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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE ANTHONY ODOM,

APPELLANT

APPELLATE CASE NO. 2015-001294

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in sentencing Appellant to life without parole, pursuant to S.C. Code §17-25-45, for a burglary second degree conviction when a prior conviction for criminal sexual conduct with a minor second degree should not have been considered a most serious offense pursuant to the statute because there is evidence in the record that the conduct was consensual?

2. Did the trial judge err in refusing to dismiss the indictment for burglary second degree when the State failed to call the case for trial until August 6, 2013, almost six years after the arrest in October of 2007, and then when the first trial ended in a mistrial, the State failed to call the case again for trial until June 8, 2015, almost eight years after arrest in violation of Appellant's state and federal constitutional right to a speedy trial?

STATEMENT OF THE CASE

In August of 2013, the Edgefield County Grand Jury indicted Appellant Odom for burglary second degree, indictment #2013-GS-19-511. The State called the case for trial in August of 2013, but that trial ended in a mistrial. The State then called the case again for trial in June of 2015. Appellant proceeded to jury trial before the Honorable R. Knox McMahon on June 8, 2015. Bennett E. Casto and Erik J. Drylie represented Appellant at trial. Ervin J. Maye and H. Franklin Young prosecuted the case. The jury returned a verdict of guilty and Judge McMahon sentenced Appellant to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on June 16, 2015. This appeal follows.

STATEMENT OF FACTS

On October 17, 2007, just before 2:00 AM two masked men threw a block through the window of the IGA grocery store in Johnston and stole ninety cartons of cigarettes. The store alarm was triggered and the police were notified. As police were investigating the burglary they discovered a white Cadillac parked in the woods about a half a mile from the IGA. (R. p.168, lines 5-9). When the officer shined his flashlight on the Cadillac he saw two people changing clothes and then flee into the woods. (R. p.168, lines 15-24). Officers searched the Cadillac and found identification documents belonging to Appellant. (R. pp. 192-194). Officers also found a bill of sale for the Cadillac reflecting that Dukes Boys Auto Sales sold the car to Demetrius Odom on September 22, 2007. (R p. 203, lines 12-21). The officers also found an insurance identification card with Demetrius Odom's name on it. (R. p. 203, line 22 – p. 204, lines 1-7). Jessie James Dukes from Dukes Boys Auto Sales testified that he sold the Cadillac to Temetrius Odom and Appellant was present at the time of the sale. (R. pp. 289-290).

Officers also found inside the car a cell phone belonging to Appellant as well as another phone. (R. p. 263, line 22 – p. 264, lines 1-17). On the other phone the police called a contact labeled "Momma" and learned that this phone belonged to the co-defendant and Appellant's half brother, Brandon Donaldson. Both Appellant and Donaldson were charged with the IGA burglary. Donaldson testified against Appellant at trial.

ARGUMENTS

1. The trial judge erred in sentencing Appellant to life without parole, pursuant to S.C. Code §17-25-45, for a burglary second degree conviction when a prior conviction for criminal sexual conduct with a minor second degree should not have been considered a most serious offense pursuant to the statute because there is evidence in the record that the conduct was consensual.

On August 25, 2014, the State filed notice of intent to seek life without parole. The notice is dated August 19, 2014. The notice was served on both Appellant and his counsel. The caption references indictment "#2010-GS-19-511 et al" although Appellant was convicted on indictment #2013-GS-19-00511[1]. During the 2015 trial the notice with certificates of service was marked as Court Exhibit #4. (R. p. 448 - Notice of Intent to Seek Life Without Parole). The body of the notice states:

