

IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01079 COA

**ALBERT RIVES A/K/A ALBERT W. RIVES A/K/A ALBERT W. RIVES, JR. A/K/A
ALBERT REEVES**

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. WILLIAM COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS FORTNER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY GORE

DISTRICT ATTORNEY: EDWARD PETERS

NATURE OF THE CASE: CRIMINAL

**TRIAL COURT DISPOSITION: RIVES CONVICTED OF AGGRAVATED D.U.I. AND
SENTENCED TO TEN YEARS**

MANDATE ISSUED: 8/5/97

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

SOUTHWICK, J., FOR THE COURT:

Defendant Albert Rives appeals the jury verdict of the Hinds County Circuit Court convicting him of aggravated driving under the influence. On appeal, Rives argues the indictment should have been dismissed because the grand jury considered medical records subpoenaed without his notice, and that he was denied his constitutional right to a speedy trial and due process of law. He also appeals several evidentiary rulings of the court.

Finding no reversible error, we affirm.

FACTS

On February 5, 1991, Defendant Albert Rives and Burnell Course were in an automobile collision at an intersection. Rives sustained only minor injuries, but Course died.

Numerous witnesses testified that Rives ran the red light, that he was visibly intoxicated, slurred his speech, and smelled of alcohol. Witnesses testified that minutes prior to the accident, Rives drove the wrong way down a one way street, ran a stop sign, and otherwise drove recklessly. He was also seen getting out of his car with a can of beer in his hand, and throwing the can at his passenger. At the hospital, Rives told the doctor that he had been drinking whiskey and refused to take the blood alcohol test. The officers testified that he had a strong alcohol odor on his breath, and that he refused a test at the hospital to determine the alcohol content of his blood, and he refused to take a breath test later at the police station.

On April 9, 1991, Rives was charged with aggravated driving under the influence. While Rives was in jail, he met Aaron Spann, who allegedly witnessed the accident and signed an affidavit to the effect that the victim, Course, ran the red light, not Rives. Spann was released from city jail on February 22, 1992. On August 11, 1992, the State dismissed the indictment against Rives by requesting and receiving an order of nolle prosequi. At some stage Spann was at the county penal farm, but was released from there on December 12, 1992. On April 9, 1993, Rives was reindicted for culpable negligence manslaughter.

On June 20, 1994, a trial was held and a jury found Rives guilty of the lesser charge of aggravated driving under the influence. He received a ten year sentence.

I. Medical records considered by jury.

Rives argues that the court erred in denying his motion to dismiss the indictment because the grand jury subpoenaed and considered his medical records without giving him notice. He argues that the grand jury abused the grand jury process and violated his constitutional right against self incrimination. Rives was entitled to receive notice of the subpoena, and that did not occur. However, the rule is well settled by decisions of the Mississippi Supreme Court as well as the United States Supreme Court that indictments are not held open to challenge on the ground that there was

inadequate or incompetent evidence before the grand jury.

[T]he law does not permit the court to go behind an indictment to inquire into the evidence considered by the Grand Jury to determine whether it was in whole or in part competent and legal.

Davis v. State, 255 So. 2d 916, 921 (Miss. 1971), quoting *State v. Matthews*, 218 So. 2d 743, 744 (Miss. 1969), cert. denied by *Davis v. Mississippi*, 409 U.S. 855 (1972).

Rives argues that the statements contained in the records were testimonial and consideration of them without his notice violated his fifth amendment right against self incrimination. The United States Supreme Court addressed a similar argument:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.

Davis, 255 So. 2d at 921, citing *Costello v. U.S.*, 350 U.S. 359, 363 (1956). The Court also stated that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." *Costello*, 350 U.S. at 359.

Rives also argues that since the records were testimonial, that he cannot be forced to testify in front of the grand jury unless he is granted immunity from prosecution. In one case, the defendant testified before the grand jury and asserted that he was immune from prosecution. *Hannah v. State*, 336 So. 2d 1317, 1320 (Miss. 1976), cert. denied *Hannah v. Miss.*, 429 U.S. 1101 (1977). The court overruled the motion because the evidence showed that his testimony was presented to the grand jury the day after the indictment was issued, and the testimony was not the basis of the indictment. The court stated that it adhered to the general rule that it could not go behind an indictment to inquire into evidence considered by a grand jury to determine whether it was in whole or part competent and legal. *Hannah*, 336 So. 2d at 1320.

