IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00814 COA

CHARLES WOFFORD 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. HENRY LACKEY

COURT FROM WHICH APPEALED: CALHOUN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: CLIFF R. EASLEY, JR.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: LARRY L. LITTLE

NATURE OF THE CASE: CRIMINAL - ARMED ROBBERY

TRIAL COURT DISPOSITION: CONVICTION FOR ARMED ROBBERY; 20 YEARS

MOTION FOR REHEARING FILED:October 20, 1997

MANDATE ISSUED: 9/30/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

Charles Wofford was convicted in the Circuit Court of Calhoun County of armed robbery and was sentenced to a term of twenty years in the custody of the Mississippi Department of Corrections. Aggrieved, Charles appeals raising the following issues: 1) that the court erred in denying him bond, 2) that the court erred in refusing to exclude certain of his statements to police, 3) that the court erred in overruling his Motion to Dismiss the indictment, 4) that the court erred by granting jury instruction S-5 and refusing to grant instruction D-8, 5) that the verdict is against the overwhelming weight of the evidence, and 6) that the court erred in the sentencing of the defendant. Finding no merit in the issues raised, we affirm.

FACTS

On the morning of September 8, 1994, Charles went to the home of his brother Casey. In the home were his two brothers, Casey and Bobby Wofford. Also in the home were Rodney Miller and James Johnson. All were asleep. While in the bathroom of the house, Charles noticed a bag of cocaine on the floor. He took the bag of cocaine and had an acquaintance who lived nearby take him to Tony Crutchfield's house. Once at Crutchfield's house, Charles and others in the house began smoking the cocaine.

A short time later, Casey, Bobby, Rodney, and James came to Crutchfield's house looking for Charles and the cocaine. The men entered Crutchfield's house and found Charles hiding in a closet. Charles then fled the house, but was caught by the other men. Casey instructed Rodney and James to have Charles rob a certain store to repay them for the cocaine he had used. Charles was then taken by Rodney and James to a store where Charles was supposed to commit the robbery. When Charles refused, the men were joined by Casey. This time, Charles, Rodney, and James went into the store to commit the robbery while Casey and Bobby waited in the car. There was testimony that Charles was not armed and did not threaten anyone in the store. Alisia Holloway and her son, Shay, who were working at the store that day, were robbed at gunpoint. The men fled the scene.

The next day, Charles and James were riding in a car with three other people when they were recognized and pulled over by Calhoun County sheriff's deputies. Looking in the car, the deputies noticed a bank bag and they arrested James and Charles. Charles gave the police at least one

statement of the facts and parties involved in the robbery. The other men involved with the robbery were also arrested and jointly indicted. Bond was set at $50,000 for all of the defendants. Charles' case was originally set for trial on January 18, 1995. The case was continued until the August 1995 term of court because there was a conference in April that the judges and prosecutors needed to attend. In the order continuing the case, the judge stated that this delay would not count against the State for the purpose of the 270 day rule.

On March 28, 1995, Charles made a motion for bail or in the alternative to reduce excessive bail that was denied. On June 27, 1995, Charles made a motion to dismiss because of the delay in his receiving a trial. This was also denied. Charles was tried and convicted of armed robbery in September of 1995. Charles was sentenced to twenty years, while Rodney and James, who had pled guilty to the charges, each received twenty year sentences with five years suspended.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE TRIAL COURT ERRED BY DENYING BAIL TO CHARLES.

Charles argues on appeal that the trial court erred in denying him bond. Specifically, the argument centers around the fact that the trial judge did not state his reasons for denying bail into the record. We disagree. Article 3, Section 29 of the Mississippi Constitution says the following about bail:

In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.

Our review of the record in this case reveals that the trial judge did make adequate findings regarding his reasons for denying bond. The trial judge was very concerned about Charles' addiction to cocaine. He was also concerned about the violent nature of the crime with which Charles was charged. The judge was concerned that these two destructive behaviors could combine and cause a serious danger to the community. We feel that the Mississippi Constitution is clear on this matter and that the trial judge applied it correctly. Accordingly, we find no merit to this issue.

