

IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00441 COA

CHARLES EDWARD RANKIN A/K/A BOOM 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. LAMAR PICKARD

COURT FROM WHICH APPEALED: JEFFERSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ANITA STAMPS

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: ALEXANDER MARTIN

NATURE OF THE CASE: CRIMINAL: SALE OF COCAINE

TRIAL COURT DISPOSITION: SALE OF COCAINE; 30 YEARS

MOTION FOR REHEARING FILED: 9/19/97

MANDATE ISSUED: 11/25/97

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

PAYNE, J., FOR THE COURT:

Charles Rankin was convicted by the Jefferson County Circuit Court for the sale of cocaine. The trial court sentenced Rankin to serve a term of thirty years in the custody of the Mississippi Department of Corrections. The trial court denied Rankin's motion for a JNOV or, in the alternative, a new trial. Rankin argues three issues on appeal: (1) whether the State violated Rankin's Sixth Amendment right to a speedy trial, (2) whether Rankin's Sixth Amendment right to effective assistance of counsel was violated, and (3) whether the trial court erred in denying Rankin's motion for a directed verdict. Finding no merit to any of these issues, we affirm.

FACTS

On April 2, 1993, the Mississippi Bureau of Narcotics was conducting an undercover operation in Fayette, Mississippi, with the aid of confidential informant, Freddie Washington. The evidence indicates that Washington set up a drug buy with Rankin over the telephone. The plan was for Washington to meet Rankin at the Triangle Mart in Fayette for the actual purchase. Washington was wired by narcotics agents and then met with Rankin as discussed. Washington testified that he knew Rankin prior to this transaction and was able to recognize Rankin immediately upon Rankin's arrival at the Triangle Mart. Washington stated that Rankin instructed him to go into the bathroom where Washington subsequently purchased two rocks of crack cocaine from Rankin for \$40 in cash. The narcotics agents testified that they could hear the conversation between Washington and Rankin but could not see them. The agents also indicated that, although they heard two voices, Washington's voice was the only one that they could identify.

Rankin's defense was based on his assertion that he was not the one that sold the cocaine to Washington. Rankin testified in his own behalf and alleged that his friend, "Crow," was the person who sold the cocaine. According to Rankin, "Crow" is dead. We note that the record is silent concerning the date, time, or place of "Crow's" death. Rankin admits to being at the Triangle Mart on the date in question and admits that he saw Washington there. Rankin, however, denies that he was the seller in this transaction. Washington unequivocally identified Rankin as the person who sold him cocaine on April 2, 1993. Washington also indicated that he knew "Crow" and that "Crow" was not

present during the drug transaction in question.

The jury returned a verdict of guilty for the sale of cocaine, and Rankin was sentenced to serve a term of thirty years in the custody of the Mississippi Department of Corrections. Feeling aggrieved by the verdict, Rankin filed this appeal.

ANALYSIS

I. WHETHER THE STATE VIOLATED RANKIN'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

Rankin complains that the delay from his indictment on July 15, 1994, until his trial on March 22, 1995, violated his constitutional right to a speedy trial. Rankin argues that his rights have been violated based upon a review of the speedy trial factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The Mississippi Supreme Court has held that a defendant's constitutional rights to a speedy trial must be considered under the four factors enunciated by the United States Supreme Court in *Barker*: (1) length of the delay, (2) reason for the delay, (3) whether the defendant asserted his/her right to a speedy trial, and (4) whether the defendant was prejudiced by the delay. *McGhee v. State*, 657 So. 2d 799, 801 (Miss. 1995). No one factor is dispositive of this issue, and the totality of the circumstances must be considered. *Id.*; see also *Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994); *Polk v. State*, 612 So. 2d 381, 385-86 (Miss. 1992).

In his denial of the motion to dismiss, the trial judge has failed to state on the record the findings of fact and legal conclusions upon which he based his ruling. As required by *Ferguson v. State*, 576 So. 2d 1252, 1255 (Miss. 1991), we therefore undertake a de novo review of the matter.

(1) LENGTH OF THE DELAY

The relevant time, for constitutional rights purposes, begins to run from the time of a formal indictment or information, or when a person has been arrested. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989). "In short, the constitutional right to a speedy trial attaches when a person has been accused." *Id.* In the present case, Rankin was formally accused by indictment on July 15, 1994. Rankin, however, was not arrested until February 25, 1995.⁽¹⁾ From Rankin's indictment on July 15, 1994, until trial on March 22, 1995, slightly over eight months elapsed. The court has said that "any delay of eight months or longer is presumptively prejudicial." *Id.* Therefore, this factor favors Rankin. Here, the delay is sufficient to require the *Barker* balancing test and consideration of its other factors. *McGhee*, 657 So. 2d at 801.