While in this case the defendant did not testify in front of the grand jury, the medical records were considered along with the wealth of other evidence. The grand jury did not base its indictment solely on the medical records. Consideration of the medical records did not impede Rives' right to have a fair and reliable grand jury in the indictment process.

2. Constitutional Speedy trial rights

Rives argues the court erred in refusing to dismiss the indictment based on a violation of his constitutional right under the Sixth Amendment to a speedy trial. He does not argue that his statutory right under Section 99-17-1 of the Mississippi Code was violated.

Analysis of the constitutional right to a speedy trial involves the application of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The four considerations 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 was prejudiced by the delay. No single factor will be dispositive of the claim, but the Court must consider the totality of the circumstances, including any additional relevant circumstances beyond the four factors. *Johnson v. State*, 666 So. 2d 784, 792 (Miss. 1995). Rives's constitutional right to a speedy trial initially attached at the time of his arrest on February 5, 1991. *Johnson*, 666 So. 2d at 792. However, once Rives's original indictment was dismissed, he was not subject to trial. His Sixth Amendment right to a speedy trial does not now have application to the delay between his initial arrest and dismissal. See *U.S. v. MacDonald*, 456 U.S. 1, 7-8 (1982). We discuss later the due process issues that are relevant. For speedy trial analysis, we begin our review on the day of Rives's reindictment, April 9, 1993.

The first question under *Barker*, the length of the delay, operates as a "triggering mechanism." *Spencer v. State*, 592 So. 2d 1382, 1387 (Miss. 1991). Rives trial began on June 20, 1994. The length of the delay between reindictment and trial was fourteen months. The Mississippi Supreme Court has recognized that a delay of eight months or more is presumptively prejudicial. *Spencer*, 592 So. 2d at 1387. Therefore, we must continue through the *Barker* factors in order to determine the effect on the constitutional right.

The second *Barker* factor is the reason for the delay. The record states that the case was continued five times from reindictment on April 9, 1993 to the trial which began on June 20, 1994. However, the record is not clear as to the reason for each continuance. The judge, in ruling on the defendant's motion to dismiss, stated that the State did not bring about any delay in the matter, and that "all the delay has been at the request of the defense or because of the crowded docket." Rives argues that "the bulk" of the delay was attributable to the State, although he admits the defense did request "occasional" continuances. Neither party specifically addressed the reasons for these continuances. Where the delay is caused by the defendant, the constitutional clock is tolled for that period of time. *Johnson*, 666 So. 2d at 792. While it appears that this factor weighs in favor of the State because the judge stated that the continuances were at the request of the defendant or because of the crowded docket, it is not clear and consequently, this factor will not be weighed heavily.

The third factor is the defendant's assertion of his right to a speedy trial. The defendant argues that his being ready for trial at the time of the nolle prosequi was an assertion of his speedy trial right. This argument fails because our consideration begins at reindictment. Although a defendant is not required to demand a speedy trial, his assertion of such a right will weigh more heavily in his favor under the *Barker* analysis. *Johnson*, 666 So. 2d at 793. Rives filed his Motion to Dismiss on the grounds that his speedy trial rights had been violated in October of 1993, nine months before the trial in June of 1994. This factor weighs in favor of the defendant.

The fourth factor is the prejudice to the defendant. The defendant may be prejudiced by the fact that he has been detained before trial, that he has suffered anxiety as a result of the delay, or that his defense has been impaired by the delay. *Id.* at 793, citing *Spencer v. State*, 592 So. 2d 1382, 1388 (Miss. 1991). Impairment of the defense may occur as a result of a witness disappearing. *Johnson*, 666 So. 2d at 793, citing *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990). Rives argues that he was actually prejudiced by the inability to locate Aaron Spann.

