Serial: **214819**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2014-CT-00572-SCT

JAMES WESLEY SCOTT A/K/A JAMES W. SCOTT A/K/A JAMES SCOTT ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

ORDER

Four of the justices of this Court are of the opinion that the judgment of the Court of Appeals should be affirmed, and four are of the opinion that it should be reversed. Consequently, that judgment must be, and is, affirmed.

Issuing conflicting opinions on the issues raised on certiorari would serve no purpose, as neither opinion would carry any authority. ***Hentz v. State***, 152 So. 3d 1139, 1143 (Miss. 2014) (Randolph, P.J., specially concurring) (citing ***Hertz v. Woodman***, 218 U.S. 205, 212-14, 30 S. Ct. 621, 622-23, 54 L. Ed. 1001 (1910); ***Durant v. Essex Co.***, 74 U.S. 107, 7 Wall. 107, 19 L. Ed. 154 (1868); ***Etting v. Bank of U.S.***, 24 U.S. 59, 78, 11 Wheat. 59, 6 L. Ed. 419 (1826); ***Rockett Steel Works v. McIntyre***, 15 So. 2d 624 (Miss. 1943)).

Accordingly, as the judgment of the Court of Appeals has not been decided to be erroneous by a majority of the justices sitting in this case, the judgment of the Court of Appeals is affirmed without opinion. The costs on appeal are assessed to Forrest County.

SO ORDERED, this the 29th day of November, 2017.

/s/James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE

AFFIRMED: RANDOLPH, P.J., MAXWELL, BEAM AND CHAMBERLIN, JJ. SEPARATE WRITTEN STATEMENT OBJECTING TO THE ORDER BY KITCHENS, P.J., JOINED BY WALLER, C.J., KING AND COLEMAN, JJ. ISHEE, J., NOT PARTICIPATING.

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No. 2014-CT-00572-SCT

JAMES WESLEY SCOTT a/k/a JAMES W. SCOTT a/k/a JAMES SCOTT

v.

STATE OF MISSISSIPPI

KITCHENS, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. Because James Wesley Scott's constitutional right to a speedy trial was violated by the nearly five-year delay between his arrest and trial, I would reverse his conviction and render judgment in his favor. Accordingly, I object to the order affirming the judgment of the Mississippi Court of Appeals.

¶2. On September 26, 2011, a Forrest County grand jury indicted James Scott for attempted rape, kidnapping, and burglary of a dwelling. He was arraigned on March 14, 2012. Scott filed a motion for recusal of the trial judge on April 12, 2012. No ruling on that motion appears in the record; however, the trial judge recused on his own motion on September 6, 2012. This Court appointed a special judge on September 20, 2012.

¶3. On March 24, 2014, and May 2, 2014, respectively, Scott, *pro se*, filed motions to dismiss in which he alleged speedy trial violations. His appointed counsel filed a third motion to dismiss alleging speedy trial violations on August 14, 2014. Scott's third motion was denied, and his trial took place on August 19 and 20, 2014.

¶4. A Forrest County jury found Scott guilty of all three charges and he was sentenced, as an habitual offender under Mississippi Code Section 99-19-83, to three consecutive life sentences without the possibility of parole. Scott then filed a Motion for a Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial, which the trial court denied. Scott appealed his conviction, and this Court assigned his case to the Court of Appeals, which affirmed. ***Scott v. State***, 2016 WL 3391630, *19 (Miss. Ct. App. June 21, 2016). This Court granted Scott's petition for a writ of *certiorari*.

¶5. On direct appeal, Scott argued that his constitutional right to a speedy trial was violated. After analyzing the factors set forth in ***Barker v. Wingo***, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the Court of Appeals held that it was not.

¶6. The Sixth Amendment to the United States Constitution guarantees criminal defendants "the right to a speedy and public trial . . . ." U.S. Const. amend. VI. Additionally, Article 3 Section 26, of the Mississippi Constitution guarantees criminal defendants a "speedy and public trial by an impartial jury. . . ." Miss. Const. art. 3, § 26. "A formal indictment or information or an arrest—whichever first occurs—triggers the constitutional right to a speedy trial." ***McBride v. State***, 61 So. 3d 138, 142 (Miss. 2011) (citing ***United States v. Marion***, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971); ***Smith v. State***, 550 So. 2d 406, 408 (Miss. 1989)).