II. WHETHER THE TRIAL COURT ERRED IN DENYING CHARLES' MOTION TO EXCLUDE STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS.

Charles argues that the confessions/statements he gave to law enforcement officers were inadmissable because they were the product of an illegal arrest. The officers who arrested Charles knew prior to the arrest that he and other members of his family were suspects in committing the robbery. One of the officers, Deputy Bobo, knew what the men who had committed the robbery were wearing. Bobo also knew that the money that was stolen was in bank bags.

When Bobo and another officer recognized Charles's brother, Casey, riding in a car with Charles and

other people, they pulled the car over. When Charles was removed from the car, the officers saw a bank bag that was wet and muddy. Charles was also wet and muddy. Bobo revealed at trial that he had been told that when the men left the store after committing the robbery, they ran through a "slough" behind the store where they and the money got wet and muddy.

An arrest has been shown to be valid if "the arresting officer has 'probable cause' to believe that a felony has been committed, and probable cause to believe the suspect to be arrested committed the felony." *Blue v. State*, 674 So. 2d 1184, 1202 (Miss. 1996). "Probable cause means less than evidence which would justify condemnation, but more than bare suspicion." *Henry v. State*, 486 So. 2d 1209, 1212 (Miss. 1986). It is the opinion of this Court that the officers clearly had more than a bare suspicion in pulling over the car containing Charles. Accordingly, they had probable cause to believe that one of the men in the car had committed the robbery and, therefore, they were justified in stopping the car and arresting Charles upon recognizing him and the bank bag.

Charles further argues that after he was arrested and read his *Miranda* rights, he gave at least one confession/statement to Bobo and the other arresting officer, Deputy Lester. Charles argues that these statements were inadmissable because they were in return for a promise that Deputy Lester would seek leniency for Charles from the judge. Deputy Lester denied doing this. "The general rule is that for a confession to be admissible it must have been given voluntarily, and not as the result of any promises, threats or other inducements." *Chase v. State*, 645 So. 2d 829, 837 (Miss. 1994). The prosecution must prove beyond a reasonable doubt that the confession is voluntary, and that burden is met by the testimony of an officer that the confession was made without threats, coercion, or offer of reward. *Chase*, 645 So. 2d at 838. "This point generally presents a fact question which is to be resolved by the trial judge according to the correct legal standards. *Id*. We will not reverse the trial judge unless we find manifest error. *Porter v. State*, 616 So. 2d 899, 907 (Miss. 1993). The following was said by the trial judge about this issue:

Court has heard the testimony and heard the evidence; and I understand the arguments of counsel, I believe. Of course, what might be a suspicion to one person might be probable cause to another. I don't know what the definition of suspicion might be; and when the arrest occurred might be a question, in my opinion is a question. Mr Bobo testified that he knew that there had been a robbery, knew that there was some bank bags missing, knew that, or from what Mr. Barnett told him, another officer, Woffords had been driving this or been in this automobile, knew that he looked like Charles Wofford and stopped him; and because of movement, suspicious movement on the back seat of that vehicle he saw a bank bag being stuffed down into the back of the car or seat of a car; and the arrest was made.

I'm of the opinion that the officer acted reasonably and in good faith; and that he had probable cause. I'm also of the opinion that there has been a lack of showing that any inducements were made in the confessions; and I'm going to allow the confessions to be introduced.

This Court can find no manifest error in the trial court's findings, and we find them to be supported by the evidence. Accordingly, we find no merit to this issue.

III. WHETHER THE COURT ERRED IN DENYING CHARLES' MOTION TO DISMISS FOR

LACK OF A SPEEDY TRIAL.

