

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01469 COA

JOHNNY LEE THOMAS

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. KATHY KING JACKSON

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES L. FARRIOR, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY WAYNE SNUGGS

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL - ARMED ROBBERY

TRIAL COURT DISPOSITION: GUILTY - SENTENCED TO FIFTEEN YEARS IN THE
CUSTODY OF THE DEPARTMENT OF CORRECTIONS UNDER HABITUAL OFFENDER
STATUTE

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Johnny Lee Thomas appeals from his fifteen-year sentence for armed robbery under section 99-19-79 of the Mississippi Code. Thomas contends that the lengthy delays between the time of his arraignment and his ultimate sentencing, and between the date of his conviction and his ultimate sentencing, violated his constitutional rights to a speedy trial. Finding no merit to these arguments, we affirm.

I. BACKGROUND

On or about June 3, 1992, Thomas was indicted for the crime of armed robbery and as a habitual offender. He was arraigned on June 26, 1992. The case went to trial on August 20, 1992, and on the following day the jury returned a guilty verdict. The State then moved for the trial court to set a date for the habitual offender sentencing hearing at a later date. After the trial judge suggested that the sentencing hearing could be held the following week, Thomas' attorney told the trial judge that he wanted to obtain some actuarial evidence and medical testimony pertinent to his client's sentencing and that it would probably "take a while to get that together in this case." At this point, the trial judge acceded to Thomas' attorney by suggesting that the attorney should try to schedule the hearing within the next two weeks. However, the matter of scheduling was ultimately left unresolved, with the trial judge stating that the defense should notify her as to when would be an appropriate time.

On October 20, 1992, Thomas was sent to Dr. Reginald Stewart for a medical examination pertaining to his diabetic condition. When Stewart's report was received, it was dated February 15, 1993. The sentencing hearing was then set for February 26, 1993. For reasons not entirely clear from the record, however, the sentencing hearing was again continued. The hearing was also continued a few days later on March 5, 1993.

On March 8, 1993, the State moved for yet another continuance because certain materials that were necessary to its case had not yet been entered into the record. By April 12, 1993, the State had received the requisite materials and was ready to proceed. However, by April of 1993, the trial court was bogged down with complex asbestos litigation. As a result of this congestion, the trial court was not able to proceed with the sentencing hearing until September of 1993.

On May 18, 1993, Thomas filed a *pro se* petition for writ of habeas corpus challenging the legality of his incarceration. On September 8, 1993, Thomas also filed a motion to dismiss the charges against him due to a failure to timely sentence him. This motion was denied by the trial judge and on September 10, 1993, the judge sentenced Thomas to a term of fifteen years in the custody of the Mississippi Department of Corrections without parole. Thomas now appeals this sentence, contending that the lengthy delay between the time of his arraignment and the time of his sentencing and, alternatively, between the time of his conviction for the offense and his sentencing, violated his constitutional rights to a speedy trial.

II. DISCUSSION

A) Did the Delay Between the Time of Thomas' Arraignment and His Sentencing Violate His Right

to a Speedy Trial?

Thomas was arraigned on June 26, 1992. He was not sentenced until September 10, 1993. The time period between these two dates is approximately 439 days. Thomas asserts that this lengthy passage of time violates his rights under both the federal and state constitutions as well as under section 99-17-1 of the Mississippi Code.

We reject Thomas' contention. While the Mississippi Supreme Court has recognized that imposition of sentence is part of trial for the purposes of the constitutional speedy trial protections, *Trotter v. State*, 554 So. 2d 313, 316 (Miss. 1989), we think that for analytical purposes it would be incorrect to begin counting the time of delay from the time of arraignment. Thomas was arraigned on June 26, 1992, and convicted on August 21, 1992. This represents a passage of time of approximately two months. Clearly, he was not denied a speedy trial with respect to the issue of his guilt for the underlying crime. Thus, it makes no sense to measure delay from the time of his arraignment.

To reiterate, Thomas cannot complain about a denial of a speedy trial with respect to the guilt phase of his trial. He was given a speedy trial for this offence. Thomas can, however, complain of the delay that occurred between the time of the jury verdict and the time of his ultimate sentencing, which was too long. Any analysis of whether the delay in his sentencing hearing violated his right to a speedy trial should be measured from the date that the jury found Thomas guilty of the crime of armed robbery.

We also note that this conclusion is supported by Mississippi Supreme Court precedent. While recognizing the holding of *Trotter*, the Mississippi Supreme Court also stated that "[h]abitual offender status is not a crime, in and of itself, but merely a status which, if proven, will enhance the sentence imposed for the conviction of an offense." *Gray v. State*, 605 So. 2d 791, 793 (Miss. 1992). Thus, a determination of habitual offender status is not an "offense" to which the 270-day Rule applies. *Id.*

B) Was the Delay Between Thomas' Conviction and the Time of His Sentencing Violative of His Constitutional Rights?

