IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00994 COA

EDWARD EUGENE PENTON, JR. APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: THOMAS A. PRICHARD

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLEN WATTS

DISTRICT ATTORNEY: CONO CARANNA

WILLIAM MARTIN

NATURE OF THE CASE: CRIMINAL-SEXUAL BATTERY

TRIAL COURT DISPOSITION: GUILTY AND SENTENCED TO SERVE TWENTY YEARS IN THE MDOC

MANDATE ISSUED: 9/2/97

BEFORE MCMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Edward Penton was convicted of the crime of sexual battery upon a child under the age of fourteen on June 20, 1991, in the Circuit Court of the Second Judicial District of Harrison County. The trial judge sentenced Penton to twenty years' imprisonment in the Mississippi Department of Corrections.

Penton was convicted on June 20, 1991, and did not file a notice of appeal until May 1994, almost three years after his conviction. The Mississippi Rules of Appellate Procedure require that a notice of appeal be filed within thirty days from the entry of judgment. M.R.A.P. 4(a). Yet, there is a second avenue available to a prisoner, in a criminal case-The Mississippi Uniform Post- Conviction Collateral Relief Act. Miss. Code Ann. §§ 99-39-1 to -29 (Rev. 1994 & Supp. 1996). This statute allows relief, including an out-of-time appeal, under certain circumstances, if the proper procedures are followed. In this case, there was no notice of appeal filed within the thirty-day period, nor were the statutory formalities observed in order for post-conviction relief to be granted. However, the trial judge granted post-conviction relief in the form of an order allowing an untimely appeal as the result of an informal letter request by the defendant. There was no objection by the State to the lack of compliance with the formalities of the Post Conviction Relief Act. We will therefore, view the absence of objection as a waiver of the issue of lack of formalities followed and likewise of the timeliness issue and review the appeal on its merits.

FACTS

The grand jury indicted Penton for willfully, purposely, unlawfully and feloniously committing sexual battery upon Jane[(1)] on or about the thirty-first day of December, 1989. Jane was, at the time of the incident, eleven years old. The battery allegedly happened when Penton inserted his finger into Jane's vagina for libidinal gratification.

Penton was indicted on June 20, 1990, and entered a plea of not guilty by waiver of arraignment and entry of plea on September 29, 1990. Trial was set for December 3, 1990, but was not actually tried until June 19, 1991.

During trial the State offered testimony of Ashraf Tabatabaii, the pediatrician who examined Jane on January 15, 1990. This testimony was allowed by the trial judge, although there were continuing objections by Penton. Penton eventually moved for a mistrial, which was also denied by the judge.

The State also introduced testimony of Suzanna Smith, Ph.D., a child psychologist who had previously evaluated Jane regarding the incident. There was certain testimony of Suzanna Smith which Penton objected to and on which he finally moved for a mistrial. The judge held that Penton had not been prejudiced by the testimony and again denied the motion.

At the end of the State's case, the trial judge denied Penton's motion for a directed verdict, holding that the State had made out a prima facia case. At the close of Penton's case, Penton requested a peremptory instruction which was likewise denied. Penton also moved for a new trial once the jury verdict and the judge's sentence was given. This request was also denied.

ISSUES

A. Did the trial court err when it refused to grant Penton his motion for a directed verdict and a peremptory instruction?

Penton argues that the State failed to prove every element of the crime of sexual battery. Penton was charged under § 97-3-95 of the Mississippi Code Annotated (1972) which states that a person is guilty of sexual battery if he engages in sexual penetration of a child under the age of fourteen. The indictment alleges the crime occurred on or about December 31, 1989. Although, in his brief, Penton never specifically states the deficiency upon which he bases his motion for a directed verdict, Penton focuses his argument on his belief that it was not proved that the incident occurred on December 31, 1989. There was proof offered by the State that the incident occurred on or about December 31, 1989, and there was contradictory evidence introduced by Penton that the battery did not occur at that time.

In reviewing a trial court's denial of a defendant's motion for a directed verdict, this Court will give the non-moving party the benefit of all favorable inferences and then review the evidence to ascertain whether it supports the verdict beyond a reasonable doubt. *Stever v. State,* 503 So. 2d 227, 230 (Miss. 1987). The trial court's ruling will be reversed only if the appellate court finds that there has been an abuse of discretion in the denial of the motion. *Wetz v. State,* 503 So. 2d 803, 812 (Miss. 1987). The evidence presented at the time that Penton moved for a directed verdict, viewed in the light most favorable to the State, presents a question for the jury to answer. Additionally, this Court must examine all of the evidence admitted, with all inferences in the favor of the State, to determine if it supports the verdict beyond a reasonable doubt. *Pierre v. State,* 607 So. 2d 43, 54 (Miss. 1992). After having done so, we find that it does. Therefore, the trial judge did not err when he denied Penton's motion for a directed verdict.

