

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable R. Scott Sprouse, Circuit Court Judge

PHILLIP ANDREW BRIDGES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002510

PETITION FOR WRIT OF CERTIORARI

VICTOR R. SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

 ORIGINAL

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance when he failed to file a motion for a speedy trial where Petitioner requested that he do so, where Petitioner's case was delayed for seven years, and where Petitioner only pled guilty because he was exhausted by the delay and wanted to get the charges resolved?

STATEMENT

During the July 2009 term, the Laurens County Grand Jury indicted Petitioner for trafficking methamphetamine. App. 79 – 80. Then during the May 2013 term, the Laurens County Grand Jury indicted Petitioner for manufacturing methamphetamine and possession with intent to distribute methamphetamine. App. 81 – 84.

On December 13, 2016 in front of the Honorable Alexander S. Macaulay, Petitioner pled guilty to possession with intent to distribute methamphetamine, first offense. App. 1; App. 6, l. 23 – 7, l. 1. Thomas Adducci represented Petitioner. App. 1. Jared Simmons represented the state. Id.

The court accepted Petitioner’s guilty plea. App. 12, ll. 4 – 7. Judge Macaulay sentenced Petitioner to five years’ imprisonment, and a special condition that Petitioner must complete drug and alcohol testing and treatment as well as substance abuse counselling as directed to include “ATU” while incarcerated. App. 12, l. 17 – 13, l. 1.

On March 17, 2017, Petitioner filed his PCR application. App. 15 – 22. On September 27, 2017, he filed an amendment to his PCR application. App. 23 – 24. His PCR application alleged ineffective assistance of counsel and involuntary guilty plea. App. 15 – 24.

Petitioner’s appointed attorney, Chip Howe (hereinafter trial counsel), who represented him from the time he was arrested until shortly before his guilty plea, never filed a motion for a speedy trial and, after a seven-year delay, Petitioner pled guilty because the delay exhausted him and said he wanted “the charge being over [him]” to be resolved. Id. On June 30, 2017, the state filed its return. App. 25 – 29; App. 41, ll. 19 – 20.

On October 10, 2017, Petitioner's PCR hearing was held in front of the Honorable R. Scott Sprouse. App. 31. Ashley McMahan represented Petitioner. Id. Justin Hunter represented the state. Id.

On November 21, 2017, Judge Sprouse filed an Order of Dismissal that denied Petitioner's PCR application because Petitioner failed to carry his burden of proof that trial counsel provided ineffective assistance. App. 66 – 78. Judge Sprouse denied the PCR application for failure to file a speedy trial motion because trial counsel lacked the opportunity to communicate with Petitioner through no fault of trial counsel. App. 69.

This petition for Writ of Certiorari follows.

ARGUMENT

Plea counsel provided ineffective assistance when he failed to file a motion for a speedy trial where Petitioner requested that he do so, where Petitioner's case was delayed for seven years, and where Petitioner only pled guilty because he was exhausted by the delay and wanted to get the charges resolved.

Relevant Facts

The state alleged the facts as follows. On April 4, 2009, police executed a search warrant in Laurens County in regard to a stolen leaf blower and chainsaw. App. 8, ll. 1 – 4. The police executed the search warrant and found Petitioner alongside his brother cutting a white powdery substance in a bedroom within the home. App. 8, ll. 7 – 9. More white powder was found in bags inside the room. App. 8, ll. 11 – 14. All of the powder tested positive for methamphetamine. *Id.*

On December 13, 2016, Petitioner pled guilty to possession with intent to distribute methamphetamine and Judge Macaulay sentenced him to five years' imprisonment and with a special condition that Petitioner must complete drug and alcohol testing and treatment, as well as substance abuse counselling as directed to include "ATU" while incarcerated. App. 12, l. 17 – 13, l. 1.

Petitioner filed a PCR application that alleged ineffective assistance of counsel for failure to file a motion for a speedy trial. App. 15 – 22. On October 10, 2017, his PCR hearing was held in front of the Honorable R. Scott Sprouse. App. 31.

