3, 2001. (Arrest warrant and affidavit, R. p. 555.) In either March or May (see footnote #1) the Edgefield County Grand Jury indicted Appellant for the murder of Sturrup, indictment #2002-GS-19-110. It is unclear from the transcript when the public defender office was appointed to represent Appellant. R. p. 35, lines 7-9. Records from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Appellant on January 29, 2002. (Defense of Indigent Act Appointment, R. p. 562). On February 16, 2005, over three years after his arrest in South Carolina, Appellant was transferred to Georgia to face charges connected to the South Carolina murder charge. R. p. 37, lines 14-25. The trial judge noted that during that three year period former tri-county public defender Lee Sturkey represented Appellant. R. p. 38, lines 1-11.

On September 12, 2006, Appellant and his co-defendant and brother, Alex Hunsburger, were convicted in Georgia for kidnapping with bodily injury. R. p. 27, lines 5-9. Appellant received a sentence of life in prison with the possibility of parole. R. p. 27, lines 9-13. At some point in time, another public defender, Mr. Siegler, was appointed to represent Appellant for the South Carolina charge. R. p. 39, lines 2-6. On May 18, 2010, Mr. Siegler moved to be relieved as counsel for Appellant based on a conflict. R. p. 39, lines 6-9. Mr. Siegler's motion to be relieved was granted and on June 14, 2010, trial counsel, Randall D. Williams, was appointed to represent Appellant. R. p. 39, lines 10-18; (Order of appointment, R. p. 559). Appellant remained incarcerated in Georgia.

On September 30, 2011, Appellant was returned to South Carolina pursuant to the Interstate Agreement on Detainers [IAD]. On October 3, 2011, the State called Appellant's case for trial. Appellant moved for a continuance which was granted by the Honorable William P. Keesley in a written order signed October 18, 2011. R. p. 559. In the order granting the continuance, Judge Keesley wrote, "There is no such motion for speedy trial now before the Court. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion." R. p. 563. On January 9, 2012, the State again called the case for trial before the Honorable R. Knox McMahon.

Prior to trial, Appellant moved to dismiss the charges based on the State's failure to bring the case to trial in a timely manner. R. p. 10, lines 11 – p. 11, lines 1-13. Appellant specifically argued a violation of the right to a speedy trial pursuant to both the United States and South Carolina Constitutions. R. pp. 21 – 26. Appellant acknowledged that the right to a speedy trial had not previously been asserted but argued that this was merely a factor for the judge to consider under Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972). R. p. 22, lines 8 – pp. 23 – 26, lines 1-18. Counsel for Appellant attributed the failure to assert the right to a speedy trial, in some degree, to the fact that Appellant's initial attorney, Lee Sturkey, was suspended from the practice of law prior to his death. Counsel stated, "Now, the position I simply take is his failure to assert his right, I think, is coupled with the fact that he was basically in a flux, did not have an attorney. I was not representing him until leading into the Barnes trial. I was - - didn't even know what his circumstances were until I was appointed some, I guess, eight years after his arrest, eight and a half years to him after his arrest." R. p. 25, lines 3-11.

Counsel further argued that his motion for a continuance should not preclude assertion of Appellant's right to a speedy trial. Counsel stated, " . . . as it relates to the issue of us requesting the continuance, my client got to South Carolina on September 30th of 2011. I had not had an opportunity to meet with him but on one prior occasion before he was moved back away from Augusta, back to some part of lower Georgia on the other side – well on the other side of Savannah and Dublin and had only met with him on one occasion. And I did request a continuance because I thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case." R. p. 32, lines 22 - p. 33, lines 1-10; p. 42, lines 13-20.

The trial judge denied the motion to dismiss. R. pp. 44 – 49. The judge stated, "I think once you get past the – you look at the right to a speedy trial and you look at those factors under Barker versus Wingo, and there is some indication that there is somewhat of a presumed prejudice because of the length of delay, I find based on the totality of the circumstances here of what's been presented, that the defendant would not be prejudiced." R. p. 48, lines 14-21. The judge went on to state, "I think given the fact that he was a sentenced prisoner in Georgia and that he was, for that length of time, that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first." R. p. 49, lines 6-12. At the close of the State's case, Appellant again moved for dismissal based on violation of the speedy trial right. R. p. 455, lines 12-24. The judge again denied the motion. R. p. 455, lines 25 – p. 456, line 1. The trial judge erred.

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

The speedy trial right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007).

In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972) Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978). In a footnote in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) the Court wrote, "Depending on the nature

of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett Fn. 1

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

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

The almost ten year delay in the present case is presumptively prejudicial. Appellant remained in pre-trial detention in South Carolina for over three years from the time of his arrest on January 25, 2002, until the time he was transferred to Georgia for trial in February 16, 2005. On September 12, 2006, Appellant was convicted and sentenced in Georgia. The State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. There is no evidence in the record that the State was unable to extradite Appellant from Georgia. Prejudice should be presumed. The excessive delay was unreasonable and without valid reason by the State.

As to the second factor from Barker, the reason for the delay, the State argued that they waited to call Appellant's case to trial until after the capital trial of co-defendant, Steven Barnes in November of 2010. R. p. 27, lines 21 – p. 28, p. 29 lines 1-5. As the trial judge correctly noted, "The reason for the delay, again, I take that balancing, for whatever reason, Mr. Barnes was not tried for eight years and some months. And I don't think you can say, well, I'm not going to try the co-defendant until I try Mr. Barnes. I

think Mr. Hunsburger's due process rights are separate and distinct from the State's prosecutorial plan so to speak on the defendants and the co-defendants involved in the Sturrup homicide." R. p. 48, lines 22 – p. 49, lines 1-5. In a letter, dated October 11, 2010, to Appellant from trial counsel marked as Court's exhibit #1, counsel for Appellant writes, "It was a pleasure meeting you on September 22, 2010. After meeting with you, I informed the prosecutor here in this county, that you did not have any information regarding the facts and circumstances of the alleged murder. He then informed that he intends to try all parties who have chosen not to cooperate with the prosecution of one, Steven Barnes. Furthermore, he has asserted that he will call your case to trial at the next available opportunity." R. p. 558.

