

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01078 COA

MICHAEL ANTHONY NAQUIN

A/K/A MICHAEL ANTHONY NAGUIN

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

ATTORNEYS FOR APPELLANT:

JIMMIE D. MARSHALL

WM. ANDY SUMRALL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY NATURE OF THE CASE: CRIMINAL - DUI HOMICIDE

TRIAL COURT DISPOSITION: DEFENDANT FOUND GUILTY OF TWO COUNTS AND SENTENCED TO TEN YEARS FOR EACH COUNT

MANDATE ISSUED: 6/24/97

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Michael Anthony Naguin was convicted by a jury in Hinds County of two counts of DUI homicide. He appeals alleging a violation of his rights to a speedy trial, error in allowing two State witnesses to retake the stand, and error in refusing a circumstantial evidence instruction. Finding his arguments without merit, we affirm.

FACTS

On March 21, 1992, a Ford Mustang in which Naguin and two others were present, went out of control on Interstate Highway 20 and struck a guard rail. All three occupants were thrown from the vehicle. Two of the occupants, Shay Poland and Walter J. Crump, Jr., died shortly thereafter. Naguin was the only survivor. There were no eye witnesses to identify which of the three was the driver. Sherry Jarrell, a State witness, had been with Naguin and his girlfriend, Poland, the night of the accident. Jarrell had taken Naguin and Poland to a lounge around 7:00 p.m. where they drank and shot pool. The witness testified that she left the lounge for a few hours. Upon her return Poland was no longer there. Naguin asked Jarrell to ride with him to pick up Poland, but she refused. Later, Jarrell saw Naguin and Crump get into the Ford Mustang and drive away.

When Jarrell first testified, she stated that she could not tell who got in on the driver's side. She was subsequently recalled to the stand and this time testified that she saw Naguin get into the driver's side of the car and Crump get into the passenger's side. The State also called Crump's father to testify that Naguin admitted to him at the hospital and the funeral that he was driving the car and was extremely sorry for what had happened. Naguin testified that he was not driving the car, but that he and Crump argued about which one was sober enough to drive. Naguin testified that the last thing he remembered was passing the keys to Crump.

DISCUSSION

1. Speedy trial violation

Naguin argues that the trial judge erred in failing to dismiss because of a violation of his statutory and constitutional rights to a speedy trial. The State argues that nothing in the appeal record reflects that a hearing on the motion to dismiss on these grounds was ever conducted and Naguin has waived the issue. In fact, Naguin complied with his obligation to have an adequate record prepared for our review. The applicable rule states:

Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.

M. R.A.P. 10(b)(1). The Rule then provides a procedure for examining and correcting the record:

For seven (7) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period,

appellant's counsel shall deliver or mail the record to one firm or attorney representing the appellee, and shall append to the record both a written statement of any proposed correction to the record and a certificate of service. . . .

M.R.A.P. 10(b)(5).

The supreme court has stated that "[o]ur law is clear that an appellant must present to us a record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved." *Lambert v. State*, 574 So. 2d 573, 577 (Miss. 1990). In Naguin's "Designation of Record" request, he asked that the following documents be made a part of the appellate record:

1. All court papers;
2. All motions and exhibits thereto and orders on said motions;
3. Transcript of testimony of all witnesses, all objections, arguments, responses, and rulings by the court, and all jury instructions;
4. All judgments, orders, sentencing and otherwise, all trial exhibits, both admitted and excluded from testimony;
5. All pre-trial motions and orders.

Naguin's attorney requested that the motions and orders detailing the presentation of this issue to the trial court be placed in the record, but the record did not contain them. The case law is replete with statements that the penalty is issue waiver for failure to designate a necessary part of a record. The problem here is not failure to designate, but failure of the reporter to include. Naguin's attorney took an alternative means to indicate the missing documents by attaching them to his brief. This back-door record is insufficient. "This Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record." *Fuselier v. State*, 654 So. 2d 519, 521 (Miss. 1995); (citing *Dillon v. State*, 641 So. 2d 1223, 1225 (Miss. 1994)); (quoting *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973)).

The appellate rules grant us authority to order on our own motion that a supplemental record be filed. M.R.A.P. 10(e). On February 28, 1997 we entered an order requiring such a record, which has now been filed.

The trial court granted the following continuances in this case:

03/09/93 Continuance granted upon motion of defendant. Grounds for continuance being counsel for defendant and district attorney agreed to continuance so district attorney could try older cases. Case continued from 03/09/93 until 03/11/93.