At the PCR hearing, Petitioner testified that he was represented by trial counsel from when he was first arrested in 2009 until shortly before he pled guilty. App. 35, ll. 5 – 12. PCR counsel asked Petitioner why he ultimately decided to plead guilty and Petitioner responded, "I just got tired of it hanging over me..." App. 41, l. 18 – 42, l. 5. Petitioner testified that trial

counsel told him how to answer during the colloquy and that he could not “go up there and tell [the Judge] that [he is] not guilty.” Id.

At the PCR hearing, trial counsel testified that he and Petitioner discussed filing a speedy trial motion, and that counsel, “wrote him and told him I acknowledged [Petitioner’s request for a speedy trial motion]. I can’t find if I ever filed one, if it is not on file then I didn’t do it.” App. 50, ll. 3 – 8.

There was no record that trial counsel ever filed the motion for a speedy trial. Trial counsel claimed that he could not locate Petitioner at times during his representation of Petitioner and that contributed to the delay. App. 53, ll. 9 – 16. Trial counsel further stated the reason for delay in getting Petitioner’s case to trial was because, “[the state] had a huge backlog because... the new administration came in and... everything kind of almost came to a halt as far as moving cases,” and that the new administration were going to, “drive hard bargains, set examples, and did not care if the docket gets clogged.” App. 49, l. 19 –50, l. 1; 54, l. 11 – 16. The Order of Dismissal stated that trial counsel did not file a speedy trial motion because he could not find Petitioner. App. 69. However, trial counsel’s testimony at the PCR hearing showed he did not file the speedy trial motion because he was reluctant to challenge “the new administration.” App. 54, ll. 9 – 16.

In the Order of Dismissal, Judge Sprouse found that trial counsel did not provide ineffective assistance of counsel when he failed to file a motion for a speedy trial because Petitioner “was incarcerated from August 15, 2011 to June 1, 2012, which contributed to trial counsel’s inability to move forward with [Petitioner’s] case,” and that trial counsel could not communicate with Petitioner through no fault of his own. App. 69.

That denial was an error and that error prejudiced Petitioner.

Discussion

Petitioner languished under the weight of his pending case for the better part of a decade. Petitioner was only guilty of being in the wrong house at the wrong time and being appointed an attorney who did not file a speedy trial motion nor search SCDC's online database for him while he was incarcerated on separate charges. If not for trial counsel's ineffective assistance, Petitioner's speedy trial motion would have been filed, and Petitioner would have insisted on going to trial.

Furthermore, this is exactly the type of plea that the Constitutional requirement for a speedy trial contemplates. The state used its infinite resources to exhaust Petitioner by delaying his trial until Petitioner gave in and pled guilty. Trial counsel's failure to file Petitioner's speedy trial motion and his failure to take the few minutes required to search SCDC's database to find his client, aided the state's exhaustion by delay strategy. Thus, the delay in Petitioner's case, which improperly caused his guilty plea, stemmed directly from trial counsel's ineffective assistance.

In order to obtain relief based upon a claim of ineffective assistance, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. Prejudice from deficient performance occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. "A

reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Id.

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy trial.” U.S. Const. amend. VI; see also Klopfer v. North Carolina, 386 U.S. 213 (1967); Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966). Additionally, our state 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. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012)(citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). If a court concludes a defendant’s right to a speedy trial has been violated, dismissal of the charges “is the only possible remedy.” Barker v. Wingo, 407 U.S. 514, 522 (1972).