Likewise, in judging the sufficiency of the evidence upon a motion for a peremptory instruction, the trial judge must follow the same procedure as for a motion for a directed verdict. *Carroll v. State,* 196 So. 2d 878, 883 (Miss. 1967). The trial judge, when a motion for a peremptory instruction has been made at the end of all the evidence, must consider all evidence which is favorable to the non-moving party as true, with all reasonable inferences therefrom. *Clemons v. State,* 460 So. 2d 835, 839 (Miss. 1984). The judge must also disregard any evidence which is favorable to the moving party. *Id.* If, after viewing the evidence in this manner, the trial judge finds that it is possible that a reasonable juror could find the defendant guilty beyond a reasonable doubt, then he must deny the motion for a

peremptory jury instruction. *Id.*

In the case at hand, there was sufficient evidence to find Penton guilty of sexual battery. The State offered evidence proving that Penton inserted his finger into Jane's vagina. The State also proved that this could have occurred on or about December 31, 1989. The question was one which should have been, and was, properly answered by a jury. The trial judge did not err in denying Penton's motion for a peremptory jury instruction.

B. Did the trial court err when it refused to grant Penton a new trial?

The argument the defense makes in its motion for a new trial is that the jury's verdict was against the overwhelming weight of the evidence and resulted in a miscarriage of justice . The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge and should be granted only where the judge is convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). In determining whether a verdict is against the overwhelming weight of the evidence, this Court must view all evidence in the light most consistent with the jury verdict. *Blanks v. State*, 542 So. 2d 222, 226 (Miss. 1989). The verdict will not be overturned unless the denial of the motion is found to have been an abuse of discretion by the trial court. *Id.* The proper function of the jury is to decide the outcome in this type of case, and the court should not substitute its own view of the evidence for that of the jury's. *Id.* at 226.

Rule 10.05 of the Uniform Circuit and County Court Rules states that the court may grant a new trial either: "1) If required in the interests of justice; or 2) If the verdict is contrary to the law or the weight of the evidence; . . . ."

In the case before us, it would not be in the interest of justice to remove the jury verdict and re-try this case; nor is the jury verdict contrary to law or the weight of the evidence. Upon reviewing all of the evidence presented in the light most consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Penton's motion for a new trial.

C. Did the trial court err when it allowed Dr. Tabatabaii to testify about Jane's statements to her?

Dr. Tabatabaii was called to testify as the victim's treating pediatrician on the night she was taken to the emergency room. When Dr. Tabatabaii was asked about the medical history she took from Jane, Dr. Tabatabaii testified that Jane told her that:

[Jane's] stepfather has been--in past five months has been sexually abusing her and putting his private part in her private part. And I ask her, when was the last time that she has done it--he has done it, and said I don't remember. I asked her if it was a month ago, two months ago? Said, no, it was earlier, sooner. And I said, how long ago, and she told me one and half weeks ago. And I asked her, in past five months, why you haven't told anybody? And she said because he told her that he is going to whip her if she tell anybody.

Penton's objection to this testimony was overruled by the trial judge on the basis that this testimony was an exception to the hearsay rule. The judge held that the testimony constituted statements for purposes of medical diagnosis or treatment under Rule 803(4) of the Mississippi Rules of Evidence. Rule 803(4) states the exception to the hearsay rule as follows:

[S]tatements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Jones v. State, 606 So. 2d 1051, 1056 (Miss. 1992) explains that the two-part test used to determine if the hearsay meets the 803(4) exception is (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment.

The statements in the case at hand met this two-part test since Jane gave the statement in hopes of promoting her treatment, and the statement is of the type which is reasonably relied upon by physicians in treating this type of patient.

