

IN THE COURT OF APPEALS 3/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00491 COA

CONSOLIDATED WITH

NO. 95-KA-00400

TIMOTHY V. MCGRONE A/K/A TIMOTHY VONZELL MCGRONE

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 F. COLEMAN

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HINDS COUNTY

ATTORNEY FOR APPELLANT:

THOMAS FORTNER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: ED PETERS

NATURE OF THE CASE: CRIMINAL: BURGLARY

TRIAL COURT DISPOSITION: APPELLANT CONVICTED OF BURGLARY AND

SENTENCED TO SERVE EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI
DEPARTMENT OF CORRECTIONS.

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

KING, J., FOR THE COURT:

Timothy McGrone was convicted of burglary of a dwelling in the Circuit Court of Hinds County. Aggrieved, McGrone appeals alleging the following points of error: (1) whether the trial court erred in refusing to grant a motion to dismiss because the State violated his statutory right to be tried within two hundred and seventy (270) days of his arraignment; and (2) whether the trial court erred in denying his constitutional right to a speedy trial as required by the Sixth and Fourteenth Amendments of the United States Constitution and Article Three, Section 26 of the Mississippi Constitution.

FACTS

The Appellant, Timothy V. McGrone was arrested for the burglary of a dwelling on January 19, 1993. On April 30, 1993, McGrone waived a formal arraignment and entered a plea of not guilty. Attorney Ron Tillman of the Hinds County Public Defender's Office represented McGrone at this proceeding. Subsequently, the court set a trial date of August 12, 1993. Because of a miscommunication between Tillman and McGrone, the trial did not take place on August 12, 1993. Tillman thought McGrone was prepared to enter a plea, but McGrone declined to do so. Because Tillman had anticipated a plea, he was not prepared to go forward after McGrone's refusal to enter a plea. The court continued the trial until December 10, 1993, but it did not occur due to a second failed plea bargain. There were no orders of continuances in the case file for either of the trial delays. At some point after the first continuance, Tillman withdrew as McGrone's counsel and was replaced by Joseph P. Frascogna also from the Public Defender's Office. Subsequently, the trial was set for March 10, 1994. On March 8, 1994, McGrone, represented by Thomas Fortner from the Public Defender's Office, moved the court to dismiss the case contending the State violated Section 99-17-1 of the Mississippi Code. The trial judge denied the motion and moved forward with the trial.

I.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A MOTION
TO DISMISS BECAUSE THE STATE VIOLATED MCGRONE'S STATUTORY
RIGHT TO BE TRIED WITHIN 270 DAYS OF ARRAIGNMENT.

McGrone contends that the State failed to bring him to trial within 270 days of his waiver of arraignment. He bases this claim of error on section 99-17-1 of the Mississippi Code, which states:

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.

Miss. Code Ann. § 99-17-1 (1972). The accused has no duty to bring himself to trial, and if there is delay, the State has the burden of establishing there was good cause for delay. *Flores v. State*, 574 So. 2d 1314, 1318 (Miss. 1990) (quoting *Reed v. State*, 506 So. 2d 277, 281, (Miss. 1987)).

The record shows that three hundred and fourteen (314) days elapsed between McGrone's arraignment and trial. Within that time, there were two delays. On August 10, the trial court continued the trial set for August 12, because McGrone's counsel was not prepared to go forward after McGrone failed to enter a plea. "[D]elays in bringing a defendant to trial which are caused by continuances granted to a defendant toll the running of the 270-day period and are deducted from the total number of days between arraignment and trial." *Flores v. State*, 574 So. 2d 1314, 1319 (Miss. 1990). The first delay of one hundred and twenty-four (124) days was attributable to McGrone and his counsel and thus, tolled the running of the 270-day period. In December, another failed plea bargain delayed the trial an additional ninety (90) days. This delay too was weighed against McGrone. These delays tolled the statute a total of two hundred and fourteen (214) days; therefore, only one hundred (100) days passed before the State brought McGrone to trial.

Although the trial court granted two continuances, McGrone argues that there is no evidence in the record indicating that the trial court ordered either of the continuances. Our review of the record reveals that no written orders of continuance were entered. However, from Ron Tillman's testimony at the hearing on the motion to dismiss, we gather that Tillman was not prepared to go forward with McGrone's defense on August 12, and the trial judge believed that it would have been a violation of McGrone's right to fair and adequate representation if he had forced him to trial. Hence, the trial was continued until December 10, 1993. In addition to Tillman's testimony, Joseph P. Frascogna testified that McGrone refused a second plea arrangement in December, which caused the court to continue the trial until March 10, 1994. The trial court granted these continuances for the benefit of McGrone and his counsel, and it was the responsibility of his counsel to prepare the orders of continuance. We will not penalize the State for defense counsels' failure to submit the continuance orders to the court. We find that the trial court found good cause to grant McGrone continuances and, therefore, his trial was well within the two hundred and seventy (270) days required by Section 99-17-1.

II.

WHETHER THE STATE VIOLATED MCGRONE'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE THREE, SECTION 26 OF THE MISSISSIPPI CONSTITUTION.

McGrone contends that his constitutional right to a speedy trial was violated. We analyze this claim under the four factors established in *Barker v. Wingo*, 407 U.S. 514 (1972). Those four factors are:

- (1) length of delay;
- (2) reason for delay;
- (3) defendant's assertion of the right to a speedy trial; and
- (4) prejudice to the defendant resulting from the delay.