The United States Supreme Court explained “[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon the circumstances.” Beavers v. Haubert, 198 U.S. 77, 87 (1905). Therefore, the Court explained the appropriate analysis for a speedy trial claim is “a balancing test, in which the conduct of both the prosecution and defendant are weighed.” Barker, 407 U.S. at 529. The Barker Court “identif[ied] some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.” Those four factors are the length of the delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant. Id. at 530; see also Doggett v. United States, 505 U.S. 647 (1992); Vermont v. Brillion, 556 U.S. 81 (2009); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973); State v. Monroe, 262 S.C. 346, 204 S.E.2d 433 (1974); Waites, 270

S.C. at 107, 240 S.E.2d at 653; State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997); State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009). However, “none of the four factors identified [are] a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial.” Barker, 407 U.S. at 533.

In order to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial “has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” Doggett, 505 U.S. at 652 (quoting Barker, 407 U.S. at 530-531).¹ The length of the delay that will trigger the inquiry is dependent upon the peculiar circumstances of the case. Barker, 407 U.S. at 530-531. Generally, the delay tolerated for an ordinary street crime is less than for a serious, complex conspiracy charge. Id. at 531.

The Barker Court found a delay between arrest and trial of well over five years to be clearly “extraordinary.” Barker, 407 U.S. at 533. Although seven months of that period was excused by the illness of a witness, the delay of “more than four years was too long a period.” Id. at 534. In Doggett, the Supreme Court noted that, depending on the nature of the charges, lower courts have generally found post-accusation delay “presumptively prejudicial” as it approaches one year. Doggett, 505 U.S. at 652; see also State v. Cooper, 386 S.C. 210, 217, 687 S.E.2d 62, 66 (2009).

The South Carolina Supreme Court has repeatedly found delays of shorter terms as presumptively prejudicial. This Court found a two-year and four-month delay sufficient to trigger further review. Waites, 270 S.C. at 108, 240 S.E.2d at 653. The Court found a twenty-three month delay presumptively prejudicial where the charges were serious, *but the factual*

¹ “The clock starts running on a defendant’s speedy trial right when he is ‘indicted, arrested, or otherwise officially accused.’” Langford, 400 S.C. at 442, 735 S.E.2d at 482 (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982)).

proof was not complicated. Langford, 400 S.C. at 442-443, 735 S.E.2d at 482. (emphasis added)

This Court also found a three year and five month delay sufficient to trigger the analysis. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997). In State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) Court affirmed a circuit court's decision that a delay of forty-four months triggered the speedy trial inquiry. Id. at 216-217, 687 S.E.2d at 66-67 (Ct. App. 2009).

The Supreme Court afforded different weights to the different reasons for the presumptively prejudicial delay. On the far end of the spectrum is a deliberate delay by the prosecution to impede the defendant's ability to defend himself. 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. (emphasis added) Obviously, delays attributed to the defendant's conduct weighs against him. Brillon, 556 U.S. at 90.

The third factor of the speedy trial analysis is the defendant's assertion of his right to a speedy trial. According to the Supreme Court, "[w]hether and how a defendant asserts his right is closely related to the other factors" because the strength of his efforts will be affected by the other factors. Barker, 407 U.S. at 531-532.

As an initial matter, 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 (2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (2009); United States v. Frith, 181 F.3d 92 (1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (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.*" (emphasis added) 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. (emphasis added) 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.

As the United States Supreme Court has observed, unreasonable delay threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by the loss of memories and exculpatory evidence. Barker 507 U.S. at 532. The Court observed that loss of memory "is not always reflected in the record because what has been forgotten can

rarely be shown.” Id. According to the Court, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” Id. Being imprisoned hinders a defendant’s ability to gather evidence, contact witnesses, and prepare his defense. Id. at 533. Even a defendant who is not in jail prior to trial is disadvantaged “by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.” Id.

Trial counsel rendered constitutionally deficient performance when he failed to file a motion for speedy trial on Petitioner’s behalf where the prosecution delayed for seven years and where Petitioner only pled guilty to alleviate the stress of the pending charge over him. The length of the delay is presumptively prejudicial in light of the nature of the case and there is no evidence on the record that the delay was the fault of Petitioner. As in Langford, supra, Petitioner’s case was not fact intensive and did not require special investigations into complex matters. At the PCR hearing, trial counsel testified to the simplicity of the state’s case, “they would have been going under a constructive possession theory...That would have been their argument.” App. 51, ll. 6 – 10.