05/10/93 Continuance granted upon motion of defendant. Grounds for continuance being agreement with prosecuting attorney. Case continued from 03/11/93 until 08/03/93.

09/13/93 Continuance granted upon motion of the state. Grounds for continuance being prosecuting attorney had trial in older case set on the same date. Case continued from 09/15/93 until 12/06/93.

12/03/93 Continuance granted on motion of the state. Grounds for continuance being additional time needed to prepare for trial and prosecuting attorney had conflict with trial date. Case continued from 12/06/93 until 03/21/94.

03/15/94 Continuance granted on motion of both state and defendant. Grounds for continuance being both sides had conflicts on March 21, 1994 and needed the case set for later in term. Case continued from 03/21/94 until 05/24/94.

05/24/94 Continuance granted on motion of state. Grounds for continuance being Bobby Delaughter was in trial in Raymond, MS on murder case. Case continued from 05/24/94 until 08/02/94.

08/01/94 Continuance granted on motion of defendant. Grounds for continuance being defendant's attorney was in trial in Meridian, MS. Case continued from 08/02/94 until 08/09/94.

08/08/94 Continuance granted on motion of the court. Grounds for continuance being the case continued on 08/08/94 was expected to last two days. Case continued from 08/09/94 until 09/07/94.

a. Constitutional Right to a Speedy Trial

The Mississippi Supreme Court has stated that "[t]he constitutional right to a speedy trial attaches and begins to run at the time of a formal indictment or information or else the actual restraints imposed by arrest and holding to a criminal charge." *Spencer v. State*, 592 So. 2d 1382, 1390 (Miss. 1991) (quoting *Handley v. State*, 574 So. 2d 671, 674 (Miss. 1990)). Naguin's Sixth Amendment right to a speedy trial began running on the day of his indictment which was October 16, 1992. The trial began on September 7, 1994. Once a defendant's constitutional right to a speedy trial has attached, the balancing test set out in *Barker v. Wingo*, 407 U.S. 514, (1972), must be applied to determine whether that right has been denied. *Smith v. State*, 550 So. 2d 406, 407 (Miss. 1989). The *Barker* court set out four factors that should be balanced to determine if the speedy trial right has been denied. The four factors to consider are: (1) length of the delay; (2) reason for the delay; (3) defendant's timely assertion of his right to a speedy trial; and (4) resulting prejudice to the defendant. *Barker*, 407 U.S. at 530.

1. Length of the Delay

The *Barker* case characterized this factor as a triggering mechanism. The court said that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Smith v. State*, 550 So. 2d at 407 quoting *Barker*, 407 U.S. at 530. Although some exceptions have been made, the court has recognized that "a delay of eight (8) months or more is presumptively prejudicial." *Smith v. State*, 550 So.2d 406, 408 (Miss.1989).

Although the delay was well over eight months and is presumptively prejudicial, it is not enough, by itself, to establish that Naguin's right to a speedy trial was violated. However, it is enough to warrant a close examination of the other *Barker* factors.

2. Reason for the Delay

There were a number of continuances granted in this case. Two of the continuances posed questions as to which party the time should be counted against. Naguin argues that the first continuance should be counted against the state because the explanation given on the order of continuance was that "counsel for defendant and District Attorney have agreed to continuance so DA can try older cases on docket." We disagree with Naguin's contention. The continuance was requested by the defendant as well as the State. "Where a delay is caused by the defendant, the constitutional clock is tolled for that period of time. The period of delay attributable to the defendant is subtracted from the total days of delay." *Johnson v. State*, 666 So.2d 784, 792 (Miss. 1995). Furthermore, when the defendant agrees to the delay, that time is also subtracted from the total days of delay. *Johnson*, 666 So. 2d at 792. Therefore, the continuance Naguin questions is attributable to him.

The supreme court has stated that "[w]here the record is silent, the time is counted against the State." *Handley v. State*, 574 So.2d 671, 674 (Miss. 1990). Therefore, that forty-three day delay unaccounted for from August 3, 1993, until September 15, 1993, is counted against the State.

After reviewing the record, we found that delays attributable to the State amounted to approximately fourteen months from the time of indictment until trial. These delays were attributed to overcrowded dockets and overworked prosecutors. Therefore, this factor will not be weighed heavily against the State.

