

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 2000-KA-01905-COA**

**TERRY FLEMING**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF TRIAL COURT JUDGMENT: 09/22/2000  
TRIAL JUDGE: HON. BOBBY BURT DELAUGHTER  
COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: CHOKWE LUMUMBA  
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: SCOTT STUART  
DISTRICT ATTORNEY: ELEANOR JOHNSON PETERSON  
NATURE OF THE CASE: CRIMINAL - FELONY  
TRIAL COURT DISPOSITION: FOR THE CRIME OF SALE OF COCAINE HE IS SENTENCED TO 30 YEARS AS AN HABITUAL OFFENDER AND THIS SENTENCE SHALL RUN CONSECUTIVELY WITH COUNT 2 OF THIS CAUSE.  
DISPOSITION: AFFIRMED - 03/12/2002  
MOTION FOR REHEARING FILED: 3/25/2002; denied 6/4/2002  
CERTIORARI FILED: 7/8/2002; denied 10/24/2002  
MANDATE ISSUED: 6/25/2002

BEFORE SOUTHWICK, P.J., LEE, AND CHANDLER, JJ.

CHANDLER, J., FOR THE COURT:

¶1. Terry Fleming was convicted in the Hinds County Circuit Court as an habitual offender of sale of cocaine and sale of marijuana and sentenced to terms of thirty and twenty years respectively. The twenty year term to be served consecutively to the thirty year term. He appeals asserting three errors: 1) ineffective assistance of counsel, 2) prosecutorial misconduct, and 3) denial of a speedy trial. Finding no error, we affirm.

**FACTS**

¶2. An undercover policeman with the Jackson, Mississippi Police Department, Detective J. M. Russell,

bought cocaine and marijuana from Tyrone McLaurin, which McLaurin had obtained from Fleming. Russell testified that he was acquainted with both McLaurin and Fleming prior to receiving a phone call from Fleming asking him if he would like to purchase the drugs, and he agreed to meet Fleming and McLaurin. Fleming did not personally attend the purchase. However, Russell tape-recorded the conversation that occurred as he purchased the drugs during which both Russell and McLaurin discussed specific actions that Fleming took in effectuating the sale. During the conversation, Russell and McLaurin disagreed over whether the amount of the cocaine was sufficient to justify the purchase price. Four days after the drug transaction, Russell telephoned Fleming, and this conversation was also tape-recorded. Russell complained about the amount of drugs being less than the amount he expected for the money he had paid. Fleming admitted to the drugs and stated that he suspected McLaurin was stealing from both of them. Fleming suggested that he meet with Russell and exchange more money and drugs.

## DISCUSSION

### I. Ineffective Assistance of Counsel

¶3. Fleming asserts four independent grounds for this assignment of error: a) counsel was ineffective for failing to inform him of a plea offer made by the State; b) counsel was ineffective for failing to raise the issue of an agreement not to prosecute him in exchange for his services as a confidential informant; c) counsel failed to adequately prepare for trial; and d) counsel was ineffective for failing to move for a new trial or in the alternative a judgment notwithstanding the verdict [JNOV]. In viewing this assignment of error, this Court applies the familiar two-part standard which requires a showing that counsel's performance was deficient and because of such performance there exists a sufficient probability that the outcome of the trial would have been different so as "to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990).

#### I. a. Plea Offer

¶4. Fleming was represented by several attorneys in this matter, as he changed attorney three times, eventually returning to the attorney whom he initially retained. Fleming asserts that his counsel failed to inform him of a plea offer. The crux of this issue is a letter that was not made part of the record at trial, but which Fleming included in his pleadings with this Court. The State wrote to Fleming's attorney of record, offering to recommend a sentence of six years to serve, with six more years of post-release supervision, and a \$2,000 fine, in exchange for Fleming's guilty plea. The letter is dated August 30, 1999, but most probably was written shortly after September 1st of that year, as it refers to an order that was entered on that date. At any rate, aside from Fleming's assertion at his sentencing hearing that he was not apprized of this offer, no facts can be found in the record to support this assertion of error.

