STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL EUGENE COLEMAN,

APPELLANT

APPELLATE CASE NO. 2019-000936

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in excluding a witness's conviction for possession with intent to distribute cocaine base pursuant to Rule 609(a)(1), SCRE, when the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence pursuant to Rule 403, SCRE?

2. Did the trial judge err in refusing to dismiss the charge based on an over ten-year delay between arrest and trial resulting in a violation of Appellant's constitutional right to a speedy trial?

STATEMENT OF THE CASE

In March of 2009, the Fairfield County Grand Jury indicted Appellant, Darryl Eugene Coleman, for criminal sexual conduct with a minor second degree, indictment # 2009-GS-20-085. (R. p. 327). The indictment reflects that the alleged incident took place on December 15, 2008, and Appellant was arrested on December 30, 2008. (R. p. 327). The State did not call the case to trial until May of 2019. On May 20, 2019, Appellant proceeded to jury trial before the Honorable Lawton McIntosh. Hemphill Pride represented Appellant. Julie Hall prosecuted the case. The jury returned with a verdict of guilty. Judge Lawton sentenced Appellant to twelve years in prison. A timely notice of intent to appeal was served on May 29, 2019. This appeal follows.

STANDARD OF REVIEW

"The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

The trial court's ruling on a motion for speedy trial is also reviewed under an abuse of discretion standard. 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. State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368 (2016).

ARGUMENTS

1. **The trial judge erred in excluding a witness's conviction for possession with intent to distribute cocaine base pursuant to Rule 609(a)(1), SCRE, when the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence pursuant to Rule 403, SCRE.**

In December of 2008, the witness reported that Appellant called looking for her cousin Catherine. (R. p. 77, lines 15-17). When the witness told Appellant that Catherine was not there, the witness claimed that Appellant invited her to go fishing. (R. p. 77, lines 17-24). The witness reported that she left the house, got in the car with Appellant and they drove to the Debutary [sic] where they met Stupu and Jessica. (R. p. 77, line 24 – p. 78, lines 1-9). At trial, however, the witness testified that she went to Appellant's house with her cousin Catherine and Catherine's boyfriend, Hoover. (R. p. 37, line 8 – p. 38, lines 1-15). According to the witness, her cousin and her cousin's boyfriend left her at Appellant's house where Appellant pushed her backwards on the bed and had intercourse with her. (R. p. 47, line 8, p. 48-51, lines 1-10). In 2008, the witness was fourteen years old and Appellant was thirty-seven years old. (R. p. 109, line 1 – p. 110, lines 1-8). Appellant was arrested on December 30, 2008. (R. p. 327).

At trial over ten years later Appellant denied having sex with the witness. (R. pp. 220-221). Appellant testified that the witness tried to perform oral sex. (R. pp. 230-232). Appellant also testified that the witness helped him ejaculate. (R. p. 221, lines 7-19). Appellant's DNA standard was not submitted to SLED until January 10, 2019. (R. p. 181, lines 24-25; p. 184, lines 18-19). SLED compared Appellant's DNA standard to a semen sample obtained from the witness's pants in 2008, and tested by SLED in 2010. (R. p. 176, lines 12-21; p. 182, lines 13-18). The DNA witness from SLED testified that the semen from the pants matched Appellant. (R. p. 182, lines 20-24).

During the direct examination of the witness, Appellant, outside of the presence of the jury, moved to impeach the witness with a recent conviction for possession with intent to distribute cocaine base. (R. p. 33, line 6-21; p. 41, line 3 – p. 42, lines 1-3). At the time of her testimony at trial she was still on probation for the charge. (R. p. 42, lines 2-6). Counsel for Appellant also argued, "And I think that to not allow me to go into her past criminal record takes the argument away from me in closing, 'Can you really rely on somebody that uses drugs and her memory and her accuracy?' You take that away from me if you don't allow me to present that. Thank you, Judge." (R. p. 44, line 24 – p. 45, lines 1-4). The State opposed admission of the conviction. (R. p. 43, line 17 – p. 44, lines 1-13). The judge excluded the prior conviction stating:

