

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00439 COA

JOHNNY BLAKENEY A/K/A JOHNNY E. BLAKEY A/K/A JOHNNY EVAUGHN BLAKENEY,
JR.

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. JOHN B. TONEY

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM O. TOWNSEND

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III DISTRICT ATTORNEY: JIM KELLY

NATURE OF THE CASE: ROBBERY WITH A DEADLY WEAPON

TRIAL COURT DISPOSITION: CONVICTION OF ROBBERY WITH A DEADLY WEAPON,
SENTENCED TO SERVE LIFE IN THE MDOC; SENTENCE NOT SUBJECT TO
POSSIBILITY OF PAROLE, PROBATION OR OTHER REDUCTION

MOTION FOR REHEARING FILED: 6/3/97

MANDATE ISSUED: 8/5/97 BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

Johnny Blakeney appeals his conviction of robbery with a deadly weapon, raising the following issues as error:

I. DID THE COURT ERR IN NOT DISMISSING THE INDICTMENT BECAUSE THE APPELLANT WAS NOT GRANTED A SPEEDY TRIAL?

II. DID THE COURT ERR IN NOT GRANTING THE APPELLANT A MISTRIAL?

III. WAS THE VERDICT OF THE JURY CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

IV. DID THE COURT ERR IN NOT GRANTING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT?

V. DID THE COURT ERR IN NOT GRANTING THE APPELLANT'S JURY INSTRUCTION NO. D-1?

VI. WAS THE SENTENCE OF COURT TOO SEVERE WHEN THE COURT HAD THE AUTHORITY TO IMPOSE A LESS SEVERE SENTENCE?

VII. DID THE COURT ERR IN NOT GRANTING THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL?

Finding no error, we affirm.

FACTS

On March 20, 1993, at around 1:00 p.m., Johnny Blakeney (Blakeney) entered Marty's Pharmacy in Flowood, Mississippi. Blakeney brandished a pistol and demanded from four workers that they give him the store's narcotics. As Blakeney held the pistol to the head of one of the workers, they took him to the laboratory where the narcotics were kept. Upon entering the laboratory, Blakeney ordered Marty Jones (Jones), the owner, to give him all the store's Dilaudid. Jones went to the locker where the narcotics were kept and handed Blakeney one or two bottles, and then Blakeney reached and got the rest out by himself. After Blakeney had gotten the narcotics, he then started to direct all the workers to give him their car keys. Once he got the keys from one worker, Brian Bagwell (Bagwell), he left in Bagwell's truck.

After ascertaining all the relevant information, Officer Johnny Dewitt called several different agencies in the Jackson area and advised them that there had been an armed robbery of a drug store and to be on the lookout for anybody with a large quantity of Dilaudid. Later on the evening of the robbery, Officer Dewitt received a tip that Blakeney and his wife were selling Dilaudid at the Krystal near the Metro Center Mall in Jackson, Mississippi. After observing Blakeney and his wife in the parking lot, the officer approached and discovered a large bag of what appeared to be narcotics in the car of Blakeney. Blakeney was arrested. After that, Officer Dewitt obtained a search warrant for Blakeney's

residence. Upon conducting the search, the officers found a small caliber pistol at Blakeney's residence and found some clothing that appeared to match the description of what the witnesses described that the suspect wore during the robbery.

Thereafter, Officer Dewitt called the five witnesses and showed them a photographic lineup. Each witness picked Blakeney out of the lineup.

On May 21, 1993, Blakeney was indicted for committing two counts of armed robbery as an habitual offender. Before the trial, Blakeney moved to sever the two counts in the indictment and the court granted the motion.

Blakeney was tried on March 30, 1994, and the jury returned a verdict of guilty of committing the offense of armed robbery. A separate hearing was held to determine whether the lower court should sentence Blakeney as a violent habitual offender under Mississippi Code Annotated Section 99-19-83. After testimony was presented about Blakeney's criminal record and ten prior convictions, the lower court sentenced Blakeney to serve a term of life imprisonment without parole.

