

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01136 COA

TRAVIS WHITE A/K/A TRAVIS ARMSTRONG WHITE

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. BARRY W. FORD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEE COUNTY

ATTORNEYS FOR APPELLANT:

MELVIN C. ELLIS, III

SHELLY NICHOLS ELLIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: LAURA HOGAN TEDDER

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT AND ARMED ROBBERY

**TRIAL COURT DISPOSITION: APPELLANT CONVICTED OF ARMED ROBBERY AND
AGGRAVATED ASSAULT AND SENTENCED TO TWENTY YEARS ON EACH COUNT TO
RUN CONSECUTIVELY**

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Travis White was convicted of armed robbery and aggravated assault. He appeals arguing that the trial court erred in denying his motion to dismiss or in the alternative to quash the indictment because his statutory and constitutional rights to a speedy trial were violated. Finding his arguments without merit, we affirm.

FACTS

White was arrested for aggravated assault and armed robbery on August 27, 1991. He was indicted on these charges along with his co-defendant, Darnell Bumphis, on June 29, 1992. On the day set for trial, June 3, 1993, White had not been appointed counsel and had not been arraigned. We have no record of the proceedings on that date, but White states in his brief that he was arraigned on June 3. He then requested a continuance, but it was denied by the trial court. The trial court also refused to sever the trial to allow Bumphis and White to be tried separately. In order to go forward with Bumphis' trial on that date, the State's motion for a nolle prosequi as to White was granted, which dismissed the indictment without prejudice. On July 19, 1993, White escaped from jail where he was being held on an unrelated charge. On August 23, 1993, White was apprehended in Illinois, and extradited back to Mississippi. Meantime, on August 5, 1993, sixty-three days after the nolle prosequi, White was re-indicted for the armed robbery and aggravated assault. On June 14, 1994, White was arraigned and counsel was appointed. He moved for a continuance of the trial on August 27, 1994. The trial was held on September 7, 1994.

DISCUSSION

White assigns two issues as error in this case. He argues violations of his statutory speedy trial rights under Mississippi Code Section 99-17-1, and of his constitutional speedy trial rights under Article III, § 26 of the Mississippi Constitution of 1890 and the Sixth and Fourteenth Amendments of the United States Constitution.

1. Was the statutory right to speedy trial rule violated?

Mississippi Code Section 99-17-1 provides:

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

White argues that this statutory right was violated in that 646 days passed between the time he was arrested for these crimes and the time he was initially to be tried on June 3, 1993. An additional 460 days passed between that date until his trial on September 7, 1994. He argues that counting only from the time of his arraignment under the second indictment on June 14, 1994 would defeat the purpose of the 270 day statute.

White makes his arguments both under the statutory speedy trial provisions and the constitutional

ones. He in effect urges us to ignore the separate rules governing application of each, and blend all together in some general speedy trial analysis. We reject that encouragement.

What commences the running of the statutory speedy trial right is explicit: a trial shall occur not later than 270 days "after the accused has been arraigned." Miss. Code Ann. § 99-17-1. The Mississippi Supreme Court has applied that language according to its own terms, stating that "[t]he time prior to arraignment is not computed to determine compliance with the statute." *Nations v. State*, 481 So. 2d 760, 761 (Miss. 1985).

If White was arraigned on June 3, 1993 under the first indictment, that indictment was dismissed on that same day. Thus no statutory violation could have occurred. White was arraigned under the second indictment on June 14, 1994, and trial began on September 7, 1994. By the plain language of the statute under which White asserts his claim, there was no speedy trial violation.

The supreme court has dealt with a similar fact situation. It rejected an argument that the date of the arraignment under a dismissed indictment should start the speedy trial calendar. "Even if [the defendant] had been re-indicted on the same offense, the 270 day period would commence on the date of arraignment of the re-indictment." *Corley v. State*, 584 So. 2d 769, 771 (Miss. 1991); citing *Moore v. State*, 556 So. 2d 1031, 1033 (Miss. 1990).

Of course this does not leave a defendant without remedy if a prosecutor has carefully avoided statutory speedy trial violations, but has deliberately engaged in delay. The protection against such acts arises from constitutional provisions. *Barker v. Wingo*, 407 U.S. 514 (1972). *Corley v. State*, 584 So. 2d at 771.

