

IN THE COURT OF APPEALS 2/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00317 COA

WILLIE LEE TOLIVER

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: HOLMES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WHITMAN D. MOUNGER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: CHARLES C. HEDGEPEETH

NATURE OF THE CASE: POSSESSION OF COCAINE--ENHANCED PENALTY

TRIAL COURT DISPOSITION: SENTENCED TO FOUR (4) YEARS- THREE YEARS
SUSPENDED, ONE YEAR TO SERVE IN THE CUSTODY OF THE MDOC; ORDERED TO
ENROLL IN A DRUG REHABILITATION PROGRAM AND TO PAY A FINE OF \$2,000.00
AND COURT COSTS.

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Willie Lee Toliver was convicted for the possession of cocaine. On appeal, Toliver alleges the following errors: (1) the trial court erred in denying his motion to suppress evidence, and (2) the trial court erred in denying his motion to dismiss for failure to grant a speedy trial. Finding no error, we affirm.

FACTS

On July 14, 1993, around 10:20 p.m., Officers Al Jobe and Howard Henderson were investigating an unrelated crime at the Black Gold Lounge, which was located in an area where burglaries occurred and where drug activity took place. The Lounge and all other businesses in the immediate vicinity were closed. As the owner of the Lounge let the officers in the front door, the officers noticed two individuals, one of whom was Toliver, walking away from the glass back door leading into an alley.

Officer Jobe stated that he knew Toliver and knew that Toliver had pulled a weapon on other officers during a previous arrest. Officer Jobe had also previously arrested Toliver, during which Toliver had attempted to flee and, upon being caught, had fought with the arresting officers.

The officers followed the men in their patrol car for about one block before exiting the patrol car and confronting the men. Jobe testified that he asked the men to stop, and Toliver began acting very "nervous." Based upon his previous dealings with Toliver, Officer Jobe asked Toliver to place his hands on the hood of the car. Toliver protested, stating "you'll have to have a search warrant to check me." At this time, Officer Jobe took Toliver by the arm. Toliver immediately began struggling to escape. As Officer Jobe held Toliver, he felt something on his arm, which he saw was blood. Jobe then noticed that there was something in Toliver's shirt pocket. Jobe managed to subdue and handcuff Toliver.

Officer Jobe saw a part of a razor blade protruding from Toliver's shirt pocket. When Jobe reached into Toliver's pocket to remove the weapon, he also removed a pack of cigarettes that were on top of the razor blade. When Jobe checked the pack for other razor blades, he saw a substance which he thought was crack cocaine. At that time, Officer Jobe placed Toliver under arrest.

ANALYSIS

I. WAS THERE A CONSTITUTIONALLY SUFFICIENT BASIS FOR THE STOP OF TOLIVER?

Toliver contends that he was denied his rights under the Fourth Amendment of the United States Constitution and Article III, Section 23 of the Mississippi Constitution since the officers did not have probable cause to stop him. Toliver also argues that the search cannot be justified under the "stop and

frisk" rationale of *Terry v. Ohio*, 392 U.S. 1 (1968).

The issue in the instant case is whether the conduct of the officers was a valid "stop and frisk" detention. Such a determination is made based on the facts of each individual case. *Penick v. State*, 440 So. 2d 547, 550 (Miss. 1983). Police officers may detain an individual without making an actual arrest for the purpose of an investigative stop. *Floyd v. State*, 500 So. 2d 989, 991 (Miss. 1986), *cert. denied*, 484 U.S. 816 (1987); *McCray v. State*, 486 So. 2d 1247, 1249 (Miss. 1986). In order to justify such a stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

An investigative stop may properly be made without probable cause to arrest if the officer has a "reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony . . . or some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity' . . ." *McCray*, 486 So. 2d at 1249-50 (citations omitted). However, such a stop must be limited in scope. If the stop exceeds the scope of an investigative stop, there must be probable cause for arrest. *Floyd*, 500 So. 2d at 992; *McCray*, 486 So. 2d at 1250.

This case is closely analogous to *Terry*, in which a detective approached three individuals and engaged them in conversation. After receiving only a mumbled response, the detective grabbed Terry and proceeded to "frisk" his outer clothing. The Supreme Court found that the detective had a reasonable reason and authority to stop the individuals to ask a few questions and to make a limited search for weapons to protect himself. The Court stated:

[o]ur evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27. The *Terry* Court further held that any officer in reasonable fear for his safety may then conduct a limited search of the individual's outer clothing for any weapons. *Id.* at 30.