¶5. While an appellate court will properly address an issue of ineffective assistance on direct appeal, the record must affirmatively show the facts alleged to have resulted in the ineffective assistance. *Reed v. State*, 430 So. 2d 832, 841 (Miss. 1983); *Edwards v. State*, 797 So.2d 1049, 1060 (¶30) (Miss. Ct. App. 2001). In this case, the only evidence in the record bearing upon the issue is Fleming's assertion at his sentencing hearing that he had not been apprized of the offer. The circuit court made no finding as to any fact going to the offer, but stated that the issue should have been raised in a pre-trial hearing. There is insufficient evidence to support this issue on direct appeal. However, post-conviction relief remedies are available to Fleming on this matter. *See, e.g., Reed*, 430 So. 2d at 841.

### **I. b. Agreement Not To Prosecute**

¶6. Fleming asserts that the State offered an agreement not to prosecute the two charges in exchange for his working as a confidential informant. However, the record is devoid of any facts substantiating such an assertion. Fleming contends that it should be obvious that some agreement to not prosecute existed because the record reflects numerous judgments nisi and missed trial dates. Further, the State acknowledged in a pre-trial hearing that Fleming had worked as a confidential informant. However, the mere fact that the record reveals a pattern that might lead to a conclusion that some agreement might have been a possibility is not determinative of whether a final agreement was reached. Even if this Court could assume an agreement outside the record existed, there would be no showing of what the State might actually have offered in return for Fleming's assistance, or whether Fleming did all that might have been required of him.

¶7. To prevail upon an ineffective assistance of counsel claim, an appellant must point to specific facts or occurrences upon which his counsel failed to act. *See, e.g., Bosarge v. State*, 786 So.2d 426, 433 (¶ 7) (Miss. Ct. App. 2001). With no testimony going to the existence of the alleged agreement, Fleming cannot meet the two-part *Strickland* test that counsel's performance was deficient and because of such performance there exists a sufficient probability that the outcome of the trial would have been different so as "to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687.

### **I. c. Counsel's Preparation For Trial.**

¶8. Fleming contends his attorney should have secured a continuance as he had only represented him for three days prior to the trial, and failed to explore defenses, interview witnesses, confer with him, or file any motions. In fact, Fleming's counsel had initially represented him and had obtained at least one continuance prior to Fleming seeking other counsel. Fleming's counsel further asserted the issues of speedy trial at the trial court. Such defense might have been unavailable following a grant of an additional continuance. The facts simply reveal that a police officer testified that Fleming sold drugs to him. Taped conversations supported that testimony. Fleming fails to identify what factual defenses or witnesses were available to him to contradict this evidence. To support an assertion that counsel was ineffective for failure to prepare for trial, an appellant must put forth specific instances of defenses not pursued or witnesses not called. *Burrell v. State*, 727 So.2d 761, 770 (¶ 31) (Miss. Ct. App. 1998). In this case, no such evidence is before the Court, rendering the issue meritless.

#### **1. d. Failure To File Post-Trial Motions.**

¶9. Fleming contends his counsel failed to file motions for a new trial or in the alternative a JNOV. However, at the close of the State's case, Fleming's counsel did in fact move for a directed verdict. The general rule is that a defendant who moves for a directed verdict at the close of the State's case-in-chief and then proceeds to present evidence in his own behalf, but fails to renew his motion for a directed verdict at the close of all the evidence, waives the issue going to the circuit court's refusal of his motion for a directed verdict. *Henley v. State*, 729 So.2d 232, 238 (¶ 27) (Miss. 1998). As Fleming put forth no case of his own, there was no need to preserve the evidentiary issue.

### **II. Prosecutorial Misconduct.**

¶10. Fleming contends that the State had offered an agreement not to prosecute him in return for his performing as a confidential informant, and the subsequent prosecution of this action amounted to

prosecutorial misconduct. The record does not disclose that any agreement was violated. An appellate court is bound by the record, and it cannot presume facts to exist where none are put in evidence. *Rushing v. State*, 711 So.2d 450, 454 (¶11) (Miss. 1998). As such, there is no merit to this argument.

### **III. Speedy Trial.**

¶11. Fleming raises two separate aspects of denial of a speedy trial claim: the constitutional considerations discussed in the United States Supreme Court case of *Barker v. Wingo*, 407 U.S. 514, (1972), and the statutory requirement that his trial occur within 270 days of arraignment, subject to certain exceptions. Miss. Code Ann. § 99-17-1 (Rev. 2000).