A prosecutor acts improperly if he intentionally delays a trial to gain some tactical advantage over a defendant or to harass a defendant. Barker, 407 U.S. at 531, n. 32 (citing United States v. Marion, 404 U.S. 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957)). Such a reason should be weighted heavily against the prosecution. Even neutral reasons weigh against the State because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531.

> Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply

> encourage the government to gamble with the interests of criminal suspects assigned to a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett, 505 U.S. at 657.

The State's purported reason for the delay, because the State wished to try co-defendant Barnes first, does not justify the almost ten year delay, especially in light of the fact that Appellant was not a witness for the State in the prosecution of co-defendant Barnes. The State's refusal to call the case for trial for almost ten years, without sufficient cause, gives the appearance that the State was using the delay as a tactical advantage to coerce cooperation from Appellant in the trial of the co-defendant, Barnes. The present case is distinguished from State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009) where the South Carolina Court of Appeals, finding no speedy trial violation, found that a twelve year delay was troubling but justified based on an appeal taken by the State and the case being transferred to different prosecuting offices. There was no appeal involved in the present case and the case was never transferred out of the Eleventh Circuit Solicitor's Office. The reason for the delay in the present case is unjustified.

The final delay, nine years after arrest and indictment, between October 2011, and the trial date of January 9, 2012, was based on the proper granting of the continuance motion. As noted by the trial judge, "Upon his return, I also do not think that you could look at the – Mr. Williams' [trial counsel's] motion for a continuance and then foreclose his right to make that motion for a speedy trial or it could have any weight and value added to it whatsoever. I just feel like a defense attorney if he stood up and says, well, we demand a

speedy trial, and the State's over there ready to try the case and he's got three to five day to try a major case like this, it would be a recipe for a disaster in my opinion. I think an attorney has to have proper time to prepare, meet with his client and talk with his client. R. p. 47, lines 1-13. Additionally, in Judge Keesley's order granting the continuance, he specifically wrote, "There is no such motion for speedy trial now before the Court. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion." R. p. 559. The continuance motion should not weigh against Appellant.

As to the third factor from Barker, Appellant's assertion of the right to a speedy trial, Appellant acknowledged that the speedy trial right had not previously been asserted. 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).

The status of Appellant's appointed counsel during the first three years after his arrest and while he remained in pre-trial detention in South Carolina is in question. While the transcript in the present case fails to reflect when the public defender was appointed, documents from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Appellant on January 29, 2002. R. p.35, lines 7-9; R. p. 562. As noted by the trial judge, Mr. Sturkey failed to appear at a bond hearing on Appellant's behalf. R. p. 38, lines 1-15.

On May 3, 2004, Appellant wrote to Judge Keesley with concerns that he was unable to obtain access to his counselor and specifically referred to his co-defendant/brother's motion for a speedy trial. R. p. 567. Judge Keesley responded to Appellant's letter in a document filed May 11, 2004. R. p.570. On May 4, 2004, Appellant wrote a letter to the Edgefield County Clerk of Court asking that Mr. Sturkey be relieved as counsel. R. p. 567. On January 4, 2005, Appellant wrote another letter to the Edgefield County Clerk of Court asking to relieve Mr. Sturkey as counsel because Appellant has never met his court appointed attorney since the time of his arrest on January 22, 2002. R. p. 572. As noted by trial counsel, Mr. Sturkey was suspended from the practice of law. In re Sturkey, 657 S.E.2d 465 (2008). R. p. 24, lines 7-12. The fact that Appellant did not previously assert his right to a speedy trial, when, it appears Appellant was effectively without counsel from 2002 until at least 2005, should not weigh against appellant.

As to the fourth factor from Barker, prejudice, 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). The Court granted relief to Doggett while noting that he "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. Prejudice should be presumed because of the excessive almost ten year delay.

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

> The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. 2182. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." Id. Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." Id. at 529–30, 92 S.Ct. 2182. 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. A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct.App.2007) (applying abuse of discretion standard to speedy trial claim), *rev'd on other*

> *grounds,* 384 S.C. 504, 682 S.E.2d 820 (2009); see also State v. Redding, 274 Ga. 831, 561 S.E.2d 79, 80 (2002) (noting the inquiry is whether court abused its discretion under Barker). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008).

Appellant's speedy trial rights were violated in the present case and dismissal is the only possible remedy. The trial judge abused his discretion in refusing to dismiss the charges. The trial judge failed to properly balance the presumptively prejudicial almost ten year delay, attaching undue significance to the fact that Appellant was incarcerated in Georgia and the State wanted to try Barnes first, against a finding that Appellant was not prejudiced by the delay. Properly balancing the Barker factors, the excessive delay, the fact that the State provided no other explanation for failing to call the case to trial for three years before extradition to Georgia and then failing to call the case for trial for another five years after conviction in Georgia on September 12, 2006, until October of 2011, and the fact that the status of Appellant's appointed representation was in question far outweigh a finding that no prejudice was demonstrated by the delay.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court, hold that Appellant's federal and state constitutional rights to a speedy trial were violated, and dismiss the charge of murder against him.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

This 8th day of October, 2013.

STATE OF SOUTH CAROLINA

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of October, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of October, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.