

IN THE COURT OF APPEALS 07/02/96
OF THE
STATE OF MISSISSIPPI
NO. 92-KA-00948 COA

COREY DAN MCINNIS

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. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

W.F. HOLDER, II

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY KLINGFUSS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO SERVE 18 YEARS IN THE CUSTODY OF
THE MDOC

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

Corey Dan McInnis was convicted of aggravated assault and ordered to serve eighteen (18) years in the Mississippi Department of Corrections. McInnis now appeals his conviction arguing that he was denied a speedy trial, and that his verdict was against the overwhelming weight of the evidence. McInnis also argues that he was denied a fair trial due to overzealous prosecutorial questioning by the trial judge. Finding that his arguments are without merit, we affirm his conviction and the sentence of the lower court.

STATEMENT OF THE FACTS

On June 22, 1990, Rodney Stapleton was sitting in his car playing his radio when he saw several people gathered on the corner of Mississippi Street and Tyler Street in Gulfport. Stapleton got out of the car to investigate and noticed two young girls fighting. One of the girls was his cousin. The other girl was Danita Street. Stapleton successfully stopped the girls from fighting and told both girls to go home. Stapleton then overheard someone tell Street that they should go get her brother, Corey Dan McInnis.

A few minutes later, McInnis arrived on the scene and asked Stapleton why he was "messaging with his sister." Stapleton replied that he "wasn't messaging with his sister." McInnis then hit Stapleton causing him to stumble back. McInnis reached into his pants, pulled out a gun, and shot Stapleton in the stomach. The bullet went through his stomach, nicked his liver, and lodged within his body.

Stapleton ran to his mother's house a short distance away. While he was running, he heard McInnis shoot at him once again. He also heard two "clicks" or misfires from the gun. When Stapleton reached his mother's house, he was taken to the hospital where surgery was performed to remove the bullet.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER MCINNIS WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A SPEEDY TRIAL.

McInnis first argues that he was denied his constitutionally guaranteed right to a speedy trial based upon the eighteen month period between his arrest and trial. We assess, as we must, the merits of that claim under the standards enunciated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), and subsequently interpreted by the Mississippi Supreme Court in a number of cases. *Barker* lists four primary factors that must be weighed and balanced in each case according to its particular facts:

- (1) The length of delay;
- (2) The reasons for the delay;
- (3) The defendant's assertion of his right to a speedy trial;

(4) Prejudice resulting to the defendant from the delay.

Perry v. State, 637 So. 2d 871, 874 (Miss. 1994).

The first factor is the only one capable of precise calculation and does not require substantial analysis. We begin our analysis with the date of the arrest until the actual date of trial. McInnis was arrested on June 22, 1990, and released on bond June 29, 1990. An affidavit charging him with the crime was filed July 2, 1990. The case was not presented for indictment until the March 1991 term. On March 28, 1991, 278 days after McInnis' arrest, he was indicted. McInnis' trial was set for August 5, 1991, 404 days after his arrest. A delay of this duration is presumptively prejudicial, albeit rebuttably so, and presumptively violative of the accused's right to a speedy trial. See *State v. Ferguson*, 576 So. 2d 1252, 1254 (Miss. 1991) (288 days).

Establishing the length of delay is not sufficient, however, to prove that the delay denied the Defendant a speedy trial. *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990). The second factor, reason for delay, becomes crucial after the length of delay is established to be presumptively prejudicial. McInnis was indicted on March 28, 1991. He waived arraignment on April 30, 1991. The statutory 270 days began to run on that date. Miss. Code Ann. § 99-17-1 (Supp. 1995). The case was set for trial on August 5, 1991.

Approximately 278 days ran from the date of McInnis' arrest and the date of his arraignment. In ruling against McInnis' motion to dismiss, testimony showed that the Harrison County grand jury met only two times per year for eighteen (18) days. Approximately 723 cases were presented at the September session. At that time, the clerk was presenting cases with the oldest date of crime first, or giving priority to cases where the defendant remained incarcerated. McInnis' case did not fall into either category. On November 11, 1991, the court ordered the trial continued due to an overcrowded docket. This is a reason which weighs against the State, but not heavily. *Barker*, 407 U.S. at 531. The delay of indictment was also for good cause, but should be weighed against the State, albeit not heavily. *Stogner v. State*, 627 So. 2d 815, 818 (Miss. 1993).