(2) REASON FOR THE DELAY

Delays not attributable to Rankin shall be counted against the State, unless the latter can provide good cause. *Vickery v. State*, 535 So. 2d 1371, 1377 (Miss. 1988). Moreover, negligence in causing delay is weighed against the State, although not heavily. *Perry v. State*, 637 So. 2d 871, 875 (Miss.

1994). The record here is completely silent. The State offers no excuse for the delay other than the fact that Rankin moved for more time to file motions on March 8, 1995, which was followed by a flurry of motions, and that Rankin failed to complete discovery by the March 13, 1995, deadline. We cannot find that this excuse helps the State as Rankin's motions and failure to complete discovery by the specified time apparently had no effect on the trial date because there is no indication that the trial had to be postponed or delayed to accommodate Rankin's late actions. The State offers no other excuses for the delay. We note, however, that seven months passed from the date of indictment until Rankin was arrested. While the inability of the police to find and arrest Rankin may have played a part in the delay of this trial, we cannot make this assumption as the State does not offer this excuse. We believe that the State has failed to provide evidence of good cause for the delays. This factor weighs against the State, albeit lightly since there is no indication that the State deliberately attempted to delay Rankin's trial.

(3) ASSERTION OF RIGHT TO A SPEEDY TRIAL

The State, not a defendant, bears the burden of bringing that defendant to trial in a speedy manner. *McGhee*, 657 So. 2d at 804. By asserting his right to a speedy trial, a defendant gains more points under this *Barker* prong than if no request had been filed. *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990). In the present case, Rankin does not request a speedy trial per se, but instead, moves for dismissal on March 8, 1995, two weeks before the trial began. Generally, 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, 169-70 (Miss. 1991). The supreme court has held that a demand for dismissal after the bulk of the total delay has elapsed is insufficient to weigh this factor in favor of the defendant. *Id.* Rankin, however, argues that he filed his motion for dismissal as soon as he had the opportunity, citing the delay between indictment and arraignment, which he waived, as having prevented him from asserting his right to a speedy trial sooner. As we stated previously, the State offers no reasons why there was such a lengthy delay between indictment and arrest. We therefore cannot fault Rankin for the delay and we find that Rankin asserted his right within a reasonable time after his arrest. We also cannot weigh against Rankin the fact that he moved for dismissal instead of moving for a speedy trial. At the time of Rankin's motion, the trial was scheduled to commence two weeks later. Had Rankin requested a speedy trial, it is unlikely that the trial could have been reset to an earlier date. Rankin's motion for dismissal was therefore the logical move. We will therefore weigh this prong of the analysis in favor of Rankin.

(4) PREJUDICE TO THE DEFENDANT

This *Barker* factor involves two concepts: (1) actual prejudice to the defendant and the ability to defend his case, and (2) interference with a defendant's liberty interests, such as pretrial incarceration, loss of job or financial resources, family, or friends, reputation damage, and anxiety. *Perry*, 637 So. 2d at 876; *see also Polk*, 612 So. 2d at 386.

In the present case, Rankin contends that his defense was adversely affected because "Crow" died prior to trial. Rankin argues that his entire defense rested on the fact that "Crow" was the person who sold the cocaine to Washington and without "Crow's" testimony, Rankin had no one to corroborate his story. To accept Rankin's prejudice claim, we would have to believe that had "Crow" been alive at

the time of trial, he would have incriminated himself so that Rankin could go free. This, as the State correctly points out, is nothing more than speculation. Without any evidence of when "Crow" died, it is impossible for this Court to assess the impact of this eight month delay from indictment to trial. For all we know, "Crow" may have died the day after the offense, in which event, there would be no prejudice at all. Since the burden of showing the existence of some prejudice is on Rankin, the State wins in the total absence of proof on this point. *See Polk*, 612 So. 2d at 387.

Rankin makes no argument regarding the effect of the delay on his liberty interests. We therefore find that his liberty interests were not affected by the delay.