ANALYSIS

I.

DID THE COURT ERR IN NOT DISMISSING THE INDICTMENT BECAUSE THE APPELLANT WAS NOT GRANTED A SPEEDY TRIAL?

On the morning of trial, defense counsel made an ore tenus motion that Blakeney had not been awarded a speedy trial. The court denied this motion. Blakeney, through his counsel, argues that this was reversible error by the lower court.

In Blakeney's submitted brief, he combines the constitutional right to speedy trial and the State's speedy trial statute, Mississippi Code Annotated Section 99-17-1. The constitutional right exists separately from the statutory right to a speedy trial. *Bailey v. State*, 463 So. 2d 1059, 1062 (Miss. 1985); *Perry v. State*, 419 So. 2d 194, 198 (Miss. 1982). This Court and the Mississippi Supreme Court conduct a separate analysis of each consideration because the statutory right to a speedy trial attaches at a different period than the constitutional right.

The Sixth Amendment to the United States Constitution and Article 3, 26 of the Mississippi Constitution of 1890 both guarantee that "[i]n all criminal prosecutions the accused shall have a right to . . . a speedy and public trial." Blakeney's *constitutional guarantee to a speedy trial attached at the time he was arrested*. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989); *Bailey v. State*, 463 So. 2d 1059, 1062 (Miss. 1985); *Perry v. State*, 419 So. 2d 194, 198 (Miss. 1982). Our speedy trial statute states "[u]nless good cause is 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 (1994) (emphasis added).

A. STATUTORY RIGHT TO A SPEEDY TRIAL

Blakeney's counsel does not include the date of arraignment in his submitted brief nor does he point this Court to that date in the record. Absent a record in support of an assignment of error, this Court need not consider the assignment. *Ross v. State*, 603 So. 2d 857, 861 (Miss. 1992); *Campbell v. State*, 580 So. 2d 1312, 1316 (Miss. 1991); *Jenkins v. State*, 483 So. 2d 1330, 1332-33 (Miss. 1986). Thus, Blakeney is procedurally barred from asserting his statutory right to a speedy trial. Notwithstanding this procedural bar, as best as this Court can tell, an arraignment, or a waiver of arraignment, might have been held on July 30, 1993. Blakeney's trial was held on March 30, 1994. This is a period of 243 days, well within the 270 days mandated by statute.

B. CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

Counsel for Blakeney did include for this Court's consideration the date Blakeney was arrested, the time the constitutional right to a speedy trial attaches. Blakeney was arrested on March 20, 1993 and brought to trial on March 30, 1994. This is 375 days. Once the constitutional right has attached, this Court will follow the test laid out by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 515 (1972), for the determination of a violation of the right to a speedy trial. The balancing test promulgated by the Court in *Barker* is: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant has been prejudiced by the delay. *Id.* at 533.

1. Length of the Delay

This first factor under *Barker* operates as a "triggering mechanism." *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989). The Mississippi Supreme Court in *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989) held "that any delay of eight (8) months or longer is presumptively prejudicial." However, "[t]his factor, alone, is insufficient for reversal, but requires a close examination of the remaining factors." *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990).

In *Handley*, the Court held that where the record is silent, we count the time against the State. *Handley*, 574 So. 2d at 674 (citing *Vickery v. State*, 535 So. 2d 1371, 1375, 1377 (Miss. 1988)). So, for Blakeney, a 375-day delay is presumptively prejudicial, and inquiry into the other *Barker* factors is required.

