STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEUNTE D. COBBS,

APPELLANT.

APPELLATE CASE NO. 2018-001599

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by refusing to dismiss the indictments where Appellant's rights to a speedy trial pursuant to the Sixth Amendment and Article I, Section 14 of the South Carolina Constitution were violated when the state failed to call his case for trial until August 2018, more than two years after Appellant's arrest for murder and attempted murder?

STATEMENT OF THE CASE

A Dorchester County grand jury indicted Appellant on September 1, 2016 for murder and attempted murder. R. 516. His case was called to trial on August 20, 2018 before the Honorable Perry M. Buckner, and a jury. R. 18. Assistant Solicitors Donald Sorenson and Michael Spears represented the state, and Ashley Chisholm and John Loy represented Appellant. R. 18.

On August 23, 2018, the jury found Appellant guilty of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). R. 482, ll. 2-13. However, it could not reach a unanimous decision on the indictment for murder and the judge declared a mistrial for that offense. R. 480, l. 25 – 482, l. 1. Appellant was ultimately sentenced to eighteen years for ABHAN. R. 491, ll. 1-7.

This appeal follows.

STANDARD OF REVIEW

"The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard." State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (citing State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012)). "An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support." Id. at 342, 794 S.E.2d at 371-372 (citing Langford, 400 S.C. at 442, 735 S.E.2d at 482).

ARGUMENT

The trial judge abused his discretion by refusing to dismiss the indictments where Appellant's rights to a speedy trial pursuant to the Sixth Amendment and Article I, Section 14 of the South Carolina Constitution were violated when the state failed to call his case for trial until August 2018, more than two years after Appellant's arrest for murder and attempted murder.

How the Issue was Presented Below

Appellant was arrested on June 27, 2016 for the murder of Brandon Mack and the attempted murder of Bradford Spells. R. 24, l. 25 – 25, l. 9. He was subsequently indicted on September 1, 2016. R. 516. Counsel from the public defender's office was appointed to represent Appellant on June 12, 2017. R. 26, ll. 13-18; R. 29, l. 21. Through counsel, Appellant filed a motion for a speedy trial on December 14, 2017, which was heard by the Honorable Maite Murphy on that same date. R. 26, ll. 5-24; R. 29, ll. 21-22; R. 499. Judge Murphy ultimately granted the motion for a speedy trial and stated that if the case was not tried during the week of January 16, 2018 bond would be revisited. R. 290, ll. 21-24; R. 500.

On January 19, 2018, the assistant solicitor admitted he was not prepared to try the case. R. 29, l. 25 – 30, l. 2. Consequently, Judge Murphy set bond at $400,000. R. 26, l. 22 – 28, l. 18; R. 29, l. 25 – 30, l. 3; R. 501. However, Appellant was unable to post bond and remained incarcerated. R. 30, ll. 2-4. On June 8, 2018, Appellant filed a motion requesting the circuit court grant a personal recognizance bond pursuant to S.C. Code Ann. § 17-23-90. R. 503. He also renewed his motion for a speedy trial. R. 30, ll. 5-7. Judge Murphy denied the motion on June 28, 2018. R. 30, ll. 5-16. Appellant's case was finally called to trial on August 20, 2018, almost twenty-six months after his arrest. R. 18.

Appellant moved pretrial to dismiss the indictments arguing his rights to a speedy trial pursuant to the Sixth Amendment and Article I, Section 14 of the South Carolina Constitution were violated by the twenty-five month delay it took to call his case to trial. R. 25, l. 18 – 26, l. 2; R. 504. Citing State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368 (2016) and State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), defense counsel asserted that this length of delay was presumptively prejudicial, thereby triggering an analysis of the factors set forth in Barker v. Wingo, 407 U.S. 514 (1972).[1] The trial judge agreed. R. 51, l. 20 – 53, l. 6.