BARKER FACTORS CONCLUSION

Although the delay was presumptively prejudicial, we note that Rankin's speedy trial claim barely falls within the time-frame that makes the delay presumptively prejudicial. Had the trial commenced six weeks earlier, Rankin would have no right to a *Barker* analysis at all. Nevertheless, based on the facts of this case, the totality of the circumstances, and the fact that the prejudice factor is so heavily weighted against Rankin, we find that the balance of the *Barker* factors falls squarely on the side of no denial of Rankin's speedy-trial rights.

II. WHETHER RANKIN'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

The standard of review for an ineffective assistance of counsel argument is the two-prong test: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Mississippi Supreme Court adopted the *Strickland* standard for an ineffective assistance of counsel argument in *Stringer v. State*, 454 So. 2d 468, 476-77 (Miss. 1984). *See McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). "The burden is on the defendant to demonstrate both prongs." *McQuarter*, 574 So. 2d at 687 (citing *Leatherwood v. State*, 473 So. 2d 964, 968-69 (Miss. 1985)). This standard is based upon the totality of the circumstances surrounding each case. *Id.* (citing *Waldrop v. State*, 506 So. 2d 273, 275 (Miss. 1987)).

Mississippi "recognizes a strong but rebuttable presumption that counsel's conduct falls within a broad range of reasonable professional assistance." *Id.* (citing *Gilliard v. State*, 462 So. 2d 710, 714 (Miss. 1985)). The court recognized "[t]o overcome this presumption, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Schmitt v. State*, 560 So. 2d 148, 154 (Miss. 1990) (quoting *Strickland*, 466 U.S. at 694). There is also a presumption that counsel's decisions are strategic. *See Handley v. State*, 574 So. 2d 671, 684 (Miss. 1990); *Leatherwood v. State*, 473 So. 2d 964, 968-69 (Miss. 1985)).

Rankin makes a three pronged attack against his defense counsel, asserting three areas in which he believes his attorney was deficient:

1. Trial counsel failed to preserve the evidence to establish that the defendant's Sixth Amendment right to a speedy trial was violated.

Rankin takes issue with the fact that his attorney did not proffer anything for the record regarding "Crow's" death or the role "Crow" could have played in Rankin's defense. Rankin contends that his attorney had a duty to conduct an independent investigation and should have known that "Crow" was dead. Instead, Rankin argues, the only mention of "Crow's" death was brought out by the prosecution during closing argument. Rankin argues further that his motion to dismiss for lack of a constitutional speedy trial was too general in that it did not address the primary issue of the death of a key witness. Rankin contends that the general nature of the motion to dismiss as well as a lack of record evidence of a hearing in regard to the motion prejudices his appeal because there is nothing in the record resembling a proffer of what role "Crow" would have played in Rankin's defense had the trial been conducted before "Crow's" death.

While it is unlikely that "Crow" would have incriminated himself and come to Rankin's defense during his hour of need, we are not at liberty to rule it out as a matter of law. Thus, Rankin's assignment of error on this point is not completely without merit. It would seem that Rankin's attorney let him down, not in failing to make a proffer about what "Crow" might have said, but, rather, Rankin's attorney failed in laying the proper predicate in order to advance such a proposition--the predicate being that, but for the State's inordinate delay in getting this matter to trial, "Crow" would have been alive and available to testify. Although this failure by Rankin's attorney is a legitimate concern, this Court cannot assess the prejudicial impact of the attorney's alleged deficiency because the prejudice depends on a fact not in the record, i.e., the actual date of "Crow's" death. In this appeal, the absence of that information means that Rankin has failed to meet his burden to show (a) that his counsel was ineffective and (b) that, but for his failing, the case would have come out differently. We have no authority to reopen the record to inquire into "Crow's" death to see if the information could have been obtained with a reasonable exercise of diligence, and, if so, whether the date of death made the delay at least facially prejudicial.

While Rankin does not satisfy his burden of proof on this point, he is not completely without remedy in a future proceeding. The Mississippi Supreme Court has addressed this issue as follows:

Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.

Read v. State, 430 So. 2d 832, 841 (Miss. 1983). After an examination of the record in regard to this prong of Rankin's ineffective assistance of counsel claim, this Court concludes that Rankin did not show that his counsel was constitutionally ineffective. We, therefore, find this issue to be without merit; however, our decision is without prejudice to the defendant's right to pursue the matter further in an appropriate post-conviction relief proceeding. *Id.*

2. The defendant was denied effective assistance of counsel by his trial counsel who called a law enforcement official concerning an arrest of the defendant involving another crime.