2. Reason for the delay

"The State bears the risk of non-persuasion regarding the reasons for delay and must show whether that the defendant caused the delay or that good cause existed for the delay." *Fleming v. State*, 604 So. 2d 280, 299 (Miss. 1992) (citing *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991)). "[W]here the record is silent regarding the reason for delay, as the record is silent here, the clock ticks against the state because the State bears the risk of non-persuasion on the good cause issue." *Vickery v. State*, 535 So. 2d 1371, 1375 (Miss. 1988). Neither Blakeney nor the State gives any reasons for the delay. The State's submitted brief on this issue is less than half a page. After close scrutiny of the record, we have determined that the lower court granted a continuance on October 15, 1993, and entered it into the docket. The docket does not show who the lower court granted the continuance for nor who requested the same. We cannot engage in conjecture on this matter. Since the State bears the burden of persuasion on this factor and neither party gave reasons for the delay, this factor will weigh against the State.

3. Whether the defendant asserted his right to a speedy trial

The record reflects that Blakeney did not attempt to assert his right to a speedy trial until the date of trial when an ore tenus motion was made. Since Blakeney did assert his right to a speedy trial, this factor favors the State.

4. Whether the defendant has been prejudiced by the delay

An accused must show prejudice before he may effectively argue that the State has violated his right to a speedy trial. "Prejudice is assessed in light of the interest of the defendant which the right to a speedy trial is designed to protect: 1) prevention of oppressive pre-trial incarceration 2) minimization of anxiety and concern of the accused and 3) limitation of the possibility of impairment of defense." *Vickery*, 535 So. 2d at 1377. The fact that Blakeney was already incarcerated takes out the first part of this analysis.

Blakeney does not attempt to show this Court what extra anxiety or concern he experienced due to any delay in his being brought to trial, foreclosing the second part of this analysis, and again, Blakeney does not attempt to show any particularized prejudice, and none is self-evident from the record, taking out the third part. *Hurns v. State*, 616 So. 2d 313, 318 (Miss. 1993). After a balancing of the *Barker* factors, the Court finds that the State clearly did not violate Blakeney's right to a speedy trial.

II.

DID THE COURT ERR IN NOT GRANTING THE APPELLANT A MISTRIAL?

Before the beginning of the trial, a hearing was held on Blakeney's motion to sever Count I and Count II of his indictment. The trial court granted the severance and announced that only Count I of the indictment, the armed robbery of Marty's Pharmacy, would be tried. The second count of the indictment dealt with Blakeney's armed robbery of an automobile owned by Brian Bagwell, one of the workers at Marty's Pharmacy. The trial court ruled that the State should not mention evidence of the robbery of the automobile; however, it ruled that Bagwell would not be precluded from testifying about what he observed as an eyewitness to the armed robbery of Marty's Pharmacy.

Blakeney's motion for mistrial was made during the testimony of the investigating officer, Detective Johnny Dewitt of the Flowood Police Department. Dewitt testified that he arrived at the pharmacy, learned it had been robbed, and talked to the people there. The State then asked him what if anything he had done or directed to be done to obtain physical evidence at the scene, and he answered, "I had Officer Mickey Young--there was a car stolen during the robbery." Upon Dewitt making the statement about a car being stolen, Blakeney moved the court for a mistrial.

In denying the motion for a mistrial, the court stated:

Now, there has been an order allowing the motion for the severance; so the two cases are not being tried together. However, the facts do overlap; and in some respects, that's going to be unavoidable.

I think part of what the officer did when he got there, and some of the eyewitness testimony that we expect to hear from the pretrial discussions, was about this person who voluntarily or involuntarily gave his car keys to the Defendant so that they could make his getaway.

I don't know how you can talk about that and not talk about the fact that a car was used for him to leave the scene. I think that's just part and parcel with relevant evidence that goes to whether or not the Defendant committed the crime of robbery.

Evidence of another crime is admissible when the two crimes are "so clearly interrelated to the crime charged as to form a single transaction or closely related series of transactions." *Mackbee v. State*, 575 So. 2d 16, 27 (Miss. 1990) (citations omitted). "[T]he State has a 'legitimate interest in telling a rational and coherent story of what happened. . . .' Where substantially necessary to present to the jury 'the complete story of the crime' evidence or testimony may be given even though it may reveal or suggest other crimes." *Mackbee*, 575 So. 2d at 28 (quoting *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986)). Blakeney's second assignment of error is without merit.