Counsel cited the length of the delay as 784 days and again emphasized that Appellant asserted his right to a speedy trial in December 2017 and reasserted it in June 2018. R. 31, ll. 2-5; R. 36, ll. 13-16. As far as the reason for the delay, counsel argued it was entirely attributed to the state as Appellant had never asked for a continuance nor done anything that would have delayed the trial. R. 31, ll. 6-10. He argued while Appellant was facing serious charges, it was not a complex case. R. 31, l. 11 – 33, l. 4. Anticipating the state would blame the delay on awaiting the results of ballistics analysis, defense counsel emphasized that the ballistics evidence was not sent to SLED for testing until sometime in January 2018, over eighteen months after Appellant's arrest and after Appellant had asserted his right to a speedy trial. R. 34, ll. 1-10. Moreover, to the extent the state would attempt to rely on securing witnesses, defense counsel asserted that Rachandra Sweed was incarcerated in Texas and that it was unlikely the state attempted to locate her until shortly before trial. R. 33, ll. 12-25. As far as the change in lead detectives and assistant solicitors, counsel argued the state is ultimately responsible for this turnover. R. 34, ll. 14-21.

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[1] These factors are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused. Hunsberger, 418 S.C. at 343, 794 S.E.2d at 372 (citing Barker, 407 U.S. at 531-532).

To establish prejudice caused by the delay, defense counsel called two witnesses to testify: Appellant and Lieutenant Dwayne Peters. Appellant testified that the nearly twenty-six month delay in calling his case to trial caused him a "great deal" of anxiety. R. 37, ll. 8-20. It also led to the loss of his employment and, with no source of income, the loss of his home and car. R. 37, l. 21 – 38, l. 10. Moreover, the lengthy incarceration had a negative impact on his immediate family. His daughter became extremely depressed, contemplated suicide, and was ultimately prescribed Prozac to manage her illness. R. 38, ll. 11-15. Appellant's son thought Appellant abandoned him. R. 38, ll. 15-22.

Lieutenant Peters testified that three cell phones were seized from the hotel room where Appellant was arrested on June 27, 2016. R. 45, l. 22 – 46, l. 12. However, they were never forensically analyzed to determine if Appellant had any contact with Brandon Mack, the decedent, or Bradford Spells, the other individual who was shot, because the phones were lost at some point between June 2016 and March or April 2018 when Peters was assigned to investigate the case after Detective Elmore left the sheriff's office. R. 47, l. 16 – 48, l. 15; R. 50, ll. 6-21.

At the conclusion of the testimony, defense counsel argued Appellant had established actual prejudice in the loss of the cell phones, which would have contained exculpatory evidence since a forensic analysis of the phones would have shown no communication between Appellant and Brandon Mack and Bradford Spells. But for the delay, counsel asserted the state would not have lost this evidence. R. 63, l. 25 – 64, l. 12. However, defense counsel also argued that actual prejudice was not required and that presumptive prejudice was sufficient to establish a speedy trial violation. He concluded presumptive prejudice was established by the general anxiety the lengthy incarceration caused Appellant. R. 64, ll. 13-21.

Regarding the length of the delay, the assistant solicitor agreed that the delay was 784 days or a little over twenty-five months between the date of the arrest and the start of trial. However, he claimed the state had older cases on the docket. R. 52, ll. 7-22. As far as the reasons for the delay, the solicitor asserted that the lead investigator, Detective Elmore, left the Dorchester County Sheriff's Office on January 3, 2017. However, for whatever reason, the investigation was not reassigned to another lead detective until March or April 2018 when the solicitor's office finally sought assistance in preparing the case for trial. R. 45, ll. 4-13.

In addition to the change in lead detectives, the original assistant solicitor assigned to prosecute the case left the solicitor's office on January 19, 2018, the same day he informed Judge Murphy that the state was not prepared to try the case. R. 53, l. 20 – 54, l. 22. The case was reassigned to Assistant Solicitor Spears, who ultimately tried the case, the following week. R. 54, l. 25 – 55, l. 16. Spears admitted he could not attest to the reasons for the delay up until January 19, 2018. R. 53, ll. 18-19. However, he claimed the delay from January 2018 to August 2018 was the result of locating material witnesses, including Rachandra Sweed, who was found incarcerated in Texas, and Bradley Spells, the alleged victim of the attempted murder, who refused to cooperate from day one of the investigation. R. 55, l. 18 – 57, l. 5. Spears further maintained that the SLED ballistics report concerning shell casings found at the scene of the shooting did not come back until March 2018. R. 57, ll. 6-10. He concluded that the delay was "caused by changing of hands in two different departments" and "by heavy investigation." R. 61, ll. 15-21.