> First this alleged event took place 11 years ago, we've been over that all morning long, and this conviction was – that was in 2009. It's alleged – well, not alleged because she pled to it, was 2017. I mean, that 's a long period of time. I don't see that it has any impeachment value quite frankly, Mr. Pride, other than to say, "You are not a good person. You're not a good person." I don't believe that just because somebody had that charge it calls into question whether their memory has been affected, whether they have any kind of lack of the ability to recall things that happened 11 years ago. She hadn't picked up any of the charges from what I hear or from what I can tell from what ya'll are saying, so the impeachment value is very low in this case. I think that credibility on the other hand to everybody in this case, because it's going to be a she said/he said type of case if it's like other ones I've had in the past, right now I don't have anything before me because we hadn't gotten out of the gate yet. But it seems to me that credibility is going to be a big part of this case and so that is a huge factor. And then to allow this crime that has no relevance or correlation back to an alleged criminal sexual conduct event that happened 11 years ago, I think, falls squarely under 403, that the probative value is greatly outweighed by the danger of undue prejudice to the witness and to the State and therefore I'm not going to allow it in. And I note your objection for the record, please.

(R. p. 45, line 14 – p.46, lines 1-15). The trial judge erred.

Rule 609(a)(1) provides:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; . . .

In State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019), the South Carolina Supreme Court wrote:

> Rule 609(a) invokes three impeachment scenarios. First, under Rule 609(a)(1), evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year (in the jurisdiction where the conviction occurred) is admissible, subject to Rule 403, SCRE. Under Rule 403, evidence of such a conviction "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403.

The other two impeachment scenarios discussed in Robinson are not applicable in the present case as those scenarios involve the accused, rather than a witness, having a prior conviction, which Appellant did not, or a prior crime involving dishonesty or a false statement, which possession with intent to distribute cocaine base does not. The Court in Robinson summarized writing, "[U]nder Rule 609(a)(1), if the witness is someone other than the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the Colf factors and determine whether, under Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice and/or other relevant considerations set forth in Rule 403. The burden of establishing inadmissibility of the conviction is upon the opponent of the evidence; . . ." 426 S.C. at 595, 828 S.E.2d at 211. The Colf factors include: 1) The impeachment value of the prior crime; 2) The point in time of the conviction and the witness's subsequent history; 3) The similarity between the past crime and the charged crime; 4) The importance of the defendant's testimony; and 5) The centrality of the

credibility issue. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). In the present case the State failed to establish that the witness's prior conviction for possession with intent to distribute cocaine base was inadmissible.

The trial judge in the present case did not properly balance the Colf factors. First, the trial judge found the impeachment value of witness's prior conviction was "very low." (R. p. 46, lines 1-2). As the Court noted in Robinson, however, "Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1)." 426 S.C. at 599, 828 S.E.2d at 213. The prior conviction for possession with intent to distribute cocaine base implies that the witness might not be credible.

As for the second Colf factor, point in time of the conviction and the witness's subsequent history, in this case the witness was convicted **after** she made the allegation against Appellant. While a long period elapsed between the accusation in 2008 and the witness's conviction in 2017, this factor does not tip the balance in favor of exclusion. The probative value is not substantially outweighed by the danger of unfair prejudice. As to the third Colf factor, there is no similarity between possession of cocaine base and criminal sexual conduct with a minor second degree. Arguably the fourth Colf is inapplicable in the present case because the impeachment is of a witness rather than the defendant.

As to the fifth Colf factor, credibility, the trial judge acknowledged that credibility was a "huge factor" in the case stating, "I think that credibility on the other hand to everybody in this case, because it's going to be a she said/he said type of case if it's like other ones I've had in the past, right now I don't have anything before me because we hadn't gotten out of the gate yet.

But it seems to me that credibility is going to be a big part of this case and so that is a huge factor." (R. p. 46, lines 2-8). The trial judge, however, found that the credibility factor weighed in favor of exclusion. The trial judge erred. As the Court noted in Robinson, " . . . [W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." 426 S.C. at 606, 828 S.E.2d at 217. The credibility factor in the present case weighs in favor of admissibility. Properly weighing all of the Colf factors, the witness's prior conviction should have been admitted for impeachment pursuant to Rule 609(a)(1). The trial judge abused his discretion by not properly weighing the Colf factors. The error is not harmless.

2. The trial judge erred by considering the fact that there was an alleged victim in refusing to dismiss the charge based on an over ten-year delay between arrest and trial resulting in a violation of Appellant's constitutional right to a speedy trial.