The reasons trial counsel gave for the seven-year long delay were inconsequential. Trial counsel claimed that the “new administration” wanted to send a message to the public by “set[ting] examples” of defendants and they did not care if the “docket gets clogged,” and that, although there is no record that he searched for Petitioner, trial counsel could not locate him². App. 54, ll. 11 – 16; App. 53, ll. 9 – 16.

² It is unclear what trial counsel meant by “new administration,” it may have meant a new solicitor. Regardless of what trial counsel meant, the fact that a “new administration” came in was inconsequential in regard to filing a speedy trial motion requested by the client.

In the Order of Dismissal, the PCR Judge found that trial counsel was not ineffective for failure to file a motion for speedy trial, after Petitioner asked him to file one, because he could not locate Petitioner. App. 69. However, the record shows that trial counsel could have located Petitioner, trial counsel simply did not try. Petitioner was in and out of SCDC during the time trial counsel represented him and the PCR court found that Petitioner's incarceration further complicated trial counsel's search. That contention is unreasonable because, due to the nature of incarceration, a prisoner's whereabouts is easily discovered. Petitioner, while incarcerated, was not going anywhere and a cursory search for him in SCDC's online database would have revealed his whereabouts. PCR counsel asked trial counsel if Petitioner was in SCDC while trial counsel was preparing for trial and trial counsel responded, "You know, some of the time he was, some of the time he wasn't. Because there was some letters in the file when I was writing him... And I went over to probation one time and they told me he hadn't reported so he could have been in, could not. *I guess the SCDC records would reflect that.*" App. 53, ll. 11 – 16. (emphasis added) Which showed that trial counsel knew Petitioner was incarcerated with SCDC, at least periodically, during the representation. It also showed trial counsel that trial counsel *never* searched SCDC's database for Petitioner because trial counsel had to guess what SCDC's records contained. Moreover, there is no evidence on the record that trial counsel attempted to contact any of Petitioner's family in the area to find him.

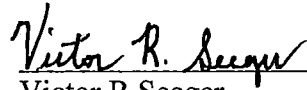
Petitioner requested for a speedy trial motion be filed by trial counsel in 2011. App. 50, ll. 3 – 8. Petitioner does not need to show that a speedy trial motion would have been successful to prove prejudice because, as in Doggett, the length of the delay in Petitioner's case is presumptively prejudicial. Petitioner's case, which was relatively simple in nature, sat idle for seven years. The state's rebuttal of that presumption was insufficient to refute the presumption.

The state never made a showing that the delay was the fault of the Petitioner. It presented evidence that showed trial counsel was negligent in his representation and as in Doggett, negligence is not an excuse for a protracted delay in a criminal case. Doggett, 505 U.S. at 657.

Therefore, the reason for delay was not Petitioner's incarceration, but counsel's ineffective assistance for failure to exercise due diligence in the representation of his client. Trial counsel did not file a speedy trial motion when he knew Petitioner requested one and trial counsel did not diligently search for Petitioner when he did not know Petitioner's whereabouts. The record showed that trial counsel knew Petitioner was incarcerated for a period of the representation and it showed that trial counsel never looked at SCDC's online database nor contacted Petitioner's family in the area to ascertain his whereabouts. That deficient performance resulted in a, presumptively prejudicial, **seven-year delay** that wore Petitioner down and caused him to plead guilty; and, if not for that deficient performance, he would have insisted on going to trial.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable R. Scott Sprouse, Circuit Court Judge

PHILLIP ANDREW BRIDGES,

PETITIONER

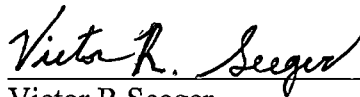
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Phillip A. Bridges, #347312, at 106 Islin Street, , Simpsonville, SC 29681, this 30th day of July, 2018.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 30th day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023