Lastly, concerning prejudice, the solicitor argued that Appellant lost his job, his house, and his car at the time of his arrest, not due to the delay in trying his case. R. 60, l. 19 – 61, l. 2. He further argued that the delay had not weakened Appellant's ability to raise specific defenses

and a mere two year delay would not cause memories to fade like the ten year delay in Hunsberger. R. 61, ll. 3-15.

The trial judge ultimately denied the motion to dismiss. He found the state had given "a legitimate reason" for the delay, including "the collection of evidence, whether it be ballistic evidence or locating witnesses." R. 66, ll. 1-3. He also cited to the change in solicitors and the lead detective as valid reasons for the delay. R. 66, ll. 4-5. As far as prejudice, the judge asserted he was not "convinced that there's sufficient prejudice to the defendant from the delay in order to dismiss the charges." R. 66, ll. 15-24.

Discussion

"The Sixth Amendment to the United States Constitution provides, 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.'" State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (quoting U.S. Const. amend. VI.) "Similarly, the South Carolina Constitution provides that 'Any person charged with an offense shall enjoy the right to a speedy and public trial.'" Id. (quoting S.C. Const. art. I, § 14). "A speedy trial means a trial without unreasonable and unnecessary delay." Id. (citing State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012)); See Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). "The remedy for a speedy trial violation is dismissal of the charges." Id. (citing Langford, 400 S.C. at 442, 735 S.E.2d at 482).

"An accused's speedy trial right begins when he is 'indicted, arrested, or otherwise officially accused.'" Id. at 342, 418 S.E.2d at 372 (quoting Langford, 400 S.C. at 442, 735 S.E.2d at 482); See United States v. MacDonald, 456 U.S. 1, 6 (1982). "To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, since, by definition, he

cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness." Id. at 342-343, 794 S.E.2d at 372 (citing Doggett v. United States, 505 U.S. 647 (1992)). "Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness." Id. at 343, 794 S.E.2d at 372 (citing Doggett, 505 U.S. at 651-652).

"Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied." Id. (citing Barker v. Wingo, 407 U.S. 514, 530-531 (1972); See Langford, 400 S.C. at 441, 735 S.E.2d at 482. "These factors are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused." Id. (citing Barker, 407 U.S. at 531-532). "A speedy trial claim must be 'analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.'" Id. (quoting State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008)); See Barker, 407 U.S. at 530.

In this case, the trial judge abused his discretion by refusing to dismiss Appellant's charges for murder and attempted murder since Appellant's rights to a speedy trial were violated when the state failed to call his case to trial until August 2018, nearly twenty-six months after Appellant's arrest.

Triggering Factor and Length of the Delay

The 784 days between Appellant's arrest and trial meets the threshold of a presumptively prejudicial delay since Appellant was not prosecuted with ordinary promptness. See Langford, 400 S.C. at 442-443, 735 S.E.2d at 482 (holding a twenty-three month delay was presumptively prejudicial). Consequently, this Court must consider the four factors outlined in Barker v.

Wingo. Hunsberger, 418 S.C. at 343, 794 S.E.2d at 372 (citing Barker, 407 U.S. at 530-531). It is undisputed that the length of delay, as asserted, was 784 days or nearly twenty-six months.

Reasons for the Delay

"The State's justifications for delay in trying a defendant are weighted differently: (1) a deliberate attempt to delay trial as a means to hamper the defense weighs heavily against the State; (2) negligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility; (3) a valid reason, such as a missing witness, justifies an appropriate delay; and (4) delays occasioned by the accused weigh against him." Hunsberger, 418 S.C. at 346, 794 S.E.2d at 374 (citing Langford, 400 S.C. at 443, 735 S.E.2d at 483). "Ultimately, justifying the delay between charge and trial is the responsibility of the State." Id. (citing Langford, 400 S.C. at 443, 735 S.E.2d at 483).