Appellant was arrested on December 30, 2008. (R. p. 327). The State did not call the case for trial until May 20, 2019. Prior to trial Appellant raised the speedy trial issue. (R. pp. 8-25). The State argued that Appellant did not raise the speedy trial issue until November 1, 2018. (R. p. 23, lines 12-14). The judge took the matter under advisement and proceeded with trial. (R. p. 12, line 21). At the close of the State's case the judge denied both the directed verdict motion and the speedy trial motion. (R. p. 198, line 11 – p. 199, lines 1-22). In denying the speedy trial motion the judge stated:

> As to your motion for speedy trial, I think that you -- that's a lot closer call quite frankly, but I'm going to deny it as well. The length is totally unreasonable, 11 years. There's not been assigned a reason for that delay, so the State loses on two of the four issues. At the same time we didn't have the defendant assert his right to a speedy trial until last year, and so after he did assert that right the trial was scheduled. And there's been no real evidence -- there's been no evidence of

> prejudice to him caused by the delay. In fact, I made a note in my notes during the course of this trial that you had made the discussion that witness' memories would fade and they would not be able to remember things as well as they could have earlier, and therefore that's going to be a problem. But most of the things I heard were their memory -- lack of memory was collateral issues, not issues that are made facts to be established in this case. I'm still going to deny your motion because you hadn't established a prejudice here to my satisfaction, I don't think there is. And I could take note of the fact that we have a victim involved in this case, we have a victim involved in this case, and she has her on own constitutional rights as well. And I don't think under the facts of this case that as a defendant you have one right to make – you don't have the right -- under the facts of this case I think the jury just makes a call whether or not he is guilty or innocent. I'm not saying he's guilty, I am saying they make the call by the jury.

(R. p. 198, line 20 – p. 199, lines 1-22). Appellant renewed the speedy trial motion at the close of the case and the judge again denied the motion. (R. p. 241, lines 5-19). The judge then discussed jury instructions and the State requested a jury charge on lewd act, arguing it was a lesser included offense. (R. p. 242, lines 19 – p. 243, 244, lines 1-5). Counsel for Appellant objected to the charge on constitutional grounds. (R. p. 245, lines 9 –19). Counsel did not object on the ground that lewd act was not a lesser included offense of criminal sexual conduct with a minor second degree.[1] The trial judge overruled the objection and charged the jury with the law on the offense of lewd act on a minor.[2] (R. p. 245, line 20 – p. 246, lines 1-10; p. 291, line 11 – p. 292, lines 1-4). Over ten years after arrest a jury found Appellant guilty of criminal sexual conduct with a minor second degree.

In State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016), the South Carolina Supreme Court wrote, "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.' U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that "Any

[1] See State v. Brock, 335 S.C. 267, 516 S.E.2d 212 (Ct.App. 1999); Campbell v. State, 342 S.C. 100, 535 S.E.2d 928 (2000).

[2] There was no objection to the jury instruction as given (R. p. 294, lines 18-22). The jury sent the judge a note stating that they were deadlocked between second degree and lewd act (R. p. 313, line 11).

person charged with an offense shall enjoy the right to a speedy and public trial." S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). In Smith v. Hooey, 393 U.S. 374, 374–75, 89 S. Ct. 575, 575, 21 L. Ed. 2d 607 (1969), the United States Supreme Court wrote, "In Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1, this Court held that, by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.' Id., at 226, 87 S.Ct. at 995." The remedy for a speedy trial violation is dismissal of the charges. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted).

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).

In determining whether a defendant has been deprived of the right to a speedy trial, the court considers 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.Ed 2d 101 (1972). The trial judge in the present case stated, "And I could take note of the fact that we have a victim involved in this case, we have a victim involved in this case, and she has her on own constitutional rights as well. And I don't think under the facts of this case that as a defendant you have one right to make – you don't have the right -- under the facts of this case I think the jury just makes a call whether or not he is guilty or innocent. I'm not saying he's guilty, I am saying they make the call by the jury." (R. p. 199, lines 14-22). The trial judge erred in considering the fact that an alleged victim was involved in deciding the speedy trial issue. Properly balancing the four Barker v. Wingo factors, the trial judge should have dismissed the charge based on the violation of Appellant's right to a speedy trial.

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) the 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 his 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 the present case is presumptively prejudicial.