The only evidence regarding Spann that was admitted during the hearing on the motion to dismiss, was that Spann was released from city jail on February 22, 1992. At some stage he was being held at the county penal farm, but was released from there on December 12, 1992. Rives was re-indicted in April 1993. Spann was not in custody at that time, and was last seen at a Jackson charity for homeless people sometime in July, 1993. Thus within sixty days of the new charges being brought, the witness had disappeared. This is not evidence that delay in bringing Rives to trial after the new indictment had anything to do with Spann's unavailability. Sixty days is certainly within the State's permissible time to bring someone to trial after indictment, and no one knew where Spann was after that sixty day period.

Balancing the four factors in light of all the circumstances, Rives was not denied his constitutional right to a speedy trial. While the delay was presumptively prejudicial, the length was contributed to by the defendant. Rives's assertion of his right to a speedy trial weighs in his favor. A witness can disappear whether a delay is long or short. There is no evidence Rives's witness ever would have been available during the period that is relevant for speedy trial purposes, namely, from re-indictment until the actual trial 14 months later. A charity worker saw him, but even then it might have been difficult to secure the witness's attendance at trial. The balance is struck against the defendant's speedy trial claim.

3. Due process issues from dismissal of indictment

Rives also argues that his constitutional due process rights have been violated. Because Rives was not subject to trial after his original indictment was dismissed, any undue delay after the charges were dismissed, like any delay before the charges are filed, must be scrutinized under the due process clause, and not the speedy trial clause. *U.S. v. MacDonald*, 456 U.S. 1, 7-8 (1982); *Speagle v. State*, 390 So. 2d 990, 994 (Miss. 1980).

To prevail in a due process analysis, the defendant must show that the pre-indictment delay was an intentional device used by the government to obtain a tactical advantage over the accused *and* the delay caused actual prejudice to the defendant. *Hooker v. State*, 516 So. 2d 1349, 1351 (Miss. 1987). Rives argues that the State dismissed the case because it did not believe it had enough evidence to convict him, and that as a result of the nolle prosequi, the State was able to pursue further investigation and obtain more witnesses to testify against him at trial. Rives also argues that he was specifically prejudiced because his witness, Aaron Spann, was in custody at the time of the order granting a nolle prosequi on August 11, 1992. Rives was ultimately unable to procure Spann's attendance, who allegedly would have offered testimony exculpating him.

That a defendant must show prejudice *and* prosecutorial misconduct may initially appear unreasonable. In this case Rives argues that a witness disappeared because of the delay, and that such prejudice should be enough. Without determining whether this witness was credible or likely to have an impact on the trial, we merely point out that the case law is clear that prejudice is not enough. There is a statute of limitation that governs the time period that may pass before charges are brought. During that statutory period, regardless of whether one indictment is brought and then dismissed, much can happen that a defendant may want to argue makes evidence harder to procure. Most such arguments are unavailing. What is availing is if one indictment is dismissed as a conscious effort by the State to make the defendant's case presentation more difficult. *United States v. Crouch*, 84 F.3d

1497, 1514 (5th Cir. 1996), cert. denied by *Crouch v. U.S.*, 117 S.Ct. 736 (1997).

It is evident that the prosecutor had by the time of the 1994 trial an impressive array of witnesses who confirmed that Rives ran the red light, and that he exhibited drunken behavior. Rives argues that the State was not nearly as well-prepared prior to the nolle prosequi and the evidence definitely supports that point. The public defender questioned the district attorney at a hearing on the speedy trial issue. The district attorney acknowledged that the case had been dismissed "because of basically a sloppy investigation in reporting by the police department. . . ." He also said that Aaron Spann's story had not been investigated. The district attorney then testified that he had, soon after the nolle prosequi, explained to city council members who were interested in the case, "that we had no proof that would sustain a prosecution. . . ." Subsequently, an investigator was hired that, according to the district attorney, permitted the obtaining of witnesses "who should have been talked to" before, but had not been.