Penton also cites *Jones v. State* in his brief, as analogous to the case at hand. Penton argues the general rule, that statements concerning the perpetrator of the crime are seldom viewed as pertinent to medical diagnosis or treatment. *Id.* at 1056-57. Penton contends that because the trial judge in that case was found in error for admitting testimony as to the identity of the perpetrator, that the trial judge *sub judice* should likewise be found in error. *Id.* The major flaw in this argument is that the defendant in *Jones* was the natural father of the victim but did not reside within the victim's immediate household. Therefore, the statement regarding his identity was not considered sufficiently pertinent to treatment or relevant to prevention. *Id.* Whereas, in the case at hand, the defendant is not the natural father of the victim but did reside in the victim's immediate household. It is clear that the statements given by the victim to Dr. Tabatabaii were reasonably related to treatment, encompassing emotional and psychological injuries, and were also necessary to the prevention of further abuse. Yet, all this becomes moot when later cases are examined. In *Doe v. Doe*, 644 So. 2d 1199, 1206 (Miss. 1994), the court expanded *Jones* to allow the identity of the child's abuser as being relevant to treatment even when the abuser did not live in the same household as the child but had regularly scheduled visits with the child. Additionally, *Eakes v. State,* 665 So. 2d 852, 867 (Miss. 1995), further extended *Jones* by stating that there is no logical reason for drawing the line for admittance of the abuser's identity for those with regular visits and allowed the identity of the child's abuser regardless of the relationship between the abuser and the child. Therefore, the statements are admissible under Mississippi Rule of Evidence 803(4).

Although the testimony was found to be admissible under Rule 803(4), counsel argued at trial that it should be excluded because it linked Penton to other unrelated crimes. Penton cites several cases in which similar identity testimony was admitted. *Woodruff v. State*, 518 So. 2d 669 (Miss. 1988); *Coats v. State*, 495 So. 2d 464 (Miss. 1986); *Hicks v. State*, 441 So. 2d 1359 (Miss. 1983). Penton argues that the reason the testimony was admitted in those cases was because it was evidence that the defendant had previously engaged in certain acts with the victim which were substantially similar to those acts on which the defendant was indicted.

Penton argues that the testimony in question here links him to acts which are not substantially similar to those for which he was indicted. The acts to which Penton is referring, in this case, are prior sexual intercourse and threats to whip the child if the child told anyone about the incidents. The indictment alleges digital penetration. The first act with which we are concerned is that of Penton inserting his penis into the child's vagina, and the second act, the one on which Penton is indicted, is inserting his finger in the same. The acts are obviously similar. Based on the argument Penton, himself, makes the testimony is admissible.

The admissibility of the testimony was not argued under Rule 803(25), the tender years exception, by either party. However, under certain circumstances, this would be a viable argument. The trial judge would have had to weigh certain factors to determine if the statements provided substantial indicia of reliability. *Idaho v. Wright,* 497 U.S. 805, 814-15 (1990). Due to the age and mental fitness of the victim in this case, and the fact that her story varied each time she repeated it, the judge would probably have held that the reliability of her statements, based purely on the tender years exception, was not substantial enough to admit as evidence. However, this does not affect the admissibility of the testimony of the expert witnesses in this case as to medical examinations performed on the victim.

D. Did the trial court err when it permitted Suzanna Smith, Ph.D. to testify that the victim said, "Victor get on me over there. Chuck wants Jerry get on me."?

Dr. Smith interviewed the victim for psychological effects of the incident. Dr. Smith took notes of the interview and referred to them during her testimony. Dr. Smith testified that Jane told her in her interview that Chuck, the nickname by which the victim referred to Penton, wanted others to "get on" Jane and had told them to do so.

Penton makes no new argument for the exclusion of this testimony, but instead refers to the argument he made for the previous issue. Therefore, this Court has no new point of law to address, and we affirm the trial court on this issue. Likewise, we reiterate that this testimony is an exception to the hearsay rule under M.R.E. 803(4) and is therefore admissible. These statements are admissible if they are made by the victim in connection with medical treatment. M.R.E. 803(4). The rule also states that the term "medical" refers to the emotional and mental health as well as physical health of the victim.