2. Was White's Constitutional right to a speedy trial violated?

The Mississippi supreme court has stated that "for constitutional purposes, the right to a speedy trial attaches and time begins to run with arrest." *Spencer v. State*, 592 So. 2d 1382, 1390 (Miss. 1991). The United States Supreme Court has established a multi-part test to determine whether a constitutional right to a speedy trial has been violated. *Barker v. Wingo*, 407 U.S. at 530. Four factors are to be balanced: (1) length of the delay; (2) reason for the delay; (3) defendant's timely assertion of his right to a speedy trial; and (4) resulting prejudice to the defendant. *Id.*, 407 U.S. at 530. "No mathematical formula exists according to which the Barker weighing and balancing process must be performed. The weight to be given each factor necessarily turns on the quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of nonpersuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered." *McGhee v. State*, 657 So. 2d 799, 801-802 (Miss. 1995). Furthermore, the balancing process is not restricted to the *Barker* factors to the exclusion of any other relevant circumstances. *Id.*

1. Length of the Delay

The Mississippi Supreme Court has stated that "a delay of eight (8) months or more is presumptively prejudicial." *Smith v. State*, 550 So.2d 406, 408 (Miss. 1989). White's Sixth Amendment right to a speedy trial began running on the day he was arrested, which was August 27, 1991. The trial began on September 7, 1994. Although all of this delay is not attributable to the State, more than eight

months of delay are attributable to the State. Some of the delay was caused by White's incarceration for another crime and his subsequent escape from custody of the Lee County Jail. He was captured in Illinois some 35 days later. This time is, of course, attributable to him. Even after discounting the time attributable to White, the delay was presumptively prejudicial. Inquiry into other *Barker* factors is required.

2. Reason for the Delay

The State does not offer a meaningful explanation as to why White was not arraigned or appointed counsel on his first indictment until the time of his first trial, or 646 days after his arrest. The State argues that this court should not begin counting at the time of the initial arrest, but should instead start the count from the second arraignment because the nolle prosequi of the first indictment made the initial charges a nullity and White was no longer "under suspicion". Furthermore, the State argues, should this Court decide to begin its calculation from the dismissal of the indictment, then "the delay which is attributable to the state, although it may be temporarily greater, is less egregious than the delay attributable to the Defendant." The State contends that this is so because of White's deliberate attempt to escape from being tried on this matter at all.

The United States Supreme Court asserted:

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

State v. Magnusen, 646 So. 2d 1275, 1281 (Miss. 1994); (quoting *Barker*, 407 U.S. at 531). The State principally relies on legal arguments, not on explanations. There is no evidence that the delay was purposeful in order to prejudice White, and at worst was negligence. Even so, "[w]here the record is silent, the time is counted against the State." *Handley v. State*, 574 So. 2d 671, 674 (Miss. 1990). The State did not offer meaningful explanations for the various delays and this factor weighs against the State.

3. Defendant's Assertion of His Right to a Speedy Trial

This factor is afforded "strong evidentiary weight." *Spencer* at 1390; (quoting *Barker*, 407 U.S. at 531). White did not assert his right to a speedy trial until his motion to dismiss for failure to provide a speedy trial was filed on September 6, 1994, one day before trial. This motion was overruled. "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Spencer* at 1390; (quoting *Barker*, 407 U.S. at 532). Although the Supreme Court has stated that the defendant has no duty to bring himself to trial, "this does not mean that the defendant has no responsibility to assert his right." *Barker*, 407 U.S. at 528. Therefore, we find that the third factor, which is to be given "strong evidentiary weight," argues against White.

IV. Prejudice to the Defendant

The relevant prejudice is placed in three categories: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; (3) limit on the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532.

The record does not indicate how long White was incarcerated for the crimes at issue in this case. However, the record does reveal that during the period of this delay White was incarcerated for another crime as well as for violation of his parole. White argues that he was prejudiced because so much time had passed without having been appointed counsel and that he had lost all hope of finding witnesses who would be helpful to his defense. This argument was brought up in the lower court. There was no identification or description of any witnesses who might be able to testify in White's behalf.

Since White proved no prejudice by the delay, and because he never seriously asserted his right to a speedy trial until the day before trial, the *Barker* factors weigh against White.

We find no denial of a constitutional right to a speedy trial.

THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY OF CONVICTION OF COUNT I, ARMED ROBBERY, AND COUNT II, AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS FOR EACH COUNT TO RUN CONSECUTIVELY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF APPEAL ASSESSED TO LEE COUNTY.

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