There is sufficient evidence in the record to show that Officer Jobe had a reasonable suspicion that Toliver was engaged in or was about to be engaged in some type of criminal activity in order to make the initial stop. There is also sufficient evidence to show that Officer Jobe, while reasonably fearful for his own personal safety and the safety of his fellow officers, conducted only a limited search for weapons. There was no error in the trial court's denial of the motion to suppress.

II. WAS TOLIVER DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL?

Toliver was arrested on July 14, 1993. The seized cocaine was submitted to the state crime lab on

September 1, 1993. The lab results were returned in July 1994. On December 9, 1994, Toliver was indicted by the Holmes County Grand Jury. He was arraigned on February 6, 1995, and the case was set for trial on March 2, 1995. On the day before trial, Toliver filed a motion *ore tenus* to dismiss for failure to grant a speedy trial.

The right to a speedy trial attaches "at the time of a formal indictment or information or else the actual restraints imposed by arrest and holding to a criminal charge." *Handley v. State*, 574 So. 2d 671, 674 (Miss. 1990); *Lightsey v. State*, 493 So. 2d 375, 378 (Miss. 1986).

Once the right has attached, this Court must evaluate the delay under the balancing test provided in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The *Barker* factors are as follows: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id.*; *see also Jaco v. State*, 574 So. 2d 625, 630 (Miss. 1990).

A. The Length of the Delay

Under Mississippi law, a delay of eight months or longer is presumptively prejudicial. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989) (citations omitted). The delay between Toliver's arrest and trial is approximately 594 days. This delay is presumptively prejudicial and triggers a review of the remaining *Barker* factors.

B. Reason for the Delay

The State has shown that there were several reasons for the delay. First, the state crime lab did not return the results of the drug test on the cocaine until July of 1994, one year after the arrest. Following its policy, the District Attorney's Office did not begin to seek an indictment until receipt of the lab tests. Second, at the next meeting of the Holmes County Grand Jury in August 1994, the grand jury only met for the limited purpose of dealing with incarcerated prisoners. Since Toliver was not incarcerated, the grand jury did not take up his case. Third, around this time, Holmes County was moved to a new circuit court district. Toliver was indicted at the next session of the grand jury in December 1994.

A deliberate attempt to delay the trial is weighed heavily against the State. However, more neutral reasons such as negligence, overcrowded courts and an overworked crime lab should not be weighed as heavily against the State. *See, e.g., Barker*, 407 U.S. at 531; *State v. Magnusen*, 646 So. 2d 1275, 1281-82 (Miss. 1994). Since the bulk of the delay was caused by these neutral reasons, this factor weighs only slightly in favor of Toliver.

C. Defendant's Assertion of his Right

Toliver never requested a speedy trial, and he waited until the day before trial to make a motion *ore tenus* for dismissal. The demand for dismissal on this basis is not the equivalent of a demand for a speedy trial. *Adams v. State*, 583 So. 2d 165, 169-170 (Miss. 1991). Further, a demand for dismissal made after the entire period of delay has elapsed is insufficient to weigh this factor in favor of Toliver. *Id.* Since Toliver waited until the very day before trial to assert this right, this factor weighs against him.

D. Prejudice

Toliver must show some prejudice in order to prove a constitutional speedy trial violation. *Magnusen*, 646 So. 2d at 1284. Prejudice to the Appellant encompasses interference with his liberty and actual prejudice in defending his case. *Id.* Toliver, who was not incarcerated during the delay, admitted that he suffered no actual prejudice as a result of the delay. Since there was presumptive prejudice only, this factor weighs heavily in favor of the State. *Id.* After balancing all of the *Barker* factors, this Court finds that Toliver's right to a speedy trial was not violated.

THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT OF CONVICTION FOR POSSESSION OF COCAINE AND SENTENCE TO FOUR (4) YEARS

IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, THREE YEARS OF WHICH IS SUSPENDED, AND PAYMENT OF A FINE OF \$2,000.00 IS AFFIRMED. ALL COSTS ASSESSED TO HOLMES COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.