E. Did the trial court err when it held that Penton's right to a speedy trial had not been violated?

A defendant in a criminal trial is guaranteed a right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and under Section 26 of the Mississippi Constitution. The period for determining whether a defendant was denied his constitutional right to a speedy trial is measured beginning at the time of formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. *Hughey v. State*, 512 So. 2d 4, 7 (Miss. 1987). In *Flores v. State*, 574 So. 2d 1314, 1322 (Miss. 1990) the Mississippi Supreme Court determined that the length of delay was the "triggering mechanism" for adjudicating whether a criminal defendant's constitutional right to a speedy trial had been violated. The length of the delay must also be presumptively prejudicial in order for it to trigger the inquiry. *Jaco v. State*, 574 So. 2d 625, 630 (Miss. 1990). Although the "triggering mechanism" is the length of the delay, once the question is brought before the court, it must then weigh four factors to determine if there has, in fact, been a violation of the defendant's right to a speedy trial. *Barker v. Wingo,* 407 U.S. 514, 530 (1972)

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The record indicates that on February 1, 1990, Penton was arrested for the sexual battery of Jane, a female under fourteen years of age. Penton was finally tried on June 19, 1991, almost seventeen months after his arrest. The trial court was required, on motion to dismiss by the Defendant, to examine the *Barker v. Wingo* factors to make the determination of whether Penton had been denied his constitutional right to a speedy trial.

Application of the four *Barker* factors

In *Barker* the United States Supreme Court established four factors which must be "balanced" in the process of determining whether the prosecution has denied a criminal defendant's right to a speedy trial. These four factors are: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant has asserted his right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay. *Barker*, 407 U.S. at 530. In *Stogner v. State*, 627 So. 2d 815, 818 (Miss. 1993), *quoting Jaco v. State*, 574 So. 2d at 630, the Mississippi Supreme Court explained the process of balancing these four factors as follows:

These factors are weighed and balanced in each case according to the facts. "The weight given each necessarily turns on the peculiar facts and circumstances of each case, the quality of evidence available on each factor . . . . No one factor is dispositive."

1. Length of Delay

In *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989), the Mississippi Supreme Court established that a delay of eight months is presumptively prejudicial, thereby triggering the inquiry into whether the defendant's right to a speedy trial has been denied. Thus because the delay in Penton's trial was more than seventeen months, it is presumptively prejudicial and triggers the examination of the remaining factors. *Id.* One factor alone is not sufficient to determine if Penton's rights have been violated; the Court must examine and weigh the remaining factors. *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990). We must therefore balance all four factors in deciding whether Penton is entitled to have his convictions reversed and to be discharged.

2. Reason for Delay

The record on this matter is not altogether clear, but it appears that there was no delay from the date of arrest, February 1, 1990, to the preliminary hearing on March 15, 1990. Penton did not have representation at his preliminary hearing, so it was rescheduled and finally heard on May 10, 1990. This delay is weighed against Penton. Once the preliminary hearing was complete, the case was presented to the grand jury who returned an indictment on June 20, 1990. Arraignment was set for July 26, 1990, but Penton failed to be transported to the courthouse. This happened twice, until Penton finally waived arraignment on October 1, 1990, and trial was set for December 3, 1990. These delays in arraignment will be weighed against the State. On December 3, 1990, the date set for trial, there was another case being tried which caused Penton's case to be rescheduled for April 1, 1991. Penton argued that there is a two-week term of the court in December, and his trial could have

taken place the second week in December. The trial judge responded that the second week was reserved for civil trials. The judge also stated that had Penton requested that the judge rollover the criminal docket to the second week, he probably would have. Therefore, this delay from December 3, 1990, until April 1, 1991 is not weighed against the State or Penton.

On April 1, 1991, the date set for trial, there were two causes against Penton. The State elected to prosecute cause number 6692 (not the case at hand), which resulted in a mistrial the same day. The State was not prepared to prosecute cause number 6691 (the case *sub judice)* at that time, and asked for a continuance. The judge granted the continuance until June 19, 1991. The time between April 1, 1991, and June 19, 1991 is weighed against the State.

In summary, the initial delay of almost two months, from March 15 to May 10, is weighed against Penton. The approximately two-month period between July 26, 1990, when Penton was not transported to the courthouse, and October 1, 1990, when arraignment was waived, is to be weighed against the State. The delay from December 3, 1990, until April 1, 1991 due to an overcrowded docket weighs lightly against the State. *Barker*, 407 U.S. at 531. The delay from April 1, 1991, to the actual trial on June 19, 1991, is weighed against the State. Therefore, although the State has more time weighed against it, the length of time is not great and must also be weighed against the other four factors.

3. Whether the Right to a Speedy Trial Was Asserted

Penton did not raise the issue of the State's denial of his right to a speedy trial until April 1, 1991, the date set for the trial, when he filed a demand for a speedy trial. The demand was granted on June 19, 1991, at which time Penton moved to dismiss on the same grounds.