Barker, 407 U.S. at 533. We cannot consider any one of these factors as dispositive, but must consider all of them collectively in light of all circumstances surrounding the delay. *Flores*, 574 So. 2d at 1322.

1. Length of Delay

In Mississippi, a delay of eight months is presumed prejudicial. *Id.* In the case *sub judice*, almost thirteen (13) months elapsed before the State brought McGrone to trial. Therefore, we weigh the delay in this case heavily in favor of McGrone. *Id.* The record indicates that McGrone was arrested on January 19, 1993. Our supreme court has held that a defendant's constitutional right to a speedy trial attaches at the time of a formal arraignment or information, or upon arrest. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989).

McGrone was tried on March 10, 1994, three hundred and ninety-four (395) days after his arrest. However, as previously discussed, McGrone tolled the ticking of the clock when the court granted him continuances in August and December of 1993. These continuances accounted for two hundred and one (201) days in delay. The delay in trial, attributable to the State, was not excessive. *State v. Magnusen*, 646 So. 2d 1275 (Miss. 1994) (delay of as many as 449 days not enough to establish violation of defendant's constitutional right to speedy trial).

2. Reason for Delay

Delay attributable to State action absent "good cause" is counted against the State. *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990). Nevertheless, delay unintentionally caused by the State will not weigh as heavily against the prosecution as when the delay was intended to hurt the defendant's case. *Jenkins v. State*, 607 So. 2d 1137, 1139 (Miss. 1992). Where the delay is caused by the defendant, he may not later complain. *Jenkins*, 607 So.2d 1139.

In the Defendant's hearing on the motion to dismiss, his first attorney, Ron Tillman, testified that he had negotiated a plea bargain with the State on behalf of McGrone. However, McGrone declined to enter a plea two days before trial to begin. Tillman testified that he was not ready to proceed, and the court set a new trial date of December 10, 1993. McGrone now complains that he had did not agree to any plea bargains at any time, nor was he aware that Tillman had negotiated any on his behalf. Tillman testified that there must have been some miscommunications between himself and McGrone. McGrone argues that since he did not acquiesce to either the plea negotiations or the resulting plea bargain causing the delay, we should not attribute the delay to him. The trial court ruled that it had granted the continuance for McGrone's benefit, and his counsel had the responsibility of preparing and submitting the order of continuance. We agree.

Although McGrone's trial was rescheduled for December 10, 1993, he did not go to trial on that day. By this time Tillman was no longer representing McGrone. He was replaced by Joseph P. Frascogna, also from the Public Defender's Office. Frascogna testified that he had negotiated a plea on behalf of McGrone and had set a plea date. The record does not indicate whether McGrone went to court on the plea date. Frascogna testified that the court granted another continuance and set a new trial date. However, the record does not contain a continuance order. We presume that since McGrone failed to enter a plea that was negotiated by his counsel, it was the responsibility of his counsel to prepare and submit an order of continuance. Again, the delay is attributable to McGrone. He was then brought to trial on the March 10, 1994.

3. Defendant's Assertion of Right to Speedy Trial

The State has the duty to insure that the defendant receives a speedy trial even though the defendant has some responsibility to assert his right. *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991). "Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 531-32. The defendant's failure to ask for a speedy trial is not dispositive, but must be weighed against other factors. *Vickery v. State*, 535 So. 2d 1371, 1377 (Miss. 1988).

In the present case, McGrone did not assert his right to a speedy trial. Even though he filed a motion to dismiss for lack of a speedy trial this is not synonymous with asserting the right. *Adams v. State*, 583 So. 2d 165, 168 (Miss. 1991) (filing motion to dismiss not synonymous with asserting or demanding right to speedy trial). The motion was denied and the case began on March 10, 1994.

4. Prejudice to the Defendant

The final factor that we will consider is the prejudice to McGrone. When we consider whether McGrone was prejudiced by the delay in trial, we weigh his pretrial incarceration, anxiety and concern, and the extent that the defense may have been impaired by the inability to locate witnesses or by failing memory of witnesses. *Barker*, 407 U.S. at 532.

McGrone was arrested on January 19, 1993, but was released on bond. Subsequently, McGrone was re-arrested on March 18, 1993, for failure to appear on some prior charges. Therefore, his pretrial incarceration was not due to the matter for which he was being tried. Where a defendant is incarcerated on totally unrelated charges there is no resulting prejudice based solely on continued incarceration. *Winder v. State*, 640 So. 2d 893, 895 (Miss. 1994). Because we have determined that McGrone caused his trial delay, we also determine that any anxiety or concern that he may have had are also attributable to him as well. Even so McGrone does not allege any anxiety or concern because of the delay in trial, nor does he assert that his defense was impaired because of the delay. Overall Balancing

The *Barker* factors have no magic qualities, and we must weigh them in light of the circumstances. *Barker*, 407 U.S. at 533. Upon a determination that a defendant was denied a speedy trial, the remedy is dismissal of the charges against him. *Perry v. State*, 419 So. 2d 194, 197 (Miss. 1982). Considering the reasons for delay-- the failed plea bargains and defense counsel not prepared to go forward--McGrone was not denied a speedy trial. Therefore, we find his arguments without merit, and we affirm the trial court's judgment.

**THE JUDGMENT OF CONVICTION OF BURGLARY OF A DWELLING OF THE
CIRCUIT COURT OF HINDS COUNTY AND SENTENCE OF EIGHT YEARS IN THE
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.
ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.**

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