In *Trotter v. State*, 554 So. 2d at 316, the Mississippi Supreme Court recognized that an unreasonably long period of time between conviction and sentencing can be violative of a criminal defendant's constitutional rights. Adopting the approach used by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Mississippi Supreme Court considered whether a delay of over four years between the time of the entrance of a guilty plea and the defendant's subsequent sentencing violated the defendant's speedy trial rights.

The *Barker* 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. *Id.* "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.'" *Stogner v. State*, 627 So. 2d 815, 818 (Miss. 1993) (citations omitted).

(1) The Length of the Delay

The jury returned its verdict of guilty on August 21, 1992. Thomas was not sentenced until September 10, 1993. The intervening time period represents a delay of approximately twelve and two-thirds months. In view of Mississippi Supreme Court precedent, a delay of this length is presumptively prejudicial. *See Smith v. State*, 550 So. 2d 406, 408 (Miss. 1889) (generally a delay of eight months is presumptively prejudicial). "This factor, alone, [however,] is insufficient for reversal, but requires a close examination of the remaining factors." *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990).

(2) Reason for the Delay

The record reveals that Thomas requested a continuance of his sentencing hearing so that he could acquire evidence relating to his health and life expectancy. This request was made on August 21, 1992. The record reveals, however, that the trial judge, pursuant to the State's request, had planned to set the sentencing hearing on August 29, 1992. Further, the court had instructed the defense to communicate to it when the necessary evidence was received so that it could go forward with the sentencing hearing. The record reveals that this evidence was not available until February 15, 1993, whereupon the hearing was set for February 26, 1993. Thus, the delay from August 29, 1992, to February 26, 1993, nearly six months time, was clearly attributable to Thomas. If a defendant causes the delay, he will not be allowed to complain. *Stogner*, 627 So. 2d at 818. Subtracting the six months chargeable to Thomas from the total time of twelve and two-thirds months, there remains a six and two-thirds month delay.

The State implicitly concedes that the delay from February 26, 1993 until April 12, 1993 was attributable to the fact that the State was not prepared to go ahead with the sentencing hearings due to its negligence or inadvertence. "Negligence causing delay must . . . be weighed against the state, albeit not heavily." *Perry v. State*, 637 So. 2d 871, 875 (Miss. 1994) (citing *Barker*, 407 U.S. at 531.) The remaining period of delay was due to a congested docket. This factor must also be weighed against the State but not as heavily. *Stogner*, 627 So. 2d at 819. Thus, the six and two-thirds months period of delay weighs "lightly" against the State.

(3) Assertion of Right.

The record discloses that on May 17, 1993, Thomas filed a *pro se* petition for writ of habeas corpus challenging the legality of his incarceration. In this filing, Thomas raised as one of his grounds the State's failure to sentence him in a timely manner. Nonetheless, we do not think that his petition was an assertion of the right to be timely sentenced. Thomas was not demanding that his sentencing hearing be held immediately or even soon. Rather, he was asserting that he should be *released* for the failure to sentence him in a timely fashion.

On September 8, 1993, Thomas also filed a motion to dismiss the charges against him for the State's failure to sentence him in a timely manner. However, the sentencing hearing occurred two days later. Again, the motion was not a demand that he be sentenced but instead was a request that he be set free.

In short, we find that between the time that the jury returned a guilty verdict and the time that Thomas' sentencing hearing was held, Thomas never demanded that he be sentenced and therefore never asserted the right. This factor weighs against Thomas.

(4) Prejudice

Presumed prejudice aside, Thomas has not attempted to show us any way in which he was *actually* prejudiced by the delay in sentencing. Nor can we contemplate any. This factor weighs heavily against Thomas.

(5) Conclusion

While it is true that a delay in sentencing of over a year is presumptively prejudicial, we find that the time of delay which was actually attributable to the State was six and two-thirds months. We conclude that this time period was the result of inadvertence and negligence on the part of the State as well as a congested docket on the part of the trial court. Although these two factors weigh against the State, they do not weigh heavily. More importantly, they are outweighed by the fact that Thomas never moved to be sentenced in a timely manner and never made a showing of actual prejudice occurring as a result of the delay. On these facts, and on balance, we conclude that Thomas' speedy trial rights were not violated.

THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT POSSIBILITY OF PAROLE, PROBATION OR EARLY RELEASE IS AFFIRMED. COSTS ARE ASSESSED TO JACKSON COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.