¶7. In ***Barker***, the United States Supreme Court set forth four factors that appellate courts must balance and consider when a defendant contends his constitutional right to a speedy trial has been violated: length of delay, reason for delay, whether the defendant asserted his

right to a speedy trial, and prejudice to the defendant. ***Barker***, 407 U.S. at 530. The ***Barker*** Court explained that each case must be considered on "on an *ad hoc* basis" and no one factor is outcome determinative. ***Id.*** at 531, 533.

Length of Delay

¶8. "A full ***Barker*** analysis is warranted only if the delay was presumptively prejudicial." ***McBride***, 61 So. 3d at 142 (citing ***Stark v. State***, 911 So. 2d 447, 450 (Miss. 2005)). Any delay that exceeds eight months is presumptively prejudicial. ***Johnson v. State***, 68 So. 3d 1239, 1242 (Miss. 2011) (citing ***Smith***, 550 So. 2d at 408)).

¶9. On direct appeal, Scott alleged that he turned himself in to police in October or November 2009. The Court of Appeals found that the record "d[id] not fully support Scott's contention that he was first arrested in late 2009 for this crime," so it calculated the length of the delay from the date of indictment. However, the State conceded that Scott turned himself in to police "sometime in late October or early November. . . 2009." Giving the State the benefit of the doubt as to the exact date of arrest, I calculate the length of the delay from November 15, 2009, until August 19, 2014, the day Scott's trial commenced. At least 1,739 days or fifty-seven months passed between Scott's arrest and trial. Because this delay far exceeded eight months, the delay was presumptively prejudicial, and this factor weighs against the State.

Reason for Delay

¶10. After a delay is found presumptively prejudicial "'the burden shifts to the prosecution to produce evidence justifying the delay. . . .'" ***McBride***, 61 So. 3d at 142 (citing ***State v.***

Ferguson, 576 So. 2d 1252, 1254 (Miss. 1991)).“‘Different reasons for delay are assigned different weights.’” ***Hurst v. State***, 195 So. 3d 736, 741 (Miss. 2016) (quoting ***Bateman v. State***, 125 So. 3d 616, 629 (Miss. 2013)). The State’s deliberate attempt to delay the trial in order to hamper the defense is weighted heavily against the State. ***Barker***, 407 U.S. at 531. But delays due to negligence or docket congestion are weighted less heavily against the State. ***Id.*** Additionally, delays that are unexplained are attributed to the State. ***Perry v. State***, 2017 WL 2377708, at *4 (Miss. Jun. 1, 2017) (citing ***Vickery v. State***, 535 So. 2d 1371, 1377 (Miss. 1988)). On the other hand, any “delay caused by the actions of the defendant . . . tolls the running of the time period for that length of time, and is subtracted from the total amount of the delay.” ***Taylor v. State***, 672 So. 2d 1246, 1259 (Miss. 1996) (citing ***Wiley v. State***, 582 So. 2d 1008, 1011 (Miss. 1991); ***Flores v. State***, 574 So. 2d at 1314, 1318 (Miss. 1990)).

¶11. The first delay occurred between Scott’s arrest and indictment on September 26, 2011. The record indicates this 680-day delay was due to the negligence of the Hattiesburg Police Department. In his opening statement, the prosecutor said, “Our police department . . . dropped the ball. They did their work that night. But after that, Hattiesburg Police Department was in shambles. The detectives are leaving, and they drop the ball. That’s why you’ve got the delay. The detectives leave. The files get lost. Statements get lost.”

¶12. The record further indicates Scott, who was on parole at the time of his arrest, served the remainder of a prior sentence between his arrest and indictment. But this Court has said, “Incarceration via parole revocation . . . is not a legitimate reason for the prosecution’s failure to bring an accused to trial.” ***Beavers v. State***, 498 So. 2d 788, 790 (Miss. 1986),

overruled on other grounds by ***State v. Ferguson***, 576 So. 2d 1252 (Miss. 1991). This 680-day delay weighs against the State.

¶13. The next delay occurred between Scott's indictment and arraignment on March 14, 2012. The record provides no reason for this 171-day delay, so we must weigh this delay against the State. A 30-day delay occurred between Scott's arraignment and his motion for recusal of the trial judge on April 12, 2012. This delay is likely attributable to Scott, and should not be weighed against the State. A delay of 148 days occurred between Scott's motion for recusal and the trial court's order of recusal on its own motion. An additional fourteen days passed between the trial judge's recusal and this Court's appointment of a special judge. I would find sixty days of this delay to be neutral, and would weigh the balance of it against the State.