III.

WAS THE VERDICT OF THE JURY CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Blakeney argues that the jury's verdict was against the overwhelming weight of the evidence and contrary to the law.

When reviewing a jury verdict of guilty we are required to accept as true all the evidence favorable to the State, together with reasonable inferences arising therefrom, to disregard the evidence favorable to the defendant, and if such will support a verdict of guilty beyond reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, then the jury verdict shall not be disturbed.

Montgomery v. State, 515 So. 2d 845, 848 (Miss. 1987) (citing *Hester v. State*, 463 So. 2d 1087, 1091 (Miss. 1985); *Carroll v. State*, 396 So. 2d 1033, 1035 (Miss. 1981)).

We will not order a new trial unless this Court is convinced that "the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Noe v. State*, 628 So. 2d 1368, 1369 (Miss. 1993) (quoting *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987)).

Looking at the trial, the State produced credible evidence to justify the jury in finding that all of the elements of armed robbery had been proven. Eyewitnesses identified Blakeney in a photographic lineup. In court, three eyewitnesses unequivocally identified Blakeney as the robber. There was no evidence opposing the verdict and there was no basis for the trial court to have set the jury's verdict aside. Under the facts here the jury's verdict was clearly not against the overwhelming weight of the evidence. We find this issue to be without merit.

IV.

DID THE COURT ERR IN NOT GRANTING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT?

In *Barker v. State*, 463 So. 2d 1080 (Miss. 1985), the Mississippi Supreme Court established the test for determining whether the lower court should grant a motion for a directed verdict. The court explained:

In passing upon a motion for directed verdict or peremptory instruction, courts must assume that all evidence for the State is true and that all reasonable inferences that may be drawn from the evidence are true and, if from all the testimony there is enough in the record to support a verdict, the motion should be overruled.

Barker, 463 So. 2d at 1082 (citing *Warn v. State*, 349 So. 2d 1055 (Miss. 1977); *Rich v. State*, 322 So. 2d 468 (Miss. 1975); *Roberson v. State*, 257 So. 2d 505 (Miss. 1972)).

This Court must give the State the benefit of all reasonable inferences. If reasonable and fair-minded jurors could have reached different conclusions, then the denial of a motion for directed verdict was proper. Because there was ample evidence before the jury to support a conviction, there was no error in the denial of Blakeney's motion.

V.

DID THE COURT ERR IN NOT GRANTING THE APPELLANT'S JURY INSTRUCTION NO. D-1?

The next assignment of error is the refusal of Blakeney's peremptory instruction. The standard of review when looking toward the propriety of a peremptory instruction, "requires that the prosecution's evidence be taken as true, together with all reasonable inferences that may be drawn from that evidence, and if the evidence is sufficient to support the guilty verdict, then the motion[] [was] properly overruled by the trial court." *Strong v. State*, 600 So. 2d 199, 201 (Miss. 1992) (citing *Lewis v. State*, 573 So. 2d 713, 714 (Miss. 1990)); *Edwards v. State*, 615 So. 2d 590, 594 (Miss. 1993); *Rogers v. State*, 599 So. 2d 930, 934 (Miss. 1992)). "Where an instruction is not supported by evidence, it should not be given." *Rogers*, 599 So. 2d at 934 (citations omitted). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989).

There was an abundance of evidence to present to the jury, which would make the peremptory instruction put forth by the defense invalid. Under the appropriate standard of review and based on the above facts, Blakeney was not entitled to a peremptory instruction. The lower court was proper in overruling the requested instruction.

VI.

WAS THE SENTENCE OF COURT TOO SEVERE WHEN THE COURT HAD THE AUTHORITY TO IMPOSE A LESS SEVERE SENTENCE?