The reasons given by the State for the dismissal fall into the category of not being ready to proceed. At least one of the factors appeared to be the statement acquired from Rive's jail-house friend, Aaron Spann, particularly when that statement was compared to the dearth of strong witnesses for the State. The United States Supreme Court has interpreted the due process protection as barring the State from delaying a trial by dismissing an indictment in bad faith. *McDonald*, 456 U.S. at 7. One court has stated that delay that intends to gain a tactical advantage includes "delay *for the purpose* of rendering unavailable evidence favorable to the defense But it would not include delay to affirmatively strengthen the government's case. . . . : *Crouch*, 84 F. 3d at 1514 (emphasis added). There was no evidence that the State sought the nolle prosequi *in order to* cause Rives' witness to disappear. The State expended considerable efforts to find Spann when the time for trial drew near. The fact that a witness for the defense may be harder to find if a delay occurs is not a due process violation unless the reason for the State's delay was to create that difficulty. We find that even if Rives was prejudiced by the inability to procure the attendance of Aaron Spann, we find no evidence that the dismissal of the indictment was by improper motivation by the prosecutor. Without showing improper prosecutorial motive, Rives was in the same legal position as if no "first" indictment had been brought and only the later indictment had been handed down. Rives's due process claim fails.

4. Admission of blood-alcohol test

Rives argues that it was error to admit into evidence his refusal to submit to a blood alcohol test when he wasn't on trial for D.U.I. He argues that a refusal is admissible if the defendant is charged under implied consent statutes of chapter 63 of the Mississippi Code, but that he was charged with negligence manslaughter under title 97. Rives concedes that the evidence was relevant, but argues that it was marginally relevant and should have been excluded as being more prejudicial than probative.

The supreme court has permitted evidence of a defendant's refusal to take a breathalyzer test under title 63, but also noted that the evidence was admissible under the Mississippi Rules of Evidence. *Ricks v. State*, 611 So. 2d 212, 215 (Miss. 1992). The court in another case allowed the evidence to prove culpable negligence manslaughter:

[I]t is clear that the test results are admissible. Under Rule 401, the blood alcohol content of the defendant goes to the state of the defendant's intoxication, and this is relevant and

probative on the issue of whether the defendant is guilty of criminally culpable negligence. Of course, being intoxicated does not create a prima facie case of culpably negligent manslaughter, but being under the influence is certainly a factor if it can be further established that the intoxication proximately contributed both to the establishment of negligence and to the resulting death. Thus, unless excluded by Rule 403, the evidence was relevant and admissible.

As for Rule 403, the jury was properly instructed that proof of intoxication alone does not constitute manslaughter by culpable negligence. Thus, it seems that the probative value of this evidence is not outweighed by any danger of unfair prejudice, confusion or misleading of the jury. (internal citations omitted)

Whitehurst v. State, 540 So. 2d 1319, 1323 (Miss. 1989). The evidence was admissible under the rules of evidence. It was relevant and its probative value outweighed its prejudicial effect. Moreover, Rives ultimately was convicted not for the offense in the indictment, but for the lesser offense that Rives acknowledges specifically allows use of the blood-alcohol test, aggravated D.U.I..

5. Evidence of Rives's racial slurs

Four witnesses testified at trial that immediately after the accident, Rives shouted to his passenger, "Did you see that nigger run the light?" One witness testified that Rives stated that he was "going to kill all the niggers."

Rives argues the court erred in admitting the racial slurs made by him. He argues the statements were not relevant, were inflammatory, highly prejudicial and violated his state and federal constitutional guarantees to due process of law. The State argues that racial slurs were relevant to show Rives' demeanor at the scene of the accident, his degree of intoxication, and his state of mind with respect to fault.

Even if the evidence was relevant, it was prejudicial beyond just proof of relevant facts. Whether it was more prejudicial than probative and should therefore have been excluded is initially a decision for the trial court. M.R.E. 403. We find that the court did not abuse its discretion.

6. Evidence of erratic driving prior to accident

Rives argues the court erred in admitting evidence that, twenty minutes prior to the accident, a taxi driver saw Rives's station wagon at the corner of Griffith and Mill Streets do a series of "donuts" in the road (drive in circles in the road), then speed down Mill Street where it ran a stop sign. Rives argues this testimony was inadmissible because it was too remote to prove the crime for which he was being tried and there was no evidence to suggest that the reckless driving continued until the time of the accident.