A. Triggering Mechanism – Length of the Delay

The over ten year delay between Appellant's arrest in December of 2008, and trial in May of 2019, triggers the speedy trial analysis. This extraordinary delay is presumptively prejudicial and weighs heavily against the State. See Hunsberger, 418 S.C. at 346, 794 S.E.2d at 373. (Finding that the eight-year delay attributable to the State weighs heavily against the State.). The trial judge properly found that, "The length is totally unreasonable, 11 years." (R. p. 198, lines 22-23).

B. 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). "A speedy trial claim must be 'analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.' State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing Barker, 407 U.S. at 530, 92 S.Ct. 2182)." Hunsberger, 418 S.C. at 343, 794 S.E.2d at 372.

In the present case the reason for the delay is wholly attributable to the State. Although Appellant was arrested in December of 2008, his DNA standard was not submitted to SLED until January of 2019. (R. p. 181, lines 24-25; p. 184, lines 18-19). The semen sample obtained from

the witness's pants in 2008, was tested by SLED in 2010. (R. p. 176, lines 12-21; p. 182, lines 13-18). The DNA witness from SLED testified that the sexual assault kit was returned to the agency on July 27, 2010. (R. p. 172, lines 22-23). In July of 2010, a year and a half after Appellant's arrest, the State knew that SLED found semen from an unidentified male on the witness's clothing. (R. p. 180, lines 14-24). The State provided no valid reason for the over nine-year delay in obtaining a DNA standard from Appellant for comparison. (R. p. 184, lines 16-19).

The prosecution attributed the delay to general backlog, the lack of sexual assault prosecutors and the fact that the investigator was later deployed by the military. (R. pp. 13-23). In Hunsberger, 418 S.C. at 346, 794 S.E.2d at 374, the South Carolina Supreme Court wrote:

> 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. Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted). Ultimately, justifying the delay between charge and trial is the responsibility of the State. Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted).

While there is no evidence that the State deliberately attempted to delay trial as a means to hamper the defense, negligence and overcrowded dockets do not justify the over ten-year delay between arrest and trial. There were no valid reasons for the delay. The investigator was deployed a couple of years after the arrest. (R. p. 19, limes 4-5; p. 122, lines 8-11). The case was not complex. The delay was not occasioned by the Appellant. The trial judge correctly found that, "There's not been assigned a reason for that delay, so the State loses on two of the four issues." (R. p. 198, lines 23-25). Balancing the conduct of the prosecution and the defense in the present case, the reasons for the delay weigh against the State.

C. Assertion of the Right

As to the third factor from Barker, Appellant asserted his right to a speedy trial on November 1, 2018. (R. p. 23, lines 5-15). The trial took place on May 20, 2019. Appellant's failure to assert the right to a speedy trial prior to November 1, 2018, is, however, 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).

In State v. Hunsberger, 418 S.C. 335, 349, 794 S.E.2d 368, 375 (2016), this Court wrote:

> Whether a defendant previously asserted the right to a speedy trial is not alone dispositive of whether he is entitled to relief. See Barker, 407 U.S. at 533, 92 S.Ct. 2182 (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. Barker, 407 U.S. at 531–32, 92 S.Ct. 2182. 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. at 532, 92 S.Ct. 2182.

Based on other factors present in this case, the over ten-year delay with no valid justification, this Court can and should find a speedy trial violation although Appellant did not assert the right until November of 2018. The trial judge found that, "At the same time we didn't have the defendant assert his right to a speedy trial until last year, and so after he did assert that

right the trial was scheduled." (R. p. 198, line 25 – p. 199, lines 1-2). The trial judge placed undue influence on the fact that Petitioner did not assert his speedy trial right until November 1, 2018, and failed to balance this factor against the length and cause of the delay which are heavily weighed against the State.

D. 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). Prejudice is not required in order for a court to find a speedy trial violation. 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 Petitioner'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 over ten 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 over ten-year 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 over ten-year delay, attaching undue significance to the fact that Appellant did not assert the right until November 1, 2018, and failed to show particularized prejudice. Additionally, the trial judge erred in considering the fact that the case involved an alleged victim as a reason to deny the speedy trial violation. Properly reviewing the Barker factors, Appellant's speedy trial rights, provided by the United States and South Carolina Constitutions, were violated requiring dismissal of the conviction and sentence.

CONCLUSION

Based on the argument presented in issue one, this Court should reverse the conviction and remand for a new trial. Based on the argument presented in issue two, this Court should reverse the conviction.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of May, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

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

ATTORNEY FOR APPELLANT

This 20th day of May, 2020.