While it is true that the Mississippi Supreme Court has stated that there is some responsibility on the part of the defendant to assert his right to a speedy trial, the court has also said that the primary burden is on the courts and the prosecutors to assure that cases are brought to trial. *Flores v. State*, 574 So. 2d 1314, 1323 (Miss. 1990). Penton did not assert his right to a speedy trial during the initial thirteen-month period between the time of his arrest in February 1990 and April 1991,the date that was set for his trial. *Johnson v. State*, 666 So. 2d 784, 793 (Miss. 1995), holds that even where a defendant is late in asserting his right to a speedy trial, this is not fatal to his claim. Penton's delayed assertion of his right to a speedy trial is likewise not fatal to his claim in this case, but this Court holds that because he was late asserting the right, we will not weigh this factor against the State.

4. Prejudice

The United States Supreme Court has stated that prejudice to the defendant should be assessed in light of the three distinct interests which the speedy trial right was designed to protect: (1) the prevention of oppressive pretrial incarceration, (2) the minimization of anxiety and concern of the accused, and (3) the limitation of the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. The only interest which Penton claims was prejudiced was his defense. Penton claims that he could no longer obtain his witnesses' presence to testify. However, all of Penton's witnesses were closely related family members who had all appeared at the April 1, 1991, mistrial and had prior knowledge of the continuance.

In recent years, the Mississippi Supreme Court has treated the prejudice prong of the *Barker* test in various ways. Although *Trotter v. State,* 554 So. 2d 313, 318 (Miss. 1989), held that no affirmative showing of prejudice is required in order to prove a defendant's constitutional right to a speedy trial has been denied, the court in *Polk v. State*, 612 So. 2d 381, 387 (Miss. 1992), said that without a showing of prejudice, this element cannot be weighed in favor of the defendant. Recently, the Mississippi Supreme Court has appeared to require criminal defendants to demonstrate an actual impairment of their defense if their claims of denial of a speedy trial are to succeed. *See, e.g., Skaggs v. State*, 676 So. 2d 897, 901-902 (Miss. 1996); *McGhee v. State*, 657 So. 2d 799, 804 (Miss. 1995). Although the court contends that no one factor is dispositive in balancing the elements, the court continues to rely on whether or not the defendant can prove he suffered actual prejudice to his defense as a result of the delay. *McGhee*, 657 So. 2d at 806 (Sullivan, J., dissenting). Penton's defense was not prejudiced by the delay because Penton did have two of his sons testify, as well as his ex-wife and her sister. The only witness Penton could not locate was Junior Ferrell, Penton's nephew. However, it is admitted that Ferrell's testimony would have been merely cumulative of other testimony. We, therefore, hold that Penton did not incur actual prejudice from the delays discussed above.

SUMMARY OF ISSUE

The first of the four *Barker* factors, length of delay, is presumptively prejudicial to Penton because it greatly exceeds the eight-month period of delay which the Mississippi Supreme Court has declared to be presumptively prejudicial. The second factor, the reason for delay, weighs more heavily on the State than Penton as previously discussed. The third factor, Penton's assertion of his right to a speedy trial, cannot be weighed against the State because Penton asserted it for the first time on April 1, 1991. In regards to the fourth and final factor, we hold that Penton was not prejudiced by the delay since all of his witnesses were present except for one whose testimony would have been merely cumulative. Therefore, we cannot weigh this factor against the State.

Because we believe the third factor is weighed more heavily against Penton, as well as the fourth factor, that Penton suffered no real prejudice, we reject Penton's argument that the State denied him his right to a speedy trial. Accordingly, we affirm the court's denial of Penton's motion to dismiss the indictment.

CONCLUSION

This court holds that the trial court did not err when it denied Penton's motion for a directed verdict and a new trial. The trial court was also correct in allowing the testimony of Dr. Tabatabaii and Dr. Smith as to the victim's statements to each of them. Likewise, Penton's constitutional right to a speedy trial was not violated, and the trial judge did not err in denying Penton's motion to dismiss on that ground. We therefore, affirm the lower court's rulings on all issues.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF SEXUAL BATTERY ON A CHILD UNDER FOURTEEN YEARS OF AGE AND SENTENCE TO SERVE TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO

HARRISON COUNTY.

BRIDGES, C.J., McMILLIN P.JJ., HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J. AND COLEMAN, J., NOT PARTICIPATING.

1. The name of the victim has been changed to protect her identity.