ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

APPELLANT

Appellate Case No. 2012-206608

FINAL REPLY BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT IN REPLY

The trial court's failure to dismiss the pending criminal charge against Appellant violated his state and federal constitutional rights to a speedy trial where the crime allegedly took place on September 3, 2001, Appellant was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Appellant's arrest.

Appellant's brief explained the relevant chronological procedural history of the speedy trial motion, the proper legal analysis, and Respondent's violation of Appellant's federal and state constitutional rights. Nevertheless, Respondent's brief raised multiple arguments that require reply by Appellant.

As an initial matter, the Respondent conceded the time of ten years from arrest to trial was "unusual when compared to delays referenced in a survey of published cases on speedy trial issues in this jurisdiction." FBOR at 14. Yet, Respondent argued "certain breaks in the time period ... undermine[d] a blanket assertion that the whole of the delay falls at the feet of the prosecution." FBOR at 15. One alleged break was Respondent's claim that Appellant did not consent to extradition proceedings in 2011. Therefore, Respondent argued one year of the ten-year delay was attributable to Appellant. FBOR. 15.

This argument contorts the facts presented to the trial judge. At the hearing, the prosecutor argued that Appellant attempted to delay his return to South Carolina by contesting jurisdiction "and not wanting us to proceed at the last term of court." R. 24, lines 21-25; R. 27, lines 6-11. However, the only actual evidence in the record concerning possible extradition was Appellant's testimony. Appellant stated that his counselor approached him in September of 2011 and asked him to sign a form consenting to extradition. The counselor explained that if he did not sign to consent, then he would have

twenty days to file a writ to contest extradition. Appellant did not consent immediately because he wanted the advice of counsel first. Appellant filed no writ of habeas corpus contesting jurisdiction. Thereafter, he was extradited to South Carolina. R. 35, line 6 – R. 38, line 9.

Respondent's attempt to blame Appellant for one year of the ten-year delay fails upon a review of the record and the actual evidence presented. Additionally, even if this Court determined Appellant had caused any delay due to his not signing the extradition consent, this occurred in September 2011, which was a mere four months before his case was called to trial. Therefore, the only delay that could be attributed to Appellant in this regard is four months. Nevertheless, Appellant contests any of the ten-year delay being attributed to any acts or omissions by Appellant.

Turning to additional alleged reasons for the delay, Respondent argued that two jurisdictions vied for the opportunity to pursue charges against a minimum of six individuals. FBOR at 16. The record failed to support Respondent's contention. The record clearly demonstrated Appellant was within the custody and control of South Carolina until the prosecution failed to try him within a reasonable amount of time. Only then did the trial judge set a personal recognizance bond enabling the state of Georgia to extradite Appellant. R. 8, lines 16-21; R. 226 (Order filed 1/28/2005). The prosecution did not attempt to regain custody and control of Appellant. In fact, the record also demonstrated no attempts by the State of South Carolina to extradite Appellant until 2011 despite the fact that Appellant had been tried and convicted in Georgia in 2006.

Respondent argued Appellant's case was "complex" and that such complexity was the reason for delay. FBOA at 16. A review of Appellant's trial transcript revealed

Appellant's case was not complex at all. The prosecution's case was very straightforward, involving the testimony of multiple eyewitnesses and police officers. The evidence also revealed the lay witnesses were prepared to testify at least as early as 2006 when they testified against Appellant in Georgia. R. 97, lines 14-16; R. 143, line 25 – R. 146, line 11.

Respondent argued that collecting witnesses was a valid cause for delay. Respondent contorts the case law supporting the proposition that collecting witnesses may support a cause of delay. The case law cited by Respondent concerned when a prosecution is delayed against an accused to collect witnesses against the accused. FBOR at 17. Here, the collecting of witnesses was the prosecution attempt to collect Appellant as a witness against a co-defendant. There was no need to delay Appellant's prosecution as the state had all the witnesses it required. Respondent's argument attempts to lay blame for the trial delay on Appellant because he refused to testify. The delay of Appellant's trial while the prosecution attempted to gather witnesses, including Appellant, to testify against Barnes was attributable to the state, not Appellant.

Although Respondent argued that the prosecution delayed Appellant's trial because it wanted to try Barnes first, and that after Barnes' trial, the prosecution actively sought a trial against Appellant, Respondent offered no explanation to justify why Appellant's trial and his constitutional rights would be dependent upon the trial of another. The prosecutor offered no reason for wanting to try Barnes first; he simply stated that the prosecutor wanted to do so.

The prosecutor very candidly admitted that the only reasons for delay were the prosecutor deciding whether to seek Appellant's death as punishment and the prosecutor attempting to force Appellant to testify against Steven Barnes. R. 4, lines 14-25; R. 25, lines

3-17; R. 29, lines 15-19; R. 23, lines 3-16; R. 26, lines 10-16; R. 26, line 24 – R. 28, line 10; R. 29, lines 10-15; R. 31, lines 10-12.