Charles argues on appeal that the trial court erred in denying his motion to dismiss for lack of a speedy trial. Specifically, he argues that he was arrested on September 8, 1994, and was not tried until August 15, 1995. Charles contends that this delay prejudiced his defense since he was incarcerated outside of Calhoun County where his counsel was located, and that the distance prevented him from adequately preparing for trial. We disagree. The Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution both guarantee the right to a speedy trial which attaches at the time of arrest. *Atterberry v. State*, 667 So. 2d 622, 626 (Miss.1995). Where a defendant asserts a constitutional speedy trial violation, the Court considers four factors established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). The factors are: 1) length of delay, 2) reason for the delay, 3) whether the defendant has asserted his right to a speedy trial, and 4) whether the defendant was prejudiced by the delay. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995). No specific mathematical formula exists with regards to how the weighing and balancing must be performed. The totality of the circumstances must be considered, and no one factor is dispositive. *McGhee v. State*, 657 So. 2d 799, 801-802 (Miss. 1995). In *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989), this Court stated that any delay of eight months or longer is presumptively prejudicial. This factor does not require reversal in and of itself, but requires a close examination of the remaining factors. *Johnson*, 666 So. 2d at 792. If a delay is not presumptively prejudicial, the Court does not need to examine the remaining factors. *Id.* Where a delay is caused by the defendant, the constitutional clock is tolled for that period of time. *Id.* at 793. A delay caused by changes in the defendant's attorney cannot be weighed against the State because it is beyond the State's control. *Id.* at 792. The period of delay attributable to the defendant and his counsel is to be subtracted from the total days of delay. *Id.*

Our review of the record in this case reveals that the time period between arrest and trial constituted a delay of approximately 340 days (or a little over ten months). This is well over the presumptively prejudicial requirement, and the other prongs of the *Barker* test must be analyzed. Since this case was continued on motion of the defendant on January 18, 1995, that time will be subtracted from the total period of delay. The next scheduled court term was in April, but because of a spring conference, the judge and prosecutor were unavailable and the trial was scheduled for the

August 1995 term. This continuance was not caused by the State or Charles, and it also will be subtracted from the total days of delay. Where the reason for the delay is overcrowded dockets and understaffed prosecutors, the Mississippi Supreme Court has stated that this factor will not be weighed against the State. *McGhee*, 657 So. 2d at 802. The defendant filed a motion to dismiss on June 19, 1995, and a hearing denying the motion was held on August 7, 1995. This delay was attributable to the defendant and will be subtracted from the total days of delay. The total period of delays deducted is 146 days (98 days from the defendant's continuance until the beginning of the next court term and 48 days from the time the defendant filed his motion until the motion was heard.). After subtracting the delays attributable to Charles, the total period of delay is 194 days, which is less than eight months.

Although a defendant is not required to demand a speedy trial, his assertion will weigh in his favor. *Johnson*, 666 So. 2d at 793. Charles only raised his motion to dismiss two months prior to the actual trial. This factor weighs slightly in favor of Charles. However, in *Adams v. State*, 583 So. 2d 169, 170 (Miss. 1991), the Mississippi Supreme Court observed that a demand for dismissal for violation of the right to speedy trial is not the equivalent of a demand for speedy trial. Such a motion seeks discharge not trial. In that case the Court held that a demand for dismissal coupled with a demand for an instant trial was insufficient to weigh this factor in favor of the defendant, where the motion came after the bulk of the entire period of delay had elapsed. *Perry v. State*, 637 So. 2d 871, 875 (Miss. 1994). This is analogous to the present case. Charles never demanded trial; he demanded a dismissal arguing that his rights to a speedy trial had already been violated. Additionally, Charles had previously moved for a continuance, which could be considered as contrary to any concerns about a speedy trial.

Charles's only claim of prejudice was that his counsel was in Bruce while he was incarcerated in Oxford. This distance allegedly prevented him from conferring with his attorney and others in the community, and as a result, he was unable to provide his attorney with the name of a material witness. We find this issue to be procedurally barred since it was not raised at the trial court level. Besides incarceration, Charles has demonstrated no actual prejudice. This lack of prejudice factor should weigh heavily against Charles in applying the *Barker* analysis. Considering the totality of the circumstances, this Court feels that Charles has not been denied his constitutional right to a speedy trial. Accordingly, we find no merit to this issue.

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING INSTRUCTION S-5 AND IN DENYING INSTRUCTION D-8.

Charles argues on appeal that the trial judge erred by granting Instruction S-5. Instruction S-5 reads as follows:

The Court instructs the jury that if two or more persons are engaged in the commission of a felony, then the acts of each in the commission of such felony are binding upon all, and all are equally responsible for the acts of each in the commission of such felony.