¶14. When ruling on Scott's third motion to dismiss, the trial judge said that a majority of delays following Scott's arraignment were caused by Rod Nixon—Scott's second attorney.[1] The trial court noted that Nixon caused delays by not agreeing to a trial date and making repeated assurances that a guilty plea would be entered. The Court of Appeals found Nixon's action's caused a 554-day delay that ran from September 20, 2012, until March 27, 2014. ***Scott***, 2016 WL 3391630, *14. The Court of Appeals subsequently attributed this delay to Scott. ***Id.***

¶15. We find that the delays caused by Nixon weigh against Scott. But the record provides little guidance on when these delays started as Nixon did not file an entry of appearance—or

[1] Nixon voluntarily surrendered his law license during the course of these proceedings.

any other document. In a letter dated March 24, 2014, Nixon informed the trial judge, assistant district attorney, and circuit court that he could no longer practice law. He further mentioned that he was retained prior to this Court's appointment of the special judge. It appears the Court of Appeals calculated the 554-day delay as beginning on the date of this Court's order appointing the special judge (September 20, 2012) and ending on the date of the trial court's appointment of new counsel (March 27, 2014). I agree and weigh this delay against Scott.

¶16. On June 19, 2014, the State filed a motion for continuance and Scott's counsel filed a motion to withdraw due to a conflict of interest. When these motions were filed, Scott's trial was set for June 24, 2014. At a motion hearing on June 24, 2014, the trial court granted the motion to withdraw, and reset the trial for August 13, 2014. Because the trial was continued due to the substitution of counsel, the State did not seek a ruling on its motion for a continuance. This 55-day delay weighs against Scott as it was caused by his attorney's motion to withdraw. Finally, the parties filed an agreed order moving the trial to August 19, 2014. This six-day delay is neutral and does not weigh against either party.

¶17. It is clear that a majority of the delays were caused by the State; therefore, the ***Barker*** reason of delay factor weighs against the State.

Defendant's Assertion of the Right

¶18. While "'the defendant has neither a duty nor an obligation to bring himself to trial, points are placed on his side of the ledger when . . . he has made a demand for a speedy trial.'" ***Bailey v. State***, 78 So. 3d 308, 322 (quoting ***Stevens v. State***, 808 So. 2d 908, 917

(Miss. 2002)). Scott asserts that he demanded a speedy trial in June, 2010, and again in May, 2013. Neither of these demands is in the court file. Scott had not been charged in June 2010, and no record existed at that time. While the motions are not in the record, the prosecutor stated that she "believe[d] . . . a speedy trial motion may have been sent to the clerk's office from the defendant." She further stated that this motion may have been filed prior to the appointment of the special judge.

¶19. Scott, *pro se*, filed two motions to dismiss in which he alleged speedy trial violations, the first on March 24, 2014, and the second on May 2, 2014. With the assistance of counsel, Scott filed a third motion to dismiss on August 14, 2014.

¶20. This Court has held that "a demand for dismissal for violation of the right to speedy trial is not the equivalent of a demand for speedy trial." ***Perry v. State***, 637 So. 2d 871, 875 (Miss. 1994). But "[t]he United States Supreme Court has rejected the notion that a defendant can waive the right to a speedy trial forever by failing to timely assert it." ***Myers v. State***, 145 So. 3d 1143, 1151 (Miss. 2014) (citing ***Barker***, 407 U.S. at 528). And this Court reversed and rendered a conviction due to a speedy trial violation in a case in which the defendant had "filed a Motion to Dismiss for Failure to comply with the 270 day rule." ***Flores v. State***, 574 So. 2d 1314, 1323 (Miss. 1990). "[T]he state argue[d] '[t]he point is, on June 21, 11985, [sic], [the defendant] demanded dismissal, not a speedy trial.'" ***Id.*** The Court held the following:

> With this argument the State is putting the responsibility on the defendant to request a trial. That duty is always on the state. Moreover, in his pretrial motions on the day of trial [the defendant] moved to dismiss on the speedy trial violation. As has been repeated throughout this opinion, a defendant may have

> some responsibility to assert his speedy trial claim, but the primary burden is on the courts and the prosecutors to assure that cases are brought to trial.

Id. (citing ***Trotter v. State***, 554 So. 2d 313, 317 (Miss. 1989), *overruled on other grounds by* ***Betterman v. Montana***, 136 S.Ct. 1609, 194 L. Ed. 2d 723 (2016)). The Court continued that a defendant's "failure to consistently badger the prosecution to proceed with his trial should not eliminate his claim that he was denied a speedy trial." ***Flores***, 574 So. 2d at 1323 (citing ***Smith v. State***, 550 So. 2d 406, 408 (Miss. 1989)). The Court held that the defendant's "failure to assert his right to speedy trial should be weighed against him only lightly, if at all." ***Flores***, 574 So. 2d at 1323 (citing ***Trotter***, 554 So. 2d at 317).