Other than Rankin himself, the defense called only one other witness, Fayette Police Officer Wilson Anderson. The testimony elicited from Officer Anderson on direct examination revealed that Officer Anderson had stopped a vehicle in which Rankin and "Crow" were traveling. Officer Wilson testified that upon making the stop, he found a matchbox containing cocaine on the passenger's side of the car near where "Crow" was sitting. It appears that the purpose of calling this witness was to establish that "Crow" had been in possession of cocaine near the time of the drug transaction in question thus supporting Rankin's claim that "Crow" was the drug dealer instead of Rankin. This strategy backfired as Officer Wilson testified on cross-examination that he could not recall the exact date that he had made the stop. The prosecution brought out that the only evidence of a stop involving Rankin and "Crow" was contained in affidavits recorded in the city book. The affidavits were dated on September 20, 1993, some six months after the undercover operation involving Washington and Rankin. The prosecution also brought out the fact that, during this stop, "Crow" never admitted to owning the cocaine found in the car which was being driven by Rankin.

Rankin asks this Court to find that his attorney was deficient because he called Officer Anderson and permitted Anderson to testify to facts regarding other crimes in which Rankin had been involved. We find no deficiency in the attorney's actions. It is clear that Rankin's attorney was attempting to establish some kind of plausible defense for his client. Putting Officer Anderson on the witness stand was nothing more than a strategic move that backfired. Certainly, this is not the first time nor will it be the last time that an attorney has called a witness that he wished he had not.

3. The defendant was deprived of his right to effective assistance of counsel due to the grossly inadequate closing statement of defense counsel, his failure to effectively cross-examine the key witness, Frankie Washington, a grossly inadequate motion for directed verdict, and his failure to object to the prosecution referring to the unavailability of a key defense witness.

We have reviewed the record and find that Rankin's allegations are without merit. This case involves a crime for which there was a great deal of evidence against Rankin, and he has been found guilty. Now, Rankin asks that this Court second guess defense counsel's performance. This we decline to do. Rankin has failed in his attempt to prove deficiency on the part of his trial counsel and there is no evidence that the verdict would have been different had Rankin's attorney performed in a manner that Rankin, in his hindsight, feels would have been more effective.

III. WHETHER THE TRIAL COURT ERRED IN DENYING RANKIN'S MOTION FOR A DIRECTED VERDICT.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Rankin's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Rankin's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to 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.

Id. (citations omitted).

Rankin argues that the State failed to prove conclusively that Rankin was the person who sold cocaine to Frankie Washington on April 2, 1993. We find no merit in this argument. Washington testified that he knew both Rankin and "Crow" prior to the transaction, and that Rankin was the person with whom he met in the bathroom at the Triangle Mart. Washington identified Rankin in court as the person who sold him two rocks of cocaine. Washington testified further that "Crow" was not present during the transaction. Finally, two narcotics agents corroborated Washington's testimony regarding his conversation with Rankin in the bathroom of the Triangle Mart. The agents testified that they wired Washington and sent him to the Triangle Mart to purchase cocaine, and that Washington returned with two rocks of cocaine. The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Rankin not guilty of the sale of cocaine. We find that the trial court properly denied Rankin's motion for a directed verdict.

We find that Rankin's assignments of error are without merit. We therefore affirm the trial court's decision on all issues.

**THE JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON COUNTY OF
CONVICTION FOR THE SALE OF COCAINE AND SENTENCE OF THIRTY YEARS IN
THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS
AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

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

1. This case is a bit unusual because Rankin's arrest came seven months after the indictment. Generally, the arrest comes first and the constitutional right to a speedy trial attaches at the time of arrest. *See Smith*, 550 So. 2d at 408. We note this only because, in this case, it would seem more logical to begin the countdown with Rankin's arrest as that was the point in time that he was personally noticed of the charge and the point at which counsel was appointed for his defense. Thus,

any preparation for a defense in this case did not begin until after Rankin's arrest. Absent a showing that the delay in arresting Rankin was a tactical move by the State, we could easily conclude that, in this particular situation, the purpose for which the speedy trial amendment was framed is better served if the countdown began at the time of arrest instead of indictment. If we began counting, for speedy trial purposes, from the date of arrest, there would be no presumptive prejudice at all as the time period between arrest and trial was a little less than a month.