3. Defendant's Assertion of His Right to a Speedy Trial

Although all of the factors must be balanced and considered, this factor is afforded "strong evidentiary weight." *Spencer*, 592 So. 2d at 1390 (quoting *Barker v. Wingo*, 407 U.S. 514, 531, (1972)). Naguin did not assert his right to a speedy trial until his motion to dismiss for failure to provide a speedy trial filed on August 1, 1994. Two days later, Naguin requested yet another continuance. Naguin did not assert his right to a speedy trial again until he filed his motion for a new trial after the trial was over.

The supreme court has stated, "[w]e emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Spencer*, 592 So. 2d at 1390 (quoting *Barker*, 407 U.S. at 532). Naguin did not assert his right to a speedy trial until almost two years after his indictment. Although the supreme court has stated that the defendant has no duty to bring himself to trial, "this does not mean that the defendant has no responsibility to assert his right." *Barker*, 407 U.S. at 528. Naguin requested over 200 days of continuances. His requests continued until almost one month before the trial actually began. Therefore, we do not find this factor in Naguin's favor.

IV. Prejudice to the Defendant

Naguin argues that he was unduly prejudiced because he lost valuable evidence and possible witnesses due to the approximate eight month delay between the date of the accident and the time he was actually charged. He contends that if he had been arrested immediately after the accident, he

could have taken steps to preserve evidence and hire an attorney to help prepare his defense. In *Barker*, the court considered three elements in determining whether the defendant was prejudiced: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; (3) limit on the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532.

Naguin was never arrested and therefore, there was no oppressive pretrial incarceration. Furthermore, Naguin requested over 200 days worth of continuances. He even requested a continuance as late as August 2, 1994. The trial was delayed only one final time. This time the court requested a continuance because of another on-going trial. Naguin's trial began September 7, 1994. We disagree that Naguin was prejudiced in this case. Therefore, this factor is in favor of the State.

While the first two factors weigh slightly in Naguin's favor, the third factor which is given strong evidentiary weight and the fourth factor do not. After weighing all of the factors, we find that Naguin was not denied his constitutional right to a speedy trial.

b. Statutory Right to a Speedy Trial

The separate statutory right to a speedy trial is as follows:

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 days (270) days after the accused has been arraigned.

Miss. Code Ann. 99-17-1 (Supp.1991). The supreme court has interpreted this rule to mean that "the state has 270 days after the date of arraignment to bring the defendant to trial." *Spencer*, 592 So. 2d at 1390. Furthermore, "like the constitutional speedy trial analysis, any delay attributable to the defendant tolls the running of time." *Id.* (citing *Handley*, 574 So. 2d at 674.) "Where the accused is not tried within 270 days of arraignment, the State bears the burden of establishing good cause for the delay." *Walton v. State*, 678 So.2d 645, 647 (Miss. 1996).

Naguin was arraigned on December 22, 1992, and trial commenced on September 7, 1994. Over 580 days had elapsed. After deducting the time attributable to Naguin's requests for continuances, more than 370 days elapsed. What we must then determine is if more than 100 days were the result, as the statute permits, of "a continuance duly granted" after a showing of good cause. The supreme court has recognized several reasons given by the State to constitute good cause. The court has found good cause to include congested trial court dockets under certain circumstances. *Polk v. State*, 612 So. 2d 381, 387 (Miss. 1992). Also, shortage of judges is "good cause shown." *McGhee v. State*, 657 So. 2d at 803. "The preempting of a trial by another case constitutes 'good cause.'" *McGhee*, 657 So. 2d at 803, citing *Folk v. State*, 576 So.2d 1243, 1245 (Miss.1991).

In this case, the first continuance requested by the State continued the case from September 15, 1993, until December 6, 1993. The reason given for the delay was "prosecuting attorney has trial in older case set on same date." The next continuance requested by the State continued the trial from December 6, 1993, until March 21, 1994. The reason given for this delay was "additional time is needed to prepare for trial and prosecuting attorney conflict with trial date." Another continuance granted on the State's behalf continued the case from May 24, 1994, until August 2, 1994. The

reason given for this delay is that the prosecutor "Bobby Delaughter is in trial in Raymond, MS on murder case." The last continuance was granted on behalf of the court because one of its cases was expected to last two days. The reasons given for these delays constitute good cause as defined in the above listed cases. Removing the days that resulted from continuances duly entered after a showing of good cause, there was no violation of Naguin's statutory right to a speedy trial.