Prejudice to the Defendant

¶21. "To determine whether the defendant was prejudiced by the delay, this Court considers: '(1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.'" ***Hurst***, 195 So. 3d at 742-743 (quoting ***Bateman***, 125 So. 3d at 631). "Generally, this Court will find prejudice where 'there was a loss of evidence, the death of a witness, or the investigation became stale.'" ***Johnson***, 68 So. 3d at 1245 (quoting ***State v. Magnusen***, 646 So. 2d 1275, 1285 (Miss. 1994); ***Manix v. State***, 895 So. 2d 167, 177; ***Sharp v. State***, 786 So. 2d 372, 381 (Miss. 2001)). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" ***Rowsey v. State***, 188 So. 3d 486, 496 (Miss. 2015) (***Barker***, 407 U.S. at 532)).

¶22. On direct appeal, Scott argued that the delay impaired his defense because it contributed to the loss of evidence and witnesses. Scott points out that the following evidence was lost: police files, the 911-call recording, and written statements by the victim and another witness. As for the loss of the victim's written statement, Scott argued that she made prior inconsistent statements and her written statement may have contained more inconsistencies that Scott could have used to impeach her testimony. He also alleged that, due to the delay, potential witnesses who would have testified about his relationship with the victim could not be located.

¶23. The Court of Appeals found Scott's arguments to have been speculative. ***Scott***, 2016 WL 3391630, *16. The court opined that Scott did not know whether the victim's statement contained inconsistencies and noted that he had had the opportunity to cross-examine the officer who took the her statement. The Court of Appeals further found that Scott "did not demonstrate what the missing police reports or 911 recording may have shown." ***Id.*** at *17. With regard to the loss of defense witnesses, the Court of Appeals found no demonstration of prejudice because Scott failed "to cite the name or potential testimony of any allegedly lost witness." ***Id.***

¶24. The blame for the loss of files and records lies squarely upon the State; thus, we presume the content of those records would have been favorable to Scott, and the burden to rebut that presumption rested upon the State. *See* ***DeLaughter v. Lawrence Cty. Hosp.***, 601 So. 2d 818, 822 (Miss. 1992) (quoting ***Bott v. Wood***, 56 Miss. 136 (1878)) ("[D]estructiojn or suppression [of a written instrument] raises a presumption that the document would, if

produced, militate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance . . . .") The Court of Appeals incorrectly placed the burden upon Scott to demonstrate that the content of lost records would have benefitted him.

¶25. In addition to the presumption of prejudice from the content of the lost documents, we point out that a defendant is not required to make an affirmative showing of prejudice to win a ***Barker*** analysis. ***Johnson***, 68 So. 3d at 1244 (Dickinson, P.J., dissenting) (citing ***Moore v. Arizona***, 414 U.S. 25, 26, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973)) ("In ***Moore***, the United States Supreme Court addressed Arizona's misreading of Barker, in which the court expressly rejected any notion that an affirmative showing of prejudice was necessary *to prove a denial of a constitutional right to a speedy trial*.") (emphasis in ***Johnson***)). Instead prejudice is presumed if the delay exceeded eight months. Here, the delay far exceeded eight months so it became the State's burden to rebut the three interests mentioned above. ***Johnson***, 68 So. 3d at 1258 (Dickinson, P.J., dissenting). The State failed to show that Scott's defense was not impaired by the loss of evidence.

¶26. In this case, the length of the delay, reason for delay, and the prejudice prongs all favor Scott. To the extent that Scott, who filed two of his three motions to dismiss for lack of a speedy trial *pro se*, did not label his filings "demands for speedy trial," I would hold that his "failure to assert his right to speedy trial should be weighed against him only lightly, if at all." ***Flores***, 574 So. 2d at 1323 (citing ***Trotter***, 554 So. 2d at 317). So a balancing of the ***Barker*** factors indicates Scott's constitutional right to a speedy trial was violated, and the trial court erred by denying his motion to dismiss for lack of a speedy trial.

¶27. Because Scott's constitutional right to a speedy trial was violated, I would reverse his conviction and render judgment in his favor. Accordingly, I respectfully object to the order affirming the judgment of the Mississippi Court of Appeals.

WALLER, C.J., KING AND COLEMAN, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.