The third element to consider is whether the Defendant asserted his right to a speedy trial. There is nothing on the record showing that McInnis ever raised the speedy trial issue before his trial. "[F]ailure to assert the [speedy trial] right will make it difficult for a defendant to prove that he was denied a speedy trial." *Stogner*, 627 So. 2d at 819 (quoting *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972)). This factor weighs heavily in favor of the State. *Id.* at 819.

Barker tells us that the most serious element in considering the fourth factor (prejudice to the defendant) is the possibility that the defendant will be impaired by the delay in properly presenting his defense. *Barker*, 407 U.S. at 530. The record reveals nothing that would suggest his defense was hindered by the delay in trial. Apparently no *vital* witnesses were unavailable due to the delays, and no witnesses complained of impaired or faded recollections.

The *Barker* case suggests two other possible factors that could be prejudicial to the defendant. One is the pre-trial incarceration. McInnis was not incarcerated during the period of the delay. The other factor is the need to minimize anxiety and concern to the defendant. McInnis presented no evidence of any particular anxiety arising out of the delay. Neither did he argue that he suffered any prejudice

resulting from the delay. In summary, although a 584-day delay is presumptively prejudicial, and the reason for the delay weighs against the State, McInnis failed to assert his right to a speedy trial and has failed to persuade us that he was materially prejudiced. Therefore, considering the totality of the circumstances, we hold that McInnis' speedy trial right was not violated.

II. WHETHER MCINNIS WAS DENIED A FAIR TRIAL DUE TO OVERZEALOUS PROSECUTORIAL QUESTIONING BY THE TRIAL JUDGE.

McInnis next argues that he was denied a fair trial due to overzealous prosecutorial questioning by the trial judge. He, however, contends in his brief to this Court that the trial court judge was not overly active in his examination of any witnesses. It is well established that a trial court judge has an undoubted right to interrogate witnesses in the interest and for the purpose of developing the truth of the matter at issue. *Griffin v. State*, 156 So. 652, 653 (Miss. 1934). He likewise has discretion to determine when a necessity or propriety therefore exists. *Id.* In the case sub judice, the trial judge questioned Stapleton about the clothes that he was wearing during the argument between him and McInnis. Specifically, the trial judge questioned Stapleton concerning whether his shorts were "baggy" in order to ascertain if he could have been carrying a weapon. We do not find that this line of questioning by the trial judge was overzealous. Accordingly, this issue is without merit.

III. WHETHER THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

McInnis finally argues that the jury verdict was against the weight of the evidence. In considering this issue, this Court must review the evidence in the light most favorable to the verdict. *See Spikes v. State*, 302 So. 2d 250, 251 (Miss. 1974). This Court will reverse a trial court's decision to deny a motion for a JNOV only if it finds that the evidence is insufficient to support the verdict, and that "the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). Moreover, this Court will reverse the trial court's decision to deny a motion for a new trial only if it finds that the trial court abused its discretion. *Wetz*, 503 So. 2d at 812.

Here, the victim, Rodney Stapleton, testified that he broke up a fight between the Defendant's sister and his cousin. A few minutes later, McInnis walked over to Stapleton and started to yell at him. He then hit and shot Stapleton. Two other witnesses testified that they saw this occur. Further, McInnis does not deny shooting or hitting Stapleton. He in fact admits that he shot and hit Stapleton. The only argument McInnis makes is that he shot Stapleton in "self-defense" because he thought Stapleton might shoot him since McInnis had been shot previously. The jury was given a self-defense instruction.

It was the jury's responsibility to evaluate all the evidence presented in this case. After doing so, the jury found McInnis guilty of aggravated assault. This Court finds that the evidence supports McInnis' conviction, and that the trial court did not err or abuse its discretion when it denied his motion for a new trial. Accordingly, this issue is without merit.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF EIGHTEEN (18) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.