> The State of South Carolina hereby notices Maurice Anthony Odom of intent to seek sentencing under Section 17-25-45 (Life Sentence for Person Convicted of Certain Crimes), South Carolina code of Laws, 1976, as amended. The Defendant is currently charged with Burglary Second Degree (Violent), a serious offense. The State hereby provides notice to the Defendant that should he be convicted of the above charge he must be sentenced to a term of imprisonment for life without the possibility of parole pursuant to Section 17-25-45 (A), South Carolina Code of laws, 1976, as amended. The State of South Carolina relies on the Defendant Maurice Anthony Odom having previously been convicted in August 2012[2] of the offense of Criminal Sexual Conduct With a Minor Second Degree (Indictment No. 97-GS-06-365), and Burglary Second Degree (Violent) (Indictment No. 2012-GS-53-0311) in Laurens County on June 11, 2014. Both of these convictions are serious offenses[3], and each are separate "strikes' under Section 17-25-45 (A), South Carolina Code of Laws, 1976, as amended.

(R. p. 448 - Notice of Intent to Seek Life Without Parole).

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[1] No objection was made to the notice on this ground and it appears to be a typographical error and the notice should read 2013-GS-19-00511.

[2] The sentence was imposed on August 2, 2002, after Appellant waived grand jury presentment and pled guilty. Judge Keesley imposed a sentence of five years.

[3] Criminal Sexual Conduct with Minors is classified as a most serious offense, except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3).

After conviction but prior to sentencing, Appellant objected to the imposition of a sentence of life without parole pursuant to S.C. Code §17-25-45. Appellant argued that the conviction for criminal sexual conduct with a minor second degree should not count as a strike because the conduct was consensual. (R. p. 428, lines 21-25; p. 437, lines 6-14). In support of the objection counsel for Appellant submitted a Memorandum, marked as Court's Exhibit #12 (R. p. 471 - Memorandum in Support of Defense Counsel's Challenge to Sentencing Under SC 17-25-45 (LWOP)) and a transcript from the original guilty plea dated October 27, 1997[4], marked as Court's Exhibit #11 (R. p. 454- October 27, 1997, Guilty Plea Transcript). The indictment for criminal sexual conduct with a minor second degree, #97-GS-06-365, and the sentencing sheet from the subsequent guilty plea on August 12, 2002, were marked as Court's Exhibit #3. (R. p. 445 - Indictment #97-GS-06-365 and sentencing sheet). The Appellant also marked an incident report in reference to the criminal sexual conduct with a minor indictment as Court's Exhibit #10. (R. p. 425 - Incident Report).

The State argued, "But in the case that we have at hand, Your Honor – and Burdette says basically once an indictment informs the defendant of the charges against him 17-25-45(h) only requires the solicitor inform the defendant the recidivist statute will apply on conviction. We certainly did that in this case." (R. p. 430 lines 3-8). The State also argued that a sentence of life without parole could be based on additional convictions that were not included in the notice. (R. p. 434, lines 2 – p. 432, lines 1-16). The State then argued that the criminal sexual conduct with a

[4] This conviction was reversed in Odom v. State, 350 S.C. 300, 566 S.E.2d 528 (2002) overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). On August 12, 2002, Appellant appeared before the Honorable William P. Keesley, waived presentment of the indictment to the Barnwell County Grand Jury and again pled guilty to Criminal Sexual Conduct with a Minor Second Degree, indictment #97-GS-06-365. The transcript from the subsequent 2002 guilty plea is no longer available. (R. p. 433, lines 3-8).

minor second degree conviction should count as a strike because the current version of S.C. Code §16-3-655, which provides that a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age, was not in place at the time of the guilty plea and even if the current version of the law applied to the 2002 guilty plea, the current version requires the actor to be eighteen or less and, according to the State, Appellant was nineteen years of age[5] at the time of the conduct. (R. p. 433, lines 3-19).

The trial judge properly refused to consider convictions not included in the notice of intent to seek life without parole. (R. p. 436, line 12 – p. 437, 438, lines 1-22). The judge limited his ruling to whether the criminal sexual conduct with a minor second degree conviction should count as a strike pursuant to S.C. Code §17-25-45. The judge first ruled, relying on State v. Payne, 332 S.C. 266, 504 S.E.2d 335 (Ct. App. 1998), that "the defendant bears the burden of proof in collateral –prior convictions that the State seeks to use in the sentence enhancement statute." (R. p. 439, lines 5-7). The judge's reliance on Payne is misplaced as Appellant did not challenge the prior conviction for criminal sexual conduct with a minor. Instead, Appellate challenged whether the conviction qualified as a most serious offense.