Here, the state's only explanations for the delay were (1) the change in lead detectives assigned to investigate the case; (2) the change in assistant solicitors assigned to prosecute the case; and (3) the alleged complexity of the investigation, including analyzing ballistics evidence and locating a witness who was incarcerated in Texas. While there is no evidence the state deliberately attempted to delay the trial to hamper the defense, the state was certainly negligent. Detective Elmore, who was the original lead detective assigned to investigate the case, left the sheriff's office on January 3, 2017. A new lead detective was not assigned to take over the investigation until March or April 2018 when the solicitor's office was preparing to try the case due to Appellant's motion for a speedy trial. Moreover, the ballistics evidence was not sent to SLED for analysis until January 2018, again after Appellant had asserted his right to a speedy trial. As far as attempting to locate Rachandra Sweed, while the timeline was not established below, it is likely the state did not attempt to locate her until after Assistant Solicitor Spears was

assigned to prosecute the case at the end of January 2018 and began preparing to call the case for trial. Moreover, the state presented no evidence that Sweed was difficult to find as she was incarcerated in Texas. Consequently, the delay was mostly caused by the state's own negligence. In regards to the change in solicitors, this likewise falls on the state.

Accused Assertion of the Right to a Speedy Trial

"Whether a defendant previously asserted the right to a speedy trial is not alone dispositive of whether he is entitled to relief." Hunsberger, 418 S.C. at 349, 794 S.E.2d at 375 (citing Barker, 407 U.S. at 533 (holding none of the four factors are either necessary or sufficient to find a denial of the right to a speedy trial). "The accused's assertion of the right, however, is entitled strong evidentiary weight in determining whether the accused is being deprived of the right." Id. (citing Barker, 407 U.S. at 531-532). "Failure by the accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial." Id. (citing Barker, 407 U.S. at 532).

It is undisputed that Appellant first asserted his right to a speedy trial on December 14, 2017, approximately eighteen months after his arrest. See R. 499. He reasserted his right in June 2018 when he requested the trial judge set a personal recognizance bond given the delay in calling his case to trial. R. 30, ll. 5-16. As seen, Appellant consistently made it be known that he sought a speedy trial on the charges against him.

Prejudice to the Accused

"[A]n accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial." Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376. "Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." Id. (citing Doggett,

505 U.S. at 655). "The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." Id. (citing Doggett, 505 U.S. at 655). "This is so because 'time's erosion of exculpatory evidence and testimony can rarely be shown.'" Id. (citing Doggett, 505 U.S. at 655); See Barker, 407 U.S. at 532. "When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim." Id. (citing Doggett, 505 U.S. at 657-658). "While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time." Id. (citing Doggett, 505 U.S. at 656).

Here, Appellant demonstrated presumptive prejudice based simply on the length of the excessive delay. This length of delay compromised the reliability of Appellant's trial. It also caused "a great deal" of anxiety for Appellant who remained incarcerated from the date of his arrest until his case was called to trial and negatively affected his immediate family.

Appellant also demonstrated actual prejudice in the loss of the three cell phones seized from his hotel room during his arrest. These cell phones would have contained exculpatory evidence since a forensic evaluation of the phones likely would have shown no communication between Appellant and Brandon Mack or Bradford Spells on the morning of the shooting. This would have refuted the state's theory that Appellant was lying in wait in the restroom before the shooting and challenged the evidence that there was an ongoing dispute between Appellant and Mack and Spells.

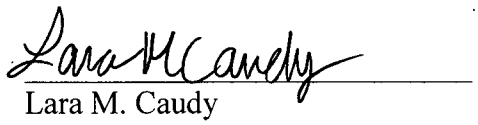
Because Appellant's rights to a speedy trial pursuant to the Sixth Amendment and Article 1, Section 14 of the South Carolina Constitution were violated by the nearly twenty-six month

delay in calling his case to trial, this Court respectfully should hold the trial judge abused his discretion, reverse Appellant's conviction and sentence, and dismiss the charges against him.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and ultimately dismiss the charges against him.

Respectfully Submitted,



Lara M. Caudy
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This 25th day of February, 2020.

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."

February 25, 2020.

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