Recently, the Supreme Court of Georgia dismissed capital murder charges against a defendant based upon a delay of fifty-three months between indictment and the defendant's motion to dismiss. Buckner was indicted in December 2007 for kidnapping, molestation, and murder of a minor. Four years later, when Buckner had not been tried yet, he filed a motion to dismiss based upon his speedy trial right. State v. Buckner, 738 S.E.2d 65, 68 (Ga. 2013). Buckner's case had been set for trial on April 4, 2011, but the prosecution announced its intent to seek the death penalty on that date. In light of the announcement, the trial was continued and new lawyers were appointed to represent Buckner. Then, on August 25, 2011, the prosecution decided it would not seek death after all. Buckner's trial was set for February 2012. Buckner filed his motion to dismiss in December 2011. Id. at 69.

The Supreme Court of Georgia initially determined, and the prosecution conceded, that the delay of over fifty-three months (over four years), raised a presumption of prejudice. Id. The Court then examined the Barker-Doggett[1] factors. The Court acknowledged the charges serious, but found the prosecution had completed its investigation by the time Buckner was indicted. The case against Buckner was "no more complicated than most other cases involving such serious crimes." Therefore, the fifty-three month delay was uncommonly long and weighed against the state. Id. at 70.

The reasons for the delay were the negligent inaction of the prosecuting attorneys and the reassignment of the case among prosecuting attorneys. This delay of approximately

[1] Barker v. Wingo, 407 U.S. 514 (1972); Doggett v. United States, 505 U.S. 647 (1992).

thirty months weighed benignly against the state. Id. The Court attributed three months of the delay to the defense submitting a notice of conflict, which weighed benignly against Buckner. Id. However, the Court weighed more heavily the delay of ten months in which the prosecuting attorneys intended to seek the death penalty. The Court explained the announcement occurred late in the already delayed case and was unnecessary in light of the prosecutor's subsequent withdrawal of the notice. The prosecution must exercise its discretion to seek the punishment it deems appropriate in each case; however, the Court could not ignore that the state chose not to exercise its discretion until the eve of trial in a case that had been pending for forty months. The late decision was not based on the discovery of new evidence or other notable newly acquired information that would cause a reasonable prosecutor to reconsider the issue of punishment. The ten-month delay due to the death penalty announcement was the result of a deliberate decision by the prosecution and was something more than mere negligence. Id. at 71. The Court explained that seeking death in the case – one "involving a convicted sex offender accused of murder, kidnapping, and sexually abusing a child" – was hardly novel. Thus, the prosecuting agency should have reviewed the file and made its discretionary determination long before December 2010. Id.

Buckner did not assert his right to a speedy trial until almost four years after his indictment; therefore, this factor weighed heavily against him. However, his repeated insistence that the state comply with his discovery requests somewhat mitigated his late assertion. Id. at 72.

The Court further found Buckner suffered prejudice because his defense was impaired by evidence tampering. A 2003 investigation revealed that two police officers and one retired police officer entered the deceased's bedroom before it was secured by the

investigating officers. At least one of the officers tampered with evidence, including removing potential evidence from the bedroom. The officer instructed the deceased's family not to tell anyone about the police entering the bedroom. Id. at 73. Also, the officer who investigated the evidence tampering in 2003 was no longer able to recall important and material details of his investigation, the recordings of witnesses to the tampering had been lost, and the witnesses were either deceased or unable to recall important details. Therefore, Buckner was unable to explore what evidence at the crime scene was altered. Id.

Finally, in balancing the factors, the Court concluded that although Buckner's late assertion weighed heavily against him, the other factors weighed against the state. Therefore, the Court affirmed the dismissal of all charges against Buckner based upon the fifty-three month delay. Id.

Appellant's trial was delayed by the prosecution significantly longer than fifty-three months.. In fact, the prosecution delayed calling Appellant's case to trial for ten years, or one hundred and twenty months, over double the delay in Buckner. While only ten months' of the delay in Buckner's case was the result of the prosecutor's inability to make a decision regarding whether to seek the ultimate punishment against him, the prosecutor against Appellant attributed the entire ten-year delay to his indecision in that regard. The prosecutor must not be permitted to hide behind its right to exercise discretion concerning punishment and its control of the docket to delay unreasonably Appellant's trial.

CONCLUSION

As requested in his brief, Appellant respectfully requests this Court vacate his convictions and sentences, and dismiss the charges against him.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT.

This 30th day of October, 2013.

CERTIFICATE OF COUNSEL

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

October 30, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

APPELLANT

Appellate Case No. 2012-206608

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of October, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.