Charles also argues that the trial court erred by refusing to grant Instruction D-8. Instruction D-8 reads as follows:

This Court instructs you, the Jury, that the defendant, Charles Wofford, has been charged with the offense of "Armed Robbery." Unless you find from the evidence in this case, beyond a reasonable doubt that: Charles Wofford did, on or about the 8th day of September, 1994, in Calhoun County, Mississippi, willfully take personal property of JoAnn Brasher, d/b/a The Corner Grocery from the person of Alisia Holloway, in the presence of Alisia Holloway and Shay Holloway, against the victims' will by violence towards Alisia Holloway and Shay Holloway, by putting them in fear of some immediate injury to their persons by exhibiting a gun, and that such gun was a deadly weapon, and at the time the defendant, Charles Wofford, had the intent to permanently deprive Alisia Holloway of the property, and if the State has failed to prove any one or more of the above listed elements, beyond a reasonable doubt, then you shall find the defendant, Charles Wofford, "Not Guilty".

"This Court's standard in reviewing jury instructions is to read all instructions together and if the jury is fully and fairly charged by other instructions, the refusal of any similar instructions does not constitute reversible error." *Hull v. State*, 687 So. 2d 708, 722 (Miss. 1997). Failure to give a jury instruction is reversible only if the instruction was substantially correct, was not substantially covered by other instructions actually delivered, and concerned an important point at trial so that failure to give it seriously impaired defendant's ability to present a given defense. *U.S. v. Andrews*, 22 F.3d 1328, 1345 (5th Cir. 1994).

With regard to Instruction S-5, Charles agreed that it was a correct statement of the law, but he felt that either the word "voluntarily" or "willingly" should be inserted. The Court reasoned that this was not necessary because his actions would not be criminal if they had not been done knowingly and willingly. We agree and find S-5 to be an accurate statement of the law.

With regard to Instruction D-8, Charles argues that it should have been granted. We disagree because the same law was covered by Instruction S-1, which was given to the jury. The trial court need not instruct the jury on otherwise valid instructions if the subject matter contained in the proposed instruction is adequately covered by an instruction already granted. *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992). We feel that D-8 was adequately covered by S-1 and, therefore, not necessary. We find no merit to this issue.

V. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Where the defendant contends that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

McClain v. State, 625 So. 2d 774, 781 (Miss. 1993). All matters concerning the weight and credibility of the evidence are resolved by the jury. *Id.*

The Supreme Court of Mississippi eloquently condensed this standard stating:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that [sic] the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

Williams v. State, 463 So. 2d 1064, 1068 (Miss. 1985).

The evidence in this case is clear. Charles was one of the men who committed the robbery. The testimony of the victims leaves no doubt that Charles was involved. There is also testimony that Charles was involved in the planning of the robbery. We find that a juror could have easily found Charles guilty and, therefore, we will not overturn the jury's verdict in this case. This issue is without merit.

VI. WHETHER THE TRIAL JUDGE ERRED WHEN HE SENTENCED CHARLES TO TWENTY YEARS.

Charles argues that the difference between his sentence, twenty years, and those of his co-defendants, twenty years with five years suspended, evidences that he was penalized for exercising his right to a jury trial. We disagree. The imposition of sentence is within the discretion of the circuit court. It is subject only to statutory and constitutional limitations. The court is not limited to the consideration of evidence presented of record at trial when imposing sentence. *Jackson v. State*, 551 So. 2d 132, 149 (Miss. 1989).

The judge in this case ordered a presentencing report on Charles. The report revealed a substantial criminal record. The judge obviously considered Charles' situation before sentencing. Furthermore, Charles' co-defendants were also sentenced to twenty years each. The only difference was that they had five years suspended after pleading guilty. We find this difference to be justified in light of the facts presented to the judge. We will not now intrude on the sanctity of the discretion of the trial judge with regard to sentencing matters. We find no merit to this issue.

THE JUDGMENT OF THE CALHOUN COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF

THIS APPEAL ARE TAXED TO CALHOUN COUNTY.

THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., NOT PARTICIPATING.