

ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

v.

JULIO ANGELO HUNSBERGER,

APPELLANT

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NOV 20 2014

SC Court of Appeals

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2014-UP-382

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Julio Angelo Hunsberger petitions the Court for rehearing. Counsel respectfully submits that the Court, in considering the four Barker-Doggett<sup>1</sup> factors and finding that Hunsberger's constitutional right to a speedy trial was not violated, overlooked several important factors. First, in regard to the length of the delay, while this Court acknowledges the almost ten year delay between arrest and trial, the Court fails to address the fact that during eight years of the ten year delay the State could have readily called the case for trial but simply refused to do so. This Court correctly notes

<sup>1</sup> Barker v. Wingo, 407 U.S. 514 (1972); Doggett v. United States, 505 U.S. 647 (1992).

that Petitioner was incarcerated in South Carolina for three years prior to being released to Georgia. This Court wrote, “Although almost ten years passed between Hunsberger’s arrest and his trial, the trial court noted that Hunsberger was only detained in South Carolina from January 25, 2002, to February 16, 2005, before he was released to Georgia. This three year period would have been sufficient to trigger further review of his speedy trial rights; however, he never asserted them.” This Court then correctly notes that Petitioner was convicted and sentenced in Georgia in on September 12, 2006 and returned to South Carolina on September 30, 2011. Counsel respectfully submits that this Court overlooked the important five year time frame between when Petitioner was convicted in Georgia in September of 2006, and the time when the State of South Carolina finally sought extradition in August of 2011. The additional five year time frame after the Georgia conviction resulted in a cumulative eight year time frame where the State could have called the case for trial but refused to do so.

Second, as for the reason for the delay, this Court wrote, “As for the reason for the delay, the trial court found that ‘given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the state to take the position that [it] wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first.’” The Court then cites United States v. Grimmond, 137 F.3d 823 (4<sup>th</sup> cir. 1998) for the proposition that, “When a defendant violates the laws of several different sovereigns, . . . at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is

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without question a valid reason for delay.” Counsel respectfully submits that the Court overlooked the fact that South Carolina was not simply waiting its turn at the prosecutorial turnstile. The State of South Carolina refused to extradite Petitioner for five years following the conviction in Georgia.

This Court also cites State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), for the proposition that the “constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable.” Counsel respectfully submits that the delay in the case was unreasonable and can not be justified by the Georgia prosecution and conviction or the fact that the State simply wanted to try the capital case against co-defendant Barnes first. This Court also cites State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), for the proposition that a two year and two month delay did not violate speedy trial rights when the case was complicated and required substantial time to investigate and prepare. There is nothing in the record to indicate that Petitioner’s case was complicated to the extent to justify the ten year delay.

The opinion notes that when the State finally called the case for trial in October of 2011, Hunsberger did not move for a speedy trial and in fact moved for a continuance. This factor should not weigh against Petitioner when the State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. When counsel was finally appointed to represent Petitioner in 2010, Petitioner was still incarcerated in Georgia and it was difficult for counsel to meet with his client. Counsel argued that his motion for a continuance should not preclude assertion of Petitioner’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 30<sup>th</sup> 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 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 days 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). The continuance motion should not weight against Petitioner. Neither the trial and conviction in Georgia nor the State’s decision to wait and call Petitioner’s case after the Barnes case justify the almost ten year delay.


Third, as to Petitioner’s assertion of the right to a speedy trial, counsel respectfully submits that this Court overlooked the fact that Petitioner Julio Hunsberger was effectively without counsel for the South Carolina charges from the time of his arrest in South Carolina on January 25, 2002, until June 14, 2010, when trial counsel, Randall D. Williams, was

appointed to represent Petitioner. (R. p. 39, lines 10-18). Petitioner's failure to assert his right to a speedy trial prior to the 2012 trial should not weigh against Petitioner when the State failed to provide Petitioner, an indigent defendant charged with murder, with competent legal counsel until June of 2010, eight years after his arrest.

Fourth and finally, in regard to the prejudice, counsel respectfully submits that this Court overlooked the fact that a finding of actual prejudice need not be shown in order to find a speedy trial violation. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6<sup>th</sup> Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5<sup>th</sup> Cir. 2009); United States v. Frith, 181 F.3d 92 (4<sup>th</sup> Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11<sup>th</sup> 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.

For the above reasons, Petitioner seeks rehearing.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

This 20th day of November, 2014.

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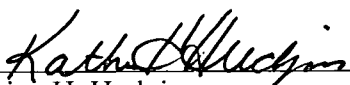
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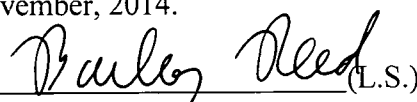
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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 20th day of November, 2014.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day  
of November, 2014.

  
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(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.