The trial judge erred in placing the burden on the Appellant. In seeking an LWOP sentence based upon section 17–25–45, the State bears the burden of establishing the defendant's prior convictions for serious or most serious offenses. See State v. Phillips, 400 S.C. 460, 734 S.E.2d 650 (2012); State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003). The State bore the

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[5] The trial judge correctly calculated Appellant's age at the time of the conduct as twenty one. (R. p. 440, lines 1-6)

burden of establishing that Appellant's prior criminal sexual conduct with a minor conviction qualified as a most serious offense. The State failed to meet its burden.

S.C. Code §17-25-45 (C)(1) lists most serious offenses. Criminal sexual conduct with minors is included in the list of most serious offenses, "except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section **16-3-655(3)**."

Prior to amendments in 2005 and 2006, S.C. Code §**16-3-655(3)** read, "A person is guilty if criminal sexual conduct in the second degree if the actor engages in a sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit **or is older than the victim**." The current version of S.C. Code §16-3-655(B)(2) provides that:

> A person is guilty of criminal sexual conduct with a minor in the second degree if: the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

The reference to §16-3-655(3) in the LWOP statute, §17-25-45, appears to reference the older version of the statute in effect prior to the 2005/2006 amendments and the version in effect at the time Appellant entered his guilty plea in 2002 rather than §16-3-655(B)(2)..

The judge acknowledged that the current version of S.C. Code §16-3-655 was not in place at the time of the initial guilty plea in 1996 writing, "Now, I take that although 16-3-655(b) was not

the law in '96 when it was heard. The legislature referred to it and asked and, therefore, if I look at the terms of 16-3-655(b), I find that Mr. Odom was not fit in that because he was older than 18 at the time although she might at her age; he was not." (R. p. 442, lines 1-6). The trial judge erred. Appellant did not argue that pursuant to the current version of §16-3-655(B)(2) he should not have been prosecuted. Instead, relying on the plain reading of §17-25-45, Appellant argued that because the conduct was consensual and he was older than the minor, the conviction does not constitute a strike for purposes of sentencing.

The judge also erroneously relied on Judge Keesley's sentencing order requiring that Appellant register as a sex offender in determining that the conduct was not consensual. (R. p. 442, line 7 – p. 443, lines 1-3). Sex offender registry and consensual conduct are not mutually exclusive. At age twenty one Appellant had consensual sexual conduct with a fourteen year old. While the conduct is illegal and Appellant is required to register as a sex offender, pursuant to §17-25-45, the conviction is not a most serious offense.

The judge finally ruled that there was not sufficient evidence in the record to establish that the conduct was consensual. (R. p. 443, lines 1-12). As discussed above, the State bore the burden of establishing that the prior conviction for criminal sexual conduct with a minor second degree was a most serious offense as defined by §17-25-45. The State failed to meet its burden. In the incident report marked as Court's Exhibit #10 the investigator wrote, "Victim stated that she had had sex with subject on three different occasions; once in June of 1996, once in August of 1996." (R. p. 425 Incident Report). The investigator also wrote in the report that Appellant admitted that he had sex with the victim three times but she led him to believe that she was nineteen years old. (R. p. 425, Incident Report). The police were contacted after the minor learned that she was pregnant.

In the transcript of the original guilty plea, marked as State's Exhibit #11, the Assistant Solicitor told the judge, "Mr. Odom had an ongoing relationship with a fifteen-year-old juvenile. She became pregnant and has since had a child. She indicates that Mr. Odom is the only one that could be the father. I believe he has already admitted that to her and the contact they had was within her home. I believe the mother knew about it. Later on she got ahold of law enforcement and these warrants were from that incidents." (R. p. 454, Guilty plea transcript dated October 27, 1997, p. 11, lines 1-9).