#### **III. a. Constitutional Right**

¶12. The Supreme Court identified four factors which are to be considered in ascertaining whether a delay in bringing a defendant to trial violates his rights arising under the Sixth Amendment to the United States Constitution: (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. *Barker*, 407 U.S. at 530-33. Our supreme court has applied the same analysis to the right to a speedy trial arising from Article 3, Section 26 of the Mississippi Constitution of 1890. *Skaggs v. State*, 676 So.2d 897, 900 (Miss.1996); *Noe v. State*, 616 So.2d 298, 300 (Miss.1993). No one factor is dispositive; rather, they must be considered together on a case by case basis. *Barker*, 407 U.S. at 533. Additionally, the *Barker* court stated, "[t]he length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530.

¶13. In this case, there was no question as to the length of delay as four years expired from Fleming's indictment until his trial. The circuit court applied the *Barker* analysis to the following relevant facts of the case. The circuit court found that the majority of the continuances were granted at Fleming's request, or delays were encountered because he was unrepresented, because he was in the midst of a change in attorneys, or because Fleming was physically unavailable. Fleming had not asserted his right to a speedy trial at any time before filing the motion to dismiss based on this assertion. The circuit court found there was no showing of any prejudice from the delay.

¶14. The circuit court applied the correct legal analysis to the issue of Fleming's constitutional right to a speedy trial. Nevertheless, Fleming asserts that the circuit court erred in applying the facts of this particular case. Fleming failed to designate as part of the record the court files containing bench warrants, bond forfeitures, motions for continuance and other material relied upon by the circuit court. The determination of *Barker* factors is a factual determination that is made on "a case by case basis." *Birkley v. State*, 750 So.2d 1245, 1253 (¶30) (Miss. 1999). Therefore, this Court is in no position to hold the circuit court in error as to the finding that the "majority of the delay has been either at the specific request of the defendant, through his various attorneys, or as a result of the defendant not being in position to go to trial because of him being unavailable." A failure to present a full record to support assertions of error is to leave "unrebutted" the presumption of correctness attaching to a trial courts ruling. *Smith v. State*, 572 So.2d 847, 849 (Miss. 1990); *Taylor v. State*, 744 So.2d 306, 315 (¶32) (Miss. Ct. App. 1999). Consequently, the circuit court's rulings as to the reasons for the delay and Fleming's failure to assert his speedy trial right cannot be disturbed. Moreover, even assuming Fleming had properly designated the record, he made no showing of prejudice either at trial or in his brief before this Court. Therefore, this issue

is without merit.

### **III. b. Statutory Right**

¶15. The statutory right to a speedy trial requires that a defendant be brought to trial within 270 days of his arraignment unless good cause is shown. Miss. Code Ann. § 99-17-1 (Rev. 2000). In ascertaining whether good cause is present in an individual case, a trial court must make a fact specific inquiry into what delays are attributable to the defense, such as requested continuances, and which may be excused for other good cause, such as congested trial dockets. *See Walton v. State*, 678 So.2d 645, 648 (Miss. 1996); *Baine v. State*, 604 So.2d 258, 264 (Miss. 1992).

¶16. In this case, the circuit court found that the delay was attributable to Fleming's own actions in requesting delays and in absenting himself from court. Fleming failed to designate the portions of the record upon which the circuit court relied. This Court cannot presume error absent the record. *Smith v. State*, 572 So.2d at 849; *Taylor v. State*, 744 So.2d at 315 (¶32). Therefore, this issue is without merit.

**¶17. THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I SALE OF COCAINE AND SENTENCE OF 30 YEARS AS AN HABITUAL OFFENDER; COUNT II SALE OF MARIJUANA AND SENTENCE OF 20 YEARS AS AN HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCES TO RUN CONSECUTIVELY TO EACH OTHER AND FINE OF \$5,000 IS AFFIRMED. THE APPELLANT IS ASSESSED ALL COSTS OF THIS APPEAL.**

**McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, THOMAS, LEE, MYERS AND BRANTLEY, JJ., CONCUR. IRVING, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION.**