2. Recalling A Witness

One of the State's witnesses, Sherry Jarrell testified on the first day of trial that although she saw Naguin and Crump get into the car in which the accident happened, she was not sure which one of them got into the driver side of the car. Jarrell left the witness stand and was finally excused. She remained in the courtroom during the testimony of another witness. The next day, the State was allowed to recall Jarrell because her testimony on the first day of trial was different from what she had previously told the prosecutors. Naguin argues that this was reversible error and that the proper procedure would have been for the State to have declared the testimony of the witness a surprise, asked the court to treat the witness as a hostile witness, and attack the witness's testimony with any prior inconsistent testimony.

The Rules of Evidence gives the trial court discretion in whether a witness can be recalled:

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witness and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

M.R.E. 611(a). The trial judge consistent with this discretion allowed the recall of Jarrell in order to allow the State to ascertain the truth. Naguin claims that allowing Jarrell to sit in on the testimony of another witness before testifying the second day was prejudicial. Jarrell's testimony was on the issue of who was driving the car. The testimony of the other witness was unrelated. Furthermore, the jury knew that Jarrell changed her story and could make whatever credibility decision in their mind flowed from that fact. The trial court did not err.

3. Allowing Officer to Retake the Stand

Barney Strawbridge was an officer with the Jackson Police Department who investigated this accident. Strawbridge testified on the first day of trial and was recalled to the stand the second day to explain why he did not take a blood sample from one of the victims, Crump, even though a blood test had been taken of the other two occupants of the vehicle. Between Strawbridge's two trips to the stand, one of Naguin's attorneys had cross-examined the crime lab toxicologist about whether a blood test had been taken of Jimmy Crump. The witness said none had been taken. The State argues that this made an issue of the integrity of the investigation, and a response was justified. Naguin argues that Strawbridge's follow-up testimony circumvented an earlier ruling by the court on a motion in limine. Naguin had earlier convinced the court to exclude the testimony of a nurse who asserted that Naguin had admitted to her that he was driving the car. Naguin contends that by allowing Strawbridge to testify as to why he did not order a blood test on Crump, which allegedly would be because the nurse told Strawbridge of Naguin's admission, the privileged communication between Naguin and the nurse would have been exposed. In order to avoid having Strawbridge testify, Naguin

stipulated that Strawbridge did not obtain a blood sample from Crump because he had been informed by hospital personnel that Naguin was the driver of the car at the time of the wreck. This stipulation did not say that the information came from Naguin.

The relevant statute for testing drivers of motor vehicle operators involved in accidents resulting in death reads:

(1) The operator of any motor vehicle involved in an accident that results in a death shall be tested for the purpose of determining the alcohol content or drug content of such operator's blood, breath or urine. Any blood withdrawal required by this section shall be administered by any qualified person and shall be administered within two (2) hours after such accident, if possible. The exact time of the accident, to the extent possible, and the exact time of the blood withdrawal shall be recorded. (2) *If any investigating law enforcement officer has reasonable grounds to believe that a person is the operator of a motor vehicle involved in an accident that has resulted in a death, it shall be such officer's duty to see that a chemical test is administered as required by this section.*

Miss. Code Ann. 63-11-8 (emphasis added).

Thus, the officer has a duty to request a blood test on a deceased person if he has reasonable grounds to believe that this person was the operator of the vehicle. The State was within legitimate areas of inquiry to recall the officer to testify why he did not have a blood sample done on Crump after a witness by the defense testified that a blood test had been done on everyone except Crump. Had Naguin raised this in the defense case, Strawbridge could have been recalled as a rebuttal witness. Since Naguin raised the point in cross-examination of a State witness, Strawbridge could be recalled earlier. The trial court struck a reasonable balance regarding the motion in limine issue, and refused to let the jury be told that Naguin told a nurse he was the driver.

4. Failure to Grant Circumstantial Evidence Instruction

"The rule in Mississippi is that a circumstantial evidence instruction should be given only when the prosecution can produce neither eyewitnesses or a confession to the offense charged." *McNeal v. State*, 551 So. 2d 151, 157-59 (Miss. 1989). Here, the State did not produce any eyewitnesses to the wreck itself, but did have two witnesses who testified that they either saw Naguin get into the driver side of the car, or that Naguin admitted that he was driving the car. This was ample direct evidence that Naguin was driving the car in order to deny the requested circumstantial evidence instruction.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF TWO COUNTS OF DUI HOMICIDE AND SENTENCES OF TEN YEARS FOR EACH COUNT WITH SENTENCES TO RUN CONCURRENTLY, BOTH IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO THE APPELLANT.

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