Pursuant to §17-25-45 a conviction for criminal sexual conduct with a minor is a most serious offense except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3). In the present case the State failed to meet its burden of proving that Appellant's conviction for criminal sexual conduct with a minor was a most serious offense. There was evidence in the record that Appellant's conviction resulted from consensual sexual conduct where the victim was younger than the actor as contained in Section 16-3-655(3) of the statute in effect at the time Appellant pled guilty. The judge erred in finding that there was not sufficient evidence in the record to establish that the conduct was consensual and sentencing Appellant to life without parole.

2. The trial judge erred in refusing to dismiss the indictment for burglary second degree when the State failed to call the case for trial until August 6, 2013, almost six years after the arrest in October of 2007, and then when the first trial ended in a mistrial, the State failed to call the case again for trial until June 8, 2015, almost eight years after arrest in violation of Appellant's state and federal constitutional right to a speedy trial.

Appellant was arrested for the IGA burglary in October 30, 2007. (R. p. 41, lines 10-14). The State did not seek an indictment until almost six years later in August of 2013, when the State initially called the case for a trial that ended in mistrial because of a hung jury. (R.1 p. 39, lines 1-5). The State did not call the case for trial a second time for almost two more years after the mistrial. Prior to trial on June 8, 2015, Appellant moved to dismiss the indictment based on the State's violation of Appellant's right to a speedy trial guaranteed under both the state and federal constitutions. (R. p. 33, lines 15-22).

The trial judge denied the motion to dismiss writing:

> I don't think – I know the State has the burden of proof in this case beyond a reasonable doubt. But it's almost, I guess, akin to civil laches, it rests back on your lawyers and your rights and then you have an "ah-ha" moment. And I realize he has to have a duty to -- to prove that he's not guilty, he's innocent. I would respectfully deny the motion based on that.

(R. p. 51, lines 18-24). The trial judge erred.

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. 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). 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).

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).

1. Length of the Delay

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) this 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 is 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 length of the delay in this case was almost six years. While the State argued that Appellant made bond on these charges and was incarcerated on other charges from other counties, (R. p. 38, lines 6-21), as the Court noted in Langford, preventing undue pretrial incarceration is just one goal of the speedy trial right. The fact that appellant was arrested and incarcerated in other counties does not justify the undue delay. The almost six year time frame between the arrest on October 30, 2007, and indictment and the first trial in August of 2013, is presumptively prejudicial and triggers the speedy trial analysis with regard to the remaining three factors: (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant.

2. Reason for the Delay

As to the second factor from Barker, the reason for the delay, every circuit to have considered the issue places the burden on the State to explain the reason for the delay. Jackson v. Ray, 390 F.3d 1254, 1262 fn #3(10th Cir. 2004); McNeely v. Blanas, 336 F.3d 822, 827 (9th Cir.2003); United States v. Brown, 169 F.3d 344, 349 (6th Cir.1999); Jones v. Morris, 590 F.2d 684, 686 (7th Cir.1979); Morris v. Wyrick, 516 F.2d 1387, 1390 (8th Cir.1975); Georgiadis v. Superintendent, Eastern Correctional Facility, 450 F.Supp. 975, 980 (S.D.N.Y.), aff'd, 591 F.2d 1330 (2d Cir.1978). In the present case the State argued, "So, Your Honor, the State would respectfully maintain that the delay in this case was on the part of Mr. Odom. He changed lawyers and created some of the delay. He got himself arrested, prosecuted, and convicted in other jurisdictions. And he has never been held on these charges, incarcerated, after the time he made bond Your Honor. So we're certainly prepared to proceed to trial at this time, Your Honor." (R. p. 39, lines 22 – p. 40, lines 1-4).