After the jury returned the verdict finding Blakeney guilty, a hearing was held to decide what punishment the lower court should give. The State sought to have Blakeney convicted under Mississippi Code Annotated Section 99-19-83, which allows for the sentencing of habitual criminals to life imprisonment without the possibility of parole or probation. This section states:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Ann Evans, a record technical supervisor for the Mississippi Department of Corrections, testified for the State. The Departments of Corrections records reveal:

The first record of conviction for Blakeney was from Hinds County, Mississippi for possession of marijuana, on November 18, 1974, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The second record of conviction was from Lauderdale County, Mississippi for the crime of business burglary, on November 18, 1974, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The third record of conviction was from Lauderdale County, Mississippi for the crime of armed robbery, on October 8, 1981, and he was sentenced to serve fifteen years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The fourth record of conviction was from Hinds County, Mississippi for the crime of possession of a controlled substance, on June 19, 1989, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The fifth record of conviction was from Hinds County, Mississippi for the crime of possession of a controlled substance, on June 19, 1989, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The sixth record of conviction was from Hinds County, Mississippi for the crime of possession of a controlled substance, on June 19, 1989, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The seventh record of conviction was from Hinds County, Mississippi for the crime of possession of a controlled substance, on June 19, 1989, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The eighth record of conviction was from Hinds County, Mississippi for the crime of business burglary, on June 19, 1989, and he was sentenced to serve seven years in the custody of the Mississippi Department of Corrections and served over one year in prison.

The ninth record of conviction was from Hinds County, Mississippi for the crime of armed robbery, on June 19, 1989, and he was sentenced to serve eight years, two months, twelve days in the custody of the Mississippi Department of Corrections and served over one year in prison.

The tenth record of conviction was from Hinds County, Mississippi for the crime of possession of a controlled substance, on June 19, 1989, and he was sentenced to serve three years in the custody of the Mississippi Department of Corrections and served over one year in prison.

After the presentation of all the evidence, the trial judge sentenced Blakeney to life imprisonment without the possibility of parole or probation. Blakeney contends that this sentence is disproportionate. However, Blakeney did not raise this issue in the trial court and cannot raise it initially on appeal. *Hewlett v. State*, 607 So. 2d 1097, 1107 (Miss. 1992).

Notwithstanding this procedural bar, a review of the evidence presented at the sentencing hearing clearly shows that there was no disproportionality in this sentence. This last conviction for Blakeney was his eleventh felony. Most of Blakeney's convictions dealt with possession of drugs and the intent to sell these drugs. However, two of Blakeney's prior convictions were for armed robbery. This last conviction was Blakeney's third armed robbery by use of a firearm under circumstances endangering the lives of several people. It is clear from Blakeney's extensive record of prior felony convictions that his time had come. Since the State proved all of the requirements of Mississippi Code Annotated Section 99-19-83 beyond a reasonable doubt, we cannot say that Blakeney's sentence is disproportionate to the crimes he has committed.

VII.

DID THE COURT ERR IN NOT GRANTING THE APPELLANT'S MOTION FOR A JUDGMENT NOT WITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL?

The rules applicable to a motion for judgment notwithstanding the verdict are substantially the same as those applicable to a motion for directed verdict based upon the insufficiency of the evidence. Like a motion for a directed verdict, a motion for judgment notwithstanding the verdict tests the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). To test the sufficiency of the evidence of a crime:

[W]e must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, 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) (citations omitted).

The trial court also denied Appellant's motion for a new trial which he brought in conjunction with his motion for judgment of acquittal notwithstanding the verdict. A motion for new trial tests the weight of the evidence rather than its sufficiency. *Butler*, 544 So. 2d at 819. The Mississippi Supreme Court has stated:

As to a motion for a new trial, the trial judge should set aside the jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence; this Court will not reverse unless convinced the verdict is against the substantial weight of the evidence.

Id. (quoting *Russell v. State*, 506 So. 2d 974, 977 (Miss. 1987)).

We are of the opinion that the sum of the evidence justifies a finding of guilt. We find that the trial court did not err in refusing Blakeney's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY OF CONVICTION OF ROBBERY WITH A DEADLY WEAPON AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO RANKIN COUNTY.

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