The determination of whether evidence is too remote to be relevant is left to the discretion of the trial judge, and his decision will not be disturbed in the absence of clear proof of abuse of discretion. *Hewlett v. State*, 607 So. 2d 1097, 1104 (Miss. 1992) Generally, a witness may not testify to the manner in which a vehicle was driven at a point distant or remote from the scene of a collision.

Hewlett v. State, 607 So. 2d 1097, 1104 (Miss. 1992), citing *Gray v. State*, 427 So. 2d 1363, 1368 (Miss. 1983). The further the conduct is away from the scene of an accident the less probable that the conduct continued. *Hewlett*, 607 So. 2d at 1104.

Two witnesses testified that Rives' reckless driving continued until the time of the accident. The driver of a JTRAN motor coach testified that moments before the accident, Rives's vehicle almost hit the front of his motor coach. Another witness testified that he saw the defendant's station wagon speeding south, the wrong way down Farish Street, then cross Griffith Street and turn right on Amite where it nearly collided with a bus. Then the witness watched the vehicle accelerate and heard a skid and a "boom," which was the accident.

The judge did not abuse his discretion in admitting the evidence.

7. Evidence of general drinking habits

Rives argues the court erred in allowing testimony of his prior drinking habits. One of Rives's friends was called as a witness to state that Rives did not use racial slurs. On cross-examination the State asked whether the witness had ever seen Rives intoxicated. An objection was made, but it was overruled because the trial court found that this was a "general character" witness. The witness acknowledged that he and Rives had been out drinking together, but also said Rives did not drive after drinking.

Rives argues that this was habit evidence improperly admitted to show that he acted in conformity with such habit on a certain occasion. That sort of evidence is improper under Rule 404. M.R.E. 404(a). An exception is made if it is a "pertinent trait of character offered by an accused, or by the prosecution to rebut the same." M.R.E. 404(a)(1). This witness did not testify for Rives regarding drinking, and thus the State could not try to rebut a trait of character that had not been presented. The evidence should not have been admitted.

"[B]efore error can be predicated at all upon an adverse evidentiary ruling, it must appear that a substantial right of the party is affected." *Jackson v. State*, 594 So. 2d 20, 25 (Miss. 1992). Rives testified that on the day of the accident, he mixed himself a drink of Sprite and Seagrams 7, and that he went to the bar with the intent to drink intoxicants, and that subsequently he was driving his own vehicle. The witness offered exculpatory evidence consistent with Rives's own testimony -- Rives and the witness agreed that Rives drank, and the witness then said Rives would not drive after doing so. We find that the error was harmless.

8. Evidence of victim's driving record

Rives argues the court erred in granting the State's motion in limine to prohibit any evidence of the victim's driving record. He argues evidence that the victim was driving under a suspended license for convictions of traffic violations was relevant and probative to show the victim's tendency to disregard traffic laws, and is admissible on the issue of proximate cause of the accident.

The supreme court has held that this type of evidence is inadmissible for the very reason that Rives argues that it is admissible:

The fact that an automobile is not licensed or the driver was not licensed has no causal

connection to the accident and does not charge the operator with liability. M.R.E. 404(b) provides that evidence of other crimes, wrongs, or acts are not admissible to prove character and that the person acted in conformity with that character, although it is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The evidence of the absence of an inspection sticker on the truck and Hewlett's lack of a driver's license does not show any of these, but implies a character for disregarding traffic regulations. This is prohibited by the evidentiary rule.

Hewlett v. State, 607 So. 2d 1097, 1103. (Miss. 1992). We find that the evidence of the victim's driving record was properly excluded.

THE JUDGEMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED DRIVING UNDER THE INFLUENCE OF INTOXICANTS AND SENTENCE TO 10 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ARE ASSESSED TO HINDS COUNTY.

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

HINKEBEIN, J., NOT PARTICIPATING.