The State claimed an attempt to call the case for trial prior to 2013, arguing, "Some of the delay in this case, Your Honor, we attempted to call this case even prior to 2013. It was initially appointed Greg Seigler. The case was not tried. It was delayed, in large part in that case, because he changed lawyers and retained Mr. Screen. So we had to go back through the discovery process and all with Mr. Screen." (R. p. 39, lines 6-12). There is no evidence in the record, however, that the State called the case for trial prior to 2013, and no evidence that Appellant's public defender or retained counsel sought a continuance.

According to the State, when they moved to revoke Appellant's bond in 2008, based on an arrest in Lexington County, the judge declined to revoke bond and instead set a curfew. (R. p. 42, line 11 – p. 43, lines 1-9). The State referenced two earlier indictments, #2008-GS-19-105, 106, and advised the judge that Appellant failed to appear for court on February 12, 2009, but the State admitted that the reason Appellant may not have appeared for court was because he may have been incarcerated in another county. (R. p. 43, line 23 – p. 44, lines 1-19). The other arrests were from counties within South Carolina. The State's purported reasons for the delay, Appellant's change in trial counsel and arrests in other counties, do not justify the almost six year time frame between arrest and the first trial and the almost two year delay between the mistrial and the second trial, especially in light of the fact that there is no evidence that Appellant ever sought a continuance based on changes in trial counsel and the fact that Appellant at all times during the time frame remained in South Carolina, at many times incarcerated on charges in other counties and easily located.

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.

In Doggett, 505 U.S. at 657, the Court wrote:

> 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.

The State's refusal to call Appellant's case for trial for almost six years, without sufficient cause, gives the appearance that the State was using the delay as a tactical advantage. This factor should weigh heavily against the State.

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 State delayed the first trial for almost six years. While the first trial ended in a mistrial, the State delayed the second trial for almost two years. The fact that the State failed to provide a valid reason for the excessive delays should weigh against the State.

The present case is also distinguished from State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), where the Court found 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. The present case was not complicated. The trial judge even stated, "Also, I don't know anything about the case. I've only read the indictment. I'm informed it's not a complicated case. It's fairly straightforward and although there are – I don't know how many witnesses there are on the witness list, it does not appear to be complicated." (R. p. 51, lines 4-8).

3. Assertion of the Speedy Trial Right

As to the third factor from Barker, Appellant's assertion of the right to a speedy trial, Appellant acknowledges that the speedy trial right was not previously asserted. Appellant's failure to previously assert the right to a speedy trial is simply one factor to be considered in the speedy trial analysis. 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).

This Court can and should find a speedy trial violation although Appellant did not previously assert the right.

4. Prejudice

As to prejudice, the fourth factor, the Court in Barker wrote:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. 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. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972).

Appellant can demonstrate particularized prejudice in the preset case because a potential witness, Nicholas Jermaine Sapp, died in a car accident in June or July of 2008, prior to the State calling the case for trial. (R. p. 37, lines 15 – 24; p. 44, line 20 – p. 45, lines 1-8). The defense was impaired by the death of the potential witness.

Although Appellant can demonstrate a particularized prejudice in the present case, such a showing is not a requirement for the Court to find a violation of the speedy trial right. 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 based on the State's negligence in refusing to call the case for trial for almost six years.

In Moore v. Arizona, 414 U.S. 25, 26, 94 S. Ct. 188, 189-90, 38 L. Ed. 2d 183 (1973) the United States Supreme Court wrote:

> A defendant is not required to show prejudice affirmatively to win a speedy trial claim. The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim. Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial:
>
> 'We regard none of the four factors identified above (length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant) as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.' 407 U.S., at 533, 92 S.Ct., at 2193 (footnote omitted).
>
> In addition to possible prejudice, any court must thus carefully weigh the reasons for the delay in bringing an incarcerated defendant to trial. In the face of petitioner's repeated demands, did the State discharge its constitutional duty to make a diligent, good-faith effort to bring him (to trial)'? Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969).

In United States v. Ferreira, 665 F.3d 701, 706 (6th Cir. 2011), the Sixth Circuit Court of Appeals wrote:

> The Sixth Circuit has recognized that "extreme" delays may, on their own, "give rise to a strong presumption of evidentiary prejudice affecting the fourth Barker factor." United States v. Smith, 94 F.3d 204, 209 (6th Cir.1996) (quotation omitted); see also Doggett, 505 U.S. at 655, 112 S.Ct.2686 ("[E]xcessive delay

> presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."). "When a defendant is unable to articulate the harm caused by delay, the reason for the delay (factor 2) will be used to determine whether the defendant was presumptively prejudiced." United States v. Mundt, 29 F.3d 233, 236 (6th Cir.1994). Where the delay has been caused by negligence, "our toleration of such negligence varies inversely with its protractedness." *Doggett,* 505 U.S. at 657, 112 S.Ct. 2686.

In Ferreira the Sixth Circuit found that a three year delay caused by the Government's negligence in filing the writ of habeas corpus in the wrong county created a presumption of prejudice. In United States v. Erenas–Luna, 560 F.3d 772, 780 (8th Cir.2009), the Eighth Circuit applied Doggett and concluded that a three-year delay between indictment and arraignment caused by "the serious negligence of the government" was excessive enough to trigger a presumption of prejudice. In United States v. Ingram, the Eleventh Circuit held that a two-year, post-indictment delay caused by egregious government negligence allowed the court to presume prejudice in the fourth Barker prong. 446 F.3d 1332, 1339 (11th Cir.2006).

In United States v. Molina-Solorio, 577 F.3d 300, 307 (5th Cir. 2009), the Fifth Circuit Court of Appeals wrote:

> The fourth factor is the prejudice suffered by the defendant due to the delay, and ordinarily the burden is on the defendant to demonstrate actual prejudice. Serna-Villarreal, 352 F.3d at 230-31. But where the first three factors together weigh heavily in the defendant's favor, we may conclude that they warrant a presumption of prejudice, relieving the defendant of his burden. Id. Although factor three does not weigh as heavily as it did in prior cases that have found a constitutional speedy trial right violation, the lengthy delay caused by the Government's negligence weighs more heavily than that factor has in our prior cases. The reason for the delay, Government negligence, also weighs heavily in Molina's favor due to the "protractedness of the delay." Bearing in mind that the Barker inquiry is "a difficult and sensitive balancing process," and a constitutional deprivation may be found without mechanical factor-counting, Nelson v. Hargett, 989 F.2d 847, 851 (5th Cir.1993) (quoting Barker, 407 U.S. at 533, 92 S.Ct. 2182) (internal quotation marks omitted), we conclude that together the first three Barker factors weigh heavily in Molina-Solorio's favor, and he is relieved of the burden of demonstrating actual prejudice. See Cardona, 302 F.3d at 498-99.(footnote omitted).

the length of the delay and the lack of a valid reason for the delay weigh heavily against the State in the present case and prejudice should be presumed.

In Langford, 400 S.C. 421, 441-442, 735 S.E.2d 471, 482 (2012) this 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 charge. The trial judge failed to properly balance the presumptively prejudicial almost six year delay, attaching undue significance to the facts that Appellant was on bond, the speedy trial right was not asserted previously and that Appellant had other charges pending in other counties. (R. p. 50, line 17 – p. 51, lines 1-17). Properly balancing the Barker factors, the excessive delay and the fact that the State provided no valid explanation for failing to call the case to trial for almost six years outweigh the fact that the speedy trial right was not previously asserted. While Appellant can demonstrate particularized prejudice in the death of a potential witness during the six year delay in the State calling the case for trial, prejudice should be presumed. The charge must be dismissed.

CONCLUSION

Based on the argument presented in issue one, this Court should reversed the sentence and remand the case for re-sentencing outside S.C. Code §17-25-45. Based on the argument presented in issue two, the conviction and sentence should be reversed.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2016.

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."

May 16th, 2013

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Edgefield County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE A. ODOM,

APPELLANT

APPELLATE CASE NO. 2015-001294

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 David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of December, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.